
CANADA / JUDGMENT

Noftle v. Bartosch

2018 BCSC 766

COURT

Supreme Court of British Columbia

DECIDED

10 May 2018

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Noftle v. Bartosch,

2018 BCSC 766

Date: 20180510

Docket: M29061

Registry: Chilliwack

Between:

DeAnna Michelle Noftle

Plaintiff

And

Mackenzie Bartosch and

Klaassen Equipment Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 368, 372 and 373 on June 5, 2018

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

Counsel for the Plaintiff:

J.L. Zacharias

B. Corwin

Counsel for the Defendants:

V.C. Gauthier

V.M. Kim

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

October 2-6 and 10-13, 2017

Place and Date of Judgment:

Chilliwack, B.C.

May 10, 2018

THE ACCIDENT

- [1] The plaintiff expressed a personal preference to be referred to as Mrs. Nofle. These reasons respect her preference. Documents and reports usually refer to her as Ms. Nofle. In that case, for consistency, I follow that usage.
- [2] The plaintiff, Mrs. Nofle, wearing her seatbelt, had stopped on Highway 1 at the Prest Road exit ramp. The defendant, Mr. Mackenzie Bartosch, was driving a flatbed truck. He did not notice the plaintiff had stopped. Mr. Bartosch swerved to avoid the plaintiff's Jetta but the side of his flat deck struck the left driver's side of her vehicle, causing the Jetta \$5,953.80 in damages. The impact jolted Mrs. Nofle forward and the seatbelt pulled her backward.
- [3] Shaken by the collision, Mrs. Nofle at first took no notice of a specific injury. She called her husband, who came to the scene. He noticed she was shaken. He thought the Jetta could be driven the distance to their home safely. He advised Mrs. Nofle she could drive it home, which she did.

Injuries

- [4] Mrs. Nofle sustained injuries to the following areas of her body, together with the following symptoms:
 - a) injury to her neck;
 - b) injury to her collar bone;
 - c) injury to her shoulders;
 - d) injury to her mid back;
 - e) migraines;

- f) headaches; and
 - g) sleep disturbance.
- [5] The plaintiff also alleges that as a further consequence of the accident and the defendants' negligence, she suffered the following:
- a) a reduction in or impairment and/or loss of her ability to care for herself and her family and in her homemaking and housekeeping capacities;
 - b) a loss of past and future earning capacity and opportunity to earn income;
 - c) loss of housekeeping capacity;
 - d) special damages;
 - e) costs; and
 - f) such further and other reasonable relief as the court deems fit and just.
- [6] The main issues in this case are damages and quantum related to loss of past and future loss of earning capacity and cost of future care.
- [7] The defendants question whether the plaintiff has taken sufficient measures to mitigate her damages. As for the subject of loss of future earning capacity, a central issue is whether the plaintiff is competitively employable, to what extent, and if so, in what capacity.
- [8] As for future cost of care, the main issues are whether the plaintiff's injuries are amenable to further treatment; and if so, to what extent can recovery be foreseen. A related issue is what further treatment the defendant should be responsible for, the cost of treatment, and whether the plaintiff has taken reasonable steps to seek reasonable treatment and diminish her symptoms and limitations.

Witnesses

- [9] Besides the plaintiff and her husband, Jayson Nofle, the court heard lay witness testimony from friends: Randolph Ian Nelson and Brad McMullan; University of the Fraser Valley work colleagues and supervisors: Leanne Thompson and Carole Peters; the plaintiff's daughter, Macie Nofle; her son, Connor Nofle; and her father, Gerald Rickaby.
- [10] As for medical and other expert testimony, the court heard testimony from the following expert witnesses called by the plaintiff:
- 1. Dr. Max Kleinman, a psychiatrist;
 - 2. Mr. Darren Benning, a consulting economist;
 - 3. Dr. Mervin Scholtz, the plaintiff's family physician;
 - 4. Dr. Hiram Mok, a psychiatrist;

5. Ms. Kim B. Gibson, an occupational therapist;
6. Dr. Rhonda Shuckett, a rheumatologist; and
7. Mr. John Lawless, a vocational consultant.

[11] The defendant called the following experts:

1. Dr. Brian Scarth, a psychiatrist;
2. Dr. Christopher Gallimore, an orthopaedic surgeon;
3. Ms. Claudia Walker, an occupational therapist; and
4. Ms. Cynthia Kresak, a professional vocational evaluator.

The Plaintiff

- [12] The 46-year-old plaintiff is a remarkable person in many ways. She has raised four children and is a grandmother to three children, in whose lives she was fully and unrestrictedly engaged before the accident. It was evident from all the witnesses who testified that before the accident she was a happy, engaged, energetic, bubbly person possessed of a strong work ethic; a person who cared more about the well-being of others than of her own particular needs. In addition to doing most of the work in and outside of her home, she was deeply involved in her church and in a wide variety of community activities. Her volunteer activities before the accident meant a great deal to her.
- [13] She met her husband, Jayson Nofle, through church in 1992. He has been self-employed during the marriage and currently owns a business called SatSkin Concealment. He is a creative person with impressive graphic and artistic skills that he applied in what were prior successful businesses. He continues to use those creative skills in SatSkin Concealment, though not to the same degree. He creates unique camouflage patterns useful for outdoor activities and, potentially, for military use. The business is in an embryonic state, Mr. Nofle is not yet earning revenue but he is optimistic about its prospects.
- [14] Interviewed by Dr. Mok, a Psychiatrist, whose reports are before the court and to which I will refer further in due course, she denied any history of developmental traumas, any history of childhood sexual, physical, or emotional abuse, or previous head injuries. She was the youngest of three children in her family. Her two older brothers live in the Fraser Valley. There is no evidence of any family history of emotional illnesses.
- [15] All the family and other collateral witnesses presented as well-balanced, credible and informed witnesses.

Volunteer activities

- [16] I mentioned earlier how immersed Mrs. Nofle was in church and community volunteer activities. Normally, I would not delve into too much detail on community activities but given how much Mrs. Nofle engaged in them before the accident and valued her involvement in those activities, it is fitting to give that subject commensurate attention.
- [17] Both Mr. and Mrs. Nofle were immersed in their church, The Church of Jesus Christ of Latter-Day Saints. Before the accident, she attended church most Sunday services. Afterwards, she cared for children ages 18 months to three years, attending with their parents. This was a fairly demanding physical activity because she played with the children on the floor and, from time to time, had to carry them to the bathroom or to their parents. She also worked on crafts with them.
- [18] Mrs. Nofle also volunteered for 1½ hours on Thursday evenings in a church youth group program. She rotated through a variety of activities, some physical ones, crafts, and specific service projects.
- [19] Mrs. Nofle engaged in extensive volunteer work in the community. It included a Thanksgiving Day Food Drive and a Chilliwack soup kitchen. The Food Drive entailed delivering Christmas hampers, delivery of plastic bags door-to-door to collect the food, then the week following returning to collect the hampers now full of goods. In short, she explained the Christmas hampers program required organization of large donations and carrying them out to families when they came by the stowage place to collect them. As for her soup kitchen involvement, she volunteered for this monthly, assisting in the making of meals for 120 to 150 people in the community. She helped set up, deliver, take down furnishings, and clean up afterwards. She still volunteers in that program but on a limited basis doing some of the planning, no longer engaged in the physical aspects of the work she did before the accident.
- [20] In short, some of her former life-enriching volunteer activities she can no longer engage in at all; and in others, only to a limited extent.

Effect of injuries on the plaintiff

- [21] Before I summarize Mrs. Nofle's evidence with respect to her injuries and the manifold effects they have had on her life, I should first note that none of the medical evidence, either on the plaintiff's or defence's side, aroused any concern about the credibility of Mrs. Nofle's accounting of her injuries and their effects on her life. No one has pointed to any indicia of exaggeration or implausibility. The underlying unfortunate fact is that despite a wide regimen of treatment modalities Mrs. Nofle has undergone in the four years since the accident, she has not significantly recovered. Her condition worsened and she has experienced mood changes, depression, and other psychological and emotional sequelae.

Initial symptoms

- [22] As I summarize Mrs. Nofle's evidence regarding her injuries and their sequelae, I will occasionally incorporate some of the related observations made by collateral witnesses, most notably, Mr. Nofle.
- [23] At the scene of the accident, to which Mr. Nofle attended soon after Mrs. Nofle called him, he recalled she appeared shaken but seemed physically okay, at that point. He recalled cautioning her that she might wake up sore the next day. About two days after the accident, he noticed bruising in Mrs. Nofle's shoulder area and recalled her mentioning soreness on her left side.
- [24] Before the accident, Mr. Nofle recalled Mrs. Nofle slept about seven sound hours daily. Post-accident, she started changing her positions in bed a lot, getting up, walking around, and awaking in the morning very tired, taking a lot of time to come around in the morning. He has not seen any change in that regard; she remains a very restless sleeper. He notices Mrs. Nofle naps, sometimes three hours daily in the afternoon. He thought she seemed to rest better with Gabapentin which had been prescribed.
- [25] Pre-accident, he recalled Mrs. Nofle was very energetic, a 'go-go-go' person, upbeat, very fit, weighing about 110 pounds but very strong for her size, able to move furniture around on her own and reorganize it. For example, they had a 50 pound or so air conditioner she had previously managed to move around on her own and position on the windowsill.
- [26] Now, Mrs. Nofle has very low energy, sometimes not wanting to do some things she liked to do before. He recalled her memory before the accident was incredible. She kept schedules and organized everyone in the family.
- [27] Before the accident, Mr. Nofle saw Mrs. Nofle as a very calm person, positive all the time, the right person for him to be around, he relied on her to keep him calm. Now, generally, she is in a bad mood. But she is not a complainer Mr. Nofle stressed, as did several other witnesses.
- [28] Mr. Nofle sees Mrs. Nofle rubbing her neck a lot. He regards her as courageous for how she carries the pain, sometimes severe, that she experiences.
- [29] Mr. Nofle said that when Mrs. Nofle speaks of her own situation, she does not use the word "depression" and she had not brought that up. He brought the subject up and they went together to see the doctor. She did not like talking about it. Signs of depressions, as Mr. Nofle saw them, were at first subtle; but became gradually more pronounced.
- [30] Mr. Nofle testified their relationship has undergone somewhat of a role change, he is now more the caregiver than Mrs. Nofle, whereas pre-accident, she was selfless; she can no longer give of her self as she used to be able to do.

- [31] As for Mrs. Nofle's present mood, he notices a stark difference in her, the joy and light she emanated no longer present; her moods swinging frequently. Sometimes, she just walks away from a gathering for example; or if they are playing cards, she just will get up and go to bed.

Hunting together

- [32] Mrs. Nofle used to go game hunting with Mr. Nofle before the accident. To begin with, Mr. Nofle hunted alone, until Mrs. Nofle took an interest in it. They started to hunt together, twice monthly, between September and December each year; and two to three times monthly, between April and June. The rough roads leading into the hunting areas require four-wheel traction. She cannot tolerate the jostling now. She could not carry a firearm, tolerate the jostling or the recoil of a rifle on her neck and shoulder, and could no longer help carry the bagged game out. That joint activity died out. He experimented with a crossbow but she could not cock it, hold it up or line it up properly. That also had to be set aside.
- [33] Mrs. Nofle also commented on her hunting and some other outdoor experiences. She recalled they used to use quads and hike. She finds it hard to hike; neck pain inhibiting her from looking down while down while taking steps. She recalled hunting with her husband three to four times each hunting season, enjoying it because it was her husband's passion, something they could do together but not since the accident.
- [34] From numerous witnesses the court heard much about the family's social activities before and after the accident and the multitude of activities Mrs. Nofle can no longer join in with the rest of the family.
- [35] Mr. Nofle confirmed they are winding down their socializing with friends. Mrs. Nofle cannot stay up past 8:00 p.m. or sit for long, and cannot look up at the screen in movie theatres. They no longer go to movies with friends.
- [36] As far as her grandchildren are concerned, as Mrs. Nofle's father also testified, she cannot engage with them, get down on her hands and knees, and play with them. If she happens to be on the couch they can crawl up to where she is but she cannot read to them for very long because she cannot look down without pain. She said she feels like an older grandmother. Mr. Nofle noted that her mother is more capable with the children than she is.
- [37] The couple used to hike two to three times a month in the spring, summer and fall. Mrs. Nofle tried hiking a couple of times but could not scramble over obstacles and could not tolerate a backpack on her shoulder.
- [38] Mr. Nofle recalled they had purchased ATVs, enjoyed taking them off-roading a couple of times a month, and had a lot of fun with that. They tried to do that after the accident, but the helmet caused neck pains and within a few moments of trying that Mr. Nofle could see the problem. They did not try that again.

- [39] They used to camp three times each summer and always enjoyed that, driving the ATVs, tubing, playing beach volleyball and hiking. Since the accident, they tried camping only once, two summers ago. Mrs. Nofle could not tolerate those activities with the rest of the family. She just sat and watched the others.
- [40] They used to toboggan and sled at a secret family location in the hills where they would light fires and have an outdoor meal, etc. They have not done that since the motor vehicle accident.
- [41] Holidays before the accident usually involved soccer. Mr. Nofle was involved in coaching soccer teams on which their children played. He recalled they were away a lot, engaged in that.
- [42] Since the accident, they have had a holiday in Las Vegas, went on a cruise to Catalina, and visited Mexico. They walked, went into a few shops, etc. She found airports, sitting and walking to the airport difficult but enjoyed the cruise.
- [43] As for driving to Alberta, Mrs. Nofle prefers to sleep on the 11-hour trip. She generally takes Gravol and falls asleep around Kamloops.
- [44] She has accompanied Mr. Nofle to trade shows where, on one occasion, he set up a SatSkin Concealment display booth for a day. They mingled somewhat with people at the trade shows, Mr. Nofle hoping to make business contacts. Mrs. Nofle however, suffering from headaches, sometimes just stayed at the hotel.
- [45] As for personal care, he testified Mrs. Nofle cannot reach out and pull on her dress; she puts her arms out and he pulls on the dress for her.
- [46] As for antidepressants, he testified he saw change from them but not for the better, rather, seeing her become more irritable. He is concerned she is using too much Advil and Tylenol. He sees heating pads, ice packs and creams giving only temporary relief.
- [47] Their physical intimacy has been affected.
- [48] Asked to look on his wife as an overall person, he stated she is still a wonderful person, much loved, resilient, not a quitter. She has tried to pull a few weeds but it hurts too much. She will wake up one day and say she wants to get a few things done but within an hour or so is down and "fed up with this". He sees her trying to do the things the doctors have suggested.

Housekeeping

- [49] Their Chilliwack residence was a 3200 square foot home, with three bedrooms and six bathrooms. Mrs. Nofle did the bulk of the housekeeping. Mr. Nofle and the children, Connor and Macie, confirmed Mr. Nofle's evidence that pre-accident, she did most household tasks, vacuuming, dusting, laundry, bedding and cleaning. Mrs. Nofle and Mr. Nofle shared the cooking.
- [50] There is no doubt Mrs. Nofle was passionate about gardening, which she found peaceful. She occasionally mowed the lawn. Heavier tasks such as renovations and power washing were left to Mr. Nofle.
- [51] Since the accident, Mrs. Nofle cannot dust in high places, clean showers or bathtubs, clean windows, take laundry up and down stairs, load and unload the dishwasher or vacuum. She cannot cut hard vegetables and has had to give up baking. She used to enjoy canning regularly but can no longer do that.
- [52] She can no longer do yard work or maintain a garden. The push and pull required when mowing the lawn causes pain in her neck, shoulder, and collarbone. In the spring of 2015, in Alberta, they hired a boy to mow the lawn for \$40 an hour. It generally takes him about two hours.
- [53] The Noftles' new home in Alberta sits on 3½ acres. It is about 700 square feet with two bedrooms, two bathrooms, and a den. It is smaller than their Chilliwack home but the problems Mrs. Nofle had confronted trying to do household tasks in Chilliwack continued to dog her in Alberta. Mr. Nofle has taken on the task of mowing the lawn on the property now, which takes him about five hours. Mr. Nofle purchased a ride-on lawn mower but Mrs. Nofle cannot use that because it is too bumpy and too hard on her body.

Plaintiff's evidence on sequelae

- [54] Mrs. Nofle did not notice significant pain right after the accident. She felt shocked more than anything and felt frustrated, thinking she could not let it interfere with her getting to work. It was not until Tuesday, post-accident, that Mrs. Nofle noted stiffness and soreness in her neck. At first, she tried to work through the pain and return to work but the clerical nature of her work at UFV, particularly the prolonged sitting, working at a computer all day, typing and doing all her other clerical duties, increased her neck stiffness and pain, which became constant. It hinders her ability to work and at home to vacuum, cook, clean, etc.
- [55] Looking down or up aggravates her pain, so she tries to avoid moving her neck, her head still sore at the end of each working day. The following morning, unable to lift her head off the pillow, she finds herself unable to go to work.

Collar bone

- [56] Mrs. Nofle also noticed a tingling "pins and needles" sensation in her collarbone. She was also experiencing headaches. Putting her seatbelt across her chest and collarbone caused pain.
- [57] Also, within that initial period, Mrs. Nofle began to feel pain in her left shoulder. It did not recover as she expected; rather, it progressed. The pain becoming constant, with the exception of a period between June 2016 and March 2017, following injections of Cortisone. The last one in January 2017, into her left shoulder. They had no lasting effect, in accord with the usual medical expectations for how long cortisone injections are effective.
- [58] Mrs. Nofle explained that movements in which she has to raise her shoulder above shoulder level or move her arms away from her body, lift, or push/pull anything with weight, causes pain. She is left-handed and finds that when she grabs a jug of milk, instinctively with her left hand, she has to use her right hand to support the weight. At the time of trial, she was finding her left shoulder always painful, the cortisone injections having lost their effectiveness.

January 2013 pre-accident transient back problem

- [59] The plaintiff acknowledged that in January 2013, when she had returned to school at UFV, and so had to sit constantly, she experienced a brief period of low back pain. From then forward, however, she denied any low back pain. This consists with her clinical records and was not gainsaid by any medical expert. She had no active pre-accident problems and has no low back pain now.

Further collateral evidence - effect on volunteer activities

- [60] Besides corroborative testimony from family, the court also heard more credible testimony from lay witnesses such as Randolph Nelson, a software developer, karate teacher and bishop in the church the Noftles attended. He confirmed the changes in Mrs. Nofle. He noticed she favoured her neck, seeming to be in pain all the time, leaving church early, giving up volunteer activities, attending less often, and her personality subdued.

Plaintiff's medical evidence

- [61] I turn now to expert medical evidence called by the plaintiff.

Dr. Max Kleinman, Psychiatrist

[62] Dr. Kleinman has practised in the field of Physical Medicine as a psychiatrist, in both Canada and the U.S., for 35 years. He has practiced almost exclusively in the field of physical and rehabilitation medicine. He has been qualified as an expert in his field between 40 and 50 times in Ontario and B.C. In the last five years, he has dealt almost exclusively with soft tissue injuries and chronic pain cases. His qualifications as an expert were not challenged.

[63] Dr. Kleinman made a positive impression as a witness, straightforward and clear. His experience working with people suffering soft tissue injuries from motor vehicle accidents is quite extensive. For 13 years, he was a lecturer in the Department of Rehabilitation Medicine at the University of Toronto.

[64] Dr. Kleinman's assessment of Mrs. Nofle took about one hour. She was given a form to fill out. In his September 20, 2015 report, he opined, at p. 9, that Mrs. Nofle's presentation consisted "with both physical and what appeared to be psychoemotional issues". He further explained, "[t]here appears to be some element of frustration, in particular how her pain is impacting on her function and I believe that there is functional overlay in the form of psychological distress." He explained "functional overlay" meant that Mrs. Nofle was experiencing an emotional response to physical pain. He further opined that Mrs. Nofle's current presentation consisted "with a chronic myofascial pain syndrome to the neck, upper back and left periscapular region."

[65] Dr. Kleinman noted the following accident related impairments at p. 9:

1. Biomechanical disorder of the cervicothoracic spine - The distribution of symptoms along with the aggravating factors is consistent with myofascial/muscular pain. Ms. Nofle describes activity-based pain throughout the neck and upper back in addition to having problems with activities that involve repetitive and sustained postures indicative of chronic spinal deconditioning. The physical examination exhibited restrictions with muscular/capsular tightness and soft tissue irritability. It is my opinion the muscles and ligaments and capsules of the cervicothoracic spine underwent a sudden overstretching with partial tearing and strain as a result of the forces involved in the indexed accident. The initial soft tissue pathology has now given way to the development of chronic scar tissue that impacts on Ms. Nofle in a way that is both physically painful as well as functionally disabling.

[Emphasis added.]

[66] As for Mrs. Nofle's chronic post-traumatic headaches, Dr. Kleinman found at p. 10, "[h]er presentation and description of her headaches is suggestive of a mixed origin including a cervicogenic (originating from the neck) component with muscular tension contribution." He further explained "[t]he referral pattern [was] characteristic of injury to the upper cervical complex with occipital-frontal referral secondary injury to either the greater occipital nerves, the nerve roots in the upper cervical spine or the local soft tissue."

- [67] Dr. Kleiman also noted at p. 10, that Mrs. Nofle had indicated difficulties with what to him appeared to be a vascular/migraine type component that occurs on an intermittent basis. He noted those headaches were more severe. He also noted her difficulty with sleep deprivation, which he opined might be impacting on her headache pattern.
- [68] With respect to Mrs. Nofle's chronic pain and associated depressive symptomology, he noted at p. 10, that "[t]he diagnosis of a pain or other mood disorder requires a DSM-5 evaluation and [was] outside [his] area of specific expertise." He noted that while further input was required from a mental health care practitioner, her physical presentation fit clinically.
- [69] Dr. Kleinman provided an addendum to his report dated March 23, 2017, at which time he had the benefit of additional medical reports, including the report of psychiatrist Dr. Hiram Mok, which I will come to later. Dr. Kleinman commented at pp. 5-6:

Dr. Mok, M.D., Psychiatrist, provides a diagnosis of somatic symptom disorder with depressive symptomatology [in his medical legal report [May 18, 2016]. His findings are consistent with my own clinical impression, noting at the time of my assessment I felt there were issues with chronic pain and depressive symptomatology. There is generally a strong correlation between psychological distress and the physical manifestation of pain. Dr. Mok has also noted that he concurs with my treatment recommendations that Ms. Nofle be enrolled in a chronic pain program. He has also made recommendations for medical support as well as the use of concurrent individual psychotherapy. His recommendations in my opinion are reasonable and consistent with the nature of the injuries sustained.

- [70] With respect to her prognosis in his earlier report, Dr. Kleinman opined at p. 10:

It is now approaching two years since the time of Ms. Nofle's accident. She presents with continued pain, restricted range of motion and functional limitation. The nature of the injuries, the longstanding duration of her problems and her current presentation that includes physical in addition to what appears to be psycho-emotional factors are all negative prognostic indicators. I am particularly concerned with respect to Ms. Nofle's presentation given that there are issues in both the physical and psycho-emotional domain. I note that she has recently been started on an anti-depressant, Citalopram, through her family physician. It is therefore apparent that her family doctor has also identified issues from an emotional perspective that are impacting on her overall condition. The combination of these factors makes her overall level of recovery that much more difficult.

While most soft tissue injuries generally resolved within a matter of months, there is a subset of individuals, generally the ones that I see due to the nature of my clinical practice, who take longer to recover with a certain percentage that never fully recover.

I would not state emphatically that Ms. Nofle has reached maximum medical recovery. I believe there is room for further physical and functional gain but on the strong balance of medical probabilities I believe that she will be left with residual symptomatology extending into the long-

term. The likelihood of complete resolution of her symptoms at this late date is in my opinion negligible if not nil. She continues to be symptomatic and in a condition of increased vulnerability to further exacerbation of her chronic injuries. Considering her overall situation on the balance of probabilities, I expect that she will be left with persistent symptoms extending into the long-term.

Impairment of functioning

- [71] On the subject of the effect of impairment on Mrs. Nofle's functioning, Dr. Kleinman opined at p. 12, her "accident-related impairments have left her with diminished functional tolerances [impacting] on her overall status". He noted that at various times Mrs. Nofle had attempted "to transition back to the workforce but was not able to continue due to her persistent pain complaints consistent with the nature of the injuries and her current presentation. She has ongoing physical and functional restrictions related to activities that place strain throughout the neck, upper back and left shoulder. These restrictions have left her with diminished capacities as it relates to her general activities of daily living, unable to participate in social and recreational activities and eventually cause her to leave the workforce."
- [72] More specifically, Dr. Kleinman noted (at pp.12-13) diminished functional tolerances for "repetitive or prolonged activities at or above shoulder height"; and "activities that place strain on the neck and upper back, including but not limited to lifting, bending, pushing and pulling in particular activities that place the arms away from the body." He noted Mrs. Nofle will have to "structure her activities and environments to find balance between her symptoms, limitations and functional needs."
- [73] As for returning to work, mindful of how the American Medical Association's, definition of disability, i.e. "an alteration of an individual's capacity to meet personal, social and occupational demands or statutory requirements", condition relates to work, Dr. Kleinman opined on the prospects for a return to work (at p. 13):

I note that Ms. Nofle attempted to transition back to the workforce but was not able to continue. She eventually had to go onto part-time work and has been off work now. Her difficulties as I have noted are consistent with the nature of the injuries, most specifically the myofascial/mechanical component and now due to her difficulties with chronic pain. Based on her current presentation, I do not believe that Ms. Nofle could return to the workforce in any competitive manner. Her difficulties arise out of the interaction between the original injuries sustained, the functional limitations and her problems with chronic pain. It is difficult to state with any certainty whether she will ever be able to transition back to the workforce. Her capabilities are significantly limited. As I have noted, she will likely need to be re-evaluated in a period of 6-9 months if there is not significant improvement in her condition.

- [74] Dr. Kleinman noted that it remained to be seen how Mrs. Nofle would respond to "a chronic pain program in order to understand precisely how she fairs with both physical and psychological treatment" (p. 13).
- [75] Cross-examined on the defendants' proposition that as Mrs. Nofle had not yet completed a chronic pain program and more active forms of therapy that had been in the works, but deferred due to the Nofles' move to Alberta, Mrs. Nofle had yet to reach maximum medical recovery, Dr. Kleinman disagreed, pointing out Mrs. Nofle was now four years post-accident, explaining Mrs. Nofle's treatment is no longer about limiting pain but about pain coping strategies and managing pain. He also thought Mrs. Nofle was doing all she could to remain as active as possible.
- [76] Regarding Mrs. Nofle's capacity to engage in homemaking activities, Dr. Kleinman noted that Mrs. Nofle attempted to complete some tasks but experienced persistent problems that consisted with the nature of her injuries. Given her then current presentation, he believed that Mrs. Nofle ought to "be considered substantially disabled", particularly with respect to activities involving repetitive and sustained postures for the neck, upper back, and left upper extremities, accentuated by the fact she is left-hand dominant.
- [77] Dr. Kleinman negated the presence of pain amplification or inappropriate illness behaviour.
- [78] I found Dr. Kleinman's evidence, gathered both from his reports and his direct and cross-examination, comprehensive, reasonable and instructive. I did not discern any partiality. He was not evasive. Extensive professional credentials and clinical experience treating similarly afflicted patients seemed to enable his blending and clarification of various medical insights. I found his guidance and explanations helpful. He was not shaken on cross-examination and his core conclusions and opinions remained intact.

Dr. Hiram Mok, Psychiatrist

- [79] Dr. Mok's qualifications as a psychiatrist were not challenged. He completed his medical training at Trinity College Dublin in 1991; and in 1997, obtained specialist certification in Psychiatry. His areas of expertise are in Mood Disorders and Cross-Cultural Psychiatry. He is a clinical professor with the Department of Psychiatry at UBC and also serves as an Associate Director of Residency Training. He is the Site Director for Undergraduate Medical Education. Dr. Mok noted at p. 2, he has "completed several hundred independent examinations of youth and adults who have sustained traumatic brain and other injuries, assessing their physical psychiatric and psychological sequelae." He has previously been accepted as an expert witness in this court.

- [80] Dr. Mok conducted a mental status examination of Mrs. Nofle and reviewed her relevant medical history on May 18, 2016. In brief, he diagnosed Mrs. Nofle (at p. 7) with "Somatic Symptom Disorder, with predominant pain persistent, severe, and Major Depressive Disorder, chronic". Its severity at that time, "mild".
- [81] Dr. Mok's opinion on Mrs. Nofle's prognosis was guarded.
- [82] When first interviewed by Dr. Mok, Mrs. Nofle denied having experienced any accident-related nightmares or intrusive daytime recollections of the accident. Mrs. Nofle reported to Dr. Mok she felt sad and unhappy secondary to her chronic pain around October 2014. She further reported this was despite her having received multiple physical treatments. She further stated she was frustrated about the lack of clinical progress, worrying she might not be able to keep her new job as a program coordinator. This also associated with severe mental insomnia, loss of usual interests, and feelings of guilt with reversed dependency on family members for household chores. She also reported fatigue, poor concentration, and weight gain of 20 pounds due to inactivity, psychomotor slowing, and feelings of hopelessness. Dr. Mok noted, however, an absence of suicidal ideation, suicide attempts, psychosis, or history of mania, hypomania, alcohol or street drug abuse. I note this consisted well with her testimony.
- [83] Dr. Mok noted that on Mrs. Nofle's mental status examination she presented as animated, pleasant, accessible, reliable and cooperative. Her speech was said to be spontaneous, of normal flow, tone and volume.
- [84] Dr. Mok noted at p. 7, however, that her "[a]ffect, was sad/restricted and she obtained a score of 10 on the [nine item] Physician Health Questionnaire with and a corresponding score of 18 on the Beck Depression Inventory , indicating mild levels of depression."
- [85] Dr. Mok also noted at p. 7 that Mrs. Nofle's "[t]hought [formation] was organized. No evidence of delusional beliefs or active suicidal ideation." He further noted she had "pessimism about her future", and was "grieving about her loss of physical functioning in different domains of her life." Mrs. Nofle reportedly said, "I am very discouraged by how different my lifestyle is right now. I am unable to work. I want to be how I used to be and I tried very hard mentally to change my outlook, but it is very, very difficult to accept".
- [86] Dr. Mok noted at p. 7:
- [Mrs. Nofle] is aware of the inter-relationship between chronic pain, insomnia, depression, and anxiety, and vice versa.
- [87] As for Mrs. Nofle's past physical treatment modalities to date, he opined they were "reasonable and medically necessary". Dr. Mok further explained (at p. 7):

My impression is that she has been left with chronic pain disorder, with subsequent physical limitations affecting multiple domains of her life, including employment, socially, recreationally, domestically, and inability to derive enjoyment interacting with her grandchildren. As with most

patients with chronic pain disorder (somatic symptom disorder), the likelihood of [Mrs. Nofle] becoming symptomatic with increased vulnerability to future exacerbation of her chronic injuries is very high, leading to potential flare ups in her major depressive disorder. My prognosis for full recovery is therefore guarded at this point in time. I would concur with Dr. Kleinman's treatment recommendations that it would be beneficial for [Mrs. Nofle] to be enrolled in a chronic pain management program utilizing a multidisciplinary approach treatment.

- [88] Dr. Mok also recommended low-dose Trazodone 25 to 50 mg H.S. to promote a good night sleep and that Mrs. Nofle be given access to concurrent individual psychotherapy through a registered clinical counsellor or clinical psychologist for cognitive-behavioural therapy for depression, chronic pain management and grief management around her various losses and transitions. He recommended bi-weekly one-hour sessions, 20 of them going forward, subject to clinical review thereafter.
- [89] Regarding the diagnosis of Somatic Symptom Disorder, Dr. Mok explained it is similar to the old DSM IV diagnosis of Chronic Pain Disorder. With respect to the former terminology, Somatic Symptom Disorder, he explained for that diagnosis a person had to have one or more somatic symptoms, i.e. physical pain, continually present from the accident and persisting for six months. He noted that in Mrs. Nofle's case, she had neck and upper back pain, left shoulder and headaches, in combination causing distress in her work and social life and the carrying out of domestic chores. As Mrs. Nofle testified, Dr. Mok noted she felt guilty being dependent on Mr. Nofle and has grieved a lot over the loss, over time, of her functioning.
- [90] Cross-examined about medically anticipated behaviour for a chronic pain condition, Dr. Mok explained that with most patients, the pain and chronic pain conditions generally wax and wane and that variables, such as winter weather or increased activity, can reinjure and activate pain; and depression may worsen the condition. He testified that Mrs. Nofle's depression was mild when he saw her but noted if pain flairs it can worsen; an expected pattern in such cases.
- [91] Dr. Mok was questioned about the soundness of his diagnosis of Major Depressive Disorder. He explained that diagnosis requires the patient to have five or more of nine designated symptoms, noting Mrs. Nofle exhibited eight symptoms and that between October 2014 and his May 2016 assessment of Mrs. Nofle, she had a major depressive disorder, her symptoms impairing all aspects of her life, therefore satisfying the criteria for a major depression. He reminded the court, however, that the severity of the condition can wax and wane: in this case suggesting that initially Mrs. Nofle was depressed, and accordingly given treatment to which she responded. Dr. Mok also pointed out Mrs. Nofle's despondency, which he characterized as classic of a person who has lost hope. Alluding to Mrs. Nofle circumstances, he testified that a personal injury creates anxiety because the injured person is unsure about what will happen to them. After three to four years, however, he opined they lose hope of ever getting better.

- [92] Dr. Mok addressed the cross-examination question as to whether Mrs. Nofle had an Adjustment Disorder. He explained there must be an overriding disorder such as a Major Depressive Disorder before a physician can make a diagnosis of Adjustment Disorder; and that, by definition, an Adjustment Disorder must be a reaction to a stressor in the first three months, pointing out that that Mrs. Nofle had no emotional or psychological symptoms within the first three months. They arose within 12 months.
- [93] On redirect examination, Dr. Mok reviewed in more detail the outcome of the 9-item Physician Health Questionnaire, and the Sheehan Disability Scale. As mentioned earlier, Mrs. Nofle completed those questionnaires as part of her assessment by Dr. Mok.
- [94] Dr. Mok noted Mrs. Nofle rated the difficulties she has been experiencing made her ability to work, look after things at home, or get along with other people as "very difficult". As for the Sheehan Disability Scale, also mentioned earlier, Mrs. Nofle rated her impairment level for school and work at 10 out of 10, her social life impairment at 7/10, and her family life and home responsibilities also at 7/10.

Dr. Rhonda Shuckett, Rheumatologist

- [95] Dr. Shuckett was qualified as an expert in the field of Internal Medicine and Rheumatology. For the last 26 years she has worked in private practice with academic privileges. She has hospital privileges at St. Paul's Hospital, UBC, and the "busy clinical practice in which [she] sees patients with many rheumatologic conditions including soft tissue pain, fibromyalgia, regional conditions, neck pain and back pain and arthritic and other inflammatory collagen vascular disorders." She spends "[m]ost of [her] time seeing patients" along with consulting work at St. Paul's Hospital, (p. 2).
- [96] I should also note she was division head of Rheumatology at St. Paul's hospital for five years in the 1990s. She also teaches undergraduate medical students and has been in charge of the Rheumatology Undergraduate Program at UBC for the past decade. I will not review all her credentials. Dr. Shuckett was clearly qualified to express an opinion as a rheumatologist and to diagnose the nature and cause of Mrs. Nofle's injuries, and give a prognosis.
- [97] Dr. Shuckett examined Mrs. Nofle August 17, 2016; and in so doing, reviewed her clinical history. Her qualifications and the admissibility of the first report dated September 22, 2016, were not contested. The defendant objected to the admissibility of Dr. Shuckett's second report, dated September 14, 2017. After voir dire submissions, I admitted the second report into evidence, except for some portions of other cited legal reports.
- [98] Dr. Shuckett diagnosed the following injuries caused by the accident:
- a. muscular ligamentous cervicogenic headaches from whiplash injury;
 - b. neck injury on the left side with mild decreased range of neck motion;

- c. myofascial pain and muscle spasm of the left neck and shoulder girdle area with painful trigger point;
- d. left shoulder rotator cuff tendinopathy with calcium suggestive of calcific tendinitis and a lesser degree of right shoulder tendinitis; and
- e. Somatic Symptom Disorder, chronic mild major depressive disorder and central Pain Sensitize examination - opinion deferred.

[99] Mrs. Nofle described the following symptoms to Dr. Shuckett:

Headache symptoms

- a. Headaches currently daily, five times weekly at least, originating in the back of the head near the neck, pinpointed to the left side of the occiput, still continuing. At this point, it is not often she gets really severe headaches.
- b. When the headaches get really bad, has had trouble with bright lights and loud noises; she has had 8 to 10 migraine headaches since the accident where she becomes physically sick with nausea and vomiting, and has to lie in a dark quiet room; pre-accident never had a headache.
- c. Immediately after the accident, her headaches were not so bad but got worse. She felt for the first three months she would work through her headaches and be fine but they became too intensified.
- d. Now that she is not sitting working at a desk all the time, her headaches have been less severe but the frequency is the same, occurring about five days a week.
- e. She never had a headache before the accident.

Neck and left shoulder symptoms

- a. Neck pain is a problem, diffuse, but mostly on the left side. Overcompensation with her right-side neck pain causes pain on the right side of her neck, as well.
- b. Neck pain on the left goes into the left upper trapezius and into the shoulders.
- c. Left shoulder blade pain in the trapezius area was constant, however, less so since she underwent cortisone injections into her shoulders, bilaterally.
- d. Left neck and upper trapezius pain are still constant, always at least of medium severity and with activity get severe. She had some left shoulder injections two months previous to three spots in each shoulder region. Before the cortisone injections, she had pain raising her shoulders above shoulder height, now can raise her shoulders and hold the in that position. While there is pain, it is "quite tolerable".
- e. Numbness or tingling in the upper extremities denied;

- f. Left anterior chest pain in the pectoralis muscle area but lessened since the shoulder injection.

Upper, mid and low back pain

- a. Upper back pain between the shoulder blades, not as bad as it used to be when it was constant but since she is not working, no longer constant; it is more activity-based.
- b. Mid back okay; low back fine.

Sleep

[100] It is well-established that sleep has regenerative powers. Mrs. Nofle reported, as noted by Dr. Shuckett, that her sleep is not good at all. She advised that in the last four nights before Mrs. Nofle saw Dr. Shuckett, her maximum nighttime sleep was two hours and 10 minutes.

[101] Mrs. Nofle can fall asleep but finds it hard to stay asleep, due to the pain and inability to find a comfortable position. She said it hurts in her left neck and left shoulder.

[102] Before the accident her sleep was good.

[103] She is poorly rested in the morning, always exhausted, moderate to severe degree.

[104] On the question of improvement, Mrs. Nofle reported she does not have constant burning, or aching pain in her upper back which had she experienced while still at work. Further, now that she is not working, the intensity of her pain is a bit less; the frequency, however, is the same.

Mood

- a. As Mrs. Nofle has said to others and in testifying, she feels more frustration than anger at what is happened and has feelings of depression.
- b. Mrs. Nofle feels she has gone through all the emotions with that, and now feels that she has come to deal with it and does not let it take over.
- c. Mrs. Nofle hopes that she will get better but felt down by the lack of adequate improvement. Now, looking back, she still believes that she was not depressed. Her doctor mentioned an anti-depressant which can help the pain as well.
- d. Mrs. Nofle does not feel that she is in control of her life. She feels like she is not contributing to society the way she was before the MVA. This is more a sense of loss than depression.
- e. Mrs. Nofle has never had significant depression in her life.
- f. Mrs. Nofle said she constantly has to crack her neck to deal with the stiffness and pain.

Prognosis and Treatment Advice

- [105] Dr. Shuckett opined (p. 19), Mrs. Nofle's "prognosis is concerning considering that at the time [she] saw her two years and ten months had ensued since the subject MVA." On re-examination, Dr. Shuckett opined that with the pain present for such a long time, prospects for major functional improvement are quite limited. She explained that when a person experiences pain for four years they are less likely to not have pain the longer the pain continues. Consistent with what Dr. Kleinman opined, she testified pain clinic treatment provides tools to cope with pain.
- [106] Dr. Shuckett recommended attendance at a pain clinic, also recommended by Dr. Kleinman, Dr. Mok, and Dr. Scholtz. She also recommended consideration of a referral to a physiatrist such as Dr. Ansel Chu for trigger point injections in the left neck and shoulder girdle region. She also thought an injection in the occiput for possible diagnosis of occipital neuralgia might be considered at the pain clinic. I note Dr. Gallimore, whose opinion is discussed below, did not favour further injections because Mrs. Nofle had already received four.
- [107] Dr. Shuckett noted that while Botox injections are sometimes used for headaches, she cautioned at p. 20 that "their use for myofascial pain has become highly questionable in more recent literature and in more recent practice [because it] can cause atrophy and wasting of muscles". Therefore, she rejected that option. She did think, however, that "trigger point injections or alternatively intramuscular stimulation (IMS) treatments are something to consider."
- [108] She encouraged (p. 20), "regular aerobic exercise, such as regular walking". I note Mrs. Nofle does walk fairly regularly. She qualified this recommendation on cross-examination, however, noting the benefits of aerobic exercise are not well demonstrated; that while she would encourage it, convincing research on it is not encouraging. Ultimately, she thought it could modulate pain.
- [109] As for Mrs. Nofle's employment prospects, Dr. Shuckett further opined (p. 20) that Mrs. Nofle's struggling with her pain and the work cessation and finding herself unable to work, was "in keeping with her injuries". She opined further that her work capacity in future will remain to be seen and will rely on what improvement she may attain at the pain clinic. She further noted that in the case of chronic pain, the measurement of disability is challenging, often not possible, and tends to be detected by the patient.
- [110] As for exercise, Dr. Shuckett noted Mrs. Nofle walked regularly, and that every activity other than plain walking was too hard for her to do. She finds exercise machines, which she liked to use pre-accident, difficult to use.

- [111] As for domestic activities in and outdoors, Dr. Shuckett noted, Mrs. Nofle has had to give up on a huge garden, which before her injuries, she had looked after; a passion of hers. She cannot do much housework. She bought a robot vacuum. She cannot do laundry and carry it down, load and unload the washing machine and dryer, or the dishwasher. Her 17-year-old daughter helps with the housework and someone comes now and does the yard.
- [112] What Mrs. Nofle reported to Dr. Shuckett consists with what she told other physicians and with the opinions of the other experts called by the plaintiff.

Dr. Mervin Scholtz, Family Physician

- [113] Dr. Scholtz is Mrs. Nofle's family physician. He was qualified to practice family medicine in B.C., as a certified member of the College of Family Physicians of Canada (CC FP). He also has a post graduate diploma in Occupational Health and Medicine (DOH & M). He works full time in his family practice in Chilliwack. He has associate privileges at Chilliwack General Hospital. At p. 2 of his report, he confirmed he saw Mrs. Nofle on October 18, 2013, just two days after the motor vehicle accident on October 16, 2013. Dr. Scholtz initially diagnosed a "whiplash type injury with accompanying soft tissue injury in her neck, upper back and [left] clavicle area with subsequent muscle spasm." He stated that "diagnosis was clear from the very first visit and stayed the same until the present day", i.e. April 9, 2015, the date he wrote his report.
- [114] At p. 3 of his report, Dr. Scholtz's provided a pessimistic prognosis regarding Mrs. Nofle's injuries; a poor one because "Ms. Nofle has had continuous pain and discomfort since October 16 2013". He based his "conclusion on the fact that she had multiple treatments by different professionals, which could not get her pain-free". He also pointed out he had "tried multiple analgesia and chronic pain medications on her without effect". He saw Mrs. Nofle for "a total of 15 consultations related to the MVA over 18 months and her symptoms [had] not improved at all." He saw this as "another indicator that [Mrs. Nofle] will suffer from more long term effects with a poor prognosis."
- [115] As for Mrs. Nofle's future disability from employment, Dr. Scholtz further noted (p. 3) that Mrs. Nofle had recently stopped working completely, basing her decision on the type of work she was engaged in, "typing a lot in front of a screen and [causing] lots of stress in her neck and upper back." He opined there was "a high probability she will have ongoing issues with the soft tissue in her neck and upper back as well as clavicle/shoulder area on the left that will cause long term disability." He further opined "[c]ertain work situations or jobs in the future may cause her symptoms to flair-up", especially where "the areas mentioned are stressed out by the wrong postures or working environment."

- [116] As for treatment generally, Dr. Scholtz noted whiplash is a very complex injury as it encompasses a lot of muscles and delicate soft tissue in the area of the patient's head, neck, shoulders and upper back. He noted that patients differ a lot and the speed and manner in which they heal differs tremendously. He stated (p. 4), "Ms. Nofle experienced intensive symptoms [since] early on, and we tried all treatment modalities to help her symptoms and to simply get her pain free and comfortable."
- [117] Dr. Scholtz confirmed that so far as the extensive treatment modalities he recommended are concerned, they were "reasonable and necessary to assist the patient and to make her more comfortable", (p. 4).
- [118] I note Dr. Scholtz's letter was prepared about 1½ years after the accident but it provides insight into his perceptions, recommended treatment modalities, etc., in that earlier period. Dr. Scholtz's curriculum vitae indicates he has had considerable experience as a family physician and it encompassed experience in Emergency and quite a wide range of rotations. His opinion generally coincides with the opinions of Dr. Kleinman, Dr. Mok, and Dr. Shuckett; and most notably, Dr. Kleinman.
- [119] In his addendum report dated February 15, 2017, Dr. Scholtz included some more current observations. Regarding his diagnosis and other opinions at that time he wrote (p. 2):

The working diagnosis of Ms. Nofle is that of chronic myofascial pain syndrome to the neck and upper back and left periscapular region due to the accident on October 16, 2013. I agree with Dr. Kleinman's summary of diagnosis of that of biomechanical disorder of the cervico-thoracic spine, left shoulder chronic soft tissue strain and chronic post-traumatic headaches. I collectively diagnosed it as whiplash injury with accompanying soft tissue injury in her neck, upper back and left clavicle area with subsequent muscle spasm in my first medical-legal report, which still stands. Dr. Shuckett concur[s] with this diagnosis of whiplash injury to the musculoligamentous cervicogeni[c] headaches as a result of the whiplash injury and myofascial pain and muscle spasm of the left neck and shoulder girdle with painful trigger points and left shoulder rotator cuff tendinopathy. Previous x-ray reports showed signs of shoulder tendinitis and a history of left shoulder pain. Dr. Shuckett suggested that her left shoulder girdle was more vulnerable to the effects of the MVA of October 16, 2013. There was a two (2) year interval between previous left shoulder injury and the MVA of 2013.

I also felt that Ms. Nofle developed major depressive disorder over the period of her rehabilitation, to a point that I suggested and implemented an antidepressant. Dr. Mok had the impression in his report of May 18, 2016 that Ms. Nofle sustained Somatic Symptom Disorder with predominant pain, persistent, severe and Major Depressive Disorder, chronic in nature.

- [120] Dr. Scholtz's views on Mrs. Nofle's future disability from employment was "very guarded and negative", as he put it (p. 4). He pointed out the problem is that Mrs. Nofle has experienced "symptoms with sitting, standing, working overhead and lifting objects repetitively as well as computer work strain", (p. 4).

[121] As for future care needs, he thought Mrs. Nofle would benefit from a chronic pain program intervention. He also felt she would benefit from ongoing registered massage therapy treatments, physiotherapy sessions/kinesiology sessions and chiropractic treatment sessions as suggested by Ms. Kim Gibson [Occupational Therapist]. He opined she had "benefited a lot from house cleaning services", (p. 5). He also noted she had "relied a lot on her husband and daughter to do activities in and around the house like cleaning, washing, laundry and other household activities"; and, considering her daughter had recently moved out of the house, would definitely "benefit even more from house cleaning services", (p. 5).

Defence medical expert opinions

Dr. Brian Scarth, Psychiatrist

[122] Dr. Scarth, called by the defendant, was unopposedly qualified to give expert opinion evidence concerning the diagnosis, causation, treatment and prognosis of mental health symptoms and psychiatric disorders; and to give a psychiatric diagnosis of the plaintiff's injuries and the causal connection between those injuries and the accident.

[123] Dr. Scarth made recommendations regarding past, current, or future treatment and their effect on the plaintiff's injuries and his prognosis.

[124] Dr. Scarth is a clinical instructor in the Department of Psychiatry at UBC. He has provided more than 500 independent medical opinions on individuals and occupational roles in which public safety is a significant concern. He testified that more than 50% of the patients he assesses are in the clinical setting of substance abuse issues.

[125] Dr. Scarth entered a Psychiatry residency through UBC, completing in 2006, after which he has worked full time; in both community and outpatient treatment settings, and in a hospital setting. He established and ran a consultation and liaison service that provides psychiatric assessment on medical and surgical units; to assess and treat psychiatric illness in the context of an overlay of medical problems. He also worked in Emergency, as a consulting psychiatrist.

[126] Dr. Scarth then proceeded to focus his clinical work predominantly in Emergency, taking on the role of clinical director in the Emergency psychiatry setting, doing that from 2006 until the present. On a routine basis, he would see approximately 15 patients per day, three days a week, to a total of roughly 1500 patients a year. He has been qualified as an expert in court on one previous occasion.

[127] Dr. Scarth conducted a two-hour assessment of Mrs. Nofle on February 20, 2017. He assumed Mrs. Nofle was truthful in the information she gave him. His assessment occurred several months before he testified, by which time he had no independent recollection of the interview. Accordingly, his recollection of the interview was confined to his notes and written report.

[128] Dr. Scarth concluded Mrs. Nofle did not have a pre-existing psychiatric illness or disorder; nor any history of significant sleep disturbance; and in summary, found no indication of prior existing problems of relevance (p. 6).

Dr. Scarth's diagnosis of the plaintiff's injuries and opinion on the causal connection between the accident and those injuries

[129] For his diagnosis, Dr. Scarth referred to the Diagnostic and Statistical Manual of the American Psychiatric Association, Edition 5 (DSM-5).

Criteria for an Adjustment Disorder

[130] Dr. Scarth explained on direct examination, the criteria of an Adjustment Disorder based on the DSM-5. He explained that Adjustment Disorders are a reaction to a stressor or particular series of stressors in which the stressor results in emotional or behavioural changes in an individual that is of sufficient extent that causes them distress. In addition, there has to be indication that their response to a stressor is exaggerated or beyond the norm or is impairing some aspect of their functioning. A key aspect to this disorder is that it is a reaction to a stressor and the expectation is that if the stressor is removed or resolved within a defined period of time, six months in the DSM-5, the Adjustment Disorder would also resolve. It is very clear that this is a response to a stressor and with resolution of the stressor, the condition resolves as well.

[131] Dr. Scarth opined at p. 6:

Based upon the symptomatic complaints reported to me by Ms. Nofle on examination, her objective presentation on that examination, and the collateral medical information, I concluded that following the accident Ms. Nofle developed an Adjustment Disorder with Depressed Mood.

This is described in the DSM-5 as a Trauma and Stressor related Disorder. It is considered to be a reaction to a particular stressor or stressors. In the case of Ms. Nofle I concluded that the relevant stressor was the development of physical pain and the impact of that pain upon her functional capacity following the accident.

[132] He further opined at p. 6, that "Ms. Nofle's description of her mood since the accident indicated the predominant state to have been one of frustration that has varied depending upon the extent and impact of her physical pain."

[133] The plaintiff's counsel pointed out that Dr. Scarth omitted in both his report and testimony a significant part of the four criteria for a diagnosis of Adjustment Disorder, i.e. that it must occur within three months of the onset of the stressor. On cross-examination, Dr. Scarth agreed:

- a. the clinical records show Mrs. Nofle's first complaint of mood changes according to her clinical records occurred on October 24, 2014;

- b. he knew Mrs. Nofle was working through her pain in the first year; and
- c. he knew Mrs. Nofle's anger and frustration really kicked in after the first year when she went part-time at work.

[134] The plaintiff's counsel pointed out Dr. Scarth could not point to any evidence of an emotional response to stress. Neither in the first three months of the stressor's onset nor even in the first full year; and that, despite his knowing the importance of onset of the disorder within three months of the stressor, granted he could not clearly define when that was.

[135] Dr. Scarth acknowledged on cross-examination that the exact point at which the stressor - pain - became sufficient to meet the criteria for an Adjustment Disorder is uncertain; and also acknowledged he could not define exactly when Mrs. Nofle's pain reached the point where it caused her sufficient distress, such that she would meet the criteria for an Adjustment Disorder.

[136] Given the shortcomings in the evidence relied on for Dr. Scarth's diagnosis of Adjustment Disorder, I agree with counsel's submission that the evidence and reasoning required to support a diagnosis of Adjustment Disorder falls short of funding that diagnosis, especially given Mrs. Nofle's clinical history.

Somatic Symptom Disorder

[137] As noted above, Dr. Scarth rejected a diagnosis of Somatic Symptom Disorder. In his report (p. 6), after having considered a diagnosis of Major Depressive Episode, he stated this regarding a diagnosis of Somatic Symptom Disorder:

I also gave consideration as to whether Ms. Nofle's distress related to her physical pain was excessive and resulting in sufficient anxiety to warrant a diagnosis of a Somatic Symptom Disorder. I concluded that her distress associated with physical pain and the functional impact of that pain was not excessive. Her description of her anxiety associated with the physical complaints was not reported by her to be a concern. On that basis I concluded that a diagnosis of Somatic Symptom Disorder was not indicated.

[138] Dr. Scarth defined Somatic Symptom Disorder as a condition in which a particular physical complaint, for example, pain, as in Mrs. Nofle's case, results in both distress and some additional "feature" to indicate persistent anxiety or disproportionate concern over the medical issue, the pain, or preoccupation with the medical condition. He considered whether this was a concern simply because she clearly identified pain as a significant issue for her since the accident, and also reported a great deal of stress related to her pain. He opined anxiety associated with that was not excessive and that her predominant pain-related complaint was frustration and Disrupted Mood Disorder.

- [139] The plaintiff's counsel noted two inconsistent positions taken by Dr. Scarth with respect to this condition: on direct examination, his testifying Mrs. Nofle was not preoccupied with pain; on cross-examination that, as Mrs. Nofle reported to him, she was thinking about the accident every day. Counsel also noted Dr. Scarth had notated in his history that Mrs. Nofle was preoccupied with pain.
- [140] On the question of whether the mood changes Mrs. Nofle has experienced might be indicative of a more significant disorder, such as a clinical depression, or, as defined in the DSM-5, a Major Depressive Episode, Dr. Scarth concluded "that the absence of a depressed mood state on a majority of days, and a retention of enjoyment, interest and motivation in activities was not consistent with such a diagnosis." He added, "[w]hile low energy, disrupted sleep, fatigue, and poor concentration and memory could be conceptualized as aspects of a depressive syndrome, in my opinion the impact of daily physical pain is a more likely explanation for these symptom complaints", (p. 6).
- [141] On the question of whether Mrs. Nofle's distress related to her physical pain was excessive and resulting in sufficient anxiety to warrant a diagnosis of a Somatic Symptom Disorder, he concluded that "her distress associated with physical pain and the functional impact of that pain was not excessive. Her description of her anxiety associated with the physical complaints was not reported by her to be a concern. On that basis [he] concluded that a diagnosis of Somatic Symptom Disorder was not indicated", (p. 6).

Major Depressive Episode

- [142] Dr. Scarth explained to the court what he meant by the terms Major Depressive Disorder, Clinical Depression, and Major Depressive Disorder or Major Depressive Episode. He explained Clinical Depression is a term widely used by clinicians in the process of providing treatment to patients. It refers to the presentation of depression of sufficient extent to cause distress and to be considered of clinical relevance, something that requires treatment. The actual defined disorder in the DSM-5 is a Major Depressive Episode. He explained that a Major Depressive Episode is a distinct episode, a period of time in which an individual's mood changes, a change in "quality", typically with a sad or low subjective state. He said that depending on an individual's background, they will use various descriptors. Typically, depressed individuals describe a quality of sadness, emptiness, or hopelessness; alternatively, a loss of enjoyment in interest and activities.
- [143] As for the DSM-5, to meet its criteria, he further explained that in addition to that core definitive mood change, there has to be additional features, five in total, that reflect the typical changes seen as part of a depressive episode, such as energy, cognitive capacity, concentration, suicidal ideation, a hallmark of more severe depression and what is called psychomotor changes, i.e. changes in movement, either agitation or a marked slowing.

- [144] Dr. Scarth further refined the definition, telling the court that for an individual to meet the DSM-5 criteria for Major Depressive Episode, there needs to be hallmark changes in the mood state in addition to further changes in those other factors. In answer to a question from the court, Dr. Scarth confirmed that Clinical Depression exhibits a mood state change and that the major episodic depression exhibits those additional criteria.
- [145] Dr. Scarth testified that for the DSM-5 criterion for this condition, five of the nine have to be satisfied.
- [146] In cross-examination, he agreed weight loss or weight gain is a DSM-5 criterion for the diagnosis. He granted he had failed to ask Mrs. Nofle about that in this case.
- [147] As noted earlier, at p. 6 of his report, Dr. Scarth opined that while Mrs. Nofle's "low energy, disrupted sleep, fatigue, and poor concentration and memory", 4 of 9 DSM-5 criteria could be conceptualized as four aspects of a depressive syndrome, he still thought "the impact of daily physical pain is a more likely explanation for these symptom complaints."
- [148] On cross-examination, Dr. Scarth agreed that it Mrs. Nofle had gained significant weight - which she had, roughly 23 pounds since the accident - that could constitute another one of five criteria under the DSM-5 for Major Depressive Episode; i.e. meeting the requirement for at least five in total.

Dr. Scarth's prognosis

- [149] At p. 8, Dr. Scarth opined that his prognosis for Adjustment Disorder, discussed earlier in these reasons, depended on the prognosis for her physical pain, for which he deferred to others. He further opined that assuming pain complaints remained unchanged for the foreseeable future, the prognosis would be for improvement, from a psychiatric perspective, opining that, more likely than not, her psychiatric presentation would improve, assuming unchanged pain complaints. He based that opinion on what he characterized as the "trend to improvement in the past two years reported by Ms. Nofle on my examination", particularly noting Mrs. Nofle's "description of an improvement in her perspective and use of mature coping styles such as rationalization." He also thought "the absence of prior psychiatric illness indicated [she] would not be at increased risk for the development of more significant depressive illness", (p. 8).
- [150] The plaintiff's counsel submitted the bases for Dr. Scarth prognosis opinion do not consist with what Mrs. Nofle actually told him, pointing out that Dr. Scarth's clinical notes, [Ex. 5, Tab 15, p. 14] indicated Mrs. Nofle told Dr. Scarth she thought about the accident every day. Counsel further submitted, reasonably in my view, that thinking about an accident daily 3 years after the accident does not signpost a trend to improvement. I find it does not consist well, either, with Mrs. Nofle's testimony, considered as a whole.

[151] Dr. Scarth presented as a very intelligent and experienced physician. His explanations assisted the court. However, I found a number of flaws and gaps in his diagnoses; their questionable factual bases undermined my confidence in the reliability of some of his analysis and conclusions. Information significant for the forming of diagnoses and the drawing of conclusions, was not mentioned, leaving an incorrect impression of the totality of the plaintiff's clinical history. He was not direct in his answers at times. I find the opinions of Dr. Kleinman, Dr. Mok, and Dr. Shuckett more instructive and prefer them.

Dr. Christopher Gallimore, Orthopaedic Surgeon

[152] Dr. Gallimore's qualification to opine in the field of Musculoskeletal Symptoms and Orthopaedic Surgery was not challenged. In cross-examination, he confirmed his elective practice and surgical work focused on the lower extremities, notably hips and knees.

[153] In his May 15, 2017 report, Dr. Gallimore opined Mrs. Nofle suffered soft tissue injuries to the neck and left shoulder; myofascial strain of the cervical spine, chronic, and exacerbation of left shoulder calcific tendonitis both related to the accident. He was not given other medical legal reports before he conducted his examination of Mrs. Nofle and wrote his report. He did not give a prognosis. He acknowledged, however, that (1) he did not recall Mrs. Nofle saying she experienced pain in her left shoulder at the time of the accident; (2) there is no clinical record for the previous two years of any pain in the neck and shoulder. He clarified he was not opining a crumbling condition in the shoulder; rather just an exacerbation. He also did not proffer any evidence to suggest that there would be a flare up of the left shoulder in future, irrespective of the accident.

[154] On the subject of Mrs. Nofle's rehabilitation, and his statement that an active rehabilitation program Mrs. Nofle attended in October 2016 was likely beneficial to her, Dr. Gallimore acknowledged his clinical notes contradicted that because he had written, "overall, no better". He agreed in cross-examination that this is what Mrs. Nofle told him and he had assumed she told him the truth.

[155] The plaintiff's counsel questioned Dr. Gallimore on the nature of Chronic Pain Syndrome. He agreed it entails both a physical element and a psychiatric element and that both chronic pain and Somatic Symptom Disorder encompass a significant intersection of psychiatric and physical components. He confirmed he confined the scope of his opinion to the physical component and deferred to a psychiatrist on the psychiatric component. He granted that when it comes to dealing with chronic pain, a physiatrist perhaps would have more expertise than an orthopedic surgeon. He testified that he had a two-month residency rotation in Psychiatry.

- [156] How close a fit an expert's expertise is to a plaintiff's medical condition depends on the nature of their injuries and the expert's professional training, clinical experience and focus. Dr. Gallimore is doubtless a capable and knowledgeable Orthopaedic Surgeon but his clinical observations in this case do not correspond well with the central clinical emphases of his practice.
- [157] The diagnostic testing Dr. Gallimore set out at p. 3 of his report found no telling abnormalities in the spine and no evidence of fracture. A January 8, 2013 neck ultrasound showed a prominent subcutaneous fat lobule at a location that corresponded with Mrs. Nofle symptoms. The clinical significance, if any, of the fat lobule at that location was not explained.
- [158] With respect to Mrs. Nofle cortisone injections, Dr. Gallimore opined one or two Cortisone injections would be appropriate. Noting she had had received four injections at the time of his examination, he opined ongoing Cortisone injections would not be appropriate.
- [159] He thought an MRI of the left shoulder to rule out rotator cuff pathology was in order.
- [160] With all due respect to Dr. Gallimore, I found the opinions of Dr. Kleinman, Dr. Mok, and Dr. Shuckett more instructive and persuasive.

Vocational, Occupational Therapist and Cost of Care Reports

For the plaintiff: John Lawless, Vocational Consultant

- [161] John Lawless is a Vocational Consultant. No objections were raised to his qualifications to provide an opinion on the subject of vocational rehabilitation. On May 1, 2017, he assisted and conducted a vocational assessment of Mrs. Nofle. In the course of so doing he read relevant medical and employment documentations. Initially, he had not been provided with Dr. Scholtz's documents. In the July 4, 2017 report following his assessment, he opined on the career Mrs. Nofle might have engaged in but for the injuries she sustained in the accident and considering what employment prospects, capacity and intentions she had.

Pre-accident capacity and intentions

- [162] Mr. Lawless surveyed Mrs. Nofle's pre-accident health and capacity at para. 12 of his July 4, 2017 report:
12. Ms. Nofle was happy with her employment at UFV and planned to stay with it, adding that she had trained at the university just so she could work there. She expected in time to advance to a permanent, full-time clerical position which would have provided good pay as well as a pension and benefits she could have shared with her family. This was important since her husband was still self-employed and their children could have got their tuition at UFV paid for.
- [163] He also commented, para. 13, on her evident "great" health at the time of the accident.

[164] The Career Ability Placement Survey (CAPS) predicts a person's success in a career through the administering of eight tests that are in turn linked to 14 Career Clusters. The areas in which Mrs. Nofle stood above the average percentile rank supported her career choice, the details of which Mr. Lawless laid out at para. 35.

Pre-injury career prospects

[165] As for Mrs. Nofle's pre-injury vocational prospects, he foresaw her continuing to work at UFV, as she had planned, and later securing a regular position. He noted at para. 45, that she did achieve this in July 2014, at which time she became a "Program Coordinator, earning \$23.93 hourly, later increased by about two dollars hourly, plus 10% in lieu of vacation and benefits. He noted Mrs. Nofle was confident that in future her position would have evolved into permanent employment with benefits.

[166] At the time of the accident, her anticipated earnings had been \$30,756.38 annually, assuming full-time hours.

[167] Mr. Lawless opined that had Mrs. Nofle left UFV for any reason, she could have found work in any of the clerical occupations she had access to previously. He noted at para. 45, "[t]hese occupations are very large and have broadly average employment prospects in BC, with many options for full and part-time employment." In his report, at p. 9, he listed earnings information on jobs Mrs. Nofle has done and to which she might have aspired, to give an idea of her earning potential before her accident. He noted the following median earnings for selected occupations in B.C. (from www.jobbank.gc.ca - in 2016 Dollars) to which she could quite reasonably have aspired and potentially achieved:

Median Earnings for Selected Occupations in BC

Receptionists

\$16.00/hr

General Office Support Workers

\$21.00/hr

Administrative Assistants

\$22.00/hr

Administrative Officers

\$23.00/hr

Supervisors - General Office & Administrative Support Workers

\$25.64/hr

- [168] Mr. Lawless opined that the National Occupational Classification (NOC) that best described Mrs. Nofle's work at the time of her accident is "General Office Clerks". He noted that like most clerical occupations it is sedentary, with "sitting" for body position and "limited" strength (defined as lifting up to 5 kg). He noted it also has "upper limb coordination," which, he also noted, "describes the keyboarding and other routine clerical tasks that go in on in an office", (at para. 48).
- [169] Mr. Lawless also noted that even more highly skilled clerks like Administrative Officers and Clerical Supervisors can engage in similar clerical activities and that in practice, such workers do as much keyboarding and paper shuffling as others in offices. He noted this would return Mrs. Nofle to her physical limitations. He further opined on this subject at para. 48 as follows:
48. In fact, any kind of clerical job would be difficult for her according to the information reviewed, as well as the impression I formed during assessment. She was testing with me for about an hour, during which I accommodated her as best as I could so she didn't have to hold her head in a downward looking position. Still she found it very difficult. If this is how she feels performing an hour of work at some regular office job, I would not expect her to remain in it. Indeed, she did try for over a year after her accident to continue at UFV in a variety of positions, yet even with an accommodating employer and reduced hours she finally gave up. And it would be hard for her to find any easier employer than this, a large, unionized public institution. Thus I believe that she is probably restricted from these occupations.
- [170] At para. 49, Mr. Lawless opined on the seriousness of Mrs. Nofle's limitations:
49. It's serious that Ms. Nofle is no longer able to perform the work that was probably going to compromise the rest of her career before her accident. Even more serious is the fact that there is really nothing lighter in the NOC than those occupations. One might advise sedentary clerical work under easier circumstances, like reduced and flexible hours from home where Ms. Nofle could make her own accommodations and be her own boss, yet she's tried this as well. For some years she was Bookkeeper for her husband's small business, but she couldn't do it after her accident even after she left UFV and now the business has been sold. Moreover every other occupation she has worked in would be even worse for her as they are more strenuous. For instance Dental Assistants would need to hold awkward body positions while helping tend to patients, Salespersons would have to reach to and handle merchandise, food service jobs require either static standing or fast paced walking, etc. So Ms. Nofle isn't suited for the sedentary office work she was doing at her accident and there is nothing else for her that is any better.

[Underline emphasis added.]

- [171] Mr. Lawless also explained (at para. 50) his concerns for the length of time Mrs. Nofle has been out of work. He explained the length of time being out of work "is a strong negative prognosticator for returning to work." He noted at paras. 50 - 51:
50. Disabled people tend to be less attached to the workforce in any case, but there is a tendency to remain unemployed the longer they have gone without work. This is especially true when the disability is a mood disorder, since that can be disabling generally. Another worrisome factor in Ms. Nofle situation now is that she has recently moved to a very small rural community in Alberta, where there would be limited employment opportunities even if she wasn't disabled.
51. To conclude, I think Ms. Nofle is competitively unemployable. She is restricted from the sedentary office work that made up her career before, and there is nothing lighter or easier for her to consider. The information reviewed did hold out some hope that she could work later in some limited capacity, but given my impression of her, the length of her unemployment so far, and where she is living presently, I think she will most likely remain out of work.

Defence criticism of Mr. Lawless's opinion

- [172] The defendants' counsel granted Mr. Lawless considered whether Mrs. Nofle was capable of returning to the same career, duties, and salary as before the accident; whether she was able to return to the same kind of work in other industries; and whether she could ever be gainfully employed, but criticized Mr. Lawless's opinion for failing to consider workplace accommodations, or flexible work arrangements, and training to develop new skills.
- [173] The defendants noted that Mr. Lawless testified in cross-examination that out of the millions of clerical administrative support jobs there might be one job that Mrs. Nofle can do, though the odds of finding that job were low. On redirect, he granted he sees some clients with chronic pain and mood problems who can still work; situations in which the individual is working for a family member. He surmised that were Mrs. Nofle to do any work at all, it would be for a family member. The defendant submitted this is the situation in which Mrs. Nofle currently finds herself and one historically occupying a major portion of her working life.
- [174] The defendants, dismissing the testimony of Mrs. Nofle and observations of multiple credible witnesses for not being objective, criticized the plaintiff for not producing a functional capacity evaluation to measure objectively her physical capacity to perform tasks at work and at home. With respect, I cannot subscribe to that argument. Well conducted and explained functional capacity assessments may assist the court's determination of the nature and extent of the plaintiff's physical limitations, especially where the injuries are discreet, and the nature and extent of the physical and psychological limiters identifiable and amenable to being measured. I note a plaintiff's self-reporting of their pain and how they are feeling during the testing being conducted is usually one of the most important

parts of the evidence available to the examiner, who typically, in my experience, keep a record of it. Dr. Shuckett noted that patients suffering chronic pain define their limitations. Further, the examiners usually form and state their own impressions.

- [175] As for objectivity, if the conflicting opinions of the experts who conducted functional capacity evaluations are a reasonable guide, test results still require interpretation no less than do the observations of the plaintiff made by witnesses. Further, in this case, the court and the OTs had the evidence of medical experts, which, in my opinion, the testimony of the lay witnesses mirrored quite well. Sworn and cross-examined observations made by a credible observant adult can be considered objective; and in some instances, can become information the OT can take into account, especially where the observations are made in real-life everyday circumstances. I do not see the lack of a functional capacity assessment in this case calls for a markdown of the value of the testimony of the lay witnesses.

Workplace accommodations

Defendants - Cynthia Kresak, Vocational Consultant

- [176] The defendants submitted a Response Report" dated August 17, 2017 prepared by Cynthia Kresak, a Certified Vocational Evaluation Specialist. Her report consisted of a review of Mr. Lawless's report and documents provided her by counsel.
- [177] At p. 5, para. 35, Ms. Kresak opined:
35. The office, clerical, and administrative support categories of the National Occupation Classification is a very large occupational category with many types of administrative support positions and varying work environments, places of employment, work hours, arrangements, and employment opportunities. While there may be some occupations requiring more of one duty than another, such as dealing with the public, computer work, and other various common administrative tasks, these occupational classifications have not been ruled out entirely as viable return to work options for future consideration.
- [178] Ms. Kresak conclusively opined Mr. Lawless's summary of his findings that "Mrs. Nofle is competitively unemployable" has not been sufficiently demonstrated and that "all occupations identified as being potentially suitable have not been fully exhausted in order to make this determination" (p. 5).
- [179] I note Mr. Lawless had indicated in his report that clerical occupations form a very large employment classification. In his response report, dated September 15, 2017, he responded to Ms. Kresak's comments as follows:
10. What Ms. Kresak is saying here is that since clerical occupations are very large, there should be some positions which Mrs. Nofle can manage. It is true that that these are large occupations, as I said. That does, not, however, mean there must be suitably lighter clerical positions for Ms. Nofle somewhere. The information I relied upon discussed the difficulty she had with work in general, not just her former positions at UFV. Moreover as I said, she

already had an employer who was better able to accommodate a worker with physical limitations, yet still she couldn't last. That point, Ms. Kresak did not relate.

- [180] As for Ms. Kresak having disagreed with Mr. Lawless's penultimate conclusion of Mrs. Nofle being most likely to remain out of work, he noted Ms. Kresak's remark that this had "not been sufficiently demonstrated" was not accompanied by any analysis and discussion apart from "a list of factors supporting Ms. Nofle's employability" and that she did not address the medical opinions regarding Mrs. Nofle.
- [181] Ms. Kresak never met with the plaintiff. The plaintiff's counsel submitted Ms. Kresak's report is unlikely to assist the court in any material way as Ms. Kresak did not meet with, examine, or interview the plaintiff; reviewing only documents and information provided by counsel. Counsel submitted examining and getting a personal history is important to providing an accurate and complete assessment, *Preston v. Kontzamanis*, 2015 BCSC 2219 [Preston].
- [182] Plaintiff's counsel submitted that Mr. Lawless's having met with Mrs. Nofle and making first hand observations of her, enabled him to have insight into his assessment and analysis of her vocational capacity. The plaintiff's counsel also noted, as I had indicated when I ruled on the admissibility of Ms. Kresak's report, that Ms. Kresak did not provide any reasoning supporting her conclusions and did not give pointed criticism of Mr. Lawless's reasoning and methodology, or itemize what information she thought relevant or supported her opinion; and introduced no contrary evidence for analysis. I also stated in my ruling that a rebuttal report should be populated mostly with highlighted empirical information supporting the expert rebuttal opinion and undercutting the other expert's opinion, clearly reasoned.
- [183] In the result, I admitted Ms. Kresak's report noting, however, the weight accorded it is another matter. The major flaw in the report is the dearth of reference to the medical information that effectively buttresses Mr. Lawless's conclusions. On balance, I find Mr. Lawless's report more persuasive.

Plaintiff's treatment history

[184] The parties agreed the plaintiff has undertaken the following treatments:

- a. One massage therapy session, October 28, 2013.

Chiropractic Treatments

- b. Two chiropractic treatments by Dr. Rob Forde, October 29 and 31, 2013; funded by ICBC.
- c. Fifty-five chiropractic sessions between January 18, 2014 and October 19, 2015, administered by Dr. Sean Kilgannon, at Vedder Village Chiropractic. ICBC funded 38 of those chiropractic treatments, except for January 18, 2014 to August 12, 2014. The plaintiff paid \$695 for 17 of the chiropractic treatment sessions between October 2, 2014 and October 19, 2015.

Fraser Valley Physiotherapy & Rehabilitation Centre

- d. Fourteen massage therapy treatments between November 7, 2013 and February 11, 2014, at Fraser Valley Physiotherapy & Rehabilitation Centre.
- e. Two physiotherapy treatments: March 11 and 13, 2014.
- f. Six massage therapy treatments between November 7, 2013 and December 20, 2013, at Fraser Valley Physiotherapy.
- g. Two sessions at Fraser Valley Physiotherapy & Rehabilitation Centre: March 11 and 13, 2014.
- h. Six massage therapy sessions between November 7, 2013 and December 20, 2013; funded by ICBC.
- i. Two physiotherapy sessions between January 9, 2014 and March 13, 2014; and 8 massage therapy sessions between January 9, 2014 and March 13, 2014; \$244 paid in total by Mrs. Nofle, [\$184 for massage and \$60 for physiotherapy].

Dr. Jing Wang, Acupuncture, Abbotsford Chiropractic Centre

- j. Two acupuncture treatments: August 15, 2014 and August 21, 2014.

Ms. Jessica Mundia, Optimum Sport Performance & Health Centre

- k. Three active rehabilitation therapy treatments: May 4, 2015, May 25, 2015, and June 1, 2015.

KARP Rehabilitation

- l. Twenty-two rehabilitation sessions on a Fit to Work Program between October 7, 2016 and April 27, 2017. ICBC funded those sessions.

Yale Therapy Group

- m. Four sessions for psychological treatment at Yale Therapy Group in May 2016. ICBC funded the treatment sessions.

[185] The costs of treatment form part of Mrs. Nofle's Special Damages Claim.

[186] I will turn now to the parties' respective assessments of future costs by qualified Occupational Therapists: Kim Gibson for the plaintiff; and Claudia Walker for the defendants.

Assessment of Costs of Future Care**Kim Gibson, Occupational Therapist called by plaintiff**

[187] Ms. Gibson's experience as an Occupational Therapist extends back to 1993, encompassing both inpatient and outpatient services in hospitals in Ontario, Alberta, and British Columbia. She is currently an independent consultant. She was provided with the relevant medical legal reports and other relevant documents set out as part of Appendix C in her

report. It is apparent from her curriculum vitae that she continues to engage in continuing education as an Occupational Therapist. Her caseload involves both occupational therapy assessment and treatment from various sources of referral, including ICBC, Veterans Affairs Canada, WorkSafeBC, the RCMP, etc.

[188] Ms. Gibson explained in her report that the governing purpose of the assessment is to determine the residual effects of Mrs. Nofle's injury on her ability to function independently; identify services, supplies, and equipment Mrs. Nofle needs in future to restore her level of independence and function for day-to-day activities, compared to what she was able to perform before the accident; and to recommend what is reasonably and necessarily required to maintain her previous level of function. She based her recommendations on medical recommendations set out in the various medical legal reports that she reviewed, and assessed the costs associated with those recommendations. In preparation for the report, she toured Mrs. Nofle's home and confirmed her awareness of how tasks in the home were divided before her accident. She did not have an opportunity to visit Mrs. Nofle's new Alberta home, which is not as large as her Chilliwack home. On cross-examination, she granted she did not ask Mrs. Nofle to perform the duty she was assessing. Mrs. Nofle told her what she could and could not do, and what family members did and did not do.

[189] She was aware Dr. Kleinman had not recommended massage therapy. She was cross-examined on the worth of passive therapy such as massage therapy, opining that passive treatment is beneficial when the patient experiences flare-ups of pain, and also maintained that kinesiology treatment is an active form of therapy.

[190] Ms. Gibson's recommendations for future care were as follows:

Chronic Pain Clinic

[191] Dr. Kleinman recommended Mrs. Nofle attend a multidisciplinary program. Ms. Gibson estimated the cost of the program would be in the order of \$15,000, depending on length of time attended and the number of professionals seen. She nominated Orion Health in Surrey as the closest private clinic to Mrs. Nofle. However, since the date of Ms. Gibson's assessment, the Nofles had moved to Alberta. A physician who initiated the process there left Alberta for a period of time, so the processing of a chronic pain program there has been stalled. Mrs. Nofle was about to commence a pain program at the Jim Pattison Outpatient Care and Surgery Centre, which would have been covered by MSP. Mrs. Nofle could not follow through that program because they had moved to Alberta.

Left Shoulder imaging

- [192] Ms. Gibson noted Dr. Kleinman had recommended a diagnostic ultrasound of Mrs. Nofle's left shoulder to determine any pathology explaining her symptomology; and that Mrs. Nofle consider receiving trigger point injections, nerve blocks, and Cortisone injections at that time. She recommended \$300 to cover those costs.

Pain Management Therapies

- [193] Dr. Scholtz recommended physiotherapy and kinesiology.
- [194] Ms. Gibson, therefore, recommended an annual allowance to use for further treatment to maintain function and to deal with any flare-ups of symptoms. She noted kinesiology sessions cost \$55 each session; massage and physiotherapy \$80 per hour; and chiropractic treatment \$40 per session. She anticipated the need for up to 12 sessions annually of massage, physiotherapy or chiropractic treatment for maintenance.

Housekeeping Services

- [195] Ms. Gibson noted Mrs. Nofle reported constant dull headache pain that increased with activity, left shoulder pain, and neck pain.
- [196] She further noted Mrs. Nofle reported she managed her pain by pacing her activity, trying to avoid activities that involve lifting her left hand above shoulder level, and stretching her neck in flexion. She reported her husband and daughter assist with housecleaning, usually carrying the laundry downstairs and then up to the machines. Mrs. Nofle advised Ms. Gibson she can perform some aspects of meal preparation but cannot chop hard vegetables or mash potatoes; she loads the dishwasher one item at a time, and cannot put items away which are stored above her shoulder height. She does not do any vacuuming or any task, such as dusting, above shoulder level.
- [197] Ms. Gibson further noted, at p. 6, that Mrs. Nofle can engage in lighter household work with accommodation and limitations but cannot perform any yard work, due to the heavy physical demands.
- [198] At p. 9 of her report, Ms. Gibson stated Dr. Kleinman noted Mrs. Nofle had difficulty with "repetitive or prolonged activities at or above shoulder height; activities that place strain on her neck and upper back, including but not limited to lifting, bending, pushing and pulling in particular activities that place the arms away from the body; and heavier housekeeping."
- [199] Ms. Gibson further noted, at p. 9, that at the time of her report Mr. Nofle and their daughter were doing tasks formally done by Mrs. Nofle before the accident. She recommended provision for two hours weekly of housekeeping services to be used for the tasks Mrs. Nofle "cannot perform herself such as high dusting, changing the bed linen and vacuuming." Ms. Gibson noted that given an hourly rate of \$30 plus GST, the annual cost would be \$3,120, provided until age 80, at which time she anticipated Mrs. Nofle would need "assistance due to age related decline in function" (p. 9). She also recommended "eight

hours, twice yearly, for seasonal cleaning.

- [200] Ms. Gibson, at p. 8, also recommended "annual funding of \$1,500 to cover the cost of receiving pain management therapy with provision throughout her window cleaning, cupboard cleaning and moving of furniture to clean underneath it", at an "annual cost of \$480 to age 75", (p. 9).

Gardening

- [201] The evidence is clear that Mrs. Nofle was an avid gardener before the accident; each spring preparing a vegetable garden. She also did a lot of the lawn maintenance.
- [202] Ms. Gibson recommended compensation for "lawn maintenance at a cost of \$45 per session for 30 times per year at an annual cost of \$1,350 (plus GST) until age 75", (p. 9).
- [203] As for the vegetable garden she used to prepare annually each spring, Ms. Gibson further opined that if Mrs. Nofle "had periodic assistance throughout the summer for heavy tasks such as lifting, she may be able to engage in this activity", which she had previously enjoyed so much but "would have to pace herself". Ms. Gibson recommended "provision of 12 hours of assistance at an hourly rate of \$45 for an annual cost of \$540 (plus GST) yearly until age 75", (p. 9).

Medications

- [204] Ms. Gibson recommended funding for the pain medications that Mrs. Nofle was using at the time for assessment, namely: Tylenol Extra Strength, two tablets two to four times daily, with a bottle containing 100 tablets costing \$12; the cost between \$175 and \$350, with provision yearly throughout Mrs. Nofle's lifetime (p. 10).

Heating Pad and Icepack Replacement

- [205] Mrs. Nofle uses heating pads and icepacks a lot. Ms. Gibson recommended funding of \$50 every five years to replace them (p. 10).

Claudia Walker, Occupational Therapist, called by the defendants

- [206] Ms. Walker was also qualified to provide an opinion as an Occupational Therapist, in her field of Occupational Therapy on matters related to the care and rehabilitation of Mrs. Nofle. Counsel for the plaintiff did not object to her qualifications or to the admissibility of her report but argued her report and her opinion should be given no weight. I will deal with this latter point a little further on in these reasons but for now, will address the essence of her report; which is effectively a critique of Ms. Gibson's report.
- [207] Ms. Walker stated in her report that since 2003, she had "prepared over 600 opinions (both defence and plaintiff) on future care in Canada and Australia", (p. 2).

- [208] She criticized the letter of instruction because it had not requested a cost of future care assessment, and had asked questions relevant to a medical expert (pp. 3-4). I do not consider that problematic because the court had before it ample medical evidence and Ms. Gibson confined her remarks, so far as I can discern, to her field. She had all the pertinent medical legal information needed for her purposes.
- [209] Ms. Walker also criticized Ms. Gibson's curriculum vitae for not indicating she had not attended a significant clinical education program since 2013. That is not correct. Ms. Walker must have overlooked Appendix "D" to Ms. Gibson's report. It shows regular and comprehensive attendance in Continuing Legal Education Programs, between 1997 and 2013; four in 2013, two in 2014, and two in 2015.
- [210] I will turn to some of Ms. Walker's criticisms of Ms. Gibson's report. I found some of the comments immaterial and of limited, if any, assistance to the court.

Assessment methodology

- [211] Ms. Walker criticized the fact that Ms. Gibson spent 80 minutes with Mrs. Nofle, deeming this an "unusually short period of time to conduct a COFC (Cost of Future Care Assessment)", (p. 4). Ms. Walker's stated practice is three to six hours for an assessment. I note, however, that the assessment in this case is not a particularly complex one, compared to some other cases I have heard. Ms. Walker also criticized the lack of a functional capacity assessment. I have already addressed that question elsewhere in these reasons and considering the length, breadth, and depth of the witness testimony. I do not consider the lack of a functional capacity assessment in this case a troubling gap. Ms. Walker criticized Ms. Gibson for "not [exploring] the family's pre-MVA division of labour", i.e. the division of labour between Mrs. Nofle and her husband, which division she sees as essential for the prescribing of future services. I note the subject of the division of labour subject was explored well by counsel, and Ms. Gibson appears to have focused on what was required to replace the function Mrs. Nofle lost with respect to the gardening she loved to do. Further, on cross-examination, Ms. Walker agreed a functional assessment provided only a brief snapshot in time. A functional capacity assessment can be an empirical adjunct to the observations of physicians and lay witnesses but the latter's observations may encompass a far greater period, and be populated with a much wider range of circumstances and activities than what a formal functional capacity assessment covers. In saying that, I appreciate less formal though structured observations of the client's functioning while performing a function in their home for example, could further enrich the court's understanding of the plaintiff's limitation.
- [212] That all noted, I do not find the absence of a functional capacity assessment, formal or informal, significantly undercut the worth of Ms. Gibson's conclusions. I note Ms. Walker's opinion was not based on a home visit, or even an interview, let alone a functional capacity assessment.

Chronic Pain Program

- [213] Ms. Walker, on cross-examination, granted a chronic pain program was recommended by Dr. Kleinman and conceded it was Ms. Gibson's role to provide a cost for it. She agreed the \$15,000 estimate was accurate.
- [214] Ms. Walker asserted Ms. Gibson's role was to assess the claimant for the suitability of a chronic pain program, which she stated should have been done by clinical inquiry into the claimant's engagement in catastrophic thinking, her use of active management strategies, her emotional state, and her knowledge of chronic pain. She stated Ms. Gibson did not pursue those areas and just referred to Dr. Kleinman. I respectfully disagree with this criticism.
- [215] It is not in issue in this case that Mrs. Nofle should be enrolled in a multidisciplinary chronic pain program. That was not just Dr. Kleinman's recommendation. Dr. Mok and Dr. Shuckett also endorsed it. Virtually every physician that examined Mrs. Nofle made the same recommendation. Mrs. Nofle had already been admitted to the pain program offered at the Jim Pattison Centre. It is only logical that an inquiry into Mrs. Nofle's engagement in catastrophic thinking would form part of the multidisciplinary assessment; the use of active management strategies, has already been explored with Mrs. Nofle, as has her emotional and mental state and her knowledge of chronic pain. I do not find, considering the circumstances of the facts in this case, Ms. Gibson having not explored those particular details undercuts her recommendation for attendance at a multidisciplinary pain clinic.

Left shoulder imaging and corticosteroid in injections

- [216] Ms. Walker also criticized Ms. Gibson's recommendation for left shoulder imaging, as was recommended by Dr. Kleinman and Dr. Shuckett. Ms. Walker stated this was a medical intervention outside Ms. Gibson's area of expertise. No one has questioned her areas of expertise but I see the imaging and injections were recommended by accredited medical experts in this case. Ms. Walker confirmed the cost for a single corticosteroid injection is approximately \$50 but objected that Ms. Gibson should have limited herself to quoting the cost of a single injection. As I explained earlier, Mrs. Nofle found the injections she received in September 2016 and January 2017 brought some improvement that was not lasting, which is usually the case with steroid injections. Further injections may be less effective or ineffective. Further, the number of injections medically possible are limited and too many may have a deleterious effect.
- [217] Medical expertise is required to estimate the number of therapeutic and medically acceptable corticosteroid injections. Further, neither party addressed the possibility Mrs. Nofle might be eligible to have the cost of the injections covered by Part 7 of the Vehicle Insurance Regulations. Further, the neurologist may need to have the medical imaging in hand before they recommend further injections. Therefore, setting the amount of an award at this stage may be somewhat premature. Nonetheless, given the breadth of the medical

opinion on the subject, the defendants are responsible for the cost of any corticosteroids incurred by Mrs. Nofle.

Kinesiology and physiotherapy

[218] Ms. Walker stated at p. 5, that Ms. Gibson had stated Dr. Scholtz had recommended treatment modalities such as kinesiology and physiotherapy, which she could not find in his report. However, on p. 4 of Dr. Scholtz's April 9, 2015 report he stated:

Ms. Nofle clearly has ongoing symptoms of whiplash type injury that will need further treatment modalities like kinesiology and possible physiotherapy etc.

[219] Ms. Walker acknowledged the error on cross-examination. She also agreed, in concert with Ms. Gibson, that it is likely the plaintiff requires access to passive modalities to manage flare-ups, which, from her experience, she expected to occur at a rate of six to eight sessions per year.

[220] I note, as well, that Dr. Kleinman agreed with Ms. Gibson's future care recommendations, see p. 6 of his September 20, 2015 report.

[221] Both witnesses at least agree Mrs. Nofle requires access to passive modalities to manage flare-ups. They disagree with respect to the frequency with which they will be required. Ms. Gibson recommended an annual allowance for further treatment to maintain function and to deal with flare-ups of symptoms: 12 sessions annually with fees. Kinesiology, at \$55 per session; physiotherapy, \$80 per hour, and chiropractic treatment at \$40 per session; totalling \$1,500 annually, through Mrs. Nofle's lifetime. She did not stipulate whether she meant 12 sessions for each of those therapies, annually. If the calculation is based on 12 sessions of each of those therapies, the annual amount would exceed \$1,500. Twelve sessions for each of those modalities in a given year would not be reasonable. Ms. Walker stated that in her experience, flare-ups can be expected to occur at a rate of six to eight sessions annually. Given the unpredictability and variability of Mrs. Nofle's symptoms and flare-ups, I do not think it is possible to be definitive. The realistic possibility of flare-ups, and the need for passive therapy at such times, coupled with far-sightedness justifies some reasonable provision being made for a higher range of estimates.

[222] Finally, on the subject of passive modalities, Dr. Scholtz recommended them but other medical experts did not endorse them. Ms. Gibson stated the annual cost would be \$1,500. But this figure requires individual sessions of \$125. Twelve \$80 sessions would work out to \$960 annually, say \$1,000; eight sessions, \$640 annually. I will comment on this later in these reasons.

Housecleaning services

[223] Ms. Walker criticized Ms. Gibson's recommendations for housecleaning services because, she asserted, she had not included necessary information to formulate her statements, including details of the house and yard, how much work Mrs. Nofle did before the accident, what standard the house and yard were kept to, tasks outside Mrs. Nofle's tolerances; and adaptive household equipment to reduce reliance on services such as a rechargeable vacuum cleaner. Ms. Gibson stated in cross-examination, however, that she was aware how the tasks were divided in Mrs. Nofle's home before the accident. Further, Ms. Gibson visited the Nofles' Chilliwack home. I also note Mr. Nofle had purchased a robot vacuum, so Mrs. Nofle did not have to vacuum. The evidence the court heard was that the house and yard were very well kept by Mrs. Nofle before the accident with some assistance from Mr. Nofle and a little from the children.

Yard Services

[224] Ms. Walker criticized Ms. Gibson's recommendation of 30 yard services annually. She opined this was excessive because Canadians do not need to maintain their lawn outside of the warmer months. She recommended 10 to 13 services per year, to reflect 26 weeks of warmer weather. I note, however, that this narrower view overlooks a year's shoulder months during which yard work often has to be carried out: pruning, cleaning up leaves, protecting plants, and clearing snow. Mr. Nofle would be expected to do the heavy components of those chores. The possibility of ice storms and the damage they cause to trees should be considered. One also should not overlook the fact that the Nofles now live on a semi-rural, quite large property; not in an urban landscape. I have Ms. Walker's point, but I find Ms. Gibson's rough estimate, which is all that can be expected for such an assessment here, is reasonable.

Maintenance of vegetable garden

[225] Turning finally here to the maintenance of a vegetable garden and Ms. Gibson's recommended annual assistance of 12 hours annually, Ms. Walker acknowledged, at p. 6, this activity held great meaning for Mrs. Nofle and as such is deserving of support. Ms. Walker stated she preferred, however, that an Occupational Therapist could assist Mrs. Nofle with "adapting the activity to enable her to pursue it without paid assistance." For this purpose, she stated she preferred "four hours OT time [costing] approximately \$480.00 (one off cost) and a budget of \$1,000.00 to purchase raised garden beds, long handled gardening tools and upright plant frames (all available through Lee Valley Tools)", she stated, and all replaceable in 10 years. Ms. Walker's reasoning was that this strategy was preferable because it returned Mrs. Nofle to independence and competence. She acknowledged, however, that Mrs. Nofle would still need assistance with handling bags of soil.

- [226] There is merit in the proposed means and objective but I cannot endorse the conclusion or reasoning. Mrs. Nofle has had help taking on the heavy tasks from her husband, her father, and a son. But with those taken care of, she could not manage even the lighter labours on her own such as planting, weeding, and harvesting. Specialized tools and upright and raised plant frames make sense, but those have already been tried. Further, it is questionable whether Ms. Walker's undocumented estimate of \$1,000 for the specialized tools, raised beds, etc., is realistic. I do not see the logic of involvement of an Occupational Therapist in Mrs. Nofle's gardening activities, enabling her to do that which for four years she has not been able to do at a level anywhere approaching what she did pre-accident, even with the help. An OT could be helpful in gathering suitable tools, etc., and in suggesting strategies to avoid or minimize aggravation and flare-ups but neither party provided for that. To be returned to the position Mrs. Nofle was in before the accident, she requires sufficient labour she could call on when needed, limiting her involvement, first, to what most gave her pleasure before the accident; and second, to what she can tolerate doing without aggravating her symptoms.
- [227] Before I move to the subject of non-pecuniary damages, I must first address the question of the weight to be credited to the report of Ms. Walker. This is somewhat anti-climatic because during the trial I addressed this and other evidentiary matters relating to admissibility of reports. The question left was and is what weight ought to be ascribed to (in this instance) Ms. Walker's admitted opinions. My finding at the hearing is still in good stead, one based on the fact Ms. Walker did not ask to meet and did not meet with the plaintiff, and did not visit the home. "Getting a personal history is important to providing an accurate and complete assessment", Preston, at para. 129. Ms. Walker granted she had not conducted her own assessment of Mrs. Nofle and was limited in her opinion to the assessment conducted by Ms. Gibson. I have considered and given some weight to Ms. Walker's opinions but more weight to Ms. Gibson's opinions.

Cost of Care - Legal principles

- [228] In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews] Dickson J. summarized the basic principles for assessing future care: At para. 25, he opined:

Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental and physical health of the injured person it may properly form part of a claim.

- [229] There must be medical justification and the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.) at para. 180.

[230] It is not necessary, however, for a physician to testify to the medical necessity of each and every item of care claimed but there must be some evidentiary link drawn between the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified care professional: *Aberdeen v. Zanatta*, 2008 BCCA 420, at paras. 43-51. McLachlan C.J. accepted the evidence of a rehabilitation expert in rehabilitation.

[231] The following table based on Mr. Darren Benning's calculations (Table 2 at p. 7) summarizes the present value of his recommendations:

Item

Cost

Frequency

Multiplier

Value

Present

Value

1.

Chronic Pain Program

\$15,000

Year 1

989

\$14,842

2.

Left Shoulder Imaging

300

Year 1

989

297

3.

Pain Management

Therapies

1,500

Annual

26,766

40,164

4.

Housecleaning Services

3,276

Annual to age 80

23,269

76,228

5.

Seasonal House Cleaning

504

Annual to age 75

21,135

10,652

6.

Gardening Assistance

1,418

Annual to age 75

21,135

29,959

7.

Vegetable Garden Spring Preparation

567

Annual to age 75

21,135

11,984

8.

Medications

276

Annual

26,776

7,380

9.

Heating Pad and Ice Pack

56

Every 5 years

5,759

323

\$191,828

[232] Mrs. Nofle accordingly seeks judgment for \$191,828 for cost of future care.

Defendants' position on Cost of Future Care

[233] The defendant's submitted an award within the range of \$1,500 to \$20,000 for future care costs was fair and reasonable. I will briefly summarize the defendant's position.

[234] Massage therapy, Karp Rehabilitation's "Fit to Work Program", acupuncture, and kinesiologist treatments produced no lasting benefit for Mrs. Nofle. Therefore, awards for extensive physiotherapy, chiropractic and massage treatments for the rest of Mrs. Nofle's life is not medically justified because it does not take into account that Mrs. Nofle may become more functional with better coping mechanisms through the pain clinic.

[235] With respect to housekeeping, aside from high dusting, vacuuming, taking the laundry up and down stairs and cleaning windows, she is able to do the rest of her housekeeping chores by pacing herself. As pointed out earlier, this is not accurately depictive. Dr. Kleinman noted Mrs. Nofle had difficulty with repetitive or prolonged activities at or above shoulder height, activities that strained her neck and upper back, including but not limited to lifting, bending, pushing and pulling in particular; and activities that placed her arms away from her body and heavier housekeeping. She reported her husband and daughter assist with housecleaning, usually carrying the laundry downstairs and then up to the machines. If they are not available, she would require assistance. Mrs. Nofle advised Ms. Gibson she can perform some aspects of meal preparation but cannot chop hard vegetables or mash potatoes, loads the dishwasher one item at a time and cannot put items away

stored above her shoulder height. She does not do any vacuuming or any task, such as dusting, above shoulder level.

Comments on claimed items

[236] I note the following:

1. The OT's for both parties endorsed the pain clinic.
2. Testing and treatment for left shoulder imaging is partly covered by MSP. The \$300 represents the one-time cost for the injections.
3. Ms. Walker and Ms. Gibson agreed there should be provision for flare-up and aggravation of symptoms [Kinesiology, \$55 per session; Massage and Physiotherapy, \$80 per hour; and Chiropractic, \$40 per session]. Physicians stressed the benefit of active therapies. The defendants aptly point out Mrs. Nofle did not find those therapies curative, though they were sometimes somewhat helpful, especially when symptoms flared-up. I do not see strong justification for a lifetime of treatments that have not been curative, but helpful during flare-ups. I find \$26,776 (present value) of \$1,000 annually, is a fair and reasonable allowance for pain management therapies, bearing also in mind the reasonable possibility the Chronic Pain Program may either lessen symptoms to a decent extent, or obviate the need for passive therapies. That cannot be confidently foreseen now, as Dr. Kleinman noted.
4. Dr. Kleinman supported Ms. Gibson's recommendations for housecleaning services: two hours weekly @ \$30 hourly = \$3,120 annually. To age 80 seems somewhat unnecessary but considering the poor prognoses at hand, it is not unreasonable to anticipate Mrs. Nofle's injuries may continue to disable her as she ages.
5. The recommended allowance for seasonal housecleaning assistance is reasonable, even assuming Mr. Nofle does some of the heavier tasks.
6. As for gardening assistance, to age 75, at an annual cost of \$1,418, Mrs. Nofle's father recalled that they used to garden together. They tried him doing the digging with Mrs. Nofle planting but it got to the point she could not do even that, and it was given up as well. Were it not for the central role gardening played in Mrs. Nofle's life pre-accident, this claim could be regarded as somewhat extravagant. But this is one of those activities that was near the centre of the constellation of recreations that gave Mrs. Nofle joy and satisfaction, a classic example of the kind of cost of care provisioning Dickson J. was alluding to in Andrews. I accept that claim.
7. The vegetable garden spring preparation, is likewise accepted.
8. Medications are necessary and reasonable.
9. Mrs. Nofle goes through a lot of heating pads and icepacks. The modest amount of \$323 is reasonable. The revised reduced total for Cost of Future Care is \$169,317, as set out in the revised table, the major change being in row 3:

Item

Cost

Frequency

Multiplier

Value

Present

Value

1.

Chronic Pain Program

\$15,000

Year 1

989

\$14,842

2.

Left Shoulder Imaging

300

Year 1

989

297

3.

Pain Management

Therapies

1,000

Annual

26,766

26,766

4.

Housecleaning Services

3,276

Annual to age 80

21,135

69,238

5.

Seasonal House Cleaning

504

Annual to age 75

21,135

10,652

6.

Gardening Assistance

1,418

Annual to age 75

19,630

27,835

7.

Vegetable Garden Spring Preparation

567

Annual to age 75

21,135

11,984

8.

Medications

276

Annual

26,776

7,380

9.

Heating Pad and Ice Pack

56

Every 5 years

5,759

323

\$169,317

[237] I will address this claim when I consider non-pecuniary damages, next.

Non-pecuniary damages

Legal principles

[238] Non-pecuniary damages compensate for a plaintiff's pain, suffering, and lost of enjoyment of life to the date of trial and for what they will suffer in future: Preston, at para. 139.

[239] The judge considers all the evidence relevant to the pain, suffering, and lost of enjoyment of life the plaintiff experienced to the date of trial and in the future, among them, the following inexhaustive list of factors (as noted in Stapley v. Hejslet, 2006 BCCA 34, at para. 46):

1. the plaintiff's age;
2. the nature of the injury;
3. the severity and duration of pain,
4. disability;
5. emotional suffering;
6. loss or impairment of life;
7. impairment of family, marital and social relationships;
8. impairment of physical and mental abilities; and
9. loss of lifestyle.

[240] The award for non-pecuniary damages, measured by the adverse impact of the particular injuries on the particular plaintiff must be fair and reasonable to all parties: Preston, at para. 140.

- [241] Each case comes with its own different persons and unique facts. Only the trial judge in the case at bar has the benefit of listening and observing all the witnesses. Awards made in similar cases do not determine what is a fair and reasonable award in the case at bar but may caution against making an award that is either excessive or too low.
- [242] I have extensively canvassed the nature and extent of Mrs. Nofle's injuries and the effects on her throughout these reasons. They form the backdrop to all the heads of damages and I will not repeat them here. There is no question she suffered significant injuries as a result of the accident; that is not contested. They encompass her neck, collarbone, left shoulder, right shoulder (from splinting in reaction to left shoulder pain), and mid back. Her pain has chronically affected her emotions. She experiences fluctuating moods. Counselling, antidepressants, and other treatments have not had any lasting effect. She cannot sleep well. She feels fatigued most of the time, frustrated by her injuries, her inability to recover anywhere near former health and level of activities. Her mentation has been affected, her once sharp memory is not nearly as good as it used to be, according to members of the family.
- [243] I find the medical and evidence in the aggregate quite convincingly establishes that Mrs. Nofle's condition will likely not improve much, if at all. A multidisciplinary chronic pain program will counsel her on how to best cope with the pain, and may improve her level of functioning; but will not recover for her the state of health, employment, and enjoyment of life that she enjoyed before the accident.
- [244] I agree with plaintiff's counsel's submission that her injuries have impacted every aspect of Mrs. Nofle's life, her emotional and psychological state, impacting her personality, energy levels, depriving her of the restorative benefits of deep sleep, sociability, depriving her of the pleasure of giving to others, one of the inner beacons in her life and those around her.
- [245] Mrs. Nofle, before the accident, was one of those remarkable people who seem endowed with boundless energy and the desire to help others in need, while still being able to devote herself to her children, friends, faith, and marriage. Viewing her life from a high path, she was at the very prime of her life, only 42 years of age, at a critical time, just when she was about to reap the benefits of her hard work, the upgrading of her education and finding employment at UFV was perfectly suited to her interests and skill set, and her ambition to support her family and reap for them also the benefits that would have come from a full-time position and likely other opportunities to advance. I will discuss the cost of future loss of income, and the aspects of this loss later; but I find this loss of opportunity, albeit one for which the foundations had not been conclusively laid when Mrs. Nofle had to give up her employment, should not be minimized simply because the glue created by all of her endeavours and accomplishments had not yet set firmly enough around her opportunities to assure her winning a full-time permanent position. The point is, at a minimum, she was unable to continue working and so unable to position herself to wait for and win another opportunity at UFV or other place.

- [246] There is no doubt, and the defendants do not contest, the accident changed virtually all aspects of Mrs. Nofle's life. She has not been able to pursue her ambition to a win a permanent position at the University; and with it, the pension and other benefits, such as free tuition for her children, that would come with it. She cannot participate in the many physical activities that had formed a major part of her life. She cannot volunteer for her community and church as before; a large part of who she was, as she testified. She testified that it seemed every aspect of her life, her identity, had been taken away; she cannot contribute how she wants to, cannot be involved in physical activities, cannot work; cannot be intimate with her husband as before; cannot lift up and play with her grandchildren, or even read them stories. Her mood and pain go up and down. She testified she does not know who she is anymore. Considering her losses, this is a credible mindset. She said she wants to feel happy and pain-free again, to go back to where she was before the accident, and has had to come to terms with the fact that, most likely, will not come to pass.
- [247] Whereas before the accident, Mrs. Nofle performed most household tasks, including vacuuming, laundering, cleaning, bedding, gardening, kitchen chores, baking, cooking and canning. She either has lost the capacity to engage in those activities or, when she attempts to do so, often experiences disabling pain.
- [248] She continues to suffer four years post-accident. Considering the weight of the evidence as a whole, the prospects for much improvement are not good. A chronic pain program may bring some improvement; at least help her cope with and manage her symptoms. The defendants relied, perhaps too sanguinely, on a small deposit of medical opinion that an active therapy/exercise program might improve her condition.
- [249] The purpose of non-pecuniary damages is to provide substitute pleasures and allow the plaintiff to purchase things or experiences that may, to some extent, alleviate her suffering or make her life more enjoyable to the extent that money can do.
- [250] Mrs. Nofle seeks non-pecuniary damages in the range of \$145,000 to \$165,000, for comparators, referring to *Cornish v. Khunkhun*, 2015 BCSC 52 [Cornish]; *Redmond v. Krider*, 2015 BCSC 178 [Redmond]; *Cumpf v. Barbuta*, 2014 BCSC 1898 [Cumpf]; and *Khosa v. Kalamatimaleki*, 2014 BCSC 2060 [Khosa].

Khosa

- [251] Ms. Khosa, a 33-year-old female licensed practical nurse, suffered similar soft tissue injuries, major depression, and also was disabled from housework and working as a licensed practical nurse. She would likely respond to psychological treatment favourably; remained, however, fragile and susceptible to future episodes of anxiety and depression. She had a Chronic Pain Syndrome. She could not continue to work. She was awarded \$140,000. In 2017 dollars, counsel calculated the award at \$145,346.

Cornish

[252] Ms. Cornish was 58 years of age. She suffered from a Somatic Symptom Disorder and a Depressive Disorder; and from that, chronic pain. The confusion and memory loss diagnosed consisted with her Depressive Disorder. Like Mrs. Nofle, she had been a vibrant person before the accident, although she had suffered from depression and a back injury. She was in remission, at the time of the accident. The court found the accident caused her current psychological state. Although she was able to do only light work before the accident, the court found that but for the accident, Ms. Cornish likely would have continued working as a care aide. She was awarded \$160,000; roughly \$4,000 more, after calculating for inflation.

Cumpf

[253] Ms. Cumpf was 44 years of age. From a second accident (she evidently had recovered from her previous one), she suffered similar injuries to Mrs. Nofle. Psychologically, she was diagnosed with Adjustment Disorder with depressive symptoms and cognitive distortions. Her contract as a property manager was terminated one-year pre-accident. Justice Greyell concluded she had limited functional capacity, able to do light duties only. Her chronic pain significantly affected her day-to-day activities. Her chronic pain condition and depression might improve from an active exercise program. Greyell J. found her medical condition and emotions had affected her family, marital and social relationships. At trial, 4½ years later, she had plateaued and would not likely improve further without significant treatment. She was awarded \$150,000 for non-pecuniary damages.

Redmond

[254] Ms. Redmond, was age 47, had a similar constellation of symptoms as the foregoing Ms. Cumpf; with the addition of a flare-up of fibromyalgia (this was her third motor vehicle accident) and reduced cognitive ability. Her Major Depressive Disorder went into remission one year after the accident. Despite fibromyalgia, she could work full-time pre-accident; after the accident, she continued to work full-time, and expected to do so in the future. She used to enjoy physical fitness and travelling but after the accident, came home after work exhausted and preoccupied with ways to lessen her pain. She was awarded \$150,000, which would be roughly \$3,000 more, allowing for inflation. At para. 145, Maisonville J., noting the defence argument that the prospects for some recovery called for a reduction in the award, stated: "I accept the defendant's submission that if this Court were to find there was some prospect of significant recovery or improvement, [future] damages should be similarly reduced; however, it is now four years after the accident and the plaintiff's symptoms have not abated, such that the expert evidence is that those symptoms have not become anything other than chronic. Consequently, I find that the appropriate award for pain and suffering is \$150,000."

Defendants' submissions

[255] The defendants submitted *Jiang v. Pappas*, 2016 BCSC 1015 [Jiang]; *McConvey v. Hart*, 2013 BCSC 1058 [McConvey]; and *Carlisle v. Vanthof*, 2015 BCSC 2427 [Carlisle], as comparators in support of the defendants' position that an award for non-pecuniary damages in the range of \$75,000-\$90,000 and towards the lower end of that range, was fair and reasonable compensation.

Jiang

[256] Mr. Jiang's injuries were similar to the plaintiff's, except that he suffered a lumbar spine disc protrusion after the second accident (there were two). He also had a left shoulder tendinopathy that was aggravated. He had chronic pain, anxiety, and depression. Mr. Jiang was 54-years-old. His injuries impacted his ability to work as an "accupressurist". Myers J. ordered \$75,000 for "General damages". Mr. Jiang was not involved in physical activities apart from, perhaps ping-pong.

[257] I do not find this case comparable.

McConvey

[258] Ms. McConvey was age 49. She suffered soft tissue injuries somewhat similar to Mrs. Nofle. Her life was changed by the accident. Four years after the accident, she continued to experience headaches, diminished quality of sleep and fatigue. However, in that case, the plaintiff had suffered a number of significant psychological traumas before and post-accident that Ker J. found not all attributable to the accident. Ker J. awarded \$80,000 for non-pecuniary damages.

Carlisle

[259] Ms. Carlisle, age 34, was awarded \$90,000 for non-pecuniary damages. She suffered from chronic pain as a result of her accident. When sedentary, her pain was relatively manageable; when active, it flared-up significantly. She was still active after the accident but the frequency, duration, and type of activities changed.

[260] There are some similarities, but more dissimilarities, between that case and that of Mrs. Nofle's, as the nature and extent of the impact of Mrs. Nofle's injuries and disability are more extensive and disabling.

[261] The defendants submitted that an award in the lower end of the range is appropriate, arguing that the impact on Mrs. Nofle's ability to engage in activities is self-imposed because she restricts herself due to pain. I respectfully disagree. Mrs. Nofle has not deliberately restricted herself due to pain. The evidence is clear that she has made a decent effort to be as active as possible. Dr. Kleinman commented on this. She can only tolerate certain types of activities, such as walking; and that is limited, as well. She has done all she

can to recover. She has engaged in some active therapy. The defendants submitted that Dr. Kleinman had recommended Mrs. Nofle receive an active component to his therapy with a strong emphasis on working through her levels of pain. Though Dr. Kleinman might not have opined against that, if asked, I do not see his having stated that anywhere in his September 20, 2015 report.

- [262] As for whether Mrs. Nofle's not having yet completed a chronic pain program rendered the impact on her lifestyle and ability to participate in pre-accident activities more severe, this is somewhat speculative. The evidence on the subject as a whole was to the effect that she would learn coping strategies, etc.; but with no assurances regarding the extent to which, if at all, her pain and disability would be significantly reduced. That remains to be seen, as Dr. Kleinman commented. However, I agree there is a reasonable chance of deriving some benefit from a chronic pain program, once completed.
- [263] Considering the evidence as a whole and counsel's submissions, I find the awards for non-pecuniary damages made in the cases submitted by the plaintiff more closely approximate the facts in the case at bar.

Loss of housekeeping capacity and cost of future care

- [264] Mrs. Nofle also sought an award of \$125,000 for loss of housekeeping capacity to compensate her for her loss of capacity in this area, not as compensation for replacement costs, *O'Connell (Litigation guardian of) v. Yung*, 2012 BCCA 57 [O'Connell], at para. 67.
- [265] Because the award reflects the loss of personal capacity, it is not dependent on whether replacement housekeeping costs are actually incurred. In *O'Connell* at para. 67, as Kirkpatrick J.A. explained, "Unlike loss of housekeeping capacity awards, damages for cost of future care are directly related to the expenses that may reasonably be expected to be required".
- [266] The claim requires the plaintiff to establish a real and substantial possibility they will continue in future to be unable to perform all their usual and necessary household work; and that the work they are unable to do will require them to pay someone else to do it or require others to do it for them gratuitously: *Jones v. Davenport*, 2008 BCSC 18 at para. 92.
- [267] There is no question Mrs. Nofle's injuries have restricted her housekeeping capacity. Before the accident, she was responsible for most of the housekeeping in their 3200 square foot, six bedroom home - practically everything except that she and Mr. Nofle shared the cooking. I have discussed her limitations above. She continues to have problems with household tasks in her new home in Alberta. Given the unencouraging prognoses proffered by almost all the experts, it is most unlikely Mrs. Nofle will be able to take up again the housekeeping tasks she used to do, including things like the baking she used to enjoy.

[268] Mrs. Nofle's credibility is not in question. I accept her testimony and those of the several credible collateral witnesses who testified with respect to her pain and suffering, loss of enjoyment and enjoyment of the amenities of life, and on her limitations and the effects on her relationships with her family and friends. Every aspect of Mrs. Nofle's pre-accident life has been significantly negatively impacted by the accident. For what she has experienced to date and likely will in future, I award \$170,000 for non-pecuniary damages, inclusive of \$15,000 for loss of housekeeping capacity. I have itemized that and will not make a separate award for that head of damage.

Special Damages

[269] The defendants admit Mrs. Nofle incurred special damages, over and above what ICBC covered, for: Prescriptions, (\$157.79); Physiotherapy, (\$244); Chiropractic, (\$710); and Acupuncture (\$130). The subtotal of the therapy expenses is \$1,241.79.

[270] The defendants objected to the mileage and parking expenses because they were calculated at .50 per km, instead of .30 per km. Given the frequency of some of the longer trips, their purpose being attendance for specialist appointments and treatment, I find .50 per km fair and reasonable enough: *Grewal-Cheema v. Tassone*, 2010 BCSC 1182 at para. 60. The mileage and parking expenses are subtotalled at \$971.15.

[271] The plaintiff is awarded special damages totalling \$2,213 (inclusive of mileage and parking expenses).

[272] Some other expenses advanced by Mrs. Nofle will be the subject of the disbursement portion of the plaintiff's bill of costs: WestJet flight costs to and from Alberta to attend trial and car rental costs for local transportation during the trial. Those are likely reasonable and necessary disbursements.

[273] The defendants objected to the costs of Tylenol incurred because Mrs. Nofle kept no receipts. She testified she did not think of them because they formed part of the grocery bill so she has no separate receipt for them. The lack of a receipt does not excuse a judge from making an award. The evidence, including medical reports, is thickly populated with references to Tylenol and other pain medications. Mrs. Nofle has not been shown to be other than credible. Mrs. Nofle claimed \$10 monthly for 48 months, \$480, which is a reasonable amount.

[274] As for the robotic vacuum Mr. Nofle purchased for between \$500 and \$600 because of the pain vacuuming caused Mrs. Nofle, the defendants' concern was the lack of a receipt. Mr. Nofle was a straightforward credible witness. He did not exaggerate testimony. To fairly address the defendants' concern, I will award the lower amount, \$400.

[275] The plaintiff is awarded \$480 for Tylenol purchases, and \$400 for the purchase of a robotic vacuum, totalling \$880 in miscellaneous expenses.

Past and Future loss of earning capacity

Employment History

[276] Although Mrs. Nofle was a full-time mother, she impressively maintained some part-time employment to support her family while also managing to further her education too. In brief:

- a. In 1989, Mrs. Nofle graduated from Abbotsford Senior Secondary School. She testified she loved high school and that her grades were good.
- b. In 1992, she attended a dental assistant correspondence course. A high-risk pregnancy and the need for bed rest prevented her from completing that course.
- c. Between 1991 and 1998, she worked in the dental industry, working variously as a dental assistant and receptionist. Initially, she worked full-time, later cutting her hours down to about 20 hours weekly during a pregnancy.
- d. In 2003, she returned to work part-time office managing WCI Media Studios ("WCI"), an architectural illustration and graphics business established by Mr. Nofle. It gradually developed into one of the most prominent real estate marketing firms in Canada. Mrs. Nofle's management duties included bookkeeping, payroll, invoicing, scheduling meetings with clients, and reception. Her 15 to 30-hour work schedule fluctuated in accord with the children's schedules and how much work was required. Because WCI operated until 2007 as a home-based business, Mrs. Nofle was able to work at home. They then purchased an office outside the home, at which time she started working in the office. She remained at WCI until 2012. That year, she also returned to school at UFV, studying there in addition to her work at WCI. In 2015, Mr. Nofle sold WCI to his brother for \$250,000. The substantial sale proceeds sustained the family financially and covered the start up costs of SatSkin Concealment.
- e. In 2010, Mrs. Nofle started to work at Pacific Eye Doctors as a contact lens technician. There she remained for about six months, until she quit because the employer required a full-time employee and she could not both work at WCI and care for the children. Although Mrs. Nofle did not remain there, she found the position itself an important experience because she felt she had been contributing financially to her family. While her work at WCI was a contribution, she never (as bookkeeper) paid herself a direct wage.
- f. In 2011, she worked three months, about 20 hours weekly at Chilliwack Hospital for Sodexo, a food services company.

Plaintiff's work history at UFV

[277] The following distils Mrs. Nofle's work history related to UFV:

.1 May 27, 2013, by then having completed the Applied Business Technology Program at UFV, Mrs. Nofle started working at UFV as a temporary on-call Level 1 Auxiliary employee in the Finance Department, earning \$15.09 an hour.

.2 July 31, 2013, she completed, as required, 140 hours as a Level 1 auxiliary employee, and classified as a Level 2 Auxiliary employee at UFV, earning \$16.86 hourly

.3 October 16, 2016, when the accident occurred, Mrs. Nofle was continuing to work as an Auxiliary 2 employee, at \$16.86 hourly, 35 hours weekly. She continued to work through the pain she was experiencing, later gaining a temporary position as a Program Coordinator, earning \$23.93 hourly. She was also eligible for vacation pay and 4.0 percent in lieu of 'Benefits Participation'.

.4 July 11 2014, she started to work full-time as a Program Coordinator at UFV, earning \$23.93 hourly.

.5 October 8, 2014 UFV increased her wage to \$24.52 hourly.

.6 November 15, 2014, Mrs. Nofle had to reduce her hours to part-time.

.7 February 19, 2015, as a result of her injuries, Mrs. Nofle stopped working at UFV.

.8 Earlier in these reasons, I set out the testimony of Ms. Peters and Ms. Thompson regarding their observations of her physical limitations post-accident. In my opinion, the evidence leaves no reason to doubt that Mrs. Nofle carried on a long she reasonably be expected of her.

.9 The defendants questioned Mrs. Nofle's testimony that Dr. Scholtz recommended she reduce her hours to part-time and later to stop working. Dr. Scholtz's clinical records do not record such a conversation. He explained he does not necessarily record all conversations he has with the patient, of whom he sees approximately 9,600 annually. Plaintiff's counsel correctly noted Dr. Scholtz on cross-examination testified he had discussions with Mrs. Nofle, of which she did not have a note. In any case, he recalled Mrs. Nofle's reduction to part-time hours was a subject of discussions with her and he agreed with the decision. In Dr. Scholtz's February 15, 2017 report, at pp. 3-4, he stated:

Ms. Nofle continued to work after the accident since this was a new position and she did not want to miss any days. Ms. Nofle had to take some intermittent leave of absence from work to attend various healthcare professionals pertaining to her rehabilitation process and treatment. Her ongoing symptoms forced her to cut back on her working hours in November 2014, when she was just working part time. She finally stopped working completely in March 2015. She has not worked since this date due to ongoing pain and discomfort. She used to work as an administrative assistant at the University of the Fraser Valley, but pain with standing and prolonged sitting and working in front of the computer forced her to stop working.

[278] With respect to Mrs. Noffle's future disability from employment, he stated, at p. 4, his "opinion was very guarded and negative". He explained that the problem was that "she is experiencing symptoms with sitting, standing, working overhead and lifting objects repetitively as well as computer work strain." This of course accords with Mrs. Noffle's testimony, the observations of her supervisors and colleagues at work, and with Dr. Kleinman, and Dr. Shuckett.

[279] In his July 7, 2017 report, Mr. Benning, of PETA Consultants Ltd., calculated Mrs. Noffle's past income loss at \$105,024, as set out in Table 3, p. 17 of his report:

YEAR

WITHOUT-

ACCIDENT

INCOME

WITH-

ACCIDENT

INCOME

GROSS

INCOME

LOSS

ASSOCIATED

INCOME

TAX/EI

PREMIUMS

NET

INCOME

LOSS

2014

\$6,334

\$2,023

\$4,311

\$1,625

\$2,686

2015

41,837

2,952

38,885

4,142

34,742

2016

43,739

0

43,739

5,969

37,770

2017

34,671

0

34,671

4,845

29,826

TOTAL

\$126,581

\$4,975

\$121,606

\$16,581

\$105,024

Post-Secondary Education - UFV

- [280] As noted earlier, Mrs. Nofle was a good student. It follows therefore that she would want to pursue post-secondary education. In 2012, she returned to UFV with a view to undertaking the Applied Business Technology Program ("ABT"). She became interested in it after she learned it was a highly regarded program and a stepping stone to an administrative position at UFV, which happened to be precisely the job she wished to have. She was particularly keen to have a permanent position at UFV because she knew that it provided excellent benefits, a pension, and free tuition for both her children and her. She thought she could work her way up in UFV, seeing this as important because Mr. Nofle had always been self-employed, still was, and so did not have any pension or benefits. Therefore, she reasoned, holding that position and having those benefits was a way she could make an important contribution to her family.
- [281] The ABT Program ran September 2012 to February 2013, for six months. A three-week practicum was worked into the Program. She completed the practicum in the Criminology Department of the Abbotsford campus with a GPA average of 3.59, making the Dean's List, as shown in the Official Transcript.
- [282] After she completed the Program, Mrs. Nofle stated she continued to volunteer steadily from the end of her practicum to 2013, the start of the next phase of her employment at UFV. In the interval between her completion of the ABT Program and the start of her May 27, 2013 employment, Mrs. Nofle earned no wages. Starting in May 2013, she worked as an Auxiliary I employee in the Finance Department.
- [283] Starting on May 27, 2013, she worked full-time in various departments at the University, including the Science Advice Centre and Continuing Education Department. She completed the 140 hours required of her before she could become an Auxiliary 2 Employee at UFV. At that point, her hourly wage increased to \$16.68 hourly. This takes her history up to about the time of the accident. When the accident occurred, she worked in the Finance and Continuing Education Department, a total of 35 hours weekly, and \$16.86 hourly; more than before.

Worsening symptoms at work

- [284] Mrs. Nofle found when she first returned to work after the accident she could not tolerate the sitting and various mechanical movements. They did not abate, not even some months later after she had given up her job, because of the pain she was experiencing and her physical limitations. Problems with sitting became a constant for her. If she sits, she can do so only for 30 minutes, after which she has to readjust her position and/or stretch. Also, after 30 minutes, she finds her shoulder, collarbone and neck become sore, stiffen, inducing headaches. She also finds sitting in a car hard because there is little room to adjust her position, and this also results in pain and headaches.

[285] Further on the subject of difficulties Mrs. Nofle had at work, I found them credibly corroborated by Carole Peters, a former colleague and supervisor at UFV and by Leanne Thompson, another colleague and supervisor.

Carole Peters' Observations of plaintiff at work, UFV Colleague

[286] Ms. Carole Peters has been employed at UFV for 37 years. She spoke of how she loved her position at the University, explaining it has given her and her family a living, a good life.

[287] Ms. Peters recalled meeting Mrs. Nofle in September 2012, when Mrs. Nofle was attending the ABT Program, one she described as very intense and demanding, taking up six months with no free time for anything else.

[288] Ms. Peters learned of Mrs. Nofle's accident about the day after. She recalled Mrs. Nofle was working as a department auxiliary at UFV. She saw her every day for about 5 to 10 minutes or more. Their desks were fairly near to one another. From her position, she could observe Mrs. Nofle quite well. She recalled Mrs. Nofle missing work days after the accident. She saw her having difficulty moving. Pre-accident, she observed no limitations whatsoever. After the accident, she noticed Mrs. Nofle looked stiff, could not move at times, had lots of headaches, and difficulty lifting heavy-duty paper, using the stapler, etc. She was not bubbly as before the accident. She could not lift her hands to the overhead cupboard and storage areas, let alone bring objects down. She saw Mrs. Nofle was very limited. Ms. Peters noticed her applying cold packs and hot packs and asking people to apply muscle rubs. She saw no improvement in her while she was still there, working between 8:00 a.m. and 4:00 p.m., Monday to Friday.

[289] Further with respect to Mrs. Nofle's demeanour, etc., before the accident, Ms. Peters mentioned more than once that Mrs. Nofle was bubbly and outgoing, speaking of her family all the time. After the accident, she became quiet and subdued, not energetic like before; rather, tired all the time.

[290] Mrs. Nofle had testified she had hard times sitting at work at UFV, had to take breaks and ask colleagues to rub ointment on her back for her.

[291] Asked about her work ethic, Ms. Peters thought she was a particularly caring person, "top-notch" she said. She was recommended by her instructor because she was good at what she did. After the accident, she moved much more slowly; not able to do much because she could not sit very much. Ms. Peters noticed, however, Mrs. Nofle was not a complainer. She recalled Mrs. Nofle left work early, in pain. She recalled her crying. She also recalled Mrs. Nofle talking about the importance of the work to her and her wanting to continue. She always wanted to put in a 110% effort. That is how she saw Mrs. Nofle. She said she enjoyed working with Mrs. Nofle very much. She thought she enjoyed her work. As for the longevity of the position, Ms. Peters explained that Mrs. Nofle was covering another employee who happened to be on medical leave at the time. That person never came back to that position which would then been opened up for applications.

[292] Ms. Peter's testimony consisted well with the testimonies of Mrs. Nofle, Mr. Nofle, other collateral witnesses and the findings of examining and treating physicians.

Leanne Thompson's Observations at work - UFV colleague and supervisor

- [293] Leanne Thompson has been a supervisor at UFV for five years. She has been a manager of continuing education program since 2010. She met Mrs. Nofle in September 2012, when Mrs. Nofle was engaged in the ABT program. She noted, as did Ms. Peters, that it is a tough program, six months in length.
- [294] She met Mrs. Nofle in class time and sometimes in her office. She regarded her as an excellent student and opined she had fully participated in the Program.
- [295] Ms. Thompson explained that her department had vacancies and had requested someone from another department to assist, which turned out to be Mrs. Nofle. She explained that their desks and offices were quite close together. She saw Mrs. Nofle multiple times throughout the day. After a campus relocation, she did not see Mrs. Nofle's office as before. She said her work ethic was excellent. She was an excellent employee who paid high attention to details. She spoke often of how she wanted to work in a regular capacity. She said her overall attitude was positive. She completed her work and would then initiate other work. She worked as a program coordinator in continuing education; and in July 2014, became a temporary employee for three months. After that expired, she wanted to keep her position and extend it, which happened. After the second term, however, they met and she indicated she did not want to extend the program because she was struggling with pain and ailments relating to the motor vehicle accident. She said she could not work full-time and asked for a part-time position. Ms. Thompson said they would love to have her. Accordingly, she worked until February 2015. Ms. Thompson understood that she quit because she had a lot going on in her life and the pain from the motor vehicle accident and she thought not working might aid her recovery. She did not return to her temporary position. Ms. Thompson explained that Mrs. Nofle would have qualified for the position as it opened up after she had left.
- [296] Ms. Thompson testified it was her impression that Mrs. Nofle enjoyed her work and wanted to complete her working years at UFV.
- [297] Asked about ergonomic accommodations, Ms. Thompson recalled something being done with respect to Mrs. Nofle's chair and seat but she did not recall anything specific. Ms. Thompson said an employee initiates requests for accommodations and that whatever is necessary to accommodate their situation would be done.

- [298] As for availability of positions, she explained the open position was filled in August 2016. The candidate selected had significant seniority, which factored in their being hired for the position. Ms. Thompson further explained that even if Mrs. Nofle had worked the entire time in a position she would not necessarily have been hired to fill the vacancy. She clarified, however, that if she had worked in the department continually, she would have had an advantage because her knowledge would have been seamless.

Further work limitations noted by the plaintiff

Difficulty looking down at work

- [299] Mrs. Nofle's problems looking down, commented on earlier, impacted her work and interfered with other every day activities. She resorted to the practical solution of holding her head steady and looking down with her eyes but this does not help when she has to look down using her neck, which causes pain to her neck. She gave the example of making photocopies, or prints on the printer when you have to look down to push the right buttons. This caused her pain.
- [300] Problems looking down extended to other activities, including being a witness in court. After testifying the first day at trial, she was in so much pain that she found herself in tears when she left the courtroom, unable to remain, having to leave right away. As anyone who has ever sung a hymn from a hymnal may recall, you need to look down to see the words. That is a problem now for Mrs. Nofle. She has to hold the book right up to her face now.
- [301] In any event, she continues to feel pain through her neck, her left shoulder into her head which in combination bring on headaches. To avoid neck pain, she has to arrive at the theatre early so she can find an exact spot where she can be positioned in a way that avoids neck pain. Otherwise, she finds having to look up at the screen "incredibly painful". Likewise, if she wants to watch television, she has to hold her head at a perfect angle, or experiences neck pain.

Repetitive Actions

- [302] Repetitive activities engaged in for a prolonged time causes or aggravates pain in any of Mrs. Nofle's affected areas. When she has to raise her shoulders to curl or straighten her hair as she used to like to do, she feels pain in the area of the collarbone muscles, extending up and into the shoulder and neck. She tried to accommodate this by resting her elbow on the counter or have one of her daughters do up her hair. She got to the point, however, as she told the court, that she just does not bother with it any more.

Observations of Mr. Nofle's father

- [303] Mrs. Nofle's father and her husband both testified that Mrs. Nofle used to cut their hair. Mrs. Nofle's father, Gerald Rickaby, a retired financial planner, told the court Mrs. Nofle was physically strong for a little girl. She had high energy, always wanting to help, involved

in church and the community volunteering. He noted her pain seemed to worsen progressively after the accident; she no longer engaged in recreational activities she used to do and enjoy. He recalled she told him she could not longer cut his hair because she could not hold her hands up. He further recalled that about a year before he testified, when he needed a haircut, she tried, but had to stop.

[304] Mr. Rickaby testified the family are huggers; their first reaction is to give one to one another, Mrs. Nottle include. Now, however, she grimaces and says, "Dad I cannot do that".

[305] He testified that it is depressing to see what she has gone through since the motor vehicle accident, before which she was positive, energetic, had a zest for life, bubbly; her family of foremost importance to her. He noted her mood seems to have become progressively worse. He observed she seems to try to hide it but that is harder and harder to do. He has not noted any improvement in her condition and finds that very troubling.

[306] Mr. Rickaby notes that when the grandchildren are there and she cannot pick them up and do the things she otherwise liked to do, she breaks down and leaves the room. She used to play with the children all the time but does not do so since the accident.

[307] Mr. Rickaby noted that she cannot drive as before because holding her hands up is problematic. She cannot play with the grandchildren, pick them up, rather just sits down with them. He recalls her excitement after getting a job at UFV. He notes that she has dwelled on the fact she lost her job there.

Past loss of earning capacity

Legal principles

[308] In *Grewal v. Naumann*, 2017 BCCA 158, Goepel J.A., in dissent but with Smith J.A. and Chief Justice Bauman in agreement, considered the subject of earning capacity and hypothetical events. At para. 48, he noted that "both past and future earning capacity involve consideration of hypothetical events". He pointed out the plaintiff does not have "to prove hypothetical events on a balance of probabilities [rather, a] future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation". He further reminded that 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."

[309] At para. 48, Goepel J.A. further stated, "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." As for the use of economic and statistical evidence, at para. 49, he noted the "use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21." The defendants also pointed out, referring to *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, that compensation for past

loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained.

Defendants' position

- [310] The defendants submit Mrs. Nofle's past loss of earning capacity can be based on two different scenarios. The first assumes she would have worked in the temporary contract position until she and her husband discussed and planned to move in December 2015, leaving a period of 40 weeks between December 2015 and February 2016, at \$24.52 hourly, 35 hours weekly, roughly \$35,000. The second scenario assumes she would have worked in the temporary full-time program coordinator position until April 2017, when the Nofles' home was sold, leaving a time period of 108 weeks and \$93,000, assuming the same hourly rate and 35-hour week for the first scenario.
- [311] The defendants submit, however, that either figure should be discounted by 20% for failure to mitigate by seeking work place accommodations and to account for negative contingencies such as Mrs. Nofle quitting work or going to part-time work for reasons unrelated to the accident. I have already discussed the defendants' theory on this issue and hold to the view that but for the accident, the Nofles would not have moved to Alberta; rather, remained in Chilliwack with Mrs. Nofle continuing to work at UFV. Absent the accident, she may not have won the permanent position she held; but had she been able to continue working, she would most likely have established herself in an excellent position, qualified for another position, and worked her way up from there. Given her commitment to the work, seeing the benefits she would derive for her and her family, it is far more probable she and her husband would have remained in Chilliwack; if not permanently, probably long enough to become eligible for pension benefits. The defendants have failed to define or prove workplace accommodations that would enable her to continue working either part-time or full-time, especially considering the nature of her symptoms. I set out earlier in these reasons (at para. 280) Mr. Benning's calculations for loss of past earning capacity. For ease of reference, I will include again the table containing Mr. Benning's calculations:

YEAR

WITHOUT-

ACCIDENT

INCOME

WITH-

ACCIDENT

INCOME

GROSS

INCOME

LOSS

ASSOCIATED

INCOME

TAX/EI

PREMIUMS

NET

INCOME

LOSS

2014

\$6,334

\$2,023

\$4,311

\$1,625

\$2,686

2015

41,837

2,952

38,885

4,142

34,742

2016

43,739

0

43,739

5,969

37,770

2017

34,671

0

34,671

4,845

29,826

TOTAL

\$126,581

\$4,975

\$121,606

\$16,581

\$105,024

[312] I have found the gross figure of \$105,000 for net loss of past earning capacity is about fair and reasonable; but a moderate reduction of 10% to \$95,000, to reflect the reasonable possibility Mrs. Nofle, for reasons unrelated to the accident, would not have continued at UFV, is supportable and fair to both parties.

Mitigation

[313] The defendants submitted that the net amount awarded for loss of past income should be reduced by 20% for a failure to mitigate by seeking workplace accommodations and for going to work part-time for reasons unrelated to the accident. With respect to the latter, I have already rejected that theory and explained why 10% is reasonable, considering adjustments already made by Mr. Benning.

Principles

[314] It is trite law that a plaintiff has a duty to mitigate their losses. If a qualified expert recommended a particular form of treatment to the plaintiff; the plaintiff failed or refused to take the treatment although it was available to them; and the plaintiff's failure was unreasonable in that if the plaintiff had taken the recommended treatment, and there is some likelihood that they would have received substantial benefit from it, and the treatment would not expose the plaintiff to significant risk, the claim is established: *Turner v. Coblenz*, 2008 BCSC 1801, para. 101; *Chiu v. Chiu*, 2002 BCCA 618, para. 57.

- [315] The defendant, however, has an onus to do more than establish those requirements. In the case of medical treatment, for example, they must also adduce medical evidence to show, had the plaintiff acted reasonably, the extent to which the plaintiff's damages could have been lessened: *Brown v. Raffan*, 2013 BCSC 114; *La Porte v. Earl*, 2016 BCSC 2298, para. 147; *Harmati v. Williams*, 2016 BCSC 2199, paras. 125-126.
- [316] Earlier in these reasons, I set out a list of the treatment regimens that Mrs. Nofle pursued hoping they would lessen her symptoms and improve her emotional and mental health. She testified she was willing to try any treatment recommended to her. Some of the treatments aggravated her condition, but she more than reasonably persevered. She engaged in physically active therapy, physiotherapy, received Cortisone injections, various medications, Gabapentin, mood medications, etc., chiropractic treatments, acupuncture, enrolled in the Jim Pattison Pain Clinic and was about to start nerve block treatment (which that had to be postponed because of her pending move to Alberta.
- [317] None of the physicians have questioned the genuineness of her complaints, suggested malingering or exaggeration. I find she has done her very best to get well enough so she can return to work and former activities. She is far removed from the type of plaintiff whose life before their accident was unhappy, limited, their medical history heavily populated with medical complaints and illnesses.
- [318] As for failing to pursue accommodations, UFV had accommodated her in her work schedule. Some changes were made to her workstation. The defendants did not propose how some of her tasks, such as reaching up to cupboards and taking down stationery and other office paraphernalia could be accommodated. You can either perform the task or someone else has to do it for you. It is questionable whether a sit-stand workstation would ameliorate her pain. She already could alternate between standing and sitting.
- [319] Pain has become an intrinsic part of her physical condition; and, according to the plaintiff's medical history, aggravating activities cannot necessarily be greeted as the first etiology in line to explain the multifaceted chronic pain experienced. In other words, activities and tasks could aggravate her pain but they were not the only tenable etiology.
- [320] As for not pursuing more accommodations, notably ergonomic ones, with UFV, no evidence was led from Ms. Thompson nor were witnesses called to particularize what curative ergonomic accommodations might be available and knowledgeably explain how they would have lessened Mrs. Nofle's condition to a level she could have worked full-time. Ergonomics, especially "improved ergonomics" is a word often mentioned, sometimes proposed as way to reduce worker's aches and pains at workstations, and sometimes to extol the virtues of expensive cars. In my opinion, the whole of the plaintiff's efforts to mitigate their injuries should be considered. In this case, I find a 20% reduction unwarranted, as the beneficial effects are unproven.

Loss of future earning capacity

Legal Principles

- [321] I commented earlier on *Grewal v. Naumann*, which is instructive on assessment of hypothetical events.
- [322] The purpose of an award for loss of future income is to compensate a plaintiff for the loss of the work they would have done, but for the accident occurring: *Rowe v. Bobell Express Ltd.*
- [323] It is not in dispute that the plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss. And that once a real and substantial possibility of a future loss has been established, there are two possible approaches to assessing the loss of future earning capacity; the "earnings approach" and the "capital asset approach": *Perren v. Lalari*.
- [324] In *Meghji v. British Columbia, (Ministry of Transportation and Highways)*, 2014 BCCA 105, Smith J.A. and Willcock J.A., writing for the court, explained how assessing future earning capacity should be approached (at paras. 81 to 82):
- [81] It is correct to say that an award of damages under this head is a result of the careful weighing of all the evidence and the application of considered judgment to that evidence. It is not a calculation: *Mulholland v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, [1995] B.C.J. No. 1823 (C.A.). Because the court is required to take into account all substantial possibilities it is necessary to use careful judgment in weighing those possibilities. In order to ensure that all reasonable substantial possibilities are taken into account, however, the conventional approach is that described in *Lines* [*Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106]. In that case, at para. 57, Saunders J.A. held:
- There are two major components to an assessment of loss of future earning capacity. One is the general level of earning thought by the trial judge to be realistically achievable by plaintiff but for the accident, taking into account the plaintiff's intentions and factors that weigh both in favor of and against that achievement, and the other is the projection of that earning level to the plaintiff's working life, taking into account the positive and negative vagaries of life. From these two major components must be applied an analysis that produces a present value of the loss, adjusted for all appropriate contingencies.
- [82] The standard of proof to be applied when evaluating hypothetical events such as loss of future earnings, is simple probability rather than the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102.
- [325] Qualifying a loss may be aided by some mathematical calculation, but there is no particular formula. A trial judge may determine the present value of the difference between with accident and without accident scenarios, but the overall fairness and reasonableness of the award must be considered taking into account all the evidence: *Rosvold v. Dunlop*, 2001 BCCA 1, at paras. 8 and 11.

- [326] Counsel for the plaintiff stressed Mrs. Nofle's stoicism and perseverance to continue despite her injuries, until it eventually became too much for her; and in February 2015, she stopped work.
- [327] Earlier in these reasons, I summarized the testimony of Ms. Thompson, Mrs. Nofle's instructor and supervisor during her ABT Program. As we saw, Ms. Thompson was also Mrs. Nofle's direct supervisor in the Continuing Education Department at UFV. Both Ms. Peters and Ms. Thompson testified very positively about Mrs. Nofle's abilities, attitude, and work ethic, both as a student and an employee. Ms. Peters commented, among other things, that Mrs. Nofle's work was top-notch. In short, she was highly regarded by her supervisors both as a student and as an employee.
- [328] With respect to Mrs. Nofle's aspirations, Ms. Thompson heard her speak about her wish to work at UFV in a regular capacity. Ms. Thompson testified she had the sense Mrs. Nofle enjoyed working at UFV, was interested in completing all her working years there, and had no interest in working anywhere else.
- [329] Mrs. Nofle's love of her employment at UFV consistently surfaced in her testimony, observations of lay witnesses and comments of some experts.

Lawless

- [330] Plaintiff's counsel reminded the court of the July 4, 2017 opinion of the Vocational Consultant, Mr. Lawless [Ex. 3, Tab 9] on two points in particular: first, that but for the accident, Mrs. Nofle would have continued to work at UFV and later secure a regular permanent position; and second, that if for any reason she had left UFV, she would have found work in any of the clerical occupations she previously accessed, given the high number similar occupations that would have been available to her but for her injuries.
- [331] Counsel further pointed to Mr. Lawless's opinion that any kind of clerical work would be difficult for her considering the difficulties she had after only one hour of testing. He stated at para. 48 in his July 4, 2017 report as follows:
48. In fact any kind of clerical job would be difficult for her according to the information reviewed, as well as the impression I formed during assessment. She was testing with me for about an hour, during which I accommodated her as best as I could so she didn't have to hold her head in a downward looking position. Still she found it very difficult. If this is how she feels performing an hour of work at some regular office job, I would not expect her to remain in it.
- [332] As for sedentary employment post-accident, Mr. Lawless noted that her employment at UFV was as light an occupation as there is, requiring less than part-time hours, unionized, and would accommodate her; the employer large and institutionalized.

- [333] The defendants submit that given the importance to Mrs. Nofle of her job and her desire to contribute financially to her family, there were accommodations that could have been investigated. But the defendants submit none of Mrs. Nofle's experts analyzed workplace accommodations for Mrs. Nofle. Ms. Thompson, whose testimony I canvassed earlier, testified that if asked, UFV would respond to any employee who requested ergonomic adjustments and other accommodation or adjustments.
- [334] In fact, however, some work ergonomic adjustments were made for Mrs. Nofle but these did not alleviate her pain or enable her to carry out all the tasks required of her position. The defendants did not lead any evidence demonstrating accommodations that would have so alleviated Mrs. Nofle's symptoms that she could have been able to continue to work without, or at least having to work through, debilitating pain and so perform all her duties. Further, ICBC could have exhaustively investigated accommodations under Part 7 of the Insurance Vehicle Regulations. The plaintiff has a duty to mitigate, but the burden is on the defendant to establish she failed to do so. In this case, the plaintiff loved her work, did not want to lose it, tried hard and persevered until she could no longer tolerate symptom's aggravated by work.
- [335] I also mentioned Dr. Scholtz's equally pessimistic opinion earlier in these reasons. He opined his opinion was very guarded and negative with respect to Mrs. Nofle's future employment, explaining that the problem is that she is experiencing symptoms with sitting, standing, working overhead and lifting objects repetitively, as well as computer work strain (Ex. 3, Tab 5, April 9, 2015 Report).
- [336] As for the opinion of Dr. Gallimore, called by the defence, regarding Mrs. Nofle's vocational capacity, which was that based on his orthopedic assessment, Mrs. Nofle would not be precluded from performing her usual work-related duties, counsel pointed out that in cross-examination, Dr. Gallimore agreed with him that an orthopedic assessment did not allow for chronic pain or Chronic Pain Syndrome, which, he explained, he was not dealing with when opining on Mrs. Nofle's ability to perform her usual work-related duties.
- [337] As for Dr. Scarth, the defence expert psychiatrist whose report and opinions I discussed in detail earlier, he did not provide any opinion on Mrs. Nofle's ability to return to work.
- [338] Dr. Kleinman opined in his September 20, 2015 report (p. 11) that the likelihood of Mrs. Nofle's complete resolution of her symptoms at this late date is negligible if not nil; and "considering her overall situation on the balance of probabilities [expected] that she will be left with persistent symptoms extending into the long term."
- [339] The plaintiff submitted the medical evidence before the court supported the proposition that she is unable to return to work as an Administrative Assistant at UFV due to accident related injuries. As such, counsel argued, she lost the opportunity she once had to secure some regular permanent position and pensionable earnings. The plaintiff stressed the defendants have proffered little in the way of contrary evidence.

Economist's Calculations

- [340] In his July 7, 2017 Report, economist Darren Benning, assuming Mrs. Nofle would have continued employment with UFV or a similar employer as a full-time co-ordinator to age 65, calculated that her pre-retirement income loss would have been \$721,090; assuming she continued working to age 70, \$780,000.
- [341] He calculated the loss of Mrs. Nofle's Municipal Pension Plan to retirement at ages 65 and 70 at \$111,925 and \$100,354, respectively. Based on this, Mrs. Nofle's total future income loss would have totalled \$833,015 (retirement no later than 65) or \$880,796 (retirement no later than 70).
- [342] Besides the usual actuarial considerations, the figures incorporated a 30% reduction to address economic contingencies such as unemployment, part-time work, and part-year work.

Prospects for improvement

- [343] I find the medical evidence considered in its totality is pessimistic, at best guarded, about Mrs. Nofle seeing any significant improvement in her symptoms. Although Dr. Shuckett saw the possibility of some improvement following attendance at a pain clinic, given the four years the pain had continued, she thought improvement less than probable. Both Dr. Kleinman and Dr. Shuckett saw treatment at the pain clinic providing pain coping strategies rather than treatments that would bring improvement in her symptoms.

Defence position

Probability of obtaining a permanent position at UFV

- [344] The defendants submitted the plaintiff has failed to demonstrate that obtaining a permanent position was a real and substantial possibility, pointing to the testimony of Ms. Thompson, (the Director of Continuing Studies at UFV) that there is no guarantee Mrs. Nofle would have obtained the full-time permanent position of Program Co-ordinator even had she continued to work until April 2017, which was when the person she was covering on medical leave resigned. UFV is a unionized institution. Ms. Thompson explained all positions had to be posted and subject to competition in accordance with UFV's Collective Agreement. Seniority and work experience are among the factors considered. Ms. Thompson also explained that the person eventually hired had more education than Mrs. Nofle. Ms. Thompson further explained she had no influence in hiring for the Program Co-ordinator position.
- [345] While there was certainly no guarantee Mrs. Nofle would have permanently won the position she was temporarily filling while the regular employee was on maternity leave, it does not follow she would not have found other postings for which she would have qualified had she continued working but for the accident. She clearly loved her work and

wanted to continue in it, not only for the regular income but also for the benefits associated with it. Her childcare responsibilities were diminishing and she could be more flexible in her employment options. While Ms. Thompson could not influence the competition for Mrs. Nofle's benefit, the very positive regard in which she and Ms. Peters held her strengthened the probabilities of her becoming aware of other opportunities. They certainly could have provided her with positive references. Mrs. Nofle might have had to take a part-time position for a while, adding to her credentials and experience, buttressing her credentials and over time, qualifying her for another permanent position.

Contingencies

[346] The defendant argued other negative contingencies, the move to Alberta, and leaving her employment for a variety of reasons. I will start with the move to Alberta. The defendants also advanced a mitigation argument related to the move to Alberta.

Leaving Chilliwack and moving to Alberta

[347] Mr. and Mrs. Nofle's decision to move to Alberta in May 2017 attracted considerable theorizing and much questioning on cross-examination. The defendants contended the move had nothing to do with Mrs. Nofle's injuries, rather was undertaken so the Noftles could live near the home of a couple of the Nofle children who had moved to Alberta. As Mrs. Nofle did not have employment in Alberta, the defence seized on this as a mitigation issue too.

[348] When the accident happened, Mrs. Nofle and Mr. Nofle lived in Chilliwack together with two of their daughters, Macie and Maddyson, until they moved to Alberta, in May 2017. Mrs. Nofle and her husband continued to live in their family home in Chilliwack. They acknowledged they had looked into purchasing acreage in 2007, around Ryder Lake, in the Chilliwack area. Apart from that, they unwaveringly maintained that before the accident, they had never considered moving to Alberta. This was confirmed by several secondary witnesses, all in a position to know. Brad ; Gerald Rickaby, Mrs. Nofle's father, a semi retired financial planner, currently residing in Lethbridge; Macie Nofle, their daughter; and Connor Nofle, their son, all saying that before the accident they knew nothing of the Noftles' planning to move to Alberta.

[349] Mrs. Nofle looked on her job at UFV, which she had obtained at about the time of her accident, as a blessing; for her, the perfect job, "one where she would have a pension, benefits and tuition for herself and her children", as I mentioned earlier. She testified that but for her injuries she never would have given up that opportunity. For his part, Mr. Nofle maintained that had Mrs. Nofle been able to continue working at UFV, they never would have considered moving to Alberta.

- [350] Mrs. Nofle further explained that a combination of losing her job due to her inability to work and the financial benefits they received from selling their home in Chilliwack at a fortuitous time in the real estate market, motivated the move at the time they decided to make it. It was after Mrs. Nofle had been unable to work for about 10 months and unable to return to it that they first thought of moving to Alberta. This was in 2015, around Christmas. About that time, Mr. Nofle happened to take on the position of bishop in their church, a very time-consuming responsibility, so they suspended the idea of moving to Alberta. Two years later, in February 2017, they decided to make the move, fortuitously managing to sell at a very good price because the real estate market was very favourable for sellers then. Further, on the purchasing side, they were also able to find a very favourable purchase price on a nice home semi-rural home in Alberta.
- [351] As for defence counsel's proposition the Noftles moved to Alberta just to be closer to family, the fact is that while Macie and Maddyson, their children, lived in Alberta, the Noftles still had two children, grandchildren, and two brothers in the Fraser Valley. Not long before the trial, Mrs. Nofle's parents also decided to move to Alberta, from B.C. but that had not been foreseen.
- [352] As for the probabilities of leaving UFV irrespective of the accident for a variety of other factors, the defendants relied on some testimony of Ms. Peters, the work colleague and supervisor at UFV when Mrs. Nofle worked there. I referred to her testimony regarding Mrs. Nofle's injuries and performance at work earlier in these reasons. For now, the focus is on her testimony that when Mrs. Nofle eventually gave up her employment at UFV in February 2015, she did so for a variety of reasons, including weddings and babies. The defendant submitted this showed there were other factors that at least partially contributed to her decision to stop working at UFV. I acknowledge the point but do not endorse its having the causative effect as counsel proposes for it. The most common theme running through the testimony of multiple credible witnesses on Mrs. Nofle's character is her boundless energy, organizational ability, and devotion to her family. Mrs. Nofle attended University and continued to be an engaged mother and work part-time. Without the accident, I do not see the demands of a few weddings and births leading her to give up employment in which she had invested so much commitment and expectation. I find the evidence clear on this question. It was her injuries, the pain and physical and psychic limitations she contended with that forced her to give up her employment at UFV, not weddings and the demands of everyday living.
- [353] As for the carrying on the business of SatSkin Concealment in a small community, Mr. Nofle pointed out the town was only one hour and fifteen minutes distant from Calgary, Lethbridge, just 50 minutes away. Some other smaller towns lie within a drive of just five to 45 minutes distance. Further, Mr. Nofle stressed that SatSkin Concealment is run as an online enterprise, which could be carried on from any location with a decent Internet connection.

- [354] The question arising from the Noftles' move to Alberta is whether it came about from their wanting to live closer to their family and not from her injuries, forcing Mrs. Nofle to give up her work at UFV.
- [355] I find the Noftles moved to Alberta because Mrs. Nofle's disabilities prevented her from resuming her position at UFV, or any other such full-time employment. Other co-incidental factors encouraging the move were the highly opportune time for sellers in the real estate market; an opportunity to expunge debt, generate some additional capital for SatSkin Concealment, their own financial support, and coincidentally finding in Alberta a pleasant, acceptably located, semi-rural home at a good price.
- [356] I find it was for those practical reasons, primarily Mrs. Nofle's inability to work at UFV, which led the Noftles to move to Alberta, not just to live near other family. I found both Mrs. Nofle and Mr. Nofle credible witnesses and I accept their plausible explanation.

Move to Alberta and limited employment opportunities

- [357] With respect, I do not endorse the defendant's argument that Mrs. Nofle has limited her employment opportunities by moving to rural Alberta. Lethbridge, which has a university, is roughly 50 minutes travel time; Calgary, roughly 1 hour and 35 minutes, similar in distance as Chilliwack is to Vancouver. As Mr. Nofle also mentioned, there are communities located not far from them. If Mrs. Nofle remained in the Chilliwack area, she would likely have to pursue opportunities in Abbotsford, including UFV Abbotsford campus, and/or Langley, perhaps Surrey or Maple Ridge, even Vancouver. But her injuries clearly left her with a limited tolerance for driving that would be a hindrance in either location. I do not see a failure to mitigate.

Employment with SatSkin

- [358] The defendants submitted that there is a real and substantial possibility that Mrs. Nofle, in future, will contribute to SatSkin Concealment in much the same way she did with WCI Media Studios from 2003 to 2012. The defendants acknowledge the plaintiff's injuries have diminished Mrs. Nofle's overall earning capacity, that she requires work accommodations. However, the defendants further argued, there is some evidence she has worked on various aspects of SatSkin Concealment. For example, registering it as a partnership, modelling products on the company website and travelling to trade shows to make business connections. With respect to this later point, Mrs. Nofle accompanied Mr. Nofle to the trade show. Her business related activities, such as, saying hello to some people attending the trade show, were minimal. She spent a lot of time in the hotel not feeling well enough to accompany Mr. Nofle. It was Mr. Nofle who spent time promoting the company. The defendants submit, however, that although Mrs. Nofle has worked for SatSkin only 20 to 35 hours in the two years since SatSkin's inception, this was an early period of SatSkin's development, wherein it did not require her bookkeeping and managerial skills. They further point out, however, that Mr. Nofle agreed on cross-examination that Mrs. Nofle's

bookkeeping skills could be used in future. Counsel accordingly argued more clerical and managerial help would be required for SatSkin in future, once Mr. Nofle fully applied the skills and marketing talent he successfully deployed for his previous companies and the company earned revenue.

- [359] In response, counsel for Mrs. Nofle pointed out SatSkin's prospects are still very uncertain, after 2½ years still not having revenue. As proceeds received from the sale of WCI are running low, he is considering taking on other contracts.

Benefits of chronic pain program and residual employability

- [360] Finally, the defendants submit, underlining the fact that five medical experts have recommended a yet to be completed chronic pain program to help her be more functional in her daily life. (Actually, the tenor of their testimony was that it would provide strategies to help her manage her pain more effectively). This, the defendants say, is a contingency that should be reflected in the assessment of her loss of earning capacity.
- [361] In response, counsel for Mrs. Nofle reiterated the evidence posited several times in these reasons. Dr. Shuckett indicated there may be some improvement with the pain clinic, but less than probable after the pain having continued for four years. It is correct that Dr. Shuckett explained the clinic would provide pain coping strategies, not treatment that would improve her symptoms. Both Dr. Shuckett and Dr. Kleinman held that view.
- [362] I agree some consideration should be given to the real possibility Mrs. Nofle may see improvement sufficient for her return to some form of employment. But I agree with counsel for Mrs. Nofle that such employment most likely would be limited, part-time, and highly accommodated. Were she to improve sufficiently to keep SatSkin's books and perform some management functions, assuming SatSkin prospered enough to require it, the employment most likely would be, at best, part-time, the employer accommodating her or someone not at arm's length, such as Mr. Nofle. Further, it cannot be overlooked that it is unlikely Mrs. Nofle would find a position she could fill and find fulfilling, and also recover the loss of the pension benefits she likely would have earned had she been able to return to UFV to work; and in due course, compete for a new position. One of Mrs. Nofle's most egregious losses was the prospective pension and other benefits.

Award for loss of future earning capacity

- [363] Considering all the evidence, my credibility findings, and the able submissions of both counsel, judgment for Mrs. Nofle's loss of future earning capacity is as follows.

Future income loss

[364] As calculated by economist Darren Benning (July 7, 2017 report, para. 340), assuming Mrs. Nofle would have continued employment with UFV or a similar employer as a full-time co-ordinator to age 65, Mrs. Nofle's pre-retirement income loss would have been \$721,090.

Positive and negative contingencies for loss of future earning capacity

[365] This figure of \$721,090 already incorporates a 30% deduction for labour market contingencies, i.e. Participation, Unemployment, Part-time work, and Part-year work.

[366] I also find a negative Without-Accident Contingency should be considered to reflect the real possibility that it would have taken Mrs. Nofle two or more years to qualify and successfully compete for a full-time co-ordinator position at UFV, or for an equivalent position outside that institution; and to reflect the significant chance a full-time position would not become available. I find, however, Mrs. Nofle's excellent work history, experience, and dedication should moderate such a deduction.

[367] A reduction to reflect the reasonable possibility Mrs. Nofle's participation in a chronic pain program might reduce her symptoms, or at least enable her to manage them more effectively, enough that she could work part-time for an accommodating employer, should also be considered, subject to the caveat that the intention of the program is to equip her to manage her symptoms, not to eliminate them, thus calling for moderation in the amount of the reduction.

[368] I find a fair and reasonable adjustment of loss of future income, considering both those negative and positive contingences, is a 10% reduction of the future earning capacity loss, i.e. \$72,109, which produces an award for loss of future earning capacity of \$648,981, rounded off at \$650,000.

Municipal Pension Plan

[369] As for the \$111,925 figure for the loss of the Municipal Pension Plan and benefits as calculated by Mr. Benning, it is highly unlikely Mrs. Nofle will ever have the physical capacity to fill a position that would replace the MPP and benefits package that would have been available to her at UFV had she continued there but for the accident. The fact that without the accident she might have had to hold part-time positions for a while until a full-time permanent position became available would not negate the real and substantial possibility that without the accident, in due course, she would have successfully competed for a permanent full-time position.

[370] According to Mr. Benning's report at p. 13, the amount of the pension is based on either the pensioner's best five-year earnings or maximum pensionable earnings in the year prior to retirement. His calculations assumed Mrs. Nofle would have joined the MPP in January 2015. As we saw, another person won the position in which Mrs. Nofle had been serving.

Given Mrs. Nofle's excellent record at UFV, her experience and dedication, there remained a real and substantial possibility she would have secured, eventually, a full-time permanent position, though of course that is not certain. There was also a real possibility she would not have won a competition or, assuming she did, that it might not have occurred until much later than 2015, diminishing pensionable earnings.

[371] I note in passing that Mrs. Nofle's loss of the pension could be regarded as a loss of opportunity. The result is the same.

[372] Considering all the evidence, I find, a reduction of 10% from the \$111,925 is a reasonable adjustment and fair to both parties. The adjusted figure for Loss of Pension Benefits, accordingly, is therefore \$100,732.50.

SUMMARY OF DAMAGES

[373] The consequences of Mrs. Nofle's injuries have been devastating. She should receive a considerable award of damages. Both parties were ably represented. Very little was left unargued. I find the following awards, considering the evidence as a whole, is reasonable and fair to both sides:

Summary of Damages Awarded

Non-Pecuniary Damages

170,000.00

Loss of Past Income Capacity

95,000.00

Loss of Future Earning Capacity

650,000.00

Cost of Future Care

169,317.00

Special Damages

2,213.00

Loss of Pension Benefits

100,732.50

Misc. Expenses

880.00

Total

1,188,142.50

[374] The plaintiff is entitled to Court Order Interest on the judgment for Loss of Past Income Capacity and for Special Damages.

[375] The plaintiff is entitled to costs at Scale "B".

[376] If the parties wish to speak further to costs, do so in writing sent to the Supreme Court Hearing Scheduler in Chilliwack or New Westminster.

"N. Brown J."

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Prepared on 26 October 2026 · Esheria