

CANADA / JUDGMENT

Marcon v. Lacasse

2022 BCSC 1133

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Supreme Court of British Columbia

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2022 BCSC 1133 Marcon v. Lacasse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marcon v. Lacasse,

2022 BCSC 1133

Date: 20220705

Docket: M20246

Registry: Nelson

Between:

Amy Marcon

Plaintiff

And

Jennifer Lynn Lacasse

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Plaintiff:

R.R.W. Sookorukoff

Counsel for Defendant:

T. Pettit and S. Nainaar

Place and Date of Trial:

Nelson, B.C.

November 23-26 and November 29-December 2, 2021

Place and Date of Judgment:

Nelson, B.C.

July 5, 2022

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INTRODUCTION

- [1] Amy Marcon was injured in an accident on August 25, 2017 in Castlegar when the vehicle she was driving was rear-ended by a vehicle driven by Jennifer Lacasse. Ms. Marcon's vehicle was pushed into the vehicle in front of her by the impact of the collision. Ms. Marcon's vehicle sustained significant damage and was written off. The defendant's vehicle was declared an obvious total loss by her insurer. The defendant admits liability for the collision.
- [2] At the time of the accident, Ms. Marcon was 31 years old. She was 23 weeks pregnant with her second child, Jones, who was subsequently born on December 27, 2017. She is married to Garrett Marcon, and they also have one older child, Jax. Jax was with Ms. Marcon in the car when the collision occurred.
- [3] The parties agree that Ms. Marcon suffered soft tissue injuries to her neck and right shoulder as a result of the collision. There is a disagreement about whether these injuries made a pre-existing SLAP tear in her shoulder symptomatic, or whether the collision caused the tear itself, but little turns on that difference of opinion. She was diagnosed with a SLAP tear after the accident, which did not respond to conservative treatment, and for which she underwent right shoulder arthroscopy in January 2019.
- [4] Ms. Marcon also has problems with her lower back and hip; the parties disagree about whether those problems are causally related to the collision, with the defendant taking the position they are the result of a pre-existing degenerative condition, and are not linked in any way to the collision.

- [5] Ms. Marcon has been diagnosed with Post-Partum Depression and Anxiety and Major Depressive Disorder with Anxious Distress. Once again, the parties disagree about the relationship of those psychological conditions to the collision. While Ms. Marcon accepts that she cannot establish that but for the collision she would not have had those mental health problems, she does submit that the collision was a significant contributing factor, which the defendant denies.

MS. MARCON'S PRE-ACCIDENT HISTORY

- [6] Ms. Marcon was born in Trail, and went to school there, graduating from high school in 2004. After graduation, she worked in retail positions in Trail and Vancouver. She earned a diploma in fashion merchandising in 2007. Mr. Marcon was also born in Trail, and they began a relationship. Eventually, she joined Mr. Marcon in Calgary, where she worked in retail. In 2008, they moved together to Yellowknife for Mr. Marcon's work as a helicopter mechanic.
- [7] In 2009, Ms. Marcon entered the nursing program at Aurora College in Yellowknife. She earned her Bachelor of Science in Nursing, in May 2013, then worked as a casual registered nurse at Stanton Territorial Hospital in Yellowknife, where she worked on the medicine and psychiatric units. While a casual, Ms. Marcon worked at least full-time hours at Stanton.
- [8] The Marcons decided to return to the Trail area to be closer to family. Ms. Marcon returned in late 2013, and Mr. Marcon followed in early 2014. Mr. Marcon got a job as an instrument technician at Teck, in Trail. Initially, and at the time of the accident, they lived in Castlegar, where Jax was born later in 2014.
- [9] Ms. Marcon started working for Interior Health at the Kootenay Boundary Regional Hospital in Trail as a casual Registered Nurse, on January 17, 2014. Jax was born on September 18, 2014, and Ms. Marcon took a ten-month maternity leave. She returned to work on June 12, 2015, to take a full-time relief position. She obtained a permanent full-time position on March 7, 2016.
- [10] Ms. Marcon primarily worked on the medical ward. While pregnant, she also worked on the psychiatric ward. She trained to work as a Patient Care Coordinator (PCC), which was a 10-month course, mostly online with periodic in-person sessions, in Kelowna. In the year prior to the collision, she was working as a PCC approximately 30% of the time. PCCs are also known as Charge Nurses.
- [11] Ms. Marcon's nursing duties were generally heavy and physically demanding. She was required to assist patients, many of them elderly and limited in their ability to look after themselves, with bathing, dressing and toileting. There was a lot of lifting. The duties while working on the psychiatric ward were somewhat less physically demanding, although that work is unpredictable as patients may sometimes need to be restrained. The PCC duties are less physically demanding than general nursing duties, as that position is not focussed on front-line patient care, but rather involves supporting nurses on the floor, overseeing patient

care, and being responsible for admissions and discharge planning. That said, as a PCC, Ms. Marcon could be pulled into typical nursing duties as and when required.

[12] Ms. Marcon loves being a nurse. She likes helping people, and being there for them in their worst and best times. She was described by her former supervisor, Robyn Sofonoff, as a very good nurse. Before the collision, Ms. Marcon intended to continue working as a nurse in the Trail area, and planned to specialize in an area such as critical care, renal or emergency nursing.

[13] At the time of the collision, Ms. Marcon was working full-time. Her shifts were four on/four off, totalling 37.5 hours a week. She worked some overtime, though less after Jax was born than she had before.

[14] Her tax returns show the following income before the accident, as set out in the plaintiff's written closing submission:

Year

Employment Income (101)

EI benefits

Total Income (150)

2013

*May 2013 - completed nursing education

\$53,722

\$53,722

2014

*moved to BC in January

*Jax born Sept 18

\$51,903

\$6,589

\$58,792

2015

\$34,717

\$15,420

\$52,057

2016

\$75,440

\$76,400

2017

*MVA Aug 25

* Jones born Dec 27

\$57,483

\$8,145

\$65,628

[15] 2016 is the only year of uninterrupted nursing income before the accident.

[16] Ms. Marcon has never returned to her pre-collision position, and has worked intermittently in a series of temporary part-time positions since the accident.

[17] Ms. Marcon was an active person prior to the collision. She went to yoga and fitness classes regularly and walked and hiked with her family.

[18] Ms. Marcon described three minor pre-collision accidents or injuries. First, in 2006, she was rear-ended. She went to physiotherapy a few times, and did not have any ongoing pain or difficulties. Second, in 2014, she was rear-ended a second time. She did not suffer any injuries on this occasion.

[19] Third, while playing softball in Yellowknife, Ms. Marcon hyperextended her right knee. She testified she used crutches for a week, and the pain resolved within a few months without treatment. When she saw a chiropractor due to hip pain, on July 6, 2016, the chiropractor noted that she had an old right knee hyperextension injury, dislocated her knee and that her knee cap "gets stuck". In cross-examination, Ms. Marcon testified that she could not recall any ongoing knee issues in 2016, and suggested the chiropractor's notes referred to an old issue. She said that she was able to run without any knee problems at that time.

[20] Ms. Marcon enjoyed generally good health prior to the collision. There is an issue with respect to a pre-existing back, hip or pelvic issue, which I will return to later.

THE ACCIDENT AND ITS IMMEDIATE AFTERMATH

[21] On August 25, 2017, Ms. Marcon was driving her 2016 Toyota Rav 4 southbound on Columbia Avenue in Castlegar. She was going home after grocery shopping with Jax. She was five months pregnant with Jones. Her pregnancy was going well.

[22] Ms. Marcon slowed to a near stop as a vehicle a few cars ahead of her was waiting to make a left-hand turn. She had her left hand on the wheel and her right hand on the shifter.

- [23] Without warning Ms. Marcon's vehicle was rear-ended by a 2006 Honda CRV driven by the defendant. The impact was significant: Ms. Marcon described it as "like a jolt", a "whipping motion", "forward and back." Ms. Marcon's vehicle was pushed into the vehicle in front of her.
- [24] Ms. Marcon described a "ripping" feeling of extreme pain across her abdomen. She was frantic and called Mr. Marcon, who was working in Trail. She told him she thought she had lost the baby. Mr. Marcon immediately left work to go to her.
- [25] Police and paramedics attended the scene. Ms. Marcon described the people from the vehicle in front of her giving onion rings to Jax to keep him calm. Both her vehicle and the defendant's vehicle were eventually written off. The damage to Ms. Marcon's vehicle was estimated at \$16,740.90.
- [26] Ms. Marcon and Jax were taken by ambulance to the hospital in Castlegar. She was assessed by the emergency physician, who also did a bedside ultrasound to check on the baby, and recommended she go to Trail where they had a better ultrasound machine. She said her biggest worry was the baby. She was feeling a lot of pain on her right side, her right neck and shoulder. She was sore but her abdominal pain had settled.
- [27] Mr. Marcon then took Ms. Marcon to the hospital in Trail, while Ms. Marcon's parents took care of Jax. She had an ultrasound, which ruled out any significant issues with the baby. At this time, she was feeling relieved that the baby was okay, but was exhausted, overwhelmed and "felt pain everywhere." She was supposed to go to work that night, but did not.
- [28] Ms. Marcon said that over the following days she continued to have significant pain in her neck and shoulder and, after a few days, in her lower back, predominantly on the right side.
- [29] She first saw her family doctor, Dr. Gil, on August 29, 2017. The record indicates that Dr. Gil diagnosed a "likely MSK R shoulder pain/lower abd" and prescribed Tylenol and massage. At the time, Ms. Marcon testified her neck and shoulder were her major complaints. She said she also had lower back pain within a short period of time from the accident, although she could not say the specific day she first remembered having it.
- [30] Ms. Marcon first saw a physiotherapist after the accident on September 1, 2017. She was cross-examined about the physiotherapist's notes, which refer to right shoulder pain, but do not refer to lower back pain. She was asked if it was possible that she did not have lower back pain on September 1, 2017, to which she said she did not know, and remembered her whole right side hurting. She could not say when she could isolate the pain.
- [31] Ms. Marcon saw Dr. Gil again on September 6, 2017. Dr. Gil's clinical entry does not reference lower back pain, but she completed an Interior Health Occupational Fitness Assessment on the same date, which references "back pain", in addition to whiplash and right shoulder pain. This entry, 12 days after the accident, is the first clinical note referring to back pain.

- [32] On September 13, 2017, Ms. Marcon saw a massage therapist for the first time after the accident. The massage therapist's notes refer to right shoulder pain, radiating into the neck and also into the lower back and hips. They also refer to left sciatic pain. On cross-examination, Ms. Marcon could not say whether this was the first time she had reported lower back and hip pain to a therapist.
- [33] There are further entries referring to lower back pain in subsequent massage and physiotherapy notes.
- [34] Generally, Ms. Marcon testified that, when she would attend appointments, there was only so much time, and she would voice her chief complaint, which at this time was predominantly her neck and right shoulder. She did not recall ever relating her back pain to her pregnancy.
- [35] Ms. Marcon remained off work for the remainder of her pregnancy on the advice of her doctors and midwife.
- [36] Ms. Marcon testified that, for the duration of her pregnancy, she felt pain all the time. She went to numerous appointments and had constant Braxton Hicks contractions and felt like she would go into early labour. Her physical complaints were in her neck, right shoulder and lower back.

BIRTH OF JONES AND ITS AFTERMATH

- [37] Jones was born on December 27, 2017. Despite having a great deal of help from her family, Ms. Marcon struggled caring for him. She could not hold or feed him, or change his diaper, without pain. She tried, but was unable to breastfeed Jones. She struggled mentally and had difficulty bonding with him. She said this was because anytime she had to do anything with him, it caused her pain. She did not know how to cope, and felt sad all the time, like she was not doing a good job as a mom. Ms. Marcon testified that she did not feel like this after Jax was born.
- [38] By January 2018, Ms. Marcon's mood had become a significant concern. Her midwife referred her to a psychiatrist, Dr. Trueman, on an urgent basis. Dr. Trueman first saw Ms. Marcon on January 23, 2018, at which time she diagnosed her with Post-Partum Depression with Anxious Distress, with possible Generalized Anxiety Disorder developing. Ms. Marcon had no previous psychiatric history. Dr. Trueman continues to see Ms. Marcon on a regular basis. She has prescribed a variety of medications for Ms. Marcon to address depression and anxiety.
- [39] Ms. Marcon's mother, Caterina Rusnell, and her husband, Mr. Marcon, described the difficulties and pain experienced by Ms. Marcon following the accident. Ms. Rusnell said Ms. Marcon always seems to be in pain. She is always stretching or rubbing her neck. She always seems to have some form of treatment going on. Ms. Rusnell and her husband, as well as Mr. Marcon's parents, have provided a lot of child care for both Jax and Jones since

the accident, as Ms. Marcon needed help to care for them, including to permit her to attend therapy.

- [40] Mr. Marcon said their life "revolves around her appointments." He said she is always in pain, tired, struggling and emotionally defeated. He said the accident has changed her life dramatically, and had negatively affected their relationship. They can no longer go on the hikes they used to enjoy, only short walks within Ms. Marcon's limitations. They used to share the housework equally, but he has taken on the majority of it. They moved to an acreage outside of Trail in July 2018, where they have horses, chickens, a dog and a cat. While the horses are his passion, Mr. Marcon does pretty much all the outdoor work. He also loves hunting, but he no longer goes out of town to hunt as much as he used to because he needs to be home to help care for the children.

TREATMENT

- [41] Ms. Marcon's treatment post-accident has been very extensive. Ms. Marcon's testimony about treatment was supplemented by particulars set out in the Agreed Statement of Facts and the List of Special Damages. The parties agreed that Ms. Marcon attended at the clinics or professionals listed in the Agreed Statement of Facts, although the defendant did not admit that all treatment was causally related to the accident. The List of Special Damages provided by Ms. Marcon includes a list that summarizes the dates, costs and types of treatment.
- [42] The following is a summary of the various therapies and treatments Ms. Marcon has pursued. She says they are all for her accident-related injuries. It is taken from Ms. Marcon's written closing submission:
- a) Primary Care:
 - i. Ms. Marcon has been under the regular care of her family doctors, initially Dr. Gil, and then Drs. Fisher and Baxter. Dr. Fisher has recently been performing trigger point injections on Ms. Marcon's right shoulder for pain relief. Ms. Marcon said they provide temporary relief in her neck and right shoulder.
 - b) Imaging:
 - i. Ms. Marcon did not initially have imaging done due to her pregnancy. Imaging dates are as follows:
 - (1) Apr 30, 2018 - Nerve Conduction Study
 - (2) Jun 17, 2019 - Ultrasound of right shoulder to rule out rotator cuff tear
 - (3) Aug 22, 2019 - MRI / Arthrogram/ Right Shoulder
 - (4) Oct 28, 2019 - Xray - lumbar spine, SI joints, pelvis

- (5) Nov 5, 2019 - CT Lumbar, SI joints, Cervical
- (6) Jul 22, 2020 - MRI lumbar spine, SI joints, C-spine
- c) Orthopaedic Surgeons:
 - i. As noted above, Ms. Marcon had an MRI arthrogram of her right shoulder on August 22, 2019. Dr. McVicar, an orthopaedic surgeon, diagnosed a minor undisplaced SLAP tear on September 11, 2019 and recommended surgery. Ms. Marcon elected to have surgery with Dr. Bitting on January 22, 2020. She said the surgery improved her range of motion but did not resolve her right shoulder pain.
 - ii. Ms. Marcon continues to see Dr. Bitting for steroid injections into her right shoulder to help relieve her pain.
- d) Neurosurgeon Assessment:
 - i. Ms. Marcon was referred to a neurosurgeon, Dr. Goplen, on December 19, 2019 and September 9, 2020, to determine whether surgery was appropriate. She said surgery was not recommended.
- e) Internal Medicine Assessment:
 - i. Ms. Marcon was referred to an internal medicine doctor, Dr. Segal, on March 2, 2020, to rule out an autoimmune disorder. She said it was ruled out.
- f) Pain Clinic - RISE BC:
 - i. Ms. Marcon was referred to a pain clinic in Nelson. She attended on 13 occasions for various treatments, including trigger point injections and prolotherapy. They were helpful, but she stopped as she had to pay for the treatments herself and could not afford to continue.
 - ii. She described the treatment as very painful. On one occasion the doctor accidentally punctured her lung, which required a night in hospital but did not cause any long-term problems.
- g) Pain Clinic - KBRH:
 - i. Ms. Marcon was referred to a pain clinic in Trail that briefly operated at KBRH, in April and May 2021. As was the case with the clinic at RISE BC, she received a number of injections, which she described as very painful.
- h) Physiotherapy:
 - i. Between September 1, 2017 and June 22, 2021, Ms. Marcon has attended 156 physiotherapy sessions for treatment of her neck, right shoulder and back. She found them helpful. Her sessions are ongoing. She testified she initially paid for the sessions, then ICBC did.
- i) Chiropractic Treatment:

- i. Ms. Marcon attended 7 chiropractic sessions at Kootenay Integrated Health, and 4 sessions at City Centre Chiropractic. She testified they were helpful. She claimed them on her husband's benefit plan.
- j) Massage Therapy (K. Reglin/Trail Integral Therapeutics):
 - i. Between August 2, 2018 and September 14, 2021, Ms. Marcon attended 68 massage therapy sessions with Ms. Reglin. Ms. Marcon testified these sessions are ongoing. She claims them through her husband's plan.
- k) Massage Therapy (with Ms. Milburn at City Centre Chiro):
 - i. Between September 13, 2017 and May 1, 2019, Ms. Marcon attended 69 massage therapy sessions with Ms. Milburn at City Centre Chiropractic. She claimed them through her husband's plan.
- l) Massage Therapy (at Ms. Milburn's own practice):
 - i. Between May 28, 2019 and November 6, 2021, Ms. Marcon has attended an additional 150 sessions with Ms. Milburn at her own practice. She testified that the sessions are ongoing. She claims them through her husband's plan.
- m) Acupuncture:
 - i. Ms. Marcon had two sessions of acupuncture at City Centre Chiropractic. She testified they were helpful. These were claimed through her husband's plan.
- n) Psychiatric Treatment:
 - i. Ms. Marcon has been treated by Dr. Trueman on an ongoing basis since January 23, 2018. As of October 28, 2021, she has had 36 sessions.
- o) Counselling:
 - i. Between August 19, 2019 and October 13, 2021, Ms. Marcon has had 26 counselling sessions with Christine VanDyke. Ms. Marcon testified that the sessions are ongoing.
- p) Osteopathic Treatment (Sante Holistic Health Centre):
 - i. Ms. Marcon attended for two osteopathic treatments on the recommendation of her doctor, on January 15, 2019 and March 5, 2019. Ms. Marcon described them as a form of alternative medicine treating the whole body. She said the sessions were helpful.
- q) Kinesiology:
 - i. Between June 12, 2020 and November 4, 2021, Ms. Marcon has attended for 49 kinesiology sessions. Ms. Marcon testified that these sessions are on-going, and being funded in full by ICBC.
- r) Medication:

- i. Ms. Marcon has taken a variety of medications since the accident until arriving at her current assortment. She is presently taking Desvenlafaxine, Bupropion, Aripiprazole, and Lorazepam. She testified that she is also taking Diclofenac for pain and Nozinan to help her sleep.
- [43] In addition to the above, Ms. Marcon stretches and performs exercises at home that she learned from her massage therapist, kinesiologist and physiotherapist. She also uses a medicine ball. At trial, she was waiting to go to a new pain clinic in Kelowna. Dr. Trueman has recommended Ms. Marcon see a psychologist, but she said she cannot afford to and is already having difficulty managing the volume of her treatments.

RETURN TO WORK POST-ACCIDENT

- [44] Following the collision, Ms. Marcon first returned to work on a graduated return to work program on May 28, 2019, on a part-time basis. She was doing project work on Safe Patient Handling Procedures. That work continued until August 2019. Ms. Marcon testified that she felt good in this position as she could take breaks when needed and the hours were short enough that she had time to go to her treatments. It did not have any physical requirements.
- [45] Between in or about August and October 2019, Ms. Marcon worked in a 0.75 FTE position as a Nursing Educator. This position did not have a lot of physical requirements beyond occasionally demonstrating how to do nursing tasks. Ms. Marcon testified that this position caused her increased pain in her shoulder and back. She did not have enough time to attend treatments to manage her pain. She felt exhausted and in pain at the end of her shifts. She said the hours were too long. She left this position after talking to her doctor about the pain she was experiencing.
- [46] There was then an employment gap until August 2020. Ms. Marcon testified that in this period she was trying to manage her pain by going to appointments. In January 2020, she had surgery on her shoulder to repair the SLAP tear, and also needed time to recover and heal from the surgery.
- [47] In August and September 2020, Ms. Marcon worked half-time from home as a Lab Booking Clerk for the Princeton Hospital. This position had no physical demands and provided Ms. Marcon with sufficient flexibility to take breaks and attend treatments. This position ended when the duty to accommodate team and employer were able to find Ms. Marcon a nursing position in the hospital in Trail.
- [48] On September 28, 2020, Ms. Marcon began working as a PCC in the hospital in Trail, three days a week, eight hours a day. She worked in that position for a total of seven shifts, and then went off work due to a lapse in her nursing licence registration. Ms. Marcon testified her licence lapsed while she was working from home as a Lab Booking Clerk and did not see the usual reminder notices nurses receive. She testified that it was her fault, that she forgot.

- [49] Ms. Marcon said that the PCC position involved overseeing patient care and reviewing the educational needs for the unit. She said that it was only seven shifts, it was manageable.
- [50] Ms. Marcon's nursing licence was reinstated in January 2021. She worked in a temporary position as a COVID-19 vaccine coordinator between April 6, 2021 and early August 2021. She administered vaccines to patients in the hospital. That position was four days a week, 5.5 hours a day. Ms. Marcon testified that her pain while working in this position depended on how many people she vaccinated, as the repetitive motions involved in vaccinating people and writing aggravated her shoulder. She could tolerate it if she was able to take breaks. This position ended as the requirement for it dwindled.
- [51] Between August 6, 2021 and trial, Ms. Marcon again worked as a PCC. That position is four days on, four days off, 6.5 hours per day. Ms. Marcon testified that this is a temporary position to determine whether she is capable of working in a permanent 0.7 FTE position, which was scheduled to commence in January 2022. She said that she is supposed to be working 0.6 FTE, but staffing shortages and workload on the busy medical unit require her to work more. Ms. Marcon testified that she is struggling physically, and she was not hopeful at time of trial that she would be able to continue in January 2022, and will likely have to seek an alternative position through the duty to accommodate process. She testified she is trying to learn how to work in pain, and see if she is able to cope, but that it is not going well.
- [52] More generally for the future, Ms. Marcon testified that she will try to find any job she can manage with her pain. She intends to stay in Trail, where she has the help and support of her family. Ms. Marcon described the difficulties she anticipates having in a variety of nursing positions and units.
- [53] Ms. Marcon's employment is governed by a collective agreement between the Health Employers Association of BC and the Nurses Bargaining Association.
- [54] The parties agree that Ms. Marcon has used the following sick and vacation time since the collision:
- 2020: Nil
 - 2019: Nil
 - 2018: Nil
 - 2017:
 - o Sick: 41.5 hours at \$36.44 an hour = \$1,512.29
 - o Vacation: 44 hours at \$35.46 an hour = \$1,560.24
 - o Total: \$3,072.53
- [55] Ms. Marcon received long-term disability benefits from Great West Life after the collision. She has a subrogation agreement which requires her to repay those benefits.

- [56] Todd Sackman is employed with Interior Health as a "Coordinator of Duty to Accommodate Search." He has worked in Interior Health's duty to accommodate department for six years. He described their process for accommodating employees, which involves a tripartite process between the employer, employee and union. The team reviews injured employees' medical restrictions and attempts to find them suitable employment. He took over Ms. Marcon's file in August 2020. He said Interior Health had generally been successful in finding Ms. Marcon suitable work.
- [57] Ms. Sofonoff was Ms. Marcon's supervisor when the accident occurred and was part of some of the duty to accommodate discussions. She recommended Ms. Marcon's initial project work and nursing educator positions. She is not Ms. Marcon's current supervisor, but sees her regularly during her weekday shifts. She has observed Ms. Marcon in pain in her current position, observing behaviours such as stretching and rubbing her neck.

EXPERT EVIDENCE

Dr. Aaron MacInnes

- [58] Dr. MacInnes is an Anesthesiologist. His practice is based at the Pain Management Clinic at the Jim Pattison Outpatient Care and Surgical Care Centre in the Fraser Health Authority. He is the Division Head of Pain Medicine in the Department of Anesthesiology for Fraser Health. He has a broad-based chronic pain practice.
- [59] Dr. MacInnes performed an independent medical assessment of Ms. Marcon on November 5, 2020, and wrote an expert report dated November 28, 2020. He also provided a report responding to Dr. Osama Gharsaa's report, dated December 30, 2020.
- [60] Dr. MacInnes diagnosed Ms. Marcon with the following conditions, all of which he opined were caused by the accident:
- a) Chronic whiplash-associated disorder:
 - i. Described as "a constellation of symptoms affecting the neck and back", this disorder is responsible for Ms. Marcon's ongoing chronic soft tissue pain symptoms in the neck, right shoulder girdle, right shoulder, right arm, lower back, bilateral buttocks and bilateral legs.
 - ii. Dr. MacInnes opined that these symptoms are unlikely to resolve, and that Ms. Marcon will likely be left with ongoing pain symptoms from this time forward.
 - b) Chronic mechanical spine pain:
 - i. Described as "an onset or exacerbation of pain with movement of the spine" Ms. Marcon has developed chronic mechanical spine pain in the cervical and lumbar spine regions secondary to the whiplash injuries.
 - ii. Dr. MacInnes opined that these symptoms are unlikely to resolve, and the prognosis is guarded.

c) Chronic myofascial pain syndrome:

- i. This syndrome was described as "a painful regional syndrome characterized by the presence of an active trigger point in the skeletal muscle."
- ii. Ms. Marcon's trigger points were found in the bilateral trapezius, bilateral levator scapulae and right rhomboid muscles. Dr. MacInnes opined that this syndrome is contributing to Ms. Marcon's symptoms in the neck, right shoulder girdle and mid-back regions.
- iii. Dr. MacInnes opined that as long as Ms. Marcon has mechanical spinal pain she will most likely to continue to have associated myofascial pain in the affected regions. The prognosis is guarded.

d) Chronic nociceptive (soft tissue) right shoulder pain:

- i. This condition was described as right shoulder pain that has had little improvement, even after surgical repair.
- ii. Dr. MacInnes noted that Ms. Marcon was diagnosed with a SLAP tear in the right shoulder as well as possible partial thickness articular surface tear of the supraspinatus tendon, and possible laminar tear of the infraspinatus tendon, which in his opinion were most likely caused by the accident, although he indicated on cross-examination that he would defer to an orthopaedic surgeon on this issue.
- iii. Her pain symptoms will most likely persist in amount from this time forward.

e) Mood and anxiety symptoms:

- i. Ms. Marcon was noted to have moderate levels of depressive symptoms and moderate levels of anxiety symptoms.
- ii. Dr. MacInnes noted that there is an interplay between mood, pain, anxiety and sleep. He deferred further comment on causation, diagnosis, management and prognosis of Ms. Marcon's mood and anxiety symptoms to a psychologist or psychiatrist.

f) Sleep disruption:

- i. Ms. Marcon reported to Dr. MacInnes that she developed issues with her sleep after the accident, which persist.
- ii. Dr. MacInnes opined that the accident and resulting physical conditions most likely contributed to Ms. Marcon's sleep disruption. If her physical symptoms improve, she may see improvements in sleep disturbance, but this is not always the case.

[61] Dr. MacInnes provided the following overall prognosis for Ms. Marcon:

Given that the accident was greater than three years ago and Ms. Marcon continues to suffer from chronic pain, psychological symptoms, and a sleep disruption in addition to reductions in her vocational and recreational capacities, it is my opinion that she will most likely continue to suffer

from daily ongoing chronic pain from this point forward. Ms. Marcon has attended multiple treatment modalities since the motor vehicle accident and it is my opinion that there is low possibility of complete resolution of her chronic pain symptoms. It is my opinion that Ms. Marcon will require ongoing self-management of her chronic pain symptoms and a combination of active and passive treatment modalities to best assist her to manage her symptoms so she can maximize her function and quality of life.

- [62] In cross-examination, the defendant put a number of questions to Dr. MacInnes related to its position that Ms. Marcon had a pre-existing degenerative back condition, and that her current low-back complaints relate to that condition, and were not caused by the accident.
- [63] First, the defendant asked Dr. MacInnes whether Ms. Marcon's reported low-back pain symptoms when she went to a chiropractor on July 6, 2016 were consistent with an activation of her pre-accident degenerative changes. Dr. MacInnes said the symptom itself could represent irritation of the nerve root on the right-hand side. On re-examination, Dr. MacInnes said that the July 8, 2016 entry, indicating that Ms. Marcon felt good and pain-free, meant it was not a nerve root irritation, as a nerve root irritation would not have resolved within two days, but would be expected to be an issue for an extended period. His opinion that Ms. Marcon was asymptomatic before the accident was unchanged.
- [64] Second, the defendant took Dr. MacInnes through all, or nearly all, the clinical entries from mid-2019 to October 2019, emphasizing that the complaints appeared to focus on the right shoulder until October 14, 2019, when there was a sudden increase in lower back pain. Dr. MacInnes agreed that this could represent an activation of pre-accident degenerative changes. However, on re-examination he said the entries were typical for someone with chronic pain, whose symptoms fluctuate. He explained that patients with chronic pain may shift their focus when pain is more severe in a given area.

Dr. Osama Gharsaa

- [65] Dr. Gharsaa is an orthopedic surgeon who assessed Ms. Marcon on November 20, 2020, and wrote a report dated November 24, 2020. He also provided a responsive report to Dr. MacInnes' responsive report, dated February 18, 2021.
- [66] Dr. Gharsaa's opinion on Ms. Marcon's shoulder pain begins by noting the MRI finding of a SLAP lesion and some tendonitis. He could not determine whether the accident caused that condition or whether it was asymptomatic and became symptomatic after the accident. He wrote there was a 50% chance the accident caused the SLAP tear. Regardless, he diagnosed the accident as having caused sprain and strain to Ms. Marcon's shoulder with a possible SLAP tear.
- [67] Dr. Gharsaa's opinion on Ms. Marcon's neck pain is that she suffered a soft tissue sprain and strain and whiplash-associated disorder grade 1 to 2 "at the most." He wrote "these typically heal within 6 to 12 weeks."

[68] Dr. Gharsaa concluded that Ms. Marcon's back pain was unrelated to the accident because "it was not until quite some time after the accident where she started to report low-back pain". Rather, he suggested her ongoing lower back pain was related to severe bilateral foraminal stenosis which is chronic in nature, and not related to the accident. In reaching his conclusion, he did not note or consider the July 2016 chiropractic records.

[69] In terms of Ms. Marcon's current and future ability to work, Dr. Gharsaa opined that "at this point structurally speaking and the result of the injuries sustained in the motor vehicle accident, including her right shoulder issues and her neck, no functional limitation or physical restriction would be required. Any restriction at this point would be self-inflicted depending on her own perception of pain."

[70] For a number of reasons, I find Dr. Gharsaa's opinion to be of little assistance.

[71] First, as recognized by the defendant in its closing submission:

Dr. Gharsaa provided opinion evidence as an orthopedic surgeon. He specifically disavowed expertise as a chronic pain specialist or a psychologist. He offered his opinions as to disability from the standpoint of functional limitations and physical restrictions as opposed to pain. A concern with this approach is a failure to take into account sources of disability which are not related to functional limitations or physical restrictions such as pain or psychological conditions. Thus, Dr. Gharsaa's medical opinion will tend to understate accident-related disability where those factors are significant.

[72] Indeed, I find that Dr. Gharsaa's opinion entirely failed to take into account sources of functional disability in Ms. Marcon's case such as pain and psychological conditions.

[73] Second, it was clear on cross-examination that Dr. Gharsaa had not performed a full inquiry into how the SLAP tear was caused. He did not inquire into how Ms. Marcon was positioned when the accident occurred, despite agreeing that when determining the cause of a SLAP tear it is important to consider where the arms are located. His notes indicate he only determined it was a rear-end collision and that she was pushed into the vehicle in front of her. I prefer the opinion of Dr. MacInnes on the causation of the SLAP tear.

[74] Third, with respect to neck pain, Dr. Gharsaa's opinion that injuries of the sort suffered by Ms. Marcon typically heal within six to 12 weeks failed to take into account Ms. Marcon's actual experience. On cross-examination, he admitted that people can have pain in the absence of an orthopaedic cause, that people can continue to suffer pain from soft tissues beyond the typical healing period, that pain has a subjective component, and that pain alone can be debilitating. He further agreed that he only assessed Ms. Marcon from an orthopaedic perspective, not a chronic pain perspective. None of that was taken into account, and indeed it was actively discounted, by Dr. Gharsaa in his report.

[75] Fourth, Dr. Gharsaa's opinion that Ms. Marcon's back pain was unrelated to the accident was based on his assumption that "it was not until quite some time after the accident where she started to report low-back pain." This statement was the subject of extensive cross-

examination, with reference to relevant clinical records. Those records show that the first post-accident reference to back pain was in Dr. Gil's September 6, 2017 occupational fitness assessment. On September 13, 2017, a massage therapist, Ms. Milburn, noted pain "also radiating down back into lower back and hips". On September 21, 2017, Ms. Milburn noted "lower back and sciatic sore". On that same date, Noelle Rocheleau, a physiotherapist, noted "neck/shoulder is main complaint but also sore in low-back/SIJs due to combination of pregnancy and accident".

[76] When referred in cross-examination to these and other subsequent entries noting lower back pain, Dr. Gharsaa said he saw them but they were not significant to his opinion. In his responsive report to Dr. MacInnes' report, Dr. Gharsaa noted that the first mention of lower back pain was September 6, 2017. He wrote that did not change his opinion that the accident did not cause the lower back pain because, "if there was any significant injury to the lower back, Ms. Marcon should have reported or noticed symptoms within the first day or two following the accident and not two weeks after it occurred". Clearly the records were significant to Dr. Gharsaa's responsive report, and he could not explain why he failed to refer to them in his first report.

[77] Further, Dr. Gharsaa noted in his report that Ms. Marcon stated she had pain in her neck, right shoulder and lower back the night of the accident. Her evidence about the pain she experienced immediately after the accident appears to have been ignored or rejected, without explanation, by Dr. Gharsaa.

[78] Fifth, Dr. MacInnes wrote a responsive report to Dr. Gharsaa's original report, dated December 30, 2020. Dr. MacInnes noted that Dr. Gharsaa did not undertake a complete chronic pain assessment. In addition, Dr. Gharsaa failed to note the clinical records related to lower back pain after the accident. Dr. MacInnes wrote that he was:

unsure how soon after an accident or trauma Dr. Gharsaa would require the symptoms to be present to be able to attribute a cause-effect relationship of the two events. However, based on the fact that Ms. Marcon had more prevalent symptoms in other areas (neck and shoulders) reporting these symptoms to her care providers within two weeks, in my opinion, is quite reasonable.

[79] It was only after Dr. MacInnes' responsive report that Dr. Gharsaa wrote his own responsive report, dealing with the clinical records in question, and suggesting that a report of pain would have to occur within 48 hours.

[80] In his responsive report, Dr. MacInnes considered Dr. Gharsaa's comments about a pre-existing degenerative chronic lower back condition. Dr. MacInnes wrote that if someone has a chronic condition and associated pain, that in in his clinical experience with chronic pain patients, the condition would wax and wane, with intermittent flair-ups. Given that Ms. Marcon did not have any visits to her family physician with respect to lower back pain prior to the accident, he did not believe this was a significant medical issue for her.

- [81] Dr. Gharsaa's expert evidence has been the subject of critical comment in cases including *Bahia v. Norton*, [2020] BCSC 1599, and the cases referred to at para. 214 of that decision, as well as *Gee v. Bock*, 2019 BCSC 1348, and *Kipnes v. Kirkpatrick*, 2021 BCSC 762. In all of those cases, the court noted problems with Dr. Gharsaa's evidence, including his failure to identify the psychological aspects of pain, and that such pain may become chronic. The observations made in those cases echo the concerns I have identified in the present case.
- [82] For all of these reasons, I give little or no weight to Dr. Gharsaa's evidence. On all matters where they disagree, I prefer the evidence of Dr. MacInnes.

Dr. Karen Trueman

- [83] Dr. Trueman is Ms. Marcon's treating psychiatrist. As mentioned earlier, Dr. Trueman first saw Ms. Marcon on January 23, 2018. She provided an expert report dated December 7, 2020. In preparing her report, Dr. Trueman reviewed the 28 progress notes from her sessions with Ms. Marcon to that date.
- [84] In her report, Dr. Trueman stated she could not "comment on any causation of mental health difficulties from the motor vehicle accident nor provide any comment on future prognosis, or future employability". As a result of that statement, Ms. Marcon did not argue that but for the accident she would not have been diagnosed with Post-Partum Depression with Anxiety in January 2018. Ms. Marcon does submit, however, that but for her accident-related injuries she would not have suffered such a significant increase in her mental health issues. In taking this position, Ms. Marcon relies on the following passages in Dr. Trueman's report:

I have as her psychiatrist noted, however, that chronic pain issues have been significant for Ms. Marcon and have been a frequently discussed perpetuating stressor to her depression and anxiety. Her pain has seemed to fluctuate depending on timing and type of therapy used among other variables but from my perspective her pain has appeared to be a negative contributing factor to her state of well being... (p. 6).

Ms. Marcon's chronic pain and physical injuries have also appeared to be a barrier to her returning to work in any sustained manner and this in turn has negatively impacted Ms. Marcon's sense of self worth and contributed to further negative cognitions about herself and perpetuated her depression. She has also experienced ongoing negative cognitive symptoms from the sleep disruption from her physical pain and depression such as poor concentration, difficulty staying on task, poor memory and foggy thinking. (p. 6)

In summary, Ms. Marcon is a pleasant, thirty four year old married woman and mother of two young boys who continues to present with features consistent with Major Depressive Disorder with Anxious Distress, in the context of chronic physical pain which Ms. Marcon attributes to the motor vehicle accident ." (p.7).

[emphasis added]

[85] The defendant submits that Ms. Marcon has failed to discharge her onus of proving that but for the collision she would have experienced the mental health difficulties she did. I return to this issue below in addressing causation.

Functional Capacity Evaluation

[86] Ms. Marcon underwent a functional capacity evaluation with Matthew Cole on November 6, 2020. Mr. Cole is a kinesiologist. Mr. Cole wrote a report, dated November 30, 2020. Sheila Branscombe, an occupational therapist, was engaged to provide an opinion on Mr. Cole's report. Her report, dated January 13, 2021, was entered into evidence. Both Mr. Cole and Ms. Branscombe were cross-examined.

[87] Mr. Cole's testing indicated that Ms. Marcon had a number of physical limitations and restrictions, most related to low-back pain and right shoulder pain. Mr. Cole summarized his findings as follows:

Ms. Marcon is a 34-year-old woman who is limited in a number of physical capacities because of right shoulder and low-back pain. She is limited to sitting to approximately 30-40 minutes intermittently because of low-back pain. Low-back pain also limits her ability to perform low-level work, crouch, bend and stoop. Walking pace also showed a significant functional decline over the day. Material handling i.e. lifting, carrying, pushing, and pulling are limited by both low-back pain and right shoulder pain. She is best suited for the light strength category for occasional work but could carry and pull into the medium strength category on a rare basis. Right shoulder pain limits her ability to perform sustained overhead and eye level reaching work as well as highly repetitive reaching with that limb. These tasks are best limited to a rare basis. She is suitable for work requiring intermittent occasional below shoulder level reaching, and forward reaching, however.

[88] Mr. Cole opined that Ms. Marcon is limited to the light strength category and has limitations with sitting, reaching, crouching, bending/stooping and walking, meaning that she has limitations with performing all of her job demands as a Registered Nurse.

[89] As Mr. Cole acknowledged in cross-examination, any functional capacity evaluation evaluates a subject's limitations on the day of assessment, and limitations can fluctuate over time.

[90] The defendant submits that little weight should be given to Mr. Cole's evidence on functional capacity. The defendant submits that Mr. Cole failed to adduce any meaningful understanding from Ms. Marcon as to her pre-accident job demands, her present job demands, or her potential future demands. Furthermore, the defendant submitted that cross-examination raised concerns as to Mr. Cole's knowledge of his own field, including standards to be used in tests he administered and relied upon in offering his opinions on capacity.

- [91] It is true that Mr. Cole did not explore Ms. Marcon's individual job demands, relying instead on the NOC Career Handbook for the occupation of Registered Nurse. However, it is possible to compare the limitations and restrictions found by Mr. Cole with Ms. Marcon's own evidence about the job demands in the various nursing positions she has worked in. The defendant's point about concerns being raised in cross-examination about Mr. Cole's knowledge of his own field is well-taken, and I have taken that into account in assessing the weight to be given to Mr. Cole's evaluation.
- [92] Ms. Branscombe did not assess Ms. Marcon, and could offer no evaluation of her functional capacities. What she did was offer a critique of Mr. Cole's report. I agree with Ms. Marcon's submission that Ms. Branscombe's report was argument in the guise of opinion. Ms. Branscombe highlighted areas where Ms. Marcon had normal or near normal function, while ignoring areas where she had limitations. She strayed from her area of expertise as an occupational therapist to offer opinions on the causation of Ms. Marcon's injuries.
- [93] As Ms. Marcon submits, Ms. Branscombe's report is something that might be useful to assist defence counsel prepare for cross-examination. But it is not something that should have been offered as opinion evidence. A similar finding with respect to a report authored by Ms. Branscombe was made in *L.A.F. v. G.M.F.C. Ltd.*, 2019 BCSC 2252, where Justice Shergill stated:
- [164] The defendants rely on the evidence of Sheila Branscombe, an occupational therapist, to challenge Ms. Szarkiewicz's opinion. Ms. Branscombe authored a Cost of Future Care Analysis -- Response Report, dated April 19, 2019. This is essentially a critique report of Ms. Szarkiewicz's methodology. I found Ms. Branscombe's evidence unhelpful and unreliable, and have placed no weight on it. Ms. Branscombe has never met Ms. F. and did not review any of the source documents in preparing her report, which is essentially argument in the guise of opinion. In addition, her testimony lacked objectivity, and exhibited an obvious bias in favour of the defendants.
- [94] The same comments apply to Ms. Branscombe's report in this case. I have placed no weight on her report.

Vocational Opinion Evidence

- [95] Dr. Quee Newell is a vocational rehabilitation consultant who wrote an expert report dated July 16, 2021, which was admitted without objection or cross-examination. She provided opinion evidence as to the range of nursing positions described as "light duty and non-physical RN jobs" within Ms. Marcon's local labour market and beyond. She located some 30 job postings for Registered Nurses in the Trail area with light physical demands and greater opportunity for postural flexibility than bedside nursing: Diabetes Education Nurse, ICU Nurse, PCC Care, RN - Opioid Agonist Treatment, Home Health Nurse, Transition Liaison Nurse, and Pre-Surgery Screening Nurse. Dr. Newell did not assess Ms. Marcon or consider whether any of these positions would be suitable for her. The report is of little assistance to

me.

CAUSATION

[96] Mr. Justice Kent provided the following summary of the law of causation in *Kallstrom v. Yip*, 2016 BCSC 829, at para. 318:

[318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

Neck and Right Shoulder

[97] As I have indicated, there is no dispute that the collision caused Ms. Marcon to have soft tissue injuries to her neck and right shoulder. For the reasons I have already given, I accept Dr. MacInnes' evidence with respect to the diagnosis and prognosis of these neck and right shoulder injuries. In particular, I prefer his opinion that the collision caused the SLAP tear to Ms. Marcon's right shoulder.

Lower Back and Hip Pain

[98] The question of whether Ms. Marcon's lower back and hip pain was caused by the collision was greatly disputed by the parties. As I have already indicated, I prefer Dr. MacInnes' opinion to Dr. Gharsaa's on this issue. While Ms. Marcon did have some pre-existing degenerative changes to her lower back, these changes were asymptomatic prior to the collision.

[99] As I have alluded to, there is a dispute about whether Ms. Marcon's current back and hip complaints are causally linked to the collision.

- [100] On July 6, 2016, Ms. Marcon visited a chiropractor. The note from the first visit states: "Acute R hip and LBP w radiation" and "R hip pain 2 days - started Monday -1st Hp - Now LBP right * w Radiation down R leg post to foot - last night was last time with radiation". The chiropractor's second, and final, entry, dated July 8, 2016, states she was "feeling really good. No numbness, no pain in back or hip." Ms. Marcon testified she went to see the chiropractor on the recommendation of a friend. She said she had sciatic pain which briefly flared and had no further issues.
- [101] I accept Dr. MacInnes' opinion that the two July 2016 chiropractor appointments are not indicative of the degenerative changes in Ms. Marcon's spine becoming symptomatic pre-collision.
- [102] An antenatal record, dated July 4, 2017, references "occ R pelvic pain". Ms. Marcon said this related to a cyst that was found on her ovary. It was not similar to the pain she experienced following the accident. I accept her evidence on that point.
- [103] I accept Ms. Marcon's evidence that her lower back did hurt the night of the accident. I do not find the fact that no treatment provider recorded back pain until September 7, 2017, sufficient to establish that she did not suffer back pain prior to that date. I accept the explanation offered by Dr. MacInnes that a patient may focus on the areas of most significant pain, and only later come to focus on areas of less significant pain. In Ms. Marcon's case there is also the fact that her immediate concern after the accident was whether she had lost her baby. Her pain paled in significance to that concern. She knew she was in pain, but found it hard to isolate.
- [104] Ms. Marcon was pregnant at the time of the collision, and I accept that some of her subsequent lower back symptoms, including her right leg occasionally giving out, were related to her pregnancy. That does not mean, however, that the great majority of her lower back symptoms were not also caused, or significantly contributed to, by the collision.
- [105] In addition to submitting that Ms. Marcon's low-back and hip issues generally were not caused by the accident, the defendant argued specifically that the low-back and related symptoms Ms. Marcon suffered in October 2019 were not caused by the accident.
- [106] In this connection, the defendant submits that in the preceding August - October 2019 time period, while Ms. Marcon had low-back and hip issues, they were not significant to her. In support of this position, the defendant canvassed, in some depth, the clinical notes of the various practitioners Ms. Marcon was seeing for her neck, shoulder, back and hip issues in this period.
- [107] I am mindful of the limited uses that can be made of clinical notes. The absence of reported symptoms in clinical records does not prove that symptoms were not present: *Bancroft - Wilson v. Murphy*, 2009 BCCA 195 at para. 11. Further, as stated by Mr. Justice N. Smith in *Edmondson v. Payer*, 2011 BCSC 118 at para. 32, clinical notes:

are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. (para. 32)

- [108] I am not prepared, on the basis of an absence of specific reference in these notes to Ms. Marcon's symptoms causing her difficulties at work to find, in the face of her evidence to the contrary, that her neck, shoulder, back and hip symptoms were not causing her difficulties at work. Nor am I prepared to find that an absence of specific references to back and hip issues in the notes of practitioners, such as Dr. Trueman, her psychiatrist, Dr. McVicar and Dr. Bitting, whom she was seeing for her shoulder issues, means that Ms. Marcon was not experiencing back and hip issues. There is no reason for Dr. Trueman, Dr. McVicar or Dr. Bitting, given their roles, to have made notes about low-back and hip issues.
- [109] Ms. Marcon experienced unquestionably significant low-back and related complaints starting in mid-October 2019. She was experiencing severe pain in her lower back and left leg and difficulty walking and occasionally standing. She sought out treatment from her family doctor, physiotherapist, massage therapist and chiropractor. As I have already canvassed, Ms. Marcon went off work as a result on her doctor's advice, on or about October 25, 2019.
- [110] The defendant's position is that the accident did not cause the flare-up in lower back and related symptoms that Ms. Marcon experienced in October 2019. It relies on Dr. Gharssa's opinion that the accident did not cause those symptoms, and that the passage of time during which she had not experienced much lower back pain suggested that any recurrence was not related to the accident. It submits that Dr. MacInnes' opinion, that the October 2019 symptoms were consistent with a flare-up of Ms. Marcon's chronic pain condition, was mere speculation. The defendant submits that Ms. Marcon did not testify that her work caused the flare-up, but rather that it was her inability to attend treatment due to working. The defendant submits, however, that there was no observable decline in the frequency of treatment Ms. Marcon was receiving in the preceding period, and that there are no though there is not any contemporaneous records to support this theory. The defendant submits that the October 2019 symptoms are far more consistent with a manifestation of Ms. Marcon's severe stenosis than a flare-up of what were otherwise minor back issues.
- [111] I find that the October 2019 lower back symptoms were a flare-up of Ms. Marcon's chronic pain condition caused by the accident. Ms. Marcon's evidence with respect to the cause of the symptoms and going off work was more nuanced than suggested by the defendant. She attributed her symptoms in that period both to the demands and hours of work and to work preventing her from attending appointments. I note on the latter point that that Ms. Marcon's general practitioner, in her October 29, 2019 clinical note, did note that "working limits ability to attend allied appointments that do help with less pain", so there is at least one contemporaneous note that supports that Ms. Marcon's work schedule was limiting her ability to attend treatment.

- [112] I have already provided reasons for preferring Dr. MacInnes' opinion to Dr. Gharsaa's. Dr. MacInnes did testify in re-examination that Ms. Marcon's October 2019 back symptoms were consistent with a recurrence of her chronic pain. This, taken together with Ms. Marcon's own evidence, is sufficient, in my view, to establish that the October 2019 symptoms were caused by the accident, which was of course the cause of her chronic pain.
- [113] The same, I find, is true of Ms. Marcon's ongoing low-back pain. While Ms. Marcon undoubtedly has a degenerative back condition, she was asymptomatic prior to the accident. I accept Dr. MacInnes' opinion that the accident caused her to develop the symptoms of chronic mechanical back pain that have continued, with some waxing and waning, from the accident to date.

Adverse Inference

- [114] The defendant asked the court to draw an adverse inference from Ms. Marcon's failure to tender expert orthopedic evidence on the issue of low-back causation.
- [115] Ms. Marcon had listed an orthopedic surgeon, Dr. Stephen Maloon, on her October 29, 2020 trial brief, but did not call him as a witness. At the time the trial brief was filed, no assessments had been done and no reports had been received. Ms. Marcon says that no report was ever ordered from Dr. Maloon. It is uncontested that Ms. Marcon never served an expert report from Dr. Maloon on the defendant.
- [116] At the trial management conference, Ms. Marcon's counsel advised that there would be no report from Dr. Maloon, but there would be an expert report from Dr. Trueman, who had not been listed in her trial brief. The same thing was stated in a December 3, 2020 letter from Ms. Marcon's counsel. Beyond this, Ms. Marcon submits that what happened between her, her counsel and Dr. Maloon is covered by litigation privilege, and that no adverse inference should be drawn from her failure to call Dr. Maloon as a witness.
- [117] Ms. Marcon relied on the decision in *Harris v. Teo*, 2019 BCSC 1631 [Harris] in support of her position that no adverse inference should be drawn. In that case, the plaintiff did not call a physiatrist, who had conducted an independent medical examination. The plaintiff had listed the physiatrist on his trial brief, and served his report on the defendant, who had served the report back on the plaintiff. At para. 57, Justice Jackson noted that the drawing of an adverse inference is within the court's discretion, and should only be drawn where the evidence of the person who was not called would have been superior to other similar evidence. In *Harris*, the plaintiff explained that the physiatrist was not available to testify, as he was out of the country. Justice Jackson concluded that the evidence did not establish that the physiatrist's evidence was superior to that of the other experts who testified, and declined to draw an adverse inference.
- [118] In my view, the same thing is true here. The defendant submits that, on the issue of causation, an orthopedic surgeon's evidence would be superior to that of a pain medicine specialist. I have found, however, that the evidence of the pain medicine specialist called by

Ms. Marcon is superior to that of the orthopedic surgeon called by the defendant. The evidence does not establish that Dr. Maloon's evidence would be superior to that of the experts who were called. Further, I agree with Ms. Marcon that the reasons she did not call Dr. Maloon are covered by litigation privilege, and that the court should not attempt to peer behind that privilege to determine why Dr. Maloon was not called, or what his evidence might have been.

[119] I decline to draw the adverse inference sought by the defendant.

Psychiatric conditions

[120] Dr. Trueman initially diagnosed Ms. Marcon with Post-Partum Depression with Anxious Distress, and later diagnosed her with Major Depressive Disorder with Anxious Distress. The defendant does not dispute these diagnoses, but submits that Ms. Marcon has failed to prove that but for the collision she would not have experienced these conditions.

[121] As Ms. Marcon's treating psychiatrist, Dr. Trueman declined to comment on the causation of Ms. Marcon's mental health difficulties, as well as her prognosis and future employability. There is therefore no expert evidence that speaks directly to the question of causation.

[122] Dr. Trueman's report does indirectly speak to this issue, however. She wrote that chronic pain issues have been significant for Ms. Marcon, and that they had frequently been discussed as a "perpetuating stressor to her depression and anxiety". She also wrote that Ms. Marcon's "pain has appeared to be a negative contributing factor to her state of well being". Further, Dr. Trueman wrote that Ms. Marcon's chronic pain and injuries appeared to be a barrier to her sustained return to work, and that this had "negatively impacted Ms. Marcon's sense of self-worth and contributed to further negative cognitions about herself and perpetuated her depression." Dr. Trueman also referred to sleep disruption caused by pain and depression contributing to negative cognitive symptoms. Dr. Trueman clearly situated Ms. Marcon's depression within the context of her chronic physical pain.

[123] Dr. Trueman's discussion of the specific relationships between Ms. Marcon's chronic pain and her depression and anxiety are consistent with Dr. MacInnes' more general comments about the relationship between pain and mood. He wrote:

It should be noted that there is a well-accepted interplay between mood, pain, anxiety, and sleep. It is well known in the medical literature that patients with chronic pain are at an increased risk of developing mood and anxiety symptoms. These psychological symptoms are well accepted to be contributing factors to a person's pain experience.

[124] The evidence establishes that Ms. Marcon's initial mental health issues arose in the post-partum context, shortly after Jones' birth. She reported to Dr. Trueman that the collision was a significant stressor during her pregnancy, and that she experienced some traumatic symptoms after the collision, although they were not sufficient to meet the criteria for Post-Traumatic Stress Disorder. Ms. Marcon reported to Dr. Trueman that her mood deteriorated

significantly after Jones' birth, and that she experienced an escalation of anxiety symptoms. There were difficulties with breast feeding and adjusting to having two young children.

[125] Dr. Trueman wrote that while Ms. Marcon had some previous tendency towards anxiety, she had no previous history of mental illness and had never seen a psychiatrist before. She did not experience post-partum depression after her first pregnancy. Ms. Marcon testified to the same effect, acknowledging that she is a bit of an anxious person, and denying post-partum depression following the birth of her first child.

[126] On all of the evidence, I am satisfied that Ms. Marcon has discharged her onus of proving on a balance of probabilities that, but for the collision, and the resulting physical injuries and chronic pain, she would not have experienced the extent, duration or severity of mental health illness she has. In other words, while I accept that Ms. Marcon would, more likely than not, have experienced post-partum depression following the birth of her second son, regardless of the collision, I find that her mental health conditions would not have been as severe nor as long-lasting in the absence of the collision, the resulting physical injuries and chronic pain.

NON-PECUNIARY DAMAGES

[127] Ms. Marcon submitted that the appropriate range for non-pecuniary damages in her case is \$170,000.00 to \$190,000.00, and sought an award at the top of that range (inclusive of housekeeping). The defendant submitted that an award of \$130,000.00 was appropriate. That suggested award was based on the defendant's position that only Ms. Marcon's neck and shoulder injuries were caused by the collision, and the existence of, in the defendant's words, "substantial confounding issues unrelated to" the collision.

[128] In support of her position, Ms. Marcon relied on *Mattson v. Spady*, 2019 BCSC 1144 [Mattson] (\$150,000.00), *Enns v. Corbett*, 2020 BCSC 1680 [Enns] (\$160,000.00), *Lai v. Griffin*, 2020 BCSC 377 [Lai] (\$170,000.00), *McCullagh v. Rozinbaum*, 2020 BCSC 429 [McCullagh] (\$175,000.00), *Chow v. Goodman*, 2016 BCSC 1486 [Chow] (\$165,000.00), *Sebaa v. Ricci*, 2015 BCSC 1492 [Sebaa] (\$180,000.00), and *Fletcher v. Bui*, 2020 BCSC 1304 [Fletcher] (\$200,000.00).

[129] Of these cases, I found *Mattson*, *Sebaa* and *Fletcher* to be of the most assistance, although I note that the injuries in the latter two appear to have had a more significant effect on the plaintiff than in Ms. Marcon's case.

[130] In support of its position, the defendant relied on *Hartman v. MMS Homes Ltd.*, 2021 BCSC 2165 [Hartman] (\$150,000.00), *Johnstone v. Rogic*, 2018 BCSC 988 [Johnstone] (\$145,000.00), affirmed on appeal, 2019 BCCA 469, *Singh v. Storey*, 2021 BCSC 1825 [Singh] (\$115,000.00), and *Quigley v. Jonsen*, 2019 BCSC 1812 [Quigley] (\$110,000.00).

- [131] Of these cases, I found Johnstone to be the most helpful comparator. Ms. Johnstone suffered an injury to her back and her pre-existing symptoms of fibromyalgia were exacerbated by the accident. She had significant chronic pain, which significantly impaired her life. She was relatively young (although seven years older than Ms. Marcon at the time of their respective accidents), and her work, family and recreational life were all impacted. A distinguishing feature is that Ms. Johnstone was not found to have had a psychiatric illness significantly worsened and extended by the accident.
- [132] In assessing Ms. Marcon's damages I have taken into account her young age at the time of the collision, and the guarded prognosis for improvement provided by Dr. MacInnes. This means that she is likely to have to live with the effects of the collision for a long time. Not only Ms. Marcon, but also her husband and mother commented on the negative effects of the prospect of having to live with her injuries for the rest of her life.
- [133] At the time of the collision, Ms. Marcon was the mother of one young child and five months pregnant with her second. The abdominal pain she suffered after the accident, and the resulting fear that she had lost her baby, was traumatic. Ms. Marcon's ability to care for both children has been negatively affected by her injuries. Caring for her children can aggravate her pain. Ms. Marcon lives with chronic pain, which has worsened and lengthened the post-partum depression she experienced after Jones' birth, and the major depression she now suffers from. She feels she has missed out on a lot of experiences with her children, and that she is constantly disappointing them by not being able to participate in fun activities with them without pain. All of this has lessened her self-worth as a mother. It has also negatively affected her relationship with her husband.
- [134] Ms. Marcon has tried to go back to doing yoga. She hired a private instructor to work with her, but when she tried to practice, her pain flared up. She has not gone back to hiking or fitness classes, although she does walk short distances with her children. She is able to do some tasks around the acreage she and her husband moved to in July 2018, such as feeding the chickens and harvesting vegetables, but she is not able to ride their horses or do the yard work, which her husband does. He also does the majority of the housework.
- [135] Despite undergoing a continuing barrage of treatments, some of them extremely painful, Ms. Marcon's injuries remain and are likely to remain disabling. She has been unable to return on a full-time, sustained basis to the profession she loves, and experiences feelings of hopelessness about her prospects of doing so.
- [136] Taking all of these factors into account, I find that Ms. Marcon is entitled to non-pecuniary damages in the amount of \$170,000.00.

PAST LOSS OF EARNING CAPACITY

- [137] Compensation for past loss of earning capacity is based on what the plaintiff would have earned to trial, absent the accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30.

- [138] The key point of disagreement between the parties with respect to Ms. Marcon's past loss of earning capacity is how much she would have worked after the conclusion of her second maternity leave. Ms. Marcon submits she would have returned to work full-time after the conclusion of her maternity leave. The defendant submits that she likely would have returned to work part-time absent the accident. It bases this position on Ms. Marcon's post-partum depression, low-back complaints, and the suggestion that she might well have wished to spend more time with her children at a young age, particularly given that her husband worked significant hours and earned well in 2018-2020.
- [139] I do not accept that, absent the accident, Ms. Marcon would likely have returned to work part-time following her maternity leave. While she had post-partum depression, I find that absent the injuries and chronic pain caused by the accident this would likely have resolved prior to the end of her maternity leave. I have found the low-back complaints to be causally related to the accident, so they cannot be taken into account as part of a hypothetical "non-accident" post-accident period. As for the suggestion Ms. Marcon would likely have chosen to stay home part-time with her children, the evidence simply does not support it. This is nothing more than speculation on the defendant's part.
- [140] I find that, but for the accident, Ms. Marcon would have returned to work full-time after the end of her maternity leave.
- [141] A second point of disagreement between the parties with respect to past loss of earning capacity relates to the period of time when Ms. Marcon did not work due to her nursing licence having lapsed. She submits that, while she testified the licensing issue was her fault, because she forgot, Dr. Trueman said in her report that Ms. Marcon experiences negative cognitive symptoms such as poor concentration due to her mental health issues. On this basis, she submits that her absence from work while her licence had lapsed is due to the accident. The defendant submits that Ms. Marcon's loss of her license is neither factually nor legally the result of the accident, and that she cannot prove that the resulting lost income was due to the accident.
- [142] I agree with the defendant on this point. I find the lapse in Ms. Marcon's nursing licence and resulting loss of income was not a reasonably foreseeable result of the defendant's negligence.
- [143] Both parties retained economists who provided calculations of Ms. Marcon's past and future loss of earning capacity. The plaintiff's economist, Peter Sheldon, calculated her past net income loss at \$146,442.00. His calculation assumed that she would have taken a one-year maternity leave and then returned to work full-time; those assumptions are consistent with my findings. This is unlike the defendant's economist, Mark Gosling, who was asked to assume that any income loss after October 15, 2019 was not related to the accident. That assumption is inconsistent with my findings. I therefore rely on Mr. Sheldon's calculations in determining Ms. Marcon's past loss.

- [144] Mr. Sheldon's calculation does not reduce Ms. Marcon's past loss to take into account the period during which her nursing licence was lapsed and she could not work as a nurse. Ms. Marcon was off work due to her licence being lapsed for approximately three months, between October and December 2020. In 2020 her absent accident income, net of income tax and EI premiums, would have been \$68,543.00. Three months net income would have been \$17,135.75. Subtracting this amount from her annual income, one arrives at a figure of \$51,407.25 for net income loss in 2020.
- [145] In the result, I conclude that Ms. Marcon is entitled to damages for past loss of earning capacity in the amount of \$129,306.25 net of taxes.

FUTURE LOSS OF EARNING CAPACITY

- [146] The parties agree that Ms. Marcon has suffered a future loss of earning capacity. They differ on the appropriate method for assessing that loss, and on its valuation.
- [147] Ms. Marcon submits that her future earnings are predictable and measurable, and that an "earnings approach" is therefore appropriate. She submits that without the accident she would likely have worked full-time to age 65, and half-time to age 70, with a 50% chance she would have done so in a level 4 nursing position. She submits that, with the accident, she will likely work in a 0.6 FTE level 4 nursing position until age 60. Using Mr. Sheldon's calculations, Ms. Marcon submits that a total loss of future earning capacity award of \$1,154,144.00 is appropriate.
- [148] The defendant submits that, absent the accident, Ms. Marcon would likely have worked part-time until September 2023, then full-time until retirement, sometime between age 55 and 60. The defendant submits that the evidence does not establish that with the accident Ms. Marcon will not be able to pursue a full-time career in nursing, although it accepts that there is a real and substantial possibility of income loss in the future. Given the medical evidence with respect to disability, the defendant submits it is not possible to put forward with a with-accident earnings stream that is supported by the evidence. As a result, it submits that the Pallos approach of awarding one or more years of annual earnings is appropriate. It submits that an award of equivalent to three years earnings, or \$280,000.00, is appropriate in Ms. Marcon's case.
- [149] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 [Ploskon-Ciesla], the Court of Appeal recently restated the approach trial courts must take in considering an award for loss of future earning capacity. The court began at para. 7 by noting the following general operative principles:
- [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; 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: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of

mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

- [150] The court then stated at para. 8 that trial courts should undertake the tripartite test to assess damages, as recently clarified in *Rab v. Prescott*, 2021 BCCA 345 at para. 47:
- [47] ... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras. 93-95.
- [151] In respect of the first step, the court in *Ploskon-Ciesla* noted at para. 11 that there are broadly two types of cases: "(1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident". The court suggested that the first and second step in cases in the first category "may well be a foregone conclusion. The plaintiff has clearly lost capacity and income". In such cases, however, it will "still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential or negative contingencies".
- [152] The present case falls into the first category of cases identified by the court in *Ploskon-Ciesla*: while Ms. Marcon has been able to perform some work since the accident, she has clearly lost capacity and income, and there is a real and substantial possibility of future loss of capacity. The defendant concedes that the first two steps are fulfilled.
- [153] This is a case where the focus of the analysis must be on the third step. With respect to the third step, the court in *Ploskon-Ciesla* stated at paras. 16-17:
- [16] As touched upon above, depending on the circumstances, the third and final step--valuation--may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
- [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the

risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[154] It is to the third step of the analysis that I now turn.

[155] In my view, an earnings approach is appropriate in Ms. Marcon's case. There is an identifiable loss of income at time of trial. At the time of the accident, Ms. Marcon had established her career as a Registered Nurse, a profession requiring four years of post-secondary education. She had returned to work after only a 10-month maternity leave following her first child's birth. She had already pursued training to work as a PCC (a level 4 nursing position), and had worked as a PCC for several months prior to the accident. I have already outlined her efforts to work since the accident, and determined that she lost \$129,306.25 in past earning capacity as a result of the accident to time of trial.

[156] I consider what Ms. Marcon's future earnings would likely have been absent the accident.

[157] For the reasons I have already given in considering her past loss of capacity, I do not agree with the defendant that Ms. Marcon would likely have worked part-time after returning to work from her second maternity leave. She did not do so after her first maternity leave, and the evidence does not support that she would likely have done so after her second. I find that she would likely have returned to full-time work following her maternity leave.

[158] The parties disagree about when Ms. Marcon would likely have retired. In her direct evidence, Ms. Marcon said that when she was in nursing school and first starting in her career, she thought she would retire when she could in her sixties. After having worked as a nurse, and now being removed from it, she testified that she realized she loved her job, and that it is part of who she is, and that she would work as long as she could, including working as a casual post-retirement, for as long as it was safe to do so. On this basis, Ms. Marcon submits that she likely would have worked full-time, until age 65, and then half-time until age 70.

[159] In cross-examination, the defendant asked Ms. Marcon about her evidence about retirement on examination for discovery, where she had testified that she did not know what age she was planning to retire, saying "whatever I get in the mail that tells me I get the highest amount of money". In response to "ideally I know we'd all like to retire tomorrow?", Ms. Marcon replied "I mean, probably I want to say between 55 and 60 years old". On this basis, the defendant submits that Ms. Marcon would likely have retired in that time period, settling on age 58 as an average.

[160] Of note, given Ms. Marcon's evidence on discovery that she would retire whenever she would get the highest amount of money, which I take to mean maximizing her pension, is Mr. Sheldon's evidence that she would have maximized her pension on December 31, 2051 at age 64.3.

- [161] As the defendant recognized in its submissions, it is difficult for anyone of Ms. Marcon's age to predict with any degree of certainty when they will retire. That lack of certainty was reflected in Ms. Marcon's answers on discovery. On the evidence before me, I find that, absent the accident, Ms. Marcon would likely have worked long enough to maximize her pension, retiring at age 65, shortly after having done so. While it is possible she would have done so, I do not find that she would likely have continued to work after retirement as a casual.
- [162] The parties disagree about the appropriate contingency to apply to Ms. Marcon's earnings. Mr. Sheldon was asked to do his calculations on "risk only" labour market contingencies. "Risk only" contingencies account for the average probabilities that a B.C. female will be forced out of the labour market into unemployment or part-time work. The alternative is to use average labour market contingencies, which provide for "risk and choice", which includes the possibility that someone may choose not to work (for example, to raise a family or because they prefer leisure over work). The difference is significant: the "risk only" contingencies in this case range from 7.6 to 9.4%, and the "risk and choice" contingencies range from 33.7 to 37.6 percent.
- [163] The defendant did not insist generally on using the "risk and choice" contingencies, although it submitted it would be appropriate to do so if the court did not accept its submission that Ms. Marcon would likely have retired by age 58.
- [164] Ms. Marcon submits "risk only" is the appropriate contingency to apply because: (a) she was established and committed to her career; (b) she returned to work after 10 months maternity leave to take a full-time position; (c) she continued to work after having Jax and while pregnant with Jones; and (d) she has continued to work despite having significant chronic pain. She is a person with a strong work-ethic and finds value in her career. She submits that there is very little chance she would voluntarily choose to exit the workforce.
- [165] Some courts have expressed concern about the potential for gender bias in the "risk and choice" contingencies. In *C.M.G. v. R.M.G.*, 2021 BCSC 1661 [C.M.G.], Justice Iyer considered this issue as follows:
- [97] The parties differ about what contingencies should be applied to this sum. I must consider whether to apply "risk only" contingencies (the risk of non-voluntary absence from the labour force) or also "choice" contingencies (the risk that a person will choose not to work). Of the gender-specific historical data that are used for these calculations, the courts have expressed concern that using such evidence may incorporate gender bias in the calculation of damages for future earnings losses: *Crimeni v. Chandra*, 2015 BCCA 131 at para 23; *Clayton v. Barefoot*, 2018 BCSC 239 at para. 128. As was done in *Broad v. Clark*, 2018 BCSC 1068, I will apply "risk only" contingencies.

- [166] I agree with the approach taken in C.M.G. Considering Ms. Marcon's personal history I think there is very little chance that absent the accident she would have voluntarily chosen to leave her nursing career before retirement. I will apply the "risk only" contingencies.
- [167] A further issue which must be considered in assessing Ms. Marcon's without-accident earnings is whether she would likely have worked in a level 3 or level 4 position. The annual difference in earnings between the two levels is \$10,300.00. Ms. Marcon submits that to account for the possibility she would have worked in a level 4 position absent the accident, her without-accident earnings should be assessed at 50% of the difference in earnings between the two levels. The defendant submits that she would likely have remained at level 3, although it acknowledges some contingencies for increased earnings.
- [168] I find that the approach suggested by Ms. Marcon is appropriate. Ms. Marcon had trained for the PCC position, and expressed an interest in specializing further. There is a reasonable likelihood she would have worked for at least some of her career in a level 4 position, and assessing her without-accident earnings on the basis of 50% of the difference between level 3 and level 4, appropriately takes that possibility into account.
- [169] Using these findings to assess Ms. Marcon's without-accident earnings results in the following. Ms. Marcon's without-accident earnings as a level 3 nurse to age 65 would be \$2,045,365.00. Her without-accident earnings as a level 4 nurse to the same age would be \$2,289,423.50. The difference between the two is \$244,058.50. Half of this is \$122,029.25. Added to her level 3 projected earnings, this results in a total of \$2,167,394.25.
- [170] To this, Ms. Marcon submits, should be added over-time work at a rate of 40 hours per year. She calculates this to result in \$132,644.51 for lost over-time pay. Ms. Marcon testified that opportunities to work over-time fluctuate. She worked some over-time after Jax was born, but not as much as she did in Yellowknife.
- [171] It is reasonable to believe that absent the accident Ms. Marcon would have worked some over-time. Forty hours a year is a modest amount of over-time, and I accept Ms. Marcon probably would have worked that much over-time annually, on average, over the future course of her nursing career.
- [172] Adding that projected over-time, one arrives at a total without-accident income of \$2,300,038.76.
- [173] I turn to a consideration of Ms. Marcon's future with-accident earnings. She submits that a reasonable approximation of her with-accident income would be based on working 0.6 FTE at level 4 to age 60. This results in a total income, using Mr. Sheldon's calculations, of \$1,160,521.00.

- [174] The defendant submits that, given the nature of the medical evidence as to disability, it is not possible to put forward a with-accident earnings stream supported by evidence. It says that to pick 60% or 70% capacity would be to pick numbers from the air, unsupported by the medical evidence. This is the basis for the defendant's position that an earnings approach is not appropriate in this case.
- [175] I have already concluded that an earnings approach is appropriate in this case. In order to determine Ms. Marcon's probable with-accident earnings, it is necessary to review the medical evidence relating to her prognosis, and the likely effect of her accident-related injuries on her ability to work in future, as well as the evidence regarding her attempts to return to work to date.
- [176] In his first report, Dr. MacInnes opined that the pain symptoms resulting from the various conditions he diagnosed were chronic and unlikely to resolve. His overall prognosis was guarded.
- [177] Ms. Marcon reported to Dr. MacInnes that the 0.75 FTE nurse educator role she worked in for a period following the accident caused an exacerbation of her low-back symptoms. She reported that she subsequently went off work due to these symptoms, and to recover and rehabilitate from the surgery to repair the SLAP tear. Dr. MacInnes stated that, from the information available, it appears that her previous work limitations were related more to her low-back pain symptoms than her shoulder symptoms. She told him that at the time of the assessment, in November 2020, she was attempting to return to work.

[178] Dr. MacInnes wrote:

It is my experience that it is often difficult for those managing chronic pain to maintain employment in addition to managing their pain. This is particularly the case when people have jobs that exacerbate their pain symptoms. Long term work durability may be an issue for Ms. Marcon given her chronic pain symptoms. It will be important for Ms. Marcon to maintain physical conditioning so that she is able to best manage her work in addition to ensuring that her work space is optimized ergonomically. In the future, she may need to consider reducing her work hours so that she is able to optimally manage her chronic pain symptoms. This will need to be monitored by her care team and she will require ongoing support for managing her symptoms as recommended below. I would also note that as Ms. Marcon ages she will likely face greater difficulties both with maintenance of physical conditioning and management of her pain symptoms.

At this time, given her ongoing chronic pain with associated psychological symptoms and sleep disruption I would recommend that she return to a sedentary to light role in a part time capacity. Given that she failed at a 0.75 FTE position, I would recommend that she resume work at no more than a 0.5 FTE initially to assist her transition back to work and to maximize the likelihood that she will be able to maintain her work load. Working a schedule of alternating days is often helpful for patients with chronic pain so that they are able to take time to recover from and manage their pain symptoms . (emphasis added)

- [179] The defendant submits that Dr. MacInnes' opinion tends to overstate accident-related disability by failing to parse out causes of disability. However, I have found that Ms. Marcon's various neck, shoulder, lower back and psychological symptoms are all related to the accident.
- [180] The defendant correctly notes that Dr. MacInnes does not say that Ms. Marcon is not capable of full-time employment for the duration of her career. However, the substance of his report is that long-term work durability may be an issue for her, that she may need to reduce her work hours in future to manage her symptoms, and that she should resume work at no more than a 0.5 FTE initially. All of this strongly suggests that Ms. Marcon is unlikely to be able to maintain full-time employment in future.
- [181] The defendant submits that Dr. MacInnes' opinion is based on a misunderstanding that Ms. Marcon failed at a 0.75 FTE position due to her work causing her low-back to flare up. The defendant says there is no evidence to support that understanding. I have already addressed this point in my causation analysis. Ms. Marcon failed in the 0.75 FTE position as a result both of pain caused by her work, including the hours she was working, and the limitations on attending therapy caused by her work hours. Her doctor recommended she go off work and she did so.
- [182] Taken as a whole, I find that Dr. MacInnes's opinion supports the view that Ms. Marcon is unlikely to be able to work full-time hours in future. The prognosis for improvement in her chronic pain symptoms is guarded, and she needs time to attend therapeutic appointments, and to rest and manage her pain. This is consistent with Ms. Marcon's own view and experience, some four years post-accident. I find that Ms. Marcon is unlikely to be able to work full-time hours in future as a result of the injuries caused by the accident.
- [183] Ms. Marcon submits that a reasonable approximation of her with-accident income would be based on working 0.6 FTE at level 4 to age 60. The defendant submits that this amounts to no more than picking a number out of thin air.
- [184] I find that Ms. Marcon's estimation of her ability to work in future with-accident is reasonable. She will be unable to work full-time due to her accident-related injuries. Working in a level 4 position, such as a PCC, will entail fewer physical demands, which will assist her in being able to maintain employment in the nursing profession. I am cognisant that there can be no certainty with respect to how much Ms. Marcon may be able to work in future. She may only be able to work in a 0.5 FTE position. Perhaps, in time, she will be able to work in a 0.75 FTE position. Indeed, it is possible that she will be unable to continue to work in a nursing position at all. The conclusion that Ms. Marcon is likely to be able to work in a 0.6 FTE level 4 nursing position to age 60 fairly takes into account those various possibilities.

[185] This results in a total with-accident income, using Mr. Sheldon's calculations, of \$1,160,521.00. Subtracting that from what I have found Ms. Marcon's likely without-accident income would have been, \$2,300,038.76, one arrives at the sum of \$1,139,517.76.

[186] It remains to be considered whether there are any negative contingencies which should be factored in in assessing Ms. Marcon's future loss of earning capacity. In particular, should a contingency be considered due to her pre-existing degenerative condition? The analysis was described by the Court of Appeal in *Dornan v. Silva*, 2021 BCCA 228, at paras. 62-64, as follows:

The question then becomes, as articulated in *Athey*: is there a "measurable risk" that this pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence?

[63] Such discussion, of course, of necessity concerns hypothetical events: what will or what would have happened in the future? As observed by Mr. Justice Goepel in *Grewal v Naumann*, 2017 BCCA 158 at para 48, and as I discuss further below, "a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation". A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable.

[64] It follows that the process is one of determining whether, on the evidence, the contingency or risk is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood.

[187] I have found that the accident caused Ms. Marcon's pre-existing low-back condition to become symptomatic. That condition was described by Dr. MacInnes as "severe foraminal stenosis at the L5-S1 levels bilaterally." He also referred to a CT scan that showed, in addition to the stenosis, bilateral sacroiliitis. It was his opinion that the degenerative changes in Ms. Marcon's spine existed prior to the accident, but she was asymptomatic. He agreed on cross-examination that those degenerative conditions had the potential to worsen over time.

[188] I find there is the real and substantial possibility that Ms. Marcon's pre-existing low-back condition could have become symptomatic in the absence of the accident, and this possibility needs to be factored into the assessment of her damages for loss of future capacity. I have found that the accident did not cause Ms. Marcon's post-partum depression or major depressive disorder, but significantly worsened and lengthened those mental health conditions. It is possible that, absent the accident, her mental health conditions would have affected her ability to work in future, but I do not find on the evidence before me that that possibility rises to the level of a real and substantial possibility.

[189] There can be no certainty about how likely it is that Ms. Marcon's degenerative spinal condition would have affected her future ability to work, absent the accident, or to what extent, but I find that a 10% reduction in Ms. Marcon's damages for future loss of capacity adequately assesses its relative likelihood.

[190] Applying the 10% reduction, one arrives at a sum of \$1,025,565.98. Remembering that what is required is an assessment based on the evidence, and that mathematical precision is not possible, I consider that a slight reduction of this to \$1,000,000.00 provides a fair and reasonable assessment of Ms. Marcon's damages for loss of future capacity.

LOSS OF PENSION

[191] Ms. Marcon seeks compensation for pension loss. Mr. Sheldon estimated her loss at \$114,400.00 if she retires on December 31, 2051, and \$127,700.00 if she retires on December 31, 2049. These are based on Ms. Marcon working in a 0.6 FTE position, which I have found is likely.

[192] I accept Mr. Sheldon's calculations as the basis for a reasonable assessment of Ms. Marcon's pension loss, on the earlier date of retirement. I reduce them by 10%, for the same reasons I reduced the future loss of capacity award. This results in an award for lost pension of \$114,930.00, which I consider fair and reasonable.

COST OF FUTURE CARE

[193] In *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 Bennett J.A. summarized the principles applicable to assessing the cost of future care as follows:

[29] The purpose of the award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position he would have been in had the accident not occurred.

[30] The award is "based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: (*Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C. S.C.) and adopted in *Aberdeen v. Langley (Township)*, 2008 BCCA 420 (B.C. C.A.) at para. 41.

[31] ICBC says that the trial judge did not examine each request and determine if there was an evidentiary link between the medical assessment and the care recommended by the occupational therapist and rehabilitation consultant. As Garson J.A. said in *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 (B.C. C.A.) at para. 39:

I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: Aberdeen at paras. 43, 63.

[194] Ms. Marcon's claim for cost of future care is based largely upon the recommendations made by Dr. MacInnes. Mr. Sheldon provided a report which enables one to determine the present value of the various items claimed, depending on the duration that the care in question is to be provided.

[195] The items claimed are summarized and valued in Mr. Cole's report dated November 30, 2020. They can be summarized as follows:

- i. Medications: \$2,991.24 annually.
- ii. Medical cannabis (CBDs): \$517.01 annually.
- iii. Kinesiology: \$8,000.00 total.
- iv. Supervised active rehabilitation: \$640.00 annually.
- v. Physiotherapy, chiropractic and/or massage therapy: \$1,200.00 annually.
- vi. Clinical counsellor or Occupational Therapist: \$800.00-\$1,150.00 annually.
- vii. Gym Membership: \$450.00 annually.
- viii. Housekeeping Assistance: \$1,440.00 annually.
- viii. Ergonomic Assessment: \$300.00 one-time cost.

[196] I address each of these in turn. Before doing so, I address the defendant's submission that Ms. Marcon has access to substantial coverage of treatment covered by her husband's plan. There is no subrogation agreement and this plan is not a collateral benefit of the plaintiff's. The defendant says that certain of Ms. Marcon's future care costs will be, in large measure, covered by Mr. Marcon's plan, and that her cost of future care award should be reduced accordingly.

[197] In support of this submission, the defendant relies on Clayton v Barefoot 2018 BCSC 239 [Clayton] at paras. 233-234.

[198] I am not persuaded that Ms. Marcon's cost of future care award should be reduced on the basis that her husband's plan may cover some of the care items.

[199] Clayton involved the plaintiff's own extended health care plan, not a family member's. The court rejected the defendant's submission that no award should be made for medications. Justice Forth noted that there was no evidence that the plaintiff would continue to have the same coverage or be employed by the same employer. Justice Forth considered that the

appropriate approach was the one taken in *Chappell v. Loyie*, 2016 BCSC 1722, in which the court took the plaintiff's extended medical benefits into account in assessing the future cost of medications. In the result in *Clayton*, the court awarded \$20,000.00 for the cost of medications. Unfortunately, the judgment does not set out how much was claimed, so it is not possible to know how much this item was reduced by.

- [200] In my view, it would be inappropriate to reduce Ms. Marcon's future care award on the basis that her husband's employment plan might cover some of them. The court has only limited evidence about what items, and at what percentage of cost, Mr. Marcon's plan would cover. Further, it is possible that Mr. Marcon's plan could change, or that his employer might change, or indeed that Ms. Marcon might cease to be covered by his plan. Given those uncertainties, I decline to reduce any of Ms. Marcon's future care items on the basis that they might be covered by her husband's plan.

Medications

- [201] Ms. Marcon was reported to be taking Wellbutrin, abilify, Ativan and diclofenac, which Mr. Cole indicated had a total annual cost of \$2,991.24. The first three medications are for psychological conditions, and the last is for pain. The cost of these medications for Ms. Marcon's projected life span is \$83,872.00.
- [202] The defendant opposes the first three medications on the basis of its position that the accident did not cause Ms. Marcon's psychological conditions. This position has already been rejected. The defendant also noted there is no psychiatric opinion evidence relating to prognosis, which means that the evidence does not support their long-term use. It did not oppose some award being made for diclofenac, and suggested that \$2,500.00 would be appropriate.
- [203] In my view, there is some merit to the defendant's submissions about the lack of psychiatric evidence to support the long-term use of the psychiatric medications. In the absence of such evidence, I will order three years of the psychiatric medications, and a lifetime award for the diclofenac. The annual cost of the psychiatric medications is \$222.57. Using Mr. Sheldon's multipliers, the present value of three years of those medications is \$647.68.
- [204] I consider it appropriate to order the cost of diclofenac for Ms. Marcon's expected lifespan, which was calculated by Mr. Sheldon to be \$10,061.00.

Medical Cannabis

- [205] Dr. MacInnes stated that Ms. Marcon reported using medical cannabis to assist with symptoms and sleep disruption. He said she should continue to use medical marijuana if she continues to gain improvement from that use. Mr. Cole provided an annual cost of \$517.01. The lifetime present value is \$16,636.00, plus \$1,948.00 in taxes.

- [206] The defendant submitted there was no evidence Ms. Marcon used or will use medical cannabis. It also submitted that Dr. MacInnes' opinion was conditional on benefit, and that therefore any award should be subject to a substantial contingency.
- [207] In my view, an award for the cost of medical cannabis is appropriate on the evidence. I find that the statements in Dr. MacInnes' opinion are sufficient to establish that Ms. Marcon would use medical cannabis. Further, his opinion substantiates that he regularly prescribes medical cannabis, and the benefits that may be obtained from it in managing chronic pain and sleep disruption. This suggests that medical cannabis is likely to be of assistance to Ms. Marcon. I award \$18,584,00, inclusive of taxes.

Kinesiology

- [208] Dr. MacInnes recommended a graded exercise program to assist Ms. Marcon in building strength and endurance. He recommended that such a program be monitored by a physiotherapist/kinesiologist, for a minimum of 12 weeks, and at least two sessions a week.
- [209] Mr. Cole recommended two sessions per week for 50 weeks, for a total of 100 sessions at \$80.00 a session and a total cost of \$8,000.00.
- [210] Ms. Marcon supported Mr. Cole's recommendation, while the defendant suggested 50 sessions in total. I find the defendant's suggestion reasonable, and order compensation for 50 sessions. The present value, using Mr. Sheldon's multiplier, is \$3,960.00, plus tax.

Supervised Active Rehabilitation

- [211] Dr. MacInnes recommended that Ms. Marcon have access to a physiotherapist or kinesiologist to guide her exercises and activities. He suggested that up to eight sessions per year should be allowed going forward.
- [212] Mr. Cole costed eight sessions of supervised active rehabilitation at \$646.00 annually. Mr. Sheldon provided a present value of \$19,464.00, plus tax, assuming this care was provided for Ms. Marcon's lifetime.
- [213] Beyond repeating its submission about the low-back and hip complaints not being caused by the accident, the defendant submits that this item should be phased out in Ms. Marcon's later years.
- [214] I accept that the supervised active rehabilitation should be phased out in Ms. Marcon's later years. I order this item through to age 75. The present value is \$17,730.12, plus tax.

Physiotherapy, Chiropractic and Massage Therapy

- [215] Dr. MacInnes recommended that Ms. Marcon continue with intermittent passive therapies to help her manage her symptoms. He noted they help her remain at work. He referred specifically to massage therapy and physiotherapy. He recommended eight of these appointments a month from this time forward.
- [216] Mr. Cole provided a cost for twelve sessions per year of massage therapy or chiropractic at \$100.00 per session for \$1,200.00 per year. Mr. Sheldon provided a present value calculation for the therapies costed by Mr. Cole of \$37,683.00 for Ms. Marcon's expected life span.
- [217] Ms. Marcon submitted an award for life was appropriate given her pessimistic prognosis for recovery. Beyond its submission, which I have already addressed, that these therapies would not all be for collision-related injuries, the defendant submitted these therapies should be phased out in Ms. Marcon's later years. It suggested a total award of \$15,000.00.
- [218] I find that it is appropriate to order twelve sessions per year of passive therapies for Ms. Marcon's expected life span. I note that this is actually far fewer sessions that Dr. MacInnes recommended. I do not think it would be appropriate to phase these therapies out, as Ms. Marcon is likely to continue needing assistance managing her symptoms for life. I order an award of \$37,683.00.

Clinical Counsellor or Occupational Therapist

- [219] Dr. MacInnes recommended that Ms. Marcon continue to work with a counsellor to address behaviours related to her chronic pain. He did not provide a specific recommendation about how many sessions or for how long.
- [220] Mr. Cole suggested that an occupational therapist could also assist with pain management strategies. He provided a cost for either a counsellor or occupational therapist, in the range of \$100.00 to \$115.00 per session. He recommended eight-ten sessions per year, at an annual cost of \$800.00-\$1,150.00. Mr. Sheldon provided a for life present value of \$30,618.00.
- [221] The defendant submitted Ms. Marcon had no claim for counselling, and in the alternative, that there was no evidence it should be carried on for life. If the latter position was accepted, the defendant submitted \$10,000.00 would be an appropriate award.
- [222] Dr. MacInnes' recommendation was clearly for a counsellor, not an occupational therapist. I do not accept the defendant's submission that counselling is not warranted. Dr. MacInnes' opinion makes clear that a counsellor could assist with mindfulness meditation and cognitive behavioural therapy, designed to assist Ms. Marcon in coping positively with chronic pain. I do agree that the evidence does not establish that such counselling will be necessary for life.

[223] I consider ten years to be an appropriate period of time for Ms. Marcon to receive counselling. Based on an annual cost of \$975.00, and using Mr. Sheldon's multipliers, this results in an award of \$8,813.03.

Gym Membership

[224] Dr. MacInnes recommended that Ms. Marcon have access to a fitness facility. Mr. Cole provided an annual cost of \$450.00. Mr. Sheldon provided lifetime value of \$14,131.00, plus tax.

[225] The defendant opposes this claim on the basis, among others, that it does not arise from the collision. I have already rejected this argument. In my view, a gym pass to age 75 is appropriate. This results in an award of \$12,350.70, plus tax.

Housekeeping Assistance

[226] Mr. Cole recommended housekeeping assistance for four hours per month. He calculated the annual cost of such assistance at \$30.00 an hour, for a total of \$1,440.00 per year. The lifetime value of housekeeping was calculated by Mr. Sheldon to be \$45,220.00, plus tax.

[227] The defence submitted that any award for housekeeping should be phased out before Ms. Marcon's anticipated life expectancy, noting Mr. Cole's evidence that age 75-80 would be appropriate. The defence suggested \$37,500.00 was an appropriate award. Ms. Marcon conceded that phasing out at age 80 would be appropriate.

[228] Using Mr. Sheldon's multipliers, the present value of housekeeping to age 80 would be \$41,800.32, and to age 75 would be \$39,522.24. I consider it appropriate to award housekeeping in the amount of \$40,000.00, plus tax.

Ergonomic Assessment

[229] Mr. Cole recommended an ergonomic assessment if Ms. Marcon is moved to another nursing position. He provided a cost of \$300.00.

[230] I agree with the defendant's submission that such an award is not warranted, given that Ms. Marcon's employer would determine what ergonomic assessments might be required. It is likely that such an assessment would be encompassed with the duty to accommodate process.

Medications

\$10,061.00

Medical Cannabis

\$18,584.00

Kinesiology

\$3,960.00

Supervised Active Rehabilitation

\$17,730.12

Physiotherapy, Chiropractic & Massage Therapy

\$37,683.00

Clinical Counsellor

\$8,813.03

Gym Membership

\$12,350.70

Housekeeping Assistance

\$40,000.00

Total Cost of Future Care

\$149,181.85

SPECIAL DAMAGES

[231] Ms. Marcon has paid a total of \$46,763.81 for special damages to date of trial. She has submitted most of her receipts to Sunlife, which as of November 18, 2021, had reimbursed her \$35,318.96. She claims the difference, being \$11,444.85. In addition, she seeks damages to compensate her for the use of 1/3 of her lifetime benefits under her husband's Sunlife plan.

[232] In support of the latter claim, Ms. Marcon relies on Bjarnason v. Parks, 2009 BCSC 48. In Bjarnason, the plaintiff was an elementary school teacher whose injuries required her to miss work, and she received continuation of her wages by drawing on sick leave benefits. Justice Ballance awarded damages for the lost "sick days" and to "replenish" her "sick leave bank" at para. 62. Ms. Marcon submits that that same reasoning would apply to someone using up her bank of available benefits through an available benefit plan.

[233] The defendant submits that an award of \$10,000.00 for special damages is appropriate. It takes issue with Ms. Marcon's mileage claim, but that claim was not included in the \$11,444.85 sought by Ms. Marcon. With respect to the use of the Sunlife benefits, the defendant submits that her future use of those benefits is a question of future care, not special damages. It notes that Ms. Marcon is not out of pocket.

[234] I award Ms. Marcon \$11,444.85 as special damages for her out of pocket expenses incurred. I accept the defendant's submission that she is not out of pocket for having used one-third of her lifetime benefits available under her husband's Sunlife plan, and decline to make an order compensating her for the use of them.

CONCLUSION

[235] I have determined that Ms. Marcon is entitled to the following damages resulting from the defendant's negligence:

Non-Pecuniary Damages

\$170,000.00

Past Loss of Earning Capacity

\$129,306.25

Future Loss of Earning Capacity

\$1,000,000.00

Loss of Pension

\$114,930.00

Cost of Future Care

\$149,181.85

Special Damages

\$11,444.85

Total

\$1,574,862.95

[236] Absent matters of which I am unaware, Ms. Marcon is entitled to her costs. Should counsel wish to speak to costs or any other matter arising out of this decision, they are to contact Scheduling within 60 days of the date of this decision to arrange a hearing for that purpose.

"Lyster J"

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