

CANADA / JUDGMENT

K.K.M. v. Greif

2025 BCSC 541

COURT

Supreme Court of British Columbia

DECIDED

25 March 2025

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2025 BCSC 541 K.K.M. v. Greif

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.K.M. v. Greif,

2025 BCSC 541

Date: 20250325

Docket: S212457

Registry: Victoria

Between:

K.K.M.

Plaintiff

And

Kevin Jeremy Greif

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph 182 on April 1, 2025

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiff:

B.A. Marlatt

The Defendant, appearing in person:

K. Greif

Place and Date of Trial:

Victoria, B.C.

September 12-13 and 16-17, 2024

Place and Date of Judgment:

Victoria, B.C.

March 25, 2025

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Introduction

- [1] In this action the plaintiff claims damages against the defendant for a sexual assault that occurred on June 30, 2017, at her home in Campbell River and for which he was convicted criminally on March 5, 2019. The defendant, who was self-represented at the trial, called no witnesses and made minimal submissions. He essentially offered no defence to the plaintiff's claim she was sexually assaulted by him. Accordingly, I will briefly address whether the defendant is liable to the plaintiff for sexual battery and will then address the facts and the damages to which the plaintiff is entitled.
- [2] For the reasons that follow, the plaintiff is entitled to damages of \$266,750 comprised of: \$200,000 for non-pecuniary damages; \$11,000 for past pecuniary loss; \$55,000 for future pecuniary loss; and \$750 for special damages. I additionally award \$1,609.52 for health care recovery costs.

Credibility

- [3] First, I address the credibility and reliability of the various witnesses that appeared before me. Those witnesses were the plaintiff, Mark Lewis and Carly Troiano, two friends of the plaintiff, and Dr. John Penhall, the plaintiff's family doctor.
- [4] Credibility and reliability are distinct but related concepts, although they are often considered together. Credibility concerns the honesty of a witness. Reliability concerns the ability of an honest witness to provide accurate information.
- [5] Some of the factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, *aff'd* 2012 BCCA 296. Ultimately, the overriding consideration is whether the evidence of the witness is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:
- [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), 1919 CanLII 11 (SCC), 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, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [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).

- [6] A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: R. v. R.(D.), 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291, at para. 93).
- [7] I generally find that Mark Lewis, Carly Troiano and Dr. Penhall were credible and reliable witnesses. They gave their evidence in an honest and forthright manner, did not exaggerate or embellish, and had a good recollection of the events to which they testified. Unless otherwise indicated herein, I accept their evidence.
- [8] Concerning the plaintiff, I accept only parts of her evidence. In particular, I am of the view that she exaggerated and embellished the effects of her injuries. The factors that cause me to accept only parts of the plaintiff's evidence include:
- a) At times her evidence was vague and incomplete and at other times internally inconsistent;
 - b) She minimized the extent of her medical conditions as they existed immediately prior to the sexual assault;
 - c) Her evidence, at times, did not make sense and was inconsistent with the evidence of Ms. Troiano; and
 - d) She admitted to not declaring all of her income to Canada Revenue Agency ("CRA"), something which illustrates a tendency to dishonest conduct where it is of benefit to her.
- [9] The defendant did not testify. Thus, I need not assess his credibility. To the extent that he gave evidence during the course of his submissions, I do not consider those submissions as evidence since the plaintiff had no opportunity to cross-examine him.

Liability

- [10] The plaintiff testified to the events of June 30, 2017. She testified that, from approximately the end of February 2017, she was self-employed cutting hair in her home. She said that the defendant, whom she knew from seeing around town, attended at her home for a haircut. She testified that the two of them were in her kitchen when he touched her thigh. She told him "Don't do that". She said he did it again and she "whacked" him on the head with a comb. She then completed the haircut and went to wash up in the bathroom. When she came out of the bathroom, the defendant was standing there. She says he pulled up her shirt and bra,

pulled down her skirt, put his fingers in her vagina, pushed her down and slapped her butt. She said she was screaming at him to stop and fought him. She did not know how long the assault lasted but the defendant did stop before penile penetration. I infer from the plaintiff's evidence of what transpired that the duration of the assault could not have been very long.

- [11] The plaintiff testified that after the assault she went outside with the defendant and had a smoke. She was unable to explain why she did that. After the defendant left, she went to her mother's home. Her mother then called the police.
- [12] The plaintiff was minimally cross-examined by the defendant on her evidence of what transpired on June 30, 2017. He asked her why he had no scratches on his back when she had testified at the criminal trial that she had scratched him. Her reply was that it was probably because she had gel nails.
- [13] On March 5, 2019, the defendant was convicted of sexually assaulting the plaintiff by Justice Jenkins (see: *R. v. Greif*, 2019 BCSC 288). An appeal of the conviction was dismissed by the Court of Appeal on May 10, 2021 (see: *R. v. Greif*, 2021 BCCA 187). The defendant further sought leave to appeal to the Supreme Court of Canada but the application for leave was dismissed on November 4, 2021 (see: *Kevin Jeremy Greif v. Her Majesty the Queen*, 2021 CanLII 109594).
- [14] There is, at present, no independent tort of sexual assault. It is subsumed in the tort of battery, which is the intentional infliction of unlawful force on another person, and is sometimes referred to as sexual battery: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 27, 34 and 43.
- [15] I accept the evidence of the plaintiff as to what transpired between her and the defendant on June 30, 2017 and I further accept that she did not consent to any sexual touching or activity on that day. It follows that the defendant is liable to the plaintiff for sexual battery.
- [16] Although this is sufficient to dispose of the liability issue, I note that in *C.D. v. Mostowy*, 2021 BCSC 1919, Justice Jackson explained that findings in a criminal trial satisfy the requisite elements of the tort of sexual battery and cannot be relitigated in a civil trial.
- [28] The elements of the cause of action of battery involve the intentional infliction of unlawful force on another person: *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226 at 246, 92 D.L.R. (4th) 449. Express consent is an affirmative defence to battery, which means a defendant bears the onus of proving it on a balance of probabilities. Lack of consent is not something a plaintiff must prove to establish their claim, unlike in a criminal trial for sexual assault, where the onus is on the Crown to prove a lack of consent beyond a reasonable doubt: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 1, 2, 22.
- [29] The defendant was convicted of sexually assaulting the plaintiff following a trial before a judge of this Court. The conviction for sexual assault was based on Mr. Mostowy's acts constituting an intentional application of force of a sexual nature against the plaintiff

without her consent: R. v. Ewanchuk, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330 at para. 23, 169 D.L.R. (4th) 193. The criminal trial judge was satisfied the Crown had proven those requisite elements of the offence of sexual assault beyond a reasonable doubt, including a lack of consent.

- [30] The essential elements of the offence of sexual assault mirror the essential elements of the tort of sexual battery. The Criminal Findings, including the absence of the plaintiff's consent, satisfy the requisite elements of sexual battery and negate the potential for any defence based on consent. I am satisfied the defendants' questions go to the very heart of and seek to relitigate the Criminal Findings in this respect.
- [17] Thus, the conviction of the defendant and the findings of Jenkins J. in the criminal trial could also support a finding of liability in this civil trial.

Facts

- [18] The plaintiff was born in October 1984 in Fort St. John. She was 32 years of age at the time of sexual assault and was almost 40 years of age at the time of the trial.
- [19] The plaintiff described an early childhood dealing with an alcoholic mother and the divorce of her parents. Her mother became sober when she was seven and her life became better. She also described moving from place to place until the family eventually arrived at Campbell River.
- [20] The plaintiff was the victim of a sexual assault at the age of 19. She did not report the assault because alcohol was involved.
- [21] The plaintiff testified that she was diagnosed with attention deficit hyperactivity disorder ("ADHD") and fetal alcohol syndrome while in high school. Her evidence of having ADHD was corroborated by her family doctor, Dr. Penhall, and I accept it.
- [22] The plaintiff graduated from high school in Campbell River in 2002 or 2003. At approximately that time she commenced a relationship with a man, whom she did not name. The relationship ended in 2006.
- [23] The plaintiff described this first relationship as abusive. She said that she was very depressed and turned to alcohol to cope. She acknowledged struggling with alcoholism and depression at the end of the relationship. However, to her credit, she sought out the appropriate help and, as of the trial, she had been sober for almost 17 years. This means she has been sober since approximately 2007.
- [24] The plaintiff gave birth to two children during this first relationship. Those children were 21 and 18 years of age respectively as of the trial.

- [25] The plaintiff entered into another relationship, with Mr. M., after returning to Campbell River in 2006. She gave birth to a third child in October 2012. She described her relationship with Mr. M. as a great, healthy relationship.
- [26] In the fall of 2015 and spring of 2016, the plaintiff enrolled in two online English courses at Thompson Rivers University. She obtained a C+ in both courses. She also enrolled in an online social work course from February 2016 to January 2017 and in an English composition course from August 2016 to July 2017. She did not complete either of these two courses, although she did not testify as to when she quit them.
- [27] The plaintiff's evidence of why she quit the social work course is important to her claim for pecuniary damages but was inconsistent. At one point in her evidence she said she quit the course because she found it too hard. At another point in her evidence she said she quit because she found it too hard to focus after being involved in a motor vehicle accident in February 2017. This latter excuse does not hold up to scrutiny because the social work course was from February 28, 2016 to January 26, 2017, which means the course was over before the motor vehicle accident occurred. Additionally, I observe that she apparently also told Dr. Denise Hall that the social work course was too difficult as Dr. Hall made express reference to this at para. 3 of the "Background" section of her report. I therefore find that the plaintiff quit the social work course at some point in 2016 simply because she found the course work too difficult.
- [28] The plaintiff's second relationship ended in January of 2017. She described the separation as amicable but sad.
- [29] On February 25, 2017, the plaintiff was involved in a motor vehicle accident. While driving home her car slipped on ice and rolled over (the "MVA").

Health and Activities

- [30] The plaintiff testified that her life was good immediately prior to the MVA. She enjoyed kayaking, dancing, camping, going to the gym and road trips to the beach. She attended AA meetings twice per week and described the meetings as a big part of her life. She also attended women's support groups and gave free haircuts to struggling and homeless women.
- [31] Mark Lewis and Carly Troiano corroborated much of the plaintiff's evidence about her activities and health before the MVA.
- [32] Mark Lewis testified that he has known the plaintiff since she was 16 and attended AA meetings with her. He described her as being outgoing, smart and fun to be around.
- [33] Ms. Troiano testified that she has known the plaintiff since 2015 and lived across the street from her in 2017. She described the plaintiff as lively and bubbly. She testified that she and the plaintiff went camping together, and went out for dinners and dancing. She also said that after the plaintiff's separation, the plaintiff was a little sad but not "super dramatic".

- [34] Concerning her health, the plaintiff testified it was pretty good except for feeling sad or depressed, which she attributed to the breakup of her relationship with Mr. M.
- [35] I do not accept that the plaintiff's feelings of depression immediately before the MVA were minor or solely due to the breakdown of the relationship with her partner. Nor do I accept any implication that her depression was temporary. She testified that at the time of her marriage breakup, she began seeing a counsellor twice per week, which suggests something more serious than just feeling sad. Additionally, the preponderance of the evidence is that the plaintiff suffered from long-term ongoing depressive symptoms. She admitted that she had been prescribed citalopram in 2012 for depression. Although she testified that the depression in 2012 was because her stepfather had passed away, she acknowledged that between 2012 and 2017 her medications had not changed, which indicates the depression was not temporary.
- [36] Significantly, Dr. Penhall, testified that in 2016, which would have been before the plaintiff and Mr. M. separated, he was treating the plaintiff for anxiety and endometriosis and that she had been prescribed an anti-depressant, risperidone, for sleep issues. He also testified she was occasionally prescribed pain medications.
- [37] The suggestion that her depressive symptoms in January 2017 were solely due to the breakdown of her relationship is not consistent with Dr. Penhall's evidence that she was taking anti-depressant medications and risperidone in 2016.
- [38] I find as a fact that from at least 2012 the plaintiff has suffered from depression and, since at least 2016, she has also suffered from anxiety, sleep issues and occasional pain.

Work

- [39] The plaintiff's evidence of her work history was disjointed and somewhat confusing. Following high school, the plaintiff worked as a chambermaid and looked after children.
- [40] At some point, it is not clear when, the plaintiff completed a course in hairdressing and began working as a hairdresser out of her home. In cross-examination, she testified that she worked full-time as a hairdresser from her home, but did not say when that was or for how long. Importantly, she testified that she did not report the income she earned from hairdressing to CRA. This, combined with the plaintiff's otherwise vague evidence, makes it difficult to assess how much hairdressing she did and how much she earned from it. Additionally, as I have indicated, her deliberate and wilful failure to report her earned income is something I take into account in assessing her credibility. Not reporting income is a dishonest act.
- [41] The plaintiff also testified to being a licenced photographer and to working as a model. However, it is unclear whether she ever worked as a photographer. Additionally, she could not recall any time when she was actually paid for modelling as opposed to modelling for charity.

- [42] The plaintiff also worked in the social services field. Her evidence of this work was somewhat more precise but still lacked details. Her work in this field consisted of:
- a) From 2011-2014, she held a contract position with the Ministry of Children and Families providing supportive living and care for high-needs children;
 - b) From 2013-2016, she was a youth support worker for the John Howard Society;
 - c) From 2015-2016, she provided supportive care and counselling to men undertaking substance use recovery for the Second Chance Men's Recovery Program; and
 - d) From 2016-2017, she provided supportive care and counselling to women for the Comox Valley Transition Society.
- [43] The plaintiff testified that immediately prior to the MVA she was working 20 hours per week on an on-call casual basis at two locations. She did not specify what those two locations were.
- [44] The plaintiff's income tax returns and notices of assessment for 2015, 2016, and 2017 are in evidence.
- [45] In 2015, the plaintiff earned an income of \$30,984. The sources of income were: T4 income of \$23,548; Universal Child Care Benefit ("UCCB") of \$4,080; Employment Insurance ("EI") of \$1,356; and other income of \$2,000. The plaintiff did not testify to the source of the T4 income in 2015 but did say that the EI was because she was between jobs. Concerning the "other income" of \$2,000, the plaintiff initially testified she this was disability income for her son but, when asked by her counsel to reconsider her answer (an improper leading question) she replied it was from doing hair. Given the plaintiff's previous evidence that she did not report her income from hairdressing and, given the plaintiff's initial answer that the \$2,000 was disability income for her son, I have no confidence that the \$2,000 represents income from hairdressing. I find that the plaintiff's total income from working in 2015 was \$23,548.
- [46] In 2016 the plaintiff earned income of \$20,586. The sources of income were: T4 income of \$9,610; UCCB of \$2,040; EI of \$8,168; and other income of \$768. The plaintiff testified her income in 2016 was lower than in 2015 because she was taking a social work course through Thompson Rivers University. I do not accept that the social work course or any of her other studies prevented her from working on a part-time basis in 2016 as she did in 2015. The plaintiff was never enrolled as a full-time student, was never enrolled in more than two courses at any one time and all of her courses were online. The courses she took would have had a minimal impact on her availability to work part-time. Moreover, the plaintiff testified that she did not complete the courses she was taking in 2016-2017, but did not say when.

- [47] In 2017, the plaintiff earned T4 income of \$2,479. The plaintiff did not expressly testify as to the source of this income. However, it must have been comprised mostly of income she earned from social services work up to the time of the MVA because she only worked a couple of shifts after the MVA.
- [48] I note that the plaintiff did not provide copies of her income tax returns prior to 2015, and did not provide full copies of her returns for 2015, 2016 and 2017. In particular, the T4 slips are not in evidence. Additionally, the plaintiff did not testify to what she earned per hour doing social work services. Accordingly, it is difficult to assess the veracity of the plaintiff's statement that she was working 20 hours per week before the MVA. This is something I will return to when I address the plaintiff's loss of capacity claim.

Post MVA

- [49] In the MVA, the plaintiff suffered a concussion and soft tissue injuries to her back. She testified that in the first few months following the MVA, she had neck and back pain, suffered from a few flashbacks and nightmares, was a bit forgetful and was depressed. She described her depression following the MVA as a six out of 10. She described it as being "bummed out" but said she was still enjoying life. She testified that she continued to attend AA meetings and continued to have friends over. However, she also testified that she ceased hiking and going to the gym and that her children helped with the housework.
- [50] The plaintiff testified that, following the MVA, she tried returning to social services work but was only able to do a couple of shifts. She therefore ceased working except for cutting hair at her home, which she said she did at a reduced frequency because of her back injury. She received income assistance from ICBC for a few months and then received disability benefits from Canada Pension.
- [51] Dr. Penhall corroborated and expanded upon the plaintiff's injuries following the MVA. He testified that she had a significant concussion, soft tissue injuries, and back pain. Importantly, he also testified that, following the MVA, the plaintiff suffered from post-traumatic stress disorder ("PTSD").
- [52] Ms. Troiano testified that, after the MVA, the plaintiff had issues with her ear and neck. She also said there were no dramatic changes with the plaintiff's personality.
- [53] I find that following the MVA the plaintiff suffered from depression, anxiety, sleep issues, concussion symptoms, soft tissue injuries, back pain and PTSD. As a result of these injuries she was unable to enjoy activities such as hiking and going to the gym and she was unable to work except for cutting hair at her home. (I note that two of the plaintiff's experts wrote in their reports that the plaintiff had returned to the gym, which information they presumably obtained from the plaintiff. However, the plaintiff was not cross-examined on this and, thus, I am left with only the plaintiff's evidence that she stopped going to the gym.)

Post Assault

- [54] I have described the circumstances of the sexual assault in the section of these reasons addressing liability.
- [55] The plaintiff testified to some bruising from the sexual assault but the more significant injuries were psychological.
- [56] The plaintiff's evidence of the psychological effects of the sexual assault was compelling but somewhat disjointed in that, for the most part, she did not provide dates or a coherent explanation of how her symptoms changed or developed over time.
- [57] The plaintiff testified that immediately after the sex assault she felt guilt and shame, wanted to kill herself and wanted to start drinking again. She became detached, anxious and fearful. At some point in time, she got a dog and installed security cameras because she was terrified the defendant knew where she lived and she thought he might hurt her. She also had difficulty sleeping because she worried that the defendant would attack her in her home. She continued seeing a counsellor twice per week.
- [58] The plaintiff testified that after the assault she could not leave the house and only had close friends over to visit. She said that if she tried to leave the house she could not breathe and would start shaking. She intimated that this condition persisted to this day. However, I am not satisfied that this is the case, something I will expand on later.
- [59] The plaintiff also testified that two months after the assault she felt better but then the defendant would drive by her house and rev his engine which renewed her terror and caused her to just stay home in her pajamas. She also testified that when grocery shopping she encountered the defendant in the store and he played "cat and mouse" with her. She said this had a debilitating affect on her. I accept the plaintiff's evidence that these events occurred and note that they were instances of harassment of the plaintiff by the defendant. I also observe, however, that the event in the grocery store illustrates an inconsistency in the plaintiff's evidence about being unable to leave her home.
- [60] The plaintiff testified that since the assault she has been unable to trust men and does not want to be around them. She tried to cut the hair of a male friend and physically could not do it. She also tried to return to the gym but did not feel comfortable with men there. She testified that she was dating at the time of the assault and continued the relationship until her then-partner passed away. She testified she tried to date but it did not work out because she does not trust men and does not want to be around them. She also said that she has not attended any AA meetings since the assault because of her feelings of anxiety around men and her difficulty leaving the house.
- [61] As of the date of the trial, the plaintiff testified that she had panic attacks all the time. She also testified that she got a number of tattoos since the assault. She said it gave her something to feel and took away from what was going on.

- [62] In cross-examination the plaintiff testified that not all of her activities were curtailed by the assault. She agreed that she could probably still go kayaking if she wished to, although she stipulated she never did much kayaking. She also testified that she has gone camping on various occasions after the assault, including with Ms. Troiano. She agreed there were men at those campgrounds but not at her campsite.
- [63] Mark Lewis, Carly Troiano and Dr. Penhall corroborated some of the plaintiff's evidence.
- [64] Mr. Lewis testified that after the assault there was a real change in the plaintiff. He said she went from an extrovert to an introvert, that she stopped going to AA meetings and that she refused to cut his hair. However, in cross-examination he testified he was not sure when the plaintiff was last at an AA meeting as his memory was not good.
- [65] Ms. Troiano confirmed that the immediate effects of the sexual assault on the plaintiff were dramatic. She said that immediately after the sexual assault the plaintiff was very scared, shaking, and crying. She also testified to what she perceived as a change in the plaintiff's personality. She said that since the sexual assault the plaintiff's "liveliness" had dimmed and her bubbly personality disappeared. She also testified that it was hard to get the plaintiff out of the house. She further testified that, as of the trial, the plaintiff was still fearful of going out alone and was not the same person she was.
- [66] Dr. Penhall testified that the plaintiff's PTSD, which began with the MVA, was worsened by the sexual assault such that it became the primary diagnosis by June 24, 2019. He also testified that she had severe anxiety following the sexual assault which developed into crippling anxiety.
- [67] Interestingly, the plaintiff and Ms. Troiano both testified to a trip they took to Las Vegas in October 2017. The plaintiff testified that the moment they landed in Las Vegas she felt relief because the defendant was not there. She testified that she enjoyed herself the entire trip and that it was only upon returning to Campbell River that her symptoms resurfaced. In cross-examination, she testified that she felt no anxiety in Las Vegas despite there being men present and large crowds.
- [68] Ms. Troiano similarly testified she and the plaintiff filled up every moment in Las Vegas and that the plaintiff was happy while there. She also testified that the plaintiff's mood changed the night before they were to return home. She said the plaintiff then became anxious, grumpy and fearful.
- [69] I observe that the evidence of the plaintiff and Ms. Troiano of the trip to Las Vegas suggests that the plaintiff's anxiety is, at least in part, situational, meaning her anxiety is less when she is not in Campbell River, the place of residence of the defendant.

- [70] Ms. Troiano also gave some evidence in cross-examination that was not entirely consistent with the plaintiff's evidence. In particular, Ms. Troiano testified that, after the assault, she and the plaintiff continued to go out. She said that they went to Chances, a bar and casino, four or five times and to JJ's, a pub, once or twice per year.
- [71] Concerning the plaintiff's employment since the assault, the plaintiff testified that she did some modelling following the assault, although it is unclear if she was paid for this. She initially said the modelling was successful but then she said she felt oversexualized and expressed concern about encountering people who knew the defendant while modelling. Again, this suggests that the plaintiff's anxiety is situational, in the sense that it is triggered by individuals who know the defendant.
- [72] The plaintiff also testified that she has been unable to cut hair since the sexual assault except for her mother and other friends. She did not really explain why she could not cut hair for other women or why she could not cut hair in a salon.
- [73] Importantly and surprisingly, the plaintiff testified to being employed as a tiler commencing in June of 2024. She testified that she enjoyed working as a tiler and was successful at it. The only reason she gave for quitting that job was that her boss knew the defendant and would sometimes bring him up in conversation, which made her uncomfortable and caused her to not trust her boss. The plaintiff's job as a tiler is important in several respects. First, it illustrates that by the summer of 2024, she was capable of working and did work. Second, it illustrates that by the summer of 2024, she was able to leave her house. Third, it illustrates that, despite her fear of men, she is able to work with men in an appropriate context.
- [74] Concerning her career plan, the plaintiff testified that she had wanted to obtain a degree in social work and become a social worker for women. She testified that she applied for two such jobs in December of 2023 but was told that she was not sufficiently qualified and needed more training. The plaintiff was asked in direct examination if she had attempted to return to school to follow up on her social work training. She replied that she had not. Surprisingly, she then said that she would rather study "justice", by which from her submissions I assume she meant criminology.
- [75] I accept some but not all of the plaintiff's evidence of the effects the assault has had on her. I accept that she had and continues to have feelings of guilt shame, and low self-esteem. I accept that she had suicidal thoughts and wanted to start drinking again, a compulsion which to her credit she resisted.
- [76] I do not accept that the plaintiff has a debilitating fear of men. She was able to go camping despite there being men elsewhere in the campground. She was able to go out for dinners and dancing on multiple occasions, despite there being men present. She was able to go on dates with men, although those dates did not work out. She was also able to enjoy herself in Las Vegas despite there being men present. She also agreed in cross-examination that she continued to see male counsellors after the assault and that she attended a New Year's Eve party with men present. Most significantly, she was able to work successfully as a tiler with a

man. In view of all this evidence, I accept that she has a fear of men but do not accept that it is as debilitating as she suggested.

- [77] I similarly do not accept that the plaintiff has a continuing debilitating fear of going outside either alone or together with others. I accept that in the immediate aftermath of the assault she had such a debilitating fear but I do not accept that it is continuing. Moreover, it appears that this fear is mostly related to the possibility of encountering the defendant, or people who know the defendant, in the community. My reasons for this finding include that her fear of going outside did not prevent her from camping, from going out in the evenings, or from going on trips to Las Vegas, Mexico and Utah. The fear also did not prevent her from accepting work outside her home as a tiler. Additionally, the plaintiff testified that it was only after encountering the defendant in the grocery store, that she began to either shop online or have friends help her with grocery shopping. I infer from this that she was not afraid to go to the grocery store, per se, rather she was afraid of encountering the defendant. The plaintiff also expressly stated that she is fearful of running into the defendant in the community and would like to move to Nanaimo to avoid that happening. Accordingly, the plaintiff's fear of going outside her home, although real, is not debilitating and appears to be mostly a fear of encountering the defendant or people who know the defendant.
- [78] Concerning the plaintiff's ability to work following the sexual assault, I accept that the plaintiff was unable to work for several years following the assault and I accept that she is unable to cut hair in her home except for her mother and close friends. However, I do not accept that she is unable to work in any capacity. She has not explained why she is unable to cut hair in a salon. Additionally, the fact that she applied for two jobs in the social services field around Christmas of 2023 indicates that she believed she was capable of resuming that type of work. The impediment to her returning to work in December 2023 was a lack of qualifications for the positions that she was seeking, not her ongoing injuries. Most significantly, the fact that she worked successfully as a tiler in 2024 illustrates that she is capable of working outside her home and with men. She did not quit this job because she was unable to do it or because she was unable to work with men or go outside. She quit because her boss knew the defendant and brought him up in conversation.

Expert Evidence

- [79] The plaintiff filed four expert reports, namely: a psychological report prepared by Dr. Laura Klubben dated December 16, 2022; a vocational training and assessment report prepared by Dr. Denise Hall dated May 29, 2024; a functional capacity evaluation prepared by Timothy Winter dated May 28, 2024; and, a pecuniary loss valuation report prepared by Robert Wickson dated June 13, 2024.
- [80] None of the experts were required to attend at the trial for cross-examination. Accordingly, their respective reports were introduced into evidence without viva voce testimony.

[81] Here I address the reports of Dr. Klubben, Dr. Hall and Mr. Winter. I will address Mr. Wickson's report later when I consider the plaintiff's claim for pecuniary damages.

Dr. Klubben

[82] Dr. Klubben assessed the plaintiff in July 2022. She opined that following the MVA, the plaintiff met the DSM-5 criteria for a major depressive disorder ("MDD") in partial remission, acute stress disorder, and eventually PTSD. She opined that immediately before the sexual assault the plaintiff's condition had improved such that she did not meet the full criteria for PTSD. She further opined that the plaintiff's psychological symptoms were "amplified" by the sexual assault such that following the assault she met the DSM-5 criteria for MDD and PTSD with panic attacks.

Based on my assessment of [K.K.M.] on July 29, and December 9, 2022, questionnaire data, collateral information, and a review of available documents, I am of the opinion that following her motor vehicle accident on February 25, 2017, [K.K.M.]'s psychological symptoms met DSM-5 criteria for Major Depressive Disorder, in Partial Remission; Acute Stress Disorder; and eventually Posttraumatic Stress Disorder. Over time, following her motor vehicle accident, her depressive and trauma symptoms lessened but persisted. In the weeks to month prior to her alleged assault in June of 2017, her psychological symptoms met DSM-5 criteria for Major Depressive Disorder, in Partial Remission; and Other Specified Trauma - and Stressor-Related Disorder [Adjustment-like disorder with prolonged duration of more than 6 months without prolonged duration of stressor/Insufficient symptoms to meet the full criteria of Post-Traumatic Stress Disorder].

Following her alleged physical and sexual assault of June 30, 2017, [K.K.M.]'s psychological symptoms amplified and met DSM-5 criteria for Major Depressive Disorder; and Posttraumatic Stress Disorder with Panic Attacks. Over time, [K.K.M.]'s depressive and trauma symptoms lessened but persisted. At the time of my assessment of her in July of 2022, [K.K.M.]'s psychological symptoms currently meet DSM-5 criteria for Major Depressive Disorder; and Posttraumatic Stress Disorder with Panic Attacks.

[83] Dr. Klubben identified the symptoms experienced by the plaintiff as including anxiety, hyper-vigilance, fear, flashbacks, nightmares, rumination, panic attacks and avoidance behaviour.

During the alleged violent assault that she experienced on June 30, 2017, [K.K.M.] was quite scared. Immediately following the alleged physical and sexual assault, [K.K.M.]'s pre-existing trauma symptoms amplified. She was consistently anxious and hypervigilant of her surroundings. She avoided leaving the house due to her anxiety. She was quite scared for her safety and her children's safety. She worried the perpetrator was going to hurt her or her children and/or have someone else hurt her. She ruminated extensively. She had considerable difficulties sleeping due to anxiety and rumination. She had daily intrusive trauma symptoms of the assault, including flashbacks and nightmares. She felt disconnected from her body. She started to

experience daily to weekly panic attacks. Her anxiety amplified, as the perpetrator reportedly drove and/or parked by her house frequently. Over time, the trauma symptoms lessened but persisted. At the time of our assessment in July of 2022, [K.K.M.]'s trauma symptoms had continued. She experiences daily anxiety, hypervigilance, and rumination. Her anxiety is particularly about her safety and her children's safety. She continues to engage in avoidant behaviors, such as avoiding leaving the house due to anxiety. She continues to experience intrusive trauma symptoms of the assault, including nightmares and flashbacks. She continues to experience panic attacks. The intensification of her trauma symptoms is consistent with the nature and severity of her alleged physical and sexual assault. Following her alleged assault on June 30, 2017, [K.K.M.]'s psychological symptoms met DSM-5 criteria for Posttraumatic Stress Disorder with Panic Attacks, and continued to do so at the time of our assessment in 2022.

[84] Concerning causation, Dr. Klubben opined that, absent the sexual assault, the plaintiff would not have experienced the "intensification of her psychological symptoms and deterioration in functioning". She also opined that independent of the MVA, the plaintiff would have met the DSM-5 criteria for MDD and PTSD with panic attacks.

I am of the opinion if not for the accident of February 25, 2017, [K.K.M.] would not have experienced psychological problems resulting in the following diagnoses: Acute Stress Disorder; and eventually Posttraumatic Stress Disorder. I am of the opinion that if not for the accident of February 25, 2017, [K.K.M.] would not have experienced intensification of her psychological symptoms and deterioration in functioning, resulting in the following diagnoses: Major Depressive Disorder, in Partial Remission. I am of the opinion that if not for the alleged physical and sexual assault of June 30, 2017, [K.K.M.] would not have experienced intensification and maintenance of her psychological symptoms and deterioration in functioning, resulting in the following diagnoses: Major Depressive Disorder; Posttraumatic Stress Disorder with Panic Attacks. [K.K.M.]'s accident in February of 2017 would have had a contributory impact on problems arising from the assault in June of 2017, which considerably amplified her emotional injuries. That said, I am of the opinion that independent of the accident in February of 2017, given the nature and severity of the alleged physical and sexual assault in June of 2017, [K.K.M.]'s psychological symptoms would have met DSM-5 criteria for Major Depressive Disorder; Posttraumatic Stress Disorder with Panic Attacks. [Emphasis added.]

[85] Dr. Klubben gave the following "guarded" prognosis:

With respect to the prognosis of returning to her pre-accident psychological condition, I feel that [K.K.M.]'s prognosis is guarded. [K.K.M.]'s constellation of physical, psychological, and cognitive problems has resulted in her being less able to cope with the ebb and flow of life's normative stressors. The course of her long-term psychological recovery will be based on a number of factors, which include her physical improvement, the availability of psychological intervention and rehabilitation services to help her with respect to her emotional and physical recovery, resolution of her cognitive problems, and the absence of experiencing other traumatic events. If her physical and cognitive problems do not resolve, her psychological problems will likely be prone to maintenance and/or to relapse.

- [86] I observe that Dr. Klubben does not clearly specify what is meant by the plaintiff's pre-accident psychological condition. However, as she speaks of "constellation of physical, psychological, and cognitive problems" she apparently means the plaintiff's February 2017 condition, not her condition immediately before the sexual assault.
- [87] I further observe that, although Dr. Klubben opines on what the diagnosis would have been but for the MVA, she does not opine on whether or when the plaintiff would have recovered from the MVA injuries if the sexual assault had not occurred.
- [88] Nevertheless, I accept Dr. Klubben's opinions that:
- a) As a consequence of the MVA, the plaintiff suffered from MDD, in partial remission, acute stress disorder, and eventually PTSD;
 - b) These conditions improved such that, immediately before the sexual assault, the plaintiff suffered from MDD, in partial remission; and stressor related disorder but had Insufficient symptoms to meet the full criteria for PTSD; and
 - c) These conditions were exacerbated by the sexual assault such that by July 2022 the plaintiff met the DSM-5 criteria for MDD and PTSD with panic attacks.
- [89] I observe that Dr. Klubben's opinions are generally consistent with the diagnoses of Dr. Penhall over time.
- [90] I further accept Dr. Klubben's summary of the symptoms or emotional injuries suffered by the plaintiff in the sexual assault as including anxiety, hyper-vigilance, fear, flashbacks, nightmares, rumination, panic attacks and avoidance behaviour.
- [91] Concerning the plaintiff's ability to work, Dr. Klubben wrote:
- Due to [K.K.M.]'s psychological trauma following the alleged assault in June of 2017, [K.K.M.] has been unable to resume work as a support worker and/or a hairstylist. It is my opinion that returning to these lines of work would be highly unlikely given the degree and nature of her psychological problems, resulting from the alleged assault. I recommend [K.K.M.] be assessed by a vocational specialist to assess her residual work, volunteer, and recreational skills, aptitude, and interests to determine if she is able to return to an alternative line of work, if any.
- [92] I accept Dr. Klubben's opinion that as of July 2022, the plaintiff was not able to work as a hairdresser or a support worker. However, I do not accept that she continues to be so disabled. The plaintiff has resumed cutting the hair of women friends and has not explained why she is not able to cut hair in a salon. More significantly, since she was assessed by Dr. Klubben, the plaintiff has worked successfully as a tiler with a male boss and applied for two positions in the social work field in 2023. Thus, Dr. Klubben's opinion of the plaintiff's ability to work is outdated and not consistent with the facts.

[93] Before leaving Dr. Klubben's report, I note that she had the plaintiff complete a Personality Assessment Inventory (PAI) and concluded that the results indicated an element of exaggeration of complaints and problems, something that I have independently concluded.

As part of her assessment, [K.K.M.] also completed the Personality Assessment Inventory (PAI) on July 29, 2022. A person with such a validity profile suggests some element of exaggeration of complaints and problems. Any interpretive hypotheses based upon clinical scale elevations should be considered with caution, since there is a high probability that the hypotheses will exaggerate the extent and degree of significant test findings. An elevation in this range may be indicative of a "cry for help" or an extremely negative evaluation of self and life in general; some deliberate distortion of the clinical picture may also be present.

Dr. Hall

[94] Dr. Denise Hall is a vocational consultant and occupational health consultant. She assessed the plaintiff on May 2, 2024, and prepared a report dated May 29, 2024. She opined that the plaintiff was unemployable in any capacity. Her opinion is summarized in the following two paragraphs:

It is my opinion that [K.K.M.] is unemployable. I have based my opinion primarily on the level of psychological distress she presented in the vocational assessment and the fact that Dr. Klubben assessed her in December 2022 and [K.K.M.]'s symptoms have not improved and have possibly deteriorated. Dr. Klubben states: Due to [K.K.M.]'s psychological trauma following the alleged assault in June of 2017, [K.K.M.] has been unable to resume work as a support worker and/or hairstylist. It is my opinion that returning to these lines of work would be highly unlikely given the degree and nature of her psychological problems resulting from the alleged assault.

[K.K.M.] is unable to perform basic tasks in the community and she requires a companion to leave her home. The perpetrator has completed his prison sentence and is still living in the community where she is located. She reported that he is not abiding by the restraining order to stay away from her. She is therefore at risk for further trauma from the perpetrator. The assault occurred in 2017, seven years ago, and she has not worked since. Also, another factor is that her transferrable employment skills are in occupations that are highly unsuitable for her given her psychological symptoms and the potential for working with clients with complex needs.

[95] I do not accept Dr. Hall's opinion that the plaintiff is unemployable. First, she relied heavily on the report and conclusion of Dr. Klubben concerning the plaintiff's employability which I have rejected as being outdated. Second, she opines that the plaintiff's psychological symptoms have not improved and have possibly deteriorated since the date of Dr. Klubben's report, an opinion she is not qualified to give. Third, as with Dr. Klubben, Dr. Hall's assessment and report was done prior to the summer of 2024 when the plaintiff was employed as a tiler. The mere fact that the plaintiff was successfully employed within months of her assessment by Dr. Hall shows the fallibility of Dr. Hall's opinion. Finally, Dr. Hall assumed that the plaintiff required a companion to leave her home, which is not the

case.

Mr. Winter

[96] Mr. Winter is an occupational therapist and functional capacity evaluator. He assessed the plaintiff on May 8 and 9, 2024 and prepared a report dated May 28, 2024. As with Dr. Hall, Mr. Winter opined that the plaintiff was not likely well suited to competitive employment at the time of the assessment.

I have outlined [K.K.M.]'s functional capacities as determined by objective testing in the "Summary, Analysis of Functional Measures" section above. The comments within this section are my opinions with regards to how [K.K.M.] current functions and what she is currently capable of doing. It is my opinion functional testing has determined that [K.K.M.] is not likely well suited to competitive employment positions at this juncture. [Emphasis added.]

[97] Concerning the specific ability of the plaintiff to work as a support recovery worker, hairdresser, and model, he was of the opinion she was not able to carry out such work because of her mental illness.

In your letter, a request for opinion regarding [K.K.M.]'s ability to work as a Support Recovery Worker, Hairdresser, and Model was made. While I am of the opinion [K.K.M.] possesses the necessary physical functions and cognitive abilities to work in these occupations, evaluation findings indicate [K.K.M.] is not currently well suited to competitive employment in any capacity due to her mental health as described in the section above. These occupations will expose her to environment and social stressors that will not be well tolerated in my opinion. [K.K.M.] is currently working as a hairdresser out of her home on a limited basis. She is not currently cutting hair, and will only work with her mother and two of her close friends. [Emphasis added.]

[98] Mr. Winter further opined that part-time employment for the plaintiff would be problematic due to the accommodations that would be required.

As detailed in this report, [K.K.M.] is likely to exhibit levels of functional-decline over the course of objective, formal testing of her functional capacity. These findings, combined with her post-testing symptom experience or reduced functions beyond the evaluation lead me to believe that targeting part time work is more reasonable consideration in this case. Despite these findings, [K.K.M.] will require multiple compensatory considerations to support her functions at this level, such that determining her competitive employability remains in question. [Emphasis added.]

[99] The plaintiff submits that Mr. Winter's report is good evidence that she recovered from the physical injuries suffered in the MVA such that her continued unemployment is due solely to the sexual assault. I disagree. Although the plaintiff suffered physical injuries in the MVA and may have recovered from those physical injuries, she also suffered psychological injuries in the MVA as found by Dr. Klubben and Dr. Penhall and, there is nothing in Mr. Winter's report that would suggest those injuries had resolved or would have resolved had the assault not occurred. Indeed, Mr. Winter is not qualified to give such an opinion.

[100] In any event, the report and opinions of Dr. Winter suffer from the same fatal defects as those of Dr. Klubben and Dr. Hall. As with the other experts, his report does not take into account the fact that the plaintiff successfully worked as a tiler in the summer of 2024.

Damages

[101] The plaintiff claims non-pecuniary damages inclusive of aggravated damages, past and future loss of income, costs of future care, and recovery of health care costs under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27.

Causation

[102] The plaintiff must establish on a balance of probabilities that the sexual assault by the defendant caused or materially contributed to an injury. The sexual assault need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[103] The primary test for causation asks: but-for the defendant's tort, would the plaintiff have suffered the injury? The but-for test recognizes that compensation for tortious conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[104] In special circumstances, the "but-for" test proves unworkable, and the law has applied a "material contribution" test. As Chief Justice McLachlin wrote in *Clements v. Clements*, 2012 SCC 32 at para. 46:

Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[105] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78 [*Blackwater*]:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey v. Leonati*].

[106] I have little difficulty in determining that the plaintiff has proven causation on a balance of probabilities. Based on the uncontroverted evidence of the plaintiff and the report of Dr. Klubben it is clear that the sexual assault caused an aggravation or amplification of the plaintiff's existing medical conditions.

Non-Pecuniary Damages

[107] The plaintiff seeks an award of \$300,000 for non-pecuniary damages inclusive of aggravated damages.

Principles

[108] The assessment of damages is a step distinct from causation. Once causation is established on a balance of probabilities, the defendant is required to put the plaintiff in the position she would have been in the absence of the tort. This requires that the court determine both the position of the plaintiff before the tort (the "original position") and the position of the plaintiff after the tort (the "post-assault position"). The plaintiff's compensable loss is the difference between these two positions: *Athey*, para. 32.

[109] An award of general or non-pecuniary damages is intended to compensate a plaintiff for pain and suffering and loss of enjoyment of life. Some of the factors to be considered when assessing such damages are set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, namely:

- a) The age of the plaintiff;
- b) The nature of the injury;
- c) The severity and duration of pain;
- d) Any resulting disability;
- e) Any emotional suffering; and
- f) Loss or impairment of life;
- g) Impairment of family, marital and social relationships;
- h) Impairment of physical and mental abilities;
- i) Loss of lifestyle; and
- j) The plaintiff's stoicism (a factor that should not, generally, penalize the plaintiff).

[110] The compensation awarded should be fair to all parties. The fairness is normally measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

- [111] There are some special considerations that apply where damages are claimed consequent upon a sexual assault. First, courts now recognize, more so than before, that sexual assault is a form of violence against women and is always grave and serious: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 1999 CanLII 711 (SCC) at para. 68. Second, the upper limit on non-pecuniary damages established by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 (SCC) does not apply to cases of sexual assault or other intentional torts involving criminal behaviour: *S.Y. v. F.G.C.*, 1996 CanLII 6597 (BC CA) at para. 30 [S.Y.]. Third, aggravated damages, although frequently claimed as a separate head of damages, are not a separate category but are part of the assessment of general damages: *S.Y.* at paras. 35-36. Fourth, what is fair and reasonable compensation in sexual assault cases is a particularly individual assessment and amounts awarded in other cases provide only a rough guide: *S.Y.* at paras. 55-56. Finally, the range of damages in sexual assault cases is generally from \$100,000 to \$175,000 (accounting for inflation the range is from approximately \$180,000 to \$315,000): *S.Y.* at para. 50.
- [112] There are special considerations that apply where, as here, the plaintiff suffers from pre-existing conditions. Such conditions are addressed in the assessment of damages using either the so-called "thin skull" or "crumbling skull" rules.
- [113] The "thin skull" rule is that the defendant is liable for injuries caused even though those injuries are more serious because of a pre-existing condition: *Athey* at para. 34. The "crumbling skull" doctrine holds that the defendant need not compensate a plaintiff for the debilitating effects of pre-existing conditions. The defendant must, however, compensate the plaintiff for any additional injury. Moreover, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future in the absence of the tort, this can also be taken into account in reducing the overall award: *Athey* at para. 35; *Dornan v. Silva*, 2021 BCCA 228 at paras. 45-46 [Dornan].
- [114] These various principles were summarized by McLachlin, C.J.C. in *Blackwater v. Plint*, 2005 SCC 58 at paras. 78-81:
- [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*
- [79] At the same time, the defendant takes his victim as he finds him -- the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are

damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

- [80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
- [81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.
- [115] The determination of whether a pre-existing condition would have affected the plaintiff in the future had the tort not occurred involves a hypothetical. There must be a real and substantial possibility, or a measurable risk, that the event (i.e. a deterioration in the plaintiff's pre-existing condition in the absence of the tort) will occur, or would have occurred, before the court will take it into account. Mere speculation is not enough. Once it is determined that there is measurable risk, the task of the court is to then assess the relative likelihood of the event occurring in accordance with the evidence and to adjust the damages accordingly; *Dornan* at paras. 62-64, 75-77 and 133.
- [116] The plaintiff submits that the thin skull rule applies in these circumstances and that the defendant is responsible for the entirety of her loss. The plaintiff makes specific reference to her troubled youth which she says left her vulnerable to greater injury than what an average person may have suffered.
- [117] I do not agree that the thin skull rule applies or that the defendant is liable for the full extent of the plaintiff's injuries following the assault. The thin skull rule does not apply for two reasons. First, it is not apparent that the plaintiff has suffered a greater injury than the average person from the assault. In fact, her injuries are in most respects the normal and usual consequences of a sexual assault, which is not to say that they are not serious but rather that virtually all sexual assaults have similar serious consequences. Further, the thin skull rule applies "only if the plaintiff's previous condition was one from which it was not to be expected that she would otherwise ever have suffered again in the future": *Zacharias v. Leys*, 2005 BCCA 560 at para. 25, citing, *Hooiveld v. Biert* (1993), 87 B.C.L.R. (2d) 160, 1993 CanLII 1753 (BC CA) at para. 31. This was clearly not the case with the plaintiff. At the time of the sexual assault she was suffering from multiple pre-existing conditions and there was a real and substantial possibility, indeed there was a virtual certainty, that she would

continue to so suffer to some degree from those injuries into the future.

[118] Accordingly, I assess the plaintiff's damages on the basis of the crumbling skull rule, which is to say that I assess the damages on the basis of the difference between the plaintiff's original position and her post-assault position.

Assessment

[119] As indicated, the plaintiff claims \$300,000 for general damages including aggravating circumstances.

[120] The plaintiff's original condition in this matter was not that of a healthy individual. To the contrary, prior to the MVA, she suffered from long-term depressive symptoms, anxiety, sleep issues, and occasional pain. Further, following the MVA and before the sexual assault, in addition to the pre-MVA medical conditions she also suffered from concussion symptoms, soft tissue injuries, back pain and met the DSM-5 criteria for MDD in partial remission and PTSD, which improved by the time of the sexual assault to become a stressor related disorder. As a consequence of these pre-assault injuries, the plaintiff was unable to enjoy activities such as hiking and going to the gym and she was unable to work except for cutting hair at her home. However, she was able to attend AA meetings, an important part of her life, and continued to have friends over at home and to generally enjoy life.

[121] The plaintiff's post-assault position was diagnosed by Dr. Klubben as meeting the DSM-5 criteria for MDD and PTSD with panic attacks. Dr. Klubben further opined that the plaintiff's pre-existing conditions were "amplified" by the sexual assault. The plaintiff's symptoms included anxiety, hyper-vigilance, fear, flashbacks, nightmares, rumination, panic attacks and avoidance behaviour.

[122] The sexual assault had a very significant affect on the plaintiff. I accept that the affects included:

- a) She has feelings of guilt, shame, and low self-esteem;
- b) She had suicidal thoughts and a desire to start drinking again;
- c) She became introverted;
- d) She developed a crippling fear of the defendant;
- e) She developed a fear of men which may have been debilitating at one time but which, by the time of the trial, had improved such that she is able to be around men and even work with men;
- f) She has had difficulties dating men;
- g) She has been unable to attend AA meetings, an important part of her life;

- h) She became reclusive and developed a fear of leaving her home but this condition improved such that, by the time of the trial, it does not prevent her from leaving her home. Moreover, the fear appears to be mostly related to the possibility of encountering the defendant in the community;
- i) She has been unable to cut hair in her home except for her mother's hair and the hair of close friends; and
- j) Although she is still able to do most of the things she did prior to the sexual assault, her enjoyment of life is significantly diminished because of the anxiety and fear she experiences, in particular, because of living in the same community as the defendant.

[123] The plaintiff has referred me to several cases which she says support an award of non-pecuniary damages in the amount of \$300,000. I now address those cases.

[124] S.Y. involved the repeated sexual abuse of the plaintiff by her stepfather when she was between the ages of 14 and 18. The total number of incidents was unclear. The plaintiff's evidence was capable of supporting 700 incidents but the defendant admitted to only 24 incidents. The plaintiff was 36 years of age at the time of the trial. The evidence indicated the plaintiff suffered from, among other things, disassociation from her feelings, mistrust of others particularly older men, depression, anxiety, suicidal feelings, promiscuity, substance abuse, and lack of self-confidence and low self-esteem. There was also evidence of aggravating circumstances including, breach of trust by the defendant due to his position as step-father, the number of assaults, the duration of the abuse, the age of the plaintiff, the degree of violence and coercion, the extent of penetration, lack of remorse on the part of the defendant, and threats by the defendant. The plaintiff was awarded \$350,000 in non-pecuniary damages by a jury at trial. On appeal, the Court of Appeal held the award was "wholly out of proportion" to the circumstances. The Court of Appeal reduced the award to \$250,000. (Adjusted for inflation this amount would be approximately \$450,000 in today's dollars.)

[125] There are multiple obvious and significant dissimilarities between the facts in S.Y. and those before me. The most significant differences are the age of the plaintiff at the time of the abuse, the fact the defendant was in a position of trust, the number of incidents, and the duration of the incidents. As a consequence of these differences, I find the award in that case to not be indicative of what the award should be here.

[126] M.B. v. 2014052 Ontario Ltd., 2012 ONCA 135 [M.B.], involved an appeal of an award of \$300,000 by a jury for general damages. The circumstances of the case were the plaintiff was sexually assaulted four times by her employer and supervisor. As a consequence of the assaults the plaintiff felt shame, was afraid to leave her home, installed double locks on her bedroom door, purchased an alarm system, experienced nightmares, suffered from insomnia and a loss of sexual desire and experienced intermittent suicidal ideations. The expert evidence established the plaintiff suffered from dissociative episodes, rumination, somatization, intrusive memories of the trauma, flashbacks, chronic major depressive

disorder, chronic PTSD, anxiety, headaches, stomach upset, pain, dizziness, weakness, fatigue and blank spells. The jury award of \$300,000 (approximately \$390,000 in today's dollars). The award was upheld by the Ontario Court of Appeal but the court noted, at para. 70, that the amount was high and not what a court would make.

- [70] There is no doubt that the jury's award for general damages was high and outside of the generally expected range. Nonetheless, I would not interfere. Although it is certainly generous and may not have been one this court would make, it is not so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole, and acting judicially, could have reached it: see *McCannell v. McLean*, 1937 CanLII 1 (SCC), [1937] S.C.R. 341, [1937] S.C.J. No. 23, at p. 343 S.C.R. Jury awards attract significant deference. This award, though outside the general range, is not, in my view, so exceptional as to warrant appellant intervention.
- [127] Important differences between the circumstances in *M.B.* and those before me are that the plaintiff was assaulted four times, the perpetrator was her employer and supervisor and her injuries were more severe than those of the plaintiff.
- [128] Other cases to which I have been referred by the plaintiff are, as follows:
- a) *C.M.A. v. Blais*, 2022 BCSC 214 [C.M.A.], where the plaintiff was awarded \$250,000 in general damages. The circumstances of that case were again quite different from the case before me. In *C.M.A.* the plaintiff was sexually assaulted on at least two occasions by a man she called "uncle" who was in a position of trust. The first assault was when the plaintiff was 10 or 11 years of age. The last was when she was a teenager. Chief Justice Hinkson determined that, as a consequence of the assaults, the plaintiff suffered from PTSD, depression, anxiety, periods of self-mutilation, impairment of sexual enjoyment, low self-esteem, and feelings of humiliation, embarrassment, and lack of self-worth. He awarded the plaintiff \$250,000 (approximately \$270,000 in today's dollars);
 - b) *D.M. v. R.L.* 2014 BCSC 1061 [D.M.], where the plaintiff was repeatedly sexually and physically abused by her stepfather from the time she was five years of age. Justice B.J. Brown noted that the range of damages for sexual assault was between \$150,000 and \$265,000 (approximately \$195,000 to \$345,000 in today's dollars) and awarded the plaintiff \$200,000 (approximately \$255,000 in today's dollars) in general damages. Justice Brown explained "[t]he abuse in this case took place over a prolonged period, but after January 1968, the abuse was less invasive than in many cases"; and
 - c) *Anderson v. Molon*, 2020 BCSC 1247 [Anderson], where the plaintiff was awarded \$275,000 (approximately \$320,000 in today's dollars) in general damages but reduced by 15% to take into account pre-existing psychological conditions. The circumstances were that the plaintiff, while a 27-year-old teacher at a Catholic school became involved in a sexual relationship with a priest. Justice Crossin described the relationship as one "born of a betrayal of trust and perpetuated by an abuse of power". He further described the abuse the plaintiff suffered as "protracted and ongoing" and "degrading and highly invasive". He noted

the abuse occurred repeatedly over months.

- [129] There are again important differences between the circumstances in C.M.A., D.M. and Anderson and those before me. In C.M.A., the plaintiff was a child when the first assault occurred, there were at least two assaults, and the perpetrator was in a position of trust. In D.M. the plaintiff was also a child, there were multiple assaults over several years and the perpetrator was a step-father. In Anderson, the abuse was protracted and the perpetrator was in a position of trust.
- [130] None of the cases to which I have been referred by the plaintiff are truly comparable to the matter before me. This assault was a single incident, could not have been of a long duration, and did not involve penile penetration. The injuries suffered by the plaintiff as a consequence of the assault are also generally, not as serious as those in the cases to which I have been referred. Thus, I consider the cases to which I have been referred to do little more than establish an upper limit on the damages.
- [131] In addition to the plaintiff's original and post-assault positions, I also take into account the following factors in the assessment of the non-pecuniary damages in this matter:
- a) The plaintiff was approximately 32 years of age at the time of the assault. She was, therefore, not as young as many of the plaintiffs in the cases to which I have been referred;
 - b) The assault was violent, grave, and serious but not as prolonged or serious as in many of the cases to which I have been referred;
 - c) The assault occurred in the plaintiff's home, a significant aggravating factor;
 - d) The defendant's conduct in "revving" his engine outside the plaintiff's house, and in playing "cat and mouse" with her at the grocery store are aggravating circumstances; and
 - e) The defendant's continued denial of the assault and lack of remorse are aggravating circumstances.
- [132] In my view, considering the plaintiff's original and post-assault positions, the cases to which I have been referred and the other factors and circumstances set out above, an award of non-pecuniary damages in the amount of \$200,000 is fair and reasonable.

Loss of Earning Capacity Generally

- [133] The plaintiff claims damages for past loss of earning capacity in the amount of \$30,000 and for future loss of earning capacity in the amount of \$350,000.
- [134] The purpose of an award for loss of earning capacity is to restore an injured plaintiff to the position they would have been in if the accident, or assault in this case, had not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[135] In *Rab v. Prescott*, 2021 BCCA 345 [Rab], the Court of Appeal clarified that there are three steps involved in the analysis of a loss of capacity claim:

- a) First, is there a potential future event that could lead to a loss of capacity;
- b) Second, is there a real and substantial possibility that the future event in question will cause a pecuniary loss; and
- c) Third, what is the value of that loss, which must include an assessment of the likelihood of that event occurring.

[136] Steps 1 and 2 of the analysis go to entitlement to an award. Step 3 goes to the valuation of the award.

[137] Once entitlement is established, the loss is quantified using either the earnings approach or the capital asset approach. The appropriate means of assessment will vary from case to case: *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.); *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.); *Pett v. Pett*, 2009 BCCA 232. The earnings approach is more appropriate where the loss is measurable. The earnings approach involves a calculation of the present value of the plaintiff's annual loss of income over the remaining years of employment.

[138] The capital asset approach is appropriate where the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Cases where the plaintiff is employed at trial and is earning at or near his or her pre-accident income but has continuing deficits, or is exposed to future problems because of accident-caused injuries, lend themselves to the capital asset approach: *Rab* at para. 29. The amount of the award can be based on the plaintiff's annual income for one or more years.

[139] Under either the earnings approach or the capital asset approach, damages are assessed, not calculated: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The assessment involves a consideration of hypothetical events and contingencies, both positive and negative. Hypothetical events need not be proven on a balance of probabilities but, provided they are not speculative, are given weight according to their relative likelihood: *Athey* at para 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[140] The plaintiff submits that the awards for past and future loss of capacity should be based on the capital asset approach as she was just starting her career in social work and her career objectives were under development. Notwithstanding this submission, the plaintiff's calculation of her losses are more related to the earnings approach than the capital asset approach. In any event, I am satisfied that the awards can be properly assessed using the earnings approach and this is the approach I will use.

Past Loss of Earning Capacity

[141] The plaintiff seeks an award for past loss of earning capacity in the amount of \$30,000.

- [142] In my view, the plaintiff has established entitlement to an award of past loss of earning capacity, which is to say she has established an event giving rise to a loss of capacity and a real and substantial possibility that the event will cause a pecuniary loss. Prior to the sexual assault, the plaintiff was actively engaged, part-time, in the business of cutting hair from her home. This was her only source of employment or business income at the time. Subsequent to the assault she was unable to cut hair except eventually for her mother and close friends. She was also unable to pursue other employment until late 2023. This is an obvious case of entitlement to an award for loss of capacity: Rabat para. 29.
- [143] The plaintiff submits that had the sexual assault not occurred, she would have recovered from the injuries suffered in the MVA and returned to work in May 2020. However, she concedes that, because of the COVID-19 pandemic, she would not have been able to work in the years 2020, 2021 and 2022. She further concedes that she would have worked only part-time in 2023 and 2024 due to childcare responsibilities. She says that working part-time (50% of full time) from January 1, 2023 to September 2024, she would have earned \$46,898 (based on an average annual salary of \$53,599 for a person in the classification of Certificate, Personal Grooming, all as set out in the report of Mr. Wickson). She further concedes that social assistance payments received during this time period (of \$16,814) must be deducted from the income she would have earned, leaving a balance of \$30,000, the amount she claims.
- [144] I accept that the plaintiff would not have worked in the years 2020-2022 inclusive because of the COVID-19 pandemic and the nature of the plaintiff's work. There are, however, several assumptions or hypothetical events contained in the plaintiff's submissions that must be addressed. They are:
- a) When would the plaintiff have recovered from her MVA injuries and returned to work if the sexual assault had not occurred?
 - b) Would the plaintiff have worked 50% of a full-time job?
 - c) Would the plaintiff have been remunerated based on the average annual salary for a person in the classification of Certificate, Personal Grooming?
- [145] As noted above, hypothetical events need not be proven on a balance of probabilities but, provided they are not speculative, are given weight according to their relative likelihood.
- [146] The first hypothetical is when would the plaintiff have returned to work if the sexual assault had not occurred. The plaintiff relies on the evidence of Dr. Penhall who testified that, on June 24, 2019, he completed a Severe Permanent Disability Benefit Medical Report wherein he stated the primary reason the plaintiff was not then able to work was due to severe anxiety and PTSD. However, this statement is not an opinion of when the plaintiff would have returned to work in the absence of sexual assault and, in any event, Dr. Penhall was not qualified as an expert. Moreover, Dr. Klubben's report provides no assistance in this regard as she did not opine on this issue.

- [147] Nevertheless, in my view there is a strong likelihood that the plaintiff would have returned to social services work by 2023, which is all that matters since the plaintiff only seeks past loss of income for the years 2023 and 2024. I am of this view because the injuries suffered in the MVA, although serious were not completely disabling, as evidenced by the fact she was able to cut hair from her home after the MVA.
- [148] The plaintiff submits that, if the sexual assault had not occurred, she would have worked part-time, or 50% of a full-time job, because she had childcare responsibilities. There are two parts to this submission which must be considered separately. The first is that the plaintiff worked part-time because of childcare responsibilities. The second is that, absent the sexual assault, she would have worked 50% of full time. The first is a past event which the plaintiff must prove on a balance of probabilities. The second is a hypothetical event.
- [149] I do not accept that the plaintiff worked part-time because of childcare responsibilities. Importantly, the plaintiff did not testify that she worked part-time for this reason. In my view, it is much more likely that she worked part-time prior to the MVA and sexual assault because of her significant and ongoing pre-existing medical conditions. Moreover, her children would have been of school age in 2017 and much older in 2023. Their ages in 2017 would have been approximately 5, 12 and 14. It would not have been necessary for the plaintiff to work part-time to look after her children.
- [150] I also do not agree that there was a real and substantial possibility that the plaintiff would have worked 50% of a full-time position in 2023 and 2024. The plaintiff's history is not indicative of her working this much, again likely because of her pre-existing medical conditions. The plaintiff's T4 incomes in 2015 and 2016 were \$23,548 and \$9,610 respectively. It is possible the T4 income in 2015 represents 50% of a full-time job but the plaintiff has failed to provide the T4 slips or other evidence corroborating this. In any event, assuming her 2015 T4 income was 50% of full-time work, her T4 income in 2016 of \$9,610 indicates she was working only approximately 20% of a full-time job. (I note here that I have rejected the plaintiff's evidence that her income in 2016 was lower than in 2015 because she was taking online courses at Thompson Rivers University.) Further, the plaintiff's T4 income for the approximate two-month period from January 1 to February 25, 2017 was \$2,749. Had the plaintiff continued to work throughout 2017 at this level, she would have earned approximately \$16,500 (6 x \$2,749), which represents approximately 35% of a full-time job, again assuming her 2015 T4 income was 50% of full-time work.
- [151] I am mindful the plaintiff testified that, before the MVA, she was working approximately 20 hours per week in two places, which equates to 50% of a full-time job. However, I do not accept this evidence as it is refuted by her income tax returns which suggest that in 2016 and the approximate first two months of 2017 she was working between 20% and 35% of a full-time job.

- [152] Given the plaintiff's work history and the minimal evidence of the amount of time the plaintiff actually worked, I am of the view that, if the sexual assault had not occurred, there is only a small possibility that she would have worked 50% of a full-time job and a significantly higher possibility that she would have worked 20% of a full-time job.
- [153] The third assumption or hypothetical in the plaintiff's calculation is that she would have been remunerated based on the average annual salary for a person in the classification of Certificate, Personal Grooming. This hypothetical is based on the report of Robert Wickson who was retained to provide information and calculations to assist in the determination of the plaintiff's pecuniary loss claims.
- [154] In *Laurin v. Tiemer*, 2025 BCCA 55 at paras. 41-42, Justice Abrioux recently confirmed the usefulness of such reports and the need for judges to consider the economic evidence they provide.
- [41] This Court has repeatedly recognised that economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 [Dunbar] at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 [Parypa] at para. 70. As this Court affirmed in *Dunbar*, such evidence provides "helpful context by identifying in a general sense the magnitude of the plaintiff's loss": at para. 20. Justice Groberman recently affirmed, in *Dong*, that:
- [27] A judge is required to assess the damages in each individual case after full consideration of the evidence.
- [28] Although an award for loss of future earning capacity is not a simple mathematical calculation, "if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them" (*Jurczak v. Mauro*, 2013 BCCA 507 at para. 37) and should not brush them aside without reason (*Fatla* at paras. 40-43).

[Emphasis in original.]

- [42] Indeed, in *McHatten v. Insurance Corporation of British Columbia*, 2023 BCCA 271 [McHatten], this Court recognised that a judge's failure to analyze available economic evidence, in comparing a plaintiff's with- and without-accident earnings, may constitute a reviewable error: at para. 26; see also *Jurczak v. Mauro*, 2013 BCCA 507 at para. 37.
- [155] Mr. Wickson prepared calculations for different groups, namely:
1. College or Other Non-university Certificate or Diploma - Cosmetology and related personal grooming services (CIP 12.04);
 2. College or Other Non-university Certificate or Diploma - Mental and social health services and allied professions (CIP 51.15);
 3. Bachelor's Degree or University Certificate Above Bachelor Level -Social work (CIP 44.07);

4. College or Other Non-university Certificate or Diploma - Criminology (CIP 45.04); and
5. Bachelor's Degree or University Certificate Above Bachelor Level -Criminology (CIP 45.04).

[156] The estimates of earnings prepared by Mr. Wickson are based on the average earnings of B.C. females from the 2021 Census data as published by Statistics Canada, allowing for wage inflation. At p.19 of his report, Mr. Wickson advises that the 2024 average annual income of a female in the classification of cosmetology and related personal grooming services (CIP 12.04) is \$53,599.

[157] I agree with the plaintiff that it is appropriate to use the \$53,599 figure as a starting point for the assessment of the plaintiff's past loss of capacity. This is so because the plaintiff has admitted she did not report her income from hairdressing on her tax returns and there is a dearth of evidence on the plaintiff's true earnings history. Further, the figure of \$53,599 is very roughly half of the amount she earned in 2015, which suggests the CIP 12.04 classification amounts are reasonably accurate for the plaintiff.

[158] Using the figure of \$53,599 from Mr. Wickson's report, during the period from January 1, 2023 to the date of trial, the plaintiff would have earned \$46,899 ($\$53,599 \times 1.75 \text{ years} \times 0.5$) if she worked 50% of full-time and \$18,759 ($\$53,599 \times 1.75 \text{ years} \times 0.2$) if she worked 20% of full-time. The amount would be \$33,013 if she worked 35% of full-time.

[159] Another way of calculating the plaintiff's loss is to take the average of her T4 income in 2015 and 2016 and extrapolate that amount to cover the period from January 1 2023 to trial. The average of her T4 incomes in 2015 and 2016 is \$16,579. If this amount is extrapolated to cover the period from January 1 2023 to trial, the amount is \$29,013 ($\$16,579 \times 1.75 \text{ years}$). The amount would be higher if more weight is given to the plaintiff's 2015 T4 income and lower if more weight is given to her more recent 2016 T4 income.

[160] Considering all of the above evidence, hypotheticals and calculations, I conclude that, subject to deductions, an appropriate and fair award for past loss of earning capacity would be \$30,000.

[161] There are two necessary deductions that must be made. First, as conceded by the plaintiff, the social assistance payments of \$16,814 received by her must be deducted, leaving a net of \$13,186. An additional deduction is also necessary to take into account the amounts the plaintiff earned during this period since the plaintiff admitted to cutting hair of some friends and admitted to working as a tiler in June 2024. The amount of those earnings is not before me as the plaintiff did not provide any evidence of her earnings from those jobs. Doing the best I can with the minimal evidence I have, I apply a deduction of \$2,000 for these earnings, which is roughly equivalent to the amount she earned from employment in January and February 2017.

[162] Accordingly, I award the plaintiff \$11,000 for past pecuniary loss.

Future Loss of Earning Capacity

- [163] The plaintiff submits that she is entitled to an award for future loss of earning capacity in the amount of \$350,000 based on a range of between \$327,565 and \$392,398.
- [164] Entitlement to an award for loss of future earning capacity depends on there being a future event giving rise to a loss of capacity and a real and substantial possibility that the event will cause a pecuniary loss.
- [165] Although I have found that the plaintiff is capable of working, I am satisfied that she is entitled to an award for future loss of capacity. The plaintiff was able to cut hair in her home before the sexual assault but, since the assault, she is unable to do so except for the hair of her mother and close friends. This is, in itself, a loss of capacity. Additionally, the plaintiff worked as a tiler in June 2024 but had to quit that job because her boss knew the defendant and brought him up in conversation, which made her feel uncomfortable. This illustrates that the plaintiff's employment opportunities are more limited as a consequence of the sexual assault.
- [166] The plaintiff calculates her loss on the basis that, but for the sexual assault, she would have obtained either a certificate in mental health or a certificate in criminology and would have worked full-time in one or the other of those fields until the age of 70. Her calculations begin with the present value of the lifetime earnings for a person of the plaintiff's age with such certificates. These are taken from Mr. Wickson's report. The present value amounts are \$1,091,833 for a person with a certificate in mental health and \$1,307,944 for a person with a certificate in criminology. The plaintiff then applies a 20% negative contingency to these amounts reducing them to \$873,466 ($\$1,091,833 \times 0.8$) and \$1,046,355 ($\$1,307,944 \times 0.8$). These are the amounts the plaintiff submits she would have earned had the sexual assaults not occurred. However, the plaintiff apparently concedes she will be able to work 50% of full time in these fields. She calculates that she will earn \$545,941 ($\$1,091,833 \times 0.5$) with a certificate in mental health or \$653,997 ($\$1,307,944 \times 0.5$) with a certificate in criminology. The plaintiff then calculates her loss as \$327,525 ($\$873,466 - \$545,941$), if she works in mental health, and as \$392,358 ($\$1,046,355 - \$653,997$), if she works in criminology.
- [167] The plaintiff's calculations involve several hypotheticals concerning future events, i.e. what would have happened, if the sexual assault had not occurred, namely:
- a) That she would have obtained a certificate in either mental health or criminology;
 - b) That she would have obtained full-time employment in one of these fields;
 - c) That she will now work only 50% of a full-time job in those fields; and
 - d) That she would have worked until age 70 in one of these fields.

[168] I will address each of these hypothetical events. In doing so, I remind myself that there must be a real and substantial possibility that the event would have occurred before it is quantified.

Career Plan

[169] The first hypothetical is that the plaintiff would have obtained a certificate in either mental health or criminology if the sexual assault had not occurred. I have set out the plaintiff's evidence of her career plan. In summary, she testified that she wanted to obtain a degree in social work and become a social worker for women. She testified to taking several single-day online courses between 2015 and 2020 for which she received certificates or diplomas. She also testified to taking four online courses at Thompson Rivers University, one of which was in social work and which she quit because it was too hard. The plaintiff later testified that she was interested in pursuing a career in justice, by which I assume she meant criminology. She said she had been accepted at the Justice Institute of Vancouver Island University but could not attend because of this court case. I infer from her evidence that her interest in criminology arose sometime after the sexual assault.

[170] I am not satisfied there is a real and substantial possibility that, absent the sexual assault, the plaintiff would have obtained a certificate in either social work or criminology. First, she did not explain why she had never previously pursued a certificate or degree in social work or criminology. She was 32 years of age in early 2017 and 39 years of age as of the trial. If obtaining a certificate or degree in social work or criminology was her career plan, why had she never pursued it, other than to take a single course in social work. Second, and relatedly, prior to taking the online courses at Thompson Rivers University, the plaintiff had not pursued any formal post-secondary education whatsoever. Third, the plaintiff quit the only social work course she ever took simply because she found the coursework too difficult and it was at a time when she said her life was generally good. Finally, the plaintiff's alleged interest in criminology seems to be an afterthought rather than a carefully considered career objective.

[171] In my view, given the plaintiff's age and her limited involvement and success with post-secondary education, her career plans are aspirational and speculative. In other words, there is not a real and substantial possibility that she would have obtained a certificate in either social work or criminology if the sexual assault had not occurred. Therefore, her loss is to be assessed based on the same classification as was used for her past loss of capacity claim, namely, cosmetology and related personal grooming services (CIP 12.04).

Full-Time Employment

[172] The second hypothetical is that the plaintiff would have obtained full-time employment had the sexual assault not occurred. Relatedly, the plaintiff submits that her future loss of capacity claim should be assessed based on her working 50% of full-time.

[173] In my discussion of the appropriate award for the plaintiff's past loss of capacity claim, I addressed her work history and determined that, if the sexual assault had not occurred there was a small possibility that she would have worked 50% of a full-time job and a significantly higher possibility that she would have worked 20% of a full-time job. These same determinations ought to apply to the claim for future loss of capacity. The plaintiff had significant and ongoing pre-existing medical conditions. She never worked full-time prior to the sexual assault. There is no basis in the evidence supporting a real and substantial possibility that the plaintiff would have worked full-time had the sexual assault not occurred. The evidence merely supports a small possibility that she would have worked 50% of a full-time job and a significantly higher possibility that she would have worked 20% of a full-time job.

Retirement Age

[174] The final hypothetical in the plaintiff's calculations is that she will work until the age of 70. This hypothetical is completely unsupported by the evidence. The plaintiff did not testify that she planned or plans to work until the age of 70. Moreover, given the plaintiff's pre-existing and ongoing medical conditions, retirement at the age of 70, as opposed to 65, seems highly improbable and speculative. Therefore, her loss is to be assessed based on the usual retirement age of 65.

Assessment

[175] According to the report of Mr. Wickson, the cumulative present value of the average earnings of a female of the plaintiff's age who works until age 65 in the field of cosmetology and related personal grooming services is \$765,888. The cumulative present value would be \$382,944 for a person who works 50% of a full-time job in that field and \$153,177 for a person who works 20% of a full-time job. These figures must be adjusted for contingencies.

[176] The main contingency that must be applied is to take into account the possibility that the plaintiff, in her present post-assault condition, will secure employment. In my view, that possibility is high. There are several facts and factors that lead me to this conclusion, namely:

- a) I have rejected the idea that the plaintiff's fear of men and fear of going outside impair her ability to secure employment;
- b) I have found that the plaintiff is not disabled from working. She worked successfully as a tiler in June 2024. She should also be able to resume work in the social services field, as she applied for two such jobs in December 2023. She did not get those jobs because she was not qualified for them. Her failure to secure those jobs had nothing to do with her post-assault condition;

- c) She did not really explain why she could not cut hair for other women or why she could not cut hair in a salon; and
- d) The plaintiff apparently concedes by her submissions and calculations that she will be able to work 50% of full time.

[177] Additionally, the diminishment in the plaintiff's employment prospects appear to be largely situational. This is evidenced by her lack of anxiety while away from Campbell River in Las Vegas, her concern about modelling outside was because people who knew the defendant might see her, and her quitting her job as a tiler because her boss knew the defendant. Her anxiety and employment prospects will improve if she moves from Campbell River to Nanaimo, which is a distinct possibility since she indicated she wished to do exactly this.

[178] Considering all of the above, I am of the view that there is approximately an 80% possibility that the plaintiff will be able to secure part-time employment in her post-assault condition. Put differently, I am of the view that over her remaining working life she will suffer a reduction in income of approximately 20% because of the injuries suffered in the sexual assault and the effects of those injuries. This translates to a future pecuniary loss of \$76,588 ($\$382,944 \times 0.2$) at 50% of full time and \$30,635 ($\$153,177 \times 0.2$) at 20% of full time. Her actual loss is likely somewhere between these two figures but somewhat closer to that of a person working 20% of full-time.

[179] Again, considering that this is an assessment and not a calculation, I award the plaintiff \$55,000 for future loss of capacity, which amount I consider to be fair and reasonable.

Costs of Future Care

[180] The plaintiff claims \$625-750 for the costs of future care based on the recommendations of Dr. Hall that she receive five counselling sessions with a vocational consultant.

[181] I award her the amount of \$750 for the costs of future care.

Orders

[182] In total, I award the plaintiff \$266,750 comprised of the following:

- a) \$200,000 for pecuniary damages;
- b) \$11,000 for past pecuniary loss of capacity;
- c) \$55,000 for future pecuniary loss of capacity; and
- d) \$750 for costs of future care.

[183] I additionally award the sum of \$1,609.52 under the provisions of the Health Care Costs Recovery Act, S.B.C. 2008, c. 27.

[184] The parties have leave to speak to me regarding the costs of the trial.

"Giaschi J."

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