

CANADA / JUDGMENT

## McLean v. Redenbach

2023 BCSC 8

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 8 McLean v. Redenbach

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLean v. Redenbach,

2023 BCSC 8

Date: 20230104

Docket: M188086

Registry: Vancouver

Between:

Susan Nicole McLean

Plaintiff

And

William Redenbach and Frances Redenbach

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

A.E. Maragos

T. Hanson

Counsel for the Defendants:

D. Lavoie

Place and Date of Trial:

Vancouver, B.C.

October 17 - 21, 2022

Place and Date of Judgment:

Vancouver, B.C.

January 4, 2023

## I. Introduction

- [1] On September 28, 2016, the plaintiff was injured after a motor vehicle owned by the defendants, and driven by the defendant Frances Redenbach, crashed through the front window of a hair salon in Ashcroft, British Columbia, and struck the chair in which the plaintiff was seated. The chair was pushed forward and toppled over, causing the plaintiff to fall onto her right side. I will refer to this event as "the Accident".
- [2] Liability for the Accident has been admitted by both defendants, leaving only the assessment of the plaintiff's damages to be determined.

## II. Background

### A. Pre-Accident

- [3] The plaintiff was born on October 1, 1975, and is currently 47 years old. She graduated from high school in Ashcroft in 1993, and then attended the University College of the Cariboo in Kamloops, BC, where she studied general sciences for two years. Afterwards, she began to practice massage therapy in British Columbia, but not as a registered massage therapist ("RMT").
- [4] The plaintiff married her husband, James McLean, in 1997. Mr. McLean worked as an instrumentation mechanic and had to frequently relocate for contract jobs.
- [5] The plaintiff and her husband have daughters aged 23 and 20, and a son aged 17. The plaintiff took one year of family leave associated with the birth of their two daughters
- [6] In 2003, the plaintiff and her family moved to Kamloops, where she started a massage therapy and Reiki studio as a sole proprietor. The studio was located in the basement of her home. She worked limited hours, performing approximately six massages per week in the evenings.

- [7] Prior to the Accident, the plaintiff enjoyed biking, going for walks, doing yoga in classes or at home, working out at the gym, and gardening. She also volunteered in her community. She was heavily involved in the Ashcroft HUB, a recreation centre. She also volunteered with: the Winding River Arts & Performing Society as a producer, putting on one play per year; the United Way; and with soup kitchens organized by her husband's union a few times per year.
- [8] The plaintiff gave evidence that she loved her job as a massage therapist; she enjoyed helping people feel better, the physicality of the work, and liked the freedom of working for herself and setting her own schedule. She testified that her flexible work schedule helped her to balance being a mother, her volunteer work, and her career.
- [9] In the three years prior to the Accident, the plaintiff continued to work from her home massage studio. She also worked as an independent contractor providing massages to guests at the Sundance Guest Ranch, a dude ranch located roughly ten kilometers outside Ashcroft, which was typically open from April until the end of October.
- [10] In 2016, the plaintiff's hourly rate for massage therapy from her home was \$60, although she kept some long-time clients at \$50 per hour. Her hourly rate at the Sundance Guest Ranch was \$90. These rates did not include GST. Her massages were either 30 minutes or one hour, with most being one hour in length, and she confirmed that all her income and appointments were reported in her income tax returns.
- [11] At home, the plaintiff did most of the cleaning, yard work, ran the household, and took care of the children. Mr. McLean was responsible for most of the grocery shopping and meal preparation.
- [12] The plaintiff testified that she had the odd headache before the Accident, but none on a regular basis. She gave evidence that her pre-Accident headaches were often caused by dehydration, and she would seek treatment if they lasted.
- [13] Dr. Kent Farnsworth, the plaintiff's acupuncturist, testified that before the Accident he treated her for various issues in 2007 and 2012.
- [14] The plaintiff saw her chiropractor, Dr. Troy Fraser, on September 8 and December 11, 2014, and June 24, July 8, September 9, and December 6, 2015, and May 16 and September 23, 2016. Dr. Fraser's records indicate that at all of these visits, except the two in 2014, the plaintiff reported headaches as a "major problem".
- [15] Five days before the Accident the plaintiff received treatment from Dr. Farnsworth for soreness in her neck, shoulders, arms, hands, and wrists, as well as slight headache. In cross-examination, she testified that before the Accident she had scheduled a follow-up appointment to see Dr. Farnsworth and knew that it would have helped her, but after the Accident she canceled the appointment because she did not want to do anything that ICBC could find fault with.

## B. Post-Accident Treatment

- [16] Police and ambulance services attended the scene of the Accident, and the plaintiff was transported by ambulance to Royal Inland Hospital in Kamloops, British Columbia.
- [17] The plaintiff testified that after the Accident, she had no difficulty getting into the ambulance and she was seated during the ambulance ride. By the time she arrived at the hospital in Kamloops, she said she had a hard time standing up. At the hospital, an x-ray was taken of a laceration on her right upper arm to check for glass; no glass was found. The laceration was repaired with stitches, and Ms. McLean was discharged the same day. Her stepmother drove her home from the hospital.
- [18] The plaintiff suffered a small laceration to her right arm, and had a number of small cuts and scratches on her face. She sustained soft tissue whiplash injuries to her neck and back. She also claimed to have suffered post-traumatic headaches as a result of the Accident. She asserts that she continues to experience pain and limitation as a result of her injuries.
- [19] The plaintiff did not have a family doctor at the time of the Accident. She saw Dr. Deborah Obu, a general practitioner, on October 7, 2016, to see if she could get her stitches removed, and to try to find a local doctor. Dr. Obu recorded the plaintiff's complaints of neck pain and back pain.
- [20] The plaintiff testified that she and Dr. Obu did not see eye-to-eye, and Dr. Obu did not take her on as a patient. Although, the plaintiff returned to Dr. Obu on October 11, 2016, at which time, her stitches were removed. and she was provided with a referral for massage therapy.
- [21] On October 17, 2016, the plaintiff began attending massage therapy with Theresa Draper, RMT. She attended a total of nine sessions with Ms. Draper until February 17, 2017.
- [22] On October 25, 2016, the plaintiff saw Dr. Amgad Zake, another general practitioner. She testified that her main concern at the time of that visit was her lower back and neck. Dr. Zake's objective note indicates: "Pleasant. Neck exam full range of motion, no tenderness. Back exam, full range of motion, no tenderness. Muscle power, sensations are normal".
- [23] On October 28, 2016, the plaintiff was assessed by Ms. Draper and given advice on stretching to perform at home, which she continues to do each day.
- [24] Dr. Fraser gave evidence that he saw the plaintiff infrequently prior to the Accident, to deal with different issues that came up. Regarding post-Accident treatment, he testified that on December 9 and 12, 2016, he treated the plaintiff with chiropractic adjustments to her pelvis, mid back, and neck. He treated the plaintiff again in February 2017, for her neck, lower back, and arms. In 2018, Dr. Fraser said that he tried different types of adjustments to the plaintiff's neck as a method of attempting to treat headaches. The nature and focus of his treatments have remained the same from 2018 through to 2022.

- [25] On April 21, 2017, the plaintiff was seen by Dr. Diana Silva, another general practitioner at Ashcroft Family Medical Practice with complaints of frequent headaches.
- [26] On May 2, 2017, the plaintiff was seen by Dr. Zake, who told her she should be referred for a CT scan and to a rehabilitation physician to further investigate complaints of headaches. No referral for a CT scan was actually made at the time.
- [27] The plaintiff resumed her contract work at the Sundance Guest Ranch for the 2017 season, however, said that she limited her availability to a maximum of three hours per day. Before the Accident she had offered availability of up to five hours a day at the ranch.
- [28] On July 11, 2018, the plaintiff was again seen by Dr. Zake, who provided an urgent referral for a CT scan.
- [29] On July 16, 2018, Dr. Zake diagnosed the plaintiff with iron deficiency anemia, and recommended iron supplements for six weeks to treat her fatigue.
- [30] The plaintiff underwent a CT scan of her head at Royal Inland Hospital on December 8, 2018. The CT scan revealed no intracranial abnormality.
- [31] The plaintiff attended 54 sessions of massage therapy between August 10, 2018 and September 28, 2022 with Ms. Angela Hall, an RMT. Ms. Hall described the plaintiff's muscles as extremely tight and that working on them was like working on concrete. Ms. Hall gave evidence that the purpose of her treatment was to deal with the plaintiff's headaches, and that she worked her neck, shoulders, upper back, and the base of her skull. She said that there would be some improvement by the end of each session, but by the time the plaintiff returned to her, she was back to feeling like concrete again.
- [32] Ms. Hall confirmed that while her recent treatments have also included the plaintiff's left shoulder, she continues to treat the plaintiff's neck as well.
- [33] The plaintiff also attended nine sessions of massage therapy with Theresa Draper, between October 17, 2016, and February 17, 2017. Between August 15, 2017, and September 8, 2021, the plaintiff had 23 sessions of massage therapy with Wendy Wiebe, an RMT, at Ashcroft Wellness Studio.
- [34] In July 2019, the plaintiff sought work that was less physical and easier on her body, and began working as a receptionist with the Ashcroft Dental Clinic. She worked 10-hour days, three days per week at the dental clinic, but continued to work part-time as a massage therapist while she worked at the dental clinic.
- [35] On March 26, 2020, Dr. Adetola, another general practitioner, recommended taking magnesium glycinate, vitamin D, and riboflavin to assist with headaches.
- [36] On October 22, 2020, Dr. Adetola provided referrals for neck and shoulder massage therapy, physiotherapy, acupuncture to assist with headaches, and referred the plaintiff to a headache specialist.

- [37] On November 12, 2020, Dr. Adetola recommended continued treatment of physiotherapy, massage therapy, chiropractor, and acupuncture.
- [38] The plaintiff left her job at the dental office and started working at Service BC in November 2020.
- [39] On April 12, 2021, the plaintiff attended a telephone consultation with Dr. Todd Collier, a specialist in neurology, electromyography, and cerebrovascular disease for reported chronic daily headaches and occasional migraines. Dr. Collier prescribed topiramate to be taken daily, and rizatriptan to be taken as needed, and has subsequently advised that her topiramate dose could be increased from 50mg to 75mg if needed.
- [40] Before the Accident, the plaintiff attended seven sessions of chiropractic treatment with Dr. Troy Fraser at Fraser Family Chiropractic between September 8, 2014, and May 16, 2016. Post-Accident, she attended 86 sessions between December 9, 2016, and June 7, 2022.
- [41] She attended one session of acupuncture treatment with Dr. Kent Farnsworth at Total Health Clinic on September 23, 2016, and 24 sessions of acupuncture treatment between November 10, 2017, and September 19, 2022. Dr. Farnsworth testified that since the Accident, he has treated the plaintiff for headaches, neck, and back pain.

### C. The Plaintiff's Evidence

- [42] The plaintiff testified that on the evening of the Accident, her head was pounding, her arm was hot and throbbing, and her forehead, the back of her head, and her neck, shoulders, hips and lower back were sore.
- [43] She gave evidence that in the first week after the Accident, she felt pain in her hips, tailbone, lower back, neck, and lower head, but the sorest part of her body at that time was the lower back. She said she had difficulty getting comfortable, falling and staying asleep, getting out of bed, as well as sitting down and standing up from the toilet. She also said that her mobility was limited in the first week following the Accident and that it was difficult to get out of bed or use the washroom.
- [44] In cross-examination, she confirmed that in the two months following the Accident she: accompanied her daughter on a car ride to Kamloops for her daughter's dental procedure on September 29; attended a surprise birthday party for a friend on October 1; drove her daughter to Kamloops for a follow up dental appointment on October 6; went to a family birthday party on October 10; volunteered at the Ashcroft HUB garage sale on October 16; drove with her family to Edmonton to visit family in late October; and volunteered in the production of a play for approximately two to three weeks in November, helping with light cleaning, painting the set, and organizing.
- [45] The plaintiff testified that in the months immediately following the Accident, she experienced intense daily headaches and that by the end of December 2016, her headaches were between five to eight out of ten a pain scale. In cross-examination, she initially denied

that her headaches in the months immediately following the Accident were low grade in nature, but then agreed that entries contained in her pain journal on October 10 and 31, 2016, November 15, 2016, January 1, 2017, and April 3, 2017, which describe her initial headaches as generally "low grade" in nature or "minimal", were accurate.

- [46] She declined prescription muscle relaxant medications following the Accident.
- [47] The plaintiff gave evidence that by the end of December 2016, her mid- and low-back were starting to improve and responding to the stretches she was doing. She also gave evidence that by that time her headaches were becoming a daily event. On a pain scale, she rated her headaches as a five to seven out of ten, and believed that they were caused by stress or physical exertion.
- [48] The plaintiff explained, and I find, that she was unable to access chiropractic and massage treatments in Ashcroft, and only attended two chiropractic sessions and two massages in the first five months of 2017, because she found that the drive home from Kamloops to Ashcroft aggravated her symptoms and negated much of the benefit of these treatments.
- [49] The plaintiff gave evidence that by the end of June 2017, her headaches were a daily occurrence and would escalate throughout the day, particularly if she was working. On a pain scale, she rated her headaches as a lower grade in the morning (three or four out of ten) and escalating to a five after working. At the same time, her neck was tense, and she woke with decreased range of motion, which she was able to improve to normal levels with stretching in the morning.
- [50] The plaintiff testified that by the end of June 2017, her mid- and low-back were much better, with only occasional flare-ups. However, she said that her neck symptoms and headaches were affecting her work, and she was more mindful of using her weight to apply pressure rather than her muscles, so as not to stress her muscles and neck.
- [51] The plaintiff testified that by one year after the Accident, she had not returned to her pre-Accident levels of work. She testified that on a good day she would wake with a low-grade headache, and it would stay that way and not interfere with her normal activities. On a bad day, her headache would be pounding, and while she would not cancel appointments, she would clear her non-work schedule for the rest of the day.
- [52] One year after the Accident, the plaintiff was continuing her volunteer work, but at reduced levels of time and involvement. She had returned to gardening, short walks, and gentle yoga, but not to the gym or biking.
- [53] The plaintiff gave evidence that by 2018, her hip and low back symptoms had basically resolved.

- [54] The plaintiff testified that her neck symptoms and headaches were exacerbated by the long hours and lack of an ergonomic workspace at the dental clinic, but said that her headaches were better on her days off, because she could rest and not deal with the physical stress of her work.
- [55] During the COVID lockdown, the plaintiff's home massage studio and the dental clinic were both closed. During that period, she felt that her physical symptoms were doing better than they had been for a long time, and while she was still waking with headaches, they did not escalate throughout the day.
- [56] She testified that when she started working at Service BC, she would still wake with headaches, but they would not worsen throughout the day because she was not physically exerting herself at work.
- [57] The plaintiff has gradually increased her dosage to two pills in the morning and two in the evening, and testified that by the end of July or early August 2021, she was starting to really notice the effect of the medication; her headaches were not as intense in the morning, and she did not feel the same amount of pain or fatigue as she went about her day.
- [58] The plaintiff gave evidence that she experienced side effects of nausea, tingling fingers, and light-headedness from the Topiramate; however, she found that she was able to improve these symptoms by drinking lots of water.
- [59] The plaintiff said that although her headaches are well managed with the Topiramate, she continues to feel an increase in her headaches with increased physical exertion, and still has to manage her level of physical activity. She described this as frustrating because she wants to get back to the way she was before, but now she second-guesses what she is doing all the time. She feels that she needs to increase her dosage of Topiramate. Her previous neurologist retired, so she is in the process of trying to find a family doctor who can then refer her to a new neurologist.

#### D. Lay Witnesses

- [60] Jo Petty is the plaintiff's friend and Reiki teacher. She has known the plaintiff for approximately 20 years, and described her energy level before the Accident as amazing, "like the Energizer bunny", and described the plaintiff as happy all the time, and the most positive person she knew.
- [61] Ms. Petty testified that after the Accident, the plaintiff was not as positive, and her energy level was lower than before the Accident. She observed signs of pain in the plaintiff after the Accident, including flinching, eyes watering, moving to get comfortable, and her skin turning pale.

- [62] Ms. Gibb is the plaintiff's sister-in-law, and described her energy level before the Accident as almost unbelievable; a force of nature, with a positive attitude; pleasant and energetic all the time; extremely tenacious; and would not accept no for an answer.
- [63] After the Accident, Ms. Gibb described the plaintiff as being subdued, like there was a blanket over her sunny disposition. Ms. Gibb observed from the tone of the plaintiff's voice and facial expression that she was frustrated, and there was a dampening in her excitement.
- [64] Ms. DeJong is a massage therapist and a friend of the plaintiff. She gave evidence that before the Accident, the plaintiff was a positive, outgoing, productive person who got things done. She and the plaintiff would go for hikes of approximately five to six kilometers, and would give massages to each other. After the Accident, the plaintiff and Ms. DeJong stopped giving each other massages, and no longer go on hikes together. It was Ms. DeJong's evidence that after the Accident, the plaintiff still has that same personality, but she seems more tired than before, and has a level of pessimism that is not normal for her.
- [65] Mr. McLean described the plaintiff's energy level before the Accident as very energetic, always working on something, action-oriented, and geared toward problem-solving. He said that after the Accident, the plaintiff is more reserved, less inclined to socialize, and spends more time reading and watching television than before.
- [66] With respect to domestic responsibilities, Mr. McLean testified that he is responsible for grocery shopping, cooking, and small repairs around the house. The plaintiff is responsible for most other domestic responsibilities, including cleaning and yard work. In the first month or two after the Accident, she was moving very slowly and not doing much around the house, and she required a lot of help. Currently, she still does housework, but more slowly than before the Accident, and she will defer tasks that she would normally get done immediately. She still does gardening, but not as much as before.
- [67] Mr. McLean testified that immediately after the Accident, he observed the plaintiff to be cut and bruised, and that she would walk downstairs using two feet per step rather than one foot per step. She continued to do this for well over a year after the Accident. Currently, he still observes the plaintiff self-massaging, and using a soft ball and wooden blocks to put pressure on parts of her body.
- [68] Mr. McLean gave evidence that the plaintiff still participates in volunteer activities, but said that she has cut back and is less involved than before. Nowadays, when planning family activities, the plaintiff's ability to handle things has to be taken into account, and they may have to reduce the number of, or time spent on activities.

## E. Expert Evidence

- [69] In his report of December 31, 2021, Dr. Giantomaso, a physiatrist, concluded that the plaintiff suffered the following injuries as a result of the Accident:

- a) mild traumatic brain injury with no ongoing sequelae of brain injury;
- b) post-traumatic cervical sprain / strain injury consistent with a WAD-II injury (chronic);
- c) post-traumatic thoracic sprain / strain injury grade 1-2 (chronic);
- d) post-traumatic headaches with migrainous features, now significantly improved with ongoing treatment including topiramate and rizatriptan; and
- e) post-traumatic right arm laceration, now resolved.

[70] Dr. Giantomaso testified that migrainous features include unilateral or bilateral throbbing and exertional headaches, and that repetitive movements, such as moving the shoulders forward and back, or moving the head in a sustained, repetitive way, can aggravate myofascial pain, usually after ten to 15 minutes.

[71] Dr. Giantomaso noted that according to the plaintiff's self-reports, she continued to experience ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms post-trauma, including limitations in sitting tolerance, standing tolerance, lifting, pushing and pulling tolerance. He wrote that the plaintiff noted that exertion could cause headaches and that vacuuming, lifting, and other household chores that require repetitive flexion/extension maneuvers and repetitive movements cause discomfort.

[72] Dr. Giantomaso also noted that the plaintiff reported that her sleep could be poor and non-restorative due to pain. Over time she had continued to experience significant fatigue and anxiety, but had not formally sought counselling or psychological management.

[73] In the same report, Dr. Giantomaso wrote that most soft tissue injuries resolve within six to 12 months, and concluded that, in all likelihood, the plaintiff will continue to experience chronic pain to some degree long-term. The pain might be reduced as part of a long-term pain management strategy, but that that would not necessarily be considered curative. He concluded that the plaintiff's self-reported limitations were reasonable given her post-traumatic injuries.

[74] Dr. Nowak, is a physiatrist called by the defendants. He agreed that it was common for massage therapists to have pain flare-ups from time to time in the neck, shoulders, back, and headaches.

[75] Dr. Nowak's opinion was that all of the plaintiff's injuries pre-existed the Accident due to her physically demanding work as a massage therapist and a dental issue causing tension headaches. Dr. Nowak's report states that he thinks the Accident did not play "any role in [the] development and maintenance of [the plaintiff's] ongoing symptoms".

[76] Both Dr. Giantomaso and Dr. Nowak stated that the temporal relationship between the Accident and the onset of headache symptoms is a key consideration.

### III. Discussion

#### A. Causation

[77] Since the defendants have admitted liability, the remaining issue is determining what damage was caused by their negligence.

[78] Causation is established when a plaintiff proves, on a balance of probabilities, that a defendant caused or contributed to their injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 13 [Athey]. This requires a consideration of the plaintiff's past circumstances and the probability of future events: *Athey* at para. 29.

[79] At para. 28, in *Athey*, Justice Major explained:

28 [P]ast events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty.

[Citation omitted.]

[80] With respect to future events and causation, Major J. wrote at para. 41:

41 If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:

1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
2. If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.
3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury.

[81] The plaintiff's central submission is that because her headaches followed the Accident, they must have been caused by the Accident.

- [82] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114 [Edmondson], the plaintiff testified that her headaches began shortly after the accident, despite the absence of any recorded complaints of headaches in the clinical notes made in the days immediately following the accident. Mr. Justice Smith considered the importance of reports of symptoms in her clinical records, and commented at para. 36 that:
- [36] [T]he absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
- [83] In *Madill v. Sithivong*, 2012 BCCA 62, at para. 20, Justice Chiasson cautioned about inferring causation from a temporal sequence, explaining "from a consideration of pre-accident versus post-accident condition".
- [84] In *Yeomans v. Buttar*, 2021 BCSC 343, Justice Kent discussed the significance of the plaintiff's failure to seek treatment for over a year, concluding at para. 96 that such a failure means that the injury did not occur "fails to fully recognize and apply some of the principles governing the concept of causation in tort law".

## B. Plaintiff's Injuries

- [85] The parties agree that the plaintiff's credibility is a central issue in this case, the plaintiff asserting that her evidence should be accepted.
- [86] The defendants say that the plaintiff has failed to prove that the Accident caused her self-reported chronic headaches or ongoing soft tissue complaints. They say that the plaintiff's evidence overall lacks sufficient reliability and should be viewed with caution.
- [87] The plaintiff testified that her sleep was affected by her injuries over the first year following the Accident, but in cross-examination agreed that the information contained in the patient intake form from the Ashcroft Wellness Studio, dated August 15, 2017, and signed by her, was accurate and that by then her quality of sleep, energy level, and stress level, were all 4/5, with 1/5 being poor and 5/5 being excellent. She also confirmed that she was then sleeping six to seven hours per night and exercising four times a week.
- [88] While acknowledging that the plaintiff may have suffered mild soft tissue injuries to her low back and neck as a result of the Accident, the defendants argue that her injuries had substantially resolved within three to six months. Thus, any ongoing complaints are related to her pre-existing regional myofascial pain or subsequent muscle aches and pains associated with aging and strenuous activities. The defendants say that the plaintiff's ongoing complaints are not disabling and are related to other factors, including pre-existing medical conditions, age, and normal wear and tear.
- [89] The defendants say that the plaintiff agreed in cross-examination that:

- a) Her right arm laceration has resolved, and her right arm felt better by the end of October 2016.
- b) Her lower back, hip, and tailbone pain had substantially resolved by about a year after the Accident, and these complaints never prevented her from doing anything.
- c) Her neck pain improved following the Accident and by the end of October 2016, consisted mostly of stiffness and sometimes achiness, and that by September 2021, her neck pain had improved to the point that it was not occurring that often.
- d) Consistent with what she advised Dr. Giantomaso at her appointment on December 21, 2021, her headaches immediately following the Accident were low grade, and were not disabling and improved significantly after she was prescribed Topiramate in April 2021. By late 2021, her headaches were no longer a major issue for her.

[90] When evaluating Dr. Giantomaso's evidence, I am guided by *Loveridge v. British Columbia*, 2007 BCCA 425 at para. 11:

11 As the cases make plain, the opinion of an expert is only valuable if it rests upon a proper factual foundation. An opinion grounded upon unsubstantiated or incredible evidence is like the proverbial house built on sand and a trier of fact is entitled to place no weight upon such an opinion. That is not infrequently seen in the courts in relation to medical opinions in personal injury cases where the opinion of an attending physician is largely based on self-reporting by a plaintiff. If the trier of fact concludes that the plaintiff is a fabulist not to be relied upon in his or her testimony, the opinion of the expert is properly given little or no weight.

- [91] In direct examination, the plaintiff admitted that she had received treatment for headaches before the Accident, and on cross-examination, acknowledged that her denial that she had received treatment for headaches at her examination for discovery was untrue.
- [92] The defendants argue that aspects of Dr. Giantomaso's report are problematic because he failed to adequately obtain a complete history, and in fact, relied on incorrect information which undermines critical aspects of his opinions.
- [93] Dr. Giantomaso agreed in cross-examination that he relied on the information provided by the plaintiff regarding her medical history, complaints, and level of activity before and after the Accident. He agreed that if the information he received was not complete or accurate, his opinion may not be complete or accurate.
- [94] The plaintiff did not provide any information about her past attendance at chiropractic therapy, massage therapy, or acupuncture to Dr. Giantomaso, who stated in his report: "she relates that she did not have pain prior to the accident in question, thus these findings are likely consistent with soft tissue injury that would be considered post traumatic, however mild."

- [95] Dr. Fraser testified that he treated the plaintiff for low grade intermittent headaches before the Accident. When the plaintiff came to see him after the Accident on December 9, 2016, he testified that he made a note of the Accident as well as her new complaints, which included some soreness in the lumbar spine, cervical spine, and arm, but there was no mention of new or increased headaches.
- [96] Dr. Giantomaso assumed that the plaintiff's headaches started "essentially immediately" after the Accident and were constant and severe and that the plaintiff had no "significant history of headaches, neck, upper back or low back symptoms" before the Accident. This is despite the plaintiff's medical records from Total Health Clinic, where she received acupuncture, indicating that she reported sore neck, shoulders, arms, hands, and wrists, as well as a slight headache five days before the Accident. There are also records from 2015 to 2016 from Dr. Fraser reporting the plaintiff's issues with headaches.
- [97] Dr. Giantomaso commented in his report that the plaintiff "notes that her headaches have improved recently with Topamax, but she had severe migraines after the accident in question and then frequent migraines until she finally saw a neurologist, Dr. Collier".
- [98] The plaintiff gave evidence that she had never experienced a migraine headache and did not tell Dr. Giantomaso that "she had severe migraines after the accident in question and then frequent migraines until she finally saw a neurologist" in April 2021. She testified that the words "severe migraine" and "frequent migraines" were the words of Dr. Giantomaso and not hers, but Dr. Giantomaso testified that the plaintiff told him this information and he recorded it in his report.
- [99] Dr. Giantomaso also noted in his report that:
- At the time of the accident, she was a massage therapist. She took three months off work and then tried to return to work but it took her a long time to even make it back to 3 hours of work, 3 to 4 clients a day, whereas prior she was working 5 hours a day, five to six days a week and was seeing at least five to six clients.
- [100] The plaintiff suggested that there must have been some miscommunication between her and Dr. Giantomaso regarding her level of work before the Accident. She was able to see up to five clients a day, but not over consecutive days, and in cross-examination, confirmed that she very rarely ever saw five clients in a day.
- [101] The defendants contend that based upon the history he was given by the plaintiff, Dr. Giantomaso was left with the mistaken impression that her headache complaints were much more serious and constant than they actually were, and that before the Accident, the plaintiff worked far more than she did.
- [102] Dr. Giantomaso agreed on cross-examination that if the plaintiff had ongoing headaches in the year leading up to the Accident, those headaches would likely have continued even in the absence of the Accident.

- [103] The plaintiff provided no medical evidence to support her allegation that she developed headaches in the hours or days following the Accident. There is no evidence that she was treated for complaints of headache by the paramedics or emergency room doctors on the day of the Accident or by the doctors at Ashcroft Family Practice on October 7, 11, or 25, 2016. Dr. Zake's note from October 25 even notes "no headache". I temper these absences given the finding in Edmondson at para. 34, that the absence of a symptom from a medical record cannot be the sole evidence for the non-existence of a symptom.
- [104] The defendants argue that the absence of medical evidence documenting the plaintiff's headaches immediately following the Accident is due to the fact that there was little difference between her headaches before the Accident and in the months afterward. They contend that the evidence establishes that the plaintiff was experiencing headaches before the Accident and that she did not suffer from new or worsening headaches immediately following the Accident. The plaintiff's worsening headaches did not develop until many months after the Accident, likely April 2017, and are a progression of the tension headaches diagnosed by Dr. Nowak in his June 2022 report.
- [105] It was also Dr. Giantomaso's opinion, which I find unsupported by evidence, that the plaintiff met the criteria for a Mild Traumatic Brain Injury ("MTBI"), because she had experienced some alteration of consciousness, and concussive force to the body or head. However, he made this diagnosis without obtaining any history that she suffered an alteration of consciousness at the time of the Accident. He suggested that he inferred this information from the nature of the Accident and the plaintiff's report of feeling "shock" at the time. There is also evidence from the Royal Inland Hospital records the day of the Accident that the plaintiff did not hit her head.
- [106] Dr. Giantomaso conceded that any MTBI sustained by the plaintiff was insignificant and would have recovered long ago, suggesting that his evidence that the diagnosis of MTBI did not really matter because the plaintiff had fully recovered within a short period of time.
- [107] Dr. Giantomaso also suggested in his report that follow up through a counsellor or psychologist could be helpful to the plaintiff despite the fact that he had previously noted that she "has some anxiety when being in front of windows but otherwise has managed her psychiatric issues very well post trauma". He acknowledged on cross-examination that the statement in his report that the plaintiff has "continued to experience significant fatigue and anxiety" was poorly written.
- [108] Dr. Giantomaso suggested in his report that the plaintiff might benefit from Botox treatments, but in cross-examination, agreed that she does need this medication at present.

- [109] I find that Dr. Giantomaso was careless and favored the plaintiff to an unreasonable extent in reaching the opinions that he did. I have concluded that I cannot safely rely upon many of Dr. Giantomaso opinions. Dr. Giantomaso relied on numerous inaccuracies in the plaintiff's history caused by the plaintiff's misstatements, his inadequate questioning of the plaintiff, and his inadequate review of her medical records.
- [110] On the other hand, in his medical report of March 3, 2022, Dr. Nowak confirmed that it was important to his opinion that the plaintiff used a dental appliance on an almost daily basis before the Accident. He agreed that if this was not the case, it would probably rule out dental problems as a pre-existing issue. In her direct and cross-examination, the plaintiff testified that this was inaccurate: while she had used a nightguard before the Accident, she only used it as-needed, and hardly needed to use it after she was no longer a student. After the Accident, it became a rare thing for her not to use it. I accept the plaintiff's evidence in this regard, and in the result am unable to rely on Dr. Nowak's opinion of the cause of her tension headaches.
- [111] I do, however, accept the defendants' alterative argument that if the Accident caused the plaintiff's current ongoing headaches, there was a measurable risk that her pre-existing headaches and upper body pain would have detrimentally affected her in the future, regardless of the defendant's negligence.
- [112] At the time of the Accident, the plaintiff's children were aged 17, 14, and 11. She gave evidence that she planed to increase her massage therapy practice to 15 to 20 hours per week as her children grew older and more independent. She had also made inquiries with the BC College of Massage Therapists regarding obtaining her RMT designation in British Columbia. To do so, the plaintiff had to take some additional courses before re-writing the board examinations, however, she decided to delay this process until after she finished the 2016 season at the Sundance Guest Ranch.
- [113] There is evidence from Dr. Fraser and Dr. Farnsworth that the plaintiff suffered from headaches and shoulder, neck, arm, wrist, and hand pain. Indeed, consistently between June 2015 and May 2016, the plaintiff received treatment from Dr. Fraser and noted headaches as a "major problem". Therefore, the Accident is likely not the sole cause of the plaintiff's current health issues.
- [114] I am prepared to accept Dr. Novak's evidence that massage therapy is physically demanding, which puts practitioners at risk of developing health issues including joint, low-back, and shoulder ailments. The plaintiff has also conceded that her pre-accident health issues were related to her work.

- [115] I find that the plaintiff was what is unkindly referred to in *Athey* as a crumbling skull litigant at the time of the accident, and would have experienced more frequent headaches and soreness in her neck, shoulders, arms, hands, and wrists had she followed her intention to increase her work as a massage therapist. I find that she would have been unable to sustain that increase in her work for any length of time, even if the Accident had not occurred.
- [116] I accept that the plaintiff's difficulties were accelerated and exacerbated by the Accident. However, that acceleration and exacerbation was for no more than four years, by which time she would have been forced to leave her career as a massage therapist and seek less demanding work, as she did when she suspended her massage practice and moved to Service BC in November 2020.

### C. Non-pecuniary Damages

- [117] Non-pecuniary damages compensate the plaintiff for their loss of enjoyment of life, and the pain and suffering caused by the negligence. The factors to be taken into consideration in assessing non-pecuniary damages are set out in the decision in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. The factors include the age of the plaintiff; the nature of the injury; the severity and duration of pain; disability; emotional suffering; and loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.
- [118] The plaintiff relies upon the assessments of non-pecuniary damages in *Jenkins v. Irving*, 2020 BCSC 391 [Jenkins], aff'd in 2022 BCCA 64, *Achan v. Jin*, 2020 BCSC 1430 [Achan], and *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258 [Honeybourn].
- [119] In *Jenkins*, a 42-year-old plaintiff sustained soft tissue injuries to her neck and lower back, with occasional myofascial pain in her shoulders, mid-back, and buttocks. The accident worsened her pre-existing headaches, and made her more susceptible to depressive episodes and chronic pain. Justice Crerar held that there was a measurable risk that the plaintiff might have been in a similar position had the accident never occurred, and awarded non-pecuniary damages of \$100,000.
- [120] In *Achan*, the plaintiff was 42 years old at trial. She suffered soft tissue injuries to her neck and back that resulted in significant pain and frequent headaches, which improved over time but did not resolve. At trial, she continued to have headaches twice a week. Her pain was no longer constant or severe, but was ongoing. Justice Fleming also found that the plaintiff suffered from an adjustment disorder and a driving anxiety. Her non-pecuniary damages were assessed at \$90,000.

- [121] In *Honeybourn*, the plaintiff was a 41-year-old that was in a motor vehicle accident. She sustained injuries to her neck, back, and headaches. Her headaches resolved to their pre-accident state; however, her low back pain became chronic, and at times radiated to her buttock, hip, and leg. She was off work for about three months after the accident, and her symptoms affected her work and social activities. Justice Blok awarded non-pecuniary damages of \$90,000.
- [122] The defendants rely upon the assessments of non-pecuniary damages in *Mothe v. Silva*, 2015 BCSC 140 [Mothe], *Erwin v. Buhler*, 2017 BCSC 362 [Erwin], *Gartner v. Baumeister*, 2019 BCSC 1291 [Gartner], *Carleton v. Warner*, 2020 BCSC 436 [Carleton], and *Hinder v. Yellow Cab Company Ltd*, 2015 BCSC 2069 [Hinder].
- [123] In *Mothe*, the plaintiff was a 48-year-old and suffered neck and left shoulder pain as well as cervicogenic headaches as a result of a motor vehicle accident. Justice C.J. Ross found that these injuries were chronic and that they had contributed to Mr. Mothe's fatigue and his discouraged, pessimistic outlook. The injuries did not prevent Mr. Mothe from working. His injuries had also negatively impacted his recreational activities and family life. He was awarded \$40,000 for non-pecuniary damages.
- [124] In *Erwin*, the plaintiff was a 53-year-old who suffered neck, shoulder, and low-back injuries in a rear-end accident. These were mostly resolved within one year, but the plaintiff continued to suffer from intermittent headaches and neck and back pain. The plaintiff also had pre-existing injuries at the time of the accident; it was difficult to disentangle the effects of the accident from those injuries. Justice Armstrong awarded Mr. Erwin \$40,000 in non-pecuniary damages.
- [125] In *Gartner*, the plaintiff was a university student who suffered soft tissue neck and back injuries, as well as continuing headaches, following an accident. Justice Sharma concluded that the plaintiff had not been materially prevented from engaging in any activities he enjoyed before the accident, or that he suffered any emotional suffering. The persistent, sometimes severe, headaches could interfere with his life, but only on a transient basis. He was awarded \$50,000 for non-pecuniary damages.
- [126] In *Carleton*, the plaintiff was 29 at the time of trial, and suffered mild chronic neck, back and shoulder pain, and headaches. She had some sleep disturbance, and her pain was expected to continue indefinitely. Her ability to engage in recreational activities and work was somewhat limited after the accident. Justice Verhoeven awarded her \$60,000 for non-pecuniary damages.

- [127] In *Hinder*, a 34-year-old plaintiff was injured in a motor vehicle accident. As a result of the accident, she suffered soft tissue injuries to her neck, upper back, lower back, and right leg as well as headaches. Her soft tissue injuries resolved within a year; however, she continued to suffer neck pain and, at times, debilitating headaches. The plaintiff's pain affected her ability to work and her ability to engage in physical sports that she enjoyed prior to the accident. Justice Steeves awarded her \$60,000 in non-pecuniary damages.
- [128] The plaintiff says that as a result of the Accident, she sustained a laceration to her right arm, headaches, and injuries to her neck, lower back, and hips. The laceration healed normally, and her lower back and hip symptoms have resolved, however, her headaches and neck pain have become chronic. The headaches are well-managed with daily medication use; however, she must be careful not to overexert herself otherwise the headaches will become worse.
- [129] While the plaintiff continues to participate in many of her pre-Accident recreational activities and volunteer work, she says that she does so at a reduced level. She also says that she lost her career of 20 years, which she loved and was passionate about. The lay witnesses called by the plaintiff also gave evidence that post-accident the plaintiff had a far less energetic and positive disposition. They also testified that the plaintiff does not engage in all the recreational activities she enjoyed pre-Accident.
- [130] The plaintiff argues that an appropriate range for an award for her non-pecuniary damages is \$90,000 to \$110,000.
- [131] The defendants argue that following the Accident, the plaintiff was able to quickly return to activities outside work, including volunteer work, housekeeping, and socializing with friends and family. Despite any ongoing complaints that she may have had, the defendants argue that the plaintiff has been able to maintain a reasonably high level of participation in these avocational and recreational realms.
- [132] The defendants contend that assuming the plaintiff is able to establish causation for her post-traumatic headaches, the appropriate range of damages awarded in comparable cases is between \$40,000 to \$60,000, but that if the plaintiff is not able to establish causation for her headaches, the damage award would be less.
- [133] I find that for the four years following the Accident, the plaintiff was more limited in her massage work, her volunteer work, her household activities, and her social life than she would have been but for the Accident. This was due to her ongoing neck pain and headaches. She has also experienced emotional suffering. However, these losses are moderated by my finding that the plaintiff's neck pain and headaches would have worsened regardless of the Accident. Considering the authorities above, I award the plaintiff non-pecuniary damages of \$60,000.

## D. Loss of income to Trial

[134] The defendants say that if the plaintiff has suffered a past loss of income from her work as a massage therapist, it would only be a nominal loss and limited to the first two or three months after the Accident.

[135] I find that following the Accident, the plaintiff went off work for roughly two to three months and then slowly returned to her massage therapy practice. She is entitled to compensation for lost income from the time of the Accident to the time of the trial.

### 1. Lost Income in 2016

[136] According to her tax returns, the plaintiff's net annual business income ranged from a low of \$6,571 in 2014 to a high of \$18,109 in 2016. The plaintiff's gross income in 2015 and 2016 was roughly \$24,000 each year, resulting in a net annual income of about \$18,000.

[137] Her average gross earnings in the last quarter of 2014 were \$4,125 (Clinic) + \$1,265 (Sundance) for a total of \$5,390, and in the last quarter of 2015 were \$3,126 (Clinic) + \$1,265 (Sundance) for a total of \$4,385. Thus, the average of her gross earnings for the last quarter of those years was \$4,887.50.

[138] The plaintiff did not return to work as a massage therapist until December 1, 2016. She had a total of six client appointments in December 2016. The plaintiff earned \$170 when she returned to work in December 2016. Therefore, I find that her gross wage loss for 2016 is \$4,717.50 based on her average income in the last quarters of 2014 and 2015.

### 2. Lost Income in 2017 & 2018

[139] The defendants deny that the plaintiff suffered any further loss of income after the end of 2016. They contend that the plaintiff has generally remained very active since the Accident, and argue that it is not clear that her time off work in 2016 was medically necessary. They say that after returning to work as a massage therapist, the plaintiff was able to maintain a similar work schedule as compared to her pre-Accident schedule.

[140] In 2017, the plaintiff continued to work at Sundance, but reported that she had to reduce her availability from five to only three hours a day due to her injuries.

[141] The plaintiff's reported net income was \$14,074 in 2017 and \$15,381 in 2018. Therefore, for 2017 and 2018, the plaintiff earned about \$3,270 less than her pre-Accident average before tax net annual income. The deficit in 2017 can arguably be explained by the forest fires affecting the region around the Sundance Guest Ranch, as described by Ms. Nichols, the General Manager of the Ranch.

[142] In 2017, the plaintiff earned \$19,790 in gross business income, and in 2018 earned \$20,875 in gross business income. She contends, and I find, that absent the Accident she would have earned \$24,000 in each of those years. I award her \$4,210 for 2017 and \$3,125 for 2018 for her gross business income lost in those years. This is consistent with her pre-Accident income.

3. Lost Income in 2019 & 2020

[143] The plaintiff made the decision to not return to her work as a massage therapist when the COVID lockdown ended. She testified that, although she loved the work, she could not figure out a way to do it that was not making her physically feel worse. When the pandemic hit, she felt the relief of not having as much pain, and she knew it was the right decision to stop, as much as it broke her heart.

[144] The plaintiff's income increased in 2019 and 2020 as a result of her obtaining alternative employment and the Canada Emergency Response Benefit ("CERB"), so she made no claim for wage loss for those years. Her concession, however, is inconsistent with the treatment of CERB payments directed by the Court of Appeal in *Yates v. Langley Motor Sport Center Ltd.*, 2022 BCCA 398 [Yates]. The Court in *Yates* found that CERB payments should not be deducted from a wrongful dismissal damages award. The Court was not convinced that if CERB was not deducted, the victim would be overcompensated. In the result, I will not deduct CERB payments received by the plaintiff from her lost income award.

[145] Regardless, I find that since the plaintiff started working as an administrative assistant, her total before tax income increased modestly to \$25,086 in 2019 and \$32,032 in 2020. She has missed no time from work in these years as a result of her health. However, she is now working longer hours than she ever did as a massage therapist to maintain approximately the same income level.

[146] In *Ibbitson v. Cooper*, 2010 BCSC 1916, aff'd 2012 BCCA 249, the plaintiff had to work longer hours to make the same money as he did prior to the accident. Justice Myers found that this was a compensable loss. See also *Mathews v. Noble*, 2020 BCSC 1499 at para. 63.

[147] The plaintiff gave evidence that before the Accident, she intended to increase her hours as a massage therapist to 15 to 20 hours per week, as her children grew older and more independent.

[148] In order to earn her 2019 and 2020 income, the plaintiff had to work far more hours each week than she would have had to work as a massage therapist to earn approximately the same income. In the result, I find that she is entitled to compensation for the loss of her chosen work and the extra hours she had to work in 2019 and 2020. The increase in hours worked at Service BC was from her anticipated 15 to 20 hour work week to a 35 hour work week. Taking this into account, I award the plaintiff \$21,500 for 2019 and \$16,125 for the first 9 months of 2020, for the additional work she had to undertake to sustain her income at the level it would have been but for the Accident. This compensates her for her

additional hours worked at a rate of \$25.

[149] The plaintiff's past income loss claim is therefore \$49,677.50, which I will round up to \$50,000.

## E. Loss of Future Income Earning Capacity

[150] In the recent decision of *Dornan v. Silva*, 2021 BCCA 228 at para. 156, the Court cited *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the Court described a claim for loss of future earning capacity in these terms:

[32] An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8.

[151] The defendants say that the plaintiff's claim for loss of earning capacity is speculative at best, and there is not a real or substantial possibility that she will suffer a future loss of income as a result of the Accident. In the alternative, they argue that if the plaintiff has suffered a loss of earning capacity, that the proper award should be the equivalent of one year of her average pre-Accident income.

[152] In three recent decisions authored by Justice Grauer, unanimous divisions of the Court of Appeal revisited the approach that a trial judge should take in assessing damages for loss of future income earning capacity. The decisions are indexed as *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*], *Rab v. Prescott*, 2021 BCCA 345 [*Rab*], and *Lo v. Vos*, 2021 BCCA 421.

[153] In *Dornan*, at para. 156, Justice Grauer cited *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the Court described a claim for loss of future earning capacity in these terms:

[32] An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8

[154] In *Rab* at paras. 29-30, Grauer J.A., described the different types of future loss claims that might arise and the different considerations that these attract:

[29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be

necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. Dornan was such a case.

[30] But in other cases, assessing the possibility of a future income loss is less straightforward. Among these are cases involving plaintiffs whose injuries have led to continuing deficits, or have exposed them to future problems, yet whose income at the time of the trial is at or near the level of earnings they enjoyed before the accident. These tend to be cases that lend themselves to the capital asset approach to quantifying the loss. [ ]

[155] Grauer J.A. set out a three-step process for assessing future loss claims in Rab at para. 47:

1. determine whether the evidence discloses a potential future event that could lead to a loss of capacity;
2. determine whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
3. if a real and substantial possibility exists, assess the value of that possible future loss, which includes assessing the relative likelihood of the possibility occurring.

[156] In this case, I have already found that due to her deteriorating health, but for the Accident, the plaintiff would have been unable to sustain her work as a massage therapist after October 2020. In these circumstances, there is no potential event caused by the Accident that could lead to a loss of capacity, and thus, no basis for any award for loss of future income earning capacity, so I will make no award for her loss of future income earning capacity.

## F. Special Damages

[157] The defendants submit that most of the plaintiff's claim for special damages relate to treatment that was either not medically necessary or not related to her injuries from the Accident.

[158] The defendants concede that the plaintiff attended therapy on the dates claimed, and was charged and paid the therapists the amounts indicated, but argue that the plaintiff's special damages by February 27, 2017 should not be compensated. By that date, the plaintiff had attended nine sessions of therapy at Welcome Back MRI and Pain Management Centre and four chiropractic treatments with Dr. Fraser, so her attendances thereafter are not related to the Accident.

[159] The majority of the plaintiff's therapy treatments occurred between 2018 and 2022; roughly half of which was during the period of time in which I have accepted she suffered from the trauma of the Accident.

- [160] Although the defendants contend that the evidence of Dr. Fraser and Dr. Farnsworth shows that much of the plaintiff's treatment since 2018 has included areas that were either not injured in the Accident or had recovered, I accept that the plaintiff continued to need physical therapy at least in part due to the Accident over this period of time.
- [161] The plaintiff gave evidence that, but for the Accident, she only traveled to Kamloops about once a month. After the Accident, the plaintiff claims she had to travel to Kamloops 47 more times than she otherwise would have to receive treatment and run errands. She testified that the round trip from Ashcroft to Kamloops is approximately 200 km. I accept that she is entitled to one half of her travel mileage at \$0.50/km amounting to \$2,350.
- [162] The remaining claim for special damages for treatments between October 2016 and October 2020 is \$564.51. Thus, I award the plaintiff a total of \$2,914.51.

### G. Future Cost of Care

- [163] In *Sendher v. Wong*, 2014 BCSC 140 at paras. 192-195, Justice Verhoeven summarized the principles with respect to determining an appropriate award for future care:
- [192] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 29 B.C.L.R. (2d) 33 (S.C.).
- [193] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for costs of future care; and (2) the claims must be reasonable: *Milina*, at para. 84.
- [194] Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315, at para. 74.
- [195] Each case falls to be determined on its particular facts: *Gilbert*, at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem) v. Brisco*, 2002 SCC 9, at para. 21.
- [164] As with the plaintiff's claim for loss of future income earning capacity, given my conclusion that her condition would have reached the point that it is now by October of 2020, there is no basis upon which she is entitled damages for cost of future care. I dismiss this aspect of her claim.

## H. Loss of Housekeeping Capacity

- [165] In *Kim v. Lin*, 2018 BCCA 77 at para. 33 [Kim], the Chief Justice Bauman set out the following guidance on loss of housekeeping capacity:
- [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.
- [166] It is settled law that lost housekeeping capacity is recoverable, even if the plaintiff did not incur expenses because a family member gratuitously replaced the services. When this is the case, then a pecuniary award may be appropriate either valued by a replacement cost or opportunity cost: *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67-68. However, courts must cautiously scrutinize the claim to ensure the gratuitous services were necessary given the injuries and were not part of the usual give and take between family members: *Dykeman v. Porohowski*, 2010 BCCA 36 at paras. 28-29.
- [167] I prefer to treat the plaintiff's claim separately from the claim for non-pecuniary damages, and make a separate award for the loss of housekeeping capacity for the period during which the plaintiff struggled due to her injuries from the Accident.
- [168] Mr. McLean's evidence is that in the month after the accident the plaintiff required his assistance with household tasks; she was not doing much around the house. Prior to the Accident, the plaintiff was responsible for most of the childcare, yard work, and cleaning tasks. Currently, the plaintiff can do household tasks, including gardening, with some difficulty, but still defers some tasks to Mr. McLean.
- [169] In *Torrance v. Davies*, 2022 BCSC 1630, the plaintiff was injured and a family member took on the majority of the housekeeping with some improvement with time. Justice Kirchner applied an arithmetic analysis of the loss of housekeeping award, using a rate of \$20 per hour, 52 hours per year for a 39-year-old plaintiff and awarded \$25,000 for this head of damages.
- [170] The plaintiff contends that she is entitled to a similar award for loss of housekeeping capacity.

[171] Although her period of incapacity was one of only four years, and would likely have increased over that time even had the Accident not occurred, I am prepared to award the plaintiff \$20 per hour, 52 hours per year for four years, which amounts to a total of \$4,160, which I round up to \$4,500.

#### IV. Conclusion

[172] I assess the plaintiff's damages as follows:

Non-pecuniary damages

\$60,000

Income loss to date of trial

\$50,000

Special Damages

\$2,914.51

Loss of Housekeeping Capacity

\$4,500

Total

\$117,414.51

"The Honourable Chief Justice Hinkson"

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