

CANADA / JUDGMENT

Jantzi v. Moore

2020 BCSC 1489

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2020 BCSC 1489 Jantzi v. Moore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jantzi v. Moore,

2020 BCSC 1489

Date: 20201006

Docket: M33563

Registry: Chilliwack

Between:

Connie Annette Jantzi

Plaintiff

And

Brady Carl Moore

Defendant

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

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Place and Dates of Trial:

Chilliwack, BC

July 6-10, 13-15 & 17, 2020

Place and Date of Judgment:

Chilliwack, BC

October 6, 2020

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Introduction

- [1] This is a motor vehicle personal injury claim where both liability and damages are in issue. The plaintiff and defendant were involved in a motor vehicle collision on July 25, 2016. These reasons reflect my decision on liability and the appropriate award of damages.

- [2] The plaintiff was 42 years old at the time of the accident. She was the driver of a 2010 Dodge Avenger turning left into her driveway from MacSwan Drive when she was struck by the defendant's 2013 Honda Fit as he was attempting to pass the plaintiff on the left hand side. It was sunny.
- [3] There is video surveillance footage from the plaintiff's home security system which recorded the collision, and which the parties agreed accurately depicts the accident from two angles. After the accident, the plaintiff's vehicle was written off. It had approximately \$12,700 in damage.
- [4] Each party submits that the other was driving in breach of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. The plaintiff argues that the defendant should be attributed 100% fault for the accident. The defendant submits that the plaintiff should be found mostly at fault.
- [5] The plaintiff alleges injuries in the form of neck, mid-back and lower back pain, right shoulder pain, headaches, mild traumatic brain injury ("MTBI") and cognitive and psychological disturbances. The defendant disputes the extent of the injuries alleged by the plaintiff, and says that many of her current complaints relate to pre-existing depression and anxiety.
- [6] The plaintiff claims losses under the following heads of damages:
- a) non-pecuniary damages;
 - b) future loss of earning capacity;
 - c) past and future loss of housekeeping capacity;
 - d) cost of future care; and
 - e) special damages. This amount has been agreed to in the sum of \$3,367.99.
- [7] The defendant argues that I should draw an adverse inference from the fact that the plaintiff did not call any treating professionals from either before or after the accident.
- [8] The plaintiff seeks a total award under all heads of damages in the range of \$893,367.99 to \$918,367.99. The defendant argues that a more appropriate award is between \$108,000 and \$154,000. The defendant argues that there should be no separate award for loss of housekeeping capacity, a modest lump sum award for future wage loss, if any, and no future care costs.

The Accident

- [9] The plaintiff was driving home from shopping with one of her daughters. She testified that as she approached the family home on MacSwan Drive she slowed down, pulled to the right, and put her left turn signal on. The video evidence clearly shows the left turn signal on for at least 7.4 seconds before the collision.

- [10] There is no centre line painted on MacSwan Drive and there was no vehicle parked to the right of the plaintiff.
- [11] The defendant was on his way home from work to his residence on MacSwan Drive.
- [12] After a flatbed truck and a small white car passed the plaintiff in the opposite direction, the plaintiff started to turn left into her driveway. At that point the defendant's vehicle approached from the rear and began to pass the plaintiff's vehicle while also moving to the left. The defendant vehicle's right passenger corner and side struck the plaintiff's vehicle on the plaintiff's driver's side door while she was turning into the driveway. The plaintiff's driver window was smashed. The plaintiff was wearing her seatbelt. The driver door could not be opened. The plaintiff left the car by crawling over to the passenger side and exiting through the passenger door with the assistance of her husband who had come out of the family home in response to the accident.
- [13] The plaintiff testified that she pulled to the right before making the left turn, away from the centre of the road, because she wanted to avoid trucks which routinely came down the road and through an s-curve which approached her driveway. This is seen in the video footage. In her experience, large trucks connected with a construction project up the road often drove into the centre of the road from the opposite direction.
- [14] There is an s-curve in the road approaching the place where the plaintiff's vehicle had stopped. The plaintiff testified the s-curve makes it difficult to see oncoming traffic. On the day of the accident, she thought the flatbed truck was coming toward her crossing the centre lane when it approached, however when it passed her it was in its own lane.
- [15] The defendant agreed at trial that vehicles often came down the middle of MacSwan Drive and that if there were enough parked cars on the side of the road it would make sense they would do that.
- [16] Video and pictures taken at the scene just after the accident show the road has dark marks along the centre of it from vehicle traffic.
- [17] The plaintiff testified that prior to making her left turn she checked her rear view mirror and did a shoulder check, and that she did not see any vehicle in those checks. She stated that she did not check her left driver's side mirror.
- [18] The defendant testified that he did not see the plaintiff's left turn signal. He testified that he was zoned out, driving on auto pilot, and was tired from working a longer day than normal. The defendant testified that he has no memory of the accident and that he generally has a poor memory. He stated if he had seen the plaintiff's left turn signal he would not have attempted to pass the plaintiff's vehicle.
- [19] The opinion evidence of two accident reconstruction experts was generally consistent with each other. From that evidence I find the following:

- a) at the start of the plaintiff's turn, her vehicle was positioned to the right of her lane with about half of her vehicle remaining in the regularly travelled portion of the lane (as opposed to the parked car portion);
- b) the plaintiff's vehicle protruded approximately 1.1 metres further north toward the centre lane than parked cars would normally;
- c) the left side of the plaintiff's vehicle was approximately 2.1 metres to the south or right of the centre of the road;
- d) the right side of the plaintiff's vehicle was approximately 1.09 metres from the right curb;
- e) the entire width of the right side lane was approximately 5.5 metres;
- f) the vehicles which did pass the plaintiff in the opposite direction did not cross the centre of the road when they passed her;
- g) the defendant's vehicle accelerated slightly from 35 km per hour as it approached the plaintiff's vehicle to 39 km per hour at the time of impact;
- h) the defendant's vehicle was centred at approximately 5 metres from the south or right curb and the left side had crossed the centre of the road before the start of the plaintiff's turn;
- i) the defendant's vehicle was approximately 0.8 metres to the left of the plaintiff's vehicle before the plaintiff started her turn; and
- j) the dark lines in the middle of the road are consistent with vehicles travelling down the middle of the road.

Liability

[20] Drivers are expected to comply with the MVA. Not complying with the MVA can be a significant factor considered by the court when determining fault in a motor vehicle accident action: *Uy v. Dhillon*, 2019 BCSC 1136 at para. 11.

[21] The following provisions from the MVA have application on assessing fault for this accident:

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

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

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

160 A driver of a vehicle must not drive to or on the left side of the roadway, other than on a one way highway, unless the driver has a clear view of the roadway for a safe distance, having regard for all the circumstances.

166 A driver of a vehicle must not turn the vehicle to the left from a highway at a place other than an intersection unless

- (a) the driver causes the vehicle to approach the place on the portion of the right hand side of the roadway that is nearest the marked centre line, or if there is no marked centre line, then as far as practicable in the portion of the right half of the roadway that is nearest the centre line,
- (b) the vehicle is in the position on the highway required by paragraph (a), and
- (c) the driver has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway.

[22] "Practicable" in the ordinary sense means "able to be done or put into practice successfully; feasible; able to be used; useful, practical, effective": OED Online, Oxford University Press, June 2020.

[23] Regardless of whether a driver is overtaking on the left or turning left in this instance, both drivers are required under the MVA to proceed cautiously.

[24] Both parties refer me to the leading authority on the relative duties of drivers when attempting to overtake versus drivers turning left: *Samograd v. Collison*, [1995] B.C.J. No. 2597 (C.A.). The plaintiff further refers me to the decision in *Eccleston v. Dresen*, 2009 BCSC 332, which summarizes the relevant principles from *Samograd* on relative duties:

24 The leading authority on the relative duties of drivers when passing, which is relied on by both parties in this matter, is *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51, 67 B.C.A.C. 223. There the plaintiff, who was riding a motorcycle, pulled out to pass two vehicles. The defendant was the second vehicle he intended to pass. The defendant had activated his left turn signal, but the plaintiff did not see it, likely because of the presence of the first vehicle he was passing. The defendant looked in his rearview mirror before turning but did not look in his side view mirror and did not see the plaintiff. They collided. The trial judge found both drivers negligent and apportioned fault 40 percent against the defendant and 60 percent against the plaintiff. In the course of doing so, he wrote (at para. 65 of the Court of Appeal judgment):

I find that the greater obligation is on the overtaking vehicle to ensure it can do so in safety. That vehicle has the view ahead of it, and in this case of a vehicle ahead of him signaling its intention to turn, in those circumstances the onus is on the overtaking vehicle to see that signal and adjust his progress accordingly. In this case I find that if he had seen the left-turn signal as soon as the defendant's car come into view he could have avoided the accident, and it was at that point the signal light was then operating.

25 The issue on appeal was whether the trial judge, in saying that the driver of an overtaking vehicle has a greater obligation to ensure that the pass can be done in safety, was expressing a general statement of the law or whether he was expressing the obligation that applied on the circumstances before him. If it was the former, then according to Finch J.A. (now C.J.B.C.), the trial judge was wrong because neither the Motor Vehicle Act nor any other legal principle support such a conclusion. Finch J.A. concluded at paras. 62 and 63 that the trial judge was not expressing a general principle of law but was applying the law properly in that he:

... regarded the parties' respective obligations as entirely dependent upon the facts of the case. The driver in the best physical position to foresee a possible collision was the overtaking driver. That was so because, having pulled out to pass, he had only to keep a look-out for what was ahead of him, whether on-coming traffic or vehicles he was intending to pass. The left-turning driver, however, had to keep a look-out in both directions, that is, for on-coming traffic approaching him as well as for traffic behind him which might be in the course of overtaking.

As I understand the judge's reasons in their entirety, he considered the overtaking driver had the better opportunity to see the potential for a collision before it occurred and therefore had a correspondingly greater opportunity to avoid it. His "greater obligation" to ensure that he could pass in safety arose from the circumstances of the case rather than from any higher legal duty, statutory or otherwise.

26 Thus, the law does not impose a greater obligation on either the passing driver or the driver being overtaken simply by virtue of whether the driver was overtaking or being overtaken; rather, their respective obligations are to be assessed in relation to the circumstances they faced and within that assessment the question of who had the better opportunity to avoid the collision is relevant.

[25] The determination of liability must turn on the facts in this case. The parties point me to a number of cases apportioning liability in accidents involving left hand turns and overtaking vehicles, including Samograd and Eccleston, for consideration in relation to the facts in this case.

[26] In Samograd, the defendant motorcyclist attempted to pass the plaintiff on his left after the plaintiff had pulled left from the curb lane to three feet to the right of the centre line before commencing his left turn.

[8] the plaintiff, travelling in the curb lane, signalled an intention to change lanes because of slow moving traffic ahead in her lane, and she moved into the centre line lane. At almost the same moment the defendant, coming up behind the plaintiff at a relatively high rate of speed for city driving, and about 15 miles an hour in excess of the speed limit, also turned into the centre line lane and collided with the rear of the plaintiff's vehicle. The plaintiff for some reason was not aware of the presence of the defendant's vehicle behind her. That might have been because it was not there when she last looked, or because she did not look .

- [27] There, the defendant overtaking driver was assessed 60% liable and the plaintiff turning driver 40%.
- [28] In Eccleston, the plaintiff was attempting to turn left off a highway where passing was permitted. There was differing evidence about the turn signal: whether it was a turn signal or brake lights flashing, the functioning of the lights themselves was at issue, and uncertainty of whether the plaintiff was attempting to turn right or left. The plaintiff also used a hand signal, not commonly used, due to her left turn signal not working. The court found that the plaintiff did not signal her intention to turn left with sufficient time to effectively warn other drivers and that she did not keep a proper lookout for traffic which may have been affected by her. The defendant's vehicle was found to have "been there to be seen." While the court did not find that the turning plaintiff had pulled to the right of the lane before turning left, the court did find that in the circumstances such conduct would not be a serious breach of the standard of care required. The defendant breached her duty of care by not sounding her horn when she realized the plaintiff was not in fact going to turn right as the defendant thought she was intending to do.
- [29] In Eccleston, the plaintiff turning driver was apportioned 60% of the liability for the accident and the defendant overtaking driver 40%.
- [30] The plaintiff also refers me to *Ali v. Fineblit*, 2015 BCSC 1494, and *Vance v. Servine*, 1992 CanLII 339 (B.C.C.A.), for additional guidance. The defendant cites *Sharma v. Kandola*, 2020 BCCA 161.
- [31] In *Ali*, the plaintiff was on a motorcycle and turning left when struck by the defendant trying to pass on the left. The plaintiff was found to have taken the necessary steps to ensure a safe turn, including activating his left turn signal and confirming the whereabouts of the vehicles behind him. The defendant attempted to pass despite being uncertain as to whether the plaintiff was turning left or right. It was found that the defendant's uncertainty meant that she should have sounded her horn to let the plaintiff know she was passing or wait until she was able to determine what the plaintiff's actions would be.
- [32] The defendant overtaking driver was found 100% liable for the accident.
- [33] In *Vance*, the plaintiff was passing a slow-moving line of vehicles on a motorcycle when he struck the defendant who was turning left into a parking lot. The court found that the defendant had his left turn signal on, checked his rear view mirror, and looked over his left shoulder. He did not see the plaintiff. The court found that the fact that the defendant and the following traffic were slowing down should have alerted the plaintiff that something was about to occur. It was incumbent on the plaintiff not to pass until he was reasonably certain that it would be safe to do so.
- [34] The plaintiff overtaking driver was found 100% liable.

- [35] In *Sharma v. Kandola*, 2019 BCSC 349, the plaintiff attempted to make a U-turn in order to park on the opposite side of a road. The defendant was not paying attention, was driving too fast and too close to the plaintiff, and did not see the plaintiff's brake and left turn signals. The defendant attempted to pass the plaintiff on her left. The trial judge found that the plaintiff's vehicle had pulled to the right before commencing her U-turn, but "at all times occupied a substantial portion of the eastbound driving lane prior to moving to the left" to make her U-turn. The trial judge found the defendant overtaking driver to be 100% liable.
- [36] On appeal, Mr. Justice Harris, for the Court, said:
- [17] I turn now to what became, in my mind, the most significant issue on the appeal: the judge's failure to address the evidence that Ms. Sharma, although checking for vehicles behind her before starting her turn, did not see the van. Indeed, she did not see the van until immediately before the collision.
- [18] It is necessary to proceed on the basis that Ms. Sharma did check to see if any vehicles were behind her, and did not see any. The van was, however, there to be seen. It is a large white van. It could not have been far from her. The street is long and straight. As the judge noted, it is straight and flat, without any visual blockages. In my view, Ms. Sharma failed to see what was plainly there to be seen. Put shortly, she ought to have seen the van, as any driver adequately keeping a proper lookout would have. On the judge's findings, the van was travelling close to her, it was moving quickly, and was attempting to pass her in the westbound lane. With respect, it is an inescapable conclusion that Ms. Sharma's negligent failure to see the van, and to wait until she could ascertain whether it was safe to start her turn, was a legal cause of the accident.
- [37] In *Sharma*, the Court of Appeal reassessed liability and found the plaintiff turning driver to be 25% liable for the accident and the defendant overtaking driver to be 75% liable.
- [38] Here, the defendant was driving without due care. If he had been, he would have seen the plaintiff's left turn signal and not tried to pass her. The plaintiff's vehicle was there to be seen by the defendant as it was protruding enough distance away from the curb and not so far away from the centre of the road to be impracticable or unreasonable in the circumstances. However, the plaintiff should have seen the defendant's approaching vehicle in the circumstances. I find the plaintiff's negligent shoulder check to be a cause of the accident, although proportionately small. Having considered the evidence, submissions and the case law provided, I apportion fault for the accident at 85% to the defendant and 15% to the plaintiff.

Background

- [39] In 1991, the plaintiff graduated from high school in Delta. During school and after from the ages of 15 to 18 she worked as a manager at a fast food restaurant.
- [40] She met her husband when they were in high school and they married in 1997.

- [41] The plaintiff's next employment was with a grocery store in Richmond. She worked there for approximately seven years in customer service, food preparation, and manager relief until some time in 1998 or 1999 when she and her husband moved to New Westminster. At that time she looked into furthering her education and enrolled in the Early Childhood Education ("ECD") training program at Douglas College. The birth of her first child interrupted her ECD studies. She completed the ECD program in 2001. As part of that program she completed a practicum.
- [42] After graduation the plaintiff was pregnant with her second child and the family moved to Alberta following a job opportunity for her husband. One year later they moved to Surrey. She then gave birth to her third child.
- [43] When her eldest child reached kindergarten until 2015 when her youngest reached middle school, the plaintiff regularly volunteered with school activities. She also established and oversaw a hot meals program for over seven years. According to the plaintiff, this volunteer activity occupied 15 to 30 hours per week. When the family moved to Chilliwack in 2015, and the children were older, the plaintiff stopped volunteering at her children's school.
- [44] At the time of the accident in July 2016, the plaintiff was living with her husband and three children in Chilliwack. She was a homemaker and not employed outside of the home. Their home is 3,400 square feet with two stories, five bedrooms and four bathrooms. Prior to the accident the plaintiff was responsible for the majority of the household chores, including vacuuming, cleaning, washing the floors, doing dishes, planning and making meals, and grocery shopping. She did the majority of the outdoor house and yard maintenance, including cleaning gutters, gardening, washing the house, and landscaping. As the children grew older they contributed to the household chores.
- [45] The plaintiff testified that it was always her and her husband's plan that until the oldest child had graduated from high school, she would stay at home and focus on keeping the household and raising the children. Once their eldest graduated, the other two would already be in high school and more self-sufficient. At that time, they planned for her to return to outside employment. She was most interested in a career in a helping profession, such as working as a teacher assistant, dental assistant, or nursing assistant. The plaintiff stated that she knew retraining was required and that she planned to attend the University of the Fraser Valley.
- [46] The plaintiff testified that growing up she played many sports including provincial fastball. Prior to the accident she was very active and in good physical shape. She outwalked her husband, skied, boogie boarded, hiked, did home exercises regularly, played on her father's softball team, and generally had no physical limitations. She practiced yoga regularly at home, did Pilates sporadically, and was in a running group and would run approximately 10 km three times a week.

- [47] She testified that she would read a book at least once every three weeks. She attended bible study group meetings.
- [48] The plaintiff's family is very close and she and her husband and children often joined her parents and siblings at family events. She would see family members once or twice a week, in addition to numerous phone calls during the week. The family took vacations together. They went camping, which the plaintiff often organized herself.
- [49] The plaintiff testified to having a very high pain tolerance, playing through sports injuries and giving birth to her three children with no epidural or medication. She said she was a patient person. She focused on listening and talking through issues with her children and husband and not getting angry or yelling. This she learned through her early childhood education training.
- [50] The plaintiff testified to not having any pre-accident cognitive difficulties. She had no issues with memory, concentration, balance, decision making, or judgment. She generally made the decisions regarding family finances and child discipline and needs.
- [51] She testified to being an independent and adventurous person, taking on significant tasks around the home and in the yard, and travelling with the children by herself.
- [52] The plaintiff testified that she did experience a period of anxiety in 2015 related to the move to Chilliwack. She sought medical treatment from her family physician. She says she was prescribed Cipralext for her anxiety symptoms and that she took a handful of these pills. She does not recall refilling the medication. She was also referred to a social worker for counselling. She did attend approximately nine sessions with a counsellor to help her handle her anxiety.
- [53] The plaintiff testified that in the few months leading up to the accident she was normally functioning and she did not have the anxiety she had before. Her children were settled in school and had new friends and she had adjusted to life in Chilliwack. She had never had driving-related anxiety.
- [54] The plaintiff testified that the anxiety she felt in 2015 was nothing like how she felt after the accident.

Post-accident

- [55] The plaintiff claims that she suffered physical, cognitive, and psychological injuries arising from the accident.
- [56] It appears that the plaintiff's husband called Emergency Services at the time of the accident but after informing them that the vehicles involved were out of the way of traffic and that the drivers and passenger were mobile, no emergency response was sent.

- [57] The plaintiff's husband took her and their daughter to the local Emergency Room. The plaintiff's memory of events post-accident is slim. There are gaps. She testified that she was confused and shocked after the accident. Her husband testified that at the hospital the plaintiff was delayed in her responses to questions and he did a lot of the speaking for her because she was not herself. She thinks the doctor prescribed her Advil and sent her home. She does not recall leaving the hospital or getting home or when those events happened. She says she was confused, foggy, and in shock.
- [58] The night of the accident the plaintiff says she woke up after having a nightmare replaying the accident and was very upset, disoriented and scared. These feelings continued in the morning when she also started to notice pain in her shoulders, neck, lower back, and headaches. She lay in bed with the lights off for the day.
- [59] Two days after the accident she visited her family doctor at the time and reported her symptoms. She recalls him prescribing Tylenol Extra Strength and Advil. She saw him a couple of weeks later due to severe wrist pain. She continued to see him and her subsequent family doctor.
- [60] The plaintiff testified that she experienced neck pain immediately following the accident and that there has been some improvement with her mobility and the intensity of pain. Advil Extra Strength, her chair massager, and baths help alleviate her pain.
- [61] She experienced shoulder pain immediately after the accident, which at first was constant. Now it is intermittent, depending on her activities. Being pulled by the dog, sudden movements or sitting for prolonged periods aggravate the pain. Her massager and tennis balls on pressure points help alleviate the pain.
- [62] The plaintiff has resumed some at-home yoga which she says helps alleviate her neck and shoulder pain. Prior to the gyms closing due to COVID-19, she and her husband attended a gym approximately twice a week so that she could use the elliptical machine. She felt sturdy on that machine. She also lifted light weights and stretched at the gym. She enjoyed this time with her husband but the bright lights and noises were not enjoyable.
- [63] She says she experienced lower back pain immediately after the accident as well, which at first was significant. This pain has improved but worsens when she has to sit for long periods. She gets up and stretches to alleviate the pain and avoids long periods of sitting.
- [64] She had wrist pain soon after the accident too, which at first was in both wrists and now is predominantly in her left wrist. Currently, if she sits for prolonged periods she experiences tingling in her hands and has to make fists to alleviate the tingling.
- [65] The plaintiff experienced ringing in her ears, or tinnitus, immediately after the accident, which initially was every day, all day long. This disrupted her sleep. She tried intermuscular stimulus into her jaw which helped reduce the ringing in places with background noise but in her bedroom the ringing remained loud. She tried a white noise machine but this did not help as she began to have nightmares connected with the particular sound it emitted. She

also tried ear plugs but they just amplified the sound. She says she still has tinnitus and certain sounds can increase its volume, for example listening to her husband's guitar playing.

- [66] With regard to sleep deprivation, the plaintiff has tried sleeping medication and breathing exercises learned from her psychologist. The medication made her foggy during the day so she stopped taking it. She often sleeps in a different bed from her husband in order to not disturb his sleep as she can be very restless trying to get to sleep. She now naps almost every day since she averages four hours of sleep a night.
- [67] The headaches the plaintiff started experiencing right after the accident became progressively worse to the point that she attended the Emergency Department at the local hospital in August 2016. On this occasion, she started vomiting at home and her headache got progressively worse. She curled up in the fetal position. She was sensitive to people talking and bright lights. Her husband took her to the hospital. She vomited at the hospital and was treated intravenously with pain medication. Her CT scan came back unremarkable. She recalls being told she was suffering from post-concussion syndrome and migraines. She testified that that headache was a 10 out of 10 on the pain scale. Headaches, which continue daily, are now at a 5 or 6 out of 10. For this, she takes Extra Strength Tylenol alternating with Advil daily, and she says she continues to have debilitating migraines approximately once a month. Bright lights, busy places, or large family gatherings bring them on. When they come on she takes Tylenol or Advil, and sequesters herself in a quiet dark room. These migraines sometimes cause her to vomit.
- [68] The plaintiff testified that she has gained weight since the accident as she has not been able to be as active as before. She spends a lot of time in bed, and no longer pays attention to her diet. This embarrasses her. She finds her clothing options are limited as many fabrics are painful against her skin.
- [69] The plaintiff testified to feeling very anxious, angry and unsettled after the accident. She felt isolated, lonely, and guilty for not being able to do the same things or be the same person for her family. She did not want to be in the same head or body. She wondered how she would get through each day. She expressed suicidal thoughts to her husband and suggested he move out in February 2017, and he took her to the hospital to get help. There, she saw a psychiatrist who she said told her she had post-concussion syndrome, post-traumatic syndrome disorder and depression. He prescribed Fluoxetine. Her family doctor referred her to psychological counselling and she began to see a psychologist in May 2017. She says this has been beneficial since she learned coping skills and breathing techniques to stop negative thought patterns. She says her depression symptoms have improved but she continues to experience symptoms, in particular, guilt, on a daily basis.

- [70] The plaintiff stated she has become quick to anger, and yells and screams at her family and others without understanding why or how to stop it. She says she has lost her "filter," in that she makes hurtful and insensitive comments without thinking first. Her family has begun to "parent" her and send her for time outs. This has improved since learning the breathing and coping skills from her psychologist.
- [71] Initially, after the accident the plaintiff was too anxious to drive. She drives now but still experiences anxiety. To reduce the anxiety, she avoids left turns and sticks to familiar routes where possible, or spends time planning her route. If her GPS loses signal she gets very sweaty, her heartbeat races and she gets anxious. She will not drive in Vancouver. She engages her breathing exercises often when driving to alleviate the anxiety.
- [72] She says she also experiences anxiety when in unfamiliar surroundings, at grocery stores, when she has to make decisions, or when she is confronted with an unexpected encounter. She has panic attacks when she is anxious. She will sweat profusely, have to sit down, do her breathing exercises and seek family assistance.
- [73] In addition to the light and noise sensitivity described above, the plaintiff says she struggles to read. Print, particularly on a white background, makes her dizzy. She experiences dizziness generally approximately five days a week. These dizzy spells last up to a half an hour even with the assistance of the breathing techniques.
- [74] She states she has difficulty concentrating, has difficulties following conversations, multi-tasking, and watching movies. She tries to focus on one person and avoid large group social situations further to her psychologist's advice. The breathing exercises also help with her focus.
- [75] The plaintiff testified to having poor short term memory since the accident. She misses meetings or shows up in the wrong location when not regularly reminded. She repeats herself, will forget what she has watched on television, forgets family birthdays, and buys the same gifts for people. To cope she has learned to write things down, make notes in her phone and place notes around the house. She says she sends texts to others in order to remind herself of certain things. Her children put reminders in her phone to ensure she takes her medicine.
- [76] The plaintiff says she is no longer able to handle the family finances, having made poor spending decisions with no apparent rationale after the accident. She can no longer have a credit card. She exercises poor judgment when responding to requests from her children, as she now finds it difficult to say no to them or comprehend the consequences of her decision. All of these decisions must now be made by her husband.
- [77] The plaintiff's ability to keep up with her prior household chores diminished substantially at first. She was bedridden in the early weeks. She returned to certain chores, including laundry, dealing with the dishwasher, and light cleaning. Vacuuming carpets continues to be difficult. Cooking and grocery shopping are extremely difficult and often not completed

properly. Her husband has taken on most of the cooking and shopping tasks as well as the outdoor maintenance tasks, particularly where machinery is involved. He testified that he now spends vacation days and lunch time when he works from home to complete household tasks. He spends approximately 25 hours a week in extra time.

- [78] Since the accident the plaintiff testified that she has problems with her balance. She fractured her ankle while walking with her dog which is out of character for her. She has recovered from this injury. She says she has fallen on walks and relies on her husband to steady her on the stairs. She trips more often than is usual. She no longer runs.
- [79] The plaintiff says she is no longer the independent confident person she used to be before the accident. She now has low self-esteem. She tries to put on a happy face but then crashes for a day or more after taking part in social events or other activities. On her second day of testimony she stated she had been exhausted the night before. She is wary to talk to new people and those she does not know as she is worried she will say something inappropriate. She no longer attends her bible study group. All of this makes her feel terrible, guilty, and embarrassed.
- [80] The plaintiff has gone on three trips since the accident. She and her husband went on a cruise which was a gift from her parents. She found the crowds of strangers overwhelming and spent a lot of the time in their room instead of meeting people and taking excursions. On a trip to Arizona the plaintiff was overwhelmed with the airport processes and procedures and her husband had to take care of steering them through. The plaintiff's parents hosted her family in Hawaii to celebrate her parents' 50th anniversary over Christmas 2019. The same problems with the airport were encountered. The plaintiff testified she could not partake in the activities she normally would have, such as boogie boarding, taking tours, snorkeling, and hiking. She always needed someone with her in case she got lost and usually sat on the beach watching the others having fun. When she returned home she was exhausted. The plaintiff stated it took her two months to recover.

Treatment

- [81] The plaintiff has primarily treated her injuries through physiotherapy including intermuscular stimulation injections (19 treatments total in 2018), neurological rehabilitation (10 occupational therapy treatments from 2016 to 2017), and performing exercises and stretches at home and in the gym. She receives clinical counselling (36 sessions from 2017 to trial) and utilizes coping mechanisms and breathing exercises learned in those sessions. For medication she takes Extra Strength Tylenol and Advil, sleeping medication, and Fluoxetine, 20 mg doses twice a day.

[82] The plaintiff testified that she would continue or undergo a neuro optometrist visit, kinesiology treatments, a physiotherapy "tune up", try new noise reduction ear plugs, accept the assistance of an occupational therapist, try Botox injections to treat her headaches, undertake psychiatric counselling, and participate in couples counseling to treat her symptoms.

Assessment of the Evidence

Credibility of the Plaintiff's Evidence

[83] Justice Dillon sets out the well-known factors for assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[84] More than mere speculation or innuendo is required to successfully make out an accusation of deliberate deceit: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 21.

[85] Where there are few or no objective symptoms of injuries, an assessment of the plaintiff's credibility is critical: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[86] The defendant highlights the plaintiff's testimony regarding her psychological state prior to the accident. The plaintiff was adamant that she was not depressed prior to the accident. She was clear that she had experienced a bout of anxiety but that it had resolved. She was also clear that she sought medical treatment for her anxiety, and not depression. On cross-examination, she was confronted with clinical notes from her then family doctor from January and February 2015. The non-opinion admissible portions of the January notes includes a prescription for Ciprex and a recommendation for counselling. The February notes also include a statement by the plaintiff that she was already feeling better, had less

anxiety, and sleeping better, which the plaintiff acknowledged. A refill prescription for Cipralelex was made. This is all consistent with the plaintiff's testimony and does not differ from her understanding that she was experiencing anxiety and that is what she was being treated for.

- [87] However, the plaintiff's testimony started to raise questions when she was presented with her PharmaNet records from 2015 to 2016. Those records show eight prescriptions being filled for Cipralelex (escitalopram), 10 mg over 18 months, the last being filled less than two months prior to the accident. The plaintiff acknowledged that the records show that the prescriptions must have been refilled, but she steadfastly refused to agree with defence counsel that she must have taken those pills and that she was experiencing chronic depression. She insisted that she only took a handful of the pills and that her anxiety was resolved by the time of the accident. She denied being depressed prior to the accident.
- [88] I heard evidence that Cipralelex is prescribed to treat both anxiety and depression.
- [89] I accept that the plaintiff believes she was not depressed or being treated for depression prior to the accident. Her evidence of the depression symptoms she experienced after the accident are entirely different from her description of the symptoms she was experiencing prior to the accident, which she called anxiety.
- [90] However, I find it implausible that the plaintiff would refill her Cipralelex prescription eight times and not take any more of the pills. I therefore treat the plaintiff's testimony with caution.
- [91] In every other sense the plaintiff's testimony was credible. She made reasonable concessions and her demeanor was consistent in both direct and cross-examination. She was not defensive, hostile, or combative. She was not impeached.
- [92] The evidence of her husband, daughter, brother, sister, and friend were all consistent with the plaintiff's testimony about her pre- and post-accident personality, functionality, and observable symptoms.
- [93] The plaintiff's husband testified to his observations of her at the accident scene, and the physical, psychological and cognitive changes in the plaintiff after the accident. Like the plaintiff and the other lay witnesses, he believes his wife has changed to be a different person from who she was before the accident.
- [94] The plaintiff's sister and brother used to see the plaintiff often. Additionally, they both would talk on the phone with her regularly for long periods, her daily and him three or four times a week. They, too, testified to the changes observed in the plaintiff's personality, physical abilities, independence and cognitive abilities since the accident. Telephone calls now last about ten minutes since the plaintiff cannot concentrate much longer. They feel like they have lost their sister.

- [95] The plaintiff's eldest daughter testified as well. In addition to the changes noted by the other family members, she testified to the change in relationship she has with her mother since the accident. She was 14 years old at the time of the accident. Since then she has lost some trust in her mother's ability to make good parenting decisions, especially with regard to her younger sister. The plaintiff's eldest daughter has taken on more of a parenting role in relation to her younger sister since the plaintiff was making inappropriate decisions.
- [96] One of the plaintiff's long-time friends also testified to the changes she observed which corresponded with the family members' observations as well as the plaintiff's testimony. They have been unable to return to their previous activities together like running, hiking, and skiing due to the plaintiff's diminished abilities. On the few walks they do, if the ground is uneven she noticed the plaintiff trips more than a normal person would. In particular, she observed the plaintiff tripping on an easy trail approximately two and one-half years after the accident. Their coffee group meets with fewer people when the plaintiff attends so that the plaintiff can follow the conversation better.
- [97] The plaintiff's siblings, husband, and friend were all aware of the anxiety in 2015 and testified that as far as they knew she had recovered from the anxiety before the accident. They also testified to the plans the plaintiff and her husband had regarding the plaintiff's return to employment, corresponding with the plaintiff's testimony. They were all confident she would have followed through on that plan.
- [98] I do acknowledge that these witnesses may have been attempting to help the plaintiff given their relationship to her, but I find their testimony to be truthful.
- [99] The defendant's expert witness, Dr. Waseem, was of the opinion that the plaintiff was not overreacting, nor was she amplifying or magnifying her complaints.
- [100] The defendant submits that the plaintiff complains of not being able to follow a three-step recipe or shop in a grocery store yet she was able to testify over two days in a coherent, organized, manner remembering many facts. However, these are not incompatible. The plaintiff has lived with her symptoms for almost six years. It is not surprising that she would be able to be coherent and have a clear memory of her own experiences which have been repetitive in nature.
- [101] I find that the plaintiff was generally credible but that she was likely taking Ciprolox around the time of the accident. I do not find that she was attempting to mislead the court by not recalling having refilled the prescriptions and claiming she had no memory of taking any more than a handful of pills. I do not find that this statement is enough to create a suspicion over all of her testimony.

Adverse Inference

- [102] The defendant argues that the failure of the plaintiff to call any evidence from any of her three family physicians who treated her before and after the accident, the clinical counsellor to whom the plaintiff was referred in 2015, and the psychologist who assessed and treated the plaintiff from 2017 to the date of the trial should result in a finding of adverse inference with respect to the seriousness of the plaintiff's symptoms. They question the plaintiff's pre-existing psychological state and query why none of the plaintiff's family doctors referred her to specialists.
- [103] The defendant takes issue with the only medical or other expert evidence called by the plaintiff being from experts retained by the plaintiff's legal counsel. These experts assessed the plaintiff between two and almost four years after the accident.
- [104] The plaintiff submits it is not appropriate to make an adverse inference in the circumstances of this case. The plaintiff's clinical records were fully disclosed except for one family doctor since he did not provide records. These records included those from her family doctors and hospital records which include the notes of a psychiatrist. These records were incorporated into a documents agreement. The family doctor clinical record of the diagnosis of acute on chronic depression, agoraphobia, anhedonia and mood disturbance in January 2015, was quickly followed up in three weeks with "Already feeling better!, Less anxiety, sleeping better Mood better". No other family doctor record appeared to pique the interest of the defence. At her examination for discovery in 2019, the plaintiff denied she had any depression prior to the accident. Dr. Waseem reviewed the family doctor and Pharmanet records in preparation of his report and in reaching his opinion on causation. It was open to the defendant to call any of these treatment providers.
- [105] A general denial of causation was raised as an issue at trial in the defendant's trial brief; he did not raise the issue of prior or pre-existing conditions as a live issue. Apart from the defendant himself, the defendant listed experts and lay witnesses to be determined. In his brief, he made objections to the admissibility of all of the plaintiff's expert reports with the grounds not specified but to be provided. The plaintiff's counsel understood the defendant's focus was disputing loss of future earnings. The plaintiff submits the defendant's adverse inference argument is an attempt to conduct his defence by ambush.
- [106] The parties referred me to *Buksh v. Miles*, 2008 BCCA 318, and *Andrews v. Mainster*, 2014 BCSC 541, and as guidance on whether to draw an adverse inference. The defendant also cites *Mohamud v. Yu*, 2016 BCSC 1138, and *Tayner v. Brard*, 2016 BCSC 1738.
- [107] In *Buksh*, at para. 35, the Court of Appeal set out a number of factors to consider as to whether an adverse inference ought to be drawn:

whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an

initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case.

Also see Andrews at para. 176.

[108] In each of Andrews, Tayner, and Mohamud, the plaintiff was either a poor historian or their memories were clearly flawed, and the testimony of treating physicians would have been the best evidence as to the plaintiffs' pre-existing conditions. Here, while I have found that the plaintiff's memory about the pill taking was flawed, the rest of her testimony is not flawed. The records of her symptoms do not differ from her testimony.

[109] The defendant had extensive disclosure of the plaintiff's medical and treatment records. Plaintiff's counsel provided a reasonable explanation for not calling the witnesses. I do not find it likely that the treatment providers highlighted by the defendant would have given harmful testimony to the plaintiff. I decline to exercise my discretion to draw an adverse inference in this case.

Causation

[110] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimis: *Atthey v. Leonati*, [1996] 3 S.C.R. 458.

[111] Notwithstanding the plaintiff's ongoing complaints of pain, cognitive deficits, and psychological issues, it is the task of the court to review all of the evidence and make conclusions about the injuries actually suffered by the plaintiff in the accident and their effect on her life. The plaintiff's complaints must be assessed with a view to the medical evidence and her functional capabilities.

Physiatrist - Dr. Jonathan Hawkeswood

[112] Dr. Hawkeswood is a physiatrist called by the plaintiff's lawyer. He conducted a physical examination and interview of the plaintiff in February 2018. His opinion took into consideration a reported pre-accident mood disturbance related to the plaintiff's move to Chilliwack in 2015 and he understood she stopped taking medication for the mood disturbance sometime thereafter.

[113] Dr. Hawkeswood diagnosed the plaintiff with the following:

- a) concussion (MTBI) with:
 - i. chronic, daily, post-traumatic headaches;
 - ii. initial headaches post-accident having migraine features;

- iii. photosensitivity;
- iv. cognitive difficulties in multiple areas including multitasking, planning, memory, and concentration; and
- v. sleep disruption.

At the time of his opinion the plaintiff had mostly, but not entirely, recovered from the concussion event.

- b) psychiatric problems as documented in the post-accident psychiatric records; and
- c) ongoing moderate anxiety and depression.

[114] The effect of the plaintiff's mood symptoms, headaches and sleep disruption were probably more significant than the brain injury by February 2018, however she was not completely recovered from her brain injury.

[115] Dr. Hawkeswood also diagnosed the plaintiff with the following:

- a) post-traumatic myofascial neck pain;
- b) mechanical low back pain, possibly facet-mediated;
- c) upper chest and lateral shoulder pain, with a predominant soft tissue component; and
- d) right ankle fracture with clinical evidence of mild residual ligamentous laxity and tenderness.

[116] In Dr. Hawkeswood's opinion, the accident caused the concussion, triggered the plaintiff's axial and upper chest pain, worsened pre-accident non-specific headaches, caused several episodes of acute migraines, and exacerbated her pre-accident anxiety and depression. He also opined the accident reduced her balance significantly, contributing to her fall risk, and resulted in the fall in which she fractured her ankle.

[117] He testified that cognitive problems could be contributed to, but not caused by, mood symptoms, headaches, and sleep disruption, whether there was a brain injury or not.

[118] Dr. Hawkeswood's opinion was that the plaintiff's functional abilities were significantly disrupted in the areas of self-care, household maintenance, and social activity, and generally that it was more likely than not that the plaintiff would not fully recover from the accident. His prognosis for her headaches was good although it would probably take months to years to slowly settle. Her neck pain would be ongoing for the foreseeable future although her symptoms should improve with progression through further rehabilitation. The plaintiff's low back pain is chronic. The ankle fracture should have no long-term implications. Her long-term cognitive function prognosis was fair, despite the plaintiff likely self-rated at a lower level in view of her collective medical problems. She is at increased risk of future concussions.

- [119] Dr. Hawkeswood recommended the plaintiff not take Advil or Tylenol more than three times a week to avoid rebound-type headaches, noting, however, that these medications do not cause headaches but can contribute to them.

Physiatrist - Dr. Zeeshan Waseem

- [120] Dr. Waseem is a physiatrist retained by the defence who examined the plaintiff in May 2020. As part of his examination, he conducted a neuropsychological assessment which he stated was an objective way to test cognitive complaints.
- [121] Dr. Waseem diagnosed the plaintiff as having a MTBI from a direct blow to the head during the accident, followed by a transient alteration of consciousness and a period of post-traumatic amnesia, and sprain and strain soft tissue injuries of the cervical, thoracic, and lumbar spines. These injuries resulted in chronic myofascial pain of the cervical and thoracic spines, chronic facetogenic lower back pain, post-traumatic headaches with migraine features, and generalized deconditioning. He further opined that the plaintiff's recovery had been complicated by psychological concerns and disturbed sleep.
- [122] Dr. Waseem was of the opinion that the plaintiff's prognosis for complete symptomatic recovery was poor.
- [123] He recommended heart-monitored cardiovascular exercises, a three-month course of vestibular therapy which targets vertigo, balance, dizziness and vision trouble, cognitive behavioural therapy, trigger point injections for myofascial pain, Triptan for migraines, prophylactic headache medications, consideration of Botox injections if the other headache interventions do not work, and ongoing use of analgesics for pain and headaches. He also recommended both abortive and prophylactic migraine medications for the plaintiff, which could be quite effective, and had not been tried by the plaintiff.

Neurologist - Dr. Donald Cameron

- [124] The plaintiff's expert, Dr. Cameron, is a neurologist who assessed the plaintiff in August 2018. He has extensive experience assessing and treating patients with varying severity of brain injuries.
- [125] Dr. Cameron diagnosed the plaintiff with the following:
- a) an altered state of consciousness or brief loss of consciousness at the time of the accident;
 - b) a period of post-traumatic amnesia for several hours following the accident;
 - c) MTBI;
 - d) post-traumatic brain injury syndrome following the MTBI;
 - e) ongoing pain and discomfort as a result of soft tissue and musculoskeletal injuries sustained at the time of the accident;

f) post-traumatic headaches; and

g) anxiety and depression.

[126] The plaintiff's segmented memory recall was consistent with having experienced an altered state of consciousness.

[127] Dr. Cameron opined that the plaintiff's headaches are a combination of headaches caused by the MTBI and the soft tissue and musculoskeletal injuries involving the neck, head, and shoulders. As well, his opinion was that it is difficult to differentiate to what degree ongoing cognitive issues were residual to the MTBI, due to pain and discomfort, and to what degree they were due to ongoing psychological problems.

[128] Dr. Cameron opined that the plaintiff's chronic pain and any cognitive complaints still residual to the MTBI were permanent. His opinion is that the plaintiff is permanently partially disabled. Improvement could be expected with the treatment of cognitive deficits that are secondary to pain, discomfort, or psychological issues.

Neuropsychologist - Dr. Douglas Cohen

[129] The plaintiff's expert, Dr. Cohen, a neuropsychologist, assessed the plaintiff in June 2019, over two days, two weeks apart. He conducted a variety of tests of intellect, ability to process information, attention and focus, memory capacity, and executive function. The testing includes validity and reliability features. During her interview, the plaintiff did report a lot of depression and some tearfulness although at first she presented as being quite pleasant and had good energy. Dr. Cohen observed that the plaintiff was someone who became depressed in response to stressors.

[130] Dr. Cohen noted symptoms of anxiety in the plaintiff. Her profile showed a perfectionism and somewhat rigid and unyielding manner which results in difficulties making decisions and that changes in her routine or unexpected events would likely result in considerable stress for her. The plaintiff described having difficulty with simple tasks like grocery shopping and finding certain items. Dr. Cohen explained that this is very characteristic of someone who normally is well organized and efficient but then suffers a brain injury. Their need for organization and perfection is unable to be satisfied after the brain injury.

[131] Dr. Cohen diagnosed the plaintiff with having a mild neurocognitive disorder due to traumatic brain injury, major depressive disorder, chronic post-traumatic stress disorder, generalized anxiety disorder, and somatic symptom disorder. In his opinion, the plaintiff's mild neurocognitive disorder likely arose from the combined effects on cognition of any residual MTBI effects, together with the impact from additional factors of mood, anxiety, fatigue, sensory intolerances, chronic pain, and the attendant stressors associated with adjusting to her symptoms and disability effects from injuries sustained in the accident. Dr. Cohen made a point of stating that the effects of the cognitive, affective, and physical factors can overlap. This makes it difficult to differentiate the effects of the brain injury as

compared to the effects of the other factors. His opinion was that we cannot apportion a certain amount of cognitive defect to the brain injury and a certain amount to depression. The brain injury tends to affect all those areas if it is significant, whereas anxiety would affect attention and not all of cognition. Brain injury affects anxiety and depression in particular, and depression is well known to be caused by concussion or aggravated by a brain injury. The same is true for anxiety.

- [132] Dr. Cohen opined that the plaintiff had likely reached her maximal level of spontaneous recovery from her concussion, with further cognitive recovery from her MTBI being limited to coping strategies. The plaintiff's everyday activities and relationships would likely continue to be negatively impacted by her cognitive defects and difficulties, her psychological conditions, fatigue, sensory intolerances, and struggles with adjustment. She is also at risk for more serious head injury if she were to suffer a concussion in the future as concussion effects are likely to be cumulative in nature.
- [133] Dr. Cohen put the plaintiff through a series of neuropsychological tests at the request of plaintiff's counsel. He noted in his report and on the stand that his test results reflect only the performance of the plaintiff on the day the tests were administered, and the results are not necessarily a reflection of a permanent level of functioning.
- [134] Dr. Cohen noted that the plaintiff was of average intelligence both before and after the accident. She actually performed in the superior range on measures of non-verbal intellect. She performed well on most of the neuropsychological testing, but he noted some reduced scores on measures of visual working memory and attention, largely reflecting impulsivity in responding to the testing questions.
- [135] Dr. Cohen said in his report that the results of the plaintiff's neuropsychological testing were consistent with a diagnosis of MTBI. He acknowledged on cross-examination that measures of cognition on neuropsychological testing can be affected and reduced by factors such as depression, anxiety, and headaches. He did not disagree with Dr. Hawkeswood that the plaintiff's cognitive presentation could be related all or mostly to depression, anxiety, and headaches rather than to lingering effects of an MTBI.

Psychiatrist - Dr. Shaila Misri

- [136] The plaintiff's expert, Dr. Misri, a psychiatrist, conducted a mental status examination of the plaintiff in July 2018. She made the following diagnoses, as a result of the accident:
- a) mild neurocognitive defects;
 - b) moderate to severe, now chronic specific phobia - situational - driving; and
 - c) persistent major depressive disorder or dysthymia worsened after the accident, presently mild, with residual symptoms.

- [137] Dr. Misri opines that the causes of the plaintiff's neurocognitive deficits were multifactorial and included probable MTBI, ongoing anxiety symptoms, chronic depressive symptoms, and ongoing pain. She stated it was impossible to assign a percentage to each of the symptoms as to their contribution to the deficits.
- [138] Dr. Misri was of the opinion that the plaintiff had a prior depressive illness at the time of seeing her family doctor in connection with the situational anxiety she experienced in 2015. Dr. Misri further opined that the illness was in remission at the time of the accident and that the accident more likely than not caused a relapse of the depression. She stated that being on anti-depressant medication does not necessarily indicate that a patient is actively suffering from depression. Absent the accident, it was unlikely that the plaintiff would have suffered from persistent symptoms of depression, which have continued since the accident because of accompanying post-accident psychiatric symptoms and pain.
- [139] Dr. Misri's prognosis with regard to the plaintiff's cognitive deficits was that the post-concussion symptoms were resolving and may improve with time as well as with treatment of anxiety and depression, however the duration of the deficits makes total recovery unlikely. The plaintiff's driving anxiety may improve with cognitive therapy treatments, but mild anxiety around being in a vehicle will likely continue. The plaintiff's persistent depressive disorder, or dysthymia, may improve with cognitive behavioural therapy or medication but complete recovery may not occur in light of the cognitive defects and anxiety. Pain is also a negative prognostic factor.

Finding on Causation

- [140] The medical experts are fairly aligned in their diagnosis and opinions on causation. The defendant submits there is not full agreement on whether the plaintiff suffered an MTBI, and points to the Emergency attendant notes about no loss of consciousness and Glasgow Coma Score. Dr. Cameron stated there are often problems with Emergency Room attendants not fully exploring the possibility of brain injury and that MTBI is often diagnosed at a later date, as occurred here when the plaintiff experienced later symptoms. Neither the full-score GCS nor the fact that the plaintiff did not lose consciousness are facts that determine the issue of whether she experienced an altered state of consciousness, which is required for a diagnosis of MTBI. I find that the plaintiff's memory of the accident and the time following to be markedly patchy. I conclude that it is more probable than not that the plaintiff's state of consciousness was altered as a result of striking her head in the accident even though she was not "knocked out".
- [141] Based on a review of the expert evidence and the testimony of the plaintiff and other witnesses, I am satisfied that the plaintiff suffered a MTBI as a result of the accident, as well as neck, right shoulder and lower back injuries, post-traumatic headaches, anxiety, and depression. I find that the plaintiff's pre-accident anxiety and depression were in remission prior to the accident or, if not in remission, were aggravated by the accident to a more severe level not previously experienced by the plaintiff. Her pre-accident anxiety and

depression were not functionally limiting.

Damages

Non-pecuniary Damages

[142] The parties in the usual course refer me to *Stapley v. Hejslet*, 2006 BCCA 34, for guidance as to the factors to consider when assessing non-pecuniary damages. In *Stapley*, at para. 46, the court sets out an "inexhaustive list of common factors" to be considered, including: the age of the plaintiff; the nature of her injuries; the severity and duration of her pain; disability; emotional suffering; loss or impairment of life; the impairment of family, marital and social relationships; the impairment of physical and mental abilities; and loss of lifestyle. In addition, a stoic nature ought not to result in a lesser award.

[143] Also cited in *Stapley* is the decision in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, which explains the underlying purpose of awarding non-pecuniary damages:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis added in *Stapley*.]

[144] An award for non-pecuniary damages must be fair and reasonable. In *Peterson v. Verma*, 2014 BCSC 2622 at para. 69, reference is made to the fairness component of non-pecuniary damages awards:

[69] Non pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties. Fairness is measured against awards made in comparable cases which, though helpful, serve only as a rough guide to appropriate compensation. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882.

[145] The plaintiff was 42 years old at the time of the accident, and is currently 46. She was on all accounts a healthy active person at the time of the accident.

- [146] She suffered a brain injury and neurocognitive disorder. She continues to experience dizziness, decreased balance, irritability, and decreased concentration and memory. She also suffered soft tissue injuries to her neck, back, and shoulders, which are chronic. She continues to have headaches and tinnitus. She has psychological injuries in the form of depression and driving anxiety.
- [147] There have been some improvements in many of these injuries but the plaintiff experiences daily limitations. The evidence on the balance indicates that the plaintiff's prognosis for a full recovery is poor. At the beginning, after the accident, the plaintiff tried to continue her family activities and attend gatherings. This exhausted her. She strived to return to normalcy but the plaintiff, her family, and friends have had to accommodate her limitations post-accident and reduce social interactions and joint activities. The plaintiff, and all around her, have had to adapt to her new reality. Her intimate relations with her husband have been negatively impacted.
- [148] She can no longer enjoy running with her friends, power walking, hiking, skiing, Pilates, and all the high energy exercise and sporting activities she used to do. Her exercise abilities are very limited.
- [149] The plaintiff is a perfectionist. Her limitations frustrate her immensely. She can no longer be the family financial and parenting decision-maker. Her ability to maintain the household is limited. It is clear that the plaintiff's personality has changed since the accident. Her anger and irritability affect her ability to interact with others in a normal way. Her husband and, to some extent, her own children, have become her caretakers. She and her family have learned coping skills and developed intervention strategies to avoid negative interactions or reduce their impact. She feels a deep sense of guilt about this.
- [150] The extreme low point she experienced in February 2017 and the resulting psychiatric diagnosis shines a light on how much she was suffering at the time. As a formerly very independent and capable person, her physiological injuries have caused great emotional distress for the plaintiff. Ongoing and future therapeutic treatment for her psychological injuries may improve those symptoms, but her brain injury and cognitive defects may be a significant cause of those symptoms and the prognosis for her post-concussion syndrome and cognitive difficulties is poor.
- [151] The future life she and her family planned is likely not possible. She and her family and friends testified to her empty-nester plans to upgrade her education and go back to the workplace in a healthcare or teaching occupation. Those plans likely have to be terminated because of the plaintiff's cognitive defects. Her future travel plans are now limited. Her relationships with her immediate and extended family and friends have been deeply affected. The plaintiff feels like a different person and her family and friends all expressed their loss of the plaintiff as she once was.

- [152] As noted above, the plaintiff tried at first to return to a life of normalcy only to realize she was unable to live like before due to pain and cognitive and psychological issues. This fits with the testimony about her high pain threshold and personal drive. Her family testified about her attempts to be "on" during family events which resulted in days of recovery afterward. She continues to press forward but with the recognition that she has limitations.
- [153] The plaintiff submits that an award in the range of \$175,000 to \$200,000 is appropriate, citing *Megaro v. Vanstone*, 2017 BCSC 2256 (\$175,000), *Dubitz v. Knoebel*, 2019 BCSC 1706 (\$185,000), *Mickelson v. Sodomsy*, 2019 BCSC 806 (\$200,000), *Wallman v. John Doe*, 2014 BCSC 79 (\$200,000). The defendants submits that non-pecuniary damages in an amount of \$80,000 would be more appropriate, citing *Abraha v. Suri*, 2019 BCSC 1855 (\$70,000), *Bischoff v. Gudaitis*, 2019 BCSC 2169 (\$70,000), *Pan v. Lau and Tai*, 2020 BCSC 288 (\$80,000), *Eaton v. Riddell*, 2020 BCSC 734 (\$75,000), and *Caffrey v. Davies*, 2020 BCSC 792 (\$90,000).
- [154] Reference to awards made in similar cases can be of assistance in arriving at a fair award for non-pecuniary damages, and the cases cited by counsel that feature MTBI and psychological issues have assisted in identifying the appropriate range. That said, each case must be decided on its own facts. An award is based on the circumstances of the individual case: *Lindal*.
- [155] The plaintiff's previous personality as a "social butterfly" and go-getter has been altered. She is no longer able to function in all aspects of her life at the high level she and her family and friends previously enjoyed. Considering all of the *Stapley* factors and applying them to the circumstances of the plaintiff, I assess her non-pecuniary damages at \$185,000.

Loss of Future Earning Capacity

- [156] Following *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8, the plaintiff is entitled to be put into the position she would have been but for the accident. Furthermore:
- [8] What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
- [157] To establish a claim for future loss of income earning capacity, a plaintiff must first prove a real and substantial possibility of a future event leading to a loss of income, as opposed to a speculative loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. There are two approaches to the assessment of loss of future earning capacity: the "earnings approach" and the "capital asset approach." The capital asset approach is better suited to cases where the loss is not easily measurable: *Perren* at para. 12. Due to the fact that the plaintiff had no recent history of paid employment, and had future plans to work in areas where she had not been previously employed, the plaintiff's income loss is not easily measurable. I find that the capital asset approach is appropriate for assessing her loss of future income.

[158] As set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), under the capital asset approach the trial judge's task is to assess the loss after answering four questions, although the list of questions is not exhaustive, taking into consideration all the relevant factors arising from the evidence. The questions include:

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

The lay evidence regarding future income

[159] At the time of the accident the plaintiff had been out of the paid workforce for 16 years. The plaintiff, her husband, family, and friends testified that it was always her plan to return to school and the workforce once her eldest child graduated from high school. She considered following up on her previous training in early childhood education and working as a childhood educator, or other caring fields like a teacher assistant or a dental assistant.

[160] She had regularly volunteered in her children's schools and ran a hot lunch program. She was offered a job in a daycare prior to the accident, and explored the possibility but she and her husband determined that the hours did not coincide with her availability because she wanted to care for her children.

[161] The plaintiff was concerned that she could not complete further education due to her significant difficulties reading and focussing, and her headaches. Filling out forms for applications is difficult because she is unable to decipher what to do.

[162] The plaintiff testified that she had concerns about whether she had the capacity to now work as an early childhood educator. The job requires a person to be responsible for young children, ensure their safety and oversee their interactions and behaviour. The walking, field trip planning and execution, and need to be able to direct or restrain children would be impeded by her cognitive and physical limitations.

[163] The plaintiff was also concerned that she would not be a capable teacher assistant since a young student could probably, as she said, teach her more now than she could teach them. Her chronic pain would affect her ability to sit for long periods, and her difficulties focussing and her headaches would negatively affect her ability to work in this field.

- [164] In addition to the issues above, as a dental assistant the plaintiff felt she would not be able to concentrate on the physical and non-physical cues that this position requires. The standing and bending over required would also be a struggle for her. Keeping track of instruments and records would also be problematic.
- [165] She explored other occupations like being a dog walker or shelf stocker or returning to retail sales work. All of these positions require additional physical demands which she says she could not endure. After a day of testimony sitting in the witness box for much of the day and reviewing documents, she stated that she went home with a severe headache, felt like she had a heartbeat inside her head and behind her eyes, and had to lie down in a dark room. She vomited. After looking at many documents, she stated she got nauseous and the bright white paper affected her vision.
- [166] The defendant submits that none of this is objective evidence of an intention to return to the workforce, and no inquiries were made prior to the accident about educational programs or applications made for training at that time. I do not know exactly why the defendant suggests there should be such evidence since the accident took place approximately two to three years prior to the plaintiff's planned start of her further education and vocational pursuits. It is perfectly reasonable that the plaintiff had not started making inquiries into furthering her education so many years before she planned to return to the workforce.

Darren Benning, Economist

- [167] Mr. Benning is an economist who produced a report calculating future income loss on the following assumptions: that the plaintiff would have returned to school in 2019 to pursue post-secondary training as either an early childhood educator, a teacher assistant, or a dental assistant, and would have entered the paid workforce by approximately the trial date (July 2020). He also assumed that the plaintiff would have received earnings commensurate with those of an average British Columbia female employed in those occupations starting at an entry level, from the trial date until retirement, no earlier than at age 65 with additional estimates at age 67. He also assumed that the plaintiff would have no residual earning capacity. He further built into his estimates contingencies for average disability rates and unemployment. He presented both actuarial multipliers and economic multipliers for consideration. He also presented information which could apply to part-time work estimates. The estimates are made yearly and so later entry and earlier retirement could also be estimated.
- [168] His estimate for loss of earnings to age 65 as an early childhood educator is \$407,608, as a teacher assistant it is \$439,917, and as a dental assistant it is \$566,487.

John Lawless, Vocational Consultant

- [169] John Lawless is a vocational consultant. He assessed the plaintiff through interview, a vocational testing, and a review of medical information from Drs. Hawkeswood, Cameron and Misri, as well as employment information.
- [170] His report sets out the educational requirements for three careers: early childhood educator, teacher assistant, and dental assistant. His opinion was the plaintiff could look for work with her existing early childhood education certificate, but that her competitiveness would be improved if she took a part-time four-semester program at the University of the Fraser Valley. To be a dental assistant, he stated that there was a ten-month dental assistant certificate program also at that university, and Douglas College offered a three-semester classroom and community support certificate program for teacher assistants.
- [171] Mr. Lawless found that the plaintiff had good measured aptitudes, however her pain, mood, and cognitive difficulties meant she might not be able to continue her education.
- [172] Mr. Lawless opined that had the accident not occurred he foresaw the plaintiff returning to the workforce in the near future. Had she waited until her eldest child was finished high school and had she started a one-year training program, he thought it was reasonable to assume she would be finished her training and seeking a new job now. He agreed with the defendant that it would have been a challenge to re-enter the workforce after 16 years. However, he stated it was common for many women to do so and it was not insurmountable. He stated that without the injury, a person has better odds of returning to the workforce.
- [173] Mr. Lawless opined that the plaintiff was permanently partially disabled because of her ongoing cognitive issues, chronic pain, and psychological problems. He doubted that the plaintiff could succeed in returning to work given the information he obtained and the fact that the plaintiff has been out of the workforce for four years due to injury.
- [174] He stated that an early childhood educator position is physically demanding and that the plaintiff was not capable of working in such a position. Her psychological problems would further negatively impact her ability to pursue this career.
- [175] These same concerns also apply to his opinion of the plaintiff's inability to work as a teacher assistant. Such jobs require workers to get down to the child's level and provide assistance to students with special needs, including pushing wheelchairs. He was concerned about the plaintiff's ability to deal with students with behavioural issues given her own mood issues. He did not think this position was suitable for the plaintiff.
- [176] Mr. Lawless also opined that the plaintiff's physical limitations, cognitive issues, and ability to complete the training meant employment as a dental assistant was also unsuitable for the plaintiff.

- [177] In addition, he considered entry level work in retail and food services since the plaintiff had previously worked in that industry. He stated that these jobs are physically demanding, fast paced, and involve long periods of standing. They are also psychologically demanding since there is a lot of interaction with customers and are ill advised for persons with mood disorders like the plaintiff. He also explained that these industries are very competitive in hiring and employers would not likely be able to offer sympathy or accommodations to workers with the plaintiff's limitations. He did opine that if the plaintiff did secure such a position she would likely never advance to a supervisory role.
- [178] Mr. Lawless also reviewed the plaintiff's ability to obtain employment in unskilled entry level service occupations, as that is one final option for individuals dealing with multiple barriers to employment, jobs such as ticket takers, and gas station or parking lot attendants. These occupations are often part-time and pay minimum wage. Even here, Mr. Lawless said it was difficult for him to foresee the plaintiff being able to access these jobs.
- [179] Mr. Lawless concluded that the plaintiff was competitively unemployable. There were no occupations that he could see her realistically accessing given the constellation of her physical, cognitive and emotional difficulties. He did not see her functioning in the workforce.

The other expert witnesses

- [180] Dr. Cameron was of the opinion that the plaintiff was permanently partially disabled because of her ongoing cognitive complaints, chronic pain, discomfort and psychological problems.
- [181] Dr. Waseem opined that it is difficult to predict precisely what the plaintiff's vocational capacity is absent an attempt to work. However, given the constellation of her symptoms she will probably be best suited to working reduced hours in employment without a significant physical component.
- [182] Dr. Hawkeswood was of the opinion that the plaintiff was not currently capable of working as an early childhood educator due to her medical problems. He recommended she focus on restoration of her typical household and social activities. He did think it was possible she could eventually work on a part-time basis as an early childhood educator.
- [183] Dr. Cohen opined that the plaintiff's prognosis for returning to her pre-accident employment level was somewhat negative at this point. It was unlikely that the plaintiff could cope with work in early childhood education with its attendant stressors and cognitive demands for structure, teaching, and task adherence. The plaintiff was not currently competitively employable and was at the risk of chronic unemployment or underemployment in the future. In his opinion, it was unlikely the plaintiff could currently cope with retraining or completing further coursework. If she did return, he would expect her to advance very slowly, and require accommodations for tests and assignments. In addition, the plaintiff would need to limit her coursework to part-time due to her cognitive

deficits and the fatigue she would incur.

Finding on loss of future income

[184] On the totality of the evidence, I find that there is a real and substantial possibility that the plaintiff will experience future income loss for the following reasons:

- a) Without the accident, the plaintiff would likely have returned to school and successfully upgraded her existing early childhood educator education or obtained certification in another teaching-related career. While she testified about exploring training and work as a dental hygienist, this does not match with her longstanding interest and previous education and volunteer work in child education-related activities and work.
- a) On the whole, I find the evidence shows that the plaintiff's injuries will not likely improve very much from her current state, although her driving anxiety will likely improve and I do not see that as being a significant impairment in her future education or employment prospects. Future psychiatric and/or continuing psychological treatment will likely improve her psychological problems, however her residual cognitive deficits and chronic pain will likely continue to negatively affect her mood.
- b) The plaintiff continues to suffer from chronic pain affecting her daily, and limiting her in nearly all activities. She faces multiple difficulties with cognitive function, mood issues, and physical pain.
- c) Given the plaintiff's symptoms, it is unlikely that the plaintiff will be able to complete the education required as a full-time student. She may be able to complete the education as a part-time student with accommodations.
- d) Even with updated certification, it is unlikely the plaintiff will be able to obtain full-time employment or even part-time employment as an early childhood educator or teacher assistant.
- e) Employment in an entry level position is a likely option for the plaintiff in the shorter term, however her chronic pain and cognitive deficits would take a toll on her ability to continue working for many years, even at a part-time level.
- f) The plaintiff is 46 years of age and she will have to compete with healthy counterparts in the open job market, quite possibly at multiple points, before she would retire, 20 plus years from now.

[185] I find, taking into consideration the contingencies that the plaintiff would not actually have followed through on continuing education or was unable to obtain work in the job market as a full-time early childhood educator or teacher assistant, the other contingencies noted by Mr. Benning, and the plaintiff's ability to earn income in her current state, an appropriate award for loss of future income is \$275,000.

Loss of Housekeeping Capacity

- [186] I find that this is an appropriate case to make an award for loss of housekeeping services. The plaintiff's ability to perform housekeeping services is diminished by reason of the injuries sustained, and the domestic services she once provided have value. This is true even if the replacement services have been provided gratuitously by the plaintiff's spouse: *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63; *Liu v. Bains*, 2016 BCCA 374 at paras. 17, 25-29.
- [187] The defendant takes the position that any such award should be minimal and be included within the award for non-pecuniary damages. He submits that the plaintiff is physically capable of performing all of the required household functions but often chooses to allow her family to perform the tasks. This does not meet with the balance of the evidence I heard in the testimony of the plaintiff, her family, and friends. I do find that she now completes a variety of household tasks and will likely be able to take on more with some improvement in cognitive difficulties and mood, but her overall prognosis is poor. It is not likely that she will be able to return to her full capacity.
- [188] The plaintiff seeks an award for past and future housekeeping capacity in the amount of \$235,000, taking into consideration a rate of \$15 per hour, past time spent by the plaintiff's husband, diminished need for housekeeping over the years once the children all leave the house, and applicable discounting.
- [189] I find that the plaintiff has established an award for future loss of housekeeping. The plaintiff will likely be able to take on many more chores for the household than she currently is able, and with the children leaving those chores will decrease in volume and intensity. In the circumstances, I award a total of \$90,000 for both past and future loss of housekeeping capacity.

Cost of Future Care

- [190] The plaintiff is entitled to be returned to the position she was in had the accident not occurred. The court must attempt to assure full compensation through the provision of adequate future care required as a result of the collision. Such an award should be based on what is reasonably necessary on the medical evidence to promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.). The costs must also be reasonable.
- [191] Assessment of the costs of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [192] The plaintiff submits an appropriate cost of future care award is \$30,000 based on medically necessary and reasonable recommendations made and costing of those recommendations.

Kim Gibson, Occupational Therapist

- [193] Ms. Gibson is an occupational therapist with a specialty in cost of future care evaluations. She assessed the plaintiff in her home in March 2020, reviewed records, and prepared a cost of future care report in April 2020.
- [194] Her observation of the plaintiff in the home was that her cognitive deficits were worse than what she expected from reviewing the medical records. She interviewed the plaintiff at the plaintiff's residence.
- [195] She costed recommendations made in the reports of Drs. Hawkeswood, Cameron, and Misri. Some of those recommendations have already been followed up with or the plaintiff has tried them to some extent but they have not worked.
- [196] The plaintiff seeks future care costs for a number of items. The plaintiff testified she would take advantage of all of these items and that she has already tried some, as described below.

Neuro-Optometry testing

- [197] Dr. Cohen recommended the plaintiff be examined by a neuro-ophthalmologist or optometrist with a specialty in visual disorders, and that she may also benefit from the provision of vision exercises and eyewear. Ms. Gibson costed this at \$595 for the assessment and \$1,000 for treatment sessions if recommended.

Kinesiology

- [198] Drs. Hawkeswood and Misri recommended the plaintiff have another 10 to 15 sessions with a kinesiologist to ensure that an exercise program is executed appropriately. Ms. Gibson costed this at \$800 to \$1,200 and also costed \$250 as an allowance for equipment a kinesiologist might recommend.

Physiotherapy

- [199] Drs. Hawkeswood and Misri recommended the plaintiff have access to allied health treatment, especially physiotherapy, for tune-up sessions over a couple of years. Dr. Waseem recommended a course of vestibular therapy over three months. This is a specialized form of physiotherapy to target problems such as vertigo, dizziness, and problems with balance and vision.
- [200] Ms. Gibson costed out 10 to 15 sessions over two years at a cost of \$800 to \$1,200.
- [201] The plaintiff had attended a number of physiotherapy sessions since Dr. Hawkeswood's report. The defendant suggests only occasional refreshers, if any, should be awarded. Ms. Gibson was of the opinion that the plaintiff still required assessments and further sessions due to changes over time. The plaintiff testified that she found the sessions beneficial and would like to continue them.

Walking poles

[202] Ms. Gibson recommended the plaintiff use walking poles, which the plaintiff has already bought.

Noise reduction ear plugs

[203] Dr. Cohen recommended the plaintiff try noise filtering ear plugs and noise cancelling technologies for her tinnitus and headaches.

[204] The plaintiff had tried one pair of foam plugs and they did not help as they did not stay in and accentuated the tinnitus. Ms. Gibson recommends using a custom-made set of ear plugs out in the community to reduce startling noises. She costed them at approximately \$270.

Psychological counselling

[205] Dr. Cameron recommended that the plaintiff attend psychological counselling. Dr. Misri recommended that the plaintiff have at least 20 sessions of cognitive behavioural therapy. Dr. Cohen recommended the continuation of psychotherapy services from a clinical psychologist for ongoing mental health support, stress, and fatigue management, and other ongoing post-injury adjustment problems and stressors that have affected her functioning. Dr. Waseem recommended the plaintiff attend mindfulness-based cognitive behavioural therapy, to target pain specifically.

[206] The plaintiff continues to see Dr. Hutcheon once or twice a month for counselling sessions and testified she found significant benefit from them and would like to continue. These sessions cost \$225 each and therefore 20 sessions cost \$4,500.

[207] The defendant submits that the plaintiff was a "regular user" of psychological counselling before the accident and that this counselling is not causally related to the accident. The plaintiff did access the services of a social worker for counselling in 2015, as referred by her family doctor. However, I have found that the plaintiff's current psychological issues are caused by the accident.

Trigger point injections

[208] Dr. Waseem recommended trigger point injections for the plaintiff's myofascial pain. No evidence of the cost of these injections was provided.

Couples counselling/therapy

[209] Dr. Cohen recommended the plaintiff access support for couples' counselling or therapy to address the additional stressors brought upon her marital and family relationships as a result of her injuries and adjustment difficulties. He recommended a course of four to six hours of intervention as being appropriate.

[210] No separate evidence of this cost was presented to me but Dr. Hutcheon's rate would be appropriate for me to consider at \$225 per hour.

Yoga and meditation

[211] Dr. Misri recommended yoga and meditation for the plaintiff. The plaintiff currently practices yoga at home with the assistance of a video. She does basic yoga stretching.

[212] The defendant submits that the plaintiff regularly practiced yoga prior to the accident and so this cost is not causally related to the accident.

[213] Ms. Gibson recommends a particular yoga practitioner who is a certified yoga therapist who assists with mental health issues and pain conditions. Ms. Gibson recommended 10 private sessions totalling \$750 and an allowance for home materials at \$250.

Occupational therapy

[214] Dr. Hawkeswood recommended that the plaintiff resume her roles within the household and increase her recreational activities. Dr. Cohen recommended the plaintiff have occupational therapy support focused on the provision of practical coping strategies for circumventing her cognitive difficulties and complaints as they affect her home functioning, to support any return to work or education demands.

[215] Ms. Gibson recommended 12 sessions at a rate of \$115 per hour plus travel time to the plaintiff's home. She costed this at \$2,530.

Medications

[216] The plaintiff started taking Fluoxetine after the accident and currently takes 40mg a day for her mood issues. The defendant says the plaintiff was taking a different anti-depressant prior to the accident and so anti-depressant medication is not causally related to the accident. I found that the plaintiff was taking a different anti-depressant and anti-anxiety medication before the accident but at a very low dose and for different symptoms.

[217] Ms. Gibson costed out Fluoxetine at 40 mg a day plus a filling fee at \$460.76 annually.

[218] The plaintiff also takes Extra Strength Advil and Tylenol daily for headaches and pain.

[219] Dr. Cameron recommended the plaintiff try prophylactic headache medication like propranolol, Topamax and/or Nortriptyline, as well as abortive Triptan for severe headaches, and the continuation of the analgesics she uses for pain and headaches.

[220] Ms. Gibson costed these headache medications at \$500 a year.

[221] The plaintiff stated that her family physician was considering prescribing Imitrex for migraines. I find this is speculative, and the above medications are already recommended for headache and migraine treatment.

Botox injections

[222] Dr. Cameron recommended Botox injections for treatment of the plaintiff's headaches, neck, and shoulder pain. The range for improvement is 60 to 80%. At least two injections are required to test the benefit of the treatment. Some patients need no more than four to six treatments, while some require injections every three months. Dr. Waseem also recommended this treatment.

[223] The defendant submits Botox has not been tried and so this treatment should not be awarded.

[224] Ms. Gibson costed this at a minimum of \$200 per vial plus an administration fee totalling \$800 per treatment.

Award for cost of future care

[225] I find that the claims for walking poles and trigger point injections are not supported by the evidence. As well, home equipment is not specific enough nor actually recommended at this point. I have considered as well the chances that Botox may not assist the plaintiff, and the prognosis for the plaintiff's future improvements, as minimal as they may be, in her psychological and cognitive defects, and consider an award of \$23,000 in future cost of care as reasonably necessary in the plaintiff's circumstances.

Special Damages

[226] The parties agreed that an assessment for special damages should be \$3,367.99 and I make that assessment.

Conclusion

[227] In summary, I make the following awards in accordance with the reasons above, and allocating 15% of the fault for the accident to the plaintiff:

Assessment

Award

Non-pecuniary damages

\$185,000.00

\$157,250.00

Future loss of earning capacity

\$275,000.00

\$233,750.00

Loss of housekeeping capacity

\$90,000

\$76,500

Cost of future care

\$23,000.00

\$19,550.00

Special damages

\$3,367.99

\$2,862.79

Total

\$576,367.99

*\$489,912.79

*Rounded up to \$490,000.00

[228] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If they do not do that, then I award the plaintiff costs at Scale B.

"Wilkinson J."

The Honourable Madam Justice Wilkinson

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