

CANADA / JUDGMENT

Meckic v. Chan

2022 BCSC 182

COURT

Supreme Court of British Columbia

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2022 BCSC 182 Meckic v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Meckic v. Chan,

2022 BCSC 182

Date: 20220208

Docket: M1912160

Registry: Vancouver

Between:

Vesna Meckic

Plaintiff

And

Christy Chan

Defendant

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

October 25-29, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 8, 2022

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I. Introduction

- [1] The plaintiff claims damages for personal injury and financial loss caused by a motor vehicle accident in Burnaby, BC on August 18, 2018.
- [2] Liability for the accident is now admitted by the defendant, however the nature and extent of the plaintiff's injuries and resulting financial loss is in dispute. In their final submissions, the parties' respective assessments differed by many hundreds of thousands of dollars.
- [3] This is an unusual case. No witnesses were called on behalf of the defendant and no medical evidence was adduced to directly contest the plaintiff's injuries even though independent medical examinations were commissioned by ICBC. This was plainly a "beat your settlement offer" trial and one that could have and probably should have been avoided.

II. The Pleadings and the Trial

- [4] The action was filed on November 27, 2019, some 15 months after the accident occurred. The plaintiff's Notice of Civil Claim pleads the identity of the parties, the location and manner in which the accident occurred, the use of a seatbelt, and particulars of the injuries sustained (including post-traumatic stress disorder ("PTSD"), post-concussion syndrome, cognitive impairment, anxiety, and chronic pain).
- [5] The Response to Civil Claim filed on behalf of the defendant is for the most part boilerplate pleading which nonetheless fails to comply with the mandatory requirements of the Supreme Court Civil Rules (the "Rules"). It denies that an accident occurred, denies that the plaintiff was injured, denies negligence on the part of the defendant, alleges that the plaintiff's injuries and losses (if any) were attributable to previous and/or subsequent accidents and pleads a failure to mitigate.

- [6] Suffice it to say that a denial of "each and every allegation of fact contained in the Notice of Civil Claim" other than those facts specifically admitted (the only admitted fact being the defendant's identity) does not comply with the mandatory requirement of the Rules that the defendant set out her own "version of facts". The author of the pleading should review the recent Court of Appeal decision in *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362. If this is a standard form pleading mandated by ICBC for use by its defence counsel, ICBC should do likewise.
- [7] The Trial Record given to the trial judge on the eve of the trial generally includes a copy of the Trial Brief filed by each party for the purposes of the Pre-Trial Conference. The Trial Brief filed by ICBC on behalf of the defendant,

denies liability; says the plaintiff sustained only soft tissue injuries; indicates that three lay witnesses would be called as part of their case without identifying who those witnesses might be or what they might be testifying about; and, states that the defendant will admit no facts for the purposes of trial.

- [8] At the opening of the trial, the Court was informed that liability for the accident was admitted on behalf of the defendant the preceding week, although no application was made by the defendant to formally amend the Response to Civil Claim in that regard. The Court also learned that ICBC had commissioned independent medical examinations of the plaintiff to be performed by a psychiatrist and a physiatrist, however, following consultation with counsel after those examinations, no formal expert report was prepared and neither of the physicians were called to testify at trial. The unidentified lay witnesses referred to in the defendant's trial brief also failed to materialize.
- [9] This case was subject to the limitation on expert evidence imposed in 2020 by an amendment to the Evidence Act, R.S.B.C. 1996, c. 124 [Evidence Act]. Section 12.1 of that Act now limits expert evidence on the issue of "vehicle injury damages" (a defined term) to 1) no more than three experts and 2) only one report from each expert. As well, the Disbursements and Expert Evidence Regulation, B.C. Reg. 210/2020 limits disbursement recovery regarding the three permitted experts to six percent of the total award of damages assessed by the court at trial.
- [10] The thinly veiled purpose of this legislation is to improve the finances of ICBC by reducing the quantity of expert evidence in motor vehicle accident liability claims and to thus both reduce litigation costs and produce lower damage awards whether by way of settlement or at trial.
- [11] This case is one where the accident has caused severe and disabling psychiatric injury such that the formerly hard-working and socially competent plaintiff is suffering from unrelenting distress, requires multidisciplinary medical care, and will no longer be capable of full-time employment. The legislation limiting expert evidence in this case resulted in:

two expert medical reports from a consulting psychiatrist and physiatrist respectively but no supporting reports from the plaintiff's treating professionals such as her family doctor and psychological counsellor and others who have been treating her in the past three years; evidence being tendered from an occupational therapist as "factual evidence" as opposed to "opinion evidence"; and, clinical and hospital records from various sources being shovelled wholesale into evidence in conjunction with a "documents agreement" which permitted their use to establish the truth of their contents (including the accuracy of diagnoses made and the treatments provided).

[12] While all of this may serve the best financial interests of the government and its Crown corporation auto insurance monopoly, it makes more challenging the already difficult task of the Court in determining the nature and extent of the plaintiff's injuries and the appropriate medical treatment that might be required in the future.

III. The Accident

[13] On August 18, 2018, at approximately 2:00 p.m., the plaintiff, Mrs. Meckic, was driving her husband's 2013 Audi Q7 four-door SUV on Royal Oak Avenue, Burnaby. Her 31-year-old daughter, Dijana, was in the backseat along with her two children (the plaintiff's grandchildren), three-year-old Luka and two-year-old Nemanja, both of whom were secured in child car seats. The plaintiff was wearing her seatbelt. A large number of flowers for a family celebration occupied the front passenger seat of the Audi.

[14] The collision occurred at the intersection of Royal Oak Avenue and Clinton Street where the 24-year-old defendant was driving her 2018 Honda CRV. The defendant either failed to see the Audi which had the right-of-way on Royal Oak Avenue or mistakenly thought she had enough time to safely enter the intersection.

[15] Mrs. Meckic swerved in an effort to avoid the collision but the right front passenger side of her vehicle nevertheless came into contact with the left front end of Ms. Chan's Honda CRV. The impact was substantial. Photographs taken by the police at the scene and by mechanics at the repair shop depict the damage to the front passenger side of the Audi and major damage to the Honda CRV, the front end of which was almost completely torn off. The cost of repairing the Audi was approximately \$25,000. The cost of repairing the Honda CRV was not put into evidence.

[16] The police and other emergency personnel attended the scene. The defendant, Ms. Chan, was issued a ticket for failing to yield the right-of-way to Mrs. Meckic's vehicle. She did not contest the charge. Ms. Chan was completely at fault for this accident and it is difficult to understand why liability was not admitted until the eve of trial.

IV. The Plaintiff's Background and Testimony

[17] The plaintiff's background is largely uncontroversial.

- [18] Mrs. Meckic was born in Bosnia on May 6, 1968 and is currently 53 years of age. She graduated from high school and took a further two years of architectural studies. She married her husband, Mitch, when she was 18 years old and their daughter, Dijana, was born one year later.
- [19] Following the civil war in former Yugoslavia, the couple along with their daughter, immigrated to Vancouver Canada as refugees in 1995.
- [20] In 1999, Mrs. Meckic started working as a housekeeper, cleaning rooms at the Hilton Hotel in Metrotown, Burnaby. She was promoted to a supervisory position at the hotel setting the schedule for other employees and assigning cleaning tasks in accordance with union rules. She also cleaned rooms when necessary. She says she loved her job and she appears to have been held in high regard by her employer. She was still working with the Hilton at the time of the accident giving rise to this litigation.
- [21] Mrs. Meckic's husband has been working full time for 24 years with Delta Building Products where he is the Lead Hand in the roofing production department. In 2006, he and Mrs. Meckic also started a family business working on evenings and weekends cleaning commercial and residential buildings. Mrs. Meckic assisted with cleaning tasks and also looked after the books for that small business. The income from the business was reported on her husband's income tax return.
- [22] Mr. and Mrs. Meckic were a hard-working couple with a happy and active social life. In 2007, they purchased a house on Willingdon Avenue in Burnaby. They are also the owners of a small apartment from which they derive rental income.
- [23] Theirs was a "traditional" marriage with Mrs. Meckic doing the cooking, cleaning, gardening and other housekeeping tasks. Her recreational activities included regular weekly attendance at the gym, walking and bicycling with friends, and fishing from time to time. Though she did not tell her family, prior to the accident, she suffered from migraines and received Botox treatments to manage her symptoms.
- [24] Mrs. Meckic was both a compelling and a poor witness on her own behalf, through no fault of her own. She was emotional and in obvious distress. There is no doubt, and the defendant does not contest, that the accident has caused severe psychological and psychiatric disorders which affect her cognition. Her memory of events, including the details of her various medical treatments to date, is poor.
- [25] Her evidence was frequently rambling in nature. An extract will suffice to illustrate:
- Q: Okay. Have you had any problems with your memory over the past month or so?

A: How can I say that? How do I know? I heard everybody's asking me questions and everybody's into the questions. Constantly they're asking me questions. So I don't know how to answer on that memory problem and I -- I know I am normal person and I am not crazy person, but I definitely have problem with my scaredness, emotional and guiltiness, but I don't -- I am normal person. I am not crazy. But why everybody just asking me constantly all the time questions, even -- I'm sorry. I'm so sorry about it.

I have a hurt in my chest and I don't know how to explain that because it's very hard for me to describe how it is. I don't want to go back to the hole that I was, I don't know where I was. But, yes, I had a problem that I didn't know -- I didn't know what was going on. But I think I'm better now and I don't want to -- I don't want to repeat the things that has been happening to me and [indiscernible]. I hope, My Lord, you understanding what I mean. It's so hard for me to all the time keep answering and answering and answering. If I go deep into the problem, then I am not okay. I cannot handle that because I am so hurt about what happened.

Sorry. I am so sorry. I am so worried about the moment that was happened and I cannot go back to fix it. I really [Indiscernible] just fix that. That makes me really hurt and upset and it's the moment that -- moment that my daughter and [indiscernible] in the car. But I am coping and I am willing to do anything. I like to do things and going into those details, what I'm doing and how I'm doing, how do I know the moments what -- how minutes, how often, how -- I don't know. I don't -- I don't write things down. I'm sorry.

[26] Neither the presentation nor content of Mrs. Meckic's evidence was fabricated. I have no doubts at all about her honesty or truthfulness. Nevertheless, standing alone, some of her evidence must be considered unreliable in terms of accuracy and I have approached it with caution.

V. Collateral Lay Witnesses

[27] Collateral witnesses who corroborated the impact of the plaintiff's injuries upon her daily life included her husband, Mitch, her daughter, Dijana, and her longtime friend and co-worker at the Hilton Hotel, Ms. Luu, who also lives in the downstairs apartment in the plaintiff's home. Another co-worker, Mr. Gbedze, also testified.

A. Mr. "Mitch" Meckic

[28] Mr. Meckic is 59 years old, born May 30, 1962. He is 6 years older than Mrs. Meckic. Their relationship was unusual in Yugoslavia, as he is Muslim and she is Christian. During the civil war, he was arrested by Serbian soldiers and put in a concentration camp for a year, hence the decision to escape Yugoslavia with the help of relatives and come to Canada as refugees in 1995.

[29] Mr. Meckic was an honest, frank and extremely credible witness. I accept his testimony without reservation.

- [30] Mr. Meckic's working hours at Delta Building Products are 6:00 a.m. to 2:30 p.m. He usually leaves the house to go to work at 5:15 a.m. He started the cleaning business in 2006 because there was an opportunity to do the work at the Delta Building Products facility and this led to further work at neighbouring businesses.
- [31] According to Mr. Meckic, his wife would assist with the cleaning and the two of them would go to work together. He has always wanted to expand the business but since the motor vehicle accident, his wife has not been able to assist.
- [32] In the past several years, the gross annual income of the cleaning business has been in the range of \$70-\$75,000 and net income has ranged from \$5,000 - \$32,000 depending on the number of workers he employs. More recently, he has been working longer hours himself and using fewer employees, hence the increase in net income.
- [33] According to Mr. Meckic, both he and his wife "worked very hard" and "never took money from the government". He confirmed that his wife did all of the cooking, cleaning and housekeeping, saying that he himself does not have time to do it and does not know how to cook in any event.
- [34] Mr. Meckic says he was not aware of any health complaints that his wife had before the accident. She did not tell him of any migraine headaches or that she was receiving Botox injections to control those headaches. He described their relationship as "very happy".
- [35] Mr. Meckic was called to the scene of the accident by telephone. He is not sure whether it was his wife or daughter who called him. When he got there, his wife was sitting on the curb in shock, crying and panicked. He took everyone home in his truck but later that evening he "forced" his wife to go to the hospital because she was having headaches, panicking and "not feeling good".
- [36] Mr. Meckic described life with his wife since the accident. He is extremely worried by the decline in her mental health. Whereas before the accident she was very energetic and social, she is now very emotional and crying all the time. She has become extremely religious and prays frequently in a room she has filled with religious icons and pictures. She forgets things and no longer engages in conversation. She needs assistance with personal tasks, cooking and cleaning. He says "she needs help" which, fortunately for the family, has been provided in large measure by Ms. Luu. Ms. Luu, however, is now close to 70 years of age and has her own serious health problems. When asked what would happen if Ms. Luu was not there to help take care of the plaintiff, Mr. Meckic said it was "hard to answer".
- [37] In describing the past six months with Mrs. Meckic, Mr. Meckic says "some days are okay and others are not". He "does not spend that much time with her". They now sleep in different rooms because she has "all that church stuff". They have no intimate life anymore. He says "I try my best, but I leave her alone", although he says he still loves her and he is not going to "quit".

B. Dijana Stoyjanovic (nee Meckic)

- [38] Ms. Stoyjanovic was born on November 12, 1987. At the time of the accident, she was living with her parents in their home. She had separated from her husband and moved in with her two children in April 2017. She moved out in January 2019, six months after the accident, and she and her husband have since reunited.
- [39] Ms. Stoyjanovic described how she and her two children were in the rear seats of her mother's vehicle travelling up a steep hill when a car came from the right, ran a stop sign, and hit the right side of her mother's vehicle. She does not remember the next 15 minutes very well although she does have a recollection of taking the children out of the car and also falling to her knees. She remembers her mother being hysterical and hyperventilating.
- [40] Ms. Stoyjanovic says she also suffered some injuries to her neck and back in the accident. One of her sons hurt his back and the other threw up at the time and has had nightmares since. The whole family went to the hospital later that day and she remembers that her mother "was not doing well".
- [41] Before the accident, Ms. Stoyjanovic says that her mother did all the household work. The house was very clean and she baked for the kids every day. Following the accident, however, Ms. Luu did everything in the house.
- [42] Ms. Stoyjanovic's decision to move out of her parents' house was triggered by her mother's behaviour. She would cry hysterically and hover around the children, scaring them. She had frequent panic attacks. She became extremely religious, praying all the time in her room which she filled with religious icons and pictures.
- [43] Ms. Stoyjanovic says she cannot talk to her mother "without feeling her depression". Her mother would not even leave her room most days.
- [44] Before the accident, Ms. Stoyjanovic never had a worry leaving her children with her mother. After the accident, Mrs. Meckic's behaviour became so focused on the children and so obsessively concerned about them, it reached the point that it was "not okay for the kids to be around her".
- [45] Ms. Stoyjanovic believes her mother is a little better these days but even so, her mother is still emotionally unstable. For example, she "looks at the kids and cries". Ms. Stoyjanovic remains sufficiently concerned about her mother's conduct that she makes sure someone else is there when the kids are visiting.
- [46] When asked if she would be available to assist her mother's care regime in the future, she says she simply has no time and could not manage that task. She now has a third child, her husband works as a long-haul truck driver, and she is a very busy, full-time stay-at-home mom.

- [47] Ms. Stoyjanovic confirmed that her mother went to the gym and went hiking regularly before the accident. She described her as happy and healthy. She was not aware of her mother experiencing any headaches or receiving any Botox treatment for those headaches but she was certain that if she had any serious conditions, her mother "would definitely have told [her]" (which she did not).

C. Ms. Trinh Phuc Luu

- [48] Ms. Luu is 69 years old and has been retired from working as a room attendant at the Hilton Hotel since February 2017. English is not her first language, and she testified with the assistance of a Cantonese interpreter.
- [49] Ms. Luu first met the plaintiff in 1999 when they were working together at the Hilton Hotel. She described Mrs. Meckic as a "very nice lady" and they became friends. Ms. Luu testified that when Mrs. Meckic became a supervisor, she was responsible for organizing the schedule of some 40 to 50 workers.
- [50] Ms. Luu had been living with her brother and sister-in-law and their growing family. When Mrs. Meckic bought her home in 2007, she invited Ms. Luu to occupy the basement suite. She moved because her brother and sister-in-law needed the space in their own home. She has never been charged rent for living in Mrs. Meckic's house.
- [51] Ms. Luu remembers the day of the accident. Mr. Meckic called her to go upstairs and help his wife and she was "of course" willing to do so. She found Mrs. Meckic upset and crying, showing signs of physical distress. She helped clean her up and calm her down.
- [52] Ms. Luu says she has been helping with various tasks at the home since that time. In the morning, she goes upstairs to check on Mrs. Meckic and make breakfast and coffee. She does the same thing at lunch. At dinner time when Mr. Meckic comes home, Ms. Luu says "I return her to her husband".
- [53] Ms. Luu would also do food preparation for dinner, laundry, and cleaning, including vacuuming and mopping. She would help Mrs. Meckic shower and wash her hair because otherwise, she would just cry in her room.
- [54] Before the accident, Mrs. Meckic would do all of these tasks herself, without assistance from Ms. Luu. Ms. Luu says she eventually became very tired from doing all the work in the house but fortunately, she had a break for six months when Mrs. Meckic's brother and his wife came over to visit and stayed for an extended period. During that time, Ms. Luu just helped Mrs. Meckic with the shower and her personal care.
- [55] Ms. Luu says that Mrs. Meckic does try to help with cooking and cleaning, and Ms. Luu permits it so that Mrs. Meckic gets out of her room. However, she says Mrs. Meckic is not very effective and just leaves more of a mess and more work for Ms. Luu to do.

- [56] Ms. Luu says Mrs. Meckic was a "dancing, singing, happy woman" before the accident, who liked to go walking and hiking. Now she basically just stays inside her room reading the Bible and praying. There have been "big changes", and it is "not like before".
- [57] In April 2020, Ms. Luu underwent surgery for breast cancer. Since that time she has not been able to do many labour intensive jobs around the house, such as major cleaning or gardening.

D. Mr. Honore Gbedze

- [58] Mr. Gbedze was a chef at the Hilton Hotel in Burnaby from May 2001 to March 2020. He was a co-worker of the plaintiff and has known her for over 20 years. While they worked in different departments at the hotel, their offices were on the same level in the building and they often spent time together at pre-shift meetings and employer-sponsored social events such as staff parties. Mr. Gbedze described the plaintiff as a "wonderful" person who was a "good friend". He believed everyone in the workplace liked, respected, and valued Mrs. Meckic.
- [59] Mr. Gbedze first saw the plaintiff following the accident in May 2021 after he was called by her husband for some help. He was very surprised by her appearance. She looked very different and didn't give him a hug. He agreed to provide Mr. Meckic with pre-prepared meals and has been doing so since that time. Various invoices in that regard were put into evidence. He does not visit with the Meckics but just drops the food off when he attends at their house.

VI. Medical Witnesses and Documentation

A. Dr. Jacqueline Purtzki (Physiatrist)

- [60] Dr. Purtzki obtained her medical degree from UBC in 1991. She practised family medicine for the first few years but following four years of residency in physical medicine and rehabilitation, she became certified as a physiatrist by the Royal College of Physicians of Canada in 2004. Her practice focuses on patients with a variety of neuromusculoskeletal and neurological disabilities, and she has been accepted on previous occasions by this Court as an expert witness qualified to provide opinion evidence in relation to her specialty as a physiatrist.
- [61] Dr. Purtzki was retained by plaintiff's counsel to provide an independent medical evaluation of Mrs. Meckic. In that regard, she reviewed all available medical and clinical records provided by counsel, secured collateral information from the plaintiff's husband, and performed a detailed medical and neurological examination of the plaintiff on May 12, 2021, before preparing a detailed, 30-page medical report dated June 2, 2021, expressing her diagnoses and opinions about Mrs. Meckic's medical conditions and functional impairments arising from the motor vehicle accident.

- [62] Dr. Purtzki also testified at trial and was cross-examined by counsel for the defendant.
- [63] I was very impressed by the thoroughness of Dr. Purtzki's investigation and by her testimony at trial. She has a great deal of experience with patients dealing with chronic pain and her testimony respecting the plaintiff's disabilities was considered compelling. I accept her evidence without hesitation.
- [64] Dr. Purtzki agrees with Dr. Kroeker's psychiatric diagnosis that the plaintiff suffers from anxiety, depression, and post-traumatic stress disorder. While the accident has also caused the plaintiff chronic myofascial pain in the neck, shoulder girdle, and lower back, both doctors opine that these physical symptoms are now associated with a severe and chronic somatoform disorder. Similarly, while Dr. Purtzki believes that Mrs. Meckic probably sustained a concussion as a result of the accident, any actual physiological injury in that regard is not the main source of the plaintiff's disability, but instead it is the psychiatric component or somatization, that is causing the chronicity of her pain and the resulting negative impact on her health.
- [65] Dr. Purtzki is of the opinion that Mrs. Meckic's severe somatoform disorder is an unconscious process, and that her suffering is both very intense and very real. She clearly states that "none of this is fabrication or malingering" and that the propagation of the plaintiff's physical symptoms is an "expression of her emotional pain and the shock and fear of possibly having hurt her grandchildren during the accident". According to Dr. Purtzki, what is particularly striking about Mrs. Meckic is that she was and is "almost immobilized by her emotional distress".
- [66] Dr. Purtzki's opinion is that Mrs. Meckic has a "very poor prognosis". She is not competitively employable and indeed is not even capable of looking after her own household. There is "zero chance" she will return to full-time employment. Mrs. Meckic simply does not have the physical or cognitive capacity to return to work. There is some small chance that, if lengthy therapeutic intervention resulted in improvement in overall function, the plaintiff might be able to do some volunteering or part-time work in the future. But, because her psychiatric and pain conditions are chronic, any such improvement would be subject to physical and emotional setbacks and hence the "prognostic factors" are negative.
- [67] Dr. Purtzki emphasized that the "fragmented approach to treatment" so often accompanying patients with these types of conditions "just does not work and . . . over time, people get worse rather than better". She was referring here to the involvement of multiple physiotherapists, massage therapists, counsellors, and other treatment providers where there is no "cohesive treatment plan". In her opinion, the best approach for treating Mrs. Meckic's condition would be an intense inpatient program of interdisciplinary therapeutic treatment, a program that is only available at the neuropsychiatric unit at UBC Hospital, and one for which the waitlist is several years long. Regretfully, she says, "we usually cannot get anybody into this program".

- [68] When asked about other multidisciplinary, chronic pain treatment programs available on an outpatient basis, Dr. Purtzki acknowledged that they exist and have fairly "standardized" approaches involving counselling, physical activation and medical treatment. But, in her opinion, "[Mrs. Meckic's] case is so severe that . . . she would not benefit" because she "really needs to be in a more inpatient type of environment".
- [69] She testified that the "prognosis for recovery from these chronic psychiatric illnesses really diminishes over time", but she hopes there will be some improvement in functionality "for [Mrs. Meckic's] own sake and not just for the sake of needing less help".
- [70] Dr. Purtzki acknowledged that Mrs. Meckic had a pre-existing history of migraines which was being treated by Dr. Petrovic (her family doctor) with Botox, although in quantities that are higher than the usual protocol. Her opinion is that a post-traumatic headache disorder has been superimposed upon the pre-existing migraine condition and that Mrs. Meckic will likely have a "suboptimal response" to Botox treatment because of the psychological aspect of her pain condition, one that requires "intensive psychological or psychiatric therapy".
- [71] In terms of recommendations for future treatment, Dr. Purtzki suggests a number of medical referrals to rule out various conditions but also recommends ongoing treatment by a psychiatrist, a physiatrist and possibly a neurologist for headache management. On a more practical level, she recommends:
- ongoing psychological supports, including couples counselling (to provide Mr. Meckic with some strategies on how to respond to his wife's emotional distress);
 - homemaking assistance for general cleaning, meal preparation, and yard work;
 - case management by an occupational therapist to assist with personal care strategies and maximize her independence in daily life;
 - one-on-one kinesiology or Pilates sessions for gentle exercise as she progresses with psychiatric treatment, hopefully progressing to an aquatic-based fitness program in a community setting;
 - intermittent physiotherapy as needed, but no more massage therapy or acupuncture since it appears to be anxiety-provoking for Mrs. Meckic; and,
 - ongoing gym memberships, perhaps at a community facility, so that she will have access to exercise.

B. Dr. Garth Kroeker (Psychiatrist)

- [72] Dr. Kroeker obtained his medical degree in 2000 and his specialist qualification as a psychiatrist in 2005. He was the Director of Psychiatry at UBC Student Health Service from 2007 to 2020 and since that time has maintained a private practice in psychiatry.

- [73] Dr. Kroeker performed a two-hour assessment of Mrs. Meckic on February 24, 2021, and prepared a 12-page report of that assessment dated February 28, 2021. His report was admitted into evidence by consent but he also testified at trial and was cross-examined by counsel for the defendant.
- [74] Dr. Kroeker's diagnosis of Mrs. Meckic's medical condition is as follows:
1. Post-traumatic stress disorder caused by the accident and resulting in symptoms that include nightmares, flashbacks, hypersensitivity to stimuli reminding her of the accident and situational panic attacks;
 2. Pervasive and almost continuous severe anxiety symptoms with frequent panic and agitation;
 3. A major depressive disorder that includes symptoms of sadness, reduced pleasure, reduced motivation, physical agitation, guilt and rumination, as well as sleep and appetite disturbance;
 4. Cognitive impairment, components of which are related to the above conditions but which is also likely due to post-concussion syndrome (he also observed that it was "not impossible" that Mrs. Meckic was having the onset of primary dementia, although Dr. Purtzki disagreed with this suggestion);
 5. Possible low-grade psychotic symptoms which should be monitored and assessed over time; and,
 6. Physical pain symptoms which are a major source of distress, including symptoms of dizziness and blurry vision.
- [75] In terms of prognosis, Dr. Kroeker says that it is possible there could be "very substantial improvement" if the plaintiff responded well to "optimal therapy", but the chronicity and severity of her persistent symptomology means there is a "lower likelihood" of full recovery. Instead, Mrs. Meckic is "at high risk of ongoing chronicity of her psychiatric symptoms, including her PTSD, panic [attacks], depression and cognitive impairment".
- [76] It is Dr. Kroeker's opinion that Mrs. Meckic is unable to have any type of paid employment, given the nature and severity of her symptomology. He believes this is a condition that is "likely to continue indefinitely", absent some sort of significant recovery, and at trial, he testified that the probability of Mrs. Meckic returning to work was "less than 5%".
- [77] Dr. Kroeker believes the psychiatric medications prescribed for Mrs. Meckic to date (Duloxetine and Amitriptyline) have been appropriate but he suggests it might be reasonable to consider a trial of an adjunctive antipsychotic medication as well. He noted Mrs. Meckic was reporting a good experience with her psychotherapy treatment but at trial also commented that while the friendly and supportive dialogue she was having with her therapist (Dr. Ma) was helpful, it was "not really treating the symptoms" and he would encourage more aggressive "exposure therapy" (following detailed informed consent) to try

and desensitize Mrs. Meckic to her trauma experience and to overcome the religion-based "safety behaviour" that Mrs. Meckic displays.

- [78] Lastly, Dr. Kroeker observed it was "absolutely essential" for Mrs. Meckic's family members to be included in her ongoing medical and psychotherapy visits and to "participate in the care plan".

C. Lindsey Townsend (Occupational Therapist)

- [79] Ms. Townsend has practised occupational therapy since graduating from the UBC Faculty of Medicine, Rehabilitation Sciences in 1991. She has been previously qualified as an expert witness in this Court in the areas of occupational therapy, functional/work capacity evaluations, and cost of future care.
- [80] It should be noted that Ms. Townsend has not met Mrs. Meckic and did not conduct any sort of functional capacity evaluation. She has also not spoken to any of Mrs. Meckic's family members or any other collateral witnesses in relation to Mrs. Meckic's medical condition or resulting disabilities. Instead, she was provided by plaintiff's counsel with the reports of Dr. Purtzki and Dr. Kroeger, which she has relied upon for relevant functional information and specific treatment/service recommendations, and she has relied on her expertise to formulate opinions regarding the most likely means to deliver the recommendations and the related costs.
- [81] At trial, the Court was first advised that Ms. Townsend's evidence was not being tendered as expert opinion evidence (because of the legislated limitations on such evidence) but rather was only tendered as "fact evidence". To their credit, however, defence counsel advised the Court that they had no objection to Ms. Townsend's report and testimony being received as expert evidence, and I have treated it accordingly.
- [82] Ms. Townsend's opinion addresses the following categories of future treatment/services:
1. medical intervention/assessments;
 2. physiotherapy;
 3. kinesiology/personal fitness;
 4. psychological counselling;
 5. neuropsychological assessment;
 6. occupational therapy;
 7. medication; and,
 8. homemaking services.

- [83] Both Dr. Purtzki and Dr. Kroeker recommended various referrals and additional medical assessments to address additional possible causes for the cognitive impairment, fatigue, blurry vision, hearing difficulties and/or dizziness. Ms. Townsend suggests that any such further medical referrals or assessments would be accessible through the Medical Services Plan at no cost and at the instance of Mrs. Meckic's family physician, although she noted certain types of treatment might not be covered under the plan and indicated possible costs that might result. Some of these matters are too speculative and the evidentiary foundation for the treatment is too weak for compensation to be awarded in that regard.
- [84] Dr. Purtzki recommends "intermittent physiotherapy" but does not define the frequency of treatment. Ms. Townsend estimates this to mean six sessions annually to support ongoing treatment plans or for management of any flare-ups. The cost is in the range of \$90 for each 30-minute treatment.
- [85] Since Dr. Purtzki recommends against continued massage therapy or acupuncture treatments, Ms. Townsend provides no recommendations or costing in that regard.
- [86] Dr. Purtzki recommends an active rehabilitation program to address deconditioning and involving gentle range of motion exercises as Mrs. Meckic progresses with her psychiatric treatment, ultimately graduating to some sort of community-based aquafit program. Again, Dr. Purtzki does not specify the frequency or duration of such treatments. Ms. Townsend's assessment is that twice-weekly sessions with a kinesiologist will be required for three to six months, and weekly sessions thereafter for a further three months. The cost will be in the range of \$100 per session and up to \$6,500 in all including GST.
- [87] An annual pass to a Burnaby community centre's gym/pool is \$550 plus taxes, an amount Ms. Townsend endorses for five to ten years into the future.
- [88] Both medical experts recommended ongoing psychological counselling, exposure therapy/ psychotherapy that should also include family members on occasion, however neither frequency nor duration of treatment was specified. Ms. Townsend notes that weekly psychology sessions typically cost \$200-\$225 per session, something she recommends for the first six months for a total cost of \$5,200-\$5,850, followed by monthly sessions at a cost of \$2,400-\$2,700. A further six sessions are also recommended specifically for couples counselling at a cost of \$1,200-\$1,350. However, Ms. Townsend is unable to opine on any frequency or recommended duration of psychotherapy thereafter, noting that this would have to be determined by the treating experts. She noted that if Mrs. Meckic was somehow able to be admitted to the inpatient neuropsychiatry program at UBC, the above recommendations "would likely require adjustment".
- [89] Ms. Townsend suggested a total cost of \$3,250 plus GST for the driver anxiety program. Although the evidence establishes Mrs. Meckic is able to drive to and from her various treatments, I consider such additional counselling appropriate in light of Mrs. Meckic's susceptibility to panic attacks.

[90] Ms. Townsend noted the cost of \$3,600 to \$4,500 for non-medical neuropsychological assessments, something Dr. Kroeker suggested should be given "consideration" to better understand the nature and severity of Mrs. Meckic's cognitive deficits. However, I agree with Dr. Purtzki that, given Mrs. Meckic's severe levels of psychological/psychiatric impairment, such a diagnostic undertaking would not be productive.

[91] Dr. Purtzki recommended that Mrs. Meckic receive management from an occupational therapist for personal care and cognitive strategies and to maximize her independence in daily life. This, of course, is precisely Ms. Townsend's expertise and she agrees that "case management assistance" would be beneficial alongside any medical management provided by Mrs. Meckic's family physician. She notes:

[T]his would support the problem-solving, prioritization, and follow through on the various medical and rehabilitation assessments/interventions and implementation of any resulting recommendations. It is also . . . to support functional application of physical and psychological improvements.

Ms. Townsend notes that in her experience this type of assistance tends to be "front-end loaded" but then tapers off as routines are established. She recommends four hours per month for the first year and two hours per month for a second year as being reasonable to address the various tissues in Mrs. Meckic's case which, at the latest occupational therapy rate of \$118 per hour, gives rise to a cost of \$5,665 for the first year and \$2,830 for the second year.

[92] Ms. Townsend's report provided information regarding the ongoing costs of Mrs. Meckic's four medications, a matter that is not controversial. The plaintiff makes no claim for the ongoing cost of Botox treatment or for a couple of other medications which the physicians suggested as possible options.

[93] Both expert physicians noted Mrs. Meckic's difficulties with household activities such as cleaning, cooking, gardening and the like. Dr. Purtzki believes the plaintiff will always have difficulty with labour intensive activities but that she will likely be able to participate in shopping and making dinner and do some laundry and light cleaning, although her endurance will likely remain limited. Dr. Kroeker also considers this impairment to be a long-term phenomenon, absent very significant recovery.

[94] Ms. Townsend estimates eight hours per week for cleaning, meal preparation and other homemaking services at a cost of \$10,400-\$14,500 for the first two years, reducing thereafter as Mrs. Meckic is able to perform certain basic tasks, albeit with continued support at reduced levels. She also assesses the costs of garden maintenance in the range of \$1,000-\$1,200 per annum, an expense that will be necessary into the foreseeable future.

D. Other Medical Documents

- [95] As noted earlier, various clinical records were put into evidence by consent without the benefit of a recent report from the numerous treatment providers summarizing the treatments, their assessment of the plaintiff's medical condition, or their recommendations and rationale for future treatments. Plaintiff's counsel provided the Court with a list of attendances/treatment dates for the plaintiff's family doctor (Dr. Petrovic), a psychologist (Dr. Ma), and for acupuncture, physiotherapy and massage therapy treatments by at least three different providers. The list totals 208 visits but it is by no means complete.
- [96] In cases such as this it is important for the Court to be provided with a comprehensive report from the plaintiff's family physician who presumably is triaging the other treatment providers. For a patient such as the plaintiff whose functioning is severely disabled by a somatoform disorder, proper medical case management and treatment coordination by a supervising medical professional is essential. The absence of a report from the plaintiff's family physician makes determinations of future care unnecessarily difficult.
- [97] This unsatisfactory state of affairs is not validly explained away by the limitation on expert evidence imposed by recent amendments to the Evidence Act. That same legislation permits the court to allow additional expert evidence to be tendered at trial and, indeed, to appoint the court's own experts on the court's own initiative, if necessary. No such application was made in this case.
- [98] I have no intention of scouring through and "cherry-picking" from all the clinical and other treatment provider records that have been shovelled into evidence in this case. That is not the role of the Court in this type of litigation. It is the role of counsel to organize and present the relevant evidence as efficiently as possible.
- [99] Having said that, I will nonetheless briefly refer to certain extracts forming part of the material put into evidence seemingly for the truth of their contents.
- [100] The Burnaby Hospital records refer to the assessment and treatment of the plaintiff on the evening of the accident. As is so often the case in these types of accidents, the diagnosis is "MVA - soft tissue injuries". The plaintiff's complaints were of pain in the upper body, dizziness, numbness, multiple episodes of vomiting, headache and nausea. A CT scan of the plaintiff's head was unremarkable.
- [101] A July 25, 2019 consultation report to Dr. Petrovic from a neurologist, Dr. Kowal, recites "lots of leg, arm and low back pain, upper back pain, constant headaches and dizziness", but a normal neurological exam nonetheless.
- [102] A June 27, 2019 report to ICBC from the plaintiff's psychologist Dr. Ma, states:

Mrs. Meckic is currently experiencing traumatic stress and anxiety symptoms, including flashback and panic attacks, that are attributable to her accident occurred on August 18, 2018. She is also emotionally distressed by persistent physical pain and postconcussive symptoms, which exacerbate her psychological symptoms and contribute to limitations in her daily living.

[103] ICBC evidently referred the plaintiff for a two-day occupational therapy assessment in September and October 2019 resulting in a report dated October 25, 2019 by a person identified as N. Hull at Orion Health which,

identifies the plaintiff's symptoms as daily headaches, rapid heart rate, neck and back pain, fatigue, ringing in ears, blurry vision and whole body weakness; noted that the plaintiff was "highly emotional" during both assessments, "zoned out" on several occasions, had to have questions repeated, and was unable to recall the names of any treatment providers. No formal cognitive testing was carried out but the assessor indicates Mrs. Meckic was "easily distressed and also presents with marked difficulties with sustained attention"; noted that Mrs. Meckic was very distressed throughout the assessments, tearful, expressed fears and anxious thoughts, reported panic attacks, and required several breaks to compose herself;

opined that Mrs. Meckic did not have the "requisite level of functioning to consider return to work options", noting that she "presents with significant psycho-emotional barriers, as well as physical limitations, that are limiting her function"; and, recommended 8 to 10 further occupational therapy sessions, 12 psychology sessions, 12 to 16 massage sessions, 12 to 16 acupuncture sessions, along with four hours a week of weekly housekeeping support.

VII. findings respecting the plaintiff's injuries, functional Limitations and disability

[104] Notwithstanding the fact that the primary medical evidence in this case has come from experts who have not provided any treatment to the plaintiff and who were retained by counsel to undertake a single assessment and prepare a single report, counsel for the defendant does not contest the findings or recommendations of those experts, subject only to responses elicited during their cross-examination.

[105] Both the medical and the lay witness evidence in this case overwhelmingly supports the conclusion, and I find as a fact, that:

The accident has caused the plaintiff chronic pain in the neck, shoulder and back that is now associated with a severe and chronic somatoform disorder;

The plaintiff also sustained a concussion as a result of the accident, although the main source of the plaintiff's ongoing disability is the psychiatric component or somatization that is causing chronic pain and suffering that is both very intense and very real;

The accident has also resulted in anxiety, depression and post-traumatic stress disorders that contribute to the plaintiff's distress and severely limit her functionality; Symptoms experienced by Mrs. Meckic include nightmares, flashbacks, panic attacks, severe anxiety and agitation, sadness, sleep and appetite disturbance, poor memory and impaired cognition;

The plaintiff also has developed a post-traumatic headache disorder which has been superimposed upon a pre-existing migraine condition that was formerly successfully managed by Botox treatments but for which treatment is now less effective because of the psychological aspects of the plaintiff's pain condition;

As a result of all of these conditions, the plaintiff is neither competitively employable and is no longer capable of performing household tasks such as cleaning, meal preparation, yardwork or even some elements of personal care;

Also as a result of these medical conditions, the plaintiff has generally become physically deconditioned; and, Overall, the quality of the plaintiff's life has dramatically deteriorated as she has been converted from a happy, high functioning and hard-working person into someone who suffers intense chronic pain, unremitting emotional distress and who has severe functional limitations with respect to the normal activities of daily living.

[106] I accept Dr. Purtzki's opinion, and find as a fact, that Mrs. Meckic has a very poor prognosis for any meaningful recovery. I accept and find as a fact that intensive psychological or psychiatric therapy is required if there is to be any realistic prospect for improvement in Mrs. Meckic's overall function in the future. The optimum approach would be the intense inpatient program of interdisciplinary therapeutic treatment at the neuropsychiatric unit at UBC Hospital but the waitlist for that program is several years long and the prospect of Mrs. Meckic being accepted for treatment in the future is very remote. It is possible but unlikely that Mrs. Meckic might see improvement of her symptoms by way of an outpatient multidisciplinary chronic pain treatment program but even there the prospects for success are small.

[107] I find as a fact that Mrs. Meckic does not have the physical or cognitive capacity to be competitively employed and that she will never return to full-time employment. It is possible that intensive and lengthy therapeutic intervention may permit Mrs. Meckic to do some sort of volunteering or part-time work in the future, but any such improvement will almost certainly be tenuous in nature and will very likely be subject to physical and emotional setbacks. The likelihood of returning to part-time employment in the future is low.

[108] Overall, while the injuries sustained by Mrs. Meckic might not be characterized by some as "catastrophic", the past, present and likely future effects of Mrs. Meckic's injuries, functional limitations and disabilities are and will continue to be very profound.

VIII. hypotheticals, contingencies, standards of proof, and the assessment of damages in personal injury cases

A. The "Simple Probability" Standard of Proof

[109] The assessment of damages in a personal injury case necessarily deals not only with past events but also with hypothetical and future events. The standard of proof for past events is, of course, the balance of probabilities and, once proven, such matters are treated as certainties. Hypothetical or future events, on the other hand, need not be proved on a balance of probabilities standard; instead, future or hypothetical possibilities are taken into account so long as they are "real and substantial possibilities and not mere speculation, and they are given weight according to their relative likelihood": *Athey v. Leonati*, [1996] 3 SCR 458, paras. 27-29; *Grewal v. Naumann*, 2017 BCCA 158, paras. 44-49.

[110] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absence of the defendant's negligence. This is the plaintiff's "original" or "without-accident" position. This is then compared with the plaintiff's "injured" or "with-accident" position and the difference between the two represents the plaintiff's loss: *Athey*, para. 32.

[111] There are thus four scenarios which the Court is required to assess:

What actually happened to the plaintiff in the past to the date of trial, a determination that includes life events between the accident and the trial, all of which, once proven on a balance of probabilities, is treated as a certainty; What would have occurred to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario); How would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario); and,

4. How will the plaintiff's life proceed in the future now that the accident and resultant injury has occurred (the future hypothetical "injured" or "with-accident" scenario).

[112] Scenarios 2 to 4 above involve past or future hypothetical possibilities which, as noted, will be taken into consideration so long as they are "real and substantial possibilities" as opposed to "mere speculation". This of course begs the question: how does one determine the difference between the two and, once the former is established, how does it apply to the quantification of damages?

[113] The leading text on personal injury damages in Canada is Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Carswell, 2018). Chapter 2 of that text addresses "Proof of Damages" and discusses the "simple probability" standard of proof and its application to the assessment of damages contingent upon chance. The word "probability" is used in its statistical sense, i.e. denoting any degree of chance.

[114] Some of the substantive principles set out in the text include the following (citations omitted):

- The "simple probability" standard of proof evaluates the degree of probability that any sequence of events will occur or would have occurred, and therefore the degree of probability that the plaintiff will suffer or would have suffered the material loss. It then awards damages for the material loss proportionate to the established degree of probability;
- The Court thus estimates what are the chances that a particular event will or would have happened, usually expressed as a percentage, and reflects those chances in the amount of damages which it awards;
- All contingencies, positive or negative, that are established on the evidence as realistic as opposed to merely speculative possibilities must be given effect;
- However, there comes a point when a chance or probability is so small that it might be characterized as "speculative", or "too remote" and thus excluded from consideration; and,

The plaintiff recovers damages in proportion to the likelihood that the event and its consequences might have or may occur; this is done by scaling the award downwards or upwards in accordance with the percentage likelihood.

[115] In *Athey* the example of the simple probability standard being applied was:

if there is a 30% chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30% of the anticipated extra damages to reflect that risk (para. 27).

B. The BCCA Trilogy

[116] In 2021, the BC Court of Appeal issued a trilogy of judgments clarifying the above principles and illustrating their application to the assessment of damages in personal injury cases. The cases include *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421. They involved hypotheticals and contingencies related to pre-existing injuries, past and future loss of earning capacity, future care costs, as well as non-pecuniary general damages for past and future pain and suffering.

[117] In *Dornan*, the Court noted in para. 92 that contingencies fall into two categories namely,

- "general contingencies" which simply as a matter of human experience are likely to be experienced by everyone and which are often "not readily susceptible to evidentiary proof" but which "may be considered in the absence of such evidence" nonetheless; and,
- "specific contingencies", ones peculiar to the particular plaintiff which must be supported by evidence that their occurrence is actually realistic as opposed to simply a speculative possibility.

[118] Insofar as general contingencies are concerned, the Court must be mindful that they can be positive as well as negative i.e. that everyone's life has "ups" as well as "downs" and that any allowance premised only on general contingencies "should be modest".

[119] Insofar as specific contingencies are concerned, however, whether positive or negative in nature, the Court must go beyond a determination of their existence to also analyze the evidence and decide the relative likelihood of their occurrence and their consequences.

[120] Dornan explains the difference between a contingency that is a real and substantial possibility as opposed to mere speculation:

A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable (para. 63).

[Emphasis added.]

[121] Elsewhere in the judgment, the Court stated that,

the risks commonly encountered on this rather dangerous planet [e.g. car accidents, tripping and falling, etc.] will not suffice to establish a real and substantial possibility such events can happen to anyone but .are not predictable [and thus] would not give rise to a measurable risk (para. 77).

[Emphasis added.]

[122] In Dornan, the trial Court applied a 30% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs to reflect the negative contingency that, given his lifestyle and history, the plaintiff was at risk of suffering a concussion with serious consequences in any event. The Court of Appeal upheld the finding that a further without-accident concussion was a real and substantial possibility for the plaintiff, however reduced the contingency deduction from 30% to 15% for future losses (and to only 10% for past losses) based on its own analysis of the second step in the process, namely determining the relative likelihood that the real and substantial possibility would actually materialize (an analysis that the Court of Appeal said the trial judge did not actually undertake: "in this case, the judgment addresses the real and substantial possibility analysis only implicitly, and is silent on the relative likelihood", para. 135).

[123] The Court of Appeal acknowledged that the task confronting the trial judge was "not easy":

By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence (para. 134).

[Emphasis added.]

[124] The "right process" insofar as specific contingencies is concerned (in Dornan, the possibility of the plaintiff incurring a serious concussion injury regardless of the accident) is:

· Step one: determine with reference to the evidence whether the hypothetical future event is a real and substantial possibility (i.e. a measurable or predictable risk as opposed to mere speculation), and if so,

· Step two: determine, again with reference to the evidence, the relative likelihood [i.e. the chances] of that event actually occurring in order to arrive at an appropriate contingency deduction (Dornan, para. 113, emphasis added).

[125] *Lo v. Vos* is another case where the trial judge applied an "across-the-board" 20% contingency deduction to the awards for nonpecuniary damages, future care costs and loss of future earning capacity on account of the plaintiff's pre-existing back conditions. The trial judge found that the accident caused physical injuries that contributed to chronic pain, which in turn lead to depression, anxiety and post-traumatic stress disorders rendering her totally disabled from working. However, the trial judge also concluded there was a "measurable risk" the plaintiff would have developed a major depressive disorder consequent on pre-existing lower back pain and leading to a level of pain and disability similar to the sort experienced at trial. Hence the 20% contingency deduction.

[126] The Court of Appeal set aside the contingency deduction on the basis that the evidence at trial did not establish any contingent risk that was a real and substantial possibility, as opposed to simply an impermissible speculative possibility. There was no expert evidence that, absent the accident, the plaintiff had any inherent vulnerability to, or any risk of developing mental health problems because of her pre-accident conditions. While it was essential for the trial judge to consider the plaintiff's pre-existing state in the assessment of damages, whether that original state gave rise to a measurable risk of her developing, mental health problems in any event (a future hypothetical event) was "a different question requiring additional evidence" (paras. 74- 78, emphasis added).

[127] The 2021 trilogy has shifted the paradigm insofar as the evaluation of contingencies and hypotheticals are concerned in personal injury cases. While no new principles of law have been introduced, the Court has effectively mandated a process for evaluation based on the evidence adduced at trial. It also requires the trial court to make a specific finding as to the relative likelihood/chances of the hypothetical/contingency and its consequences materializing, and the scaling or adjustment of the damage award proportionate to that likelihood (usually but not necessarily determined with reference to percentages).

[128] With these principles in mind, I now turn to the assessment of damages in this particular case.

IX. non-pecuniary general damages

A. General Principles

[129] In *Sahota v. Slupsky*, 2019 BCSC 2215, I summarized the law governing the assessment of non-pecuniary general damages:

[112] In a personal injury lawsuit, the Court may make an award for non-pecuniary damages to compensate a plaintiff's pain and suffering, loss of amenities, and loss of enjoyment of life. The Supreme Court of Canada has articulated a "functional approach" to the assessment of such damages. Following this approach, because non-pecuniary losses are intangible and

not readily susceptible to evaluation, any such award should be designed to provide reasonable "solace" for a plaintiff's loss, where "solace" is viewed in the sense of funding things that might make life more bearable or enjoyable.

[113] In 1978 the Supreme Court of Canada also limited these types of general awards to \$100,000, a limit which is subject to upward adjustment to account for the effects of inflation since that date. At the present time, the upper limit is in the vicinity of \$400,000, which is only awarded in cases involving extremely severe injury and disability and where maximum solace must be recognized.

[114] A non-exhaustive list of factors taken into account in assessing any award for non-pecuniary general damages include the plaintiff's age, the nature of the injury, the severity and duration of the pain, disability, emotional suffering, impairment of life, family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle. While there is no "tariff" on such awards, their fairness and reasonableness are measured with reference to awards made in other cases involving similar injuries and circumstances. In each case an appreciation of the plaintiff's specific circumstances is required as the need for solace does not necessarily correlate with the seriousness of the injury.

See *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229; *Thornton v. School Dist. No. 57 (Prince George) et al.*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267; *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287; *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629, at 638-648; *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46, leave to appeal ref'd [2006] S.C.C.A No. 100.

B. Plaintiff's Submission

[130] The plaintiff's submission was brief and made no attempt to apply any of the above principles to the particular circumstances of this case. The submission also made no reference to any contingencies of the sort raised by the defendant below and upon which the latter relies to reduce the award.

[131] Instead, the plaintiff's submission simply attached a list and description of seven cases previously decided by this Court said to be "similar" to the present case, where nonpecuniary general damages were awarded anywhere between \$150,000 and \$200,000, (in 2021 values, \$170,000 to \$245,000). Based on these comparators, counsel submit that the appropriate award for nonpecuniary damages in this case would be \$200,000.

C. Defendant's submission

[132] The defendant's submission is somewhat more sophisticated. After listing the Stapley factors referred to above, the defendant argues that this is not a case of "total loss", either physically or emotionally, that the plaintiff does have at least some enjoyment in her life, that she has recently started swimming, and in addition to going to the pool, she also goes to church and to her treatment providers, driving herself to these activities. She also enjoys

spending time with her grandchildren and occasionally accompanies her husband on cleaning jobs that are part of the family business.

[133] The defendant also argues that the assessment of nonpecuniary general damages in this case is subject to a contingency reduction for the "probability that the plaintiff may realize some improvement with recommended treatments". Counsel submits, with selected reference to the evidence of Dr. Purtzki, Dr. Kroeker, and Ms. Townsend, that:

- "The plaintiff's physical symptoms including headaches and myofascial pain are treatable";
- "Psychiatric conditions are amenable to improvement with treatment";
- "Moreover, the plaintiff is motivated to improve her condition", something that may promote long-term success; and,
- Active case management from an occupational therapist "can be of significant assistance".

[134] Defence counsel purports to describe the plaintiff's "most likely future scenario":

- "A lengthy and difficult journey of treatment and at least partial recovery";
- "Engaging in a multidisciplinary treatment program";
- Potentially starting a course of antipsychotic medication;
- "An occupational therapist providing case management", as suggested above;
- Her recovery will be a "slow progression" but "will likely take two years";
- "She will likely have very substantial improvements of her psychiatric conditions" (noted by Dr. Kroeker to be "possible with optimal therapy");
- "It is possible but very unlikely she will have complete recovery it is more likely she will have partial but still 'substantial' psychiatric recovery"; and,
- "Her physical injuries are amenable to treatment" and "they will resolve, or nearly completely resolve" following psychiatric treatment.

[135] Finally, the defendant refers to three "comparable cases" namely, Sekihara v. Gill, 2013 BCSC 1387 (\$135,000), Slater v. Gorden, 2017 BCSC 2265 (\$135,000), and Morena v. Dhillon, 2014 BCSC 141 (\$130,000), ultimately submitting that the appropriate general damage award in this case should be \$130,000.

D. Determination

[136] In section VII of these reasons for judgment, I have set out my findings of fact regarding the plaintiff's injuries, functional limitations and disability. I will not repeat them here except to say that the past, present and likely future effect upon the plaintiff has been and will continue to be very profound. She suffers from intense and very real chronic pain that has resulted in unrelenting distress and psychiatric disorders that severely limit her

functionality. The quality of her life has dramatically deteriorated, as has her relationship with her husband and other family members. Her physical and cognitive capacity is such that she will never return to full-time employment and any improvement that might accompany future treatment will be fragile in nature and very likely subject to setbacks.

- [137] While the defendant obviously did not have the benefit of these findings for the purposes of its submissions, suffice it to say that I reject the defendant's "most likely future scenario" for the plaintiff as unrealistic and highly improbable. I acknowledge that scenario perhaps crosses the threshold in terms of constituting a real and substantial possibility, however I do not accept the relative likelihood of its occurrence implicit, albeit not expressly articulated, in the defendant submission.
- [138] I find the relative likelihood of any significant improvement in the plaintiff's medical condition to be very low. It is perhaps possible but is highly unlikely. I have accepted Dr. Purtzki's evidence that the best prospect for any improvement of Mrs. Meckic's condition lies with an intense inpatient program of interdisciplinary therapeutic treatment, however it is highly unlikely such a program will be available to the plaintiff given very lengthy waitlists and the other shortcomings of the healthcare system. I also have accepted Dr. Purtzki's evidence that outpatient chronic pain treatment programs will not likely benefit Mrs. Meckic, nor will the present fragmented regime involving multiple treatment providers.
- [139] In these circumstances, I estimate the chances of any meaningful future improvement in the plaintiff's present medical condition to be very low, a maximum of 15% and more likely less than that. Any scaling down of the general damage award in that regard must be modest.
- [140] The plaintiff's future is bleak. She will likely experience intense pain for the rest of her life. The defendant's description of the reduction in the plaintiff's enjoyment of life as "significant" is a vast understatement. Her need for solace is profound and is required over her remaining life expectancy of approximately 33 years (based on statistical averages). The defendant's suggestion of an award of general damages in the amount of \$130,000 is wholly inadequate. It is arguable that even the \$200,000 proposed by plaintiff's counsel also falls short of the appropriate mark.
- [141] Absent a contingency deduction for possible meaningful improvement in the plaintiff's medical condition in the future, I would have assessed nonpecuniary general damages in this case in the amount of \$225,000. Given the very low likelihood of that contingency materializing, I award the plaintiff \$190,000 in that regard.

X. Loss of Earning Capacity

A. General Principles

- [142] Most personal injury lawsuits include a claim for damages for loss of past and future income that the plaintiff would have earned if the defendant's negligence and the resulting injuries had not occurred. As noted in *Kallstrom v. Yip*, 2016 BCSC 829:
- [388] Since *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229, it has been acknowledged that, technically speaking, it is not loss of earnings for which compensation is being made, but rather it is for loss or impairment of a capital asset, namely, the plaintiff's capacity to earn income.
- [389] Valuation of the loss may be measured in different ways depending on the circumstances of each particular case. Generally speaking, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that he or she would have received, whether in the past or in the future, had the tort not been committed. The essential task of the court is to compare what would have been the plaintiff's past and future working life if the accident(s) had not happened with the plaintiff's actual past and likely future working life after the accident(s). The difference between the two scenarios represents the plaintiff's loss and the resulting monetary award is thus consistent with the basic principle of tort law compensation, which is to restore the injured plaintiff to the position he or she would have been in but for the defendant's negligence, at least insofar as a monetary award is capable of doing so.
- .
- [393] There is a discrete, two-step process that is required with respect to these past and future loss of earning capacity claims:
1. the court must first determine whether, as a result of the injuries sustained in the accident(s), the plaintiff's past or future earning capacity has been or will likely be impaired, such that there has been an actual loss of income in the past and/or a real and substantial possibility of a loss of income in the future; and
 2. if so, then the court must then determine the amount of past loss that has been incurred to the date of trial and, on a present value basis, assess the amount to be awarded for any possible future financial loss.
- [394] The first question deals with entitlement and the second with quantum.
- [143] All three cases in the BCCA 2021 trilogy address loss of earning capacity. In *Dornan and Lo*, the trial judges' awards were found to be inordinately low and were substantially increased (doubled in the former and almost tripled in the latter). In *Rab*, the award was reduced by two-thirds. In all three cases, there was a measurable risk of future loss, however, the Court found both factual and analytical error at trial for failure to assess the relative likelihood of that loss actually occurring.

[144] Rab discussed the correct analytical framework as follows:

[27] As this Court observed in *Dornan v Silva*, 2021 BCCA 228 at para 134, the process of determining whether a hypothetical future event is a real and substantial possibility can be a difficult task:

By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence .

[28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v Naumann*, 2017 BCCA 158:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[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. *Grewal* was such a case, as were *Pallos*, *Brown* and *Perren*. This one is also such a case. The respondent advanced no claim for past loss of income, and her income at the time of trial, all of which was passive, was greater than it had been at the time of the accident.

[31] Accordingly, the process described in *Grewal* comes to the forefront: assessing whether there is a real and substantial possibility of an event leading to future loss, and assessing its likelihood, before turning to quantification on either an earnings or capital asset approach.

[145] After reviewing the case law dealing with the "capital asset" approach in cases where there has been no clear loss of income before trial, and which was said to have given rise to "some apparent confusion", the Court continued:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.

[Emphasis added.]

[146] The claims for past and future loss of earning capacity in this case fall into the "less challenging" category described in paragraph 29 of *Rab* above. The defendant concedes that the plaintiff has suffered a significant and lasting injury of a sort which means she will never return to full-time employment. The defendant also concedes that the "arithmetical", as opposed to the so-called "capital asset" approach to quantification, is appropriate in the circumstances. The former was described in *Kallstrom* as follows:

[395] Some cases are relatively simple. For example, where a plaintiff is engaged in steady, long-term, likely permanent employment, and sustains injury which makes her unable to work both before and after the trial, a past and future loss of capacity to earn income is clearly established and a relatively simple arithmetical approach to valuation may be appropriate, e.g. doing the obvious calculation on past loss, albeit adjusting for contingencies, and for future loss, present valuing the stream of income that would have been received from that employment from trial to the date of retirement, taking into account appropriate discount rates and contingencies affecting the plaintiff's personal circumstances.

[147] The defendant also generally accepts the expert evidence of the plaintiff's consulting economist, Mr. Benning, regarding present values of past and future income loss in this case, although she argues for further discounts based on additional contingencies. The contingencies invoked in that regard relate to the labour dispute at the Hilton Metrotown Hotel (the employees have been locked out since April 16, 2021) and the possibility of Mrs. Meckic sufficiently recovering from her injuries in the future and thereupon returning to work on a part-time basis.

[148] I turn now to discuss these matters in further detail.

B. Past Loss of Earning Capacity

- [149] For the purposes of his calculations, Mr. Benning has proceeded on the assumption that, if the accident had not occurred, Mrs. Meckic would have continued in her employment with the Hilton Hotel until retirement. His illustrations demonstrate the impact of retirement at each age of 65, 67 and 70. While the parties may not agree on the date of likely retirement, they both agree that the assumption of continued employment with the Hilton Hotel for the remainder of Mrs. Meckic's working life is a reasonable basis on which to quantify the claim.
- [150] Mr. Benning calculates Mrs. Meckic's past loss of income to the date of trial in the amount of \$73,140. Again, the parties do not dispute the arithmetic, however plaintiff's counsel correctly points out that this is a conservative number which has reduced the value of the past loss by deductions on account of the COVID-19 pandemic and the labour dispute at the Hotel.
- [151] Plaintiff's counsel suggests Mr. Benning's figure should be increased to \$100,000 on account of two "positive contingencies" or hypothetical "without-accident" scenarios namely, the plaintiff would have increased her hours assisting with the family business (as Mr. Meckic did in the past three years) resulting in lower paid contractor expenses and an increase in the net income of at least \$500 per month; and, during the pandemic, Mrs. Meckic's work ethic would undoubtedly have resulted in her taking on a substitute minimum wage job for 32 weeks, resulting in additional earnings of \$19,200 (a total gross amount of \$25,200 or a net amount of approximately \$20,000).
- [152] Neither of the parties referred to the 2021 BC Court of Appeal trilogy (although one of the cases, *Lo v. Vos*, was not released until after the conclusion of the trial) and neither party expressly assessed the suggested contingencies in the manner now required by the trilogy.
- [153] The evidentiary basis supporting the suggested positive contingencies is rather weak. For sure, Mr. Gbedze secured alternate employment at another hotel and thus exemplifies the real and substantial possibility of something similar happening with Mrs. Meckic. There is, however, no evidence from Mrs. Meckic herself as to her attitude to unionized labour disputes and, in particular, whether she would have joined the picket line with some other employees or whether she would have found other work elsewhere, either increasing her hours in the family cleaning business or in some other job. She did, however, testify that work colleagues on the picket line are receiving "strike pay" though the amount was not specified.
- [154] There is certainly evidence supporting the conclusion, one I have already made, that both Mr. and Mrs. Meckic were hard-working people, loyal and valued employees for others, and enterprising entrepreneurs in terms of an "after-hours" cleaning business. Mr. Meckic testified how his wife's income helped pay the bills. In these circumstances, I do not think it is "mere speculation" to find it likely that Mrs. Meckic would have attempted to find a

replacement source of income during the pandemic and strike but there is no evidence respecting the available job market and no scientific way to allocate any sort of percentage to the likelihood of success.

[155] The case law repeatedly reminds us that the quantification of this type of loss is an assessment and not just an arithmetical exercise, that the assessment is a matter of judgment and not calculation, and that overall fairness and reasonableness of the award must also be considered. I agree that Mr. Benning has been quite conservative in his assessment of Mrs. Meckic's past loss of income and in light of Mrs. Meckic's very creditable work ethic, a fair adjustment to account for the realistic likelihood of her sourcing replacement income would be to simply round up Mr. Benning's calculated figure to \$85,000, which is the amount I award Mrs. Meckic under this heading.

C. Future Loss of Earning Capacity

[156] There are two aspects to this part of the claim, namely, loss of anticipated earnings and also loss of post-retirement pension income. I will deal with each separately.

[157] As noted earlier, the parties have agreed that the appropriate quantum methodology in this case is the "arithmetical" approach based on the "without-accident" probability that Mrs. Meckic would have remained an employee of the Hilton Hotel for the rest of her working life. Both parties accept Mr. Benning's present value calculations of Mrs. Meckic's without-accident future stream of annual employment earnings and non-wage benefits. The calculations reflect both actuarial and labour market contingencies and the discount rates prescribed under the Law and Equity Act to assume retirement dates of Mrs. Meckic's 65, 67, and 70th birthdays. The present value of such an assumed income stream is as follows:

65th birthday - \$371,362 67th birthday - \$426,713 70th birthday - \$505,587

[158] Given these concessions, it is not necessary to critically review the contingencies or broad statistical averages built into the Benning model.

[159] However, the parties do not agree on certain other hypothetical factors relevant to the assessment, namely:

the appropriate retirement date;

any contingency reduction for the labour dispute at the Hilton Hotel (which was ongoing during trial); any contingency reduction for the possibility of Mrs. Meckic returning to work on a part-time basis some time in the future; and, whether the claim should include additional income allocated to Mrs. Meckic for her without-accident future contribution to the family cleaning business which, according to plaintiff's counsel, would have a value in the range of an additional \$60,000 to age 65 or \$78,000 to age 70.

[160] I will deal with each item separately but I would again point out that even before the additional guidance provided by the 2021 trilogy, the Court of Appeal has repeatedly acknowledged that:

while quantification of the loss is an assessment which must be grounded in the evidence, it is not just an arithmetical exercise; and, while mathematical aids and economic analysis can facilitate a useful "bracketing" of possible awards in any given case, the assessment must also reflect the plaintiff's pre-accident employment history, training and capabilities as well as intangibles such as personality, work ethic, and attitude.

See *Grewal v. Naumann*, 2017 BCCA 158; *Knapp v. O'Neill*, 2017 YKCA 10, paras. 17-19; *Rousta v. MacKay*, 2018 BCCA 29;

Gao v. Dietrich, 2018 BCCA 372.

1. Retirement Date

[161] The defendant acknowledges Mrs. Meckic's evidence that she enjoyed her work and would have continued working at the Hotel as long as she felt able to. Counsel argue that while Mrs. Meckic had no concrete plans to retire, neither did she have any concrete plans to work to any specific age. They speculate that because her husband was six years older it "may be expected that he would be retired" by the time he turned 71 years of age "and that she may have joined him in retirement" when she is 65. Such a proposition was not actually put to either Mr. or Mrs. Meckic during their cross-examination but I would acknowledge simply as a matter of common sense that it is a real and substantial possibility.

[162] Another real and substantial possibility, however, is that, provided they remained in good health, both Mr. and Mrs. Meckic would have continued to work in the jobs that they enjoyed so much long after the "normal" retirement age. Mrs. Meckic said exactly that in her testimony, commenting that her father "is 97 years old and is still functioning".

[163] I would assess the chances of Mrs. Meckic working beyond the age of 65 as quite high, indeed more probable than not, given the family's well-established work ethic and drive to succeed. While the assessment is not particularly scientific and hence may appear somewhat arbitrary, I conclude that a fair balancing and reflection of the likelihoods in the circumstances would be to use Mrs. Meckic's 67th birthday as her likely retirement age for the purposes of Mr. Benning's calculations. As noted, the present value of that future income stream as at the date of trial, and after taking into account the "standard" contingencies, is roughly \$427,000.

2. Labour Dispute

- [164] As at the date of trial, the labour dispute at the Hilton Hotel in Burnaby was continuing and the unionized employees such as Mrs. Meckic were still locked out by their employer. The defendant submits there is a "probability" of the labour dispute continuing seven months following trial "during which the plaintiff's expected" without - accident "income would be nil", thus warranting a deduction from Mr. Benning's future loss of income calculations in the amount of seven months income, approximately \$22,000.
- [165] No evidence was tendered from any union or employer representatives explaining the nature of the labour dispute, the status of negotiations (if any), or the anticipated date of resolution. Mr. Gbedze expressed an opinion that hotel management was not cooperating with the union, and that the matter would not be resolved until "maybe end of this year or maybe next year".
- [166] I acknowledge that the labour dispute has proved to be protracted, having lasted some six months to the date of trial, and accordingly there is a real and substantial possibility that it might continue for quite some time following completion of the trial as well. There is simply no evidence upon which the Court can assess the likely outcome of that dispute, let alone determine any relative degree of likelihood in that regard.
- [167] Mr. Meckic testified that he substantially increased the number of hours he was working in the family cleaning business because "I do not want to lose the house, the apartment, nothing". He stated that after the accident, Mrs. Meckic "lost her income, so I have to make more money to pay all we have to pay". This is the only insight provided at trial as to the family's financial circumstances, but it is one which militates very strongly in favour of a likelihood that, absent the accident, Mrs. Meckic would have sourced replacement income, whether by increasing her hours in the family cleaning business or finding some other job, in order to continue her well-established contribution to the family finances.
- [168] For this reason, I do not accept the defendant's proposed seven-month post-trial deduction based on Mrs. Meckic earning zero income while the labour disruption continues. As with the past loss of earning capacity claim, there is no scientific way to allocate a value to this particular contingency but in my view, a fair and proportionate deduction to account for the relative likelihood of Mrs. Meckic's not being able to fully replace income during the labour dispute would be the amount of \$7,000, 30% of the figure proposed by the defendant.

3. Returning to Part-Time Work

- [169] This is the most significant contingency deduction sought by the defendant who "accepts that Mrs. Meckic is unlikely to return to full-time employment" and who also "accepts that the plaintiff's prospects for returning to work in some capacity depend on whether her psychiatric condition can improve to a point that would permit that". Notwithstanding these concessions, however, the defendant speculates that "the most likely future for the plaintiff" involves:

- a supervised, case-assisted, multidisciplinary treatment program over the course of the next two years;
- thereafter, the plaintiff will be able to work part-time (25% of full-time) in a minimum-wage position; and,
- after a further five years, the plaintiff will be capable of working 50% of full-time of a full-time position until retirement age.

[170] The defendant then "calculate[s] the plaintiff's likely future earnings" to be \$106,400 and thus submits the damages for loss of future earning capacity, as calculated by Mr. Benning, should be reduced by approximately 25%.

[171] Plaintiff's counsel protests that this submission is nothing but speculation and points out that this scenario was not presented to any of the medical witnesses, let alone the plaintiff or her husband. Plaintiff's counsel submits there should be no deduction whatever on account of future part-time earnings by Mrs. Meckic.

[172] Earlier in this judgment, I already rejected the defendant's "most likely future scenarios" for the plaintiff as being unrealistic and highly improbable. I concluded that Mrs. Meckic does not have the physical or cognitive capacity to be competitively employed and that she will never return to full-time employment. I acknowledged the possibility that intensive and lengthy therapeutic intervention might permit Mrs. Meckic to do some sort of volunteering or part-time work in the future, but any such improvement would almost certainly be tenuous in nature and would very likely be subject to physical and emotional setbacks. My earlier assessment was that the chances of any meaningful future improvement in the plaintiff's present medical condition were very low, a maximum of 15% and more likely less than that. I found that the likelihood of her returning to part-time employment in the future is low.

[173] In these circumstances, I conclude that a contingency deduction for the relative likelihood of future part-time employment income is appropriate but must be modest. I thus reduce the plaintiff's claim for loss of future earning capacity by 10%.

4. Cleaning Business Income

[174] Plaintiff's counsel points out, quite correctly, that the Benning report does not include any potential income or positive contingency for the plaintiff's contribution to the family cleaning business. The income from that enterprise was declared on Mr. Meckic's tax return but was put into the family joint bank account. Mr. Meckic speculated that he "could have found an additional \$1,000- \$2000 per month easily" in the past three years if Mrs. Meckic had been available to meaningfully work in the family business. Plaintiff's counsel treats 50% of that amount as the net value of Mrs. Meckic's contribution and applies Mr. Benning's multipliers to produce "an additional future loss of income to the plaintiff of at least \$60,000 to age 65 and \$78,000 to age 70".

- [175] No explanation was provided to the Court for the failure to instruct Mr. Benning to include this aspect of the claim in his assignment. No forensics were produced regarding the profitability of the family cleaning business beyond Mr. Meckic's tax returns.
- [176] Mr. Meckic testified that he substantially increased the number of hours he was working in the family business because he had to replace at least some of the income that his wife was no longer generating from her employment after the accident. However, he also testified that, while they were hoping to expand the business, their pre-accident "goal" was to have more employees and for Mr. and Mrs. Meckic themselves to "work less".
- [177] The evidentiary basis supporting an increase in the "base figure" for loss of future earning capacity calculations is therefore muddled and unclear. Nevertheless, Mrs. Meckic did work in the family business after hours with her husband and, while she was not paid any wage in that regard, her contribution did have, and but for the accident would have continued to have, economic value and should therefore be accounted for in her loss of future earning capacity claim. The conservative value of that probable contribution would be somewhat less than half the pre-accident net income of the business, say, \$4,500 per annum, which, using the Benning economic multiplier of approximately 10, gives rise to a present value of the future economic loss in the amount of \$45,000, an amount that must also be reduced to reflect the modest contingency of possibly improved health that might allow a partial return to work.

5. Pension Loss

- [178] The Benning report includes a detailed calculation of the plaintiff's pension loss by reason of her not being able to continue employment at the Hilton Hotel and obtain the benefit of employer contributions to her pension until her retirement. The loss is calculated to be approximately \$18,000, regardless of whether she retires at 65, 67 or 70. The defendant does not dispute this claim, and I therefore award \$18,000 under this heading.

6. Reconciliation

- [179] The award for loss of future earning capacity in this case therefore breaks down as follows:

Present value of income stream to age 67

\$427,000

Loss of cleaning business income

\$45,000

Less part-time employment contingency (10%)

(\$42,700)

Labour dispute deduction

(\$7,000)

Pension loss

\$18,000

TOTAL

\$440,300

(rounded down to \$440,000)

[180] I therefore award Mrs. Meckic \$436,000 as the present value of her loss of future earning capacity.

XI. Cost of Future Care

A. General Principles

[181] Kallstrom v. Yip summarizes the relevant law governing entitlement to this type of award:

[429] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same, or as narrow as, "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis, despite however much particular items might be recommended by experts in the field; the court should have regard for whether any particular expense will actually be incurred and an allowance can be made for any contingency, any real and substantial possibility, that the cost may not in fact be incurred;

- in motor vehicle cases, given the distinction between mandatory and discretionary benefits under s. 88 of Part 7 of the Insurance (Vehicle) Regulation, BC Reg. 447/83 and the requirement of mandatory deductions under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, it is desirable for the trial court, where possible, to assign specific amounts for each future care item claimed;
- properly considered, homemaking costs are awarded for loss of capacity and are distinct from future cost of care claims; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), [1990] 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), [1990] 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 1996 CanLII 3429 (BC SC), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128; *Sunner v. Rana*, 2015 BCCA 406.

[182] Quantification of claims for future cost of care can be complicated. Pre-trial expenses incurred are classified as special damages and, assuming the costs were reasonably incurred and are reasonable in amount, will usually be compensated in full, including an allowance for pre-judgement interest where appropriate.

[183] The cost of future care and other similar expenses is first divided as between (1) initial capital outlay, and (2) ongoing expenses. The first is calculated as a straightforward lump sum. The second, much like other future pecuniary loss such as earning capacity, is awarded by way of a lump sum representing an amount which, conservatively invested, will produce a stream of income sufficient to cover the future costs when incurred and which fund will be depleted when such costs will no longer be incurred. The calculation involves the application of a "real rate of return" (gross rate of return minus rate of inflation, in British Columbia presently, the 2% rate mandated by the regulation made under section 56 (3)(b) of the Law and Equity Act) grossed-up to deal with taxation of such returns, and adjusted for appropriate contingencies.

[184] Contingencies applicable to damages for cost of future care often warrant separate consideration from those related to future loss of earnings (earning capacity). The inquiry under the two heads of damages has a different focus. Whereas the concern under loss of earnings is mostly into "what would have been but for the accident", the cost of care inquiry is into "what will now occur, as a result of the accident". The exercise is still a manifestation of the "simple probability" standard of proof referred to earlier in this judgment, where possibilities and probabilities are weighted according to the degree of likelihood of their occurrence.

[185] The contingency inquiry takes into account the real and substantial possibility that the estimated future care expenses will not in fact be incurred, as well as the possibility that they might actually be more than the original assessment contemplated. In many cases, the negative and positive contingencies specific to the plaintiff may counterbalance each other. It is also not uncommon for competing possibilities to be accommodated in the initial calculations which are almost always just a "best estimate" of the plaintiff's future needs in any event.

[186] In British Columbia, once all of the above complicated assessments and calculations have been performed, the award for future care expenses is then further adjusted to account for a statutory deduction mandated by section 83 of the Insurance (Vehicle) Act. That section provides for a "deemed release" by the plaintiff to the extent she "receives or is entitled to receive benefits respecting the loss on which the claim [for damages] is based". The term "benefits" is defined in the Act to include:

- first party no-fault benefits paid or payable by ICBC to the plaintiff for health care, rehabilitation and related expenses; and,
- similar benefits provided under (1) other insurance policies, (2) certain specified programs offered by both levels of government, and (3) also under the terms and conditions of any employment or collective bargaining agreement.

This legislation can significantly reduce the amount of future care damages that would otherwise have been awarded by the court under common law principles governing the assessment of damages for personal injury. Instead of being awarded a larger lump sum amount of money which the plaintiff would otherwise control, the plaintiff ultimately receives not only a lesser sum but is also required to deal with ICBC, potentially for the rest of her life, in respect of various aspects of her ongoing healthcare, medical treatment and rehabilitation expenses.

[187] The statutory deduction mandated by section 83 of the Insurance (Vehicle) Act is usually resolved by the parties directly or, if necessary, by way of a further application to the court before any final judgement is formally entered.

[188] The process often renders moot significant portions of the court's assessment of future care damages (and the related judicial effort in that regard).

B. Parties' Submissions

[189] Counsel for the plaintiff argues that:

- medical experts were not expressly challenged by the defence on the therapies or care items that they recommended and, absent any such challenge, any defence criticism of such matters in an attempt to reduce the damage award should be rejected; and,

· the report of the occupational therapist, Ms. Townsend, assesses the actual cost of the care recommended by the medical experts and, subject to certain proposed adjustments, the lump sum present value of the plaintiff's future cost of care as calculated by Mr. Benning (\$380,672) should be accepted and awarded by the Court.

[190] In final argument, the plaintiff decided not to pursue the claim for Botox. The claim was questioned by the defence because of the plaintiff's pre-existing migraine condition which was already being treated by Botox. The proposed annual amount formerly claimed by the plaintiff was \$3,200, the present value of which over the plaintiff's lifetime was approximately \$76,000.

[191] However, the plaintiff seeks an amount for future occupational therapy costs that is significantly higher than that recommended in the Townsend report. The service relates to medical case management along with functional support of physical and psychological improvements, should they occur. Ms. Townsend recommended two years of service but in closing argument, plaintiff's counsel suggested that the duration should be extended to 10 years, given the severity of the plaintiff's psychiatric symptoms. This would increase the present value of the claim from approximately \$8,500 set out in the Benning report to \$28,000.

[192] For their part, defence counsel submits that the plaintiff's cost of future care plan "is rife with over-programming, excessive modalities of care, and is not practical". Thereafter, the defendant purports to "accept" certain treatments/costs and "reject" others, in some instances based on the defence's assessment of "the plaintiff's likely future recovery after two years", a scenario I have already rejected.

[193] After allocating what they consider to be the appropriate amounts under the appropriate headings, defence counsel submits future care expenses are "justified" in the total amount of \$61,886, however, in light of uncertainties and contingencies, they "suggest that a total cost of future care award not exceeding \$100,000 would be appropriate". They also ask this award "be broken out by specific items, including number of treatments or home assistance visits and hourly or unit costs for treatment providers" without suggesting any specifics in that regard.

C. Determination

[194] The rather casual approach adopted by both parties to the question of future care costs is rather unsatisfactory. Neither party has assisted the Court with the more disciplined approach now required by the Court of Appeal trilogy of cases referred to above, particularly insofar as identifying contingencies is concerned and assessing the relative likelihood of those real and substantial possibilities materializing. Furthermore, almost all of the items sought in respect of future care are the type that will trigger the "deemed release" provisions of the Insurance (Vehicle) Act, and any effort by the Court to quantify damages in accordance with the common law is likely to be cast aside at the second phase

of these proceedings.

- [195] I will deal separately with each category of future care costs identified by Ms. Townsend in her report and also reflected in Mr. Benning's present value calculations.
- [196] All of the "medical interventions/assessments" listed in the Townsend report are covered by MSP with the exception of certain possible costs related to tinnitus and vestibular physiotherapy. The plaintiff does not seem to be pursuing these latter items in their final submissions and I am inclined to agree with the defence that they are too speculative in nature in any event.
- [197] Regarding "physiotherapy", this treatment was specifically recommended by Dr. Purtzki and Ms. Townsend indicates this would be an annual requirement, albeit one tapering in later years. The defence "accepts" physiotherapy, but only for two years and at a total cost of \$1080 a proposition I reject for the reasons stated earlier. Mr. Benning calculates the present value of the anticipated annual expense over the balance of the plaintiff's lifetime to be \$12,810, but he concedes that any tapering off of the treatment would obviously decrease that estimated amount.
- [198] As with all therapies, triaging is required by the plaintiff's family physician or an occupational therapist to ensure appropriate modality and frequency, and it is the Court's expectation that ICBC will follow (and fund) their recommendations for as long as they are required by the plaintiff. Nevertheless, for the purposes of present assessment and even though the approach is admittedly somewhat arbitrary, I reduce Mr. Benning's present value to \$8,000 to account for the contingency of reduced frequency/need as time goes by.
- [199] Regarding "kinesiology/activation", I accept Ms. Townsend's recommendations and Mr. Benning's present valuation at \$5,400 for kinesiology and \$4,000 for gym membership, respectively. The services of a specialized kinesiologist/trainer experienced with the gentle rehabilitation of patients with complex symptomology, including psychiatric/psychological limitations, are specifically required as a direct result of the plaintiff's negligence and are different from the plaintiff's pre-accident recreational activities.
- [200] Regarding "psychological counselling", I note the defence "accepts" all three categories (direct counselling, couples counselling and driver desensitization) are required, but challenges any necessity beyond two years with respect to direct counselling and certain costs with respect to the desensitization program. I reject the defence submissions in this regard, as I consider all of the services to be particularly necessary for the plaintiff and the costs claims I find to be reasonable. However, it is not at all clear on the evidence that the plaintiff will require monthly sessions of direct counselling for the rest of her life (the basis of Mr. Benning's present value of \$60,000) and given these uncertainties, I would apply a contingency reduction in the amount of 50% to award the sum of \$30,000 in that regard.

- [201] Regarding "neuropsychological assessment", I agree with Dr. Purtzki that, given Mrs. Meckic's severe levels of psychological/psychiatric impairment, such a diagnostic undertaking would not be productive. I make no award under that heading.
- [202] Regarding "occupational therapy", I note the defence "accepts" the costs and duration recommended by Ms. Townsend totalling approximately \$8,500 for the two year period following trial. However, I also agree with plaintiff counsel that a longer period of case management and functional assistance will almost certainly be required. There are many unknowns in that regard, particularly insofar as the role of Mrs. Meckic's family physician is concerned but, given the nature and severity of the plaintiff's disabilities, I accept the submission that 10 years is a more appropriate timeframe. The present value of OT expenses for the entire 10 year period would be approximately \$28,000 but I would reduce this to \$21,000 to reflect a 25% contingency that the requirement for such assistance may diminish over time and disappear earlier than the projected 10 year period.
- [203] Regarding medication, I note the claim for Botox is no longer pursued and I agree with the defence that the cost of possible alternative medication is not appropriate. I do find, however, that the cost of all four of the plaintiff's current medications is appropriately claimed for the rest of the plaintiff's life, and I accept the present values of such medications as indicated in the Benning report in the aggregate amount of \$24,000 (rounded up).
- [204] With respect to "homemaking services," Dr. Purtzki recommends a homemaker once a week for general cleaning as well as someone to prepare a meal three times a week for dinner for the first two years after trial. Thereafter she recommends housecleaning support twice a month, intermittent yardwork support and ongoing once to twice weekly meal support for dinners.
- [205] The defence agrees with these recommendations but objects to any support beyond the plaintiff's "likely future recovery after two years" (again, a proposition that I have rejected). Based on Ms. Townsend's figures, Mr. Benning has calculated the present value of the support to age 80, to be the aggregate sum of \$176,000.
- [206] Given the likely permanent nature of the plaintiff's physical and mental disabilities, the likelihood of any recovery significant enough to render homemaking services unnecessary is very low, particularly as Mrs. Meckic ages, and only a modest contingency reduction is warranted. In that regard, I reduce the homemaking award to the aggregate sum of \$160,000.
- [207] In summary, the plaintiff is awarded the following amounts for the cost of future care:

Physiotherapy

\$8,000

Kinesiology

\$9,500 (rounded up)

Psychological Support

\$30,000

Occupational Therapy

(Case management & functional support)

\$21,000

Medication

\$24,000

Homemaking Services

\$160,000

TOTAL

\$252,500

[208] As noted earlier, the above award is subject to a gross up for tax but also a (likely significant) reduction on account of the "deemed release" provisions of section 83 of the Insurance (Vehicle) Act. If the parties are unable to agree on these items, they may apply to the court for a determination in that regard.

XII. Loss of Housekeeping Capacity

[209] Plaintiff's counsel submits that the plaintiff has lost housekeeping capacity and that she is entitled to compensation as a consequence. He acknowledges that some cases consider this loss of amenity as an aspect of non-pecuniary general damages and also that there is a trend for lost housekeeping capacity awards to be in a nominal amount when monies have also been awarded under cost of care for housekeeping assistance.

[210] It is not clear whether the plaintiff is actually seeking an additional sum for loss of housekeeping capacity, as no cases were presented for review nor is any specific amount actually claimed in the plaintiff's submissions.

[211] Counsel for the defendant submits that any award for loss of housekeeping capacity should be subsumed in the award of non-pecuniary damages in this case and that a separate award might well amount to double recovery where the cost of future care award has included an amount for past and future housekeeping services.

[212] I agree with the defence submissions on this point and would advise the parties that I have expressly included the plaintiff's loss of housekeeping capacity as a factor increasing the award of non-pecuniary general damages in this case. Hence, assuming a separate claim is actually being advanced for such loss of capacity, I decline to make any further award in that regard.

XIII. "In-Trust" Award

[213] The parties agree that the Court has jurisdiction to make an in-trust award as a separate head of damages to compensate any individual who provides to the injured plaintiff care and services such as housework, nursing and other assistance made necessary by the plaintiff's injury. The claim is usually brought on behalf of family members providing the assistance and support but in-trust awards can also be made to non-family members.

[214] Generally speaking, the requirements for making such an in-trust award include the following:

- the assistance provided must be necessary for the care of the plaintiff as a result of her injuries;
- the services must be over and above what might be ordinarily expected from a family member or friend;
- quantification of the award should reflect the true and reasonable value of the services performed, taking into account the time required and the quality and nature of the work;
- the maximum value of such services will generally be the cost of obtaining them from a professional third-party service provider; and,
- it is not necessary for the person providing the services to have foregone other income in order to qualify for an award.

[215] In the present case, an in-trust award is claimed both for the plaintiff's relatives from Bosnia who visited for six months and also for the plaintiff's friend, Ms. Luu, who for the last 3 and a half years has provided almost daily assistance to the plaintiff with housecleaning, meal preparation and even personal hygiene tasks such as bathing and dressing.

[216] The defendant opposes any in-trust award. Counsel submits "standard compassion and care of relatives or friends are not to be compensated" but only extraordinary services provided by such persons, and then only at a reasonable cost. They argue, quite correctly, that there was virtually no evidence in this case as to any assistance actually provided by the plaintiff's brother and sister-in-law during their six-month visit. With respect to Ms. Luu, they note "she has the benefit of living rent-free with the Meckics and she is fairly compensated for any services provided by that arrangement".

- [217] I generally agree with the defendant's submission regarding the plaintiff's brother and sister-in-law, however, I strongly disagree with their submission respecting Ms. Luu. The latter testified as to the nature and extent of the services she provided, none of which was required in any of the years before the accident that she was living in the Meckic household. Her contribution was extensive, selfless, and most deserving of compensation. Except when she was away travelling following her retirement and except also for the time that the plaintiff's family was visiting from Bosnia, Ms. Luu provided hours of assistance to the plaintiff and her household every day cooking, cleaning and helping Mrs. Meckic with personal care.
- [218] It is no answer to the claim to say that Ms. Luu has been living rent-free with the Meckics for many years. Such kindness may well have been at least part of Ms. Luu's motivation to provide assistance after the plaintiff sustained injury but there was no legal requirement for her to do so and there was no such expectation by the Meckics.
- [219] I agree with the submission of plaintiff's counsel that Ms. Luu has essentially been working as a "homemaking service" for Mr. and Mrs. Meckic since the accident, and that some compensation for such selfless contribution is warranted. Counsel points out that professional homemaking service providers are being paid in the range of \$10,000-\$14,000 for such assistance as part of the cost of future care award in this case and it would therefore be appropriate to make an in-trust award for Ms. Luu of at least \$30,000.
- [220] The amounts suggested by counsel reflect gross rates which obviously include a profit component over and above whatever wage might actually be received by individual providers. A somewhat more modest amount would better reflect Ms. Luu's personal circumstances while also rewarding her kindness and hard work. I therefore make an in-trust award for Ms. Luu's benefit in the amount of \$20,000.

XIV. special damages

- [221] Plaintiff counsel prepared a schedule of special damages, together with supporting documentation for most of the expenses claimed. The schedule substantiates expenses of at least the \$16,123.35 claimed, an amount that excludes items actually incurred and paid, but which were abandoned in an effort to reach a compromise with the defence. The abandoned amounts included some \$1,800 for adult diapers (the plaintiff is frequently incontinent when agitated) and a \$2,600 bill pay for the restoration of the Meckics' long-abandoned garden which had formerly been maintained by Mrs. Meckic. The abandoned amounts are ones I consider to be properly collectible as special damages.
- [222] The defence did not accept the proposed compromise and maintains further objections to certain items on the schedule, including:
- \$3,500 paid to fly Mrs. Meckic's brother and sister-in-law to Vancouver to provide some respite to Ms. Luu;

- non-prescription and over-the-counter pain medication estimated to be approximately \$700 over the past three years but for which there are insufficient supporting receipts;
- housecleaning expenses totalling approximately \$1,100; and,
- meal preparation expenses charged by Mr. Gbedze from July to September 2021 and the amount of \$1,400.

[223] I have no intention of performing some sort of forensic analysis on the reasonableness and adequacy of these expenses. In my view, they all qualify as special damages and appear both reasonable in amount and reasonably incurred, with the possible exception of the cost of flying extended family members to Vancouver from Bosnia (and even then, some portion of that expense might well be recoverable).

[224] I award the plaintiff \$16,500 as special damages, which includes an allowance for prejudgment interest.

XV. summary and conclusion

[225] For the reasons stated I award the plaintiff damages against the defendant in the following amounts:

Non-Pecuniary Damages

\$190,000

Past Loss of Earning Capacity

\$85,000

Future Loss of Earning Capacity

\$440,000

Cost of Future Care

\$252,500

"In-Trust" Award for Ms. Luu

\$20,000

Special Damages (Including PJI)

\$16,500

TOTAL

\$1,004,000

- [226] Should the parties be unable to agree on any adjustments to the award mandated by the provisions of the Insurance (Vehicle) Act, they may file an application before me for determination of the matter. Any such application, including supporting affidavits and written submissions, must be filed no later than 60 days following the date of this judgement.
- [227] Should anything have occurred between the parties that might affect any award of costs in this case, the parties may make written submissions in writing on the matter also no later than 60 days from the date of this judgement. Otherwise, costs will follow the event and are awarded to the plaintiff to be assessed on the Scale B of Appendix B of the Supreme Court Civil Rules.

"Kent, J."

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