

CANADA / JUDGMENT

## Orregaard v. Clapci

2020 BCSC 1726

### COURT

Supreme Court of British Columbia

### DECIDED

16 November 2020

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2020 BCSC 1726 Orregaard v. Clapci

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Orregaard v. Clapci,

2020 BCSC 1726

Date: 20201116

Docket: M179302

Registry: Vancouver

Between:

Rachel Christine Orregaard

Plaintiff

And

Michael Clapci and Rachel Agnes Radek

Defendants

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial/Hearing:

July 27-31, 2020

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Vancouver, B.C.

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Table of Contents

Introduction. 3

Ms. Orregaard's Life Prior to the MVA. 3

Family, High School, and Undergraduate Degree. 3

Legal Studies, Marriage, and Career Decisions. 4

Ms. Orregaard's Articling Plans in 2016. 8

The Circumstances of the MVA. 11

Ms. Orregaard's Pre-MVA Health. 12

Ms. Orregaard's Injuries and Treatment. 12

The Reliability of Ms. Orregaard's Evidence. 16

The Medical Experts. 19

Dr. Jacqueline Purtzki, Physiatrist 20

Dr. Gordon Robinson, Neurologist 24

Dr. Timothy McDowell, Neurologist 25

Damages. 27

Causation. 27

Failure to Mitigate. 27

Non-Pecuniary Damages. 27

Loss of Homemaking Capacity. 28

|                                                                    |
|--------------------------------------------------------------------|
| Past Loss of Earning Capacity. 30                                  |
| Ms. Orregaard's Residual Capacity. 33                              |
| Ms. Orregaard's Pre-MVA Earning Capacity. 34                       |
| The Applicable Law: Future Loss of Earning Capacity. 40            |
| Expert Economic Evidence in Assessing Loss of Earning Capacity. 44 |
| Assessing Ms. Orregaard's Loss of Income Earning Capacity. 45      |
| Loss of Earning Capacity - the Expert Evidence. 45                 |
| The Defendants' Position. 49                                       |
| Conclusion on Future Capacity Claim.. 52                           |
| The Applicable Law: Cost of Future Care. 55                        |
| Conclusion. 59                                                     |
| Costs. 60                                                          |

## Introduction

- [1] Rachel Orregaard claims damages for injuries she sustained in a motor vehicle accident on March 19, 2016 (the "MVA"). Specifically, Ms. Orregaard claims non-pecuniary damages, damages for past and future loss of earning capacity, damages for past loss of homemaking capacity, the cost of future care, and special damages.
- [2] Liability for the MVA has been admitted, and the parties have agreed that Ms. Orregaard should be awarded \$150,000 in non-pecuniary damages and \$26,000 for special damages.

Ms. Orregaard's Life Prior to the MVA

## Family, High School, and Undergraduate Degree

- [3] Ms. Orregaard was born in Swift Current, Saskatchewan on September 14, 1974. She was the only girl of four children. She had two older brothers and one younger. She was raised in a faith-based family. Her father, Peter Nikkel, was a pastor in a Mennonite Brethren church in Swift Current, and her mother was a trained social worker who stayed at home to raise her children before returning to the workforce. Her parents met while they were both studying social work.
- [4] Ms. Orregaard moved to Richmond, BC when she was eight years old. She graduated from high school in 1992. Mr. Nikkel testified that Ms. Orregaard excelled in high school. She won awards for her academic and athletic performance. Her sister-in-law, Janice Nikkel, testified that she nicknamed Ms. Orregaard "Straight A Ray" because Ms. Orregaard was such an excellent student.

- [5] After graduating high school, following her family's tradition, Ms. Orregaard studied for a year at a Bible college in the United Kingdom.
- [6] Ms. Orregaard started at the University of British Columbia ("UBC") in the fall of 1993, majoring in cell biology and genetics and minoring in psychology. Her UBC transcript was in evidence, and her undergraduate marks were exemplary. During her undergraduate studies, Ms. Orregaard worked for the Insurance Corporation of British Columbia ("ICBC") in Vancouver, as an administrative assistant. She lived with her parents in Richmond and graduated with no student debt.

### Legal Studies, Marriage, and Career Decisions

- [7] In the last year of her undergraduate studies, Ms. Orregaard started seriously considering a legal career. After graduating, she worked full time for ICBC for a year, wrote the Law School Admission Test, and scored in the 95th percentile. She was accepted into the faculty of law at UBC and started in the fall of 1999. Ms. Orregaard completed her first year law courses over two years so that she could continue working for ICBC and avoid student debt. Between her first and second year of law school, ICBC trained and hired her as a telephone claims adjuster. She continued working at ICBC part time during her second year of law school.
- [8] Ms. Orregaard met Eldon Orregaard in 2000, at the end of her first year of law school. They married a year later. Mr. Orregaard testified that, when they first met, they considered not having children and travelling. After they married, they planned to establish their careers and then have two children. They discussed wanting their children to be relatively close in age. Ms. Orregaard had a close relationship with her brother who was close to her in age, and she wanted that for her children.
- [9] Prior to their marriage, Mr. Orregaard was taking courses with a view to becoming a teacher. Afterwards, Mr. Orregaard, whose father was adopted, began to have contact with his father's birth family. One of them was an RCMP officer and, through him, Mr. Orregaard became interested in policing. For a time, he pursued both careers. He wrote and passed the RCMP entrance exam.
- [10] Ms. Orregaard testified that she supported her husband's interest in policing. At that time, she did not clearly understand the time demands of the work or its incompatibility with family life.
- [11] In January 2003, Ms. Orregaard learned that she was unexpectedly pregnant. She and Mr. Orregaard adapted their lives accordingly. Charlotte was born on September 16, 2003. Ms. Orregaard took a year's maternity leave from law school and work in the 2003-2004 school year.
- [12] Mr. Orregaard testified that prior to Charlotte's birth, he was still undecided about his career. He continued to work on his education prerequisites as a part-time student while working at a body shop. Qualifying as a teacher would take at least two more years, during

which he would not be earning a professional income. At the same time, he was waiting to hear whether he had been selected into the RCMP basic training program in Regina, which was for six months and unpaid. Upon successful completion, he would be paid as an RCMP constable.

- [13] A week after Charlotte's birth, Mr. Orregaard learned he had been selected for the training. He attended training from October 3, 2003 to March 14, 2004. He had no access to a cell phone and limited internet access. Ms. Orregaard remained in Vancouver with Charlotte.
- [14] After his training, Mr. Orregaard was assigned to the Langley detachment, The Orregaard family moved into an apartment directly across the street from it so that they could function with one car.
- [15] After Charlotte's birth, the Orregaards decided to have their second child in close succession, as planned. Ms. Orregaard would delay articling for a year after graduating from law school.
- [16] Ms. Orregaard returned to law school in the fall of 2004. She maintained exceptional grades. She became pregnant during that year and their son, Hunter, was born on May 31, 2005.
- [17] Despite being pregnant, having a toddler at home, commuting from Langley to UBC, and juggling her husband's work schedule, Ms. Orregaard maintained high grades in her last year of law school. She earned two As, an A-, and a B. She earned one A in tax and her A- in a directed research project, supervised by Professor Isabel Grant, considering the effects of reproductive technological advancements on parental rights.
- [18] After Ms. Orregaard finished law school, she and Mr. Orregaard realized that his work schedule was more demanding and less predictable than expected. He worked four days on, consisting of two day and two night shifts, with four days off. The night shifts were from 6:00 p.m. to 5:00 a.m. Towards the end of a shift, if he received a call on a file involving a person who was in custody, he had to complete all the interviews and paperwork before he went home. He often worked late.
- [19] In addition, Mr. Orregaard worked significant overtime. His proximity to the detachment meant that he was often called out. The family needed the extra income, and it was hard to turn down shifts because he might not be offered them on the next occasion.
- [20] The Orregaards discussed Mr. Orregaard applying for less demanding RCMP positions, but there were few available, they were in high demand, and it was rare for a constable to apply for a transfer within their first three years.
- [21] When Hunter was born, Mr. Orregaard was the sole income earner.

- [22] As Ms. Orregaard's maternity leave was coming to an end, she and Mr. Orregaard discussed their options in light of Mr. Orregaard's schedule. They agreed that their best option was for Mr. Orregaard to work more overtime and for Ms. Orregaard to postpone articling again. They were concerned that, if she started articling, they would need a nanny and a bigger house and that their children would see little of their parents.
- [23] Mr. Orregaard testified that Ms. Orregaard's articling was cost neutral. If he could work enough overtime, it would be in their children's best interests to have a parent at home. They could tread water financially. He acknowledged that it meant Ms. Orregaard was making a sacrifice by delaying her career. Ms. Orregaard testified that she looked into the impact on her career of delaying articles and learned that she could article at a later date.
- [24] After about three years as a constable, and for about four or five months, Mr. Orregaard was assigned to work on a gang-related issue in Aldergrove. Positive feedback about his work led to a request for him to work on an on-street, anti-gang project in the Lower Mainland. Mr. Orregaard testified that he and Ms. Orregaard discussed the assignment as it required him to work four straight night shifts, from 4:30 p.m. to 4:30 a.m., for a period expected to be 60 days. They agreed it was a positive opportunity for Mr. Orregaard's career and that Ms. Orregaard would delay articling again.
- [25] In November 2007, Mr. Orregaard was seconded to the Provincial Anti-gang Task Force ("AGTF"), operating out of Vancouver. At the time, it did not have permanent funding. He continued for 14 months, after which he returned to the Langley detachment.
- [26] In the summer of 2008, the AGTF received stable funding from the province. Mr. Orregaard learned that two supervisory positions were being created. The Orregaards decided that it was in their family's best interests for him to apply. As Mr. Orregaard explained, it would be unusual for promotions to be awarded in the first seven years of an RCMP career but, given his experience in gang-related policing, he was promoted to a supervisory position with the AGTF in the summer of 2009.
- [27] Mr. Orregaard's supervisory position required him to travel to the satellite AGTF offices in Prince George, Kelowna, and Victoria. In addition, he regularly travelled to Regina as a firearms instructor.
- [28] Once again, Ms. Orregaard deferred articling, and the pursuit of her career, to allow Mr. Orregaard's advancement. They did a cost-benefit analysis of Ms. Orregaard starting her law career and its potential impact on their children. They agreed that Ms. Orregaard would defer articling until the fall of 2016, when Charlotte was going into Grade 8 and Hunter into Grade 6. At that point, the children would be old enough to get to and from the neighbourhood school on their own. They also agreed that Ms. Orregaard's career would then take priority and Mr. Orregaard would take a less demanding role with the RCMP.

- [29] Charlotte testified that she understood her mother's plan was to return to work when Hunter was in Grade 6 and that, in preparation, her mother was fostering independence and self-sufficiency in her children. She understood that she needed to be ready to bus to school when her mother went to work.
- [30] Mr. Orregaard testified that he earned a base salary of \$80,000-85,000 a year and an additional \$50,000-55,000 in overtime. Ms. Orregaard testified that it was good to have the extra money and she believed she could pick up her law career, as planned, when Hunter was going into grade 6. In the fall of 2015, she realized that it was going to be her last year at home with the children. Both she and Mr. Orregaard felt good about that prospect, and Mr. Orregaard agreed that it was time to focus on Ms. Orregaard's career.
- [31] In April 2008, Ms. Orregaard worked on a contract basis for Lexis Nexis, from home, as a researcher on the BC Family Law Manual, authored by the then Justice Huddart of the BC Court of Appeal, and with Trudi Brown, a Victoria family law practitioner.
- [32] I find that Ms. Orregaard worked 259 hours from April to June 2008 and, until 2011, about 50 hours a year, on updates to both the BC and Ontario manuals.

### **Ms. Orregaard's Articling Plans in 2016**

- [33] Ms. Orregaard testified about her intention to obtain an articling position in the fall of 2016. She said that she intended to order the articling handbook and read it through to find firms with a tax practice. She said that she wanted to reach out to firms when she was in a position to take a job. She did not think she could ask firms to wait six months until the end of the summer.
- [34] Mr. Nikkel told Ms. Orregaard of a possible family law opportunity with Judith Janzen, who started the Onyx Law Group ("Onyx"), a family and estates firm, in 2012. Ms. Janzen was married to Mr. Nikkel's friend and parishioner. Mr. Nikkel testified that he spoke to Ms. Janzen on a number of occasions about his daughter and her articling plans. He specifically recalled doing so in 2013 and in early 2016. Mr. Nikkel testified that, in early 2016, he understood that Ms. Orregaard was about to continue her law career.
- [35] Ms. Janzen is one of the principals of Onyx, a Vancouver family and estate firm with seven lawyers. She said that Ms. Orregaard's parents approached her, sometime in 2013 or 2014, about their daughter who had a law degree, had completed a directed research project in family law, and had not articulated. Ms. Janzen understood that Ms. Orregaard had taken some time away from her career, to raise her family, and was interested in obtaining articles as some point in the future.
- [36] Ms. Janzen said that she was looking for lawyers to build her family law practice and had previously taken on a number of articulated students. She was particularly interested in Ms. Orregaard because she was mature and had raised children. She told Mr. Nikkel to have Ms. Orregaard contact her when she was ready to article.

- [37] Ms. Janzen testified that she would have interviewed Ms. Orregaard before hiring her. It was her practice to make an offer within 12 hours of an interview, which would generally remain open for 12 hours. Ms. Janzen testified that if someone was a good fit, she would find a place for them. Her firm had more work than it could handle. She described family law as an area in which lawyers could quickly acquire their own clients and develop their own practice.
- [38] Ms. Janzen only learned of Ms. Orregaard's interest in tax law at trial. She said it would have made her more interested in Ms. Orregaard because tax and accounting issues come up in many cases.
- [39] Ms. Orregaard testified that she planned to investigate articling opportunities in intellectual property ("IP") and tax law but was also very interested in family law and the opportunity with Ms. Janzen. She testified that she did not intend to speak to Ms. Janzen until she was in a position to accept an offer if one was made.
- [40] Ms. Orregaard testified that she felt confident she could find an articling position in family law. In cross-examination, she added that although she could not be certain, she was optimistic that she would quickly find articles when she started looking.
- [41] Mr. Orregaard testified that before the MVA, he intended to apply to transfer out of the AGTF to be closer to home and to be of assistance to Ms. Orregaard when she started working. He expected that a transfer request would have been granted quickly. His evidence in that regard was not contradicted. His plans were derailed by the MVA. He took on extra overtime because he continued to be the sole income earner.
- [42] Mr. Orregaard applied for a release in June 2017 when he said it became clear that Ms. Orregaard's post-MVA symptoms were not resolving. At the time, he was part of a security detail for witnesses in a high profile criminal trial in Kelowna. He said he could have insisted on a quick release but felt obliged to see the project through because there had been significant investment in the project, and replacing him would be costly and might result in a trial delay. The RCMP granted him a release as of January 1, 2018.
- [43] I accept, on the un-contradicted evidence, that from about May 2005 until September 2016, the Orregards planned their future, and the development of their careers, based on what they agreed was in each of their best interests and the interests of their children. They discussed each decision and the impact it would have on them, their children, and their careers. Ms. Orregaard acknowledged that these were difficult decisions and weighed on their marriage. Their lives were set to change at the start of the 2016 school year when Charlotte and Hunter were ready to look after themselves both before and after school. They discussed the changes with their children and prepared them. Charlotte also confirmed her understanding of the plan for the fall of 2016.

- [44] The defendants questioned how realistic the Orregaard family's planning process was because it did not extend to what would happen with the children's activities when Ms. Orregaard returned to work. I do not agree. On the date of the MVA, Ms. Orregaard planned return to work six months hence and there was lots of time to work out specific details as and when they arose.
- [45] There was no evidence on which to find that Ms. Orregaard would not have pursued her career as planned. All of the evidence was to the contrary.

### **The Circumstances of the MVA**

- [46] The circumstances of the MVA are not in dispute. In the early afternoon of March 19, 2016, Mr. Orregaard was driving their Honda Odyssey minivan on Crescent Rd. in White Rock, on the way to Elgin Heritage Park to walk their dog. Ms. Orregaard was in the front passenger seat. Crescent Rd. is one lane in either direction. As they approached the entrance to the park on their right, Mr. Orregaard slowed down and signalled the turn. In his rear view mirror, he saw a vehicle approaching in a manner that made him believe the driver had not seen him. He recalls swearing and then feeling and hearing the impact which he described as "quite loud". The impact pushed the minivan forward, past the park entrance.
- [47] Ms. Orregaard said that she did not anticipate the MVA. Just prior to impact, she heard her husband call out, and she looked right towards the park entrance. Her neck was turned to the right at the moment of impact, which she does not recall. Her next memory was of being pulled over on the side of the road, past the park entrance.
- [48] Mr. Orregaard testified that he got out of the minivan and approached the other driver to exchange information. Mr. Orregaard went back to the minivan to get a pen. He asked Ms. Orregaard twice to roll down her window and pass him one. She appeared disoriented.
- [49] Ms. Orregaard's recollection is somewhat different. She thought her husband asked her if she was okay and then got out to deal with the other driver, who then left. She said they got out of the car and looked at the damage to the minivan on the side of the road.
- [50] Ms. Orregaard testified that, immediately after the MVA, she felt dazed, the front of her head hurt, and she felt a little dizzy. The police and the ambulance were not called and both vehicles were drivable. They took their dog for a short walk, and Ms. Orregaard said she did not feel any pain. Within a few hours, she began experiencing increasing pain and stiffness in her neck and back, along with extreme fatigue. She went home and, uncharacteristically, took a nap.

### **Ms. Orregaard's Pre-MVA Health**

- [51] There is no dispute that, prior to the MVA, Ms. Orregaard was healthy and active. She testified that she rarely got headaches and never had to lie down as a result of them.

- [52] Ms. Orregaard was a runner and a cyclist who regularly exercised at home in a dedicated workout room in the basement.

### **Ms. Orregaard's Injuries and Treatment**

- [53] Ms. Orregaard's symptoms continued to worsen over the week following the MVA. She testified that she experienced dizziness, confusion and memory problems, and suffered from very painful headaches. By the end of the first week, she was nauseous all the time. She started chiropractic treatments with Dr. Dowes, D.C., and continued to attend appointments with him until June 3, 2016.
- [54] On April 4, 2016, Ms. Orregaard went to see Dr. Steven Hansen, her family doctor since 2003, who continues to treat her. She reported her symptoms to him on an intake form. Ms. Orregaard testified that she was concerned about her headaches, dizziness, and nausea. She was also becoming confused when driving, getting lost, and having difficulty following what her children told her. Finally, she was still experiencing back and neck pain.
- [55] Dr. Hansen diagnosed a myofascial strain of the cervical spine and tension headaches. He prescribed Advil as needed.
- [56] Ms. Orregaard followed up with Dr. Hansen on May 3, 2016. He recorded that she was often dizzy and nauseous and continued to suffer from a myofascial strain. He assessed her as having vertiginous episodes, dizziness, nausea, and disorientation. He recommended that she see a specialist in post-concussive neurological symptoms.
- [57] Ms. Orregaard testified that her headaches, nausea, and dizziness continued to worsen.
- [58] As the specialist that Dr. Hansen had recommended could not see her until September, and she could not face waiting, Ms. Orregaard spoke to Dr. Hansen about attending the Advance Concussion Clinic ("ACC") on West Broadway in Vancouver. She had heard about the ACC on sports radio. The ACC offers a multi-disciplinary team of specialists including physiotherapists, rehabilitative therapists, and neuropsychologists.
- [59] Dr. Hansen testified that he supported Ms. Orregaard's attendance at the ACC. She started in the program on June 8, 2016, and attended 74 sessions over the following 21 months. Each session involved driving 42 km each way. On occasion, Mr. Orregaard drove her.
- [60] Ms. Orregaard testified that her appointments at the ACC were generally in the morning, when she was at her best, and that she usually went home and slept afterwards due to her headaches. She woke up to pick her children up from school.
- [61] Ms. Orregaard testified that the physiotherapists at the ACC worked on her back, neck, and shoulders, and on desensitizing her vision and balance. She said that when she was looking at a busy computer screen, or reading, she would become nauseous and would occasionally vomit. The ACC worked with her to provoke mild and lesser symptoms, based on the theory that she would eventually become used to them.

- [62] The ACC introduced Ms. Orregaard to a pacing system, under which daily activities were allotted a certain number of points. The point system taught her to pace out her daily activities, in order to avoid using up all her points and ending up with a debilitating headache with associated nausea and dizziness. Ms. Orregaard found this system useful for managing her headaches, as it made her aware of the daily activities affecting her and her headaches. It also allowed her to better communicate with her family about how much they could expect her to do in a day, and what activities would exacerbate her symptoms.
- [63] Charlotte testified that the point system helped her understand her mother's capacity in a particular day. Charlotte said that she knows her mother only has limited points, which represent her capacity. She now plans ahead and asks her mother a few days in advance if she wants to do an activity that will use a lot of points.
- [64] Despite using the points system and seeing some improvements, by the end of her treatments at the ACC, Ms. Orregaard was still experiencing constant dull headaches. They would consistently turn into debilitating headaches by late afternoon or early evening.
- [65] Between September 14, 2016, and May 2, 2017, Ms. Orregaard attended eight treatment sessions with Dr. Kevin Loopeker, a vestibular optometrist at Fortius Sport & Health in Burnaby, for treatment of headaches and vestibular issues.
- [66] Ms. Orregaard stopped attending the ACC after Dr. Hansen arranged a consultation with a neuro-ophthalmologist, Dr. Briar Sexton, who told Ms. Orregaard that she thought her ongoing symptoms were related to a post-traumatic headache disorder and not an ongoing concussion.
- [67] Following her attendance at the ACC, Ms. Orregaard started to attend physiotherapy either weekly or bi-weekly at PhysioLife. She continued physiotherapy until March 2020, when it was suspended due to COVID-19. She intends to return, particularly to clinical Pilates, when the restrictions are lifted. She continues to perform her prescribed exercises at home.
- [68] Ms. Orregaard testified that when she started at the ACC, she returned to bed by noon, got up and picked up her children at school, and then returned to bed in a darkened room. With pacing, therapy, and time, she broke the cycle of daily debilitating headaches. She now experiences low level headaches on most days. They are only debilitating, with associated nausea, fatigue, and disequilibrium, two or three times a week. She continues to experience intermittent pain in her back, neck, and shoulder area.
- [69] Ms. Orregaard testified that, on some mornings, she wakes up without a headache but, within about an hour, has a low grade headache. She walks most days, either outside or on a treadmill. She tries not to overexert herself as exertion makes her headache worse. She plans her appointments in the morning, when she is at her best. By mid-morning, she may have to try and "back [her headache] off" by sitting down and closing her eyes. On most days, her headache is at a moderate level by lunchtime. She sits or lies on the couch, taking deep breaths, trying to prevent her headache from becoming severe.

- [70] Ms. Orregaard testified that her headaches are triggered by movement (walking, bending, turning, or driving), by sunlight, bright lights, noise, and reading.
- [71] On her evidence, and the evidence of her family members and closest friend, Jennifer Thoews, none of which was seriously challenged, I accept that all aspects of Ms. Orregaard's life have been affected by her injuries. She has withdrawn almost entirely from her involvement in her church community which was previously a significant part of her life. Prior to the MVA, she was a voracious and quick reader and often had more than one book on the go. In the four years since the MVA, she has not read a book through. She listens to audiobooks instead. She participates minimally in family gatherings, with her friends, or in family vacations. To her profound regret, and unlike she had done previously, she has not been able to assist her father through his continuing health difficulties. She feels guilty and sorrowful about the changes in her life and their impacts on her family.
- [72] Her father's description of the changes to Ms. Orregaard's life was particularly compelling. He compared several Phoenix vacations that he and his wife had shared with Ms. Orregaard and her family. The first two, pre-MVA in 2013 and 2015, were for about a month. They involved daily activity including hiking, biking, and swimming. On the vacation in 2017, post-MVA, Ms. Orregaard went for a week. She was passive, listened to audio books around the pool and engaged in no physical exercise.
- [73] Mr. Nikkel said that he has a profound sense of sadness, approaching grief, when he now thinks about Ms. Orregaard. He described how his faith, and the rules by which he lives his life, cause him to focus on what remains, not on what he has lost. The trial forced him to focus on loss. He testified, "this girl, with this phenomenal potential--intellectual and physical potential--and the sky's the limit, marching along in life, confident to be a leader and with every indication of being that leader--has been reduced, really, to someone who struggles to take care of the daily responsibilities of life and that fills me with a profound sense of sadness."

### **The Reliability of Ms. Orregaard's Evidence**

- [74] The defendants submit that Ms. Orregaard's evidence is not reliable. They say her Type A personality, her perfectionism, and her very high standards have coloured the lens through which she looks at the world, her alleged injuries, and the treatment of them.
- [75] The defendants therefore submit that Ms. Orregaard's disabilities are not as serious as she believes. They say that she has not proceeded with recommended treatments which may reduce her disabilities in the future.
- [76] I do not agree with the defendants' assessment of Ms. Orregaard's personality or the scope of her disabilities.
- [77] First, the defendants did not seek to have Ms. Orregaard examined by a psychologist. As a result, there is no psychological evidence to support their characterization.

[78] Second, the defendants did not point to any clinical records of her treating doctor, or cross-examine her expert witnesses in an effort to support their submissions. The diagnosis by the defendants' expert, Dr. McDowell, mirrored the diagnoses of Ms. Orregaard's experts. I also note that in Robert Gander's Functional Capacity Evaluation Report, prepared on behalf of the defendants, he commented on the reliability of Ms. Orregaard's pain and disability reports and said:

Ms. Orregaard reports upon the effects that her symptoms exert upon her functioning with accuracy. There are no observed behavioural inconsistencies.

[79] Third, when questions addressing the reliability of her evidence were put to Ms. Orregaard in cross-examination, she remained firm in her denials. She fairly and frankly discussed her current disabilities and the areas in which she has seen improvement. She testified about her capacity during the day and what she did, with some success, to prevent her headaches from becoming debilitating. She did not exaggerate her evidence.

[80] In addition, the defendants did not cross-examine the members of Ms. Orregaard's family or Jennifer Thoews, her close friend, about the issues they raise in their submissions regarding the reliability of Ms. Orregaard's evidence.

[81] I found Ms. Orregaard's evidence to be reliable throughout. She intelligently and carefully answered the questions that were put to her. Her evidence was consistent in both direct and cross-examination.

[82] The defendants submit that Ms. Orregaard's evidence is less credible since had not had a migraine headache as a result of testifying at trial. She said that she was pleased that she had not experienced a migraine over the course of two and a half days. She explained how, during her evidence, she stayed in a nearby hotel and rested over the lunch break. At the end of the court day, she went to the hotel and slept. I do not accept the defendants' submission.

[83] Ms. Orregaard consistently described her symptoms, and the impact of them on her life, to the doctors and other professionals who treated or otherwise engaged with her. She stopped certain treatments when she derived no medical benefit from them and experienced negative side effects. No medical or other professional suggested that she did so inappropriately. Although she never took Advil at the dose suggested by Dr. Hansen, Advil was prescribed to treat her symptoms of pain but was not suggested as a curative treatment.

[84] After considering Ms. Orregaard's evidence as a whole, there was no basis on which to conclude that she would give up the things that meant the most to her--time with family and friends, involvement in her church life, support for her father, and her love of reading--on the basis that the lens through which she looks at the world has been tainted or altered as suggested by the defendants.

- [85] Instead, the evidence supports that Ms. Orregaard has been diligent with her treatment and her attendance with Dr. Hansen. Although the defendants described Dr. Hansen as sympathetic to Ms. Orregaard's own decisions about her health, they did not cross-examine him on this point. He struck me as a compassionate family physician who discussed treatment options with Ms. Orregaard fairly and frankly. He considered her views as she is clearly an intelligent, engaged, and informed patient.
- [86] For 74 visits over two years, Ms. Orregaard attended the ACC, travelling some distance to do so, and participated in their program. She stopped only after medical advice that she was no longer suffering from a concussion. Over time, she has been prescribed, and has taken, medications. She brought the recommendations of the experts retained in this case to Dr. Hansen's attention.
- [87] In particular, on March 6, 2018, Ms. Orregaard was prescribed Amitriptyline. She testified that she took it for about six months, but it made her feel drugged and caused her gastrointestinal issues. She discontinued its use. She discussed the discontinuance with Dr. Hansen, and he supported her decision.
- [88] Ms. Orregaard testified that she saw Dr. Hansen on January 21, 2020, to discuss the recommendations in Dr. Gordon Robinson's expert report, including his suggestion that Botox injections would be a "reasonable consideration" for her. Ms. Orregaard was concerned that Botox injections might disrupt the balance that she had in her neck and make her vertigo worse. While Dr. Hansen did not recall seeing Dr. Robinson's report, or specifically discussing it with her, they did discuss Botox on the first visit after Dr. Robinson's report was available. He testified that he advised Ms. Orregaard that, if she wanted, he could arrange for another physician in his practice to administer Botox. He said it was completely reasonable for her not to want to do so. In his clinical note, he wrote:

Possibility of Botox. However this tends to be used more for acute migraine therapy or acute onset headaches. Nevertheless, if Rachel wants to trial this then the other physician in this office, Dr. Chu does do Botox injections. She can readily have this trialed. At this point in time she is quite reticent about trialing this type of therapy which I completely understand. One does need to follow one's intuition, instinct or that little voice in the head that says this is perhaps not a good idea. I reassured Rachel that the first visit with Dr. Chu would simply be for a consultation only and would not involve any injection. The other option is also to consider trigger point injections with Xylocaine-like products that would be much more shorter lived and perhaps would be a good marker or determinant of whether or not Botox would be effective. She will take this under consideration and let me know if she wishes to proceed otherwise I will leave it open for now. Has struggled to get to this point in baseline and is very reticent and anxious regarding doing something that might upset the balance and cause a relapse in the vestibular dysfunction and headache. Completely understandable.

- [89] In March 2020, Ms. Orregaard was prescribed Propanolol, a beta blocker, used as prophylactic migraine medication. She tried it but testified that she became lightheaded, and felt as though she was going to faint, so she discontinued its use. Dr. Hansen testified that, based on the side effects she was experiencing, it was reasonable for her to discontinue.
- [90] In May 2020, Ms. Orregaard tried Topiramate, another medication used to treat migraines. She testified that she experienced a mental fog, stomach aches, and nausea as a result of this medication, and Dr. Hansen testified that he recommended that she stop taking it.

#### The Medical Experts

- [91] Ms. Orregaard has been seen by a number of medical experts at the requests of her counsel and defence counsel.

#### Dr. Jacqueline Purtzki, Physiatrist

- [92] Dr. Purtzki, an expert in physical medicine and rehabilitation, assessed Ms. Orregaard on February 12, 2020, and produced an April 8, 2020 report.

- [93] She diagnosed Ms. Orregaard with initial concussion and persistent chronic post-traumatic headache, and a secondary migraine disorder that developed as a result of the injury to her head and neck. She wrote:

Mrs. Orregaard likely suffered a concussion as a result of the MVA, with initial concussion, poor memory and orientation, persistent headaches, dizziness, fatigue, light and sound sensitivity, and nausea. Over time she developed secondary autonomic dysfunction (see below). She developed a secondary post-traumatic headache disorder, particularly disabling migraines due to trauma to the head and neck.

In my opinion and in Dr. Sexton's and Robinson's opinion, she developed a secondary migraine disorder, which needs to be treated as a diagnosis of its own. I agree with Dr. Sexton, who recognized the nausea and motion sickness as part of a migraine disorder (see below). I also agree that her symptoms are no longer related to vestibular dysfunction.

Many of the concussion symptoms have been gradually improving, but her chronic migraine disorder continues to be a major limiting factor to activity on a daily basis.

- [94] Dr. Purtzki notes that Ms. Orregaard experiences both musculoskeletal type headaches, which are likely related to the whiplash injury she suffered in the MVA, and post-traumatic headaches with migrainous features, which are residual from her concussion. Dr. Purtzki provides a bleak prognosis for this disorder:

In my experience, patients may try a variety of prophylactic oral medications, or Botox, but the response to treatment is very unpredictable and often not complete. This type of headache disorder is now permanent and will not spontaneously resolve.

[95] Dr. Purtzki also diagnosed Ms. Orregaard with chronic myofascial pain:

After the MVA, Mrs. Orregaard began experiencing chronic muscle tension and pain of the left shoulder, neck and mid-back, as well as mild winging of the scapula. She was diagnosed with whiplash and myofascial pain. Her examination showed a slim lady with not a lot of muscle mass. I think that her physical build makes her vulnerable for the persistent symptoms. She likely had an initial strain, but not a lot of muscle mass to absorb the impact. At this time, she is dealing with chronic muscle tension. I think she will continue to be at least intermittently symptomatic. She needs to continue with exercise and stretches as well as periodic physio. Aggressive massage or muscle mobilization will likely cause flare-ups and is not recommended.

[96] Finally, Dr. Purtzki diagnosed Ms. Orregaard with Autonomic Dysfunction, secondary to concussion and deconditioning. In her report, she explains that a subgroup of individuals suffer from an autonomic imbalance following a concussion that leads to spikes in heart rate and a drop in blood pressure. This may lead to Postural Orthostatic Tachycardia Syndrome ("POTS"). Dr. Purtzki opined that Ms. Orregaard demonstrated POTS symptoms following the MVA, which have since improved. The primary treatment for POTS is cardiovascular exercise.

[97] With respect to Dr. Purtzki's prognosis for Ms. Orregaard's overall recovery, she wrote:

Mrs. Orregaard had a less favorable recovery after a concussion than one would normally expect for a generally healthy person.

I think the fact that she struggled for such a long time with post-concussion symptoms is due to the fact that she developed secondary conditions such as a migraine disorder after the concussion. It is now more widely recognized among concussion specialists that persons with unresolved symptoms have most likely developed a new condition as a result of the concussion.

In terms of Mrs. Orregaard's prognosis, this means the following: she had a prolonged period of symptoms, which means that she would experience a flare up of symptoms and likely a very prolonged period of symptoms with any additional concussion.

Secondly, it means that she now has a chronic migraine disorder, which I do not think will spontaneously remit. She will require ongoing treatment for this and only the treatment will be able to control her symptoms. Some people respond favorably to migraine treatment. The goal of treatment is to decrease symptom burden and increase the threshold at which symptoms arise. It is more likely than not that she will have ongoing symptoms (headaches, nausea and light/sound sensitivity, cognitive slowing and fatigue). Mrs. Orregaard will still need to modify her activities to accommodate her new normal state. I anticipate a waxing and waning course depending on life circumstances.

[98] In cross-examination, Dr. Purtzki confirmed Ms. Orregaard's six-month use of Amitriptyline and that she experienced morning drowsiness which, she opined, could be a very good reason to discontinue its use. As Ms. Orregaard had side effects from the Amitriptyline, and did not tolerate it, the dosage could not be increased.

[99] When Dr. Purtzki was asked in cross-examination whether she believed that Ms. Orregaard's reduced resilience to stressors could be improved with psychological treatment, Dr. Purtzki said "we're not going to really change her overall quality of life to any degree".

[100] When Dr. Purtzki was asked in cross-examination whether activity avoidance can sensitize or worsen chronic pain symptoms, Dr. Purtzki responded:

I would say not necessarily in respect to migraines. I know that that is something we think about for chronic musculoskeletal pain, let's say somebody that has a low back pain where I think it's firmly established that lying on the couch is bad for you and does make things worse. So we do really want an active rehabilitation program and we want that activity. I think these migraines are different because migraines will get worse. And they will--and that's the unfortunate thing. I don't think that applies to the migraines.

[101] When Dr. Purtzki was asked in cross-examination whether activity avoidance was an issue with respect to Ms. Orregaard, and whether a psychologist or occupational therapist would be of assistance, as recommended by Mr. Gander, Dr. Purtzki responded:

So that would maybe be looking at modifying activities, making them easier, so utilizing compensatory methods. Psychology, from my perspective, was more aimed towards really dealing with the coping with the result, like, the grief counselling, so to speak, like, okay, I had this life before, now I have this condition. And coping with it. It's not the same I think as what he is suggesting where he is suggesting the patient has an avoidant style of coping and needs to be coached to overcome an avoidance style of coping. But there's no evidence that she has an avoidance style of coping because it's mentioned that she does try and push herself to do activities, you know, she is not actually avoiding them, but she does activities despite the headaches and gets more headaches. So I know that this is something that we often recommend for people that are very sedentary, but that's not the case for her. So I don't think we can apply that to her case.

We also can't apply it necessarily to a case--like I mentioned before, migraines do not get better with increased activity. Back pain does, but not this particular issue. Chronic headache pain doesn't get better. So I feel that he is applying a principle to an area where I don't think it really makes sense.

I don't feel that that applies to a--the main problem here, which is the--well, I guess there a problem complex of chronic daily headaches, and with that associated symptoms of, you know, nausea and those kinds of things, because she has actually tried to increase her activities and it didn't work. And she has tried to do things. She has tried to run on her treadmill. She is trying to do her household things or drive the kids. So I don't think that this, number 1, applies because

she actually is doing things and she has been trying to do things. And secondly, in my experience, the migraine disorder always reaches a certain threshold that they cannot go past. They will do so much and they will start to get a migraine. And they start to get escalating headaches. And doing more doesn't solve the problem. So the occupational therapist is good for compensatory strategies, so that would be, like, okay, I'm not going to do it one way, I'm going to do it another way. Compensatory strategy is I'm not going to read, I'm going listen to an audiobook, that would be a simple thing. The psychologist can help with, you know, teaching maybe mindfulness, those kinds of things, but the focus is not one of trying to deal with pain avoidance or--or fear of--pain and pain avoidance that we see in other cases. There are clearly other cases where that's the issue, but I don't think that's the issue here.

[102] In cross-examination, Dr. Purtzki agreed that Ms. Orregaard's migraine disorder is her major limiting and disabling factor. She went on to say that there were a lot of overlapping symptoms, vestibular symptoms as well as migraines. She explained that people with migraines are motion sensitive. She could not say that Ms. Orregaard no longer suffered from vestibular dysfunction, but the biggest limiting issue is her migraine disorder.

[103] In closing submissions, the defendants submitted that Dr. Purtzki was clearly an advocate for Ms. Orregaard, was argumentative and evasive, refused to acknowledge new or missed information, or refused to make admissions contrary to her own interests. Having considered the tone of Dr. Purtzki's evidence and having reviewed the transcript, I do not reach that conclusion. Overall, her evidence was clear and straightforward. She never waived from her conclusion that Ms. Orregaard's current major disabling condition is her post-traumatic headaches. She acknowledged that there had been improvement in Ms. Orregaard's condition since the MVA. She did not retract a statement that Ms. Orregaard told her that Dr. Robinson did not recommend Botox. It was her recollection that Dr. Robinson did not think Botox would be particularly helpful, but she did not say that she got that information from Ms. Orregaard. She acknowledged that she was not sure about Dr. Robinson's recommendation. When she was shown his report, she agreed that Dr. Robinson had said that Botox might be helpful. It was, in fact, the defendants' expert, Dr. Timothy McDowell who did not recommend Botox for Ms. Orregaard.

[104] I have accepted Dr. Purtzki's evidence. In my view, it accords with Dr. Robinson's and Dr. McDowell's conclusions about Ms. Orregaard's current condition.

### **Dr. Gordon Robinson, Neurologist**

[105] Dr. Robinson assessed Ms. Orregaard on December 2, 2019, and produced a December 12, 2019 report. He also prepared a responsive report to Dr. Timothy McDowell's report, a report prepared on behalf of the defendants.

[106] Dr. Robinson diagnosed Ms. Orregaard with persistent post-traumatic headaches related to the neck whiplash injury she sustained in the MVA.

- [107] Dr. Robinson opines that Ms. Orregaard will likely continue to suffer from post-traumatic headaches indefinitely. He notes that no physical therapies have been shown to be curative. At best, patients will experience temporary benefits but on occasion the headaches may be more severe following physical therapy.
- [108] Dr. Robinson opines that:
- Medications are often unhelpful in treating chronic posttraumatic headache. Analgesics, muscle relaxants and anti-inflammatory drugs are usually of little value. Migraine abortive medications (triptans) such as sumatriptan (Imitrex) may be helpful when headaches have migrainous features .I believe it unlikely that triptan medications would be helpful.
- [109] He rules out nerve blocking anaesthetic injections. He refers to a number of drugs used to prevent migraine attacks which he says are "occasionally" useful in chronic posttraumatic headache but most efficacious in patients who had pre-existing migraine or post-traumatic headaches with migrainous characteristics.
- [110] At para. 98 of his report, Dr. Robinson suggests that a trial of Botox, which has been approved by Health Canada for migraine treatment, would be a "reasonable consideration" and may help Ms. Orregaard because some patients show improvement with it.
- [111] In cross-examination, Dr. Robinson agreed that, while there had been no large clinical trials evaluating Botox in chronic post-traumatic headache related to neck injury, many patients have had a positive experience. In his report, he suggested a restricted Botox treatment, focusing on the left occipital, upper paracervical, and upper trapezius regions, rather than the extensive PREEMPT injection protocol used for chronic migraines. He explained that the PREEMPT protocol involved injections at 31 sites: brow, upper forehead, temples, back of head, upper neck, and both shoulders with the option of adding a further 40 units in either temple or both, or either shoulder or both, with each site receiving five units of Botox. He explained that, in post-traumatic headache, which is one of the harder headache disorders to treat, there is no approved protocol and Botox would be used off-label.
- [112] Dr. Robinson testified that there were no cognitive complaints at Ms. Orregaard's examination and that she told him that she is able to concentrate "reasonably well" unless she suffers from an increasing headache.

### **Dr. Timothy McDowell, Neurologist**

- [113] Dr. McDowell assessed Ms. Orregaard on March 12, 2010, at the defendants' request, and produced an April 7, 2020 report. He also prepared a responsive report to Dr. Robinson's December 12, 2020 report. Counsel for Ms. Orregaard chose not to cross-examine Dr. McDowell.
- [114] In his April 7, 2020 report, Dr. McDowell diagnosed Ms. Orregaard with MVA-related concussion, post-traumatic headache, and mechanical neck and low back pain.

- [115] Dr. McDowell opines that Ms. Orregaard is disabled two to three days a week when she has severe headaches. During the rest of the week, she is partially disabled due to her headaches. Dr. McDowell suggested that Ms. Orregaard try Topiramate. His prognosis is optimistic, as long as she is able to tolerate it.
- [116] In Dr. Robinson's May 8, 2020 responsive report to Dr. McDowell's report, he comments on the serious side effects of Topiramate and the high dropout rates in clinical trials. He did not agree with Dr. McDowell's opinion on the effectiveness of Topiramate in patients with migraine. He also expressed high doubt about the efficacy of other daily migraine preventative drugs on patients with post-traumatic headaches.
- [117] In his June 3, 2020 responsive report, Dr. McDowell acknowledged that literature related to Topiramate relates to its effectiveness in migraine headache and not post-traumatic headache. To some extent, he resiled from his optimistic April 7, 2020 prognosis. He said, "my opinion remains that if she can tolerate topiramate for several months there will likely be some at least partial improvement in her headache severity or intensity."
- [118] Dr. Robinson testified that many patients cannot tolerate Topiramate's side effects even if it provides some therapeutic benefit.
- [119] As set out above, Ms. Orregaard tried Topiramate, under the supervision of Dr. Hansen, and she derived no benefit with respect to her post-traumatic headache, and could not tolerate the side effects. She discontinued its use.
- [120] With respect to Botox, which had been suggested by Dr. Robinson as a possible treatment option for Ms. Orregaard, Dr. McDowell writes in his June 3, 2020 report that he is "not aware of any strong evidence that Botox would work for [Ms. Orregaard's] headaches aside from a chronic migraine perspective--where there is quality evidence of benefit." Dr. McDowell disagreed with Dr. Robinson's suggestion not to follow the PREEMPT protocol if using Botox. He opines that doing so would reduce any therapeutic benefit.
- [121] Drs. Robinson, McDowell, and Purtzki did not diagnose Ms. Orregaard with a migraine disorder. They all agreed that she has a post-traumatic headache disorder which, two to three times a week, usually later in the day, has migrainous features that are disabling. Their diagnoses are consistent with Dr. Sexton's consult report from February 22, 2018.
- [122] Ms. Orregaard has chosen not to try Botox because she is concerned about it making her headaches worse. She made that choice in consultation with Dr. Hansen who, as set out above, endorsed her decision.
- [123] On all of the evidence, I am satisfied that, as a result of the MVA, Ms. Orregaard suffered a concussion which led to a post-traumatic headache disorder with migrainous features. She also suffers from chronic myofascial pain.

[124] Although Dr. Robinson agreed that the symptoms of headache are subjective, and cannot be measured subjectively, throughout trial, Ms. Orregaard has clearly and consistently described her symptoms, and as I have found, she was a reliable witness. In total, four medical experts have confirmed the diagnosis of post-traumatic headaches.

#### Damages

#### Causation

[125] In this case, it is undisputed that Ms. Orregaard has established, on a balance of probabilities, that her injuries and current disabilities were caused by the MVA as described in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 17-20.

[126] There is no evidence that suggests any other cause, or potential cause, of Ms. Orregaard's injuries and disabilities.

#### Failure to Mitigate

[127] The defendants are not arguing that Ms. Orregaard has failed to mitigate her damages. They submit that there are, or may be in the future, treatments that will improve Ms. Orregaard's prognosis, and that I should take those into consideration as negative contingencies affecting her loss of future capacity claim.

#### Non-Pecuniary Damages

[128] As set out at the beginning of these reasons, the parties agree that Ms. Orregaard is entitled to an award of non-pecuniary damages in the amount of \$150,000.

#### Loss of Homemaking Capacity

[129] Ms. Orregaard claims a loss of homemaking capacity.

[130] In *Deglow v. Uffelman*, 2001 BCCA 652, the Court of Appeal explained that a personal injury victim may claim damages for loss of homemaking capacity, despite not incurring any expense to replace homemaking services previously provided, where the plaintiff's capacity to provide those services has been diminished by their injuries. The court said:

[24] The applicable principles were reviewed in [*McTavish v. MacGillivray*, 2000 BCCA 164]). It was noted (by Huddart J.A. and by Saunders J.A. in concurring reasons (at para. 73)) that:

This Court, in *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; 4 B.C.L.R. (3d) 178 recognized that damages for past and future loss of housekeeping capacity may be awarded by a trial judge, even though housekeeping services were gratuitously replaced by a family member. Further, it recognized that, depending on the facts, this compensation may be by pecuniary or non-pecuniary damages, and if non-pecuniary, that there was no reason these damages could not be segregated.

[25] Most of the discussion in *McTavish* focused on the principles to be applied in determining the quantum of compensation. The question was whether the services the plaintiff could no longer provide could be valued in economic or pecuniary terms. The Court decided that in the circumstances of that case the services provided by the respondent (the plaintiff) could be evaluated by replacement cost because others had provided them (at para. 62). Huddart J.A. said (at para. 63):

it is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of her family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

[27] The trial judge did not make clear to the jury, however, the principle established in *Kroeker* that the disabled plaintiff need not have actually incurred an expense or suffered a monetary loss to recover damages under this head. The trial judge did not explicitly state this principle anywhere in his charge on this head of damage or make it clear that an award, if made, is for loss of capacity and not to compensate for an expense or loss incurred. In describing how to calculate the loss, some of the words he used could have been understood by the jury to mean that an expense had to be incurred, which is not the law.

[28] In my view, the absence of a clear statement of the principle to be applied in determining whether a plaintiff has suffered a loss of homemaking capacity could have misled the jury and caused it to make no award under this head.

[131] More recently, in *Schenker v. Scott*, 2014 BCCA 203, the Court of Appeal upheld a \$15,000 award for loss of homemaking capacity where the plaintiff was also awarded pecuniary future care damages to replace homemaking services. The court said:

[93] Ms. Scott also challenges the trial judge's award of \$15,000 for loss of housekeeping capacity. She argues this represents a duplicate award because the judge accounted for this loss in her award for future care costs.

[94] I see no merit to this alleged error. An award of damages for loss of housekeeping capacity may be considered under a separate head of damages and I see no error in the judge's analysis: *Deglow v. Uffelman*, 2001 BCCA 652; *McTavish v. MacGillivray et al.*, 2000 BCCA 164. The law compensates a plaintiff for a diminished ability to perform housekeeping duties and, on these facts, there is no question that Ms. Schenker has been impaired due to her injuries.

- [132] While some decisions have expressed caution about possible double recovery when awards are made for both cost of future care and loss of housekeeping capacity, in this case, Ms. Orregaard claims \$15,000 for past loss of homemaking capacity and makes no claim for future homemaking capacity as she has claimed damages for the cost of future care to provide the services to bring her home up to her standard of cleanliness.
- [133] Prior to the MVA, Ms. Orregaard testified that her home was always clean and orderly. She was entirely responsible for the household. She said that she cleaned a lot. She liked a clean house and vacuumed either every day or every second day. She loved to cook.
- [134] She testified that she is no longer able to maintain her home to its previous level. She has cleaners that come in, once a week, for just over an hour, but the bathrooms are not cleaned weekly.
- [135] Ms. Orregaard now relies on cooking simple, low-preparation, or delivered meals.
- [136] Mr. Orregaard agreed that his wife used to vacuum a lot, never left dirty dishes in the sink, and at the end of each day, cleaned and organized for the following day. He said that the cleanliness of their home has declined since the MVA, despite having a cleaning service. As an example, he described mildew in the shower which was never there before.
- [137] Charlotte Orregaard testified that, prior to the MVA, her mother vacuumed every day and was a good cook. Since the MVA, her mother only vacuums when she absolutely has to, and they have very basic dinners such a Kraft Dinner or chicken and vegetables (meals that do not include extensive preparation or chopping).
- [138] Ms. Nikkel described that, prior to the MVA, Ms. Orregaard's home was "very put together". She said everything had its place and the home was very organized. In cross-examination, she said that Ms. Orregaard had meticulous standards with respect to her housekeeping.
- [139] I am satisfied, on the evidence, that Ms. Orregaard suffered a past loss of homemaking capacity and an award of \$15,000 is appropriate in the circumstances.

### **Past Loss of Earning Capacity**

- [140] The MVA intervened before Ms. Orregaard had begun searching for articles in the fall of 2016, as she had planned to do. The primary issues in this case are the extent of Ms. Orregaard's residual capacity to work and what the course of her career would have been but for the MVA.
- [141] In order to assess her past loss of earning capacity, the Court must consider several past hypothetical events: whether she had a genuine intention to secure articles, the likelihood of her successfully obtaining an articling position, and the type of firm and practice area in which she most likely would have worked.

- [142] Unlike past actual events, past hypothetical events need not be proven on the balance of probabilities. Instead, the court must consider whether there is a real possibility those events would have occurred. If there is a real and substantial possibility those events would have taken place, then the court must also consider the likelihood of each event occurring. Damages are adjusted to account for those hypothetical events based on their relative likelihood.
- [143] These principles were confirmed by the Court of Appeal in *Smith v. Knudsen*, 2004 BCCA 613 and, more recently in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 45-49. Although Justice Goepel wrote in dissent in *Grewal*, his legal analysis was adopted by the majority at para. 60. A plaintiff must prove that an injury affected their ability to earn an income on the balance of probabilities. Once that is established, past hypothetical events--like future hypothetical events--can only be proven on the basis of real possibilities and the likelihood of those possibilities occurring. The court said in *Smith* at paras. 28-29:
- [28] There are a number of decisions of this Court which accord with what was said by the Supreme Court of Canada concerning proof of future and hypothetical events. One of those cases is *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133, [1990] 5 W.W.R. 365. In that case, Hutcheon J.A., for the majority, after making reference to a number of authorities referred with approval to *Smith* and *Bouck*, Civil Jury Instructions (1989) on the instructions to be given to a jury about the different standards of proof. The instruction, which is set out below, was said to be modelled on what was said by Lord Diplock in *Mallett v. McMonagle*, *supra*:

## COMPARISON WITH STANDARD OF PROOF FOR ACTUAL EVENTS

5. In deciding what actually happened in the past, you must weigh the evidence and reach conclusions on a balance of probabilities. Anything more probable than not you should treat as certain. When you are asked to determine (what might happen in the future/what would have happened in the past but for the (injury/loss)), you must use a different method of proof. First you must decide if the event (is/was) a real possibility, you must then determine the actual likelihood of its occurring (at 138).
- [29] That instruction accurately reflects the distinction made in the case authorities between proof of actual events and proof of future or hypothetical events. What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [144] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, the Court of Appeal emphasized that a claim for past wage loss is more properly described as a claim for loss of earning capacity, "that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury."

- [145] With respect to past loss of earning capacity, a plaintiff is only entitled to recover the net amount of damages: Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, s. 98 and *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras.152-158.
- [146] As described in her evidence, Ms. Orregaard presently suffers daily headaches brought on by even simple homemaking activities and reading. She wakes with a headache on most days or develops a headache soon after waking. Her headache increases with activity throughout the course of each day.
- [147] Ms. Orregaard has significantly reduced her pre-accident activity level to manage her daily headache. She testified that reading is a trigger for her headache and she cannot read for more than ten or 15 minutes without provoking increased headache with migraine features. Doing simple things like looking down, or bending over--changing the position of her head--provokes a headache.
- [148] Ms. Orregaard testified that on most days of the week, she spends time in the afternoon sitting or lying in her living room, with her eyes closed, waiting for her headache to abate to a manageable level. On average, two to three days a week, the headache becomes debilitating to a point that she must lie down in a dark room, and she is unable to function for the rest of the day.
- [149] When Dr. Purtzki was cross-examined about Ms. Orregaard's activity avoidance to prevent headache, she described Ms. Orregaard's headache management as "enduring" rather than "avoiding".
- [150] In addition to headaches, Ms. Orregaard experiences chronic myofascial pain in her neck, shoulder, and back, although less frequently.
- [151] Ms. Orregaard submits that, absent the MVA, she would have returned to the workforce in September 2016 seeking full-time work as an articling student and then as a lawyer. Her unrefuted evidence, supported by that of her husband, daughter, and father, supports a finding that, following the birth of her children, Ms. Orregaard suspended her career plans to permit her husband's career advancement. His career was demanding and involved night shifts and overtime. As a couple, the Orregaards agreed that she would stay at home and provide stability to their children. She is not be criticized for the decisions she made. I accept that she had a firm plan to commence the process of seeking an articling position in the fall of 2016 when Hunter entered Grade 6.

#### Ms. Orregaard's Residual Capacity

- [152] Ms. Orregaard submits that, due to her injuries and her current condition, she is totally disabled from working as a lawyer.
- [153] Dr. Purtzki opines:

Given her current symptoms and the poor prognosis for her migraine disorder it is unlikely that she will return to articling and being a lawyer. Her endurance and resilience to stressors, long hours and especially her ability to read is significantly compromised, even with treatment. This will translate into a less efficient worker who is less employable from a competitive perspective. As mentioned, I envision a flexible part-time job with a low level of demand and stress as a more reasonable alternative. I think that it will likely be possible for her to do some kind of work, but this would need to be reaffirmed by a vocational consultant.

[Emphasis added.]

[154] Dr. Robinson opines:

It is now well over three years since the March 19, 2016 motor vehicle accident. I believe that she probably will continue to have posttraumatic headaches indefinitely. It is possible that her headaches will improve should there be a response to the treatments suggested in this report.

Her persisting posttraumatic headaches, neck, left shoulder and back pain combined with vestibular symptoms characterized by nausea, dizziness and imbalance continue to affect her ability to function.

She had hoped to resume her legal training and develop a career as a tax lawyer once her children became independent. Unfortunately, her ability to continue with this plan is far from certain and from the account of her current symptoms I believe unlikely.

[Emphasis added.]

[155] At the request of her counsel, John Lawless, a vocational rehabilitation consultant, interviewed Ms. Orregaard on March 3, 2020. He had her complete brief vocational testing. He prepared an April 30, 2020 report. In his report, Mr. Lawless assessed Ms. Orregaard's ability to competitively access the labour market, considering the opinions expressed by Drs. Purtzki and Robinson, and her limitations.

[156] Mr. Lawless said that lawyering is primarily a sedentary occupation which does not require much physical strength. It does, however, emphasize reading, computer use, meetings, and long hours. He expressed concern about the ability to accommodate Ms. Orregaard's limitations in a legal career. He opines that it was unlikely that she would be hired as an articling student, thereby pre-empting a legal career.

[157] Mr. Lawless then considered Ms. Orregaard's capacity for any work. He ruled out any physically demanding work or work that requires reading or ongoing use of a computer. While he considered the possibility of knowledge-based work from home, like the work Ms. Orregaard had done for Lexis Nexis, he ruled it out because of the required reading and computer use and her related headaches. He said that she might not be reliably productive even for a few hours a week from home. Mr. Lawless' opinion is that:

Ms. Orregaard is unemployable. Her headaches and associated difficulties leave her with no realistic vocational options that I can see, certainly not realizing her aspiration of becoming a Lawyer. Her prolonged absence from the workforce since [the MVA] also strongly indicates that she will remain that way.

[Emphasis added.]

### Ms. Orregaard's Pre-MVA Earning Capacity

- [158] With respect to Ms. Orregaard's capacity pre-MVA, I heard from Warren Smith, the BC Managing Partner of The Counsel Network, a Canada-wide legal recruitment company. Mr. Smith has acted for, and placed, lawyers at every level across a broad range of firms, organizations, and companies from small firms in outlying communities to larger international firms and companies. On behalf of organizations, he acts as a "headhunter" to find and recruit lawyers to meet the needs and specifications of particular employers. He screens and interviews lawyers, and manages the hiring process from start to finish.
- [159] He met Ms. Orregaard on January 28, 2020, and produced an April 7, 2020 report. In his report, he describes Ms. Orregaard as presenting well. She was sociable and had poise and maturity, which he said would be well-received by firms considering more senior candidates for articling positions.
- [160] He opines that, as a result of Ms. Orregaard's excellent law school grades, her directed research study in family law, her maturity, her work on the Lexis Nexis BC Family Law Practice Manual, and the high demand for family law lawyers in BC, absent the MVA, it was a near certainty that once she commenced her search, Ms. Orregaard would successfully have obtained an articling position, followed by an associate position, in family law.
- [161] During her evidence, Ms. Orregaard said that she enjoyed the courses that she took in tax law and in IP, and that those areas of law would have been of interest to her but that she was also interested in family law. She said her plan was to weigh her options. She testified that she thought she would be an attractive candidate for articling positions in family tax law. She realized that her family law opportunities were more realistic. Her plan was to get the articling handbook, and explore whether tax positions would be available to her before pursuing family law opportunities. She testified that she was eager to pursue her career and become a leader in her field.
- [162] With respect to Ms. Orregaard's interest in IP law, Mr. Smith said that there is a limited demand for IP lawyers in Vancouver. Practitioners generally have advanced degrees in science, applied science or engineering and have worked in a related field prior to entering law school. He opines that Ms. Orregaard's chances of securing articles would be quite limited. Despite her Bachelor's of Science degree in Biology from UBC, he expected that her science experience would be viewed as dated and she lacked the advanced degree she would need to be seriously considered. Mr. Smith opined that Ms. Orregaard had less than a 5% probability of securing articles and pursuing a career in IP law.

[163] With respect to Ms. Orregaard's interest in tax law, Mr. Smith said there is a limited demand for tax lawyers in Vancouver and the practice area is highly specialized. However, the fact that she did well in her three tax courses at law school suggested she had a clear interest in the practice area. He expressed some concern about her lack of recent tax experience and suggested that she might need to upgrade her knowledge. Mr. Smith opines that Ms. Orregaard would have had a 10-25% probability of securing articles and pursuing a career in tax law.

[164] Mr. Smith opines that Ms. Orregaard's experience is "most compelling" with respect to family opportunities. He said:

Her involvement with the BC Family Law Practice Manual afforded her both substantive exposure to the practice area and connections in the profession relevant to the practice area. Ms. Orregaard also noted in recent discussions it had been suggested she could have secured articles with a boutique family law firm were she interested to commence practice in this area. Given the high demand for practitioners in this area, combined with [her] prior experience with family law, I would anticipate her to have a 85-100% probability of securing articles and pursuing a career in this area.

[165] As set out above, Ms. Orregaard was invited to contact Ms. Janzen about an articling position at her firm. Ms. Orregaard said that she was very interested in the opportunity, but she did not want to approach Ms. Janzen until she could say that she would accept the position and was ready to start work immediately.

[166] The defendants called Marketta Jokinen, a legal market expert who had been involved in recruiting and professional development at Borden Ladner Gervais ("BLG") for 15 years. Ms. Jokinen left BLG in 2017 to start her own legal career coaching and consulting firm, Current Talent.

[167] Ms. Jokinen agreed with Mr. Smith's opinion that demand for IP and tax lawyers in Vancouver is limited and that demand for family law practitioners is high.

[168] As part of her coaching role, Ms. Jokinen assists students in seeking summer and articling positions and lawyers who are in career transition. In cross-examination, Ms. Jokinen agreed that Ms. Orregaard's grades were clearly somewhere within the top 25% of her year and, had she applied for articling after graduation in 2005, she would have been interviewed by BLG and other large Vancouver firms.

[169] I conclude that the expert evidence called by both parties supports a finding that it is substantially likely that Ms. Orregaard's career path prior to the MVA was as an articling student, an associate, and eventually a partner at a boutique family law firm in Vancouver. Mr. Smith put her chances of obtaining such a position as a near certainty, and I agree.

[170] Considering the evidence as a whole, Ms. Orregaard was appropriately cautious in approaching her search for articles. She wanted to assess her options. It was reasonable for her to delay approaching law firms for articling positions until she was ready to start

working and was clear in the direction she wished to take. As a mature applicant, she might not have had the luxury of a change in the direction of her legal career. It was reasonable for her to consider applying to tax and family law firms so that, if she had multiple opportunities, she could weigh her options and make the best decision for her future.

[171] Throughout their marriage, the Orregaards consistently demonstrated a considered and cautious approach to Mr. Orregaard's career. They had weighed and considered their options. It is not surprising that, once that Ms. Orregaard's career was a priority, the same approach would be applied. It is for this reason that Ms. Orregaard was concerned about approaching Ms. Janzen, her parent's friend, without being able to give her a positive response to any offer that might be forthcoming. I accept Ms. Orregaard's evidence in that regard.

[172] In all aspects of her life, Ms. Orregaard demonstrated focus and resolve. She worked and lived at home while obtaining her undergraduate degree to avoid student debt. She approached law school in the same way and graduated without student debt. Despite working, she achieved academic success, never earning a grade lower than B. Similarly, when Ms. Orregaard learned that she was pregnant in January 2003, she still achieved top grades in the winter term of that year.

[173] I agree with Ms. Orregaard's counsel that this achievement speaks to Ms. Orregaard's strength of character, her abilities, and her commitment to her career despite challenging personal circumstances.

[174] Ms. Orregaard demonstrated a similar approach to her role as the primary parent of her children. After her plans changed following the births of her children, and having decided to put her career on hold, she embraced the role of parenting to permit Mr. Orregaard to pursue his career. She described herself as feeling like she was a single parent because of Mr. Orregaard's work schedule. She was actively involved in the children's school and in their life. She homeschooled her daughter for two years when the Orregaards decided that the program at their local school did not meet her needs. Charlotte has just finished grade 11 with a 97% average, and intends to apply to UBC to pursue a career in social work.

[175] It is also the case that Ms. Orregaard comes from a family that values and encourages academic and career success.

[176] Finally, Mr. Nikkel described Ms. Orregaard's approach to assisting him when he was diagnosed with prostate cancer. She researched his condition, understood the treatment options and their benefits and risks, asked the doctors detailed questions, and conveyed the information to Mr. Nikkel and his wife.

- [177] There is nothing in the evidence to suggest that, having decided to pursue articling in the fall of 2016, Ms. Orregaard would not have approached her legal career with the same competence, ability, and commitment she displayed in the other aspects of her life. Ms. Orregaard demonstrated that she was capable of hard work, and that capability combined with her clear intellectual ability suggests that she would have been a successful articling student and lawyer.
- [178] Although the defendants argue that it was far from certain that Ms. Orregaard would ever have completed articles and successfully launched a legal career, I do not agree. I accept that, apart from working for Lexis Nexis, she did not do any legal work after law school and for the next 11 years, but that was because she applied her focus to other aspects of her life. The defendants submit that Ms. Orregaard did not pursue career opportunities in those 11 years, from which I should infer that she had no real intention of pursuing a legal career. There was no evidence to support that submission. In fact all the evidence pointed to a deferred but clear intention to pursue her career.
- [179] In assessing her past capacity for employment, I am not dealing with certainties. What would have happened in the past but for Ms. Orregaard's injuries is no more certain than what Ms. Orregaard's future will look like. I must decide if a legal career was a real possibility and then determine the likelihood of it occurring.
- [180] Mr. Lawless testified that 80% of people who stayed home to look after their family for six years returned to the workforce. I conclude that Ms. Orregaard would have been among the 80%. She had a professional degree, which she had worked diligently to obtain with excellent results. Mr. Orregaard's career had taken precedence over hers, but there was no evidence that she never intended to pursue her career in the future.
- [181] I also conclude, on the evidence, that Ms. Orregaard would have been an outstanding lawyer, well-suited to withstand and manage the pressures and time demands of practice.
- [182] If Ms. Orregaard had started looking for articles in September 2016, after Hunter was successful in school, she would have done so outside the normal articling cycle and, as a result of her 11-year hiatus since graduation, would have been a unique candidate. These factors make it reasonably likely that, absent being offered an immediate position by Ms. Janzen, she would have taken some months to obtain a position. Both Mr. Smith and Ms. Jokinen agreed that an 11-year hiatus would create difficulties in her search.
- [183] However, Ms. Jokinen also agreed in cross-examination that, based on Ms. Orregaard's law school grades, she would have been interviewed. She would have expected Ms. Orregaard to have a good cover letter and résumé. She agreed that when applying to boutique family law firms, Ms. Orregaard could highlight her directed research, her work for Lexis Nexis, and her experience and maturity from her time spent raising a family. Doing so would make her a strong and maybe even exceptional candidate, whom family law firms would be interested in. Ms. Jokinen agreed that, if she were working with Ms. Orregaard as a career coach, she could assist her in writing a cover letter to accentuate her background to her

advantage.

[184] In addition to Ms. Orregaard's strong candidacy as described by Ms. Jokinen, Ms. Orregaard also had knowledge of, and an aptitude for tax issues, which Ms. Janzen considered an advantage in a family law lawyer. Finally, Mr. Smith, an expert in legal recruiting, had interviewed Ms. Orregaard and was impressed by her poise and maturity. She displayed those same characteristics in her evidence.

[185] I conclude that there was a real and substantial likelihood that Ms. Orregaard would have been successful in obtaining an articling position with a boutique family law firm by the end of 2016. I also conclude that, having articulated, Ms. Orregaard would have become a successful lawyer and gone on to an associate position and then partnership in a boutique family law firm.

### **The Applicable Law: Future Loss of Earning Capacity**

[186] In *Rosvold v. Dunlop*, 2001 BCCA 1, the Court of Appeal summarized the approach a trial judge should take in assessing damages for future loss of income earning capacity:

[8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away[.] Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities[.] Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence[.] Guidance as to what factors may be relevant include:

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;

3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

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

[Citations omitted.]

[187] These principles were re-affirmed in *Perren v. Lalari*, 2010 BCCA 140, in which Justice Garson, writing on behalf of a unanimous panel, said:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

...

[32] A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach. The former approach will be more useful when the loss is more easily measurable. The latter approach will be more useful when the loss is not as easily measurable.

[Emphasis in original.]

[188] The court's task is to assess, not calculate, damages. Mathematical aids may assist in the assessment and form a good starting point. The court's decision must be based on what is reasonable in all the circumstances and projections. Mathematical calculations and formulas can provide a starting point for determining what is fair and reasonable: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37, and the cases cited therein.

- [189] Assessment of impairment of future earning capacity must be determined on the whole of the evidence and is a fact-intensive and case-specific inquiry. Of course, it is inherently difficult to assess awards for hypothetical future events.
- [190] In *Shapiro v. Dailey*, 2012 BCCA 128 at para. 40, the court repeated earlier descriptions of the exercise including, "gazing into a crystal ball", "an estimate based on prophecies", and that "there is much more art than science in the process".
- [191] Insofar as possible, the plaintiff should be put in the position that he or she would have been in but for the injuries caused by the defendant's negligence. The court's task is to compare the likely future of the plaintiff's working life, if the accident had not happened, with the plaintiff's likely future working life following the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [192] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 24, and the "capital asset approach" from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8. Both approaches are correct. The earnings approach will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: *Perren* at para. 12.
- [193] The earnings approach involves math-oriented calculations based on: either i) predicting or presuming a minimum annual income loss for a plaintiff's remaining working years, multiplying the annual projected loss by the number of remaining years and calculating a present value of the loss, or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos* at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [194] The capital asset approach involves considering factors such as whether a plaintiff: i) has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown* at para. 8; *Gilbert* at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.
- [195] Ms. Orregaard submits that any loss should be assessed on the earnings approach.
- [196] The defendants do not dispute that there is a real and substantial possibility that Ms. Orregaard will suffer a future loss of income as a result of the injuries she suffered in the MVA. However, they say that Ms. Orregaard's loss should be assessed on the capital asset approach because Ms. Orregaard had no demonstrated earnings record on the date of the MVA.

[197] I have concluded that the earnings approach is appropriate in this case. Despite the fact that Ms. Orregaard had completed her law degree and had never worked as a lawyer, her career path was clear, and I have evidence on which I can reliably predict what her earnings future would have been, but for the MVA. Further, based on the evidence, I have found that Ms. Orregaard would have found an articling job and had a successful law career.

#### Expert Economic Evidence in Assessing Loss of Earning Capacity

[198] Expert economists use statistical evidence to guide their assumptions when quantifying loss of earning capacity.

[199] In *Crimeni v. Chandra*, 2015 BCCA 131, Justice Willcock upheld the decision in *J. D. v. Chandra*, 2014 BCSC 466 and wrote about how a loss of future income earning capacity is to be assessed:

[15] An award for loss of income earning capacity is intended to put the plaintiff in the position she would have occupied had she not been injured. It must be founded upon a real and substantial loss and must be measured by seeking to approximate the actual economic loss the plaintiff has suffered. The quantum of damages under this head has not been set or limited by convention

[16] Whether the award is a wholly erroneous assessment of the claim cannot be addressed by asking whether it is simply "too large". Such an award cannot be said to be excessive in the absence of a misapprehension of evidence or an error in principle. An award for the loss of the capacity to earn income can only be said to be "wholly erroneous" if it cannot have been arrived at on any reasonable view of the evidence, such as might be the case where there has been an error in the estimation of the pre-injury stream of earnings or the effect of the injury on earning capacity.

[200] I have concluded that as a result of the MVA, Ms. Orregaard has been left with a number of chronic and disabling conditions that are permanent. I find that on a balance of probabilities, nothing more than a modest improvement in her condition could reasonably be expected. There is no doubt in my mind that Ms. Orregaard has established the probability of future income loss.

[201] The major financial issue in this case is the extent of Ms. Orregaard's future loss of capacity. I must assess what her future would have looked like, absent the accident, assess her future with the accident, and consider both positive and negative contingencies.

[202] In assessing Ms. Orregaard's loss of income earning capacity, I have taken into account the following facts that were established on the evidence:

(a) Ms. Orregaard is not competitively employable in any job. Mr. Lawless reached that conclusion. While Dr. Purtzki was slightly more optimistic about the possibility that she could perform some work, she said that was subject to a vocational assessment. Ms. Orregaard's debilitating headache is brought on by reading and computer use. The onset of

her debilitating headache is unpredictable but occurs two or three times a week and requires her to lie down in a darkened room. Although the onset of the debilitating headache tends to be later in the day, at other points she may have to employ coping mechanisms to "back them off". Her chronic myofascial pain prevents her from physical work. She has no viable employment options.

- (b) Ms. Orregaard's headaches are triggered by reading and computer use. I accept Mr. Lawless' evidence that a career in law is out of the question as a result. I also accept his evidence that there are no available alternative career options.

[203] On the evidence, I conclude that, without improvement in her current condition, Ms. Orregaard is not competitively employable in any job.

Assessing Ms. Orregaard's Loss of Income Earning Capacity

### Loss of Earning Capacity - the Expert Evidence

[204] In his report, Mr. Smith gave a range for lawyer compensation at large Vancouver law firms, which he defined as 40+ lawyers, in the first nine years of practice. He said:

2017 1st Year of Call \$89,000 - \$105,000

2018 2nd Year of Call \$95,000 - \$115,000

2019 3rd Year of Call \$100,000 - \$125,000

2020 4th Year of Call \$105,000 - \$140,000

2021 5th Year of Call \$115,000 - \$155,000

2022 6th Year of Call \$130,000 - \$165,000

2023 7th Year of Call \$135,000 - \$175,000

2024 8th Year of Call \$135,000 - \$190,000

2025 9th Year of Call \$135,000 - \$205,000

[205] He said that from the sixth to the ninth year of call, salaries are more commonly set based on a subjective and individualized approach, resulting in a wider range.

[206] Mr. Smith opines that boutique Vancouver firms would lag slightly behind this range. Mr. Smith's evidence in this regard was supported by the factual evidence provided by Judith Janzen regarding the amounts she pays her associate lawyers. She currently pays associates in the first year of call \$87,500, the second year of call \$95,000 plus a \$5,000 bonus, and in the eighth year of call \$140,000.

[207] During cross-examination, Ms. Jokinen agreed with Mr. Smith's salary ranges and that boutique family law firms would pay at the low end of the range for large firms outlined in Mr. Smith's report.

- [208] With respect to compensation for partners at a boutique family law firm, Mr. Smith opines:
- As a partner, I would reasonably expect compensation to be generally lower in a boutique family law environment as compared to a major Vancouver law firm. I would reasonably expect a successful family law practitioner working in a boutique environment to earn \$200,000 - \$400,000, though there are clear examples of top tier practitioners who earn considerably more.
- [209] Ms. Janzen was asked about Mr. Smith's expectation of family law partners in boutique firms. She testified that while she and her partner, the founders of Onyx, had not yet invited an associate into the partnership, she expected that a partner at her firm could easily earn in the range suggested by Mr. Smith.
- [210] Ms. Orregaard relied on an expert report from economist Darren Benning. Mr. Benning prepared a series of tables based on various scenarios about Ms. Orregaard's earnings. All of his tables are based on his instructions, and on Ms. Orregaard earning an associate salary in 2017 and a work life to age 70.
- [211] Based on my findings, Ms. Orregaard would have earned \$36,000 as an articling student in 2017 and would not have started earning an associate's salary until 2018.
- [212] Mr. Benning testified that a delay in becoming a lawyer to a date after January 1, 2017 (the date of his instructed assumption), would reduce the past income numbers in his tables, alter the numbers for the following years, and eliminate the last entry, depending on retirement age. He indicated that it would be difficult to alter the tables in a simple fashion, but he gave some examples where the present value was reduced by over \$150,000 or more.
- [213] Table 2A of Mr. Benning's report projects Ms. Orregaard's earnings without the MVA, assuming the low end of the salary range for associates at large firms through to the ninth year of call, and partnership income of \$350,000. Applying a 22.6% reduction for labour market contingencies based on male lawyers in BC, Mr. Benning calculates Ms. Orregaard's past loss of capacity to be \$251,541 and her future capacity loss to be \$3,797,291.
- [214] Table 2B of Mr. Benning's report calculates Ms. Orregaard's earnings without the MVA, assuming the top end of the salary range for associates at large firms through to the 9th year of call, and partnership income of \$500,000 a year. Applying the same labour market contingencies, Mr. Benning calculates Ms. Orregaard's past loss of capacity to be \$332,000 and her future capacity loss to be \$5,897,683.
- [215] Ms. Orregaard submits that the calculations in Table 2B should be considered as a positive contingency based on Mr. Smith's evidence there was a 10% to 25% chance that she would have been hired at a tax firm. Ms. Jokinen put that chance at less than 5%. Ms. Orregaard submits that Mr. Smith's opinion should be preferred over Ms. Jokinen's given that Mr. Smith met her and got a sense of how she would present in an interview.

- [216] On the evidence, I conclude that Ms. Orregaard's chances of being hired at a tax firm were less than 5%. Mr. Smith's estimates include a number of caveats. First, there are few tax opportunities in the Vancouver market. Second, while her marks would be attractive, her chances would improve if she was open to working at a discounted rate during articles and/or if she pursued additional courses to demonstrate more recent tax experience. Ms. Orregaard did not say that she had considered articling at a discounted rate, which would reduce her articling income, or taking current tax courses, which might delay her articles.
- [217] I have not considered Tables 2C and 2D of Mr. Benning's report as they project partnership income of \$800,000 and \$1,000,000 and the evidence does not support those partnership income levels.
- [218] In Tables 2G through 2I, Mr. Benning uses the high end of the big firm range for associate salaries and partnership income topping out at \$600,000, \$800,000, and \$1,000,000. I have not considered those tables as the evidence does not support those partnership income levels.
- [219] In Tables 2J through 2L, Mr. Benning calculates Ms. Orregaard's earnings absent the MVA as a sole practitioner. I have not considered those tables.
- [220] Ms. Orregaard submits that a past loss award of \$250,000 is appropriate, taking into account that it could have taken her a year to find an articling position, and that a future loss of award of \$4,000,000 is appropriate, which equates to Ms. Orregaard achieving earnings of roughly \$375,000 a year once she reached partner status.
- [221] Ms. Orregaard says that I should take into account a number of positive contingencies. Ms. Orregaard was a top performer in law school, achieving grades in the top 25% of her class in challenging circumstances.
- [222] Ms. Orregaard testified that she was driven to succeed in her law career and wanted to be a leader in her field and a top performer. She and her husband testified that their children had reached a point of partial independence. Mr. Orregaard was ready to reduce his work and take less overtime. Ms. Orregaard had sacrificed her career up to that point and it was Mr. Orregaard's turn to make sacrifices so Ms. Orregaard could engage in her career. There was a chance Ms. Orregaard would obtain a job at a large firm or boutique tax law firm and earn higher remuneration than she would as a family law practitioner.

## The Defendants' Position

- [223] The defendants submit that I should prefer the evidence of their economist, Mark Szekely. He prepared a May 27, 2020 report commenting on Mr. Benning's report.

- [224] Mr. Szekely did not rely on Mr. Smith's ranges of associate and partnership incomes in the Vancouver market despite the ranges having been agreed to by Ms. Jokinen. Instead, he relied on the Pannu Report, a report apparently prepared in 2014 for the purposes of setting judicial salaries and based on income tax filings by self-employed lawyers.
- [225] During the direct examination of Mr. Szekely, counsel for the defendants sought to lead evidence about the background of the Pannu Report, why Mr. Szekely relied on it, and his conclusions based on it. The questions were objected to because, in Mr. Szekely's report, other than his references to the Pannu Report, he did not set out the background to the report, his view of its reliability, or what he took from it. I upheld the objection as it appeared to me to be an inappropriate expansion of what Mr. Szekely had set out in his report about another document. It was essentially hearsay. I accept that Mr. Szekely is entitled to rely on the work of others in support of his opinion. But, in doing so, he should explain why he determined the Pannu Report to be reliable. He did not do so.
- [226] Mr. Smith also mentioned the Pannu Report in his expert opinion, and similarly did not discuss its reliability.
- [227] There are other issues with Mr. Szekely's report. He explained that he had applied a 15.1% increase to the figures in the Pannu Report relying on the increase in average weekly earnings in BC, between 2014 (when the Pannu Report was prepared) and the date of Mr. Szekely's report, as set out in the Statistics Canada's Survey of Employment, Payrolls and Hours. However, the average weekly increases may not reflect increases in lawyers' earnings, some of which may be reported and earned through professional services corporations.
- [228] In addition, Mr. Szekely applied income multipliers for Canadian females with a bachelor's degree in legal professions and studies. He says that income multiplier would be 12.864. Mr. Benning's report uses male multipliers to age 70. He says that income multiplier would be 15.223. The defendants suggest that a reasonable multiplier for me to apply would be an approximate average of the two, a multiplier of 14. I do not agree.
- [229] It is now uncontroversial that using female statistics in determining earnings for female plaintiffs is not appropriate: *Terracciano v. Etheridge*, [1997] 7 W.W.R. 185 (B.C.S.C.); *Soligo v. Turner*, 2001 BCSC 205, *aff'd* 2002 BCCA 73; J.D.; and *Crimeni*.
- [230] More recently, in *Jamal v. Kemery-Higgins*, 2017 BCSC 213 at paras. 96-99, Justice Morellato relied on the earlier cases and concluded that it was not appropriate to use female statistics in the analysis of a female massage therapist's claim for loss of earning capacity. See also: *Howell v. Machi*, 2017 BCSC 1806 at para. 359; *McColl v. Sullivan*, 2020 BCSC 137 at paras. 143-151.
- [231] In *Fancello v. Cupskey*, 2019 BCSC 1724, Justice Burnyeat wrote at para. 233:

- [233] It is clear that using "female" statistics in determining earnings for female plaintiffs is not appropriate[.] In any event, I am satisfied that it would not be appropriate to use "female statistics" here as Ms. Fancello was employed in an occupation which is predominately male. I am satisfied that making deductions based on historical female labour market participation rates would result in a measurement and an adjustment reduction that is not supported by the evidence or by case authority.
- [232] Finally, in *Gill v. Lai*, 2019 BCCA 103, one of the issues on appeal was whether the trial judge erred in using male labour market statistics, in respect of a female plaintiff, when adjusting the loss of future earning capacity for negative contingencies. The trial judge declined to use female statistics to adjust for contingencies of non-participation and part-time employment. He reasoned that such statistics may reflect embedded discrimination, based on Justice Morellato's discussion in *Jamal*. He also noted the plaintiff's demonstrated strong adherence to the work force and financial independence. The Court of Appeal upheld the trial judge's decision, saying at para. 55:
- [55] It is not an error to recognize gender-based contingencies can incorporate bias. Having said that, we must bear in mind the quantification of damages necessitates an individual approach.
- [233] In valuing Ms. Orregaard's loss of earning capacity, using female statistics, would be inherently discriminatory. Mr. Szekely agreed in cross-examination that the majority of the deductions in the female labour market contingencies represented women who voluntarily chose not to participate in the labour market or voluntarily chose to work part-time. There was no evidence that those voluntary choices applied to Ms. Orregaard. In fact, her time out of the workforce for child-related responsibilities was behind her. Her children were, or soon would be, teenagers.
- [234] As to a deduction for unemployment, I have found that Ms. Orregaard would most likely have practiced as a family law lawyer. Mr. Smith, Ms. Jokinen, and Ms. Janzen all agreed that this area of the law is underserved. It would be unlikely that Ms. Orregaard would have been unemployed. In any event, she was no more likely to be unemployed than her male colleagues. In fact, based on her law school standing, perhaps less likely.
- [235] Finally, although Ms. Janzen testified about historical dropout figures pertaining to women in the practice of law, Ms. Orregaard's circumstances were unique. She was eager to pursue her career and was doing so at a time when she would not be challenged by balancing the demands of career and family, as some women must in the practice of law.
- [236] Mr. Szekely confirmed on cross examination that the male labour market contingencies applied by Mr. Benning resulted in a reduction of Ms. Orregaard's future loss of capacity of 22.6%. The female labour market contingencies he applied resulted in a reduction of 34.6%. The vast majority of that difference was based on choice.

## Conclusion on Future Capacity Claim

- [237] In my view, and based on my findings with respect to Ms. Orregaard's career path, the most appropriate tables for consideration are 2E and 2F by Mr. Benning, both of which are based on Ms. Orregaard's earnings without the MVA at a boutique family law firm.
- [238] Table 2E calculates Ms. Orregaard's earnings absent the MVA at a boutique family law firm. The numbers in it are based on the low end of the big firm range for associate salaries, and partnership income of \$250,000 a year. This analysis calculates past capacity loss of \$238,000 and future capacity loss of \$3,072,346.
- [239] Table 2F calculates Ms. Orregaard's earnings absent the MVA at a boutique family law firm. The numbers are based on the high end of the big firm range for associate salaries, and partnership income topping out at \$400,000 a year. It assesses past capacity loss of \$327,916 and future capacity loss of \$5,259,591.
- [240] As I have said, I accepted the uncontroverted evidence that Ms. Orregaard would have started looking for articles in September 2016 and found that it is likely for her to have found a position by January 2017.
- [241] I also accept Ms. Orregaard's evidence that she intended to work until age 70. She testified that her parents worked into their 70s. In addition, I reasonably infer that, having waited until she was 41 to begin her legal career, she would have worked until at least age 70.
- [242] The only evidence I have about what articling students made in 2017 is Ms. Janzen's evidence that the then salary at Onyx was \$36,000. Based on that evidence, I find that Ms. Orregaard would have earned \$36,000 in 2017. She would not have started earning an associate's salary until January 2018.
- [243] The figures in both Tables 2E and 2F have to be reduced to account for Ms. Orregaard earning \$36,000 as an associate in 2017, starting as an associate one year later, delaying a partnership income for a year, and the totals adjusted accordingly.
- [244] Given that Ms. Orregaard would be starting her legal career when her children were teenagers, and that her husband could modify his work to permit Ms. Orregaard to engage in her career, the 22.6% reduction in the male labour market statistics adequately addresses the negative contingencies that may have affected Ms. Orregaard's career.
- [245] As Doherty J.A. for the Ontario Court of Appeal said in *Graham v. Rourke* (1990), 40 O.A.C. 301, cited with approval by Justice Burnyeat in *Fancello*, adjustments for general labour market contingencies should be modest:

These cases, and those which have applied them, tell me that contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered

in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies, but where the adjustment is premised only on general contingencies, it should be modest.

[Emphasis added.]

- [246] The defendants submit that it is unlikely that Ms. Orregaard would have successfully obtained articles until at least January 2018 when Mr. Orregaard was released from his position with the AGTF. If she commenced looking for articles at that time, they submit that the summer of 2018 was a likely start date. They also submit that she may never have become a lawyer, or, having done so, not found the career to her liking. The evidence does not support that submission.
- [247] First, Ms. Jokinen agreed with Mr. Smith that Ms. Orregaard's best opportunity to article would likely be in the area of family law. Ms. Jokinen wrote that if Onyx was able and willing to hire Ms. Orregaard as an articling student, then she would have had an 85-100% probability of securing articles commencing sometime in the fall of 2016. She did not explain why the probability was not 100% in this scenario. Ms. Jokinen said that if the opportunity at Onyx was not available, it could have taken Ms. Orregaard until sometime in 2017 to find another position.
- [248] I have concluded that Ms. Orregaard would have found an articling position by the end of 2016. In my view, that date takes into account both the likelihood of an opportunity at Onyx or at another boutique firm. It is later than she would have started at Onyx and earlier than she would have started at another firm.
- [249] Second, it was Mr. Orregaard's uncontroverted evidence that he was entitled to a release from the AGTF in 2016. He did not ask for the release after the MVA. He testified that the time it takes to get a release is subjective and depends on the officer's assignment and operational requirements. He said that he was prepared to ask for a release when Ms. Orregaard went to work if he could not cut down on overtime or travel. He said he was confident he would have been released if he had asked.
- [250] Determining Ms. Orregaard's past and future loss of capacity is an assessment, not a calculation.
- [251] Based on all of the available evidence, I assess Ms. Orregaard's past loss of income capacity at \$200,000 and her future loss of income at \$2,750,000. These figures reflect a reduction in Ms. Orregaard's future loss of capacity by 10% on the basis that, although I have found that Ms. Orregaard is currently incapable of working in any capacity, there are further treatment options that she has yet to try. They might allow her to pursue some remunerative employment of the type she previously did for Lexis Nexis. She has, for example, yet to try Pilates as suggested by Dr. Purtzki, and she has not exhausted trials of all of the

medications recommended by the experts.

### The Applicable Law: Cost of Future Care

- [252] Although the parties relied on different cases, there is no real dispute about the applicable principles in assessing the cost of future care.
- [253] The test for determining the appropriate award under the heading of cost of future care is an objective one, based on medical evidence. As Justice McLachlin, when a member of this Court, explained in *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.), there must be a medical justification for the claims, and the claims must be reasonable. The award for cost of future care should reflect what the evidence establishes is reasonably necessary to preserve a plaintiff's health, recognizing that health is intertwined with happiness. The cost of future care must relate to medical needs and not simply improve a plaintiff's enjoyment of life: at paras. 193-195, 199.
- [254] Determining how to compensate Ms. Orregaard requires an appreciation of her deficits arising from her injuries, so that the cost of what has been lost can be properly reflected in a damage award.
- [255] The first step in the assessment involves determining what abilities or functions have been affected or lost. The second step is to quantify the cost of replacing the functions affected or lost.
- [256] The standard of proof required to establish a claim for cost of future care is simple probability, the same as for any future pecuniary loss. Ms. Orregaard must establish a real and substantial risk that a future pecuniary loss will occur.
- [257] In this case, an occupational therapist, Dr. Tracy Witty, conducted a home assessment with Ms. Orregaard on February 20, 2020, at the request of Ms. Orregaard's counsel. She also interviewed Mr. Orregaard. She produced a May 4, 2020 cost of future care report.
- [258] Drs. Robinson, Purtzki, and Witty all made a number of recommendations for treatment and management of Ms. Orregaard's current MVA-related conditions. For the purposes of the claim, Dr. Witty place them in three categories: 1. medication and supplies; 2. projected therapeutic modalities; and 3. home support.
- [259] In his report of May 5, 2020, Mr. Benning has calculated the present cost of the various recommendations for Ms. Orregaard's future care needs. He calculates them at between \$373,185 and \$439,742, depending on whether Botox is included. He sets the present costs out in Table 2 of his report:
- [260] The defendants challenge many of the items claimed and submit that an award of \$55,000 would be reasonable for future care.

- [261] Under medication and supplies, Dr. Witty has costed Advil, Tylenol, prophylactic medications, Botox, Sumatriptan, and Ondansetron.
- [262] Although Ms. Orregaard did not include a claim for the over-the-counter medications in her special expenses, I accept that Ms. Orregaard uses them from time to time.
- [263] Two of the prophylactic medications mentioned by Dr. Purtzki in her report, Topiramate and Propranolol, have already been tried by Ms. Orregaard and discontinued due to side effects. She has not tried the remaining two, Nortriptyline and Gabapentin. With respect to Botox, it has been suggested as an option to Ms. Orregaard, and she has declined to use it. Dr. Purtzki recommended Sumatriptan to stop migraines and Ondansetron to treat nausea.
- [264] I accept that over-the-counter medications are appropriately claimed, as are prophylactic medications and Sumatriptan and Ondansetron. I also accept the costs for Nortriptyline and Gabapentin, alternative prophylactic medications.
- [265] With respect to the therapeutic modalities, Ms. Orregaard has been attending physiotherapy. Dr. Robinson suggested that it may not be of assistance to her. Dr. Purtzki recommended Pilates, and Ms. Orregaard expressed her interest in trying it. There was no evidence that Ms. Orregaard intended to participate in aquafit or any other pool therapy. With respect to a psychologist, Ms. Orregaard said that she would be willing to attend a psychologist. The need for a neuropsychology assessment is not clear on the evidence, and I note that Ms. Orregaard was seen by a neurologist at the ACC on approximately 30 occasions.
- [266] With respect to home support, Dr. Witty says at para. 10(b) of her report:
- Ms. Orregaard is hiring Molly Maid cleaners, 1.25 hours per week (with 2 workers) which overall, is not sufficient to clean her entire house, including linen changes on a weekly basis. Typically, professional cleaners require about 4 hours per 1,000 square feet to clean a home. Ms. Orregaard's home is nearly 1,500 square feet, so she would typically require 6 hours per week of professional cleaning to clean the entire space at one time, which is consistent with her self-report of not having sufficient paid assistance to clean the whole home and the home assessment with tasks being undone or done less frequently than usual. I recommend housecleaning with a total of 6 worker hours per week. According to ATUS data, women with household children under the age of 18 are spending an average of 1.57 or 11 hours per week on such household tasks. Therefore, it is assumed Ms. Orregaard would remain responsible and continue to participate in daily tasks or ~45% of the total housework. Additionally, ATUS data reports that men who are employed full-time are also participating in housework, albeit significantly less (.23 hours per day or 1.61 hours per week). In other words, despite hiring household cleaning weekly and Ms. Orregaard participating in ~5 hours per week of household tasks within her capability (taking longer), Mr. Orregaard will likely continue to participate in intermittent household tasks, e.g. dishes, his own laundry, etc. as he did pre-injury.

- [267] In addition to house cleaning assistance, Ms. Witty says that Ms. Orregaard requires assistance with grocery delivery, meal preparation, laundry, and dishes to age 80.
- [268] I accept that Ms. Orregaard requires some assistance with homemaking but not at the level suggested by Ms. Witty. Ms. Orregaard testified that she has some residual capacity, particularly in the morning, and is able to do some light housework. In addition, the Orregaard's children are now teenagers and should be assisting her with some homemaking tasks, including cleaning their own rooms and doing their own laundry. I expect they could also assist with other tasks like meal preparation. Mr. Orregaard is also available to assist. He has returned to working a four-on/four-off shift pattern and is no longer assigned to the AGTF. Presumably, he is available to assist Ms. Orregaard with some homemaking tasks on his days off.
- [269] Finally, I infer that when Ms. Orregaard started articling and working as a family law lawyer, she would have required some homemaking assistance absent the MVA.
- [270] Considering all the evidence, I find that \$175,000 is a fair award for the cost of Ms. Orregaard's future care. I arrive at that figure deleting Botox, physiotherapy, a pool pass, and a neuropsychology assessment and by reducing, approximately in half, the home support claim.

## Conclusion

- [271] I assess Ms. Orregaard's damages as follows:

Non-pecuniary damages:

\$150,000 (As agreed)

Past loss of income capacity:

\$200,000

Future loss of income earning capacity:

\$2,750,000

Future care costs:

\$175,000

Special Damages:

\$26,000

## Costs

- [272] Costs should follow the event, at Scale B. If there are any offers to settle that I should take into account, counsel may seek to appear by contacting Supreme Court Scheduling.

"MacNaughton J."

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