
CANADA / JUDGMENT

Ngo v. Fong

2020 BCSC 624

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2020 BCSC 624 Ngo v. Fong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ngo v. Fong,

2020 BCSC 624

Date: 20200423

Docket: M177869

Registry: Vancouver

Between:

Thi Thanh Kim Ngo

Plaintiff

And

Top You Fong

Defendant

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

March 2-6 and 9-13, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 23, 2020

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I. introduction

- [1] On October 5, 2015, Thi Than Kim Ngo was walking in the crosswalk at the intersection of Salisbury Avenue and Arcola Street in Burnaby, B.C., when she was struck by a vehicle driven by the defendant (the "Accident"). Liability has been admitted by the defendant and the matter proceeded to trial on the issue of damages only.
- [2] As a result of the Accident, the plaintiff suffered a traumatic brain injury, a lacerated liver, fourth nerve palsy in her left eye, and soft tissue injuries to her back, neck and knee. She claims she is significantly disabled as a result of the defendant's negligence and she sues for non-pecuniary damages, loss of future earning capacity, cost of future care and special damages.
- [3] While the defendant concedes that Ms. Ngo continues to suffer from a traumatic brain injury and ongoing diplopia in her left eye, the defendant argues that Ms. Ngo has had a fairly good recovery overall. The defendant submits that many of Ms. Ngo's complaints at trial are the result of her post-partum depression, marital stress and other factors unrelated to the Accident. The defendant argues that Ms. Ngo's ongoing cognitive and physical symptoms are very mild, were not caused by the Accident and do not affect her overall functioning.

II. The Plaintiff's circumstances before the accident

- [4] Ms. Ngo was born in Vietnam on January 1, 1989. She studied civil engineering at the Vietnam National University - Ho Chi Minh City - University of Technology ("University of Technology"). Her husband, Viet Tran, attended the same school. The plaintiff and Mr. Tran testified that the University of Technology was the top engineering school in Vietnam. Mr. Tran described the university as having extremely high admission standards and a high failure rate amongst its students.

- [5] Ms. Ngo had to repeat many courses at university but she ultimately obtained her bachelor's degree in civil engineering in 2014. She worked as a civil engineer in Vietnam for close to a year before moving to British Columbia in late 2014 to start her life with Mr. Tran.
- [6] Ms. Ngo met Mr. Tran in 2007 when he was her instructor at the University of Technology. After studying in Vietnam, Mr. Tran obtained a PhD in civil engineering at McGill University, then moved to the Lower Mainland in 2013 to take a job at an engineering firm. In February 2013, Ms. Ngo and Mr. Tran commenced a long-distance romance. By January 2014, they were married in a civil ceremony, with a formal wedding celebration taking place in Vietnam in December 2014.
- [7] Shortly after their formal wedding in December 2014, Mr. Tran sponsored Ms. Ngo to immigrate to Canada and they settled in Burnaby.
- [8] Ms. Ngo and Mr. Tran both testified that Ms. Ngo's long-term plan was to qualify to work as a civil engineer in Canada. At the time of the Accident, about ten months after her move to Canada, Ms. Ngo had not started any kind of paid employment. She was taking English courses with a plan to improve her language skills before entering the job market. She testified that she intended to become proficient in English, obtain relevant work experience, and then undertake the professional engineering qualification exam so that she could work as a civil engineer in Canada.
- [9] The defendant argues that there is uncertainty about whether Ms. Ngo would have pursued her goal to be a civil engineer had the Accident not occurred. The defendant notes that civil engineering is a demanding, male dominated profession, it is competitive to find work, and Ms. Ngo's university grades were poor with multiple failed and repeated classes. As such, the defendant submits that it is unlikely that the plaintiff would have ultimately worked as a civil engineer in Canada.
- [10] I cannot agree with the defendant on this point. Ms. Ngo completed an engineering degree at an elite post secondary institution in Vietnam. She worked for almost a year as a civil engineer before moving to Canada. Her husband successfully transitioned from civil engineering in Vietnam to civil engineering in Canada and together, they had a plan to ensure that Ms. Ngo would do the same. There is every reason to believe that this plan would likely have been successful had the Accident not occurred.
- [11] Prior to the Accident, Ms. Ngo was an active person. She went to the gym 3-4 days a week. She made friends quickly in Canada and developed a social network. During the short time that they lived together before the Accident, Ms. Ngo looked after all domestic responsibilities for herself and Mr. Tran, including cooking, laundry, grocery shopping and cleaning.

III. The Accident

- [12] Ms. Ngo was struck while walking across the street in a marked crosswalk on October 5, 2015.
- [13] James Trudell witnessed the Accident. He found Ms. Ngo lying in a prone position approximately ten meters from the crosswalk where she was struck. She was unconscious when he first saw her, and she started convulsing before the first responders arrived.
- [14] The fire department incident detail report describes the plaintiff as lying supine and "incoherent". The ambulance report establishes that, at the time she was assessed by paramedics, Ms. Ngo had a Glasgow Coma Score ("GCS") of 11 out of 15. She was reassessed ten minutes later and her GCS was 14.
- [15] Ms. Ngo was admitted to Royal Columbian Hospital where she remained for three days. While she was in the hospital, a CT scan was taken of her head. The scan showed bilateral subdural hematomas. She was also diagnosed with fourth nerve palsy in her left eye and a lacerated liver.
- [16] Ms. Ngo had a period of amnesia surrounding the Accident. She appears to have no recollection of certain events that took place before the Accident, has no recollection of the Accident itself and has only some recollection of events that took place for a period of about a month after the Accident.

IV. The Plaintiff's Circumstances After the Accident

- [17] Since the Accident, Ms. Ngo has complained of left knee pain, headaches, diplopia in her left eye, dizziness and severe cognitive, mood and anxiety issues.
- [18] With respect to the diplopia, Ms. Ngo testified that she has double vision whenever she looks up and to the left. Also when she is tired, she gets double vision when she looks straight ahead. Notwithstanding her diplopia, Ms. Ngo was able to obtain a driver's license subsequent to the Accident.
- [19] The plaintiff also describes ongoing issues with dizziness, headaches and lack of concentration. This limits her ability to read and to concentrate on any task for a long period of time.
- [20] Ms. Ngo's life has been significantly affected by the cognitive problems she has suffered from since the Accident. Her memory has been particularly affected. She carries a notebook with her to write down things she does not want to forget and she keeps a schedule on her phone. Despite these coping strategies, she often misses appointments. She finds herself, in both home and work contexts, asking the same question repeatedly.

- [21] In January 2016, about three months after the Accident, Ms. Ngo returned to her full-time English studies. She took English courses from January to March 2016, and went on a three week trip to visit family in Vietnam in the spring of 2016. She attended another course of full-time English studies from May 2016 to August 2016. She then applied for and attended a full-time pastry making course at the Northwest Culinary Academy from September to December 2016.
- [22] Ms. Ngo testified that, before the Accident, she did not plan to have children until she had established her civil engineering career in Canada. After the Accident, her extended family began pressuring her to get pregnant, on the theory that having a baby to look after might alleviate the low mood and anxiety she had been suffering from since the Accident.
- [23] The matter of whether or not to have children was a source of great conflict between Ms. Ngo and Mr. Tran in 2016, and it was not helped by the pressure they were under from their parents. At one point, the conflict reached a point where Ms. Ngo suggested divorce. Ultimately, they decided not to separate and Ms. Ngo became pregnant in the summer of 2016. Her son was born in April 2017.
- [24] In March 2018, Ms. Ngo started her first job in Canada, working as a baker at Solodko Ukrainian Bakery. This job only lasted a few months. The circumstances of this job are illustrative of the types of challenges Ms. Ngo presently faces in a workplace. She testified that she had trouble keeping up with the required pace of work and, more importantly, remembering the required steps in the recipes she had to make. She did not inform her employer of her injuries and instead she tried to compensate by writing down very simple recipes. Her employer required her to memorize ingredients and baking temperatures and, because she was unable to remember these things, she made mistakes which led to criticism from her employer. This criticism ultimately caused her to leave the job.
- [25] In June 2018, she started working as a baker at Railtown Café. This job appears to have been a better fit for the plaintiff than her prior baking job. She worked there for eight hours a day, four days a week until March 2019. At the time of trial, she was no longer working regular hours at Railtown Café, but she continued to pick up occasional shifts.
- [26] The plaintiff testified that she liked working at Railtown Café and found it to be a supportive work environment, but it was not without its challenges. Sometimes she would ask a co-worker the same question three or four times, and she continued to make a fair number of mistakes. She found the physical and emotional strain of working an eight-hour day to be manageable, but at the price of being too tired when she got home to participate in the care of her son, or to do anything except rest when she was not working.
- [27] Ms. Ngo's manager at Railtown Café, Andy Shea, testified that she made more mistakes than most employees, and she had to write notes to herself in order to remember basic work tasks. He noted that her performance improved, and she made fewer mistakes, over the time that she worked for him.

- [28] Since January 2019, and continuing to the date of trial, Ms. Ngo has been taking English and computer courses at the British Columbia Institute of Technology.
- [29] In the fall of 2019, Ms. Ngo became very depressed. Many of the experts who prepared reports for this trial assessed Ms. Ngo while she was depressed and before she had received treatment for her depression. Since she has received treatment, some of her depression symptoms have improved.
- [30] Ms. Ngo and her husband testified about Ms. Ngo's emotional instability and how it affects their life at home. Ms. Ngo described herself, post-Accident, as "too emotional" and she described a number of instances of attempted self-harm. This included Ms. Ngo banging her head against a wall, cutting her wrists and at one point trying to jump off the apartment balcony during an argument with Mr. Tran.

V. The Plaintiff's injuries

- [31] There were many expert reports tendered in this case. For the most part, the experts on both sides agree that Ms. Ngo suffered a moderate, or a complicated mild, traumatic brain injury ("TBI") in the Accident. They also mostly agree that she currently suffers from depression, knee pain and difficulties with concentration and memory. However, the cause of those problems is disputed amongst the experts, as is Ms. Ngo's prognosis.

- [32] The parties called the following medical experts:

Plaintiff

Defendant

Psychiatrist

Dr. Stephen Anderson (February 3, 2019)

Dr. Paul Janke (December 5, 2019 and January 8, 2020)

Neurologist

Dr. Donald Cameron (January 4, 2019 and September 17, 2019)

Dr. Rehan Dost (July 10, 2019)

Family Doctor

Dr. Andrew Wong (October 20, 2019)

Physiatrist

Dr. Rosemary Nairn Stewart (July 2, 2018)

Neuro-Ophthalmologist

Dr. Briar Sexton (September 30, 2019)

Orthopaedic Surgeon

Dr. Bassam Masri (October 11, 2019)

[33] The parties tendered the following non-medical expert reports:

Plaintiff

Defendant

Occupational Therapist

Julia Dao (October 21, 2019) and Dionne Sellick (November 12, 2019 and November 26, 2019)

Chris Nguyen (November 21, 2019)

Vocational Consultant

Alex Jackson (November 15, 2019)

Dr. Colleen Quee Newell (November 20, 2019 and January 10, 2020)

Neuropsychologist

Dr. James Schmidt (October 29, 2018)

Economist

Mark Szekeley (December 4, 2019)

[34] I have reviewed and considered all of the expert reports. Not surprisingly, given the nature of most of Ms. Ngo's injuries, the expert reports heavily rely on the subjective reporting of Ms. Ngo. The defendant has focussed on Ms. Ngo's subjective reporting, and particularly inconsistencies in her reporting about her symptoms at different times to different experts, to impugn her credibility and reliability. I will deal with this in a separate section below. For the purposes of considering the expert evidence, I will address the broad areas of agreement and disagreement as amongst the experts.

A. Moderate or Complicated Mild Traumatic Brain Injury

[35] All experts qualified to opine on the brain injury suffered by Ms. Ngo agreed that she suffered a TBI in the Accident. While Drs. Wong, Stewart, Schmidt, Dost and Anderson diagnosed a moderate TBI, Dr. Janke diagnosed a complicated mild TBI and Dr. Cameron opined that the injury suffered by Ms. Ngo could be either a moderate or a complicated mild TBI. Dr. Cameron explained that there is no difference in outcomes between a moderate and a complicated mild TBI. Because there is no difference in outcomes, the categorization of the TBI as moderate or complicated mild has little bearing on the damages assessment in this case. However, to the extent it is necessary for me to do so, I prefer the opinion of the majority of experts, including one of the defendant's own experts (Dr. Dost), that Ms. Ngo suffered a moderate TBI.

- [36] Dr. Cameron opined that Ms. Ngo has developed symptoms of post traumatic brain injury syndrome. He found her symptoms had improved over time but had not resolved, as evidenced by her day to day cognitive problems. He attributed her decreased memory and concentration, mood swings, disturbed sleep, dizziness, headaches and other mental and emotional problems to her post traumatic brain injury syndrome.
- [37] After reviewing an MRI scan of Ms. Ngo's brain, Dr. Cameron provided an addendum to his report. In his addendum, Dr. Cameron noted that the MRI imaging, which shows a hemorrhagic shear injury to Ms. Ngo's frontal lobe, reinforced his opinion that Ms. Ngo had suffered a complicated mild or a moderate TBI.
- [38] The experts who opined on Ms. Ngo's TBI (Drs. Wong, Stewart, Schmidt, Anderson, Cameron, Janke and Dost) were in agreement that a complicated mild or a moderate TBI could lead to cognitive, emotional and behavioural difficulties. However, there were differences amongst the experts as to the extent to which Ms. Ngo ever suffered or currently suffers from these symptoms and whether they are attributable to the TBI.
- [39] The primary difficulties described by Ms. Ngo related to the TBI are depression and anxiety, poor concentration and memory, and headaches.

1. Depression and Anxiety

- [40] Drs. Anderson and Janke, the two psychiatrists, agreed that Ms. Ngo has suffered and continues to suffer from depression.
- [41] Dr. Anderson primarily attributed Ms. Ngo's depression to adjustment factors post-Accident and the residual effect of her brain injury. He diagnosed Ms. Ngo with a mild neurocognitive disorder ("NCD") due to the TBI. With respect to the emotional difficulties associated with NCD he opined that:

Common emotional difficulties include irritability, reduced frustration tolerance, mood lability, anxiety and depressive symptoms.

- [42] Dr. Anderson found that Ms. Ngo's present "depressive symptoms" overlap with symptoms that can result from NCD, anxiety and pain. However, he also found that her depressive symptoms were more severe than one would expect if solely due to NCD and he diagnosed her with a moderately severe major depressive disorder as well as a moderately severe generalized anxiety disorder.
- [43] Dr. Anderson opined that the NCD, the major depressive disorder and the generalized anxiety disorder were likely caused by the Accident. He was pressed on cross-examination on this point and asked whether, given the number of stressors in Ms. Ngo's life, such as her new marriage, distance from her family and support network, and her reluctance about starting a family, the depression she suffered from might have happened irrespective of the Accident. Dr. Anderson did not agree. He opined that Ms. Ngo was unlikely to have suffered from depression or anxiety had the Accident not occurred. He noted that she had lived a

happy, mentally healthy life pre-Accident, and that the MRI scan showed that she had permanent brain damage from the Accident, further supporting his opinion that her mood disorder was caused by the Accident.

- [44] Dr. Janke was also of the view that Ms. Ngo may have suffered from mild NCD, but he opined that it had mostly resolved by the time he met with her in October 2019. He opined that Ms. Ngo had post partum depression arising after the birth of her son. However, he also opined that "overall Ms. Ngo was experiencing residual symptomatology arising from the effects of the motor vehicle accident."
- [45] Dr. Janke's opinion is brief and somewhat lacking in detail in terms of analysis. However, he does not directly challenge any of the conclusions in Dr. Anderson's more fulsome report, with the exception of Dr. Anderson's conflation of post-concussion syndrome symptoms with Ms. Ngo's vestibular injury and fourth cranial nerve injury. In terms of Dr. Anderson's conclusions about Ms. Ngo's psychiatric condition, Dr. Janke appears either to be in agreement, or he makes no comment.
- [46] Dr. Janke does not appear to have directly considered whether Ms. Ngo was suffering, or had suffered from, a major depressive disorder or a generalized anxiety disorder arising from the Accident. The only reference to depression in his report is his opinion, based on Ms. Ngo's self reporting, that Ms. Ngo had post partum depression after the birth of her son. Whether or not Ms. Ngo had post partum depression after the birth of her son is not determinative of whether she suffers from depression or anxiety, or both, as a result of the Accident. I therefore do not find that Dr. Janke's report contains any opinion that would call into question Dr. Anderson's diagnosis of depression and anxiety, in addition to the mild NCD.
- [47] In terms of prognosis, Dr. Janke is more optimistic than Dr. Anderson about Ms. Ngo's likely recovery with treatment.
- [48] With respect to Ms. Ngo's long-term prospects for recovery, I prefer the opinion of Dr. Anderson to the opinion of Dr. Janke on the basis that Dr. Anderson expressly considered and opined on the question of whether Ms. Ngo suffers from a mood disorder as a result of the Accident. Dr. Janke's report simply does not contain sufficient analysis or consideration of Ms. Ngo's depression and anxiety symptoms for the court to confidently rely on Dr. Janke's conclusion that Ms. Ngo will likely recover in a relatively short time with treatment.
- [49] I have separately considered the differing opinions of Dr. Anderson and Dr. Janke with respect to Ms. Ngo's future dementia risk in the context of her cost of future care claim below.

2. Concentration and Memory

[50] Dr. Schmidt, the neuropsychologist, administered a number of standardized psychological and neuropsychological tests. He also interviewed Ms. Ngo and her husband. He concluded the following:

- a) Ms. Ngo's basic intellectual abilities fall in the high average and possibly the superior range.
- b) Ms. Ngo had significant weaknesses in processing speed and difficulty sustaining her attention over time.
- c) Ms. Ngo had no difficulty learning visual information but showed very poor retention of what she learned.
- d) Ms. Ngo suffered a "neuropsychologically significant" TBI in the Accident which has had an impact on her cognitive, emotional and behavioural functioning.

[51] I accept Dr. Schmidt's opinion with respect to the impact of the accident on Ms. Ngo's cognitive abilities. There is no evidence that she was cognitively impaired prior to the Accident. She graduated from a top university and worked in a demanding job before moving to Canada. After the Accident, she had two bakery jobs and in both, her work performance was impaired by her cognitive difficulties. There can be no question that Ms. Ngo's cognitive abilities have been compromised as a result of the injuries she suffered in the Accident.

3. Headaches

[52] While a number of experts testified about ongoing headaches suffered by Ms. Ngo, likely attributable to her TBI, it does not appear that the headaches are particularly severe. Dr. Dost recommended nortriptyline and Botox to manage headache pain, however Ms. Ngo herself testified that she successfully manages the pain from her headaches with Tylenol. Dr. Wong also testified that Tylenol was sufficient for managing Ms. Ngo's chronic headaches.

B. Diplopia

[53] Ms. Ngo suffers from ongoing intermittent diplopia, or double vision, in her left eye. Dr. Sexton opined that the Accident is the most likely cause of this visual disturbance and it is unlikely to resolve. While Dr. Sexton opined that Ms. Ngo is limited from driving as a result of her visual impairment, it is notable that she obtained her driver's licence after the Accident.

C. Knee Pain

[54] Drs. Wong and Stewart both opined that Ms. Ngo suffered soft tissue injuries to her left knee in the Accident. Dr. Masri, the orthopaedic surgeon, diagnosed Ms. Ngo with iliotibial band tendonitis, caused by the Accident. He recommended a fairly rigorous treatment protocol, including physiotherapy and active rehabilitation with a trainer. He recommended prolonged supervision of this rehabilitation by a kinesiologist because of Ms. Ngo's cognitive

difficulties. Ultimately, he was of the opinion that "the prognosis is very good" and he expected Ms. Ngo's left knee pain to resolve.

VI. Functional Capacity

[55] Functional capacity reports were prepared by two occupational therapists: Julia Dao and Chris Nguyen.

[56] Ms. Dao is Ms. Ngo's treating occupational therapist. She performed a functional capacity evaluation of Ms. Ngo on October 8, 2019. Ms. Dao found that Ms. Ngo suffered from the following functional limitations:

- a) difficulty reading for more than 40 minutes at a time;
- b) difficulty with repetitive neck movements and prolonged neck flexion;
- c) weak grip strength;
- d) issues with manual dexterity;
- e) problems with performing repetitive tasks that involve balance;
- f) problems with prolonged dynamic standing or prolonged walking;
- g) difficulty with crawling due to pain in her left knee; and
- h) difficulty with tasks requiring repetitive reaching, kneeling, crouching, bending, twisting, lifting or carrying.

[57] Ms. Dao made a number of treatment recommendations for Ms. Ngo, including seeing an ophthalmologist, vestibular therapy for her dizziness, psychotherapy for her depression, physiotherapy and active rehabilitation.

[58] A functional capacity evaluation was also performed by Mr. Nguyen, a kinesiologist and functional capacity evaluator, on October 28, 2019. Mr. Nguyen's functional capacity evaluation analyzed the physical demands for specific occupations according to the National Occupational Classification values and compared them to the abilities demonstrated by Ms. Ngo in the tests administered by Mr. Nguyen. He found that there was a functional match between the demonstrated physical abilities of Ms. Ngo and the physical demands of a civil engineer. He also found a functional match between Ms. Ngo's physical abilities and the physical demands of a baker. He concluded that Ms. Ngo is competitively employable in the workforce for the occupations she has done in the past, and for those she aspires to.

[59] Mr. Nguyen's report is limited to evaluating Ms. Ngo's physical abilities. He is clear in his report, and readily admitted on cross-examination, that his report does not consider the mental, emotional or cognitive demands of any particular job, nor does it consider any mental, emotional or cognitive challenges suffered by Ms. Ngo that might impact her job performance.

- [60] The primary difference between Mr. Nguyen's report and Ms. Dao's report is that Mr. Nguyen based his findings almost solely on the functional capacity evaluation tests results. However, Ms. Dao's report, while also grounded in the results from the tests she performed, contains conclusions and opinions derived from the subjective reporting of Ms. Ngo. As Ms. Ngo's treating OT, Ms. Dao knows Ms. Ngo and has a deeper understanding of the day to day issues faced by Ms. Ngo. However, it is difficult to reconcile the objective test results with some of the conclusions in Ms. Dao's report. For example, Ms. Dao concludes that Ms. Ngo has difficulties with her vestibular system. This is based on Ms. Ngo's reporting of dizziness. However, Ms. Ngo scored 55/56 on the Berg Balance Test, which suggests that she has no issues with respect to her balance.
- [61] Overall, Ms. Ngo did well on most of the objective functional capacity tests administered by Ms. Dao, as she did on those administered by Mr. Nguyen. However, Ms. Dao concluded that Ms. Ngo suffered from multiple significant limitations to her functional capacity. In reaching her conclusions, Ms. Dao relied heavily on reported symptoms and pain behaviours exhibited by the plaintiff during testing. In my consideration of Ms. Ngo's functional limitations I have placed greater weight on the test results from Ms. Dao's report, as well as Mr. Nguyen's conclusions, than I have on Ms. Dao's conclusions or Ms. Ngo's self reporting. This is because, as discussed below, I have some concerns about the reliability of Ms. Ngo's self reporting.

VII. Credibility

- [62] The court cannot assess credibility solely on the demeanour of a witness. Credibility must be assessed in accordance with the preponderance of the probabilities when reviewing the evidence as a whole: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at para. 356; *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 187.
- [63] The assessment of credibility involves a host of considerations, including whether a witness' evidence harmonizes with independent evidence that has been accepted, the ability of the witness to resist the influence of interest to modify her recollection and whether the witness changes her testimony during direct and cross-examination: *Bradshaw*, at para. 186.
- [64] The defendant points to a number of inconsistencies in Ms. Ngo's evidence and argues that Ms. Ngo is neither a credible nor a reliable witness. The defendant notes that there are many instances in which, according to the expert reports, Ms. Ngo told an expert something different from what she told the court at trial. Some of the inconsistencies are so small as to be inconsequential, such as telling Dr. Janke that she liked to cook complex Vietnamese dishes and then testifying at trial that she was only able to cook simple meals. Other inconsistencies are considerably more pertinent to the matters that must be determined in this case. For example, Ms. Ngo appears to have told her first occupational therapist Bethany Brown that her knee pain had resolved in July 2016. However, she testified at trial that her knee pain had never resolved.

- [65] The defendant points out that the plaintiff told: Dr. Stewart in November 2017 that her headaches had resolved; Dr. Cameron in December 2018 that she had headaches every few weeks; Dr. Anderson in January 2019 that she had headaches once a week; and Dr. Newell in November 2019 that she had headaches two to three times a week. At trial she testified that she has headaches once or twice a week.
- [66] The defendant notes that Ms. Ngo gave a different explanation for why she left her job at the Railtown Café to each of Julia Dao (return to school), Dr. Masri (not stimulating enough), Alex Jackson (knee pain and dizziness), and Dr. Newell (job was boring and she wanted to work with people who spoke English).
- [67] The alleged inconsistencies relied on by the defendant were put to Ms. Ngo in cross-examination and for the most part she did not agree that she had made the statements attributed to her by the experts in their reports. Rather, she pointed out that she needed to use a translator for most of her meetings with the experts and that the translator likely incorrectly translated some of her statements. She also testified that, in answering questions about her symptoms, she generally answered on the basis of how she was feeling that day. Many of her symptoms fluctuate, so that what she told one doctor one day may be different from what she told another doctor on another day, and both would be true.
- [68] I accept that there likely were some misunderstandings between Ms. Ngo and the experts arising from mistranslation. I also accept that, with fluctuating symptoms, it is reasonable that different symptoms and different degrees of pain and impairment would be reported at different times. The inconsistent statements between the plaintiff's self reporting as evidenced in the expert reports and the plaintiff's trial evidence would not, on their own, cause me to question the credibility or reliability of the plaintiff's evidence.
- [69] However, in addition to the inconsistent reporting to experts, the defendant raises two specific incidents where Ms. Ngo made representations that she admitted on cross-examination to be untrue.
- [70] First, in her essay seeking admission to Northwest Culinary Academy in August 2016, Ms. Ngo made a number of statements about her future plans. She stated that when she first came to Canada she had no plans for a future job, but that she had now decided that her goal was to open her own bakery. In her testimony, she said that none of this was true, that her plan had always been to come to Canada to be a civil engineer. She admitted on cross-examination that she said things that were untrue in her application to Northwest Culinary Academy so as to improve her chances of being admitted into the program.
- [71] The second incident involves representations made to Ms. Ngo's family doctor. Ms. Ngo and her husband went to see Dr. Wong in May 2016 to discuss fertility issues. They told him that they had been trying to get pregnant for a year, which was incorrect. At that point they had only recently resolved their disagreement about having children and Ms. Ngo had only been trying to get pregnant for a month or two. Ms. Ngo admitted on cross-examination that she told her doctor something that was not true, and that she did this so that her husband could

get a semen analysis more quickly. Her husband testified on cross-examination that he and Ms. Ngo told Dr. Wong information that was untrue because "we wanted Dr. Wong to pay more attention to us."

- [72] While any one of the issues raised by the defendant would not be enough to cast Ms. Ngo's credibility into question, together they give rise to significant concerns about Ms. Ngo's credibility and reliability.
- [73] As such, I must exercise caution and examine her evidence carefully. This is particularly true because of the nature of the plaintiff's injuries and the fact that, with the exception of the injury to her fourth cranial nerve that causes her diplopia, her injuries are capable of being proven primarily on the basis of subjective reporting.
- [74] As Mr. Justice Smith noted in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114:
- [2] Neither the medical profession nor the court can measure or confirm the existence of pain. Some accident victims may consciously or unconsciously exaggerate their pain or become unduly focussed upon it. It is therefore well settled that where a plaintiff's case relies on subjective symptoms with little or no objective evidence of injury, the court must be "exceedingly careful" in its examination of the evidence: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.).
- [3] However, in my view, it is equally the case that a defendant who accuses a plaintiff of deliberate falsification—an accusation that effectively amounts to one of fraud and perjury—must be prepared to present the court with something more than speculation and innuendo.
- [75] In this case, the defendant's arguments about credibility and reliability go beyond speculation and innuendo. The defendant has pointed to numerous instances where the plaintiff has been inconsistent in her reporting or, more concerning, admittedly untruthful in representations she has made to others. As such, I have approached Ms. Ngo's evidence with great care.

VIII. Conclusion regarding injury and functional capacity

- [76] Notwithstanding the care and scrutiny I have applied to Ms. Ngo's evidence, I find that there can be no question that Ms. Ngo suffered a moderate TBI in the Accident. As a result, she continues to suffer from cognitive and emotional deficiencies. I find her testimony about the emotional pain she has suffered, and the toll her injuries have taken on her marriage and her relationship with her son to be wholly credible and consistent with the objective evidence.
- [77] However, I am not persuaded that her physical injuries are as functionally disabling as she alleges. While I accept that Ms. Ngo suffers from knee pain, headaches and dizziness, I do not accept her submission that her knee pain, headaches or dizziness are significant functional impairments to her work or domestic life. The evidence she has given about

these three symptoms is generally not consistent with what she reported to various experts. Her excellent school performance at Northwest Culinary Academy and her physical ability to do the work required of her as a baker at Railtown Café both suggest that she is not significantly functionally impaired by any of her physical injuries.

- [78] I find that Ms. Ngo's primary long-term injury from the Accident, in addition to the diplopia in her left eye, which is uncontroversial, is the NCD that she suffers as a result of the TBI, which has given rise to significant cognitive impairments and mood issues. While I am of the view that Ms. Ngo's evidence with respect to her knee pain, headaches and dizziness was exaggerated, I am satisfied that she is credible in her evidence about the impact the TBI has had on her life. As a result of her cognitive, behavioural and emotional impairments, her personal and working life have been profoundly compromised.

IX. Vocational Prospects

- [79] Alex Jackson, a vocational consultant, opined that Ms. Ngo's injury-related cognitive impairments will have a significant impact on her future vocational prospects.
- [80] Mr. Jackson opined that it is likely that, but for the Accident, Ms. Ngo would have succeeded in her pre-Accident career goal of working as a civil engineer in Canada. He noted that Ms. Ngo is highly intelligent and is drawn to innovative professions that require a high degree of intellectual challenge.
- [81] Mr. Jackson identified a number of specific barriers to Ms. Ngo's future employment, including:
- a) Ms. Ngo's cognitive impairments will result in difficulties performing work tasks requiring sustained concentration, vigilance, attention to detail, multitasking and analyzing complex information.
 - b) Ms. Ngo's impaired memory and poor retention of information, along with poor concentration and focus, will affect her ability to acquire new skills and will result in a slow pace of work for cognitive based work tasks.
 - c) Ms. Ngo's anxiety and mood issues will affect her ability to work in stressful situations and will pose challenges to her working in situations involving high level interpersonal or communication skills, or working as part of a team.
- [82] As a result of these barriers, Mr. Jackson opined that Ms. Ngo would be best suited for occupations such as ticket taker, laundry worker, food counter attendant or counter clerk. He noted that with further development of her English language skills, Ms. Ngo may eventually be able to obtain employment in more remunerative occupations such as data entry clerk, accounting clerk or medical lab assistant.
- [83] Mr. Jackson recommended that Ms. Ngo obtain vocational counselling in order to identify specific employment options available to her.

- [84] Dr. Newell also provided a vocational assessment of Ms. Ngo. Her opinion was, in many ways, consistent with the opinion of Mr. Jackson. However, her view of Ms. Ngo's future vocational prospects was considerably more optimistic than that of Mr. Jackson.
- [85] Like Mr. Jackson, Dr. Newell opined that, but for the Accident, Ms. Ngo would have become a civil engineer in Canada, assuming she took the necessary steps to qualify and improve her English. She noted that the birth of Ms. Ngo's son and any subsequent children would have delayed Ms. Ngo in reaching this goal.
- [86] Dr. Newell opined that Ms. Ngo's current and future capacity for working as a civil engineer was uncertain. Dr. Newell found that Ms. Ngo's vocational test results indicated superior intellectual capacity and strong numeracy development. She concluded that:

Should it be determined that Ms. Ngo is not capable of managing the cognitive and emotional demands of professional engineering, on the basis of Ms. Ngo's vocational test results, I believe she could successfully pursue a related occupation with less stress and less responsibility.

- [87] Dr. Newell's report describes two alternative technical occupations that would coincide with Ms. Ngo's interests and intellectual abilities, while providing a lower stress and lower responsibility work environment: civil engineering technologist or drafting technologist.
- [88] Dr. Newell, like Mr. Jackson, recommended vocational counselling for Ms. Ngo to explore and research career options compatible with her aptitudes, abilities, interests and values.
- [89] Both vocational experts' reports illustrate a central dilemma facing Ms. Ngo in pursuing her career. She is clearly a highly intelligent person (Dr. Newell's testing put her in the 95th percentile for intellectual capacity) who will be bored and unfulfilled in an occupation that lacks intellectual stimulation. However, her cognitive and emotional challenges arising from the TBI are such that her prior career, civil engineering, is no longer an option for her.

X. damages

- [90] I will address Ms. Ngo's claim for damages under the following headings:
- a) Non-pecuniary damages;
 - b) Loss of earning capacity;
 - c) Cost of future care; and
 - d) Special damages.

A. Non-pecuniary Damages

- [91] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.
- [92] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.
- [93] Ms. Ngo submits that non-pecuniary damages should be awarded in the amount of \$250,000. In oral submissions, counsel for Ms. Ngo modified this position somewhat to say that if the cost of future dementia care was not included as part of the cost of future care award, Ms. Ngo's non-pecuniary damages should be increased to \$300,000 to account for the increased risk of Ms. Ngo developing dementia.
- [94] In support of her position on non-pecuniary damages, Ms. Ngo relies on *Tan v. Mintzler and Miller*, 2016 BCSC 1183 (\$210,000), *Payne v. Miles*, 2013 BCSC 1545 (\$210,000), *Owen v. Folster*, 2018 BCSC 143 (\$210,000), *Grassick (Guardian ad litem of) v. Swansburg*, 2015 BCSC 2355 (\$220,000).
- [95] In support of his position on non-pecuniary damages, the defendant relies on *Gauthier v. Dubois*, 2018 BCSC 229 (\$145,000), *Gregg v. Ralen*, 2018 BCSC 171 (\$150,000), and *Macie v. DeGuzman*, 2019 BCSC 1509 (\$170,000).
- [96] I note that the defendant's cases all involve mild TBIs, not complicated mild or moderate TBIs. Based on the evidence of all the experts who testified on this issue, I find that complicated mild and moderate TBIs have very different prognoses and outcomes than mild ones. Therefore, the defendant's cases on non-pecuniary damages are not particularly helpful.
- [97] With respect to non-pecuniary damages, the plaintiff urges me to consider the fact that the prognosis for future improvement is almost non-existent and that there is a substantial risk that Ms. Ngo's condition will worsen over time. Ms. Ngo is at risk for further and ongoing difficulty including divorce, relapses of depression and dementia.
- [98] Mindful of the *Stapley* factors, I find the following considerations to be relevant to an assessment of Ms. Ngo's non-pecuniary damages:
- a) Ms. Ngo's young age;
 - b) the significant strain her injury has put on her marriage and family life;

- c) the emotional toll of having her career and life aspirations cut short;
- d) the risk of her condition worsening over time; and
- e) the considerable impairment to her social life and leisure activities.

[99] There can be no doubt that Ms. Ngo's life has been profoundly negatively impacted by her injuries arising from the Accident. In all the circumstances, I find that an award of \$210,000 for non-pecuniary damages is appropriate in this case.

B. Loss of future income earning capacity

1. Legal Authorities

[100] The legal principle that governs the assessment for loss of earning capacity is that, insofar as it is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.

[101] In *Falati v. Smith*, 2010 BCSC 465 at paras. 40-41, *aff'd* 2011 BCCA 45, this Court set out certain principles which inform the assessment of loss of earning capacity:

1. The amount of damages for loss of earning capacity may involve a consideration of hypothetical events;
2. The standard of proof is not the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss;
3. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong; and
4. The court must undertake an assessment of damages for loss of earning capacity, rather than take a purely mathematical approach to the issue.

[102] A plaintiff must always establish that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden, they then must prove the quantification of loss of future earning capacity on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Either way, this Court must endeavour to quantify the financial harm accruing to the plaintiff from her injuries over the course of her working career, taking into account relevant and realistic negative and positive contingencies: *Pett v. Pett*, 2009 BCCA 232 at para. 19.

[103] The capital asset approach requires the court to consider the four factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, in the context of the particular facts of the case. The court must make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[104] The four factors are:

- a) whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as an employee to potential employers;
- c) whether the plaintiff has lost the ability to take advantage of job opportunities which might otherwise have been open to her, had she not been injured; and
- d) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive market.

[Morgan at para. 53]

[105] Under the capital asset approach, one way of assessing loss of future earning capacity involves a consideration of a multiplier of annual income, but this is not the only available option. There is no single formula for determining loss of future income earning capacity: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 35.

[106] Economic projections can be helpful in assessing damages but they are only part of the inquiry. As stated in *Rosvold v. Dunlop*, 2001 BCCA 1:

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula. Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[107] Therefore, in this case, I must consider the evidence about the plaintiff's likely future income as well as her residual income earning capacity in the context of the findings of fact I have made about her functional impairments and her vocational prospects. The award must, above all, be fair and reasonable, mindful that the process is "an assessment rather than a calculation, and that many different contingencies must be reflected in such an award:" *Barnes v. Richardson*, 2010 BCCA 116 at para. 18.

2. Assessing the plaintiff's loss of future income earning capacity

- [108] The plaintiff seeks an award for loss of future income earning capacity in the amount of \$1,600,000, based on the difference between what Ms. Ngo likely would have earned had she not been injured and her residual income earning capacity. The defendant argues that, because of the uncertainty of the plaintiff's career trajectory, a capital asset approach is more appropriate. The defendant's position is that an appropriate award for loss of future income earning capacity would be between \$180,000 and \$400,000.
- [109] I am of the view that a capital asset approach is most appropriate in this case. While I find that the career path Ms. Ngo would have taken but for the Accident is relatively clear, there is significant uncertainty about what career currently lies ahead for Ms. Ngo. As such, an accurate calculation of Ms. Ngo's lost earnings is simply not possible.
- [110] I find that, but for the Accident, Ms. Ngo would have pursued her career goal to work as a civil engineer in Canada and she likely would have been successful in doing so. I also find that, as a result of the Accident, Ms. Ngo is unlikely to work as a civil engineer in the future.
- [111] Mark Szekely is an economist who provided calculations for future wage loss as well as cost of future care. Mr. Szekely estimated that, had Ms. Ngo pursued her plan to become a civil engineer, her income would have a present value of \$1,553,962.
- [112] Two deductions are factored into Mr. Szekely's \$1,553,962 income estimate: a 28% average reduction to account for labour force non-participation and a 15.1% average reduction to account for part-time work. Both of these are uncontroversial deductions that economists use, based on population data, to account for the fact that not all workers participate in the workforce full-time for the entirety of their working aged lives. The reduction for labour force non-participation accounts for factors like disability, temporary illness and time out of the work force to raise a family. The reduction for part-time work accounts for the statistical likelihood of someone in Ms. Ngo's demographic engaging in part-time, rather than full-time, work.
- [113] Plaintiff's counsel argues that I should amend the two discounts used by Mr. Szekely because prior to the Accident, Ms. Ngo had a higher than average commitment to the work force and a lower than average risk for part-time work. The plaintiff asks me to reduce the labour force non-participation deduction from 28% to 20%, and to reduce the part-time deduction from 15.1% to 10%. These changes, plus the addition of 10% in benefits (excluded from Mr. Szekely's calculation), would cause the present value of Ms. Ngo's future income, but for the Accident, to increase from \$1,553,962 to \$2,013,281.60.
- [114] I prefer the approach advocated by Ms. Ngo's own expert, Mr. Szekely, to the approach advocated by plaintiff's counsel in argument. Mr. Szekely used average numbers based on population data to determine the likelihood of labour force non-participation and part-time work. These numbers are the most useful in a situation like this, where there is no evidence before me that would allow me to conclude anything about the likelihood of the plaintiff straying from the average. Ms. Ngo was less than a year into her career as a civil engineer when she moved to Canada. She had never worked as a civil engineer in Canada. She was

newly married and likely to have children. Ms. Ngo testified that, but for the Accident, she would have waited to have children until she was more established in her career but she did not testify that she didn't plan to have children. There is simply no evidence from which I could conclude that Ms. Ngo was less likely than the average Canadian, foreign-born female with a bachelor's degree to take time out of the work force or to work part-time. Therefore, for the purposes of my analysis, I have considered the calculations provided by Mr. Szekely without any adjustments.

- [115] The plaintiff promotes an earnings based approach to assessing her loss of future income earning capacity by asking the court to take what would have been her income but for the Accident, and to deduct the amount she is likely to earn post-injury. In order to calculate Ms. Ngo's income post injury, the plaintiff uses the occupations set out in Mr. Jackson's report as being suitable for her, and averages the income calculated by Mr. Szekely for the lowest paid occupation (food counter attendant) and the highest paid occupation (medical laboratory assistant). Mr. Szekely was asked to assume that Ms. Ngo would only work half-time in the future. On this basis, the plaintiff argues that Ms. Ngo's likely income post-injury should be calculated at \$400,000. Alternatively, the plaintiff suggests that her 2018 income may be used as a predictor of her future income. If this were done, using Mr. Szekely's multiplier, the present value of Ms. Ngo's residual earning capacity would be approximately \$390,000. Since the plaintiff says that her earnings but for the Accident would be \$2 million, the plaintiff argues her award for loss of future earning capacity should be \$1.6 million.
- [116] I cannot agree with this approach for a number of reasons. First, both Mr. Jackson and Ms. Newell appeared to agree that Ms. Ngo's work preferences, high intelligence, level of education, and previous work experience as a civil engineer all suggest that she is unlikely to be stimulated by repetitive, non-intellectual work. Her short, unsuccessful career as a baker speaks to this. I find it extremely unlikely that Ms. Ngo would work for long in a job such as a food counter clerk or laundry worker, or even as a baker. Further, to the extent that her limited English is an impediment to her income earning abilities, Ms. Ngo appears to be excelling in her English language acquisition, notwithstanding her brain injury. She achieved 83% in the last English course she completed at BCIT. She testified in English at trial without any problems. As Ms. Ngo's English improves, her career prospects will expand.
- [117] I find that, with the appropriate career counselling recommended by both vocational experts, Ms. Ngo is likely to find a career path that accommodates her injuries but also gives her the stimulation she requires. This may be one of the careers recommended by Dr. Newell (civil engineering technologist or drafting technologist) or one of the alternate careers that Mr. Jackson suggested Ms. Ngo may be able to pursue as her English improves (accounting clerk or medical lab assistant). It is not possible to determine what path Ms. Ngo's career will take until Ms. Ngo has had this career counselling.

[118] Second, I am not persuaded that Ms. Ngo is limited to working half-time. Since the Accident, she attended full-time language school, full-time cooking school, and later had a job at Raitown Café that consisted of close to full-time hours (eight hours a day, four days a week). None of the experts have opined that Ms. Ngo is limited to working half-time hours. I therefore cannot find that Ms. Ngo's loss of future income earning capacity should be based on the assumption that she will only work half-time in the future. Indeed, I find it is likely that in due course she will return to full-time work.

[119] Mr. Szekely was asked on cross-examination how his present value of future income calculations would be impacted if he were to assume that Ms. Ngo were working full-time and not part-time. He testified that this calculation could be achieved by doubling his present values, and then deducting 15.1% to account for the part-time contingency. Applying those calculations to the numbers proposed by Mr. Szekely, if Ms. Ngo were to work full-time in the careers suggested by Dr. Newell or the alternative careers suggested by Mr. Jackson, the estimated future income of Ms. Ngo would be as follows:

- Data Entry Clerk: \$721,108
- Accounting Clerk: \$826,859
- Medical lab assistant: \$836,115
- Civil Engineering technologist: \$1,231,510
- Drafting Technologist: \$969,652

[120] The range in income for these professions, as well as the uncertainty about the plaintiff's career path, make the earnings approach impractical. However, it is notable that even under the highest paying alternative career, Ms. Ngo will make considerably less money over her lifetime than she would if she had been able to pursue a career in civil engineering. It is also notable that even under the lowest paying career alternative, the difference is nowhere close to the \$1.6 million sought by the plaintiff.

[121] Applying the Brown factors, I find that as a result of the Accident, the plaintiff has been rendered less capable overall of earning income; she is most certainly less marketable as an employee (i.e. job opportunities that would have been open to her are not open to her); and she is less valuable to herself as a person capable of earning income in a competitive market.

[122] Ms. Ngo is a bright, motivated individual who suffers from a brain injury that limits what she can do in the work place. She will need considerable assistance in finding a career path that enables her to utilize her significant gifts and talents while accommodating her disability. Her cognitive impairments are sufficiently severe that she will likely require special accommodations from any employer who hires her. This further limits her marketability and the range of jobs for which she will be qualified.

- [123] I must also take into account both the negative and positive contingencies that could impact Ms. Ngo's future income. Contingencies that could negatively affect Ms. Ngo's future income include the risk of her falling into another serious depression and the possibility of her having more children. Contingencies that could positively affect Ms. Ngo's future income prospects include the evidence before me that her mood disorder has been improving since she started medication and therapy in the fall of 2019 and may continue to improve to the point where she ceases to suffer from mood disorder symptoms at all. Additionally, her English will most certainly improve, which will open more doors for her.
- [124] The difference between the \$1,553,962 estimated by Mr. Szekely as the value of the plaintiff's future income but for the Accident, and the value of her future income under the various alternative careers suggested by Dr. Newell and Mr. Jackson, ranges from \$322,452 to \$832,854. These numbers are helpful, but not determinative, particularly given the uncertainty surrounding Ms. Ngo's future career path. In any assessment of damages, this Court must consider the overall fairness and reasonableness of an award. In this case, the career limitations imposed by Ms. Ngo's cognitive impairments and the uncertain prognosis for her depression both mitigate in favour of an award at the higher end of the range.
- [125] In all the circumstances, and recognizing that the determination of loss of future earning capacity must be done as an assessment, not a calculation, I award Ms. Ngo \$700,000 for loss of future income earning capacity.

C. Cost of Future Care

- [126] The plaintiff's claim for cost of future care, excluding contingent dementia care, is \$300,638. This is based on Mr. Szekely's present valuation calculation of the various items contained in the cost of future care reports provided by Dionne Sellick, an occupational therapist. The plaintiff seeks an additional approximately \$450,000 to account for what the plaintiff argues is her increased risk of requiring dementia care later in life. This portion of her claim is based on Ms. Sellick's estimate of the cost that would be incurred by the plaintiff if she developed dementia and required full-time caregiving, either at home or in a residential facility. The total amount sought by the plaintiff for cost of future care is \$750,000.
- [127] The defendant is in agreement with many of the future care costs claimed by Ms. Ngo. The defendant consents to the cost of physiotherapy, kinesiology, occupational therapy, psychological counselling, medication, vocational counselling, a functional driving evaluation, neuro-optometry therapy and vestibular therapy. However, the defendant takes issue with the following claims for future care costs:
- a) massage therapy;
 - b) child care;
 - c) housekeeping; and

d) dementia care.

1. Legal Authorities

[128] The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Gigmac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.

[129] The test for assessing future care costs is whether the costs are reasonable and whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.

[130] In assessing what is reasonably necessary to promote the plaintiff's health, the court should also consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14.

[131] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21 [*Krangle*]; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.

2. Massage

[132] Ms. Ngo has never been prescribed massage therapy by her family doctor and she has never received massage therapy for her injuries. Ms. Sellick testified that she recommended massage therapy in her cost of care report because she understood it to be helpful for managing headache pain.

[133] On direct examination, Ms. Ngo was asked whether she would like to do massage therapy in the future. She responded that she hadn't tried it, and that while she might try it in the future, it wasn't something she had thought much about.

[134] Massage therapy was not recommended by any of Ms. Ngo's medical professionals. Moreover, based on her testimony, it is unlikely that Ms. Ngo will use massage services in the future. Therefore, I disallow her claim for the cost of massage therapy treatments.

3. Child care

[135] Ms. Sellick recommended that Ms. Ngo obtain the services of a child care provider, who can look after Ms. Ngo's son in her home for two days a week. Ms. Sellick stated in her report that:

Ms. Ngo reports she is managing to take care of her son without any difficulty and that he was placed in full time day care as she needed more rest during the day. Considering my observations during the assessment and collateral provided by Mr. Tran, Ms. Ngo's husband I would anticipate Ms. Ngo having difficulty managing her son [sic] needs over the day, without assistance. I recommend that a minimum of two days a week of day-care is replaced with 2 days a week of in-home childcare assistance

[136] This recommendation appears to bear no connection to any medical advice. Indeed, it doesn't appear to even address Ms. Ngo's injuries. Ms. Ngo's son is in full-time day care. There is no evidence that either Ms. Ngo or her son are having any difficulty with the current child care arrangement. I cannot conceive of why it would be better for Ms. Ngo's recovery from her injuries for her son to be removed from day care, for two days a week, to be cared for by a caregiver in her home. I decline to award any amount for in-home child care for Ms. Ngo's son.

4. Housekeeping

[137] The plaintiff makes a claim for both homemaking and interior home maintenance based on the recommendations of Ms. Sellick and the amounts set out in her report. The defendant concedes that the plaintiff should receive some amount for the cost of hiring a housekeeper but says that the amount claimed by Ms. Ngo for housekeeping is inflated.

[138] Dr. Stewart noted that Ms. Ngo had resumed all of her household duties when she saw her on November 15, 2017. She also opined that "Ms. Ngo's current limitations with respect to household activities are largely cognitive and no longer physical." Dr. Stewart documented some difficulties kneeling to clean the floor and carrying heavy items, but no other functional limitations with respect to cooking, cleaning, or child care.

[139] Whether the plaintiff's challenges with housekeeping are cognitive or physical, I do find that challenges nonetheless remain. It is clear from all the evidence that the plaintiff's capacity to juggle work and domestic responsibilities has been impeded by her injuries. She likely will return to work full-time. In light of the limitations she suffers as a result of her injuries, she will not be able to manage the demands of housecleaning and full-time work at the same time.

[140] However, I agree with the defendant that the amounts set out in Ms. Sellick's report are inflated. The plaintiff and her husband live in a small apartment and Mr. Tran does his fair share of work around the house. The plaintiff is only partially compromised in her ability to do housework. I am therefore not persuaded that the claim for 2.5 hours a week of housekeeping until her son reaches age 19, and 3 hours of housekeeping every two weeks thereafter, is reasonable. I am also not persuaded that the plaintiff reasonably requires the cost of a "handyman" service for interior home maintenance, a matter about which no evidence was tendered.

[141] I am satisfied that Ms. Ngo is entitled to a reasonable amount for the cost of obtaining housecleaning services and I have factored that amount into the overall cost of future care award below.

5. Dementia Care

[142] A significant matter in contention is whether Ms. Ngo is at increased risk for developing dementia later in life as a result of her TBI. The experts differed in their opinions on this. Dr. Wong testified that people with moderate TBIs have an increased risk for developing dementia. Specifically, persons with moderate TBIs experience approximately twice the risk of the general population. However, on cross-examination, Dr. Wong admitted that there is some disagreement in the published literature about this, and there are some articles that suggest that there is no increased risk of dementia in patients with moderate TBIs. Nevertheless, he maintained that the medical consensus is that TBIs are a risk factor for dementia.

[143] Dr. Stewart also opined that Ms. Ngo is at risk for development of dementia as a result of having a moderate TBI. Like Dr. Wong, she was cross-examined on two journal articles that suggest the link between TBI and Alzheimer's dementia is unsupported. Dr. Stewart maintained her view that Ms. Ngo's moderate TBI puts her at greater risk for dementia. With respect to the specific articles she was asked to comment on, she noted that there are many studies written and articles published on this issue. One would need to look at a meta-analysis of all the literature to find out what the consensus is.

[144] Dr. Janke testified that Ms. Ngo has the same chance of developing dementia as the general population. This is because even if she had a moderate or severe TBI (as opposed to a complicated mild TBI, which was Dr. Janke's view), the data suggests that individuals who suffer moderate to severe TBIs have an earlier date of onset of Alzheimer's dementia, but no greater risk than the general population of having dementia. The risk of dementia in the general population, according to Dr. Janke, is 5%.

[145] While acknowledging that future contingent dementia care may be an unusual element to a cost of future care claim, Ms. Ngo argues that the cost of future care claim should account for "some contingencies should [her] care needs change in the future". On this basis, Ms. Ngo seeks \$450,000 in "contingent costs", to account for the risk of her needing dementia care in the future.

[146] The law is clear as to how the court ought to approach contingent future care costs. In *O'Connell v. Yung*, 2012 BCCA 57, the Court of Appeal held:

[55] The law is settled as to the appropriate approach to be taken in assessing future care costs. In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205, referred to by the trial judge, the Court articulated the test:

21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[Emphasis added.]

[147] Therefore, while it is appropriate to consider contingent future events in quantifying cost of future care, the assessment of future care costs entails a consideration of the costs that may reasonably be expected to be required. It is not an award for all expenses that might possibly be incurred.

[148] Future care costs must take into account positive and negative contingencies. The measure of a future care award must be adjusted to reflect the specific care needs of a plaintiff. The assessment of those specific care needs depends on medical evidence and opinions concerning the nature and duration of a required service: *Ho v. Ip*, 2019 BCSC 2220 at para. 96.

[149] While there is undoubtedly a risk that Ms. Ngo will develop dementia, it is not reasonable to expect that Ms. Ngo will develop dementia. On the basis of Dr. Wong's opinion (ignoring the opinion of Dr. Janke and the controversy in the medical literature on this point), Ms. Ngo's chance of developing dementia is double that of the general population. Dr. Janke testified that in the general population, the chance of developing dementia is 5%. This means that at most Ms. Ngo has a 10% chance of developing dementia.

[150] Ms. Ngo relies on *Sangra (Guardian ad litem of) v. Lima*, 2015 BCSC 2350 in support of her claim for dementia care as a cost of future care. However, in *Sangra*, the court did not quantify the cost of dementia care and add it to the cost of care award, as the plaintiff asks me to do in this case. Rather, the court determined that the plaintiff in that case was at a

risk of injury from a fall, dementia, seizures, further surgery and attendant complications, bowel obstruction and insufficient nutrition due to the plaintiff's problems with swallowing. Based on the medical evidence, the court found that there was "a very real and substantial possibility" that the plaintiff would require care beyond the services and costs claimed. As such, the court applied a 25% contingency to be added to the future cost of care award.

[151] Taking a similar approach in this case, I find that there are both negative and positive contingencies that may impact the cost of future care for this plaintiff. On the one hand, Ms. Ngo may have an increased risk of developing dementia or a risk of an earlier onset of dementia than she would otherwise have faced absent her TBI. On the other hand, Ms. Ngo's depression could improve. Ms. Ngo has only been treated for her depression with medication and therapy since the fall of 2019. Dr. Anderson, the psychiatrist, opined that her psychiatric prognosis will become clearer once Ms. Ngo has had a course of psychotherapy combined with pharmacotherapy.

[152] The extent to which a future cost of care award should be adjusted depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and therefore a contingency adjustment is not required: *Peters v. Ortner*, 2013 BCSC 1861 at para. 144.

[153] I find that this is a case where the negative and positive contingencies offset one another. There is some possibility of Ms. Ngo's condition worsening, and of Ms. Ngo developing dementia later in life. There is some possibility that Ms. Ngo, despite the permanent nature of her TBI, will be able to manage her mood and anxiety symptoms with the assistance of psychiatric intervention. On the medical evidence, I find the likelihood of the negative and the positive contingencies to be approximately equal, and I find they offset one another with the result that a contingency adjustment to the cost of care award is not required in this case.

6. Conclusion re cost of future care

[154] An assessment of damages for cost of future care is not a precise accounting exercise, rather it requires the court to peer into the future and fix damages as best it can: *Krangle* at para. 21.

[155] I accept that, with the exception of massage, child care, interior home maintenance, homemaking and dementia care, the costs of future care set out by Ms. Sellick are reasonable and medically justifiable. Considering the present valuation calculations set out by Mr. Szekeley, and keeping in mind that an assessment is not a precise calculation, I award the plaintiff \$200,000 for cost of future care.

D. Special Damages

[156] The plaintiff and defendant have agreed on special damages in the amount of \$1,153.00.

XI. Conclusion

[157] In summary, the damages are assessed as following:

Non-pecuniary damages

\$210,000

Future Income Loss

\$700,000

Cost of Future Care

\$200,000

Special Damages

\$ 1,153

[158] If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to appear before me to speak to the issue.

"Francis, J."

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