
CANADA / JUDGMENT

McColl v. Sullivan

2020 BCSC 137

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 137 McColl v. Sullivan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McColl v. Sullivan,

2020 BCSC 137

Date: 20200206

Docket: M153118

Registry: Vancouver

Between:

Alissa McColl

Plaintiff

And

Jason Sullivan and Yong H. Lee

Defendants

Corrected Judgment: The text of the judgment has been
corrected at paragraph 177 on December 21, 2020

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

April 1-3, May 21, July 3-5 and 8-10, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2020

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I. Introduction

- [1] The plaintiff Alissa McColl was injured in two rear end collisions, which occurred 3 months apart. The first happened on December 13, 2013, and the second on March 1, 2014. She had just turned 25 before the second accident, and was pursuing a career as an editor for film and TV at the time. She seeks damages as a result of the injuries she suffered.
- [2] The first accident occurred on West 2nd Ave, Vancouver, near the Manitoba Street intersection. This was a low speed collision, where she was struck from behind. Ms. McColl did not feel any pain immediately after the accident, and was able to proceed on to dinner with friends. She began to experience pain a day or two after the accident.
- [3] The second accident occurred on Pacific Boulevard, Vancouver, at the approach to the Burrard Street bridge. Again, this was a low speed collision and Ms. McColl was struck from behind. Ms. McColl says she immediately felt a headache and an escalation of her pain.

- [4] Neither accident resulted in significant damage to Ms. McColl's car. The defendants admit liability for both accidents which occurred as a result of their failure to keep proper attention when approaching Ms. McColl's car.
- [5] While the defence highlighted the fact that these accidents were minor, the amount of damage to a car, or the speed of a collision, are not particularly relevant factors in the assessment of a plaintiff's injury. The Court of Appeal has been clear in reminding courts that assumptions are not to be made about the "relationship between vehicle damage and impact, and personal injury": *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at para. 27. Injuries can arise from minor accidents, and I will assess Ms. McColl's injuries on the basis of the evidence relating to her injuries, not on the evidence relating to the force of impact in the collision.

II. Issues

- [6] This case raises the following issues:
- Did the accidents cause or exacerbate Ms. McColl's injuries?
 - What is Ms. McColl's prognosis?
 - Is Ms. McColl entitled to any damages?

III. Analysis

A. Did the accidents cause or exacerbate Ms. McColl's injuries?

- Ms. McColl's abilities and health pre-accident
 - Work and social life
- [7] Prior to the accident, Ms. McColl was an active, social, hard working young woman. She received good grades in school, and excelled in the editing courses she took as part of her degree at Emily Carr University ("ECU"). She graduated from university in 2012 with a Bachelor of Fine Arts with a specialization in film, video and integrated media.
- [8] Ms. McColl was recommended by her professor Christine Stewart for a position as an assistant editor with Paperny Entertainment. At some point after 2014 Paperny was bought by a company called Entertainment One. In these Reasons I will refer to the two companies collectively as ("Paperny"). Ms. McColl began work with Paperny in June 2012, and worked there until after the accidents.
- [9] Ms. McColl was also very athletic. She played team sports such as basketball, volleyball, and soccer, and participated in winter sports like snowboarding. She went to the gym and ran up to 60 minutes a week. She was an avid motorcycle rider.

- [10] Ms. McColl had an active social life, with many friends who she spent time with playing sports, dining out, and engaging in activities such as hiking and spending time at the beach. She also liked cooking and played musical instruments including guitar, keyboard, and kalimba.
- [11] Ms. McColl was described by her friends as happy, upbeat, and energetic. Ms. Jacobsen, a friend Ms. McColl met at ECU, knew of no health problems experienced by Ms. McColl before the accident, and described her as outgoing, always in a good mood, very social, and passionate about her work. Mr. Porte Petit, another university friend, described Ms. McColl before the accident as active and healthy with a bubbly and energetic personality. Mr. Rowe, a co-worker, described Ms. McColl as very vivacious and energetic, who was always smiling and in a bright mood.
- b) General health
- [12] Ms. McColl reported no health difficulties prior to the accidents. She was a healthy, active 24 year old woman. She had no treating general practitioner in BC prior to the accidents.
- [13] On four occasions before the first accident, Ms. McColl attended for massage treatments. She went twice in 2012 and twice in 2013. The treatments related to tension relief and relaxation. She reported no underlying conditions to a doctor in relation to these massages. I find that her massage treatments in 2012 and 2013 were in the nature of ordinary stress and tension relief, which are commonplace and do not indicate an underlying condition.
- [14] Ms. McColl first moved to Vancouver when she was 19. At that time she experienced some stress, and was prescribed medication for anxiety. However, she did not take the medication, and her anxiety was not present in the years leading up to the accident.
2. Ms. McColl's abilities and health post-accident
- a) Lay evidence
- [15] The two accidents were only months apart. In assessing her injuries, none of the medical experts distinguished between the two accidents. The injuries which arose in the first accident were exacerbated by the second accident. The defence has not asserted the injuries are divisible between the accidents. As such, I will not distinguish between the two accidents when assessing Ms. McColl's health after the accidents.
- [16] Over the first few days following the first accident, Ms. McColl began to feel throbbing pain in her shoulders, neck and back. She started to experience headaches, which were accompanied by dizziness, blurred vision and ringing in her ears. Her jaw and hips were also painful. These symptoms continued until the second accident, although Ms. McColl had felt the symptoms were beginning to resolve.

- [17] Immediately after the second accident Ms. McColl felt her pain escalate. The pain in her neck increased and has continued to the present, with some improvement in severity over time. Ms. McColl experienced pain radiating to the back of her head, the front of her neck, her chest and her back. The pain in her upper right back is the most severe back pain, although she also experiences tightening and locking up in her mid back, and periodic flare ups of soreness in her lower back.
- [18] On her right side, Ms. McColl experiences some mobility and range of motion restrictions in her right shoulder and, most significantly, intense nerve pain, numbness and weakness in her right arm and fingers. Her hand cramps and gets weak and cold. She loses strength in her hand which makes it hard to write or hold things. Her hand shakes, and she experiences pain if she applies force with her hand, such as when opening a jar. She finds using a computer difficult, and it is difficult for her to elevate her arms. The nerve symptoms occur frequently, and are brought on or aggravated by overhead, repetitive motions, certain exercises, and experiencing vibrations from things like driving or playing guitar. Ms. McColl understands these symptoms to result from thoracic outlet syndrome ("TOS"), which has been diagnosed by a number of medical professionals.
- [19] Ms. McColl experienced the symptoms described above after the second accident. She found that the TOS symptoms began to improve in the summer and fall of 2014, but in the spring of 2015 the TOS pain returned. She found the recurrence of pain to be extremely intense, to the point where it would wake her up. She says she now experiences TOS to some extent every day, and can have significant flare ups which can last days or weeks. The TOS and myofascial pain in her back and shoulders are her most significant ongoing physical complaints from the injuries she suffered in the accidents.
- [20] Ms. McColl had experienced some improvements in her other conditions by the time of trial. Her jaw pain had fully resolved. Her hip pain is manageable and doesn't occur frequently anymore. Her headaches, which had affected her concentration, have improved, but do continue to occur about once a month.
- [21] Ms. McColl continues to find it difficult to sit for extended periods of time, and cannot stand still for extended periods of time. Her discomfort was evident in the trial when she had to adjust positions and stand on and off while giving evidence. She still finds it difficult to use a keyboard or use the pen on a tablet. She says that the improvements she has experienced result from her ongoing efforts to manage her pain, and avoid activities which aggravate her symptoms. She finds her concentration is still affected, and she must take frequent breaks when she is working on anything that requires her to concentrate.
- [22] In addition to the physical injuries described above, Ms. McColl has experienced psychological impacts. She has had recurring nightmares and anxiety about car accidents. She now avoids driving or riding in cars due to her anxiety. Her anxiety and the physical pain she suffers have impacted her sleep, causing her to become fatigued.

- [23] After the second accident, Ms. McColl returned to work but by July 30, 2014 she had reduced her hours to 2 days per week. She left her job on September 30, 2014. Ms. McColl found that she was unable to cope with the pain experienced through her use of a computer and tablet. She created a standing desk to help her manage her pain, but that was not adequate. She has not been able to return to work as a film editor as she can no longer manage the physical requirements of working on a computer for a full day, combined with the required focus and concentration needed for the job.
- [24] Ms. McColl is no longer the very social and active person she used to be. She was proud of the work she was doing as a film editor, and hoped to rise through the ranks in that industry. Her performance in her career had been exceptional, as noted by her co-workers and instructor. Because of her injuries, she is no longer able to do the work of a film editor. This has affected her self esteem.
- [25] Initially following the accidents, Ms. McColl was not able to initiate or maintain intimate relationships. This has improved over time, as she has learned better pain management techniques and is more comfortable communicating her limitations to her partners. She dreamed of having a family, but now is unsure if she would physically be able to manage a pregnancy, or carry and tend for a child once it was born.
- [26] The impact of Ms. McColl's injuries on her life has been significant. Ms. McColl is no longer able to participate in all the different sports she did before. She cannot perform household tasks in the same way she did before. She used to take pleasure in cooking. Now she cannot chop food and wash dishes as she did before, and so she is reliant on pre-prepared food, and food deliveries. She must restrict her shopping to small loads as her ability to carry is lessened. She can no longer carry laundry baskets up to her third floor apartment from the basement laundry. Her friends testified that they come and help her carry her laundry baskets.
- [27] Ms. McColl is no longer as social as she was before. She does not go out with friends or participate in group activities as she did before the accidents. She becomes irritable because of the pain and her limitations, and finds it difficult to explain her limitations to her peers.
- [28] However, Ms. McColl has been able to continue to develop her creative work. She has learned an adapted way to play the guitar, and has written and recorded some music. She performed on stage a number of times since the accidents. She developed a stand up comedy routine, performing a dozen times in 2016 and 2017.
- [29] Her friends and family testified as to Ms. McColl's anxiety, forgetfulness and exhaustion. Mr. Rowe stated that after the accidents he saw physical changes in Ms. McColl. She constantly moved positions, alternating between standing and sitting, she was quieter, and had a look of pain on her face.

- [30] Ms. Turner, the supervisor at Ms. McColl's work, said that Ms. McColl was not the same person after the accident. She appeared to be in pain and was not the same bubbly person. One day she encountered Ms. McColl crying in the bathroom and, shortly after that, Ms. McColl came to her to say she was in too much pain to continue working full time. Ms. Turner accommodated a reduced schedule for Ms. McColl as long as she could, but Ms. McColl was not able to return to full time work.
- [31] Mr. Porte Petit testified that after the accidents he observed Ms. McColl to move stiffly and have problems using her arms. He observed her having a hard time holding cutlery and a cup, having difficulty holding eye contact, and having difficulty following conversations. He noted that he has seen her more recently begin playing the guitar again, now that she has learned how to manage her pain better.
- [32] Ms. Wong, a friend from ECU, noted that after the accidents she has observed Ms. McColl unable to carry heavy loads or to sit for extended periods of time such as during meals or movies. She has had to assist Ms. McColl in removing her shoes, and has assisted Ms. McColl in setting up cameras when Ms. McColl has attempted photo shoots. Ms. Wong has also assisted Ms. McColl financially, paying for her rent for several months, and paying for two Botox injections.
- [33] Ms. McColl's father, Mr. Buell, observed Ms. McColl looking exhausted, having difficulty concentrating, not as strong, hyper vigilant about safety, and unable to maintain herself financially. Mr. Buell has supplemented Ms. McColl's income to assist her with rent, dental expenses, vision care, and food because she has not been able to provide sufficient funds through her employment.
- b) Evidence of medical experts
- [34] Immediately following the first accident, Ms. McColl began being treated by Dr. Ramsey, who remains her family doctor to present. Dr. Ramsey diagnosed Ms. McColl with the following injuries following the two accidents:
- a) Myofascial pain in her upper back and cervical spine,
 - b) Paresthesias, numbness and pain in her right arm with limited range of motion in her right shoulder,
 - c) Migraine type headaches and disrupted sleep, and
 - d) Depression and anxiety.
- [35] In 2015 Ms. McColl was referred to Dr. Finlayson, a specialist in physical medicine and rehabilitation, with additional expertise in TOS. Dr. Finlayson conducted clinical assessments of Ms. McColl from September 2015 to March 2017, and continued to treat her through the trial, with her last visit occurring two months before Dr. Finlayson's testimony at trial.

- [36] Dr. Finlayson diagnosed Ms. McColl with TOS as the probable cause of her right side neck and upper limb pain, and her upper limb numbness, tingling, and dysfunction. She also found that Ms. McColl's TOS was associated with myofascial pain affecting her scalene and pectoralis minor muscles. Dr. Finlayson began treating Ms. McColl with Botox injections in March 2017. These injections provide substantial temporary relief, which lasts for only about three months after each injection. While these injections provide transitory benefits, Ms. McColl always returns to her baseline pain as the injections wear off.
- [37] In 2016 and 2018 Ms. McColl was seen by Dr. Salvian, a vascular surgeon with a subspecialty interest in the diagnosis and treatment of TOS. Dr. Salvian was of the opinion that Ms. McColl suffered from chronic myofascial pain in her right neck, shoulder, and chest, radiating down her right arm. He also noted associated sleep deprivation and disruption, anxiety, depression, and headaches.
- [38] With respect to the paresthesias, numbness and pain Ms. McColl experienced in her right arm, Dr. Salvian diagnosed post traumatic TOS with irritation of the lower nerves of the brachial plexus, and "double crush" syndrome. He found that Ms. McColl may have suffered from double crush syndrome arising from proximal nerve injury at the level of the cervical spine or brachial plexus. Dr. Salvian was of the opinion that the neuralgic pain experienced by Ms. McColl resulting from these injuries was her most significant and limiting factor in her daily living activities.
- [39] In 2017 Ms. McColl was assessed by Dr. Cameron, an expert in neurology. Dr. Cameron gave opinion evidence in relation to TOS, musculoskeletal injuries, and headaches. Dr. Cameron agreed with the diagnoses of Dr. Finlayson and Dr. Salvian in relation to the TOS suffered by Ms. McColl. In addition, it was Dr. Cameron's opinion that Ms. McColl suffered from both neurogenic and vascular acquired TOS, and soft tissue and musculoskeletal injuries resulting in chronic pain.
- [40] Dr. Cameron noted muscle spasm in Ms. McColl's lumbar area was causing her left leg to become shorter than her right leg, resulting in further chronic pain in her back.
- [41] Dr. Cameron diagnosed Ms. McColl with post traumatic musculoskeletal cervicogenic headaches associated with her chronic neck, shoulder and upper back pain.
- [42] Dr. Klubben, a psychologist with expertise in the diagnosis and treatment of psychological conditions, assessed Ms. McColl over four visits in 2018. She then began treating Ms. McColl beginning in 2018. By the time she testified in July 2019, Dr. Klubben had completed 20 treatment sessions with Ms. McColl. Dr. Klubben diagnosed Ms. McColl with a number of symptoms, which she described as:
- a) An adjustment disorder, where Ms. McColl gets depressive symptoms when she experiences pain. In other words, Ms. McColl's emotional problems intensify as a result of her pain,

- b) Generalized anxiety disorder, where Ms. McColl experiences anxiety on a daily level, including how her pain will impact her future,
 - c) Specific phobia, where Ms. McColl experiences anxiety and enhanced pain when in a car, and
 - d) Somatic symptom disorder, where Ms. McColl experiences excessive thoughts, feelings and behaviors associated with her physical condition, including worrying and becoming down about her physical symptoms.
- [43] Whether Ms. McColl met the psychological criteria for these diagnoses was disputed by a psychiatrist who gave evidence on behalf of the defence.
- [44] The defence called three medical experts: Dr. Rickards, Dr. Fry, and Dr. Okorie.
- [45] Dr. Rickards is an orthopedic surgeon who deals with patients experiencing TOS and chronic pain as part of his practice. Dr. Rickards found Ms. McColl experienced pain in her cervical spine, shoulders and lumbar spine. He also noted pain when she was asked to perform TOS manoeuvres. He was of the opinion that Ms. McColl suffered from soft tissue strain of the cervical and lumbar spines, and TOS of her right upper extremity.
- [46] Dr. Fry is a retired vascular surgeon who examined Ms. McColl in 2017 and 2018. While Dr. Fry agreed that Ms. McColl suffered from TOS, he found her to exaggerate her symptoms and also put forward an opinion that Ms. McColl had a chronic condition which made her more vulnerable to injury and resulting TOS from the accidents. For the reasons I set out below, I did not find Dr. Fry's opinion to be helpful.
- [47] Dr. Fry engaged in what I would describe as a credibility assessment of Ms. McColl, looking for inconsistencies between what she told him and what was recorded in the medical records he was provided. In particular, he placed a great deal of weight on her failure to report to him what he described as myofascial pain she experienced before the first accident. His references for this underlying myofascial condition were the massage records I have already described above. I have found that the previous four massages Ms. McColl received in the two years prior to the first accident do not support a finding that Ms. McColl had any pre-existing condition. Dr. Fry implied that Ms. McColl was not being honest with him about important pre-existing myofascial pain symptoms. I do not agree. I accept that the four massages were simply ordinary stress relief massages and, in the absence of any related reporting to a physician of a specific complaint, do not support a conclusion that Ms. McColl suffered from any pre-existing underlying condition. As such, to the extent that Dr. Fry's opinion is based on the existence of a pre-existing myofascial condition, it is based on an incorrect factual assumption.
- [48] Dr. Fry also advocated that Ms. McColl would have eventually developed TOS due to her likely having a cervical rib or an elongated process of C7. He referred in a general way to literature supporting his view, but did not specify which article or study supported him. He overstated the incidence of TOS arising from a cervical rib by stating that up to 1 out of 10

people with a cervical rib will develop TOS, without clarifying that only 1% of the general population have such a cervical rib. From such a tiny fraction of the population which is vulnerable to TOS from this abnormality, Dr. Fry goes on to conclude that it is more likely than not that Ms. McColl would develop TOS. He came to this conclusion without any actual evidence that Ms. McColl has such an abnormality at all, and agreed under cross examination that he had not examined the x-ray of Ms. McColl's cervical spine which indicated no acute bony abnormalities.

- [49] In addition to the egregious deficiencies I have identified above, I agree with Ms. McColl's assessment of Dr. Fry's report in general, including that Dr. Fry has included highlighted commentary throughout his report which advocates for the defence position, ventures into fact finding within the purview of the court, and challenges the honesty of Ms. McColl. Further, Dr. Fry ignored medical evidence which is not helpful to the defence position, including General Practitioner records which disclose no physical complaints prior to the first accident, and medical records which indicate numbness in the fourth and fifth fingers in Ms. McColl's right hand.
- [50] In *Litt v. Hassan*, 2015 BCSC 1920 at para. 84 the court rejected a medical opinion, finding that the physician giving the opinion lacked objectivity, produced an argumentative review of the plaintiff's medical history and clinical records, advanced a view on the relationship between muscle injury and immediacy of pain which has been rejected by the courts, and relied on an incorrect underlying factual assumption. Similar observations were made by the court in *Howell v. Machi*, 2017 BCSC 1806 at paras. 281-286. Consistent with the law articulated in *Litt* and *Howell*, I reject the opinion of Dr. Fry for reasons I have described in more detail above.
- [51] Dr. Okorie is a qualified psychiatrist, practising psychiatry in the United Kingdom since 2007, and Canada since 2013. Dr. Okorie examined Ms. McColl in December 2018. Dr. Okorie agreed with Dr. Klubben that Ms. McColl suffered from pain and trauma related emotional symptoms. However, he differed from Dr. Klubben in her diagnosis of post traumatic stress or depressive/anxiety disorders.
- [52] Dr. Okorie was of the opinion that Ms. McColl had developed a number of significant symptoms since the accidents. These include sadness and emotional changes, "injury/accident anxiety, exaggerated startle response, avoidant behaviors and occasional accident-related nightmares". He found that all of the limitations and disabilities suffered by Ms. McColl were related to her physical concerns arising from the accident.
- [53] While Dr. Okorie acknowledged Ms. McColl's symptoms to be significant, he was of the opinion that they did not rise to the level of a psychiatric diagnosis. He found she did not meet the criteria for a depressive or anxiety disorder, or post traumatic stress disorder as specified in the DSM-5.

- [54] While Ms. McColl discounts Dr. Okorie's opinion on the basis that he spent less time with Ms. McColl than Dr. Klubben has, and did not provide a detailed specific response to issues raised by Dr. Klubben in her second report, I do not agree. I find Dr. Okorie to be a credible and unbiased witness. He did not spend as much time as Dr. Klubben with Ms. McColl. However, Ms. McColl presented no opinion to refute his statement that he spent the time required by his profession to complete a diagnosis. Dr. Okorie acknowledged the seriousness of the symptoms experienced by Ms. McColl, and recommended continued psychotherapy to address her symptoms and assist her in managing her pain. He simply did not agree with the psychiatric diagnosis advanced by Dr. Klubben, or with the need for psychotropic medications.
- [55] While I accept Dr. Okorie's assessment of whether Ms. McColl met the criteria for psychiatric diagnoses, the distinction between the two experts is not material in terms of the treatment recommendations of each of them. Both Dr. Klubben and Dr. Okorie recommend that Ms. McColl be treated with further psychotherapy sessions. In his initial opinion Dr. Okorie supported further sessions with Dr. Klubben. At trial, he testified that he felt Dr. Klubben was not pursuing a helpful direction in her psychotherapy as she seemed to moving her focus away from pain management and towards curing a psychiatric illness which Dr. Okorie did not agree with. However, I did not understand Dr. Okorie to be resiling from his recommendation for further psychotherapy, provided it was focussed appropriately on managing pain. Furthermore, there is no material difference between them in relation to Ms. McColl's prognosis, which is directly tied to her ability to manage her ongoing pain.

3. Causation

- [56] Dr. Finlayson stated that TOS is a common result of whiplash type injuries. Because of the way Ms. McColl's car was rear ended, Dr. Finlayson considered it reasonable for Ms. McColl to have suffered a whiplash type injury as her head and neck were thrust suddenly back and forth. Dr. Finlayson was of the opinion that both Ms. McColl's myofascial pain and TOS symptoms arose from the first accident, and then were exacerbated in the second accident.
- [57] Dr. Salvian did an extensive review of all Ms. McColl's prior health records, including her visits to a massage therapist prior to the accidents. He was of the opinion that Ms. McColl's injuries, including her myofascial pain to her right shoulder, neck, and chest muscles, and her severe TOS, resulted from the accidents. There was nothing in her pre-accident medical history which indicated these injuries would have occurred but for the accident.
- [58] Dr. Cameron was of the opinion that the soft tissue and musculoskeletal injuries originated with the accidents. These injuries then led to Ms. McColl's TOS and cervicogenic headaches.
- [59] Dr. Klubben found the onset of Ms. McColl's depressive symptoms to be consistent with the nature of the accidents, and the injuries she suffered in the accidents. In other words, to the extent the physical injuries arose as a result of the accidents, the psychological complaints also follow as a result of the accidents.

[60] Dr. Rickards agreed that Ms. McColl's TOS likely arose as a result of the accidents.

[61] The defence acknowledged that Ms. McColl was injured as a result of the accidents. The defence further acknowledged that Ms. McColl suffered soft tissue injuries and developed TOS. Issue is taken only with the nature and extent of Ms. McColl's functional limitations as a result of the injuries.

[62] I find that as a result of accidents Ms. McColl suffered:

- a) myofascial pain in her right shoulder, neck, and chest muscles,
- b) severe TOS,
- c) cervicogenic headaches, and
- d) psychological and emotional symptoms resulting from her physical injuries.

B. What is Ms. McColl's prognosis?

[63] Ms. McColl has undertaken all courses of treatment recommended by her treating professionals, including physiotherapy, Feldenkrais therapy, massage therapy, neuromuscular massage therapy, chiropractic treatments, acupuncture, and dry needling. These treatments provided short term, but not permanent, relief.

[64] In 2014 she attended the CHANGE Pain clinic for group therapy to learn techniques to manage chronic pain. She has undertaken psychotherapy with Dr. Klubben since 2018.

[65] In 2017 she began Botox injections with Dr. Finlayson, which will continue into the future. The Botox has helped with her TOS symptoms, providing her with relief for up to a couple of months following an injection. While the Botox remains effective, her pain improves, as does her mood, concentration, and memory. She is able to improve her strength and conditioning during these periods, as well.

[66] Ms. McColl has also participated in some yoga and pilates classes, often modified to accommodate her limitations. She has done some swimming, and some limited running. She has attended at a gym and diligently engaged in stretching and strengthening exercises.

[67] Ms. McColl has tried various pain killers and muscle relaxants, creams, heating pads, and other devices to assist her in managing her pain.

[68] The defence does not assert that Ms. McColl has failed to mitigate her physical injuries or psychological symptoms.

1. Physical injuries

- [69] Dr. Ramsey held the opinion that, while Ms. McColl had been compliant with all treatment recommendations, her prognosis with respect to recovery from chronic myofascial pain was very limited to unlikely. In addition, he was of the view that, in relation to her TOS, her current functional limitations may be her new baseline, i.e. further recovery was not anticipated.
- [70] Dr. Finlayson, after treating Ms. McColl with Botox several times and not finding a sustained benefit from the treatments, was of the opinion that Ms. McColl's symptoms were unlikely to completely resolve. She plans to continue giving Ms. McColl Botox treatments two to three times a year indefinitely.
- [71] Dr. Salvian noted that Ms. McColl had undertaken all she could for the management of her myofascial pain, and recommended further sessions with a fitness instructor or kinesiologist to maintain her fitness.
- [72] It was the opinion of Dr. Salvian that Ms. McColl would have ongoing chronic myofascial pain, and is unlikely ever to be pain free in her neck. Similarly, Ms. McColl would never be cured of TOS. Dr. Salvian recommended that Ms. McColl avoid heavy repetitive use of her right arm, particularly with the arm extended or above chest height. He also recommended that she take breaks every 40-50 minutes to stretch and change positions. Dr. Salvian recommended that Ms. McColl continue working, but that she was likely limited to a part time position as working full time, or back to back days, will be difficult for her.
- [73] Dr. Cameron also was of the opinion that Ms. McColl would remain partially disabled from the chronic pain she suffers as a result of her soft tissue and musculoskeletal injuries, including TOS. With respect to the cervicogenic headaches Ms. McColl experiences, these lessened as Ms. McColl reduced her work load. Because the headaches result from the pain associated with the other injuries, to the extent Ms. McColl is able to manage her chronic pain, the headaches are not as prominent. However, should Ms. McColl aggravate her chronic pain, the headaches will become a bigger issue for her.
- [74] Dr. Rickards agreed that the longer a patient suffers from soft tissue pain, the less likely it is that the patient will fully recover. While Dr. Rickards initially was of the view that Ms. McColl's soft tissue and TOS injuries would recover, at trial he agreed that this opinion had changed and he no longer thought she would fully recover. To the extent Ms. McColl's TOS symptoms interfere with her work abilities, Dr. Rickards deferred to the opinion of Dr. Salvian.
- [75] While Ms. McColl's headaches have more or less resolved by the time of trial, I find that Ms. McColl will suffer ongoing myofascial pain and TOS throughout her life. While she may experience some improvement over time, she is unlikely to recover to her pre-accident state. She will have to manage her activities to accommodate her symptoms and prevent any aggravation.

2. Psychological and emotional symptoms

- [76] Dr. Klubben gave Ms. McColl a guarded prognosis. She found that if Ms. McColl's physical problems do not resolve, her psychological problems are likely to require maintenance and are vulnerable to relapse. However, Dr. Klubben also was of the opinion that long term psychological recovery may be possible if Ms. McColl receives appropriate psychological intervention. Dr. Okorie ties Ms. McColl's psychological recovery to her pain management.
- [77] I find that Ms. McColl's psychological health will improve with therapy and her ongoing pain management, but she will continue to suffer from some emotional and psychological symptoms as long as her physical injuries persist.

C. Is Ms. McColl entitled to damages?

- [78] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care and loss of housekeeping capacity, and special damages.

1. Non-pecuniary damages

- [79] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
 - (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [80] Ms. McColl seeks \$250,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is \$90,000.

[81] Ms. McColl relies on the following cases where awards ranged from \$185,000 to \$300,000 for plaintiffs suffering from TOS and associated injuries:

- a) Broad v. Clark, 2018 BCSC 1068
- b) Felix v. Hearne, 2011 BCSC 1236
- c) Mickelson v. Sodomsky, 2019 BCSC 806
- d) Gill v. Apeldoorn, 2019 BCSC 798
- e) Zacher v. Prescesky, 2019 BCSC 500

[82] The defence relies on the following cases where awards ranged from \$50,000 to \$110,000 for non-pecuniary damages in cases with a range of physical and psychological injuries:

- a) Langley v. Heppner, 2011 BCSC 179
- b) Mowat v. Orza, 2003 BCSC 373
- c) Singh v. Clay, 2011 BCSC 1172
- d) Jawanda v. Samra, 2013 BCSC 138
- e) Kodelja v. Johal, 2017 BCSC 164
- f) Hsu v. Choquette, 2015 BCSC 1123
- g) Danielson v. Johnson, 2013 BCSC 1261
- h) Gillam v. Wiebe, 2013 BCSC 565
- i) Cimino v. Kwit, 2009 BCSC 912
- j) English v. Jao, 2016 BCSC 1975
- k) Downey v. O'Connor, 2017 BCSC 1459
- l) LaRocque v. LaRocque, 2019 BCSC 655

[83] I note that the combined total of comparator cases produced by counsel is 17. There is simply no reason to bring forward so many cases on the issue of non-pecuniary damages. Counsel should restrict themselves to a maximum of three comparator cases as the usefulness of comparators is limited due to the nature of non-pecuniary damages.

[84] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. Of the cases noted above, I find the following to be useful comparators: Gillam v. Wiebe, 2013 BCSC 565 (\$90,000), English v. Jao, 2016 BCSC 1975 (\$105,000), and Downey v. O'Connor, 2017 BCSC 1459 (\$110,000).

- [85] Ms. McColl was 24 at the time of the first accident. Her injuries have had a large impact on her life. As a result of the accidents, she suffers from ongoing myofascial pain in her right shoulder, neck, and chest muscles, must significantly alter her activities to manage her ongoing TOS, and suffers from psychological and emotional symptoms resulting from her physical injuries.
- [86] Her injuries have resulted in emotional and psychological symptoms, affecting her personality and relationships with friends and family. I find that these impacts have lessened over time as she has learned to manage her symptoms and pain, but they are likely to continue into the future. She can no longer do many of the things which brought her pleasure in the past, including the array of sports and social activities she used to participate in. However, I am satisfied that her ability to navigate a social life, including intimate relationships, is improving as she learns to manage her pain more effectively. I am satisfied that she will continue to improve in this respect. While she has concerns about her ability to be a parent, I am not satisfied that she will be unable to successfully parent a child, should that possibility arise in her personal life.
- [87] Significantly for Ms. McColl, however, is the impact of her injuries on her chosen career. She is unlikely to work in her chosen career again. She had justifiably high ambitions as a film editor, and with the loss of that career she has suffered a loss of self esteem and disruption of her professional hopes and ambitions.
- [88] In all of the circumstances of this case, I find that an award of \$120,000 is appropriate for non-pecuniary damages.
2. Pre-trial loss of earning
- a) Ms. McColl's employment to date of trial
- [89] Ms. McColl was a fairly recent graduate of ECU at the time of the accidents. She was recommended by her professor for a position at Paperny, and was hired as assistant editor and graphic designer on June 15, 2012. Paperny, through its production companies, hired people such as Ms. McColl on a contract basis. Each production was covered by a new contract. If contractors produced good work and were valuable to Paperny, they would be rehired on new contracts on an ongoing basis.
- [90] Ms. McColl's job required her to work at a computer, editing raw video footage and producing graphics for television productions. This entailed long hours sitting at a computer using a keyboard, mouse, and graphics tablet.
- [91] Ms. McColl typically worked 45-60 hours each week, and was constantly employed on a full time basis from June 2012 until after the second accident in 2014. She negotiated increases in her daily rate on each contract renewal, from \$120/day when she was first hired, to \$190/day at the time of the accidents.

- [92] Mr. Rowe testified that although he had 6 years more experience than Ms. McColl, she was outperforming him, and was able to produce visual graphics in addition to her editing work, which in his view entitled her to a higher rate of pay than him.
- [93] Ms. Turner testified that Ms. McColl stood out, and she was keen to keep her contracted to Paperny. She said Ms. McColl went above and beyond what was required of her.
- [94] In addition to the work required for her job, Ms. McColl produced several short films, and was a keen networker in the entertainment industry. She obtained additional requirements to allow her to meet the eligibility requirements for union and film set work.
- [95] Over the summer of 2014, Ms. McColl was struggling at work. She had attempted to create her own standing desk and work through her pain, but it became too much. Ms. Turner testified that she found Ms. McColl crying because of her pain several times, and did what she could to accommodate Ms. McColl's condition. Because Ms. McColl was valuable to the productions, Ms. Turner permitted Ms. McColl to work a reduced schedule of two days a week beginning on July 30, 2014. This continued until the end of September 2014. Ms. McColl found that the reduced hours did assist in alleviating her symptoms.
- [96] At the end of September, Paperny required Ms. McColl to return to full time work. Ms. Turner testified that Paperny was unable to accommodate part time work, due to the intense nature of the work. Once Ms. McColl completed her contract, she was not offered a new part time contract. Ms. McColl was offered a new full time contract, but was unable to accept it because of her injuries.
- [97] Ms. McColl began accessing medical employment insurance benefits and started looking for part time work. She tried to work as a freelance editor, and reached out to agencies looking for part time work.
- [98] In the fall of 2014 she met with an occupational therapist retained by ICBC. This therapist wanted to reach out to Paperny to discuss a return to work plan; however, Ms. McColl did not consent to this approach. Ms. McColl's evidence at trial was that no part time position with Paperny was available to her, so there was no point in the occupational therapist contacting her former employer.
- [99] Ms. McColl's efforts at finding work since leaving Paperny did not yield much success. In December 2014 she did one small piece (16 hours) of freelance work for CARTA, an organization associated with her father. She reported \$40,749 in income in 2014.
- [100] In 2015 she made very modest efforts at seeking work in her field, including sending out some resumes and expressing interest in some positions. She made enquiries with respect to one position in March, three in June, three in July, one in August, and one in December. None of these resulted in any work. In 2015 she did do four small pieces of freelance work, two for CARTA and two for other organizations. She earned \$1,500 from her freelance work in 2015.

- [101] In 2016 she applied to a couple of receptionist-type positions, but these did not result in any work. She did get a position with Canadian Census in 2016, but was not able to continue with the job because she had to carry a bag as she walked from house to house, and that aggravated her symptoms. In 2016 she did two small pieces of freelance work, one for CARTA and one for a tattoo artist. Her income in 2016 was \$3,755.
- [102] In 2017 it does not appear that Ms. McColl made any attempt to apply for positions in her field. Instead, she created her own company, called "Let's Go Dogwalking", which she incorporated in February 2017. To accommodate her injuries, Ms. McColl uses a harness around her waist to anchor the dog leashes, and chooses to work only with small, well behaved animals who will not pull too hard on their leashes. She has enjoyed this small business, which has allowed her to meet people and have a sense of purpose. It has not been particularly remunerative, however. In 2017 she earned \$8,236.
- [103] In the summer of 2018 Ms. McColl again began a job search. She applied for a number of jobs, such as administrative support clerk, theatre attendant, recruiter, receptionist, art director, bartender, and English teacher. Ultimately she did get a position serving beverages at the PNE. She earned less than \$2,000 at the PNE. Her total earnings from dog walking and the PNE were \$10,891.
- [104] In 2019 to the date of trial, Ms. McColl earned \$3,779 from dog walking.
- b) Failure to mitigate
- [105] The defence argues that Ms. McColl failed to mitigate her losses in relation to both past and future earnings, and that her failure to mitigate should be taken into account in my damage award. The burden of proof is on the defence to establish that Ms. McColl could have mitigated her loss, but failed to do so. The defence must prove not only that Ms. McColl could have mitigated her loss if she had acted reasonably, but also how and to what extent that loss could have been minimized: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at 163-164.
- [106] The defence argues that Ms. McColl has failed to mitigate her job losses in two ways. She did not reasonably continue to work with the occupational therapist to develop a return to work plan at Paperny. She also did not reasonably apply herself to obtaining employment after she left Paperny.
- [107] Ms. McColl made the decision to stop working with the occupational therapist, and her decision was supported by her doctor. Ms. Turner, Ms. McColl's supervisor at Paperny, was asked by the defence whether she would have agreed to work with the occupational therapist on developing a gradual return to work for Ms. McColl. Ms. Turner's testimony was that to do so would be detrimental to others in the company and so, even though it sounds harsh, she would not have been permitted to allow a gradual part time return to work for Ms. McColl. The evidence of Ms. Turner is consistent with the evidence of Ms. McColl, namely that there was no point in working with the occupational therapist on a return to work at Paperny.

- [108] The defence also argued that Ms. McColl has failed to pursue job opportunities in a reasonable way. Ms. McColl expected to be able to work at least part time after she left Paperny. However, her efforts to obtain work were very sporadic and she provided no compelling explanation for why she was able to find virtually no work at all during the years 2015 and 2016. The defence argues that, with the exception of the Census work, Ms. McColl did not receive opportunities that she had to turn down due to her injuries; she simply did not get called in for interviews. As such, the defence argues that it is not her injuries that prevented her from getting work. Rather it is the market, Ms. McColl's inadequate efforts, or the fact that Ms. McColl was not qualified for some of the jobs she had applied for, which resulted in her continued under-employment.
- [109] Similarly, in the years 2017 to 2018, Ms. McColl has not been able to establish a financially viable dog walking business. Her business provides her with some income, but not enough to support herself. She has been successful in the additional work she got at the PNE, but that was also insufficient to support herself. She had an obligation to continue her efforts to find work which would allow her to contribute in a more meaningful way to her expenses. The defence argues that Ms. McColl was employable after 2014, but has not reasonably applied herself to obtaining employment.
- [110] The defence points to the efforts Ms. McColl made in things like music creation and stand up comedy to argue that Ms. McColl was capable of doing more in the employment arena than she did.
- [111] I find that it was objectively reasonable for Ms. McColl to have more actively participated in a job search. No expert gave an opinion that Ms. McColl's condition rendered her incapable of working in some capacity. I will discuss the vocational assessments in more detail below. I am satisfied that Ms. McColl is able to obtain work, albeit not in her chosen career as a film editor and not without some accommodation, and that she did not actively seek work within her limitations for a number of years between 2014 and the trial. As such, I am not satisfied Ms. McColl has satisfied the test set out in Janiak, namely that the objective standard of reasonableness is beyond Ms. McColl's capacity to obtain: Janiak at 160.
- [112] In the result, I find that the defence has met its burden of proving that Ms. McColl has failed to fully mitigate her losses by failing to actively search for employment consistent with her capabilities. Ms. McColl's failure to mitigate will be taken into account in my assessment of damages.
- c) Assessment of past loss of earning capacity
- [113] Ms. McColl worked for 9 months of 2014, two of those months being part time. Her total income in 2014 was approximately \$40,749. The defence argues that her annualized income for 2014 would be slightly more than \$54,000. Ms. McColl argues that her annualized income for 2014 should be \$45,000.

- [114] Ms. McColl tendered four reports from Derek Nordin, a vocational consultant, who estimated Ms. McColl's potential income to be in the range of \$45,000 to \$56,000. Mr. Lawless, retained by the defence, provided statistics which support an annualized salary of approximately \$60,000.
- [115] Ms. McColl argued that I should disregard the reports of Mr. Nordin and Mr. Lawless, and I should rely instead on the evidence of Ms. Turner as to what Ms. McColl would have made. I agree that the evidence of Ms. Turner is very useful, given her 20 years of experience in the industry, and her role in managing payrolls of editors and others in the industry. However, her evidence was anecdotal and not complete. She provided some insight into 2019 incomes at Paperny, but her evidence cannot be determinative of Ms. McColl's past and future income.
- [116] Ms. Turner testified that in 2019 her assistant editors made \$1,600/week, but they have less experience than Ms. McColl. She stated she expected Ms. McColl would be making \$2,000/week in 2019 had she still been working at Paperny as an assistant editor. Further, Ms. Turner agreed that if the accidents had not happened, she would have wanted to retain Ms. McColl at Paperny. Ms. Turner did not testify as to what Ms. McColl would have likely made in 2015, 2016, 2017, or 2018. Ms. McColl urges me to adopt \$2,000/week as a likely income for Ms. McColl in each of 2015 and 2016 - almost a tripling of Ms. McColl's 2014 income.
- [117] Ms. Turner testified that Ms. McColl would likely become an editor. Ms. Turner said she expected Ms. McColl would be a "junior editor" in 2019. She did not give an income estimate for a junior editor. Ms. Turner agreed that Ms. McColl had the capability of becoming an editor over time, and said that editors in 2019 made \$3,000 to \$3,500/week if they were non-union, and even more if they were union. Ms. McColl urges me to accept that she would be making \$3,500/week in 2017 and 2018, which is the income Ms. Turner ascribes to an editor in 2019. Ms. Turner did not testify about what an editor would make in 2017 or 2018, and did not state that she expected Ms. McColl would be an editor in 2017, 2018, or even 2019. Rather she said Ms. McColl would likely be a junior editor.
- [118] The evidence of Ms. Turner is not adequate to support the income figures advanced by Ms. McColl. However, I find the evidence of Ms. Turner does suggest the industry averages put forward in the evidence of Mr. Nordin and Mr. Lawless are understated for the editing work Ms. McColl would have done at Paperny. As such, I find that there is a real and substantial possibility that Ms. McColl's loss of income is higher than the losses would be based on the reports of Mr. Nordin and Mr. Lawless.
- [119] I find that Ms. McColl would have earned \$54,000 in 2014, and that she would have received increases of 15% each year as an assistant editor until 2018 when she would have transitioned to being a junior editor. In 2018 and 2019 I find she would have become a junior editor, and her income would have increased again. I find that, but for the accidents, Ms. McColl's income in her chosen profession to the date of trial (April 1, 2019) would have been:

Annualized income

Approximate income received

Loss

2014

\$54,000

\$40,749

\$13,251

2015

\$62,100

\$1,500

\$60,600

2016

\$71,415

\$3,755

\$67,660

2017

\$82,127

\$8,236

\$73,891

2018

\$100,000

\$10,891

\$89,109

2019 (3 months)

\$25,000

\$3,779

\$21,221

TOTAL

\$325,732

[120] As I have found that Ms. McColl failed to mitigate her past loss of earnings, I apply a 20% discount to the loss calculation set out above. I assess Ms. McColl's total pre-trial loss of earnings as \$260,000.

3. Loss of future earning capacity

[121] The purpose of an award for loss of future earning capacity is to restore the plaintiff, as best as possible, to the position he would have been in had the accident not occurred. The plaintiff must establish an impairment in her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

[122] The court in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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

[123] I find that Ms. McColl has established that her earning capacity has been impaired as a result of the injuries she sustained in the accidents. Ms. McColl had successfully trained in a specialized career, obtained a good job in the film industry, and was doing very well in that job. This career would have returned her a very good income. The evidence before me was overwhelming that she will no longer be able to pursue the career she trained in and loved.

[124] Dr. Finlayson and Dr. Salvian were of the opinion that Ms. McColl's work as a film editor would aggravate her condition and is not sustainable. Dr. Ramsey and Dr. Cameron were of the opinion that Ms. McColl would be permanently limited in her ability to work full time. Mr. Winter, who conducted a functional capacity assessment on behalf of the defence, found Ms. McColl's "current functional tolerances do not meet the demands of her previous occupation". This assessment was further confirmed by Mr. Nordin and Mr. Lawless, vocational evaluators retained by both the plaintiff and defence.

- [125] In addition, not only will Ms. McColl be unable to return to her chosen career in the film industry, she will be faced a number of restrictions in other work opportunities. There is no question that Ms. McColl has been rendered less marketable as a result of her injuries.
- [126] In terms of assessing her loss, the questions before me include how long she would have stayed in the film industry, what level would she have ultimately reached, and what her future prospects are with her injuries.
- [127] Ms. McColl says she would have worked until she was 70. She points to her father as an example of someone who is still working at age 64. While one witness acknowledged he knew of a few people who worked past the normal retirement age, no evidence was tendered to establish that people in the film industry typically work past the normal retirement age of 65. I am not satisfied that Ms. McColl has established a real and substantial possibility that she would have worked to age 70. Her loss will be assessed to age 65.
- [128] Ms. McColl also argued that she would have become a show runner - one of the very highest positions in the film industry. While Ms. McColl has established that she was a very competent film editor, who worked hard and excelled in her first two years, she did not establish a real and substantial likelihood that she would have reached the pinnacle of the film industry.
- [129] Ms. McColl argues that a reasonable yearly income assessment for each year until she reaches age 65 is \$175,000. This is based on Ms. Turner's evidence that a non-union editor in 2019 would earn between \$125,000 and \$175,000.
- [130] I am satisfied that Ms. McColl has established a real and substantial possibility that she would have become an editor in the film industry. Ms. Turner's evidence represents her current knowledge of the industry and, in particular, income levels at Paperny. While that evidence was helpful with respect to past income loss as it was likely that Ms. McColl would have continued working at Paperny from 2014 to 2019, it must be treated with caution as a baseline for Ms. McColl's remaining career. I cannot assume that Ms. McColl would have continued at Paperny for her whole career, or that Paperny's wages represent the average in the industry.
- [131] I find that a conservative, but reasonable, assessment of Ms. McColl's annual earning capacity until 2023 is \$100,000/year. I find that Ms. McColl would have continued to advance in her career and her earning capacity would have increased as a result. From the beginning of 2023 until the end of her working life at age 65, I find that a reasonable assessment of Ms. McColl's earning capacity is \$130,000/year.

- [132] I must also consider Ms. McColl's residual earning capacity. As stated above, I do not accept that Ms. McColl has done all that she can in terms of obtaining work. In addition, Ms. McColl's evidence was that she is experiencing some improvement in her physical symptoms. She began one on one psychotherapy treatments with Dr. Klubben in 2018, and I am satisfied these will assist her in living with and managing her ongoing emotional and psychological symptoms.
- [133] Dr. Salvian emphasized that Ms. McColl was bright and creative, and it was important for her to work. However, he acknowledges that she has many restrictions in the kinds of work available to her. Dr. Finlayson notes certain repetitive uses of Ms. McColl's right arm would be intolerable, but did not rule out occupations that did not aggravate Ms. McColl's condition and specifically recommended vocational counselling to assist Ms. McColl in finding a suitable career. Dr. Rickards was of the view that Ms. McColl would be able to work in the future if accommodations were made.
- [134] Both Mr. Nordin and Mr. Lawless provided vocational assessments of Ms. McColl. On balance, I prefer the opinion of Mr. Lawless.
- [135] Mr. Nordin concluded that Ms. McColl could work with accommodations, but was of the view it would be difficult for her to retrain because of difficulties with her memory and concentration. Her cognitive scores were low when tested by Mr. Nordin in 2017, and were inconsistent the fact she had successfully completed a Bachelor's degree. I have found that in the past her headaches contributed to problems with concentration and memory. This may have affected the testing done by Mr. Nordin in 2017. Her headaches are no longer the problem for her they once were, and this improvement is noted in Mr. Nordin's follow up report dated December 31, 2018. Mr. Nordin also notes in 2018 that Ms. McColl has obtained additional part time employment, and that this is a positive indicator from a vocational rehabilitation perspective. As Ms. McColl continues to learn how to manage her pain, I am satisfied that she will be in a better position to retrain.
- [136] Mr. Lawless reviewed a number of occupations that would be suitable for Ms. McColl and consistent with her interests. His opinion of Ms. McColl's prospects was realistically guarded, given her limitations, but did express a number of options Ms. McColl could pursue. Mr. Lawless recommends vocational counselling to help Ms. McColl settle on future career options that could accommodate her limitations, but also her creativity and intelligence.
- [137] Ms. McColl will be restricted in the work available to her. However, I accept the opinion of Mr. Lawless that Ms. McColl is "young and bright with good prospects for retraining for skilled and professional occupations, particularly in social services and healthcare". I do not accept that Ms. McColl will be unable to work in the future. She needs to make a more concerted effort to find out what she is capable of in a work environment.

[138] I find that Ms. McColl has suffered a loss of future earning capacity. I assess that loss to be 60% of the earning capacity she would have enjoyed but for the accidents.

a) Present value

[139] Any award for loss of future earning capacity must be assessed as a lump sum, which takes into account the present value of the plaintiff's future loss. By calculating the present value of the future loss, the court accounts for the fact that money received today will be invested and produce the appropriate income stream for the plaintiff's expected earning life.

[140] Ms. McColl relied on a report prepared by an economist, Mr. Darren Benning, which sets out two present value tables which calculate present value multipliers for females and males with Bachelor's degrees (other than law) in BC. He presented calculations which account for labour market contingencies in the following ways: he provided calculations which reflected statistics for premature death (actuarial multipliers), and calculations which reflected statistics for premature death, non-participation, unemployment and part-time/part-year employment (economic multipliers).

[141] The defence relied on a report from an economist, Mr. Mark Gosling, who reviewed Mr. Benning's report and provided adjusted present value calculations. Mr. Gosling's primary complaint with Mr. Benning's work was that Mr. Benning "restricted his non-participation contingency to exclude non-participation for any reason other than disability". Mr. Gosling says that the non-participation category is intended to account for the possibility that the individual will not be working or actively seeking work for any number of reasons, including disability, preference for leisure (including retirement) over paid work, and preference for unpaid household work (including caring for children or disabled family members) over paid work.

[142] Mr. Gosling provided present value calculations for females only. Under cross examination Mr. Gosling agreed that he was not aware of data indicating that female editors earned less than male editors, and that "if a female will behave like a male, the male projection would be okay".

[143] There is a meaningful discrepancy between the calculations done using female statistics, as against male statistics. This discrepancy has been accepted in our courts as indicative of embedded gender bias and historical inequality in the underlying statistical information. The court of appeal in *Gill v. Lai*, 2019 BCCA 103 discussed this issue as follows:

[54] Judges can and do recognize income statistics may incorporate historic and inequitable gender-based pay differences and, as such, have increasingly taken a cautious approach to gender-based income statistics. In *Crimeni v. Chandra*, 2015 BCCA 131, this Court said:

- [23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach v. O'Brien*, 2011 BCCA 302.
- [24] It is certainly not an error, in my view, for a trial judge to recognize that the use of historical data can reflect such bias and, to the extent, the circumstances giving rise to the bias may be expected to diminish, to view the evidence as conservative.
- [25] I can see no error in the judge's consideration of the plaintiff's pre-injury earning potential.
- [55] In my view, the same can be said of labour market contingencies. It is not an error to recognize gender-based contingencies can incorporate bias. Having said that, we must bear in mind the quantification of damages necessitates an individual approach.
- [144] I find that it would be inappropriate to rely on female statistics, particularly in the case of Ms. McColl who intended to be competitively employed in the film industry until her retirement.
- [145] However, I am also not persuaded that the male multipliers prepared by Mr. Benning are appropriate because of his restricted assessment of non-participation factors.
- [146] Ms. McColl argues that her tenacity, ambition and passion for her career take her out of the ordinary, such that factors like a preference for leisure or unpaid work would have no statistical application in her case. I cannot agree with Ms. McColl. While she did very well in art school, and excelled in her first two years as an assistant editor, I cannot agree that there was compelling evidence to establish a real and substantial possibility that her tenacity, ambition and passion took her outside the statistical norm.
- [147] While Ms. McColl pursued a number of creative projects during the years 2015 to 2019, she did not actively pursue employment. I acknowledge that she was coping with her injuries during this period. However, if she was out of the ordinary in terms of tenacity and ambition, I would have expected such extraordinary tenacity and ambition to drive her forward following her injuries in way she has not demonstrated.
- [148] Further, Ms. McColl has demonstrated many creative interests, including music and comedy, which she may choose to pursue over the course of her life, and which may take her out of the work force. She has said she wishes to start a family. She has parents that she may be asked to assist with as they age. None of these possibilities are certain. But the point of using statistics in developing the non-participation multipliers is they take into account statistical possibilities against the population as a whole. To find the statistical multipliers were not useful in Ms. McColl's case, I would have to find that there was no possibility of her taking any time out of the work force for anything except disability.

[149] I am not persuaded that there is a real and substantial possibility that Ms. McColl is so extraordinary that non-participation factors should be restricted to disability alone.

[150] In the result, the parties are directed to assess the present value of Ms. McColl's future loss, using the following assumptions and directions:

- a) Ms. McColl will work until age 65,
- b) Ms. McColl's loss from April 1, 2019 until December 31, 2022 is \$60,000 per annum,
- c) Ms. McColl's loss from January 1, 2023 until her 65th birthday is \$78,000 per annum,
- d) calculations will be prepared using economic multipliers, including all conventional non-participation factors, and
- e) male earning statistics will be used.

[151] If the parties are unable to agree on the present value calculation, I refer the present value calculation to be assessed before a Registrar.

4. Cost of future care

[152] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.). The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140 at paras. 192-195.

[153] Ms. McColl relies on an assessment performed by Ms. Abdel-Barr, an occupational therapist who reviewed the relevant medical evidence, including a functional capacity evaluation prepared by Mr. Winter, and performed an in home assessment of Ms. McColl. Mr. Winter prepared a report responsive to that of Ms. Abdel-Barr. I have considered both reports and the underlying medical reports which were tendered in evidence at trial. While the defence disputes the necessity of some items, the costing for specific items is not generally disputed. My assessment of reasonable costs of future care are set out below, generally following the format of the recommendations in Ms. Abdel-Barr's report.

a) Botox

[154] Dr. Finlayson testified that the maximum number of Botox sessions per year for Ms. McColl would be two, and that it is not a permanent or indefinite treatment. She will continue the treatments as long as the benefits outweigh the risks, although it is unclear as to how long exactly Ms. McColl will be able to receive Botox. I find that Ms. McColl will be able to receive Botox for the next 10 years.

[155] The cost to administer a Botox injection is \$250 per injection. The cost of Botox per injection (100 units) is \$418.48. On an annual basis the cost of Botox treatment is \$1,337, including the drug and cost to administer the drug. I award \$1,337/year for Botox treatments for 10 years.

b) Medications

[156] Various pain medications, prescription and non-prescription, have been costed and the combined total on a recurring basis is \$2,581-\$3,354/year. Pain medication is recommended by Dr. Ramsey and Dr. Cameron. However, the evidence of Ms. McColl consistently taking such medication in the quantities costed in the report is weak. I allow \$500/year for pain medication on a recurring basis.

c) Ergonomic equipment

[157] The cost of ergonomic equipment for future employment is supported by the defence and I allow \$1,000 as a one time cost for such equipment.

[158] A perching stool to provide comfort and positioning in kitchen spaces was costed at \$450, and a hands free headset was costed at \$60. I find both of these pieces of equipment to be medically justified based on the assessment done by Ms. Abdel-Barr and the medical evidence provided. A one time cost of \$510 for both items is allowed.

d) Vocational / educational

[159] I accept that Ms. McColl will benefit from vocational counselling, as confirmed by Mr. Lawless and Mr. Nordin. Ms. Abdel-Barr recommended recurring counselling of \$900-\$9,000/year. This strikes me as excessive. I find that vocational counselling is appropriate for three years, with a yearly cost of \$1,800.

[160] Some retraining for Ms. McColl to allow her to pursue a new professional career is also reasonable and consistent with the opinion of Mr. Lawless. I allow \$20,000 for retraining costs.

e) Projected evaluations

[161] Ms. Abdel-Barr recommended three one time psychological evaluations. This recommendation is supported by Dr. Klubben, and I allow this one time cost in the amount of \$600.

f) Projected therapeutic modalities

- [162] Psychotherapy is recommended by both Dr. Klubben and Dr. Okorie. Dr. Klubben recommended a further 26 psychotherapy sessions in her report dated December 31, 2018. Since that report, Ms. McColl has attended a number of sessions with Dr. Klubben, three of which are included in the special damages claim presented at trial. As such, while I allow the costs of the recommended sessions, I reduce the claim for future costs to 23 sessions, or \$4,600.
- [163] Ms. Abdel-Barr presented costing for ongoing massage in the amount of \$600-\$1,320/year. Mr. Winter agrees this is reasonable. I allow \$800/year for massage treatments.
- [164] A one time cost of \$2,560 for Feldenkrais therapy, as recommended by Dr. Salvian is supported by the defence, and I allow that cost.
- [165] I do not allow any physiotherapy costs as I am not satisfied Ms. McColl has proven a real and substantial likelihood that she would use such services.
- [166] Ms. Abdel-Barr recommends an occupational therapist to provide services for 48 hours/year for five years. This approach is accepted by Mr. Winter. I agree that such occupational therapist services are reasonable, and I allow a yearly cost of \$5,000 for five years.
- [167] Ms. Abdel-Barr recommends ongoing occupational therapy sessions following the initial five years, but that these would be more sporadic and designed to address new issues which may arise. Mr. Winter agrees with this approach which he refers to as "booster sessions". I allow 8 sessions a year on a recurring basis, with a yearly cost of \$800, following the first 5 years.
- g) Aids for independent function
- [168] Ms. Abdel-Barr recommends a one time purchase of a light weight vacuum cleaner to help Ms. McColl to clean her house without aggravating her symptoms. The defence agrees this is reasonable. I allow a one time cost of \$80 to allow for the purchase of a light weight vacuum.
- h) Home support
- [169] Ms. Abdel-Barr recommends housekeeping support, including an initial deep clean of 8 hours, followed by 5 hours per week of housekeeping which includes assistance with laundry. I find that this recommendation is excessive. Ms. McColl is able to manage many day to day tasks to maintain her home. She is certainly limited in terms of deep cleaning, and tasks that require high reaching. I agree that some support is appropriate, just not the extent advanced by Ms. McColl. I allow 8 hours for an initial one time cleaning at a cost of \$264, and 8 hours (\$264) per month on an ongoing basis.

- [170] Dr. Salvian identified that Ms. McColl may need assistance with heavier home maintenance and yard work, should she move into a house at some point in her future. I agree that she will need such assistance, and I agree that the yearly cost estimates of \$1,600-\$2,000/year for both is reasonable. However, because it is not certain that Ms. McColl will move into a house in the future, I discount this cost by 50%. I allow \$1,000/year from age 39 to age 75.
- [171] Ms. Abdel-Barr provided a cost for 16 hours of assistance required to pack and clean in the event of a move, which she assumes will occur every seven years over Ms. McColl's life. This is costed at \$3,668-\$4,368 over her life. It is not clear what the assumption that Ms. McColl would move every seven years is based on. Further, most people as they age need assistance in a move and that would be expected of Ms. McColl regardless of the accidents. Therefore, while I agree Ms. McColl is likely to move and she will need assistance, I discount the cost advanced by Ms. McColl by 70% to reflect the fact that a move every seven years was not proven, and that after a certain age Ms. McColl would likely have hired people to assist her with a move in any event. I award \$1,300 in relation to moving costs.
- [172] A number of homemaking costs were advanced to assist Ms. McColl in the event she starts a family. I am not satisfied that these additional costs are likely to be accessed by Ms. McColl. While she testified that she hopes to start a family, she did not say she hoped to do so as a single parent. I am not satisfied that, in the event she starts a family, her partner would be unable to perform any additional homemaking required. I allow nothing for the costs advanced in this category.
- [173] Similarly, I find the costs of a nanny are costs which would likely have been incurred by Ms. McColl in any event should she have started a family, and I decline to make any award in this respect.
- i) Health maintenance and leisure
- [174] Ms. Abdel-Barr recommends 78 kinesiology sessions in the first year, followed by 12 sessions per year on an ongoing basis. This recommendation is supported by Mr. Winter. A number of the medical experts also recommend kinesiology sessions. I award \$5,000 for kinesiology in the first year, and \$780/year on an ongoing basis after the first year.
- [175] A community centre pass to access a gym and pool is recommended by Dr. Salvian. Both Ms. Abdel-Barr and Mr. Winter support such a pass. I allow \$460/year for a community centre pass.
- [176] Ms. Abdel-Barr and Dr. Finlayson recommend pilates and yoga, and Ms. Abdel-Barr provided costing for both. Mr. Winter agrees with the need for ongoing treatments, but states that in his experience it is unlikely that a patient would access all the possible treatments. Rather, patients tend to choose one thing as it is too time consuming and taxing to access a great range. I tend to the view expressed by Mr. Winter. Ms. McColl demonstrated an interest in a range of treatments over the past number of years, but did not access all on a consistent basis. I find it is reasonable to award \$1,000/year on an

ongoing basis to allow Ms. McColl to access either pilates or yoga as she sees fit.

j) Present value of costs of future care

[177] Like future loss of earning capacity, a present value of any costs of future care must be assessed. Mr. Benning provided calculations in respect of the present values. The defence agrees these are appropriate. For all costs which are assessed on an indefinite yearly basis, I find a reasonable end date to be April 1, 2069, when Ms. McColl will be 80 years old. I set out below the cost of future care which I have awarded, assessed as a present value where appropriate:

Item

Recurring annual cost

One time cost, or present value

Botox

\$1,337 for 10 years

\$13,180

Pain medication

\$500/year

\$15,346

Ergonomic equipment

\$1,510

Vocational counselling

\$1,800/year for 3 years

\$5,240

Retraining

\$20,000

Psychological evaluation

\$600

Psychotherapy sessions

\$4,600

Massage

\$800/year

\$24,553

Feldenkrais therapy

\$2,560

Occupational therapist

\$5,000/year for 5 years

\$23,775

Occupational therapist

\$800/year after first 5 years

\$20,750

Vacuum

\$80

Housekeeping - initial deep clean

\$264

Housekeeping

\$264/month

\$97,232

Yard work/home maintenance

\$1,000/year ages 39 to 75

\$20,164

Moving costs

\$1,300

Kinesiology, year one

\$5,000

Kinesiology

\$780/year after year 1

\$23,168

Gym/pool pass

\$460/year

\$14,118

Pilates/yoga

\$1,000/year

\$30,692

TOTAL

\$324,132

5. Interference with homemaking capacity

[178] Damages for loss or impairment of homemaking capacity may be awarded on a pecuniary or non-pecuniary basis. As the Court of Appeal explained in *Kim v. Lin*, 2018 BCCA 77 at para. 33:

Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[179] I find that Ms. McColl is adequately compensated for her loss of homemaking capacity by virtue of the cost of future care awards I have already made for housekeeping.

[180] Ms. McColl argues that the law permits an award for loss of homemaking capacity in addition to housekeeping claims which form part of an award for the cost of future care, relying on *Anssari v. Alborzpour*, 2019 BCSC 512. However, it is clear that *Anssari* does not stand for such a proposition. *Anssari* confirms that loss of homemaking capacity can be assessed two ways: either as a pecuniary loss where the person can no longer perform certain tasks, or as a non-pecuniary award where the person can perform certain tasks but with pain or difficulty. When measured as a pecuniary loss, the loss can be measured by the cost of replacement services, and there can be no discount to account for the possibility the person may not actually hire replacement services. This head of damage is intended to compensate for something the person had but has now lost.

[181] The substance of what is being claimed and awarded must be carefully assessed to avoid double recovery. In the case before me the plaintiff has chosen to include various homemaking claims as part of her future care costs. She could just as easily have advanced them as a measure of Ms. McColl's loss of homemaking capacity. The claims advanced represent the pecuniary value of the homemaking capacity Ms. McColl has lost - the value of the housekeeping and homemaking work she is no longer able to perform.

[182] In Anssari at para. 151 the court comments that at trial in *Kim v. Lin*, 2016 BCSC 2405, the trial judge "disallowed claims under the cost of future care for household chores and yard work because they duplicated the claim for loss of housekeeping capacity". Like the trial judge in *Kim v. Lin*, I find that to award Ms. McColl additional damages for loss of homemaking capacity in addition to the housekeeping, yard work and home maintenance awards I have already made would constitute a double recovery. As such, I decline to make a further award under this head of damage.

6. Special damages

[183] The plaintiff advances a claim of \$21,123.74 for special damages. The defence disputes the following:

- a) Shiatsu therapy in the amount of \$340, although agrees if this was actually a registered massage therapist the cost would be acceptable,
- b) Housekeeping in October 2014 in the amount of \$105,
- c) Direct pay medical visits in the amount of \$2,001.90, which the defence says ought to have been paid by MSP, and
- d) Orthotics in the amount of \$100.78 which Ms. McColl purchased at a drug store.

[184] I am satisfied that special damages should be reduced to \$20,683 to account for the Shiatsu massage and orthotics which are not properly compensable.

IV. Conclusion

[185] Ms. McColl is awarded the following damages against the defendants, jointly:

a)

Non-pecuniary damages

\$120,000

b)

Past loss of earning capacity

\$260,000

c)

Loss of future earning capacity

- April 1, 2019 until December 31, 2022:
- January 1, 2023 until Ms. McColl's 65th birthday:

\$60,000 per annum

\$78,000 per annum

d)

Cost of future care (present value)

\$324,132

e)

Special damages

\$20,682

[186] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. McColl at Scale B.

"Baker J."

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