

CANADA / JUDGMENT

Mac v. Liao

2024 BCSC 609

COURT

Supreme Court of British Columbia

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2024 BCSC 609 Mac v. Liao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mac v. Liao,

2024 BCSC 609

Date: 20240514

Docket: M188378

Registry: Vancouver

Between:

Cindy Mac

Plaintiff

And

Ping Hun Liao, Charlotte Victoria Hopkins, Jagwinder Singh Sohi,

Chelsea Eileen Knowles, Justin Adam Ling,

Lucky Eight Enterprises Ltd. & John Kuok Ling

Defendants

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

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K. Naish

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Place and Dates of Trial:

Vancouver, B.C.

August 8-12, 15-19, September 15,

October 25 and November 7, 2022;

February 10, November 6 and December 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

May 14, 2024

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I. INTRODUCTION

[1] This trial relates to injuries the plaintiff, Cindy Mac, alleges she suffered as a result of a car accident that occurred on December 31, 2016 (the "Accident"). Ms. Mac was born in March 1995 and was 27 years old at the time of trial. The Accident occurred when the plaintiff was almost 22 years old. The plaintiff was a passenger in a car driven by the defendant, Ping Hun Liao. Ms. Liao's car rear-ended a vehicle and was then struck from behind by a vehicle operated by the defendant, Chelsea Eileen Knowles. The plaintiff discontinued her claim

against the other named defendants.

- [2] The plaintiff was also involved in a second accident, also occurring on New Year's Eve on December 31, 2020 (the "Second Accident"), but the Second Accident does not form part of the plaintiff's claim.
- [3] There were many disjointed days of hearing in this trial. Part of the reason for the protracted trial was that, as I will describe below, the defendants became aware that the plaintiff had been in a third motor vehicle accident on May 30, 2022 (the "Third Accident"). The defendants only learned of the Third Accident during the plaintiff's testimony at trial. In fairness to the defendants, the trial was adjourned to allow the defendants to make inquiries about the Third Accident and determine, what, if any, relevance the Third Accident would have on the litigation. Ultimately, the defendants take the position that the Third Accident is relevant only to the extent that it provides evidence that the plaintiff recovered quickly from the Third Accident, despite it appearing to be significant. The defendants argue that the plaintiff's quick recovery from the Third Accident demonstrates the plaintiff likely also recovered from her injuries from the Accident quickly and that the Accident did not have as significant an impact on her life as she claims.
- [4] The defendants admit liability for the Accident. Accordingly, the issues before the Court are whether, and to what extent the Accident is the cause of the plaintiff's injuries as well as the quantification of any damages arising from those injuries. The most contentious of the issues, both in terms of difference in the parties' monetary positions and their respective views of the evidence, is the plaintiff's claim for her loss of earning capacity, both past and future. More specifically, the contentious issue is, if the Accident had not occurred, whether the plaintiff would have worked full-time hours and taken on overtime shifts as a nurse.
- [5] The issue is made more complicated in the circumstances of this case, because at the time of the Accident, the plaintiff had not yet even commenced her training to become a nurse. As such, there is more limited information upon which to make a meaningful comparison between the plaintiff's before-accident and after-accident career trajectory to assess her potential loss of earning capacity.
- [6] In these reasons for judgment, I will first provide a brief summary of the nature of the Accident for context and then turn to my findings of fact regarding the plaintiff's pre-accident background and health. I will then turn to my analysis and determination of the issues, under which I set out my findings of fact in respect of the causation, diagnosis and prognosis of the plaintiff's injuries as well as my assessment of damages.

II. BACKGROUND FACTS

A. The Plaintiff's Testimony - Credibility and Reliability

- [7] Before addressing the plaintiff's testimony as it relates to her description of the Accident and her circumstances before and after the Accident, I will first comment on the quality of her testimony. The plaintiff consistently demonstrated a poor memory of many of the specific events of her life. During her testimony she answered, "I cannot recall" in excess of one hundred times. Her memory of the particular details of her work history and health treatment history was lacking. Her recall of timelines and details of her condition at various points over the past years as well as her treatment was weak at best. I would characterize her evidence as vague and generalized.
- [8] While I find it somewhat surprising that the plaintiff's memory about specific matters was so poor, I do not conclude that her lack of detail or forgetfulness was engineered or motivated to gain an advantage or to deceive the Court. In my view, the plaintiff did her best to tell the truth, but if she did not know an answer she would admit she did not recall the answer. To this extent, her evidence was so consistently poor, it did not appear contrived, in that she equally could not recall events that might have assisted her case to the same extent as she was vague on facts that disadvantaged her claim. It is not that I find the plaintiff's testimony was untruthful or incredible. However, I will approach her testimony with caution because of her failure to remember certain events with exactitude such that I question her reliability. As a result, I will tend to examine the plaintiff's evidence in relation to other evidence that either confirms or refutes her testimony.
- [9] I also recognize that the Accident occurred at the end of 2016, thus seven years before trial and specific details such as the reason a day was taken away from work or the feeling of her symptoms on a specific day may not be expected to be committed to memory. The plaintiff is relatively young. Importantly, I acknowledge that the many life events experienced by the plaintiff during the time immediately following the Accident including choosing, enrolling in and completing post-secondary courses, training as a nurse, moving out of her parents house and starting a career, are of such volume that it is not unreasonable to accept that her memory of particular appointments or the impact of her injuries or motivations at a point in time might be foggy to her now. I contrast this to an older individual who may have a relatively settled pattern of life in terms of family, residence, career and location, where other events such as treatments or symptoms at a given time might carry a greater significance in how they might disrupt routine ways of living. In summary, I find the plaintiff to be a truthful, albeit somewhat inaccurate historian.

B. The Plaintiff - Before the Accident

- [10] The plaintiff graduated high school in 2013. She testified that she was a good student in high school and was on the honour roll. Her parents primarily spoke Vietnamese. The plaintiff testified that the language issues were somewhat of a barrier to her closeness with them as her primary language was English. She testified she had a normal childhood that was not marked by abuse or traumatic events.
- [11] During high school, the plaintiff worked at a fast food restaurant when she was 15 or 16 years old. After graduating from high school, the plaintiff took a year off and worked at a retail shoe store and a restaurant. She testified that she always wanted to be a nurse, because she saw the job portrayed on television when she was younger. She testified that when she was younger she did not want to be a doctor.
- [12] After working at the shoe store and restaurant she then took a job at a retail make-up store and then at an Apple retail computer store on March 14, 2015. She testified that she worked both jobs because it was social and she wanted to earn money. The plaintiff testified she enjoyed working at Apple, but never considered it to be a career. She earned about \$18.12 an hour while working at Apple. As I will describe below, the plaintiff was working at Apple when the Accident occurred.
- [13] In terms of the plaintiff's physical and social activities prior to the Accident, she testified that she would go for hikes lasting a bit over an hour with friends every couple of months. She testified that she would go to dinner and lunch with friends. In direct examination, the plaintiff testified that she went to the gym "five times a week" before the Accident and it was a "fun outlet" for her. She testified she did a mix of upper and lower body workouts and also did cardio at the gym. In cross-examination, the plaintiff was confronted with her attendance records from her She's Fit gym membership. The records told a somewhat different story as to the frequency of the plaintiff's work outs prior to the Accident, indicating that she did not go to the gym nearly as frequently as she believed.
- [14] In my view, this suggests that, while I accept that exercise was an important aspect of the plaintiff's lifestyle prior to the Accident, the evidence does not support that it was as large a part of her life as she would have the Court believe. This conclusion is relevant to my consideration as to how the Accident has impacted the plaintiff's life, which I will address below in my consideration of the issues.
- [15] A high school friend of the plaintiff, Mr. Salar Akbari, testified that he knew the plaintiff since Grade 8. He described her as super-friendly and very outgoing. He testified she "loved to crack jokes". Mr. Akbari testified that the plaintiff kept to herself after high-school and seemed focused on work and school. She seemed more "closed off" at that time, but they still kept in touch. Mr. Akbari testified that he would go to the gym and hiking with the plaintiff and described her as "very healthy".

- [16] In cross-examination, Mr. Akbari accepted that he worked out with the plaintiff at the Newton recreational centre from around 2007, but that in 2016 he "rarely" worked out with the plaintiff and was not sure how much she actually went to the gym, although he believed she went to the gym because he would get texts from her saying she was going to the gym. He also testified in cross-examination that the plaintiff was "super-active in 2016" and he has seen her run for an "hour straight on the treadmill."

C. The Accident

- [17] The Accident occurred on December 31, 2016. The plaintiff was a passenger in the car of her romantic partner at the time, Ms. Liao. The plaintiff testified that there were "really snowy conditions". The plaintiff recalls that the Honda CRV driven by Ms. Liao struck the car in front of them. The first impact felt only like a "bump". However, the CRV was then struck from behind by another car and the plaintiff described that impact as more severe. The second impact caused the CRV to again impact the car in front of them and also to be pushed into the ditch where it struck another car. As such, the Accident involved four different impacts on the car in which the plaintiff was a passenger.
- [18] The plaintiff testified she felt like she was in shock after the Accident. She did not go to the hospital that evening, but that night felt a tightness in her neck, shoulders and upper and lower back. She thought it was just stress. She testified that the next morning, January 1, 2017, it was difficult for her to get out of bed and the pain felt "incredibly intense". She first went to see a doctor at a walk-in clinic on January 3, 2017. She was prescribed naproxen (an anti-inflammatory) and flexeril (a muscle relaxant) and her physician advised her to take some time away from work.
- [19] The plaintiff testified that relatively soon after the Accident, the pain in her lower back resolved. However, she testified that she also began experiencing anxiety and depression as a result of her injuries. I will describe the plaintiff's post-accident physical and mental condition in more detail later in these reasons.
- [20] The Second Accident occurred on December 31, 2020. The plaintiff testified that the Second Accident did not cause her any injuries but "freaked her out" and caused her anxiety. She testified that when her shoulders are in pain it impacts her mental state and then when her mental state gets worse her pain injuries get worse. She described this as a cycle and also testified that when her "mental health is bad, [her] sleep is worse." The plaintiff did not take any time away from work after the Second Accident.
- [21] As referenced above, the plaintiff was involved in the Third Accident on May 30, 2022. The Third Accident occurred after her examinations for discovery were concluded and the defendants only learned about the Third Accident during the plaintiff's testimony at trial. As noted above, this caused a significant delay in the continuation of trial as the defendants conducted further examinations for discovery of the plaintiff, conducted investigations as to the nature of the impacts of the Third Accident and the plaintiff was recalled to testify

further at a continuation of the trial.

- [22] The plaintiff testified that after the Third Accident, she took about two weeks off work and took naproxen. She testified that the Third Accident caused an exacerbation to her upper back but that she returned to baseline in fewer than two weeks. The plaintiff described her baseline as a "constant aching in [her] neck and upper back."
- [23] The defendants contend that given the Third Accident appeared to be significant due to the damage to the vehicle and the plaintiff returned to baseline so quickly supports their theory that the plaintiff was never as injured in the Accident as she would have the Court believe. In other words, the plaintiff is more resilient than her claims of injuries suggest given her quick recovery from the Third Accident.

D. The Plaintiff After the Accident

- [24] As set out above, the morning after the Accident the plaintiff testified that her pain was intense. She visited a walk-in clinic two days after the Accident and received pain medication. She testified that she visited her doctor, Dr. Faraday, starting in February 15, 2017. At that time, the pain in her lower back had resolved.
- [25] The plaintiff testified that her upper back and shoulders are in constant pain and it feels "like someone is sitting on [her] shoulders." She described the pain as a "dull, aching, constant pain." She says that while she feels it all of the time, it is not "excruciating" all of the time.
- [26] In September 2018, after the Accident, the plaintiff enrolled in the nursing program at Douglas College. The program is a three-year program with a preceptorship (an internship for nurses) that requires full-time activities in various rotations in a hospital. The plaintiff completed the preceptorship but testified that it took a heavy toll on her physically and emotionally because of what she alleges was the pain from her symptoms from the injuries.
- [27] The plaintiff testified that she has generalized anxiety. From the clinical notes it appears that the anxiety started as only anxiety related to driving in the snow. The plaintiff testified that as time passed and her injuries did not heal, the anxiety became more generalized. I will describe her claims of injuries in more detail in my analysis below.
- [28] Mr. Akbari testified that, in his view, since the Accident, the plaintiff's mood has changed. He described her as "still herself" but she is not as active or outgoing as she was before. He testified that the plaintiff appears more focused on her injuries and her work than she was before the Accident. He also observed that she has gained weight since the Accident and that she is "more emotional". As examples of the changes he has observed in her he testified that the plaintiff no longer wants to go on hikes with him and instead would want to go for a "short walk and go to eat".

[29] I will discuss the expert evidence as to the causation, diagnosis and prognosis of the plaintiff's injuries below.

III. LAW AND ANALYSIS

A. Causation

- [30] The defendants acknowledge that the plaintiff suffered injuries as a result of the Accident, however, they assert that the injuries were resolved within four months of the Accident in approximately May or June 2017. The defendants base their position largely on the clinical notes of health care professionals who treated the plaintiff after the Accident. The defendants also point to observations and concerns expressed by the experts who could not find demonstrable evidence of the pain that the plaintiff said she experienced, or commented that the plaintiff was not using her full effort to participate in the assessment process.
- [31] My understanding of the defendants' position is that, in large measure, they contend that the somatic nature of the plaintiff's injuries is related to mental health issues that were caused by other stressors in the plaintiff's life. In short, the defendants argue that they are not the sole cause of the plaintiff's current inability to function as she did earlier in her life. The defendants' position with respect to causation is articulated in the written submissions:
- [313] As to the Plaintiff's submission that "every aspect" of the Plaintiff's life has been affected, the Defence replies that the evidence does not establish this at all and such assertion is based entirely on the self-reporting of the Plaintiff, which is not reliable or, in some instances, credible. The Plaintiff has not, as asserted, put her life on hold. Rather, she was a young student at the time of mva1, who is coping with the usual rigours of transitioning to the working life of an adult, all in the context of being somewhat uncertain of the nursing path she has, thus far, chosen.
- [32] In essence, in addition to arguing that the plaintiff's injuries resolved after four months, the defendants contend that the plaintiff's current symptoms are a result of other stressors in her life that include: the breakdown of her parents' marriage in 2018; the failure of her relationship with Ms. Liao in 2018; her mother's cancer diagnosis; and the general stress of determining what career to commence and how to commence that career. The defendants say that the medical evidence suggesting the plaintiff has back and neck pain is entirely based on the plaintiff's self-reporting and is incompatible with the injuries from the Accident.
- [33] The plaintiff submits that the Accident does not need to be the sole cause of the plaintiff's current injuries so long as they are a cause of those injuries. The plaintiff contends that her injuries to her neck and upper back have never resolved and impact every part of her life. She testified that her life has shrunk to an existence of working and then trying to rest so she can work another shift. The plaintiff contends that the Accident has caused a profound change in her health which has impacted her social life, her work life and her way of being.

In other words, the plaintiff asserts that "but for" the Accident she would not be in the pain that she alleges impacts all of her choices including her choice to work only part time hours and not take any over time as a nurse.

- [34] The primary test for causation asks whether the plaintiff would have suffered the injury and loss but for the defendant's negligence. This "but for" test recognizes that compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. The plaintiff must establish causation on a balance of probabilities, and causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-17. It is settled law that a defendant's negligence need not be the sole cause of the injury for the 'but for' test to be satisfied: *Athey* at para. 17; see also *Baglot v. Fourie*, 2019 BCSC 122 at para. 280.
- [35] As I will describe below in my analysis and determination of each head of damage, in my view, the evidence supports that, on balance, the Accident was a cause of the plaintiff's current pain symptoms and health issues, both mental and physical. While the plaintiff was young and had not determined where her life might take her at the time of the Accident, the evidence supports a conclusion that she was motivated to work and move towards a career in nursing. As described above, she was generally healthy and active until the Accident. In my view, the Accident caused her life to take a different trajectory that it would not have taken "but for" the Accident, specifically that the pain she lives with now has impacted her ability to work to her full capacity and to enjoy her non-work activities as fully as she did before the Accident. This conclusion is supported by the expert evidence.
- [36] I qualified Dr. Zohar Waisman as an expert psychiatrist able to give opinion evidence of psychiatric injuries. Dr. Waisman opines that it was the subject accident that led the plaintiff to "collapse her defences and develop an Adjustment Disorder with mixed depression and anxiety." Dr. Waisman explained the meaning of an Adjustment Disorder as a group of symptoms, such as stress, feeling sad or hopeless, and physical symptoms that can occur after an individual goes through a stressful life event and is having a hard time "coping".
- [37] Dr. Waisman also concluded that the plaintiff met the criteria for Somatic Symptom with predominant pain, mild, and persistent. He described that criteria as one or more somatic symptoms that are distressing or result in a significant disruption of daily life. Another criterion is that an individual has excessive thoughts, feelings or behaviours related to the somatic symptoms with associated health concerns that are:
- a) disproportionate and persistent thoughts about the seriousness of one's symptoms;
 - b) persistently higher level of anxiety about health or symptoms; and
 - c) excessive time and energy devoted to these symptoms.

- [38] Dr. Waisman opines that the plaintiff "suffers from excessive thoughts and feelings related to the chronic pain condition as manifested by persistently higher levels of anxiety about health or her pain symptoms." In my view, Dr. Waisman articulates the disconnect between the defendants' position and the plaintiff's claim. The defendants contend that the plaintiff is not as injured as she claims and could work if she were not so focused on her injuries. Dr. Waisman's opinion suggests that indeed the plaintiff has an unhealthy fixation on her pain and her injuries. This fixation, as I understand it, is a critical aspect of somatic symptom disorder.
- [39] As such, while it may be true that the plaintiff is overly fixated on her pain from the injuries caused by the Accident and is caught in a cycle, she nonetheless is experiencing real suffering that was caused by injuries suffered as a result of the Accident. It is well-settled law that a defendant takes a plaintiff as found and will be liable for damages arising from a defendant's negligence even if another plaintiff would have not have experienced the same, or any damages, in similar circumstances.
- [40] Other expert evidence also establishes that the Accident was the cause of the plaintiff's injuries. I qualified Dr. Gillian Simonett as an expert physiatrist able to give opinion evidence on the diagnosis, causation, prognosis and treatment of physical injuries. Dr. Simonett examined the plaintiff on three occasions. The first was on June 5, 2018, and the second on June 12, 2020. A third follow up interview was conducted by telephone on May 5, 2022.
- [41] Dr. Simonett opines that the plaintiff's description of her neck and upper back pain is most consistent with myofascial pain. During the June 5, 2018, examination, Dr. Simonett was unable to reproduce pain symptoms and so her diagnosis is based on the reporting of the plaintiff. The defendants argue that because the opinion is based on the plaintiff's self-reporting, the Court must approach Dr. Simonett's conclusions with caution because the findings are subjective. However, Dr. Simonett concluded that the plaintiff's reporting of delayed pain one day after the Accident was consistent with a diagnosis of myofascial pain.
- [42] Dr. Simonett's opinion remained unchanged after the second examination on June 12, 2020, which was three and a half years after the Accident. In the second examination, Dr. Simonett was able to reproduce pain in the muscles of the plaintiff's neck and shoulders.
- [43] Given the foregoing, I have no hesitation finding that, on balance, the plaintiff has established that the Accident is the cause of her injuries, both physical and psychological. As such, I accept that the plaintiff has met the test for causation. I also reject the defendants' argument that the plaintiff's injuries to her neck and upper back resolved by June 2017. Neither the medical evidence nor the evidence of the plaintiff supports such an assertion.
- [44] I find that the defendants' argument that the plaintiff's apparent quick recovery from the Third Accident is irrelevant to my analysis of the plaintiff's injuries suffered in the Accident. How the plaintiff recovered from the Third Accident as compared to the Accident, is not, in my view, of assistance in determining the extent of her injuries from the Accident. There

are a multitude of variables as to why a person may be injured in one accident but not in another, or why significant damage to a vehicle may leave a person unscathed or, conversely, why a minor impact can cause a person to have injuries. Accordingly, such reasoning is unhelpful.

B. Mitigation

i. Law

[45] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. The defendant has the burden of proof on the issue of mitigation, which involves a two-step analysis. Namely, where the plaintiff has not pursued a course of medically-recommended treatment, the defendant must prove that: (i) the plaintiff acted unreasonably in not doing what the defendant says the plaintiff should have done; and (ii) the plaintiff's loss would have been reduced or eliminated had the step or steps been taken: *Baskerville v. Liu*, 2022 BCSC 2164 at para. 347, citing *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 and *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62. Whether the plaintiff acted reasonably is a factual question, considering all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[46] Each part of the two-part test set out by the Court of Appeal in *Chiu* attracts a distinct burden. The first aspect, whether the plaintiff acted unreasonably in not taking the treatment or course of action, must be proven on a balance of probabilities, because it is based on a consideration of past facts. The second aspect, the extent, if any, to which the plaintiff's damages would have been reduced had the plaintiff followed the recommended treatment, will be weighted according to its relative likelihood, provided the possibility is real and substantial, because it is based on hypothetical events: see *Gao v. Dietrich*, 2018 BCCA 372 at paras. 37-39; and *Evans v. Keill*, 2018 BCSC 1651 at para. 121.

[47] Justice Verhoeven helpfully summarized the legal principles relating to a mitigation defence in *McNabb v. Rogerson*, 2022 BCSC 1514:

[134] In summary:

- a) The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of the loss.
- b) In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to the plaintiff by doctors, the defendant must prove two things:
 - i. that the plaintiff acted unreasonably in deliberately avoiding the recommended treatment, and
 - ii. the extent, if any, to which the plaintiff's damages would have been reduced had the plaintiff acted reasonably.
- c) In order to meet this second part of the test, the defendants must establish a real and substantial possibility that any part of the losses could have been avoided.

- d) If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.

[48] As held by Justice Walker in *Borecka v. Wilkins*, 2017 BCSC 13, the duty to mitigate also applies where "a plaintiff has failed to pursue appropriate, alternate employment or continues to work in a job that is clearly adverse to their recovery": at para. 251.

ii. Parties' Positions

[49] The defendants contend that the plaintiff failed to mitigate her losses in two ways. First, they argue the plaintiff failed to follow through on the conditioning exercises that were given, shown, and recommended to her by medical professionals including her physiotherapists and Dr. Faraday and Dr. Simonett. Second, the defendants assert that the plaintiff failed to request accommodations at work or seek different, more sedentary, nursing positions which would have increased the hours she worked, thus reducing her wage loss both past and future.

iii. Determination

[50] Dr. Simonett opines that the plaintiff's prognosis includes that the plaintiff's deconditioned and reduced tolerance for physical activity are contributing factors for her prolonged neck and upper back pain. In my view, Dr. Simonett's conclusion includes a rationale that the plaintiff has failed to maintain her physical activity to a recommended standard and that failure has contributed to the persistence of her pain symptoms. Dr. Simonett writes:

Ms. Mac reports that prior to the COVID-19 lockdown she was primarily receiving passive modalities with her therapists. She reports that more recently she has [been] increasing her cardiovascular type exercises, which is appropriate. Based on her ongoing poor posture, she should also incorporate more core and postural strengthening exercises ..I recommend transitioning from her more passive modalities that she was doing prior to lockdown and progressing her exercise based program .It is my impression her previous deconditioning (which she is actively trying to improve upon) and her poor posture are her leading risk factors for ongoing symptoms.

[Emphasis added.]

[51] Dr. Simonett further opines in her report of June 12, 2020, regarding the plaintiff's prognosis:

Currently her main ongoing physical symptoms appear to be related to her deconditioning and development of poor posture .Therefore, I think the main primary intervention is to continue to strengthen with the specific postural exercises so that she improves her posture, as well as have appropriate stretch breaks at work.

[52] As I will discuss below, I conclude that based on the medical evidence, if the plaintiff follows more active rehabilitation treatments to improve her conditioning and posture, there is potential to reduce her pain symptoms and improve her mental health. However, while I

accept that the plaintiff focused her energies more on passive modalities of treatments to improve her pain symptoms, I do not find that the defendants have met their burden that the plaintiff failed to mitigate her damages by not following a recommended course of treatment.

[53] I accept the medical evidence that the best course of treatment and pathway to improved health, both mental and physical, for the plaintiff is to improve her conditioning and her posture. Her attendance at the gym, as established by the She's Fit attendance records and her testimony at trial, demonstrates that she did not engage on her own in the exercises that were proposed by her physiotherapists with any regularity. Indeed, the She's Fit records showed that after April 2018, the plaintiff never attended the She's Fit gym again, this is despite the examination by Dr. Simonett in June 2018 that recommended the plaintiff improve her conditioning and posture.

[54] However, a review of the plaintiff's treatment records in their entirety demonstrates that she has generally followed the treatment regimes proposed to her. Namely, her physiotherapist, Sunny Gill, testified that the plaintiff follows his advice and is continuing treatments. Similarly, the plaintiff completed 24 kinesiology sessions of active rehab under Jaewon Suh, and was discharged in February 2018, because she had completed all of the recommended treatment sessions. Simply put, while the plaintiff could have done more active rehab and exercise on her own and increased her commitment and intensity to improve her conditioning and posture, I do not find that the defendants have established that, in the circumstances of this case, given the treatment recommendations and the number of treatments and appointments the plaintiff has attended, that her actions could be considered to amount to avoiding recommended treatments resulting in a finding that she failed to mitigate her damages.

[55] As I will discuss below, I find that given the medical evidence, there is a real and substantial possibility that the plaintiff's pain symptoms will lessen and her mental health will improve in the future if she takes steps to become better conditioned and address her postural issues, but for the reasons just stated, I do not find this future opportunity for improvement equates to a conclusion that the plaintiff has failed to mitigate her damages by her actions taken from the time of the Accident to trial.

[56] The defendants also ask the Court to find that the plaintiff failed to mitigate her damages by not taking a less physical role in nursing or by not seeking out accommodations that would have reduced her pecuniary loss. In my view, the issue of whether the plaintiff sought accommodations is more properly addressed in my analysis of the plaintiff's loss of past wages and future loss of earning capacity.

[57] I decline to reduce the plaintiff's damages on the basis that she failed to mitigate her losses.

[58] I will now consider the specific heads of damages claimed by the plaintiff.

C. Non-Pecuniary Damages

i. Law

[59] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities in an amount that is fair and reasonable to both the plaintiff and defendant. The fairness of non-pecuniary damages is assessed against awards made in comparable cases. However, such cases only serve as a rough guide, since what is fair and appropriate in each case will depend on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[60] The parties agree that the factors the Court should consider when assessing non-pecuniary damages are well-established and set out in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), by our Court of Appeal:

[46] The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering; and
- f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[61] I must consider the plaintiff's circumstances, before and after the Accident, to determine what award will place her in the position she would have occupied had it not been for the defendants' negligence. In other words, as best as money can do, the plaintiff is to be compensated to put her in no better or worse a situation than if the Accident had not occurred.

[62] The assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with their injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25. This is so even if her injuries are more severe than they would be for another person. However, the defendants are not required to compensate the plaintiff for any debilitating effects of a pre-existing condition which she would have experienced anyway: *Athey* at paras. 32-35.

ii. Parties' Positions

[63] The plaintiff contends that an appropriate award for non-pecuniary damages is \$180,000. She argues that she was only 21 years old at the time of the Accident and is currently 27 years old, and, as such, will have to live with pain for many years in the future. She points to the uncertainty she feels about her future work and social life due to the injuries. The plaintiff asserts that she lives with pain on a daily basis that fluctuates with the physicality of her work. As I understand her argument, the plaintiff is faced with choosing between the specific job she loves--which she says causes her more pain and requires more recovery--or working at a less demanding job and having less pain. She contends that neither of these outcomes are optimal and she should be compensated for her pain and suffering.

[64] In support of her claim for \$180,000 in non-pecuniary damages, the plaintiff relies upon the following cases:

- a) *Lim v. Busha*, 2019 BCSC 1223: The plaintiff was a 33-year-old physiotherapist that suffered injuries in three motor vehicle accidents. She had begun pursuing a career in physiotherapy in an area she desired and was successful. Prior to the accident, she lived an active and energetic lifestyle. The Court awarded Ms. Lim \$160,000 in non-pecuniary damages (using the Bank of Canada Inflation Calculator, from 2019 to 2024 the adjusted amount in 2024 dollars is approximately \$188,000);
- b) *Khosa v. Kalamatimaleki*, 2014 BCSC 2060: The plaintiff was a 33-year-old licensed practical nurse involved in a motor vehicle accident with a tractor trailer. The plaintiff suffered soft tissue injuries to her neck, lower back, left arm, left shoulder and left leg. At the time of trial, the ongoing symptoms were related to her neck and lower back pain, with associated headaches. The plaintiff developed symptoms of anxiety and post-traumatic stress. The plaintiff attempted to return to work full time as a licensed practical nurse, but was not successful due to a combination of physical and emotional difficulties. The plaintiff eventually took a part-time position as a nursing assistant. The Court awarded the plaintiff \$140,000 in non-pecuniary damages (using the Bank of Canada Inflation Calculator, from 2014 to 2024 the adjusted amount in 2024 dollars is approximately \$179,000);
- c) *Lo v. Vos*, 2021 BCCA 421: The plaintiff was a 30-year-old certified teacher involved in a motor vehicle accident. Three years prior to the accident, the plaintiff suffered a lower back injury that resulted in lumbar disc degeneration causing ongoing chronic lower back pain. The accident aggravated the plaintiff's lower back pain and caused her headaches, shoulder pain, and hip pain. She missed two weeks of work but had ongoing pain and limitation upon

return. By the time of trial, the plaintiff had developed psychological disorders including post-traumatic stress disorder, generalized anxiety disorder, and a major depressive disorder. She developed low self-esteem, lack of confidence, and low motivation. Her relationship with her partner, general enjoyment of life, and ability to work were and continued to be impacted. Justice Horsman (as she then was), in reasons indexed at 2019 BCSC 1306, awarded the plaintiff \$175,000 in non-pecuniary damages. Our Court of Appeal reduced that amount to \$140,000 to account for the pre-existing conditions to the plaintiff's lower back (using the Bank of Canada Inflation Calculator, from 2021 to 2024 the adjusted amount in 2024 dollars is approximately \$160,000); and

- d) *Domil v. Cheung*, 2017 BCSC 65: the plaintiff was a 37-year-old Canada Revenue Agency tax examiner injured in two motor vehicle accidents, the first being the more significant accident. Immediately after the first accident, the plaintiff suffered pain in her abdomen, legs, neck, and shoulders and had headaches. The diagnosis at the time of the trial included multiple soft tissue injuries leading to chronic mechanical neck and back pain, chronic whiplash-associated disorder, cervicogenic headache, chronic myofascial pain syndrome, a sleep disorder, depression and anxiety symptoms. The plaintiff's symptoms met the diagnostic criteria for Adjustment Disorder with mixed anxiety and Somatic Symptom Disorder. The Court awarded the plaintiff \$175,000 (using the Bank of Canada Inflation Calculator, from 2017 to 2024 the adjusted amount in 2024 dollars is approximately \$215,000).

[65] The defendants assert that the appropriate amount to compensate the plaintiff's pain and suffering is \$50,000 on the basis that she should be compensated for the soft tissue injuries claimed for, at the most, the period from January to April 2017, being four months after the Accident.

[66] The defendants provided two cases in support of their position for non-pecuniary damages: *Marriott v. Peterson*, 2021 BCSC 1066, and *Dhanda v. Thind*, 2022 BCSC 1003. I note that in both cases the Court awarded an amount greater than \$50,000, being \$75,000 and \$100,000, respectively. The defendants assert that every case is fact specific and the court should not award the plaintiff as great an award as it did in *Marriott* or *Dhanda* because the impact on the plaintiff's life in the case at bar is less significant than in those cases and the plaintiff has exaggerated the extent and impact of the injuries from the Accident on her life.

iii. Determination

[67] I have reviewed the cases provided to me by the parties. In my view, the following facts are relevant to my assessment of non-pecuniary damages as compared to the factors set out in *Stapley*.

[68] The plaintiff was only 21 years and ten months old at the time of the Accident, which I consider to be relatively young. The Accident occurred at a pivotal time for the plaintiff when she was making decisions about her life and career. Further, she has the potential to live for decades during which she will have to live with the consequences of the Accident.

- [69] The plaintiff was physically active prior to the Accident. While her memory of her attendance at the gym was exaggerated, I accept that the gym was part of her routine at times in her life. This fact was corroborated by Mr. Akbari. While her gym attendance was not as extensive as she believed it to be, and thus not as great a loss as she claimed, I accept the plaintiff's testimony that due to the Accident her ability to participate in physical activities such as going to the gym has been reduced. The plaintiff testified that as a result of her injuries she, "has lost her love of the gym."
- [70] The plaintiff testified that before the Accident she used to enjoy being active and hiking. After the Accident, she limits herself from going hiking because of her concern of aggravating her neck. The plaintiff believes that this lack of ability or enjoyment of general exercise has caused her to gain weight. While not a direct correlation between physical exercise and weight gain, the plaintiff became emotional several times while testifying about her negative feelings about herself due to her deconditioning and weight gain.
- [71] In respect of her social life, the plaintiff testified that she "really does not have a social life" and that her time is focused on treatment and counselling. She testified that she has to spend her time before her shifts getting focused and prepared on the next shift. She described this as working "set to set" referring to the nursing terms for groups of shifts. The plaintiff became tearful when testifying about her fear of the onset of the pain in her back when there are "bad flare ups." She testified that, "I do not know when they are going to happen and it scares me."
- [72] My view of the evidence is that it appears the plaintiff was both more physically and socially active before the Accident. However, I accept that there would more likely than not be a reduction of social activities even without her injuries, due to her more demanding studies and work as a nurse and during her preceptorship. In other words, the Accident occurred while the plaintiff was still living at home and still living in a student type lifestyle. Since the Accident, the plaintiff has moved out on her own, attended school and has a career. These events can also limit the ability of an individual to be social and participate in recreational activities. I believe it is important to consider the context of other factors that have occurred in the plaintiff's life before and after the Accident that may contribute to a change in lifestyle aside from the injuries.
- [73] Each case will turn on its facts, but after careful consideration of the cases put before me by the parties, I find that the cases of Khosa and Dhanda are most similar to the case at bar. However, I have reduced the amount to reflect my conclusion, which I will discuss below, that with proper active rehabilitation treatments, there is a likelihood that the plaintiff's condition will improve in the future. Given the foregoing, I conclude an appropriate award for non-pecuniary damages is \$140,000.

D. Past Wage Loss

i. Law

- [74] Compensation for past loss of income, or more accurately past loss of earning capacity, is based on what the plaintiff would, not could, have earned had the injury not occurred: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [75] The plaintiff need not establish earnings loss on a balance of probabilities, since what would have happened between the date of the accident and prior to trial is essentially hypothetical, as are predictions regarding future losses. As the Court of Appeal stated in *Smith v. Knudsen*, 2004 BCCA 613:
- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [76] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

ii. Parties' Positions

- [77] The plaintiff claims there are two components to her loss of past earnings. The first relates to days she missed working her retail job at Apple. The second relates to her work as a registered nurse.
- [78] In respect of the days the plaintiff missed from working at Apple, she provided a letter from Apple indicating she missed 28 days of work from January 28, 2017, to August 4, 2018. She testified that her shifts were generally 8 hour shifts for which she was paid \$18.12 per hour.
- [79] During her testimony, the plaintiff acknowledged that her memory of the reasons she took time away from work at Apple is not clear. She also testified that other events may have caused her to take time off work during that time, including her mother's illness.
- [80] I qualified Darren Benning as an expert economist able to give opinion evidence as to the valuation of loss of past and future income. Mr. Benning opines that, based on the letter from Apple, the plaintiff's 28 missed shifts would have lost her \$2,968 after taxes (\$4,117 in pre-tax income). This conclusion was not strongly contested by the defendants.
- [81] As referenced above, on October 7, 2021, the plaintiff obtained a permanent part-time position (0.73 full-time equivalent ("FTE")) at Eagle Ridge Hospital in the medical surgical unit, which is also known as bedside nursing. Mr. Benning provides calculations of the plaintiff's loss from her inability to work as she would otherwise as a registered nurse at Eagle Ridge Hospital on a with, and without, overtime basis. With three overtime shifts per month, the net past wage loss for registered nursing in 2021 and 2022 totals \$25,706 (\$7,221 (2021) + \$18,485 (2022)). Of that \$25,706 past wage loss, Mr. Benning calculates the plaintiff's loss from the difference between 0.73 FTE and full-time work as \$12,991 (\$3,633 (2021) +

\$9,358 (2022)) and from the missed overtime shifts as \$12,715 (\$25,706 - \$12,991). Given Mr. Benning's calculations, the plaintiff claims that her net past income loss, after deductions of income tax and employment insurance premiums, from her work at Apple and as a nurse totals \$28,675 (Apple \$2,968 + nursing \$25,706).

- [82] The defendants contend that the plaintiff returned to work and continued to work without a significant disruption from the time of the Accident until she started nursing school. They point to the fact that she worked full time while attending school for a period of three years and assert that her claim of compensation for only being able to work 0.73 FTE at her nursing job is unreasonable. In other words, the defendants argue that the Accident has not caused the plaintiff to lose any wages over the time of the Accident to the time of trial, because she was working to a full-time capacity until she reduced her hours and started working part-time hours as a nurse. They assert the plaintiff has not established she is incapable of working less than full time as a nurse and so she is not entitled to her past lost wages claim.
- [83] The defendants' expert, Mr. Szekely, opines that Mr. Benning's assumption that the plaintiff would have earned \$99,272 per year as a nurse from October 2021, exceeds the statistical average earnings of a female nurse in British Columbia of \$77,264, by over \$20,000 or 28.5% and so should not be relied upon by the Court. The defendants argue that tethering the plaintiff's potential earnings as a nurse to census data regarding earnings of nurses in BC or based on the wages set out in the Collective Agreement for nurses in BC provides a more accurate estimation of the plaintiff's earnings as a nurse to the date of trial.
- [84] The defendants also contend that the plaintiff has not proven her loss. They assert that whether considered a failure to mitigate by taking on additional work or seeking accommodations or simply that the evidence does not support the plaintiff only being capable of part-time work, the plaintiff has not established her claim for lost wages. In the alternative to the Court not allowing the plaintiff any loss for past wage loss, the defendants submit that the plaintiff's lost wages should be assessed as a maximum of \$10,000.

iii. Determination

- [85] In assessing the plaintiff's loss of past wages, I must determine the real and substantial possibility of what income the plaintiff would have earned absent the Accident, while taking into account all realistic contingencies that could impact her earning capacity. This process requires me to weigh possibilities and probabilities of hypothetical events, which are given weight according to their relative likelihood: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, leave to appeal to SCC ref'd, 29761 (8 January 2004).
- [86] In respect of the plaintiff's claim for her past wage loss while working at Apple, in my view, given her memory was so unclear as to the reasons she was away from work and there appear other events that may have caused her to miss work, she should not be entitled to claim each missed day resulted from the Accident. That said, given her testimony was that the impacts of the Accident was most acute immediately after that accident, and there are

several days missed immediately after the Accident, I accept that there is a real and substantial possibility that a significant portion of the time the plaintiff took away from Apple was related to the Accident.

- [87] Based on the evidence, I find it appropriate to reduce the wages lost from the plaintiff's absent days from Apple by 20%. While I acknowledge it is a crude estimate, the reduction accounts for the evidence at trial that during the time the plaintiff worked at Apple, she had difficult events in her life including her mother's cancer diagnosis which the plaintiff admitted was stressful and may have required her to take time away from work. Given the foregoing, I assess the plaintiff's past wage loss from Apple as a net loss after deductions for income tax and employment insurance premiums in the amount of \$2,374.40 (\$2,968 x .80).
- [88] In respect of the plaintiff's claim for past wage loss as a registered nurse, I am required to assess the hypothetical event of the amount the plaintiff, absent her injuries, would have worked and thus earned as a nurse. I must be satisfied that there is a real and substantial possibility and not mere speculation that the plaintiff would have worked these shifts and earned the amounts she claims. Based on the evidence before me, I am satisfied that the plaintiff has established that it is not mere speculation that she would have worked full-time hours as a nurse had she not been injured. This is tethered to the evidence in that the plaintiff worked full-time hours during her preceptorship and other various training requirements - when she was required to do so to qualify as a nurse, despite her injuries. Further, prior to the Accident, the plaintiff generally worked the equivalent of full-time hours. I find that the plaintiff has met the burden of a real and substantial possibility that she would have worked full-time hours absent the Accident.
- [89] However, I do not find that the plaintiff has established a real and substantial possibility that she would have worked the overtime she says she would have worked. In reaching my conclusion, I accept the evidence that, generally, if a nurse wants to work overtime shifts, those shifts are available. The evidence of both the plaintiff and Teresa Berndt, a clinical manager who works at Eagle Ridge hospital, was clear that there are more nursing shifts available than nurses to take those shifts. However, I am not satisfied that I have an evidentiary basis, beyond mere speculation, to support that the plaintiff would have worked all of the overtime hours she says she would have worked. However, I will assess some amount for missed overtime on the basis that the plaintiff would have worked some overtime on an irregular basis.
- [90] The evidence before me is that during the plaintiff's schooling and preparation for registering in the nursing program, she did not take a full course load, thus giving some evidence that the plaintiff would be less likely to work a combination of full time and overtime hours. Further, there is no established track record for the plaintiff working overtime hours. I acknowledge that this is a difficulty in this case, because the plaintiff was injured before she ever worked a shift as a nurse, but it is settled law that awards for hypothetical lost earning capacity must be based on what a plaintiff would have earned, not what she could have earned: Rowe. As such, I find the most appropriate measure of the

plaintiff's past wage loss to be Mr. Benning's calculation of the plaintiff's without overtime loss from the date of the Accident to the date of trial.

- [91] For the purposes of my analysis of past wage loss, not being given a calculation by the defendants as to what the plaintiff's after tax and employment insurance premiums would be with any specificity, I accept Mr. Benning's calculations. In doing so however, I note that in part I am accepting them for the plaintiff's relatively limited career up to trial, when she has not settled into a routine that might more likely approximate the average earning of nurses in British Columbia. As stated earlier in these reasons, a nuance in this case is that the plaintiff was injured before she even commenced her schooling for a career in nursing. As such, as will be developed below, given the many years of future employment for the plaintiff, I find it more accurate to assess the scenario of her likely without accident income capacity for calculation of future loss of earning capacity based on Mr. Szekely's opinion, but accept Mr. Benning's method of calculation for the plaintiff's past wage loss. Again, in part this is due to the defendants' failure to provide an acceptable alternate basis to assess the plaintiff's past wage loss.
- [92] However, while I accept Mr. Benning's calculations, I conclude it is necessary to reduce the plaintiff's loss of past income as a nurse to account for the fact that she did not seek accommodations or a different role within nursing. While there is some logic to the defendants' description of this occurrence as a failure of the plaintiff to mitigate her damages, I find that it is better characterized as a contingency reduction because it engages a hypothetical scenario of what might have occurred. In other words, I conclude that the evidence supports that there is a measurable likelihood that accommodations or a different role in nursing were available to the plaintiff that would have reduced her loss of her past wage loss: *Dornan v. Silva*, 2021 BCCA 228 at para. 63.
- [93] In respect of the plaintiff's choice to work in bedside nursing, when she first testified at trial in August 2022, she stated that her only interest was to work as a bedside nurse. This choice was made despite it placing greater physical demands upon her than would other types of nursing. The plaintiff's testimony when she initially testified was that she was certain that bedside nursing was the only type of nursing of interest to her. However, by the time the trial recommenced after it was adjourned to deal with issues related to the Third Accident, the plaintiff had, in fact, changed her role in nursing at Eagle Ridge Hospital from bedside nursing to one in the operating room.
- [94] The plaintiff took additional courses, paid for by her employer, to be trained for the operating room nursing role from January to April, 2023. In May to August, 2023, she completed an orientation to work as an operating room nurse. She is now working as a nurse in the operating room, although she continues to work only part time in that department (0.7 FTE). She testified that the nursing environment in the operating room, like bedside nursing, also has physical demands. However, the fact the plaintiff changed from bedside nursing to an operating room nurse demonstrates to me that her belief that there was only one type of nursing job in which she would pursue was not as immutable as she

had expressed during her testimony. Further, the timing of her changing from bedside nursing to another type of nursing appears in line with the general attrition rates from bedside nursing testified to by other witnesses at the trial.

- [95] As support for my conclusion that accommodations are available to nurses working with disabilities, I find the evidence of Michele Trask, a manager with Vancouver Coastal Health, persuasive. Ms. Trask testified that, in her experience of managing approximately 550 nurses, there are variety of career options and accommodations available to nurses. Ms. Trask provided examples in which the employer provided workplace accommodations for nurses, including for a nurse who had had half her rib cage removed, a nurse who could not wash her hands, and nurses accommodated for religious reasons or to work only days or only nights. Ms. Trask's testimony supports that there were opportunities for the plaintiff to pursue options within nursing at the hospital that would allow her to work more than she did.
- [96] In respect of the potential to seek other forms of nursing environments, the plaintiff testified that her employer, Fraser Health, would allow her to train for other roles and pay for her wages during that time so she would not lose income. As set out above, indeed, the plaintiff during the trial has participated in that very program to retrain as an operating room nurse. In my view, this supports that there were, and are, options available to the plaintiff to seek other forms of nursing that would be less physically demanding with remuneration equivalent to that of full time bedside nursing.
- [97] I conclude it is appropriate to reduce the plaintiff's loss of past wages from nursing from the date of the Accident to the date of trial by 20% to account for the hypothetical scenario where she sought and was granted accommodations or sought and changed work to a more sedentary role in nursing in which she could have worked full time, thus reducing her loss.
- [98] In summary, I assess the plaintiff's loss of past income from Apple as \$2,374.40. I assess her past wage loss from nursing as \$12,000. I assess that amount by accepting Mr. Benning's calculation of the plaintiff's loss of wages (without overtime) of \$12,991 and increasing it to \$15,000 to account for some overtime that the plaintiff might have taken. As set out in the reasons above, while I have concluded that I am not persuaded that the plaintiff would have worked all of the overtime she said she would, there was evidence before me that there is overtime available to nurses and I accept that the plaintiff may have taken some overtime shifts to the date of the trial. I have then reduced the amount of \$15,000 by 20% for the reasons articulated above. The result is that the plaintiff's past wage loss is assessed at \$14,374.40 (\$2,374.40 (Apple) + \$12,000 (nursing)).
- [99] Before concluding the issue of the plaintiff's past wage loss, I wish to comment that in the particular circumstances of this case, the plaintiff, when she started in bedside nursing, was aware that she might have difficulty working full time and taking overtime shifts due to her injuries. Despite this, she did not explore other options within nursing that may have given her the ability to work full time and work overtime shifts. Nor did she ever attempt to make

meaningful efforts to work full time or take overtime shifts. Without that evidence, I am not satisfied that the defendants should bear the entirety of the loss the plaintiff claims from the Accident to the date of trial. However, as I will now describe, I find that these contingencies apply somewhat differently to the plaintiff's claim of future loss of earning capacity.

E. Future Loss of Earning Capacity

i. Law

[100] Many of the same factors related to assessing a plaintiff's past wage loss in respect of predicting how a plaintiff's "without accident" life would unfold apply to assessing a plaintiff's future loss of earning capacity. In assessing a claim for future loss of earning capacity, the court is to compare a plaintiff's future earning capacity with, and without, the accident: Dornan at paras. 156-157. This assessment necessarily involves a prediction of possible events that are unable to be known with exactitude. While there is "no one right answer", the court must use a process that is "tethered to the evidence": Dornan at para. 134.

[101] For a future potential loss to be considered for the purposes of assessing damages, its occurrence must be a real and substantial possibility and not mere speculation: Athey at para. 27. A risk of loss that is a real and substantial possibility as opposed to mere speculation is measurable and supported by evidence: Dornan at para. 63.

[102] Our Court of Appeal developed a three-step approach to assessing claims for a future loss of earning capacity in Rab v. Prescott, 2021 BCCA 345. The Court set out the steps at para. 47:

- a) whether the evidence discloses a potential future event that could give rise to a loss of capacity;
- b) whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
- c) what is the value of that possible future loss, having regard to the relative likelihood of any such possibility occurring?

[103] Once a conclusion is reached using the above steps, the court must then determine if the award for future loss of earning capacity is fair and reasonable: Lo at para. 117.

[104] There are two principal approaches to quantifying the future loss of earning capacity once it has been proven by the plaintiff: the earnings approach or the capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32.

ii. Parties' Position

- [105] In this case, neither party suggested that the capital asset approach was appropriate in the circumstances of this case. I agree that in the circumstances, where the loss is more easily measurable, the earnings approach is appropriate: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64, citing *Perren* at para. 32. As such, I will apply the earnings approach to the assessment of the plaintiff's loss of future earning capacity.
- [106] The plaintiff asserts that she will never be able to work full-time hours or take overtime shifts as a nurse due to the injuries that she suffered from the Accident. She contends that if the Accident had not occurred, she would have worked full time and taken overtime shifts just as most nurses do. As referenced above, the plaintiff provided expert opinion evidence from Mr. Benning as to what both female and male nurses in similar circumstances to the plaintiff would expect to earn in their lifetimes.
- [107] The plaintiff argues she only works 0.73 of the FTE, and that there is evidence before the Court regarding the average overtime shifts taken by registered nurses in hospitals. As such, the plaintiff's future loss of earning capacity can be quantified. Further, because the plaintiff works as a unionized nurse, the earnings are governed by a Collective Bargaining Agreement which can be (and was) used by the economist experts to calculate her full-time and overtime wages with some predictability.
- [108] Mr. Benning's report provides the present day value of the plaintiff's wage loss based on the assumption that she would have worked full time and worked an average of three, 11-hour, overtime shifts per month to age 67. As he did with the plaintiff's past wage loss, Mr. Benning calculates future loss of income including both overtime and without overtime scenarios. Mr. Benning calculates the total future income loss of the plaintiff using female based labour market contingencies ("LMC") at \$1,263,725. That amount is based on the loss of full-time wages and Municipal Pension Plan ("MPP") amounts and the loss of overtime of \$581,382. As such, the loss excluding overtime is \$682,343. Mr. Benning also calculates the plaintiff's loss using male LMC. The loss he calculates using male LMC is \$1,442,454. Mr. Benning calculates the specific loss of overtime using male LMC at \$672,506. As such, using male LMC, Mr. Benning calculates the plaintiff's loss without overtime is \$769,948. I note that Mr. Benning includes in his calculations the plaintiff's loss of both base pay and additional pay.
- [109] In the plaintiff's written submissions regarding the plaintiff's loss of future earning capacity, the amount for past and future loss were combined, thus the plaintiff's written argument that "a fair and reasonable assessment for this head of damage is \$1,450,000", exceeds Mr. Benning's assessment of her loss of future earning capacity.
- [110] The defendants' position, as is consistent throughout this case, is based on their view that the plaintiff's injuries from the Accident resolved within a period of four months. The defendants assert that the plaintiff demonstrated she was able to work full time as a nurse during her training and preceptorship and is now choosing not to work full time nor to take overtime shifts. Further, the defendants say that they should not be liable to compensate

the plaintiff for her refusal to accept more sedentary nursing roles than the role of a bedside nurse. In essence, the defendants argue that the plaintiff is choosing to work part-time hours and not take overtime shifts and they should not be responsible for that decision, because it is not causally linked to the injuries from the Accident.

- [111] The defendants contend, in a similar vein to their argument as to why the plaintiff's past wage loss should be lessened, that the plaintiff bases her future loss of earning capacity on only ever working one week at one full-time position--bedside nursing--and determining that she will never be able to work full time again until she retires. Put in simple terms, the defendants argue that the plaintiff has failed to establish that the Accident is the cause of the magnitude of her future loss of earning capacity.
- [112] The defendants' economic expert, Mr. Szekely, opines that Mr. Benning's opinion overstates the plaintiff's earning by at least 9.4%. Mr. Szekely opines that, based on Statistics Canada 2016 Census for BC Registered Nurses and Registered Psychiatric Nurses and applying the LMC for females, the present value for the plaintiff's wages would be \$1,628,009 to retirement, which the defendants set at age 62.2, which is the average retirement age of nurses. The defendants set the plaintiff's Municipal Public Pension benefits would have been, for females, applying LMC, \$308,005 based on her work to age 62.2. Mr. Szekely also provides his opinion that based on his calculations the plaintiff's wages based on the collective agreement to age 63 would be \$1,727,130. Mr. Szekely opines that the reason the amount calculated under the collective agreement is 5.7% higher than the census-based calculations may be because the census data captures nurses who work fewer than 37.5 hours a week or because his estimates may overstate the value of shift premiums and statutory holiday pay.
- [113] The defendants contend that because the plaintiff has only tried to work full time for one week, there is no evidence of a real and substantial possibility that she will have a future loss. They argue that it is mere speculation that the plaintiff will continue to be unable to work full time, so the plaintiff should receive no award for future loss of earning capacity. In the alternative, the defendants assert that the plaintiff should only be entitled to 10% of Mr. Szekely's calculation of the plaintiff's future earning capacity. I note that in written submissions, the defendants indicated this amount was \$175,000 calculated as approximately 10% of Mr. Szekely's calculation of the plaintiff's future earnings to age 70 of \$1,710,979. It appears that the defendants' did not include Mr. Szekely's calculation of the plaintiff's MPP of \$308,005 in their calculations.

iii. Determination

- [114] Many of the same considerations that impact the plaintiff's past wage loss are relevant to her future loss of earning capacity. Specifically, in assessing the plaintiff's future loss of earning capacity I must determine whether there is a real and substantial possibility that, without the injury, the plaintiff would have worked full-time hours and overtime hours as a nurse and for how many years she would do so. However, I must also consider whether

there are contingencies that should apply to any loss of future earnings to the plaintiff. These contingencies are applied to the loss to establish the relative likelihood of the loss occurring and consider, for example, whether the evidence supports that there is a realistic possibility that the plaintiff's injuries could improve over time or that her situation will change such that her losses will reduce in the future.

- [115] Quantifying the loss of capacity is not a mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49. Although the economist experts have provided calculations for loss of earnings, the Court must weigh both negative and positive contingencies of hypothetical events in order to estimate a pecuniary loss.
- [116] Under the first step of Rab, I find that there is a real and substantial possibility that the loss of the plaintiff's future capacity will materialize as a result of her injuries. Based on the evidence, I find that it is beyond mere speculation that the plaintiff will suffer impairment to her future capacity as a result of the Accident: *Kim v. Baldonero*, 2022 BCSC 167 at para. 88.
- [117] The second step of the Rab analysis requires the court to determine whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. I accept that the Accident will cause a pecuniary loss to the plaintiff and thus the second aspect of Rab is satisfied. While I conclude that the plaintiff has established that, without her injuries, she would have worked full time as a nurse (1.0 FTE), I am not satisfied she has established beyond mere speculation that she would have worked the overtime hours she claims. Given the plaintiff has not established a track record of working overtime and, for the reasons I articulated above in considering her past wage loss, I am of the view that it is appropriate to consider the statistical average earnings for a nurse of a similar age and gender to the plaintiff as informed by Mr. Szekely's calculation of what a BC nurse would earn under the Collective Agreement to establish what the plaintiff's earnings would have been absent the injuries, and then reduce that amount by 27% to reflect that she has established that she is working only 0.73 of FTE. I will address my assessment of the plaintiff's with, and without, accident loss in more detail below.
- [118] Under the third step of the Rab analysis, I am to compare the likely scenario of the plaintiff's future working life had the Accident not occurred with her likely future working life given the injuries. I am then to adjust this difference for positive and negative contingencies. Of course, as courts have held, this process "invariably involves an element of 'crystal ball gazing'": *Marriott* at para. 56. Nevertheless, the scenarios and the conclusions drawn by the court must be tethered to the evidence adduced at trial and not based on speculation.
- [119] I have determined that there are three contingencies that I must apply to assess the plaintiff's future loss of earning capacity. First, that the plaintiff's symptoms will improve with time if she pursues the recommended active rehabilitation treatments. Second, that the plaintiff will change roles to a more sedentary nursing role allowing her to work full

time hours. Third, that the plaintiff will seek accommodations in her current role (or other roles in nursing) such that she is able to work full-time hours. I find that each scenario is not speculative and is tethered to the evidence adduced at trial. I will now turn to a discussion of these contingencies.

Contingency One: A Real and Substantial Possibility That the Plaintiff's Symptoms Will Improve

- [120] Dr. Waisman suggests that the plaintiff should receive cognitive behavioural therapy ("CBT") and participate in a multidisciplinary pain management program. If the plaintiff follows those suggestions, Dr. Waisman opines that there is opportunity for improvement. I find there to be, based on the evidence, a real and substantial possibility that the plaintiff, upon receiving CBT treatment, counselling and with the assistance of a multidisciplinary pain management program, will improve her somatic symptom disorder and participate more fully in the work force.
- [121] Dr. Waisman focused his comments on the fact that the plaintiff worked in a nursing environment that requires safety sensitivity and deals with vulnerable patients with "no room for error". In my view, as I will discuss below, there are potential options within other fields of nursing that would allow the plaintiff to be more involved in nursing without the concern of "burn out."
- [122] Dr. Simonett also opines that the plaintiff's deconditioned state contributes to her physical limitations. As such, I find that if the plaintiff becomes better conditioned, there is a real and substantial possibility she will improve.
- [123] I find that the plaintiff's prognosis for improvement (while recognizing it is somewhat guarded and the likelihood of full recovery diminishes as time passes) presents a real and substantial possibility that her future loss of earning capacity will lessen as a result of the active rehabilitation and counselling recommended by the health care professionals. There is evidence that with the proper care and treatment, the plaintiff's condition could improve such that she will be able to increase her hours as a nurse, thus reducing her future earnings loss.
- [124] As set out above, Dr. Simonett opines that the plaintiff's injuries are most consistent with myofascial pain. Dr. Simonett was unable to reproduce the pain symptoms during her examination of the plaintiff on June 5, 2018, and so the opinion is based on the plaintiff's reporting. Dr. Simonett opines that the plaintiff's symptoms are, in part, related to deconditioning and poor posture:

Based on her current asymptomatic presentation, it is likely that the deconditioning and change to posture are the primary contributing factors for her reported prolonged symptoms.

[125] I accept that Dr. Simonett acknowledges that given the prolonged nature of the plaintiff's pain, the plaintiff "will be at an increased risk for poor prognosis for full recovery." Despite the guarded prognosis, taken in totality, I conclude that the medical evidence supports it is a realistic possibility, beyond mere speculation, that if the plaintiff takes steps to improve her physical condition and posture, her symptoms will improve. I further note that the plaintiff testified that, "she has not given up on getting over 0.73."

[126] I also tether my conclusion to the evidence of Dr. Simonett and Dr. Waisman. Dr. Simonett opines that with further active rehabilitation, the plaintiff's symptoms may improve. Dr. Waisman opines that with improvement the plaintiff may become less fixated on her injuries and be able to participate more fully in work.

[127] I will summarize my calculation of the impact of all three contingencies after I review the second and third contingencies.

Contingency Two: A Real and Substantial Possibility That the Plaintiff Will Pursue a More Sedentary Role Within the Nursing Profession

[128] The second contingency involves the likelihood that the plaintiff will seek out a more sedentary role within nursing. The plaintiff testified at the start of the trial that she "had her heart set on being a bedside nurse" and only wanted to perform bedside nursing. However, only months after that testimony, she undertook months of training and changed her nursing position from that of a bedside nurse to a nurse in the operating room. This shows that her reticence to change roles within the nursing sector is not as set as she initially believed.

[129] I accept the evidence of Jeff Bergen, who manages approximately 50 nurses on a regional team at Fraser Health Authority, and Ms. Trask that there is, even in the absence of physical limitations of a nurse, an attrition from bedside nursing due to its physical demands. Ms. Trask testified that the attrition rate from medical/surgical (bedside) nursing is generally 20% after the first year and 30% to 60% in the second year.

[130] The expert occupational therapist, Joanne Beattie, opines that it was only certain types of nursing in which the plaintiff's injuries would limit her ability to participate fully. Ms. Beattie referred to types of nursing that were more physical in nature as those that required providing physical assistance to patients with mobility issues. Ms. Beattie, provided evidence that the plaintiff's limitations are "role specific" within the nursing profession. Ms. Beattie provided the following opinion when asked if the injuries affected or reduced the plaintiff's vocational options, and, if so, how:

[The plaintiff's] current symptoms and physical capacity would likely result in limitations in the types of nursing environments in which she would be capable of working on a durable basis. For example, long term care facilities or post-surgical units where patients have reduced mobility and require more physical support from nurses for transferring, bedside care, bathing, etc. would be difficult for her to manage given her limited tolerance for lifting, carrying, pushing, and

pulling as well as her limited tolerance for moderate stooping as these tasks and postures would likely be essential to performing the job.

[131] However, Ms. Beattie provided evidence that the plaintiff would be capable of competitive employment of a "sedentary nature, with an appropriate ergonomic workstation". Further, Ms. Beattie provided that the plaintiff "would be competitive in certain areas of nursing that do not involve heavier job demands such as outpatient clinics, where she would be more likely to work with individuals who are mobile."

[132] Ms. Beattie also opines that the plaintiff is not fully disabled from working as a nurse and it is the heavier tasks that cause issues:

Overall, her experience is consistent with my previous impression that she is not fully disabled in working as a nurse, but has limitations with tolerance in working heavier tasks for extended amounts of time (she notes limitations following three consecutive work days).

[133] Ms. Beattie opines that the plaintiff's physical capacity "would likely result in limitations in the types of nursing environments in which she would be capable of working on a durable basis" (emphasis added). In my view, this is important because her conclusion that the plaintiff has limitations in types of nursing activities implicitly concludes that the plaintiff is capable of working in in some other types of nursing environments. Ms. Beattie then provided the types of nursing that might be unsuitable for the plaintiff which included long-term care facilities or post-surgical units "where patients have reduced mobility and require more physical support from nurses for transferring, bedside care, bathing." I conclude that Ms. Beattie's opinion supports my finding that the plaintiff is not precluded from working fully and in a durable manner in every nursing activity. In other words, the plaintiff could work to a full capacity in some types of nursing environments.

[134] Dr. Waisman's opinion regarding the limitations of the plaintiff also appears focused on a nurse's role dealing with "vulnerable patients", which I infer means bedside nursing as opposed to other forms of nursing that may not involve interactions with vulnerable patients. In this regard, Dr. Waisman opines:

There is a partial disability. She is unable to perform her work as a nurse on a full time basis. Her work as a nurse is safety sensitive and involves dealing with vulnerable patients with no room for error. Her work requires full alertness, focus, and emotional regulation. She suffers from a partial impairment in her ability to regulate her emotions that is most manifest at times of fatigue and stress. Full time work will prevent her from crucial opportunity to recharge and prevent fatigue and burn out.

[Emphasis added.]

[135] Given the foregoing, I am satisfied that there is a real and substantial possibility that there are other roles available to the plaintiff of a more sedentary nature that would reduce her future loss of earning capacity.

[136] I reiterate that the plaintiff, despite testifying originally that she would never change her type of nursing from bedside to other environments, has, in fact, made that change during the course of the trial. As I concluded above, this demonstrates to me that the plaintiff's view of her future in nursing was not as immutable as she first testified. I pause to comment that I commend the plaintiff for making a positive change to her working environment to explore different aspects that might allow her to find more fulfilling work that remunerates her and also may provide her with an ability to recover. In other words, I commend the plaintiff for making positive steps to explore her options in nursing given she is so new to the profession and her career path may not be as established as she first believed it to be. In saying this, I also recognize that the plaintiff still is choosing only to work part-time hours in the operating room and that it is still a more physically demanding nursing environment than other more sedentary roles.

Contingency Three: A Real and Substantial Possibility That the Plaintiff Will Seek More Accommodations as a Nurse

[137] The plaintiff testified that she has not sought accommodations that would allow her to work differently and for more hours, thus reducing her loss. From her testimony, I accept that her reason for not seeking accommodations is, at least in part, that she wants to be a "team player" and participate fully when working. Again, I find this commendable. However, the evidence before me, especially considering the shortages of nurses and the availability of accommodations for nurses with various forms of limitations, supports a conclusion that the plaintiff could seek out some form of accommodations that would allow her to work more hours than she currently does and thus reduce her loss of future earning capacity.

[138] To reiterate, the evidence of Ms. Trask was that there are a variety of career options for the plaintiff as well as available accommodations as a nurse. As noted above, Ms. Trask testified of circumstances in which accommodations were given to nurses, including for a nurse who had had half her rib cage removed, a nurse who could not wash her hands, and nurses accommodated for religious reasons or to work only days or only nights. Ms. Trask testified that the goal is to accommodate the individual nurse in her or his own position. The next step of accommodation is a process called "bundling", which keeps the person in their own role but a different type of job in that role. If neither of those processes work, attempts are made to accommodate the nurse in a different job that matches that particular nurse's job abilities. In my view, Ms. Trask's testimony supports that there would be opportunity for the plaintiff to pursue options within bedside nursing (or operating room nursing) with accommodations that would allow her to work a 1.0 FTE position; an opportunity the plaintiff never canvassed with her employer.

[139] In coming to my conclusion that the plaintiff could have sought accommodations, I have considered the evidence of Mr. Bergen and Ms. Berndt. Mr. Bergen testified that in his seven years of managing bedside nursing, he has not seen any accommodations given to nurses and believes he would not hire a nurse in bedside nursing who required accommodation. Mr. Bergen testified it was an intense physical job. I note that in cross-

examination, Mr. Bergen acknowledged that the last time he worked in bedside nursing was over 20 years ago. As such, I put less weight on his evidence as to whether the plaintiff could be accommodated in some manner in the nursing profession.

[140] Ms. Berndt testified that she would not hire someone who needed physical accommodations. She testified there have been some successful accommodations for mental health but it is difficult with physical accommodations, because the burden would fall to a co-worker. Where the evidence differs between Ms. Trask and Ms. Berndt, I prefer Ms. Trask's evidence. In my view, Ms. Trask's experience in managing approximately 550 registered nurses provides her with a more robust view and experience of whether accommodations would be available in nursing.

[141] As with the first two contingencies, I find the third contingency to be a real and substantial possibility that would reduce the plaintiff's future losses.

Summary of Contingencies to be Applied

[142] Having found that each of the three contingencies is a real and substantial possibility, I conclude it is appropriate to apply a global contingency for the plaintiff's future loss that accounts for the likelihood that one or more of these three events reduces her loss from an impaired future capacity to earn income. In my view, an appropriate amount is to reduce her future loss of earnings by a contingency of 50%. This represents my view that, based on the evidence, there is a substantial possibility that one of these three scenarios will occur, thus reducing the plaintiff's loss of future earnings. I find that the contingencies are measurable and tethered to the evidence. To be clear, I do not find that individually each of the three contingencies have a 50% likelihood of occurring. However, in my view, there is a 50% chance that one or more of the contingencies will arise thus reducing the plaintiff's loss. For example, the plaintiff may change nursing environments and receive accommodations, or her symptoms may improve and she also takes on a more sedentary role in nursing, thus reducing or eliminating her loss. To reiterate, I find that there is a real and substantial possibility of these scenarios occurring and set this contingency at 50%.

[143] Having now established my methodology to assess the plaintiff's future loss of earning capacity, I will now turn to the quantification of that assessment. The assessment requires a review of the opinions provided by the expert economists put forward by the plaintiff and defendants, Mr. Benning and Mr. Szekely, respectively.

Economic Experts' Calculation of Future Loss of Earning Capacity

[144] As set out above, the parties each presented expert evidence as to the appropriate calculation of the plaintiff's loss of future earning capacity.

- [145] The plaintiff's expert, Mr. Benning, calculated the plaintiff's future loss of earning capacity by assuming the plaintiff's current salary and factoring in wage benefits and increases over time. Mr. Benning also included a calculation based on the plaintiff's lost opportunity to work three 11-hour overtime shifts a month.
- [146] A primary difference between the economic experts is that Mr. Benning has used the salary earned by the plaintiff at a full-time rate as well as overtime shifts, and projected it into the future to the plaintiff's retirement at age 67. Mr. Szekely, however, opines that Mr. Benning's calculation of the plaintiff's loss significantly overstates the plaintiff's income when compared to an average income, based on 2016 census data, for a 25 to 30-year-old Registered Nurse and Registered Psychiatric Nurse in British Columbia. Mr. Szekely also opines that Mr. Benning assesses the plaintiff's loss of overtime on a basis that she would take all overtime worked as income and not as time away from work. Further, Mr. Szekely opines that Mr. Benning has assumed a significantly higher labour force participation rate that exceeds the census data, thus overstating the plaintiff's loss.
- [147] I am not satisfied that, in the circumstances of this case, the plaintiff has established a sufficient track record of working or earning that would allow me to assess her earnings to retirement in the manner assumed by Mr. Benning. This is the plaintiff's first significant job. She has only worked at one hospital. I am not persuaded that the evidence is sufficiently reliable to demonstrate that the plaintiff will continue to work as she has in these initial years to her age of retirement. The plaintiff testified that she "had no plans to retire at this point." This, of course, is reasonable given she is in her late twenties and just started her nursing career.
- [148] Given the plaintiff's limited history of employment in the nursing profession, I find that it is more accurate to assess any losses of future earning capacity of the plaintiff using Mr. Szekely's calculations of the wages based on the Collective Agreement for BC Nurses. I make this determination on the basis that it appears closer in value to the census data for nurses, being only 5.7% above the earnings reflected in the census data - a difference rationally explained by Mr. Szekely.
- [149] In my view, Mr. Szekely's assessment of the plaintiff's future earnings are tethered to the census data, which I find is appropriate in this case, given the plaintiff's short history of working as a nurse. Statistics, of course, can be vulnerable to not being representative of an individual. However, based on the evidence before me, including that the plaintiff has already shifted from one area of nursing to another, I conclude the best assessment is Mr. Szekely's use of nursing wages in BC under the collective agreement as they better reflect the statistical average of earnings for a female Registered Nurse in BC in the census data.

- [150] I pause to note that the plaintiff also included the calculations for male market labour contingencies. The plaintiff argues that this is justified because of potential bias contained within the statistical data in Canada regarding male versus female contingencies: see *Gill v. Lai*, 2019 BCCA 103 at para. 52, and *Orregaard v. Clapci*, 2020 BCSC 1726 at paras. 229-236 and 244.
- [151] More recently, our Court of Appeal provided guidance on the use of gender-based statistics in *McColl v. Sullivan*, 2021 BCCA 181 at paras. 41-49. The Court said, at para. 49, that "the legal framework to be applied" is that set out at para. 41:
- a. damages for loss of future earning capacity are to be assessed on an individual basis: *Gill* at para. 55;
 - b. gender-based earning statistics "may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings": *Crimeni* at para. 23;
 - c. however, gender-based earning statistics require caution because they may incorporate bias: *Steinebach* at para. 55; *Crimeni* at para. 23; *Gill* at para. 54; and
 - d. it may be reasonable, depending on the evidence, for a court to assume a convergence in earnings: *Crimeni* at para. 23.
- [152] In *McColl*, at para. 43, the Court observed that "gender-specific statistics guide rather than determine damages": at para. 43 (emphasis in original). Further, I find some guidance in the reasoning set out in *Martin v. First Truck Centre Vancouver Inc.*, 2020 BCSC 240, which specifically addresses the issue of gender-based analysis in the nursing profession:
- [192] Mr. Peever acknowledged that some of his projections were based upon female statistics only and that the inclusion of males in his statistics could affect his results, for instance, if males and females have different rates of participation in the labour market. The defendants point to the decision in *Crimeni v. Chandra*, 2015 BCCA 131 at paras. 23-25 for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. While that may be so in certain instances, the nursing profession remains substantially female-dominated, and many of the positions are unionized. Therefore, I find that the concerns over possible bias in the underlying statistics do not substantially undermine the weight that ought to be afforded to Mr. Peever's calculations in this particular context.
- [153] In my view, in the circumstances of the case before me, there is insufficient evidence to support the use of the male labour market contingencies. While I acknowledge the jurisprudence attempts to remedy historical and present inequities between male and female wage levels, in my view, the purpose of assessing a plaintiff's future loss, which by necessity involves some element of prediction, is to assess, as best as possible, what a particular plaintiff would have lost. In the circumstances of this case, given the plaintiff's track record of work in this career is not yet established and that she works in what is currently a female dominated profession, I find it more accurate to rely upon the female

based labour market contingencies to assess the plaintiff's potential future earnings.

Quantification of the Plaintiff's Future Loss of Earning Capacity

- [154] I accept Mr. Szekely's calculations that the plaintiff, based on the census data and the Collective Agreement for BC Nurses (excluding overtime) with labour market contingencies and net present value adjustments applied to age 63 would have earned \$1,727,130. If the plaintiff continues to only be able to work 0.73 FTE, to age 63, her loss would be \$466,325.10 ($\$1,727,130 \times 0.27$).
- [155] Applying the three contingencies above (that I concluded have a 50% chance of reducing the future earning loss of the plaintiff), the plaintiff's future earning loss of capacity is \$233,162.55 ($\$466,325.10 \times 0.50$).
- [156] Mr. Szekely calculates that the plaintiff's MPP would be \$308,005. I calculate the plaintiff's loss related to her MPP as \$83,161.35 ($\$308,005 \times 0.27$). Applying the contingencies of 50%, I find the plaintiff's loss of MPP is \$41,580.68 ($\$83,161.35 \times 0.50$).
- [157] As is clear from my assessment of the plaintiff's loss, I have set the plaintiff's retirement at 63 years which corresponds to the end of the year after the statistical average of retirement age of 62.2 for female nurses in British Columbia. As set out above, the plaintiff testified that she had no plans for retirement at this point and wanted to work in bedside nursing as long as she could. While difficult to predict when the plaintiff would retire with certainty, I was not provided with evidence that presents a real and substantial possibility that the plaintiff would continue to work to age 67 or 70 or to stray from the statistical average for the retirement age of female nurses in British Columbia.
- [158] In summary, I find that the assessment of the plaintiff's present value loss of future earning capacity is \$274,743.23 ($\$233,162.55$ (wages) + $\$41,580.68$ (MPP)). However, despite my conclusion that the plaintiff has failed to establish that she would consistently work overtime until retirement, I will increase the amount of the plaintiff's future loss of earning capacity to \$300,000, on the basis that I accept that, based on the evidence of Mr. Bergen, Ms. Trask, Ms. Berndt, and the plaintiff, overtime is generally available to nurses in British Columbia and there is a realistic possibility that absent the Accident the plaintiff would worked some overtime shifts in her career. In awarding this additional amount, I am following the guidance of our Court of Appeal in Lo that a concluding step in the analysis after adjusting awards for contingencies is to consider if the award for future loss of earning capacity is fair and reasonable: Lo at para. 117. In my view, increasing the amount to account for some overtime shifts is fair and reasonable.
- [159] In making my assessments, I am aware that our Court of Appeal has emphasized that the process is "not a mathematical exercise"; instead, "it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue": Ploskon-Ceisla v. Brophy, 2022 BCCA 217 at para. 7. I acknowledge the difficulties of predicting the plaintiff's future career and health outcomes with

precision. However, I have attempted to tether my conclusions and the basis of my assessment to the evidence presented to me at trial.

F. Cost of Future Care

i. Law

- [160] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary, as best as possible with a monetary award, to restore the injured person to the position he or she would have been in had the accident not occurred: see *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29.
- [161] In determining an appropriate award for the cost of future care, the plaintiff must demonstrate an evidentiary link between her pain symptoms and disability and the recommended treatment: *Gignac* at para. 32. In other words, the test for determining the appropriate cost of future care award is an objective one based on medical evidence: *Palidwor v. De Vries*, 2021 BCSC 85 at para. 45. Specifically, the test is whether the items or services claimed are medically justified and whether the claims are reasonable: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78, 84, 1985 CanLII 179 (S.C.).
- [162] In assessing whether the future care costs are justified, the court is to determine if the proposed care recommended by the expert is both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for them to justify a claim in respect of that service: see *Warick v. Diwell*, 2018 BCCA 53 at para. 55; *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74. However, just because the plaintiff has refused a type of treatment in the past does not mean that she will be denied an award for it as part of her future care.
- [163] As is obvious from the flexibility in courts' approaches to assessing the cost of future care, each case must be determined on its own facts. The award can also be adjusted to reflect the likelihood that future treatment will improve or maintain a plaintiff's injuries suffered as a result of a defendant's actions. In all, the assessment of this head of damages is ultimately an exercise in prediction, and not one of precise accounting: see *Alvarado v. KCP Heavy Industries Co. Ltd.*, 2022 BCSC 1668 at para. 93, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

ii. Parties' Positions

- [164] The plaintiff did not obtain a cost of future care report. Instead, she relies on her testimony about her current treatments, and what she says is medically necessary and that she would use in the future to manage her injuries. While the plaintiff sets out the costs of the treatments in the future and applies the present value multiplier set out in the Civil Jury Instructions ("CIVJI") that totals \$444,526.87, she limits her claim for cost of future care to \$135,000. Specifically, the plaintiff sets out the amounts she says she is entitled to and the amounts she claims as follows:

Treatment

Frequency

Duration

Cost

Present Value (CIVJI)

Amount Claimed

Physiotherapy

1x/2 weeks

"as long as I have symptoms"

\$45/session \$1,170/year

\$32,005.93

\$15,000

Registered Massage Therapy

1x/2 weeks

"as long as I have symptoms"

\$100/session \$2,600/year

\$71,124.30

\$35,000

Counselling

1x/week

"as long as anxiety continues"

\$150/session \$7,800/year

\$213,372.90

\$50,000

Acupuncture

1x/week

"as long as I have symptoms"

\$90/session \$4,680/year

\$16,250/year

\$128,023.74

\$35,000

Total

\$444,526.87

\$135,000

[165] The basis for the plaintiff's concession that she need only \$135,000 for future care is that she accepts that the treatments would lessen over time. She bases her position on Dr. Simonett's opinion that the plaintiff should expect to transition from more passive modalities of treatment to more active exercise-based programs in the future.

[166] The defendants contend that the only aspect of the plaintiff's claim for cost of future care that the Court should award is an amount sufficient to allow her to re-learn what she was shown in active re-habilitation and for gym access for some months into the future to assist in the implementation of these activities so she can re-condition herself. The defendants do not reduce their position to a dollar amount.

iii. Determination

[167] Based on the expert evidence of Dr. Waisman, and the testimony of the plaintiff, I accept that continued counselling is necessary and helpful to the plaintiff to treat and improve injuries she received from the Accident.

[168] As set out above, I do not accept the defendants' position that the psychological issues faced by the plaintiff are unrelated to the Accident or were pre-existing. The defendants must accept the plaintiff as they find her, and in this case that includes that she was injured at a pivotal time in her life when there are stressors related to career and life choices. In my view, counselling will assist in the plaintiff's ability to maintain or improve her current circumstances, especially so given Dr. Waisman's diagnosis that the plaintiff suffers from a somatic disorder.

[169] As I understand the evidence, a somatic disorder involves an individual who focuses too acutely on her or his injuries, thereby preventing the individual from moving forward with recovery. However, I find that weekly counselling is excessive and does not appear justified on the evidence before me, especially on an indefinite basis. The plaintiff has not appeared to attend counselling at such a frequency and, while I accept it is helpful for her recovery, weekly counselling is unwarranted.

[170] I conclude that counselling of one time per month for ten years is appropriate. As such, I award $\$150 \times 12 = \$1,800$, annually. This amount adjusted for net present value based on the 2% CIVJI calculations is \$16,168.68 for future counselling costs, which I round to \$16,170.

- [171] I accept that, based on the medical evidence and the plaintiff's testimony, the plaintiff would benefit from active treatments such as physio. Indeed, in my view, if the medical evidence suggests that if the plaintiff undertakes active rehabilitation treatments to address her deconditioning and postural issues, her prognosis will improve. However, while I find that the plaintiff should have access to active therapy for an extended period of time, I find it unrealistic that the physiotherapy would continue indefinitely. As such, I find that two times per month for fifteen years is appropriate. In making this award, I am of the view that it may be that at other periods of time beyond five years the plaintiff may require physiotherapy, but I also find it unlikely that the plaintiff will attend physio two times per month for the first five years. As such, I am attempting to balance the number of treatments that the plaintiff will actually use in the future.
- [172] Based on my calculation of 24 sessions a year for the next 15 years at \$45 per session, I arrive at a total of \$1,080 annually. This amount adjusted for net present value is based on the 2% CIVJI calculations is \$13,877.24 for physio or other active rehabilitation, which I round to \$13,890.
- [173] In respect of passive treatments such as acupuncture and massage therapy, I find that the plaintiff would use these as temporary relief from flare-ups of her symptoms should they persist. I find it appropriate that she have access to two sessions a month (of either massage therapy or acupuncture) for the next 10 years. By my calculation, this is \$2,400 (\$100 x 24) annually which, when adjusted for net present value based on the 2% CIVJI calculations, is \$21,558.24. I round this amount to \$21,560 for passive treatments.
- [174] I acknowledge this is a crude calculation, but in my view, it considers that the plaintiff's symptoms are somewhat uneven in their impact on her. By this I mean that there may be times when she requires more passive treatments for pain relief and other times when she requires fewer treatments. By spreading the amounts over time for a longer duration, I am attempting to provide the plaintiff for compensation for the treatments she will require.
- [175] To reiterate, in my view, given the medical opinions of Dr. Waisman and Dr. Simonett, and based on the plaintiff's own evidence that she found some treatments such as counselling helpful, I believe it is important that the plaintiff have access to both active rehabilitation services and counselling as it may improve her symptoms, or at least maintain her current levels into the future. Especially so given the evidence of the somatic nature of the diagnosis which involves the unhealthy focus of the plaintiff on her injuries and her status as an injured person. It is my sincere hope that the plaintiff will pursue all treatments available to her in an effort to improve her health and well-being.

G. Special Damages

- [176] The plaintiff originally claimed special damages of \$3,252.32. However, during the trial she reduced this amount to \$3,248.26 because \$4.06 of the claim was for the purchase of over-the-counter pain medication on August 1, 2017, related to an injury to the plaintiff's foot while working out at the gym.
- [177] The defendants did not strenuously contest the claim for special expenses except for an amount of \$200, which was a charge for a cancellation of the plaintiff's cognitive therapy appointment. The plaintiff asserts she was unable to attend that appointment because she was not feeling well due to the symptoms of her injuries.
- [178] Generally, a plaintiff should not be required to pay for an out of pocket cost that is related to an accident. I was not given the specific context as to how the cancellation cost of the appointment was incurred. However, on the evidence before me, it appears that if the plaintiff missed the appointment, thus incurring a cancellation charge, as a result of the Accident, she is entitled to be reimbursed for that amount. This should not be taken as condoning a plaintiff's failure to diligently make, keep and reschedule appointments so as not to waste funds. However, in this case, given the minimal amount at issue, the fact it appears to be only one cancellation charge in years of treatments and her testimony that she missed the appointment because she was feeling unwell as a result of the Accident, it appears reasonable that the plaintiff be reimbursed for the cancellation of the one appointment. Accordingly, I award the plaintiff the amount of \$3,248.26 (\$3,252.32 - \$4.06) as special damages which I round to \$3,248.00.

IV. ORDER

- [179] By way of summary, I conclude that the plaintiff is entitled to the following award of damages, rounded to the nearest dollar against the defendants and order:

Non-pecuniary Damages

\$140,000

Loss of Past Income (net of taxes and employment insurance premiums):

i. Apple - \$2,374

ii. Nursing - \$12,000

\$14,374

Loss of Future Income (including loss of pension)

\$300,000

Costs of Future Care - Total

iii. Counselling - \$16,170
iv. Physiotherapy - \$13,890
v. Passive Treatments - \$21,560
\$51,620
Special Damages
\$3,248
Total
\$509,242

[180] The plaintiff is entitled to her costs at Scale B, subject to any matters that may require a reconsideration of costs. If the parties wish to address costs, require clarification of the terms of this order, or other issues arising from this order, they have leave to make arrangements, within 30 days of receipt of these reasons, through Supreme Court Scheduling to appear before me for those purposes.

[181] I wish to thank counsel for their presentation of the evidence and submissions, and for their assistance to the Court throughout this matter.

"Gibb-Carsley J."

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