CANADA / JUDGMENT

Iampietro v. Leung

2019 BCSC 1750

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2019 BCSC 1750 Iampietro v. Leung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Iampietro v. Leung,

2019 BCSC 1750

Date: 20191011

Docket: M133487

Registry: Vancouver

Between:

Vasiliki Iampietro

Plaintiff

And

Kai Leung and Octa Stone Inc.

Defendants

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:

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Y.H.A. Ng

R. Gunnarsson

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 11-15 and 28, 2019

March 1, 2019 and 12-14, 2019

April 30, 2019

May 1, 2019

Place and Date of Judgment:

Vancouver, B.C.

October 11, 2019

Introduction

[1] Kai Leung, driving a vehicle owned by his employer, Octa Stone Inc., rear ended a vehicle driven by Vasiliki Iampietro in Burnaby on June 12, 2011. Mr. Leung and the corporate defendant admit liability for the accident.

[2] Ms. Iampietro claims she suffered injuries including thoracic outlet syndrome, myofascial pain, a herniated disc, depression, anxiety disorder and somatic symptom disorder as a result of the accident. She claims that after a failed return to work as a receptionist/ switchboard operator at Sunny Hill Health Centre for Children, she is no longer able to work that position and she will not be able to return to work in any capacity. She claims that her injuries have detrimentally affected her marriage to John Iampietro, her role as a mother to their two sons, her relations with family members, as well as curtailing her pursuit of physical fitness and her busy social life.

[3] Mr. Leung and Octa Stone argue that the accident was at low speed with minimal damage to both vehicles. They argue that I should not accept Ms. Iampietro's evidence because it is not reliable in some respects and not truthful in other respects. They argue that most of her claims should fail because her evidence is the foundation for most of them. They argue that prior to the accident, Ms. Iampietro had suffered from depression and carpal tunnel syndrome, and had requested to work part time. They submit that Ms. Iampietro's herniated disc was not caused by the accident. They argue that her symptoms of pain and numbness in her arms and hands are not due to thoracic outlet syndrome, but due to her pre-existing carpal tunnel syndrome which may have been re-triggered by the accident. Mr. Leung and Octa Stone concede that she experienced a variety of soft tissues injuries to her neck and back but those conditions do not support her claim to be disabled from work. They argue that her inability to work is caused by her pre-existing issues and the intervening, non

accident related, herniated disc.

[4] The issues are:

a) whether Ms. Iampietro's evidence is not reliable or truthful and if so, whether there is sufficient evidence to prove her claims;

b) whether the accident impact was sufficient to cause the injuries that Ms. Iampietro complains of,

c) what injuries Ms. Iampietro has,

d) whether the accident caused Ms. Iampietro's injuries, and

e) whether those injuries disable her as she claims in particular with regard to not being able to work now or in the future.

[5] Depending on the answers to those questions, the issues are what damages are appropriate to compensate her for pain, suffering and loss of enjoyment of life, loss of earning capacity, special damages, cost of future care, income tax gross up and investment management fees.

Credibility and Objective Evidence

[6] Mr. Leung and Octa Stone submit that the foundation of Ms. Iampietro's case is her evidence of her symptoms and her reports of her symptoms to her own doctors and doctors she saw for independent medical evaluations. They submit that her reports of her symptoms are implausible and not reliable. Her family physician, Dr. Meenaz Rasool, did not testify, and so they submit that the lack of reliability of her evidence is compounded by the lack of evidence of the physician who saw her most regularly after the accident and who could testify as to her symptoms over time.

[7] Ms. Iampietro submits that there is nothing that should cause me to question the reliability of her evidence. While she does not remember the progression of her physical symptoms in a manner that perfectly matches other evidence, she submits that is to be expected given that the accident occurred over seven years prior to trial. She did not call Dr. Rasool because he has retired. She called her current family doctor.

[8] A plaintiff must lead convincing evidence on the matters on which he or she bears the burden of proof. In a personal injury case, it can be the plaintiff's own evidence, so long as the court scrutinizes it when there is no objective evidence available: Butler v. Blaylock Estate, [1983] B.C.J. No. 1490 (C.A.) at para. 13. It is not necessary to accept the evidence of any witness in its entirety. It is reasonable for a trier of fact to accept parts of a witness' evidence and apply different weight to different parts of a witness' evidence: R. v. R.(D.), [1996] 2 S.C.R. 291 at para. 93; and R. v. Howe (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

[9] In assessing credibility, the approach described by Madam Justice Dillon in Bradshaw v. Stenner, 2010 BCSC 1398 at paras. 186-187, aff'd 2012 BCCA 296, is often cited because it comprehensively summarizes the task at hand. The process is to first examine a witness' evidence on a stand alone basis including the ability to and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, whether the witness changes evidence during direct examination and cross examination, motive to lie and demeanour. If the trier of fact accepts the witness' evidence as being generally credible, then the trier of fact should compare that with the other evidence to determine whether it fits with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": Bradshaw at para. 186, citing Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Q.B.).

[10] In Novak Estate (Re), 2008 NSSC 283 at para. 36, the Nova Scotia Supreme Court noted that caution should be used when relying on demeanour and consideration should be given to the motive that parties to the proceedings who are witnesses may have to fabricate evidence. See also R. v. Sue, 2011 BCCA 91 at paras. 46-47; and, R. v. S.H.P., 2003 NSCA 53 at paras. 28-30.

[11] In challenging Ms. Iampietro's evidence as implausible because of the manner in which she describes her symptoms, Mr. Leung and Octa Stone argue that I should conclude she is exaggerating her symptoms and injuries. Their counsel appropriately described it as a reliability issue, not a veracity issue. Ms. Iampietro has used colourful and dramatic language with some of the doctors she has seen. Dr. Rosemary Nairn Stewart, the physiatrist who saw Ms. Iampietro twice at the request of her counsel, put some of the things that Ms. Iampietro said to her in quotes for this reason.

[12] However, Dr. Stewart also testified that the second time she saw Ms. Iampietro, she was not nearly as dramatic and was much more subdued. Dr. Stewart's observations echo the evidence of most of the witnesses who knew Ms. Iampietro before and after the accident. They described Ms. Iampietro as a very high spirited and social person who was the "life of the party" but who has withdrawn, socializes much less, and when she does, is quiet.

[13] Both Dr. Stewart and Dr. Shaohua Lu, a psychiatrist whom Ms. Iampietro saw at her counsel's request, commented that some of the things Ms. Iampietro told them did not make sense. The defendants point to the evidence that Ms. Iampietro said that her chiropractor / acupuncturist cracked her sternum, that her neck was out of socket and that she had her rib cage massaged to alter her lung position.

[14] These are odd ways of describing such things and may be attributable to Ms. Iampietro's use of dramatic and colourful language. They could be attributable to her not having enough understanding of anatomy and medical issues to make accurate descriptions. For example, a common usage for describing an adjustment by a chiropractor is to say the chiropractor

cracked one's back. That does not mean the chiropractor fractured a bone. Counsel for the defendants did not ask Ms. Iampietro whether she actually meant that the chiropractor had fractured her sternum. Dr. Lu referred to these descriptions in his report where he was describing how somatic symptom disorder, a psychiatric condition, is playing a central role in Ms. Iampietro's functional changes, including what he described as her bizarre understanding of her pain and physical function.

[15] I accept that Ms. Iampietro's descriptions of her medical injuries may not be accurate in all respects. However, that does not necessarily mean that her descriptions of her symptoms are not reliable. The description of the problem causing her neck pain or her sternum pain is different from whether she has pain. Having said that, Dr. Lu also opined that persons who have somatic symptom disorder often see their pre-injury status through rose-coloured glasses and their post-injury status as dim.

[16] The defendants rely on the records of Mr. Andrew Bexson, a hypnotherapist counsellor whom Ms. Iampietro saw at the request of her employer's disability insurer, shortly after the accident. Mr. Leung and Octa Stone assert that these notes show that Ms. Iampietro was depressed prior to the accident, had marital difficulties prior to the accident and did not want to return to work because of depression and anxiety. They also argue that these clinical notes demonstrate that Ms. Iampietro was not truthful about her reasons for not returning to work and her state of health at the time of the accident. I will discuss this in more detail below when I review the evidence pertaining to mental health issues. At this juncture, I simply state that the evidence does not support Mr. Leung and Octa Stone's assertion that these records show that Ms. Iampietro was not telling the truth.

[17] The defendants also pointed to what they say are contradictions between Ms. Iampietro's evidence and other, objective, evidence.

[18] Some of this is based on video surveillance of Ms. Iampietro. One day of video surveillance involved Ms. Iampietro shopping at Metrotown for several hours. Ms. Iampietro testified that usually she can only manage short shopping trips after which she needs to lie down and relax with cold packs due to pain. She testified that on this shopping trip, she returned to her vehicle to have a snack, take medication, rest and relax. The investigator testified that she was not able to video record Ms. Iampietro during the whole of the shopping trip. She testified that she saw Ms. Iampietro return to her vehicle on two occasions. She testified that on the first occasion, Ms. Iampietro returned to her vehicle and when she exited the vehicle, she had her purse with her. She testified that Ms. Iampietro returned to her vehicle a second time about an hour later. The investigator testified that she then lost sight of Ms. Iampietro because the parking lot was busy but she later saw the vehicle and Ms. Iampietro was no longer in it. Mr. Leung and Octa Stone submitted that this evidence showed that Ms. Iampietro had not had an extended period of rest and medication. I note that the defendants misstate Ms. Iampietro's evidence because she did not testify that she returned to her car for an "extended" period. In any event, the investigator did not testify as to how long Ms. Iampietro was in her car on either occasion. Therefore, this evidence does not contradict

Ms. Iampietro's evidence.

[19] A second example is that Ms. Iampietro testified the job she held prior to the accident and at which she had a failed return to work after the accident involved lifting boxes and parcels, some of which were heavy. Her former supervisor testified that her work included moving around large bulky speech devices that were boxed to be couriered out. Her job did not require her to carry them from floor to floor but to move them around the reception area where her work station was. Her former supervisor testified that these devices were not heavy. Accordingly, there is a disagreement as to whether boxes Ms. Iampietro had to lift and move were heavy, but not as to whether Ms. Iampietro had to lift and move boxes as part of her work. She did not describe this as a reason why she could not continue in that job. She testified that she has learned how to safely lift some heavy items such as milk jugs and flats of soup cans while grocery shopping. I do not consider the evidence on this issue to impact her credibility.

[20] Ms. Iampietro did provide evidence that was contradicted to a certain extent. She testified that she does not shop at Costco because that shopping is too heavy for her so she lets her husband do it. Ms. Iampietro's former supervisor testified that she saw Ms. Iampietro at Costco with her husband after Ms. Iampietro had stopped working. Mr. Iampietro also testified that they go to Costco together sometimes but lately he has been going without Ms. Iampietro. I do not consider this to be a serious contradiction. It is not a critical matter and it does not cause me to discount Ms. Iampietro's evidence as being generally not truthful.

[21] I will not recount the other examples relied on by Mr. Leung and Octa Stone. None of them cause me concern. Many are based on more video surveillance evidence of Ms. Iampietro at the gym, grocery shopping and at Starbucks with her son. They do not show her doing things inconsistent with her evidence or the injuries she describes. Apparently, Ms. Iampietro was under surveillance for more than 63 hours. Les than one hour was played at trial and showed nothing remarkable.

[22] I also do not accept the defendants' submission that the foundation of the case, and in particular the medical opinion evidence, is solely Ms. Iampietro's self-reporting. The physicians who saw her undertook tests which provide an objective basis for their opinions. Several witnesses, some of whom were friends and relatives and others who were not, testified about Ms. Iampietro's pre-accident and post-accident functioning. Their evidence was substantially consistent with each other and with that of Ms. Iampietro and her husband.

[23] In my view, this case has the ordinary assortment of evidentiary misstatements, mostly minor contradictions by the plaintiff, which one would expect where the accident was almost eight years before trial and the medical issues have been protracted. I take into account Dr. Lu's evidence that Ms. Iampietro is pain-focussed due to somatic symptom disorder and has an inaccurate understanding of her physical conditions as well as the evidence that she has used colourful dramatic language to describe her symptoms.

[24] For these reasons, it is appropriate to consider Ms. Iampietro's evidence about her symptoms and functional limitations in conjunction with the medical records, the evidence of experts who have examined her, and the evidence of witnesses who know her and testified about her pre-accident and post-accident behaviour to determine what fits with the preponderance of probabilities. I not do see any reason to reject her evidence in its entirety.

The Accident

[25] On June 12, 2011, Ms. Iampietro was driving east on 1st Avenue approaching the intersection with Boundary Road. She testified that she was hit hard from behind.

[26] Mr. Leung testified that as he was approaching the intersection, he slowed to turn into the left lane, but he thought the cars in front of him were moving because the light was green. He struck the back of Ms. Iampietro's Nissan Pathfinder. He described the impact as a bump. He testified that he was travelling about 30 km/h, although during his examination for discovery he said he was travelling a normal speed. During his evidence at trial he testified that a normal speed for that area would be 50-55 km/h, but he had slowed to about 30 km/h. I accept that Mr. Leung had slowed to about 30 km/h as he testified. Mr. Leung's vehicle had a cracked licence plate frame. He testified that he saw no damage to Ms. Iampietro's vehicle. His vehicle struck the trailer tow hitch on her vehicle.

[27] Mr. Leung accepts responsibility for the accident. The point of the evidence about the impact was whether the impact was consistent with the extent of the injuries claimed by Ms. Iampietro. There was no reconstruction evidence called to address the nature or force of the impact. Mr. Leung and Octa Stone cross examined Dr. Stewart, an expert in physical medicine and rehabilitation, on this issue. Dr. Stewart testified that without engineering evidence, there is no way to determine the amount of force based on vehicle damage in relation to the injuries, as cars absorb impact differently. This evidence was not contested and I accept it.

[28] Without evidence on the force of the impact and whether an impact of particular force is required to cause the injuries asserted, it is inappropriate for me to reach a conclusion that the impact was not capable of causing the injuries Ms. Iampietro complains of based on relative vehicle speed and damage to the vehicles: Greenway-Brown v. MacKenzie, 2019 BCCA 137 at para. 27.

Accident Injuries

[29] Ms. Iampietro testified that at the time of the accident, she was well. She was 38 years old (46 years old at the time of the trial) and married to John Iampietro. They have two children, a son who was five at the time of the accident and who is now 13 and a son who was one at the time of the accident and is now nine. Ms. Iampietro testified that after their younger son was born she had post partum depression but she recovered from it prior to returning to work after her maternity leave. She testified that at the time of the accident she was working full

time as a receptionist at Sunny Hill Health Centre for Children, a position she enjoyed and which provided an income that her family needed. She worked out at the gym regularly, she walked and was social with friends and family. She and Mr. Iampietro entertained often. Ms. Iampietro had a reputation among her friends and family as a very good baker and the "life of the party".

[30] Ms. Iampietro testified that on impact, her body moved back and forward and her head hit the headrest. She testified that she felt like she was in shock and she also felt pain in her neck and tingling in her left hand. She testified that the next day she saw her family doctor because she had headaches, pain in her neck, shoulder and back, and tingling in her hands.

[31] Ms. Iampietro testified that she underwent acupuncture treatments on the recommendation of Dr. Rasool. She testified that, at the request of her family doctor, she took time off work to rest and let her symptoms resolve. She applied for a medical leave from work. She was off work until October 4, 2011. She saw a hypnotherapist, Mr. Bexson, at the request of her employer's disability insurer, for the purpose of facilitating a return to work.

[32] Ms. Iampietro commenced a gradual return to work on October 4, 2011. She returned to full time work in February 2012. Her headaches largely resolved, but she testified that she experienced pain in her neck, shoulders and arms. She testified that she had tingling and numbness in her arms, wrists and hands. She went to the gym and tried to use exercise to rehabilitate.

[33] In April 2012, Ms. Iampietro experienced a sudden increase in her neck pain. She was subsequently diagnosed with a herniated disc at C6-C7. During this time, Ms. Iampietro also developed panic attacks and depression. She was prescribed Ativan. She has been prescribed several medications over time including medications to address nerve pain, anti-inflammatories, anti-depressants, and anti-anxiety medication. At the time of trial, she was regularly taking medications including Propranolol, Ativan and Tylenol.

[34] In June 2012, Ms. Iampietro decided she could not work and cope with the pain and anxiety she was experiencing. She applied for and received long term disability. She has not worked since.

[35] Since June 2012, Ms. Iampietro has reduced her gym workouts to one per week with a kinesiologist. She has undergone physiotherapy, acupuncture, chiropractic, and osteopathic treatments. Ms. Iampietro testified on cross examination that in 2017, while receiving treatment from her acupuncturist / chiropractor, the doctor cracked her sternum. She experienced pain and electrical sensation over her chest and has had ongoing chest pain since that time.

[36] Ms. Iampietro testified that she has trouble sleeping. She starts her day with exercises to reduce her pain. She gets the children ready for school. She may go to the gym, go grocery shopping or do chores. She testified that five to seven times per day, she lies down, tries to relax and takes medication to relieve pain. She often has meals in bed. The children are

accustomed to coming to her bed if they want her attention. She rarely goes out in the evenings, but if she does, she needs to be in a place where she can lie down, so she limits herself to the homes of friends and family where she is comfortable to do so. She and Mr. Iampietro do not entertain as much. They sleep separately and they are no longer intimate because of Ms. Iampietro's concerns about her pain.

[37] Mr. Leung and Octa Stone contest the extent to which Ms. Iampietro has such symptoms, whether they are caused by injuries sustained in the accident and whether they cause her to be disabled from work and from household chores.

Lack of Evidence from Dr. Rasool

[38] At the time of the accident and until early 2018, Ms. Iampietro's family physician was Dr. Rasool. He retired and she began seeing Dr. Harmandeep Khosa in February 2018. Dr. Rasool did not testify at trial. Dr. Khosa prepared a medical legal report and testified at trial.

[39] The defendants argue that the lack of testimony from Dr. Rasool is fatal to Ms. Iampietro's claim because the medical experts relied on Dr. Rasool's reports of Ms. Iampietro's symptoms over time. The whole of Dr. Rasool's clinical records were not in evidence because he did not testify and the defendants would not agree to enter them in the absence of his testimony. They put extracts of them to Ms. Iampietro and those extracts were entered into evidence.

[40] Ms. Iampietro argues that it is not necessary to enter clinical records into evidence because the defendants had the opportunity to cross examine her on her injuries and on what she told Dr. Rasool over time, and because the defendants had the opportunity to call Dr. Rasool if they thought his evidence was critical.

[41] In Cunningham v. Slubowski et al, 2003 BCSC 1854, Madam Justice MacKenzie discussed the use of clinical records in personal injury trials. Citing McTavish v. MacGillivray (1997), 38 B.C.L.R. (3d) 306 at para. 10 (S.C.), she noted that if they are to be admitted into evidence for the proof of their contents, they must qualify as business records under the Evidence Act, R.S.B.C. 1996, c.124, including being made contemporaneously, being made by someone having personal knowledge of the things being recorded, and there must be a duty to make the notes as a part of the usual and ordinary course of business. If they meet such requirements, a statement that a diagnosis was made is admissible, as are recorded observations. However the opinions of consulting doctors or others that may be included in the bundle of clinical records are not admissible for the proof of their contents unless they are independently admissible as business records and notice of any opinions have been given. If the records are not admitted as business records, they can be used to cross examine the plaintiff (for the purposes of credibility or to establish an admission against interest) or the maker of the records. The maker of the records can also use them to refresh his or her memory at trial.

[42] Mr. Leung and Octa Stone argue that unless they can cross examine Dr. Rasool on what symptoms Ms. Iampietro reported over time, they cannot test the symptoms she reported to the doctors who diagnosed her. They did use Dr. Rasool's clinical records to cross examine the plaintiff. Ms. Iampietro did not deny making any statements that were attributed to her in the portions of Dr. Rasool's records that the defendants put to her.

[43] Mr. Leung and Octa Stone also argue that to the extent that the experts rely on matters recorded in Dr. Rasool's records, there is no evidence to support such assumptions. The party leading opinion evidence must prove the facts which the expert assumes in making his opinion: Sandhu v. Braich (1991), 61 B.C.L.R. (2d) 273 at para. 49 (C.A.).

[44] I accept this statement of the law but it does not mean that the trier of fact cannot accept an opinion if it is based on a fact in clinical records and the records have not been proven in evidence. If the expert relied on a fact set out in the records and there is no other evidence of that fact it may affect the weight, if any, to be given to the opinion. However, if the fact was otherwise proven, it does not matter that it was not proven through the clinical records, especially since in this case the records are simply a record of what Ms. Iampietro told Dr. Rasool and the defendants had the opportunity to cross examine Ms. Iampietro.

[45] Extracts of Dr. Rasool's records are in evidence to the extent that Mr. Leung and Octa Stone used them in cross examination of Ms. Iampietro. This sub-set of records is less than what many of the experts reviewed. Accordingly, the opinions of the experts must be scrutinized to determine whether they rely on facts stated in Dr. Rasool's records which have not been otherwise proven. This is an issue with the experts of both parties.

Neck and Back Myofascial and/or Musculoligamentous Injuries

[46] Ms. Iampietro claims she suffered soft tissue injuries to her neck and back. According to counsel for Mr. Leung and Octa Stone, they have not "shied away" from the position that she experienced "a variety of soft tissue injuries to her neck and back" as a result of the accident.

[47] Three physicians saw Ms. Iampietro for independent medical examinations and opined that she suffered myofascial injuries involving her neck and back and reactive headaches as a consequence of the accident. They are Dr. Navraj Heran, a neurologist retained by the defendants; Dr. Stewart, a physiatrist retained by Ms. Iampietro; and Dr. Anthony Salvian, a vascular surgeon retained by Ms. Iampietro.

[48] In forming their opinions, they all took into account complaints made by Ms. Iampietro to Dr. Rasool since the accident. I am satisfied that Ms. Iampietro's evidence at trial is proof that she suffered the symptoms recorded by Dr. Rasool relating to her neck and back. I am also satisfied that their opinions were based in large part on their own examinations of her and the history they took from her. Dr. Salvian noted positive trigger points, which he described as paraspinal muscle spasms, in her scalene muscles during his physical examination of her. These are objective findings that are not reliant on Ms. Iampietro's reports of pain.

[49] Although Ms. Iampietro's lower back pain and headaches have diminished to the point where they are now rare, I am satisfied based on her evidence that her upper back and neck continue to cause her pain. Each of these physicians opined this pain is chronic, although Dr. Heran does not agree that she has the chronic pain syndrome known as somatic symptom disorder.

[50] In considering whether these injuries disable her from work, recreational activities and household work, I must have regard to the diagnosis of chronic pain and somatic symptom disorder which I will address below.

Injuries to Nerves in Arms and Hands - Thoracic Outlet Syndrome and/or Carpal Tunnel Syndrome

[51] Ms. Iampietro had carpal tunnel syndrome in both wrists in her early twenties. She had numbness and pain in her hands that would cause her to wake up while she was sleeping. She underwent surgery when she was 22 years old. The surgery resolved her symptoms. She testified that she had some pain and numbness in her hands after her second child was born when she also had some symptoms of post partum depression. She testified that she did not have any symptoms of carpal tunnel syndrome at the time of the accident. She claims that the accident triggered a repeat onset of her carpal tunnel syndrome.

[52] Ms. Iampietro claims that she also developed thoracic outlet syndrome due to the accident, a condition in which there is compression or irritation of the arteries and nerves to the arm. The compression occurs in an area called the scalene triangle, where the scalene muscles (neck supporting muscles) adjoin the first rib. Ms. Iampietro claims that thoracic outlet syndrome and carpal tunnel syndrome are responsible for the pain and numbness she has in her hands and fingers.

[53] Mr. Leung and Octa Stone argue that Dr. Salvian's testing was not definitive for thoracic outlet syndrome and is called into question because other doctors tested for it and could not reproduce the symptoms. The defendants assert that and I should find that her pain and numbness is caused solely by carpal tunnel syndrome, a pre-existing condition that can be treated by surgery.

[54] Ms. Iampietro saw Dr. Salvian, a vascular surgeon, for a medical-legal opinion. Since 1981, Dr. Salvian has had a subspecialty interest in the treatment and diagnosis of thoracic outlet syndrome. He also performs surgery to relieve thoracic outlet syndrome. He explained that vascular surgeons often treat thoracic outlet syndrome because the source of the problem is injury and compression to an area that is anatomically very complicated, involving muscles, nerves, veins and arteries. By its nature, it is suited to the expertise of vascular surgeons.

[55] Dr. Salvian sees about 150-200 patients per year, referred to him by other surgeons, neurologists, rehabilitation specialists and family practitioners, with possible or probable diagnoses of thoracic outlet syndrome. He sees about 120 patients per year referred to him for medical-legal assessments.

[56] Dr. Salvian explained that the C8 and T1 nerve roots pass through the scalene triangle where they fuse to become the ulnar nerve which provides sensation to the inner arm and 4th and 5th fingers. Post traumatic thoracic outlet syndrome occurs when the scalene muscles are injured causing them to shorten and spasm, compressing the ulnar nerve and causing numbness, tingling and pain. In rare cases the compression is relentless. In most cases it is intermittent and so are the symptoms. He also explained that patients who develop thoracic outlet syndrome generally have a congenital anatomical propensity to it.

[57] Ms. Iampietro noted numbness and tingling in her left arm and hand right after the accident. When she returned to work a few months later, she noticed it in both hands. On the tests that Dr. Salvian conducted, Ms. Iampietro had symptoms in her 4th and 5th fingers in four tests, and in her 2nd and 3rd fingers on two tests. This is reflective of her complaints of numbness and tingling in all of her fingers. Dr. Salvian opined that when a patient has numbness, tingling and paresthesia radiating down the arm and into fingers, there are three possible causes: radicular pain, peripheral neuropathy or post-traumatic thoracic outlet syndrome.

[58] Dr. Salvian is of the view, based in part on literature, that the whiplash injury Ms. Iampietro suffered in the accident caused brachial plexus irritation. That is a factor consistent with thoracic outlet syndrome. Dr. Salvian also opined that Ms. Iampietro's condition is consistent with post-traumatic thoracic outlet syndrome because her onset of symptoms is typical of the condition, she has trigger points in her scalene muscles, her family doctor noted positive testing within the first month after the accident, and her arterial compression is strongly suggestive of one of the anatomical abnormalities that make her susceptible to thoracic outlet syndrome.

[59] Dr. Salvian did not find clinical or physical symptoms consistent with radicular pain (compression of nerve roots as they exit the cervical spine). Carpal tunnel syndrome is a form of peripheral neuropathy. In 2012, Ms. Iampietro underwent electrophysiological (nerve conduction) studies that showed bilateral carpal tunnel syndrome. These records are not in evidence but Dr. Salvian pointed out in his evidence that surgery does not always result in complete recovery to the nerve or nerves and it is common for a person who has had symptom resolution after carpal tunnel surgery to continue to have positive nerve conduction studies. Accordingly, the nerve conduction studies do not necessarily assist in demonstrating that her carpal tunnel syndrome was symptomatic at the time the studies were done.

[60] Dr. Salvian opined that it was likely that her carpal tunnel syndrome was previously asymptomatic but became clinically significant when combined with the nerve irritation she suffered at the brachial plexus and potentially at her cervical spine. He explained that it is likely that the degenerative changes in her spine and her post traumatic thoracic outlet syndrome compromised her nerves leading to the arms at her brachial plexus and/or her cervical spine. This would make the nerves at her wrists more sensitive. He calls this "double crush" syndrome - double because there is both proximal nerve irritation (at the brachial plexus and/or the cervical spine) and distal nerve irritation at the wrist.

[61] It is Dr. Salvian's opinion that the numbness and tingling that Ms. Iampietro experiences in her hands is caused by a number of conditions including post traumatic neurogenic thoracic outlet syndrome, chronic myofascial pain involving her scalene muscles and double crush syndrome leading re-triggering carpal tunnel syndrome. Dr. Salvian opined that these conditions can be closely related particularly where there are trigger points involving the scalene muscles as he observed in Ms. Iampietro. He explained that injury to the scalene muscles is instrumental in the onset of post-traumatic thoracic outlet syndrome.

[62] During testing for thoracic outlet syndrome, Dr. Salvian noted what he called a "bruit", a noise that indicates that an artery is being compressed. Given this, and Ms. Iampietro's symptoms of loss of colour and a waxy appearance to her right hand on occasion, he opined that she may also have intermittent symptoms of arterial thoracic outlet syndrome. He is of the view that she does not have "true" arterial thoracic outlet syndrome.

[63] On cross examination, Dr. Salvian was challenged on his diagnosis of post-traumatic thoracic outlet syndrome on the basis that other physicians could not adduce the symptoms on testing and on the basis that the numbness and pain in Ms. Iampietro's fingers were more likely due to her pre-existing carpal tunnel syndrome. Dr. Salvian was confident that the testing he did demonstrated clinical manifestations of post-traumatic thoracic outlet syndrome. Dr. Salvian explained that when there are several factors involved in neurogenic symptoms in the arms and hands, it is important, from a diagnostic perspective, to look at the distribution of the pain, numbness and tingling in the arms and hands, as that will assist in determining what is causing it. Carpal tunnel syndrome causes numbness and pain in the thumb, index and long fingers, which Ms. Iampietro has intermittently by her report and on some testing. If there is numbness and pain in the fourth and fifth fingers, as Ms. Iampietro demonstrated on testing conducted by Dr. Salvian, then it cannot be caused solely by carpal tunnel syndrome.

[64] Dr. Stewart did not observe symptoms of thoracic outlet syndrome on either visit. However, on her first assessment, she noted that in early July 2011, Dr. Rasool observed signs of thoracic outlet syndrome on both sides. She opined:

In my opinion this was probably due to increased muscle tension/muscle spasms in her neck secondary to her neck injury in the accident. The thoracic outlet syndrome on both sides probably contributed to the numbness in her hands at that time.

[65] Because this opinion is based on facts solely recorded in Dr. Rasool's clinical notes that are not in evidence, I do not accept it.

[66] In examination in chief, Dr. Stewart confirmed that although she was aware that others had seen signs of thoracic outlet syndrome, she did not. Dr. Stewart opined that the numbness and tingling in both hands that Ms. Iampietro experiences is a recurrence of carpal tunnel syndrome. She also testified that she would defer to Dr. Salvian because of his signficant expertise, experience and stature in the medical community on thoracic outlet syndrome and because some of Ms. Iampietro's symptoms are explained by thoracic outlet syndrome. On cross examination, Dr. Stewart agreed that she was familiar with some but not all of the tests used by Dr. Salvian to diagnose thoracic outlet syndrome. She confirmed she did some of these tests, and they were negative, but she also testified that they can have variable results from day to day.

[67] Given that Dr. Stewart deferred to Dr. Salvian's greater experience and expertise in diagnosing thoracic outlet syndrome, and her testing was not as extensive, I prefer Dr. Salvian diagnosis over Dr. Stewart's findings.

[68] Dr. Heran provided a report responding, in part, to Dr. Salvian's opinion. This report was prepared in November 2018, more than two years after he saw Ms. Iampietro. Dr. Heran opined that Ms. Iampietro is suffering from a recurrence of carpal tunnel syndrome directly as a result of the accident. He disagrees with Dr. Salvian's view on double crush syndrome and on the combination of carpal tunnel syndrome and thoracic outlet syndrome.

[69] Dr. Heran did not do any testing for thoracic outlet syndrome. He disagrees with Dr. Salvian's opinion that she is suffering from a combination of problems, and Dr. Salvian's diagnosis of thoracic outlet syndrome "Dr. Salvian is very nonspecific with the distribution of the fingers being involved. The record of Dr. Stewart clearly outlines that all the fingers get involved. This is supportive of the nonspecific origins of such symptoms and is against the presentation typically seen with thoracic outlet syndrome of a neural origin."

[70] I do not accept this opinion for several reasons. First, Dr. Heran did not do the testing. Without testing, there is no basis for opinion that what Dr. Salvian observed on testing is not attributable to thoracic outlet syndrome. Next, he is simply wrong when he says that Dr. Salvian does not identify the fingers involved. Dr. Salvian reported the fingers that were affected on testing and addressed how the distribution of the numbness and tingling is important to the diagnosis. On cross examination, Dr. Salvian testified that it was not possible that carpal tunnel syndrome completely explained Ms. Iampietro's symptoms because it would not cause numbness and tingling in her fourth and fifth fingers. Dr. Heran does not say why it is not likely that her problems are caused by a combination of problems, except to say it would be "exceedingly rare". He opined that her symptoms over time are not consistent with Dr. Salvian's opinion but he does not explain the inconsistency.

[71] Dr. Salvian reviewed the clinical records including those of Dr. Rasool and those of doctors who investigated her for carpal tunnel syndrome due to the pain and tingling in her hands. I conclude that most of the facts he took from those records were proven in evidence through the examination in chief and cross examination of Ms. Iampietro. These facts include the onset of her symptoms, their frequency and that she was referred to Dr. Bozek in May 2012 in part to consider carpal tunnel syndrome and the worsening of her neck pain radiating into her arm. However, entries in Dr. Rasool's records where he noted positive Tinel's sign (June 15, 2011 and July 6, 2011), positive testing for thoracic outlet syndrome (July 6, 2011) and the results of the nerve conduction studies were not proven in evidence.

[72] Dr. Salvian's view that post-traumatic thoracic outlet syndrome and intermittent symptoms of arterial thoracic outlet syndrome are causes of Ms. Iampietro's pain and numbness in her hands and fingers is based on the fingers in which he adduced pain on testing, the waxy and pale colour of her hand as she described it, and he observed on testing, and her arterial compression. Those are not matters contained in Dr. Rasool's notes about positive testing for thoracic outlet syndrome or the nerve conduction studies conducted by Dr. Bozek. His evidence about the nerve conduction studies is that the results do not rule out thoracic outlet syndrome or indicate active carpal tunnel syndrome. Accordingly, the failure to prove these parts of Dr. Rasool's clinical records does not affect Dr. Salvian's opinion.

[73] I find that Ms. Iampietro had carpal tunnel syndrome before the accident. It was asymptomatic at the time of the accident. Since the accident, she has had symptoms in fingers that are associated with carpal tunnel syndrome, symptoms in different fingers that are associated with post traumatic thoracic outlet syndrome, and symptoms that are indicative of intermittent arterial thoracic outlet syndrome.

[74] Dr. Salvian opined that non-surgical management of post-traumatic thoracic syndrome and myofascial pain is to try to relax the trapezius and pectoralis minor muscles. He recommended that Ms. Iampietro avoid prolonged or repetitive overhead use of the arms and heavy lifting. He opined that around the house, she should avoid heavy house cleaning tasks, carrying heavy items such as groceries and avoid overhead shelves and cupboards. He explained that these conditions can interfere with comfortable sleep so she needs a good bed, a good pillow and she may need sleep aids. She should work with a kinesiologist or a personal trainer to develop a fitness and conditioning program that will avoid further injury. He recommends avoiding running, cycling, backpacking, kayaking, golf and tennis because the impact and posture of these activities will aggravate her pain. He recommends walking and pool exercises.

[75] Dr. Heran is of the view that she should be assessed by a hand surgeon for an opinion on surgery. He testified that while a first surgery for carpal tunnel syndrome has a success rate of over 90%, second surgeries have at least a 70% success rate. Dr. Sahjpaul, referred to below, is also of the view that she should be assessed for surgery for carpal tunnel syndrome. Ms. Iampietro testified that she saw Dr. Christopher Bozek, a neurologist, and Dr. Shahid Gul, a neurosurgeon, in relation to her neck pain and the tingling and numbness in

her hands. She testified that neither recommended surgery for carpal tunnel syndrome.

[76] I conclude that it is possible that Ms. Iampietro may be a candidate for carpal tunnel release surgery and it may alleviate some, but not all of her symptoms.

Disc Herniation at C6-C7

[77] In April or May 2012, Ms. Iampietro suffered increased pain radiating down her right arm from her neck. Dr. Rasool referred her to a neurologist, Dr. Bozek. Ms. Iampietro agreed that Dr. Bozek's consultation note accurately records the timing of the referral and the reasons for the referral, numbness and tingling in her right hand and pain emanating from her neck into her shoulder. Ms. Iampietro agreed that Dr. Bozek diagnosed her with bilateral carpal tunnel syndrome and sent her for a CT scan for a suspected disc herniation. She also had an MRI scan. She was diagnosed with a disc herniation at C6-C7.

[78] Dr. Stewart testified that disc protrusions or herniations occur when a tear in the annulus (grisly structure) that surrounds and protects the jelly-like disc allows the disc to protrude through the tear and compress the spinal cord, causing pain. Dr. Stewart reviewed the CT scan and MRI scans. She opined that these images show a disc protrusion at C6-C7 which contacts Ms. Iampietro's right C6 nerve root.

[79] On cross examination, Dr. Stewart agreed that disc protrusions can be caused by trauma or by degeneration of the spine. In her report, Dr. Stewart opined that because Ms. Iampietro did not have neck, shoulder or arm symptoms prior to the accident, the accident probably aggravated a pre-existing disc protrusion or rendered a previously asymptomatic disc protrusion symptomatic. On cross examination, it was suggested to Dr. Stewart that because Ms. Iampietro noticed the pain after a workout involving heavy weights, it was likely that exertion caused the protrusion. Dr. Stewart agreed that exercise can cause a disc herniation. However, in this case she thinks it is more likely that this post-accident exercise played a role in the onset of the pain, not the herniation itself. Given there were no symptoms prior to the accident, Dr. Stewart is of the view that the accident caused the tear. This seems to contradict the opinion she gave in her report that the protrusion pre-existed the accident but became symptomatic after the accident.

[80] Dr. Ramesh Sahjpaul, a neurosurgeon retained by Ms. Iampietro, explained that the type of degenerative changes seen in Ms. Iampietro's cervical spine is common in people over the age of 40 and they are often asymptomatic. Dr. Sahjpaul explained that medical literature holds that it is not unusual for a person who has trauma to the spine to experience delay between the trauma which causes the tear and the actual herniation which causes the radicular pain. In Dr. Sahjpaul's opinion, while degenerative changes can play a role in disc deterioration and annulus deterioration, in order for there to be protrusion or a herniation, there has to be some level of trauma. The more degeneration, the less trauma needed.

[81] Dr. Sahjpaul reviewed the CT scan and MRIs of Ms. Iampietro's cervical spine. In his report, Dr. Sahjpaul opined that the trauma of the accident probably caused the herniation. He did not say why he is of that opinion given the symptoms came on ten months later, other than with reference to the medical literature, or explain what role degenerative changes to her spine may have played in either the tear or the protrusion.

[82] Dr. Heran opined that most disc herniations are spontaneous and not traumatic. Dr. Heran reviewed the CT scan of Ms. Iampietro's cervical spine, but not the MRI imaging (just the reports). On review of the CT scan, he saw degenerative changes in the form of osteophytes, which are bony growths associated with degeneration of the spine structure. In his opinion, those changes were long standing and chronic well before the accident. It is his opinion that the accident did not cause Ms. Iampietro's herniation.

[83] Dr. Heran agreed that trauma due to a motor vehicle accident can cause a disc herniation or can cause a degenerative disc herniation to become symptomatic. However, he would not agree that trauma can cause one of those two things when there is an interval of 10 months prior to the onset of symptoms.

[84] In my view, Dr. Heran's opinion is most persuasive on this issue. He provides a reason for his opinion, whereas Dr. Sahjpaul states a bare conclusion and Dr. Stewart's opinion in her report is different from what she said under cross examination.

[85] The doctors all agree that the disc herniation has improved, as has the radicular pain. Ms. Iampietro testified that the pain settled down after the initial acute pain. Dr. Heran's opinion is that she is currently back to the level she was at prior to the disc herniation.

[86] I conclude that Ms. Iampietro has not proven that the accident caused her disc herniation. I conclude that it is no longer playing a role in her pain or disability.

Sternal Chest Pain

[87] Ms. Iampietro testified that she has had burning sternal pain that is aggravated by lifting, sitting and activity since 2017 when her chiropractor / acupuncturist cracked her sternum.

[88] Although Dr. Stewart and Dr. Lu both testified that Ms. Iampietro's description that her sternum was cracked does not make sense, Dr. Stewart opined that the pain she experienced is likely inflammation of the joints between the sternum or breast bone and the ribs caused by treatment for her accident injuries. Dr. Stewart opined that this inflammation, known as costochondritis, is quite painful.

[89] I do not accept Ms. Iampietro's evidence that her sternum was fractured by her chiropractor / acupuncturist, if that is what she meant by cracked. Dr. Stewart did not accept that either. It was not Ms. Iampietro's characterization of the injury that was important to Dr. Stewart, but the pain itself, where it was, and that it made sense given the objective evidence that she was receiving treatment when it commenced. I accept Dr. Stewart's opinion. There was no evidence led by Mr. Leung and Octa Stone to contradict it.

Somatic Symptom Disorder

[90] Ms. Iampietro claims that as a result of her accident injuries, she has developed somatic symptom disorder. This disorder starts with chronic pain. Over time, the individual is no longer able to differentiate between mind and body and his or her experience of pain becomes all encompassing. The experience of pain is magnified and the individual perceives it to be the cause of all issues. Somatic symptom disorder is included in the Diagnostic and Statistical Manual of Mental Disorders (5th edition), known as the DSM-5. Under DSM-4, it was not separately and specifically described, but rather was considered to be part of chronic pain.

[91] Ms. Iampietro led the evidence of Dr. Lu, a psychiatrist who saw Ms. Iampietro. He opined that as a result of her lengthy course of pain and functional impairment after the accident she has persistent physical, cognitive and psychological symptoms that are a clinical manifestation of her response to pain.

[92] Dr. Lu explained that pre-existing psychological disorders, such as depression or anxiety, may make a person more vulnerable to developing somatic symptom disorder after an onset of pain, but there cannot be somatic symptom disorder without precipitating pain that has become chronic. On cross examination he would not agree that Ms. Iampietro's post partum depression, even if ongoing at the time of her accident, was the cause of her somatic symptom disorder. Aside from the requirement of precipitating chronic pain, Dr. Lu explained that functionality plays a role in diagnosis and causation. A marker of somatic symptom disorder is that the experience of pain takes over one's existence and causes functional disability. In Ms. Iampietro's case, prior to the accident she was fully functioning. Despite having had post partum depression, at the time of the accident she was working full time, parenting her two young children, undertaking household responsibilities and functioning within her many relationships. Since the accident, her main focus has been her pain and her functionality is markedly diminished on all fronts.

[93] Dr. Stewart agrees that Ms. Iampietro has somatic symptom disorder. She opined that Ms. Iampietro has chronic pain due to her accident injuries, the necessary foundation for somatic symptom disorder. On cross examination, she disagreed with the thesis that the source of Ms. Iampietro's chronic pain could be her bunion, sternum pain or other pain unrelated to the accident.

[94] Dr. Stewart observed that Ms. Iampietro's presentation as an "all or nothing" person - that before the accident she was the life of the party and a great mother, and after the accident she has nothing and she is not able to do anything - is influenced by her development of somatic symptom disorder.

[95] Dr. Heran testified that he would defer to Dr. Lu on psychiatric diagnosis. He agrees that Ms. Iampietro has chronic myofascial type pain, but because it is intermittent, he opined that it is not consistent with a diagnosis of chronic myofascial pain syndrome. In his second report, he characterized her myofascial injuries as persistent and questioned the characterization of her pain as chronic.

[96] Dr. Lu's evidence was that it is the persistence of the pain over time that is important; it does not have to be present every minute of every day.

[97] I accept the evidence of Dr. Lu and Dr. Stewart that chronic pain is a necessary precept for somatic symptom disorder. I conclude that Ms. Iampietro has developed chronic pain which has in turn caused her to develop somatic symptom disorder.

Depression and Anxiety

[98] Ms. Iampietro claims she has developed depression and anxiety as a result of her accident injuries. Mr. Leung and Octa Stone argue that she had depression and/or anxiety prior to the accident which was ongoing at the time of the accident.

[99] Dr. Heran is of the view that Ms. Iampietro's symptoms, other than myofascial injuries to her neck and back, are not caused by the accident but rather pre-existing and long standing depression, superimposed anxiety fears and suicidal ideation, and trouble in her marriage. His opinion is that Ms. Iampietro's inability to work is not caused by her accident related injuries, but by her pre-existing mental health issues.

[100] There is no evidence to support Dr. Heran's conclusion that her depression and anxiety were longstanding, pre-existed the accident and were ongoing at the time of the accident. Ms. Iampietro testified that she had post partum depression after the birth of her second child. It had resolved prior to her returning to work in January 2011 at the end of her maternity leave. Dr. Heran describes Dr. Rasool's records as disclosing longstanding pre-accident depression. On cross examination, he agreed that the only mention of depression in Dr. Rasool's records is the June 2010 entry regarding an appointment during which Ms. Iampietro and Dr. Rasool discussed her post partum depression. Ms. Iampietro confirmed in her evidence that the records accurately record that topic being discussed at that time. Dr. Heran conceded that he is wrong that Dr. Rasool's records disclose longstanding pre-accident depression based on this one note.

[101] Dr. Heran also reviewed the notes of the hypnotherapist, Mr. Bexson. Ms. Iampietro saw Mr. Bexson at the request of her disability insurer in 2011, after the accident, in preparation for her return to work. Mr. Bexson testified that he is a counsellor, a coach and an instructor.

His records include references to stress and anxiety, suicidal thoughts, marital difficulties and fear of returning to work. He testified that when making his notes, he was not attempting to record Ms. Iampietro's words precisely. For example, he testified that even though he wrote down "marital difficulties" he did not think that Ms. Iampietro referred to marital difficulties during their sessions, rather he made that note as an interpretation of her voicing frustration over her perceived lack of support for her accident injuries. Ms. Iampietro was cross examined about some parts of the records and denied providing Mr. Bexson with information that would cause him to form the impressions he noted.

[102] As discussed above, Mr. Leung and Octa Stone assert that the contents of these records demonstrate that Ms. Iampietro had ongoing mental health issues at the time of the accident, was already seeking to work part time at the time the accident occurred, and was experiencing problems in her marriage at the time of the accident. Based on the evidence of Mr. Bexson and Ms. Iampietro, I find that Mr. Bexson's notes do not demonstrate that Ms. Iampietro was not truthful about these matters when she testified.

[103] In addition, there is nothing in Mr. Bexson's notes that could be interpreted as recording long-term pre-accident depression and anxiety. Mr. Bexson's notes were recorded post-accident and were recorded about Ms. Iampietro's situation at the time they were made. Dr. Heran's reliance on them as referring to longstanding mental health issues is misplaced.

[104] Dr. Heran's incorrect conclusion that there was evidence of longstanding pre-accident depression is a mistake of significant magnitude that is fundamental to his view that her accident injuries are not the cause of her current disability. Accordingly, I reject Dr. Heran's opinion that her pre-accident mental health is responsible for her ongoing disability.

[105] Mr. Leung and Octa Stone also point to a portion of a diagnostic assessment interview form completed by Ms. Iampietro after the accident, which was filled out at Dr. Rasool's office. In this form she recorded an event or events from her childhood, which based on the few words Ms. Iampietro wrote about it, could have been traumatic. Despite cross examining her on parts of this form, the defendants did not ask Ms. Iampietro any questions about that part of the form or whether what she wrote was an incident that played a role in her mental health at the time she filled out the form, at the time of the accident, or presently. There is no evidence that anything in Ms. Iampietro's childhood or pre-accident history was causing her depression or anxiety at the time of the accident.

[106] I conclude that Ms. Iampietro suffers from anxiety, depression and somatic symptom disorder. Prior to the accident, she had experienced post partum depression. It had resolved by the end of 2010. She had no active mental health issues at the time of the accident.

Causation

[107] In a personal injury case, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. There must be a substantial connection between the injury and the defendant's conduct. The primary test for causation is the "but-for" test: but-for the defendant's negligence, would the plaintiff have suffered the injury: Resurfice Corp. v. Hanke, 2007 SCC 7 at paras. 21-24.

[108] However, the defendant's negligence need not be the sole cause of the injury, provided the plaintiff proves the accident was a cause of the injuries, beyond the de minimus range: Athey v. Leonati, [1996] 3 S.C.R. 458 at paras. 15-17; and Farrant v. Laktin, 2011 BCCA 336 at para. 9.

[109] Where there are both tortious and non-tortious causes of injury, the defendant is liable so long as the defendant's conduct is a cause of the plaintiff's injury. The plaintiff must establish such causation on a balance of probabilities before damages are assessed: Blackwater v. Plint, 2005 SCC 58 at para. 78.

[110] I have concluded that the disc herniation was not caused by the accident. Its cause is non-tortious. Two issues arise out of this determination. The first is whether the accident injuries are a cause of Ms. Iampietro's chronic pain given that the disc herniation is not an accident injury. The second is whether the accident injuries are a cause of her ongoing disability given that the disc herniation is not an accident injury.

[111] I conclude that the accident injuries are a cause of Ms. Iampietro's chronic pain and they are more than de minimus. Although Ms. Iampietro no doubt had pain from the herniated disc, she had pain before the increased pain radiation down her arm and neck due to the disc herniation. The disc herniation is now much reduced but she still has pain from her carpal tunnel syndrome, her thoracic outlet syndrome and in her sternum. It is chronic. Accordingly, I find her accident injuries to be a cause of her chronic pain, her chronic pain underlies her somatic symptom disorder, and her chronic pain and her somatic symptom disorder are causing her current disability. I also conclude that the accident caused her post-accident depression and anxiety.

Prognosis

[112] Both Dr. Sahjpaul and Dr. Heran opined that Ms. Iampietro should be seen by a hand surgeon for an opinion on whether her recurrence of carpal tunnel syndrome is appropriate for surgical intervention. Dr. Heran opined that surgery to address recurrent carpal tunnel syndrome has a lower success rate than initial surgery, but it is still above 80%. If the surgery is successful, to the extent the pain and numbness is caused by the carpal tunnel syndrome, it will be reduced or relieved.

[113] With regard to her overall prognosis, Dr. Lu opined that Ms. Iampietro is likely to have chronic somatic symptom disorder for life. He opined that Ms. Iampietro is of the view that she does not have a major mental health problem - a view common among those who have somatic symptom disorder. To the extent that she accepts that she has problems with her mental health, such as depression and anxiety, she does not understand that this impacts her pain and physical experience. Notwithstanding the difficulty of the situation, he opined that she should have cognitive behavioural therapy treatment and vocational support to increase her sphere of daily activities and diminish her focus on pain.

[114] I find that Ms. Iampietro will have some level of pain from her thoracic outlet syndrome, may have chronic pain from her carpal tunnel syndrome depending on whether she is a candidate for repeat carpal tunnel release, and will have chronic depression, anxiety and somatic symptom disorder. I also find that she may have some improvement in her mental health conditions if she undergoes treatment, since implicit in Dr. Lu's opinion that she should have treatment with a focus on increasing her daily activity in that her activity can improve with treatment.

Damages

[115] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place them in the same position as they would have been had the tort not been committed, insofar as this can be achieved by a monetary award: Lines v. W & D Logging Co. Ltd., 2009 BCCA 106 at para. 167, citing Ratych v. Bloomer, [1990] 1 S.C.R. 940 at 962-63.

[116] This principle is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day to day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong he or she was subjected to. Non-pecuniary damages are assessed to compensate for pain, suffering, and loss of enjoyment of life both prior to trial and into the future having ensured that the pecuniary losses are appropriately compensated such that the expenses to reasonably address the injuries will not erode the non-pecuniary damages.

[117] In a trilogy of cases decided in 1978, the Supreme Court of Canada set a rough upper limit of $100,000 (in 1978 dollars) for non-pecuniary damages based on the premise that pecuniary damages are fully compensated: Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 at 265; Arnold v. Teno, [1978] 2 S.C.R. 287 at 334; and, Thornton v. School Dist. No. 57 (Prince George), [1978] 2 S.C.R. 267 at 284.

[118] The premise on which the rough upper limit was set demonstrates that while the heads of damages are to be assessed individually, they are also interlocking. In particular, the future needs of the plaintiff must be met so the balance is struck between restorative care awards and policy-driven non-pecuniary damages.

Income Loss

Is Ms. Iampietro Disabled from Working?

[119] Ms. Iampietro was completely off work from the day after the accident, June 13, 2011, until she commenced graduated return to work on October 4, 2011. She returned to full time work in February 2012.

[120] Ms. Iampietro's position is that her physical and psychiatric injuries are such that she is permanently disabled from working.

[121] Mr. Leung and Octa Stone submit that Ms. Iampietro's income losses until her return to full time employment are compensable, but nothing after that. They argue that because Ms. Iampietro returned to work on a graduated basis, I should conclude that anything that caused her to not be able to work after that time is caused by the accident. They assert that her reason for going off work was the pain from her disc herniation and her sternum pain, which are not causally related to the accident in their submission. They also assert that her psychological conditions are not caused by the accident so any role that they play in her disability are not compensable.

[122] I have found that Ms. Iampietro's sternum pain is an accident injury as are her psychological conditions. The defendants' expert, Dr. Heran, opined that her pre-existing psychological problems are the cause of her disability. While I agree that her psychological injuries are a source of her disability, I have rejected the opinion that she had psychological problems that were ongoing at the time of the accident. I have found that her current psychological problems were caused by the accident.

[123] I have found the disc herniation to not be causally related to the accident. Ms. Iampietro testified that after her return to full time duties, she experienced pain at work, especially in her neck, shoulders and arms. She testified that she had tingling and numbness in her arms, wrists and hands. In April 2012, Ms. Iampietro experienced sudden increased pain in her neck. She was subsequently diagnosed with a herniated disc at C6-C7.

[124] The onset of disc herniation pain was during the time she was working full time. After it commenced, she decided she could no longer work due to her pain and anxiety. She testified that she also had musculoskeletal pain, carpal tunnel symptoms, and thoracic outlet symptoms. She describes depression and anxiety, including panic attacks, affecting her at that time. These problems affect her to the present. As does the chest pain she developed in 2017 and which Dr. Stewart opined is costochondritis.

[125] I find that the disc herniation was one of a number of injuries affecting her at the time she decided she could no longer work. She did not stop working solely due to the pain of the disc herniation, but due to the constellation of injuries I have described, all of which were caused by the accident except the disc herniation.

[126] Dr. Salvian opined that it is often difficult for persons with thoracic outlet syndrome and carpal tunnel syndrome to maintain static positions such as sitting or standing as it increases neck and back muscle tension. He opined that it is often difficult for such patients to look at a computer screen for prolonged periods and do prolonged keyboarding, typing or "mousing". He says such patients cannot typically work a full day, or even part days every day of the work week. He recommended a functional capacity evaluation and a vocational assessment.

[127] In her first report, Dr. Stewart also recommended a functional capacity evaluation and that Ms. Iampietro see a vocational rehabilitation counsellor. She opined that Ms. Iampietro is likely to continue to experience her symptoms and limitations. She opined that Ms. Iampietro would be unable to do physically demanding work. In sedentary work, she will require flexibility to change her work tasks and position periodically throughout the day. She opined that it would be likely that she would be restricted to part time work in the future.

[128] In her second report, Dr. Stewart opined that given Ms. Iampietro's development of somatic symptom disorder and her decline in all aspects of function, she will not likely be employable in any capacity, including part time, because of her ongoing disability stemming from her accident injuries.

[129] Dr. Lu opined that as Ms. Iampietro has not worked for five years, and after five years of long-term disability with somatic symptom disorder most patients with this disorder cannot return to their prior work capability. However, he did not rule out some level of remunerative employment, opining:

In many ways, Ms. Iampietro needs extensive vocational support to reverse the many losses and limitations she experiences over the past years. While she expresses the wish to return to work, she needs instrumental support to overcome her SSD and chronic pain. Currently, her avoidance and isolation have been a major factor in her limitations. Already she has lost her position. Her job skills would have been severely affected by her disability over the past few years. Realistically, even with optimal response, she is unlikely to return to her prior functional status. Even for part-time work, she will need an extended period to update her job skills. She would need vocational support and gradual reintegration into the workforce.

[130] Ms. Iampietro attended a work functional capacity evaluation with an occupational therapist, Ms. Jerica Ditson. Ms. Ditson found that Ms. Iampietro put in a near full physical effort. Ms. Iampietro did not complete the assessment due to onset of pain, tightness in her chest, difficulty breathing, and a lack of ability to concentrate. She advised Ms. Ditson that she felt like she was having an anxiety attack. Ms. Ditson opined that it is not unusual for persons who have a significant psychiatric diagnosis to have difficulties completing a full functional work capacity evaluation. She concluded that Ms. Iampietro is not likely employable in any occupation at this time.

[131] Ms. Iampietro attended a vocational rehabilitation assessment with Derek Nordin. His opinion is that Ms. Iampietro is not job ready and would not be ready for vocational rehabilitation or support until she had treatment.

[132] Through the medical, functional capacity and vocational evidence and her own evidence, Ms. Iampietro has established that she is not capable of working presently and a real and substantial possibility that she will lose income in the future due to her accident injuries. I find that she may have some residual capacity to work, especially if she successfully undergoes treatment for her somatic symptom disorder. I find that condition to be the most significant condition in her functional disability at this time. I find that successful treatment will increase her functionality, but not completely because her somatic symptom disorder is permanent and because she does have underlying pain which will continue to impact her functionality. I conclude that her functionality might increase to allow her to work part time. That is not a good possibility, but it is appropriate to take it into account nonetheless.

Past Income Loss

[133] At the time of the accident, Ms. Iampietro was working as a receptionist at Sunny Hill. She earned $38,425 in her last full year of employment, 2008. Between 2009 and the accident, she worked partial years due to her maternity leave that commenced in 2009 and ended in 2010. The plaintiff asserts that but for the accident, she would have worked full time between June 2011 and the present. Her present earnings would be $43,327 per annum. Ms. Iampietro's economist calculates her past income loss to be $254,969. This accounts for the funds earned on her graduated return to work.

[134] Mr. Leung and Octa Stone dispute the basis on which the calculation has been prepared. They submit that the forms filled out by Ms. Iampietro after the accident and her absence from work on the two working days prior to the accident are evidence that she had already decided and requested to work part time due to her pre-existing psychological issues. They assert that she was unhappy at work and her evidence that she liked her work should not be believed. They called her former supervisor, Ms. Barbara Kenny, to testify.

[135] Ms. Kenny testified that Ms. Iampietro was well suited to the job of a greeter in the hospital because of her bubbly personality and because she was good with children. She testified that Ms. Iampietro did her job well although she was not great with the petty cash aspect of her job. They had worked through that problem with improvement on Ms. Iampietro's part. Ms. Kenny did not agree that Ms. Iampietro had ever requested to work part time other than after the accident and she had not requested medical leave, other than maternity leave, prior to the accident. Ms. Kenny testified that there were conversations about part time work at the time of Ms. Iampietro's return to work after the accident. Her graduated return to work was handled by the human resources department, not Ms. Kenny. When Ms. Iampietro was working full time in 2012, Ms. Kenny discussed with Ms. Iampietro the possibility of part time work. Ms. Kenny advised Ms. Iampietro that the position at Sunny

Hill was full time and if Ms. Iampietro wanted a part time position, she would have to move to another hospital campus.

[136] Based on this evidence and the evidence of Ms. Iampietro that she planned to work full time and needed to do so for financial reasons, I conclude that as of the time of the accident, Ms. Iampietro was working full time and intended to continue to work full time.

[137] I accept the plaintiff's expert evidence of the past income loss in the amount of $254,969 and award that amount.

Loss of Earning Capacity

[138] Assessing an award for loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. The assessment is fact-intensive and case-specific: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at paras. 32-33.

[139] There are two widely used approaches to quantify loss of future earning capacity, the earnings approach and the capital asset approach. The distinction between the two was explained by Mr. Justice Kent in Hoy v. Williams, 2014 BCSC 234 as at paras. 156-59, citing Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.); Gilbert v. Bottle, 2011 BCSC 1389 at para. 233.

[140] The earnings approach is a mathematical approach (albeit still an assessment) based on the present value of the difference between the plaintiff's projected with accident annual income and the plaintiff's projected absent accident annual income over the working years until retirement. Where there is no residual earning capacity, the present value of plaintiff's entire projected annual salary, absent injury, forms the basis for the award.

[141] Where the evidence is such that lost earnings are not measurable, the capital asset approach is used: Perren v. Lalari, 2010 BCCA 140 at para. 32. That approach involves considering i) whether the plaintiff has been rendered less capable overall from 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 him or her; and iv) whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market: Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); Gilbert v. Bottle, 2011 BCSC 1389 at para. 233; and Morgan v. Galbraith, 2013 BCCA 305 at paras. 53, 56.

[142] The earnings approach is often used where the plaintiff had an established earnings pattern or career trajectory prior to the accident, and after the accident the plaintiff continued to work in the same position with either reduced hours or modified duties, or took early retirement from that position as a result of accident-related injuries: see, for example, Riding-Brown v. Jenkins, 2014 BCSC 382 at para. 25.

[143] The capital asset approach is used where there is a level of uncertainty making it difficult to measure the loss in a pecuniary way. As this Court stated in Riding-Brown, at para. 26, this approach is "usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult."

[144] Ms. Iampietro argues that the earnings approach is possible because her earning trajectory without the accident was established based on her long time employment and she is not in a position to return to work in any capacity. The assessment of the loss starts with a mathematical exercise that can be undertaken.

[145] Mr. Leung and Octa Stone argue that the capital asset approach is appropriate because although the plaintiff is not working, she could be and she should return to work. They argue that the plaintiff's evidence is not reliable and cannot be a foundation on which to assess a loss on an earnings approach and there are too many contingencies, both past and future, such that the earnings approach is more appropriate. They argue that the facts are similar to Wagner v. Newbery, 2015 BCSC 894, in which the Court found the plaintiff's employment path was not sufficiently clear and the contingencies too great to use the earnings approach (at para. 253).

[146] In my view, the earnings approach is appropriate in this case. The plaintiff has a long established history of working full time as a receptionist at Sunny Hill. She bases her future earnings projection on continuing along this same path with the same earnings, increasing only by the amounts that the earnings have historically changed, until a retirement date of age 65 or 70. I find the plaintiff's evidence to be reliable on this issue not only because I reject the defendants' submission that she is not generally reliable, but also because her evidence is supported by the evidence of Ms. Kenny. Ms. Kenny refutes the defendants' suggestions that Ms. Iampietro had sought to work part time for other health reasons. Ms. Kenny gave evidence that Ms. Iampietro was good at her job and well suited to it.

[147] In Wagner, the plaintiff had not finished the degree she was working towards or established an attachment to the labour force that would support the conclusion she would have worked full time. The evidence called into question whether, without the accident, she would have embarked on and completed her degree. In this case, Ms. Iampietro had established and committed to full time work in a position such that her earnings to retirement can be projected with reasonable confidence.

[148] I have found that the plaintiff may have some residual earning capacity with treatment, although she is not currently capable of working. In my view, this is best dealt with as a contingency in assessing her damages. While in some cases, the number of contingencies and their nature may make the capital asset approach appropriate, this is not such a case.

[149] The process to establish the loss is that first, the plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: Perren at para. 32, Kim v. Morier, 2014 BCCA 63 at para. 8. If the plaintiff discharges his or her burden of proof, the court turns to an assessment of damages. The general principles the court should apply when making an assessment under this head of damages are:

a) the court should assess damages rather than calculate them mathematically;

b) the standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are weighed according to their relative likelihood;

c) allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong; and

d) the overall goal of the assessment is to be fair and reasonable.

See: Falati v. Smith, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45.

[150] As discussed above, Ms. Iampietro has established a real and substantial possibility that her future earnings are impaired.

[151] Ms. Iampietro testified that she planned to work to age 65. Ms. Iampietro's economist calculated her earnings from the date of trial to retirement at age 65 to be $661,605.

[152] With regard to contingencies, I take into account the following:

a) absent the accident, Ms. Iampietro might have been absent from work or worked part time for reasons that were not manifest at the time of the accident;

b) Ms. Iampietro might have retired earlier than age 65; and

c) Ms. Iampietro may regain some income earning capacity.

[153] All of these contingencies are negative. In O'Brien v. Cernovec, 2016 BCSC 1881 at para. 137, the Court explained that both positive and negative contingencies should be taken into account in the analysis. Ms. Iampietro did not ask for any positive contingencies, and given the evidence pertaining to her earnings history and her plan for the future, this position makes sense.

[154] Ms. Iampietro's economist has applied a statistical deduction for being absent from the workforce into his calculation that addresses (a) and (b) above.

[155] I have discussed the medical and factual evidence with regard to regaining income earning capacity above. As stated, it will be in the future and the possibility of it occurring, based on the medical evidence, is low. If it occurs, it is likely to be part time and perhaps lower paying than her pre-accident employment due to her more limited functionality. I apply a contingency of 15%.

[156] Taking into account a contingency for residual earning capacity, I assess Ms. Iampietro's future loss of earning capacity at $560,000.

Non-Pecuniary Damages

[157] In Stapley v. Hejslet, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing non-pecuniary damages: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism. Courts also consider cases in which the plaintiff has suffered similar injuries as a guide: Lindal v. Lindal, [1981] 2 S.C.R. 629 at 637. However, they are no more than a guide since similar injuries may not have similar consequences for the injured person.

[158] Ms. Iampietro was older than a young adult, but she was not yet middle-aged at the time of the accident. I find that the accident injuries will affect significant phases of her life - her career, her motherhood, her marriage, the years she might have otherwise enjoyed a healthy retirement, and her old age. I accept her evidence and those of other witnesses that she was a physically active person who loved the challenge of staying fit and improving her fitness but she now exercises for rehabilitation. Both Ms. Iampietro and her husband testified that her accident injuries have eliminated physical intimacy in their marriage and I accept their evidence in this regard. She testified that she believes she is not acting as a mother should and her husband is very distressed about how often she is in bed when she should otherwise be interacting with their children. I accept their evidence.

[159] Several friends and family members testified that Ms. Iampietro was always impeccably groomed before the accident but that has changed. She testified that she liked to wear beautiful clothes and high heels prior to the accident, but she now often wears work out clothes or comfortable clothes and low footwear. One exception to this is Ms. Diana Iampietro, Ms. Iampietro's sister-in-law, who still perceives Ms. Iampietro as bubbly and testified that she still looks good and takes care of herself. Her evidence was different from the evidence several witnesses whose testimony was detailed and consistent and I do not accept it for that reason.

[160] I find that Ms. Iampietro can no longer work at a job she found rewarding and which was financially important to her family. She no longer demonstrates her pre-accident attention to her appearance. Her enjoyment of hosting and attending social gatherings has largely been reduced to hosting smaller gatherings at her home or attending at the home of other

people where she can use a bed to lie down. She spends a lot of time in bed trying to manage her pain. She has depression and anxiety which result in anxiety attacks when she tries to push herself beyond her very small range of activities, such as during her functional capacity evaluation. She has somatic symptom disorder, a syndrome whereby a person with a level of chronic pain perceives the pain as worse than it is or objectively should be. She is trapped in a cruel negative feedback loop between her pain and her mental health.

[161] The plaintiff relies on Brundige v. Bolton, 2018 BCSC 1843, in which Mr. Justice Butler determined the plaintiff suffered from neck, back and pelvic myofascial and musculoskeletal injuries. He also found that she suffered from adjustment disorder with depressed mood and somatic symptom disorder which were caused by the accident and caused her to be anxious, depressed and preoccupied with her perceived pain. The plaintiff suffered daily pain, could not work and had every aspect of her life affected. She was 39 years old at the time of the accident. Her somatic symptom disorder magnified her perception of pain and caused her to see her level of impairment higher than it was. He concluded he should make an award at the higher end of the reasonable range, and awarded $165,000.

[162] The plaintiff also relies on Firman v. Asadi, 2019 BCSC 270, in which Mr. Justice Verhoeven found that the plaintiff's accident injuries included a left hip injury requiring surgery, thoracic outlet syndrome requiring surgery, myofascial injuries to the spine resulting in chronic pain, and mental illnesses including depression, somatic symptom disorder and anxiety. These injuries meant that she was no longer able to participate in her previously very active lifestyle including fitness training, marathons and triathlons. Her personality changed and she was no longer outgoing and social. However, she was not completely debilitated and there was a chance her condition would improve, although the overall prognosis was poor. Verhoeven J. awarded $170,000. The plaintiff also relies on Verhoeven J.'s review of several cases but in my opinion, the review does not demonstrate significant similarity between those cases and this case.

[163] The plaintiff relies on Evans v. Keill, 2018 BCSC 1651, in which the plaintiff, age 34 at the time of the accident, had chronic pain from myofascial injuries to her neck and upper back, suffered chronic headaches, was disabled from working and many recreational activities, suffered depression, had two suicide attempts, and suffered from somatic symptom disorder. By the time of trial, her psychological condition had improved; she was no longer suffering from somatic symptom disorder and her depression was managed. I was the trial judge in that case and I awarded her $110,000 in non-pecuniary damages.

[164] The defendant has argued cases based on findings of injuries caused by the accident grouped as follows:

a) moderate and continuing myofascial pain, hand numbness from carpal tunnel syndrome: $60,000 or $75,000 to $110,000 inclusive of housekeeping capacity;

b) the above issues, not including thoracic outlet syndrome but including somatic symptom disorder: $115,000;

c) the above issues as well as somatic symptom disorder, double crush or thoracic outlet syndrome something less than $135,000.

[165] Since I have found that the plaintiff suffers from thoracic outlet syndrome and somatic symptom disorder, both caused by the accident, I will consider the applicable cases cited by Mr. Leung and Octa Stone. They are Starchuk v. Hannig, 2016 BCSC 1655, and Hrnic v. Bero Investments Ltd., 2018 BCSC 1880. I will also consider Rutter v. Adams, 2016 BCSC 554, because, although thoracic symptom disorder was rejected in the case, the other injuries are similar.

[166] In Starchuk, the plaintiff suffered soft tissue injuries to her neck, shoulders, upper limbs, back, chest and right foot, a capsular tear of her breast implant requiring surgery and causing permanent pain and loss of sensation, post traumatic stress disorder, somatic symptom disorder, chronic pain and a mild traumatic brain injury. Madam Justice Brown assessed non-pecuniary damages at $135,000.

[167] In Hrnic, the plaintiff was 54 years old at the time of the accident in which she suffered injuries that developed into chronic nerve and muscle pain. Mr. Justice Saunders found that the plaintiff's chronic pain was exacerbated by and explained by somatic symptom disorder. The somatic symptom disorder pre-existed the accident, but was not disabling prior to the accident and was aggravated by the accident. Saunders, J. awarded $85,000 in non-pecuniary damages.

[168] In Rutter, the plaintiff was 29 years old at the time of the first of two accidents. She experienced neck pain, back pain, headaches, pain in her left knee and psychological problems. She had serious depression and suicidal ideation, anxiety, somatic symptom disorder, and post traumatic stress disorder which had become sub-clinical. She went back to work after the first accident and was able to continue working but not in the area she was pursuing prior to the first accident. She was disabled for four months following the first accident. Madam Justice Watchuk awarded non-pecuniary damages in the amount of $115,000.

[169] This case has similarities and differences in comparison to all the cases referred to above. In some of these cases, the physical injuries were more serious and greater in number, but the psychological injuries were not as profound or had improved over time.

[170] Taking in account Ms. Iampietro's age at the time of the accident, her persistent curse of chronic injuries, the most serious of which are her psychological injuries, the diverse and serious impact they have had on her ability to work, be a parent, a spouse and a physically and socially active person, as well as her chances for improvement, I assess non-pecuniary damages at $125,000.

Loss of Housekeeping Capacity

[171] Ms. Iampietro argues that her accident injuries preclude her from undertaking most of the significant housekeeping activities she did prior to the accident, including weekly cleaning of the family's four bedroom three bathroom home and laundry. She still does some cooking and grocery shopping, but on a diminished basis. The family now eats take out many evenings a week. They now pay for five hours of housekeeping services every two weeks. Mr. Iampietro, who use to participate in cleaning with Ms. Iampietro on weekends and who did the majority of the yardwork, is not able to do so to his pre-accident level because he has taken over many domestic duties, including minding the children on the weekend. The evidence of friends and family members was uniform: prior to the accident, the Iampietros loved to entertain and their home was immaculate.

[172] Mr. Leung and Octa Stone argue that there is no evidence that Ms. Iampietro was responsible for anything beyond minimum household maintenance. This assertion is based on the fact that Mr. Iampietro is an electrician and would therefore be in a better position to undertake household improvements.

[173] In McTavish v. MacGillivray, 2000 BCCA 164 at paras. 67-68, the Court of Appeal held that a plaintiff whose ability to perform housekeeping is diminished should be compensated, including for work that other family members have gratuitously assisted with after the accident. I accept this approach, and that the functional approach to compensating pecuniary loss is applicable to loss of housekeeping capacity.

[174] In Liu v. Bains, 2016 BCCA 374 at paras. 25-29, the Court of Appeal considered the governing principles to this head of damage. The Court explained that like other loss of capacity claims, it is a matter of assessment, not mathematical calculation. The court may consider labour force information regarding the value of replacement services as guidance in determining the appropriate quantum. It can be treated as an aspect of pain, suffering and loss of enjoyment of life, or it can be assessed separately. Although Westbroek v. Brizuela, 2014 BCCA 48 at para. 76, discusses a conservative approach to loss of household capacity, the Court in Liu, at para. 29, held that the jurisprudence does not support an approach that provides less than full compensation for a proven loss.

[175] The evidence of Ms. Iampietro, her husband, and several friends and family was uniform that Ms. Iampietro was a particular housekeeper who spent several hours a week ensuring their family home was immaculate. She and Mr. Iampietro worked together on this. His evidence was that he has taken over many of the child rearing duties and no longer has capacity for anything else.

[176] I also accept that Mr. Iampietro is, to a large extent, playing the role of both parents. Given the evidence, the functional approach to assessing damages supports an award for loss of housekeeping capacity to cover house cleaning and yardwork even though Mr. Iampietro used to do some of it.

[177] Ms. Iampietro's claim is based on approximately six hours per week for both housekeeping, seasonal heavy cleaning and yardwork. Given the evidence that prior to the accident, she and Mr. Iampietro spent about eight hours a week combined on such work, her claim is reasonable. Some of the claim is to their youngest child's 18th birthday, and other claims go on longer. This too is reasonable except that the landscaping claims go to age 75. After their children are grown, I expect that Mr. Iampietro will no longer be occupied with the child care and child rearing activities and will be able to resume his yardwork and house maintenance.

[178] In addition, I factor in the same 15% contingency that Ms. Iampietro will gain functionality and will be able to participate in childcare and/or family duties such that Mr. Iampietro will be able to resume some of his previous tasks.

[179] The claim under this head of damages is $172,555. I asses the future loss of housekeeping capacity at $95,000.

Cost of Future Care

[180] Future care costs are awarded where the plaintiff establishes that the items of care are medically necessary and the costs are reasonable: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[181] Ms. Iampietro's expert medical witnesses made a number of recommendations which were reviewed by an occupational therapist, Ms. Claudia Walker who set out a schedule of cost of future care items and pricing for them. Ms. Iampietro's economist, Mr. Darren Benning, provided the present values for those items.

[182] Mr. Leung and Octa Stone take the position that certain of these costs, in addition to housekeeping which I have already addressed, are not reasonable or supported by the evidence. They also object to paying for ongoing treatment for life. I will address those that are controversial.

Occupational Therapy and Rehabilitation Assistant

[183] Dr. Lu opined that Ms. Iampietro will need a team approach to her care. Dr. Stewart recommended occupational therapy to coordinate the various treatments and requirements. Ms. Walker has provided costing for an occupational therapist in the first year and 12-18 hours every year into the future, and a rehabilitation assistant in the first year. The rehabilitation assistant and the occupational therapist appear to be duplicative for the first year. With regard to the recommendation of occupational therapy for each subsequent year, while I accept that Ms. Iampietro does not have the skillset to coordinate her multi-disciplinary care at this time, as time goes on she will grow these skills. It does not make sense that she would require several hours of occupational therapy support each year indefinitely. The total claimed is $57,000. I award $20,000 for both occupational therapy and rehabilitation assistance for the first year and all subsequent years.

Manual Therapies to age 80

[184] Ms. Iampietro has undergone massage therapy, physiotherapy, osteopathy therapy, and acupuncture. With regard to ongoing osteopathic treatment, Dr. Stewart opined that it is not usual that passive treatments are effective this long after injury, but given that they provide Ms. Iampietro with symptomatic relief, it is reasonable for her to continue every two weeks indefinitely. Dr. Stewart did not make a recommendation for massage therapy. Dr. Salvian commented that it may be beneficial but did not make a clear recommendation. Ms. Walker has made an allowance for 12-18 sessions of remedial massage therapy, physiotherapy or osteopathy treatments. Given the recommendations of Dr. Stewart on osteopathy treatments, this is reasonable.

Yoga and Meditation to age 80

[185] Dr. Lu recommended mindfulness therapy and included yoga and meditation as examples. Ms. Walker provided costing for a restorative yoga course. Mr. Leung and Octa Stone argue that they should not have to pay for yoga to age 80. Given Dr. Lu's opinion that she will struggle indefinitely with her mental health, I see no reason to cease the recommended treatment at a particular date or age.

Functional Capacity Evaluation

[186] Both Dr. Stewart and Dr. Salvian recommended a functional capacity evaluation. It has been undertaken although Ms. Iampietro was not able to complete it. My findings anticipate that Ms. Iampietro may be able to return to work if treatment is successful. There is no evidence as to the utility of another functional capacity evaluation at that time, although the potential utility is apparent as a matter of logic. However, there is also a claim for vocational rehabilitation and in my view the allowance for that is sufficient to cover the cost of a future functional capacity evaluation if one is undertaken. I decline to make a separate award.

Childcare Assistance

[187] Ms. Iampietro claims an allowance for a nanny for their children. Dr. Stewart supports this claim. She expressed concern about how often the children are left to their own devices. The children are nine years old and 13 years old. The older child has a learning disability.

[188] Ms. Iampietro and Mr. Iampietro testified that they hired a nanny before the accident, when the children were young, and it relieved the stress that Ms. Iampietro was experiencing around the time of her post partum depression. Ms. Iampietro testified that she does the morning routine with the children prior to school. Mr. Iampietro testified that he gets off work and gets home around 4:30 p.m. and he does all the parenting from that time onward and on weekends. Neither of them testified as to the role a nanny would play in their current situation, in particular how a nanny would assist.

[189] There is evidence from which I can infer that a nanny would be helpful, including Ms. Iampietro's evidence that she is often in bed when the children come home from school, evidence that she used a bus for disabled children to get them to school when she was not able to drive, Mr. Iampietro's evidence that he does not work as much overtime as he could because he would have to hire a babysitter, and evidence of Ms. Iampietro's sister who helped out with the children when Ms. Iampietro was not able. But in the absence of specific evidence of either parents, I decline to make an award based on inferred evidence as to the need and no evidence as to the quantum of the need. In addition, I have made an award for loss of housekeeping capacity on the basis that Mr. Iampietro's work on housekeeping and yard maintenance has been diverted to child care. Accordingly, I am satisfied that the compensation overall satisfies the functional approach.

Botox

[190] Dr. Salvian referred to Botox both as diagnostic tool and a pain management tool. Dr. Salvian testified under cross examination that he recommends Botox treatments to relax the scalene muscles. Ms. Iampietro claims for Botox treatments. The costs included are for a trial in the first year, and then if that is successful, ongoing injections. There is no evidence as to the possibility or probability that the treatment will be successful. In the absence of evidence as to the likelihood that treatments after the trial would be recommended, I award only the costs for the trial.

Psychological Counselling to age 80

[191] Mr. Leung and Octa Stone object to provision for psychological counselling to age 80 (which I understand to be lifelong).

[192] I have accepted Dr. Lu's evidence that Ms. Iampietro will have somatic symptom disorder chronically. Dr. Lu, Dr. Stewart and Dr. Heran all recommend psychological treatment. This treatment is linked to several other heads of damages because I have accepted that improvement is a possibility, and reduced other awards based on the chance of improvement. I see no reason why this treatment, given the opinion that she will continue to struggle, should be terminated at a particular age. I award this cost in full.

[193] In addition, Dr. Stewart recommended marriage counselling. The evidence is that Ms. Iampietro's accident injuries have taken a severe toll on their marriage. I accept there is a need for this therapy and award the costs of it.

Upgraded Mattress, Pillow and Vacuum

[194] Dr. Salvian recommended that Ms. Iampietro have a supportive mattress and cervical pillow. He also recommended a lightweight vacuum cleaner. The initial cost to purchase these items is $1,108. The present value of the cost to replace them every seven years is $3,379. This amount is reasonable. However, had the accident not occurred, Ms. Iampietro would have incurred expenses to replace her pillow, mattress and vacuum cleaner at

similar intervals to those proposed. These special items are not unusually expensive compared to the cost of ordinary pillows, mattresses and vacuum cleaners. Accordingly, the replacement costs are expenses Ms. Iampietro would have incurred in any event. I award the initial purchase only.

Conclusion on Cost of Future Care

[195] Taking into account the amounts listed above, and the separate award I made for loss of housekeeping capacity, I award $171,584 for cost of future care. Mr. Leung and Octa Stone submitted that depending on the award, they may seek to make further submissions on amounts to be deducted pursuant to s. 83(5) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. If the parties are unable to agree on any amount to be deducted, they may speak to it.

Out of Pocket Expenses

[196] The parties agree that the out of pocket expenses claimed by Ms. Iampietro were paid for by her and total $65,100. The defendants dispute the expenses for maintaining extended health benefits, tutoring for her younger son, acupuncture treatments, osteopathic treatments and housekeeping services.

[197] With regard to maintaining extended health benefits, Mr. Leung and Octa Stone's argument is premised on their argument that after 2012, she was not disabled from work due to the accident. I have rejected that argument. I allow the cost of maintaining extended health benefits as an out of pocket expense.

[198] With regard to tutoring, Ms. Iampietro testified that they hired tutors for their younger child starting in kindergarten and for their older child starting in grade eight. Ms. Iampietro testified that she is only claiming the costs of a tutor for the younger child, as she is of the view that she ought to be able to help her elementary school-aged child with his homework but she cannot because of her accident injuries. Mr. Iampietro testified that they have the tutor for their younger child because his wife has not been able to help the child, and he is physically and mentally exhausted.

[199] I have declined to make an award for a nanny or for child care generally on a prospective basis. The reasoning for that would apply to prospective tutoring. However, this is a past award. I take into account that this expense was incurred when the Iampietros did not have a functionally-based and interlocking set of compensatory awards to try to fill the gaps created by Ms. Iampietro's disability. In these circumstances, hiring a tutor to fill one of the gaps was reasonable. I award the costs for a tutor as claimed.

[200] With regard to osteopathic and acupuncture treatments, Mr. Leung and Octa Stone take the position that they should only be awarded if the expenditures were supported by medical evidence that survives scrutiny. Dr. Stewart opined that such treatments are generally not curative but can provide transitory relief, and she recommended their continuation. On that logic, the past treatments were medically supported and reasonable. With regard to

the costs of attending such appointments, the evidence of both Mr. Iampietro and Ms. Iampietro is that on some occasions, Ms. Iampietro could not drive after the appointments and so unless she took a cab both ways, Mr. Iampietro would have to take time off work to drive her. The claim for transportation is supported by the evidence.

[201] I award out of pocket expenses in the amount of $65,100.

Income Tax Gross Up

[202] Ms. Iampietro seeks income tax gross up on her award but notes that it cannot be calculated until the amount of the award is known. Mr. Leung and Octa Stone argue that if I award damages in line with their submissions, an income tax gross up award should not be made.

[203] I am of the view that an award of income tax gross up is appropriate. If the parties are unable to agree on the amount, they may speak to it.

Investment Management Fee

[204] Ms. Iampietro claims an investment management fee but notes that it cannot be calculated until the amount of the award is known. Mr. Leung and Octa Stone argue that if I award damages in line with their submissions, there should be no investment management fee awarded.

[205] There are authorities on the circumstances in which such an award is appropriate. They were not argued before me. If the parties are unable to agree on the applicability and/or quantum of an award for an investment management fee, they may speak to it.

Summary of Damages

[206] I award Ms. Iampietro damages as follows:

a) non-pecuniary damages: $125,000

b) past income loss: $254,969

c) loss of earning capacity: $560,000

d) loss of housekeeping capacity: $95,000

e) cost of future care: $171,584

f) special damages: $65,100

[207] The total is $1,271,653.

Costs

[208] Subject to any matters of which I am not aware relating to costs, I award Ms. Iampietro costs at Scale B. If the parties wish to speak to costs because there are matters about which I am unaware, they may do so.

Additional Submissions

[209] If the parties which to speak to deductions from cost of future care, income tax gross up, management fees and/or costs, they shall, within 30 days of these reasons, contact the Registry to make arrangements to do so. Those arrangements must include delivering written submissions of five pages or less and authorities on each topic to the Court and to each other at least one week prior to the hearing.

"Matthews J."

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