CANADA / JUDGMENT

Pak v. Ham

2024 BCSC 43

COURT
Supreme Court of British Columbia

DECIDED
11 January 2024

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2024 BCSC 43 Pak v. Ham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pak v. Ham,

2024 BCSC 43

Date: 20240111

Docket: M244736

Registry: New Westminster

Between:

Conny Pak

Plaintiff

And

Yanghyun Ham and Dale Spicer

Defendants

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

E. Lay

Counsel for the Defendants:

V. Pierce

K. Wang

Place and Dates of Trial:

New Westminster, B.C.

April 24 - 28; May 1, 2 and 4; and

June 22, 2023

Place and Date of Judgment:

New Westminster, B.C.

January 11, 2024

I. Introduction

[1] Conny Pak was injured in a car accident on September 15, 2017. Liability was determined in favour of Ms. Pak in an earlier trial (Ham v. Dhaliwal, 2022 BCSC 520), and so this trial focused on damages only.

[2] The plaintiff says the accident has left her in chronic pain, mostly low back pain. She says a later-diagnosed L1 vertebra compression fracture was caused by the accident. She also alleges she suffered a concussion, which has left her with post-concussion symptoms, depression, anxiety and a change in her personality.

[3] The defendants say the plaintiff's physical injuries are limited to soft tissue injuries to her neck and back, and her mental health symptoms are better described as a mild adjustment disorder with mixed anxiety and depression. They also submit the plaintiff failed to mitigate her damages by failing to seek psychological counselling or therapy, and by not seeking employment after the accident.

II. Plaintiff's Case

A. Conny Pak

[4] Ms. Pak, who was 46 years old at trial, lives in Hinton, Alberta. She was living in Chilliwack, with her parents and her son, at the time of the accident.

Background

[5] Ms. Pak was born in Edmonton and lived 30 years of her life there. She had a full and active childhood, participating in dance and basketball, and playing piano.

[6] Ms. Pak graduated from high school in 1995. She acknowledged she did not have the best grades, and her graduation was delayed by two years as she had to made up lost credits. As a teenager, she was busy with dance, basketball and her social life.

[7] During her teen years, and continuing well into her adult years, she worked in her parents' businesses, as her parents had a number of family-run businesses over the years, such as gas stations, convenience stores, restaurants, bars and food court kiosks.

[8] After high school, Ms. Pak took some vocational training in esthetics, office administration and ESL instruction but did not pursue these as vocations beyond the short term. A trip to Korea for the purpose of teaching ESL students ended badly due to significant misbehaviour by the school director. She also attended university for a year, studying toward a sociology degree, but discontinued these studies after a year due to "family stuff". She also worked as a youth worker for a time, looking after two siblings during overnights.

[9] Ms. Pak's son was born in 2003. The father was not a good partner, and they did not marry. She supported herself with help from her parents.

[10] Ms. Pak's parents moved to British Columbia in the early 2000s and she moved there in 2009 to help them in their latest business venture, a gas station and store. She lived with them in Chilliwack. They later acquired a transmission shop in Chilliwack and she worked there for 18 months. That business failed.

[11] Ms. Pak worked as a volunteer with the Salvation Army for 10 years, starting in 2010. She worked in the charity's food bank and Christmas kettle program and also assembled Christmas hampers.

[12] After the failure of the transmission shop, her parents purchased a motor inn in Boston Bar. The inn had a bar and restaurant. She did various things in that business, though her work was unpaid, as it was for all her work in the family businesses. She worked there for about 18 months. That business failed as well.

Later Pre-Accident Employment

[13] Ms. Pak's income tax returns from 2012 to 2016 reveal very modest earnings. In 2012, her reported earnings were zero. That year she was working in her parent's transmission shop. In 2013, her declared income was about $3,200, earned during a brief part-time stint as a bartender in Clinton, B.C. In 2014, she declared income of about $15,000, which she earned while working as a clerk at a farmer's market. She earned about $8,800 from that same source in 2015. In 2016 she declared income of about $3,900, which she earned at the Salvation Army in a three-month paid position associated with the kettle campaign.

[14] Ms. Pak began working with a mobile catering outfit - a food truck - on a part-time, casual basis. She worked there from August to December 2017.

Career Plans

[15] Ms. Pak testified that prior to the accident, she was taking a course at the University of the Fraser Valley (UFV) to upgrade her English. She wanted to embark on a training program to be a community support worker or community health worker and she needed to upgrade her English to get into that program. She said her long-term plan was to get a diploma in community health work, but as a result of the accident she changed her goal to social work.

Pre-Accident Health

[16] Ms. Pak said she was "extremely healthy" prior to the accident. She had no physical limitations or symptoms and she had no physical or mental health issues.

The Accident

[17] As noted earlier, the accident occurred on September 15, 2017. Ms. Pak was driving her vehicle on a residential street in Chilliwack when a car driven by the defendant Yanghyun Ham reversed out of a driveway and struck Ms. Pak's vehicle.

[18] Ms. Pak said there was no warning; "everything happened so fast". She remembers hitting her head. Later, she said she hit the left corner of the windshield. She exited her car, held her head, went to the house and then turned back. She said she was in shock. Her shoulders, head and wrist were sore. Her head was the worst; it was "sore and throbbing". Her shoulder was really tender and it "throbbed quite a bit". Eventually, the outside of her shoulder went numb.

[19] An ambulance attended, but she did not leave in it. She attended at the hospital later on, but the emergency room was very busy and the wait was too long, so she left. She later went to a walk-in clinic, where she was given "pills" and a referral for massage treatment.

Post-Accident Symptoms

[20] Ms. Pak said that after the accident her head, shoulder and wrist were still sore, but her lower back also started hurting. Her head was "really foggy", and she suffered from headaches and sensitivity to light and noise. Loud noises brought back thoughts about the accident. She still gets nervous about driving, and she is excessively cautious while driving.

[21] Her back pain made it uncomfortable to sit. She felt "sharp pain like being hit with a stick". This started a week or two after the accident, as her other injured areas improved. After a few weeks, her primary problems were with her head and lower back. She could do some chores around the house, but not all.

[22] She had physiotherapy treatments in 2017 that "helped to a certain degree".

Treatments

[23] As per the agreed statement of facts reached between the parties, Ms. Pak has had the following post-accident treatments:

a) Physiotherapy: 16 treatments at two different clinics beginning in October 2017 and ending in November 2018;

b) Physical rehabilitation: 19 treatments from January to June 2018;

c) Family physician: 32 attendances from September 18, 2017 to September 26, 2022; and

d) Psychological counselling or therapy: five appointments from August to November 2018.

Post-Accident Employment and Schooling

[24] Ms. Pak returned to work with the food truck business after the accident but found lifting and being on her feet "too hard". It did not help that she was "not seeing eye to eye" with the owner during this time.

[25] Ms. Pak did not work at all in 2018. She said she was attending physical rehabilitation and "trying to get myself together".

[26] In the fall of 2018, Ms. Pak took studies at UFV towards a community support worker certificate. She took three courses in each of the first two semesters and one course in the 2019 summer semester. Ms. Pak said her injuries impaired her ability to study, as she had difficulty sitting and retaining information, despite accommodations from UFV such as a different chair, a note taker, additional time to complete assignments and being excused from presentations and standing. She changed to the social worker program instead.

[27] Ms. Pak worked at the Salvation Army in Chilliwack as a casual/on-call shelter worker from March 9, 2020 to July 21, 2022. Her rate of pay was $20 per hour, although the rate was raised to $23 per hour from November 2021 to March 2022 to reflect "COVID pay".

[28] Her duties included feeding the residents, dispensing medications, doing light cleaning and performing checks of the outside of the property. Despite her continuing low back pain, she worked full-time to start, which involved three 12-hour shifts per week. She reduced her hours on the recommendation of her GP, who had suggested she limit her hours to no more than two shifts per week.

[29] In June 2022, Ms. Pak was given a "final warning" for smoking marihuana while at work. She explained that she had availed herself of an offer of marihuana from a co-worker because she was experiencing back pain.

[30] In May 2021, she was offered a full-time position as a relief support worker with the Elizabeth Fry Society. She declined that offer when she came to realize that the commute from Chilliwack to Vancouver would be too much for her. In cross-examination, she said she could have done that job but for the fact it was located in Vancouver.

[31] In September 2021, Ms. Pak started casual employment as a client engagement worker at a Chilliwack shelter. She worked the equivalent of about four shifts between September 2021 and March 2022. She left that position because "it was too much" for her to work both there and at the Salvation Army.

[32] In October and November 2021 she worked at another charitable society that was running a shelter. She worked the equivalent of about eight seven-hour shifts during those two months. Among other things, she had to do mopping and other tasks involving lifting and bending, which aggravated her back. She left that position because the employer wanted her to work full-time.

[33] July 21, 2022 was her last day of work at the Salvation Army as she moved to Hinton, Alberta in that month. She and her husband had been looking to relocate in a more affordable location, and her husband secured employment based in Hinton.

[34] In Hinton, she applied for a position as a part-time support worker at a local society but she then learned that it involved working with some persons with disabilities and she concluded she would be unable to handle the lifting involved.

Earnings

[35] The following table shows Ms. Pak's earnings for various years, derived from her income tax returns:

Year

Total Income

Employment Income

2012

$1

$1

2013

3,256

3,256

2014

15,055

15,055

2015

11,972

8,782

2016

7,486

3,889

2017

1,554

1,554

2018

1

1

2019

659

659

2020

29,089

25,089

2021

45,861

17,741

[36] There was no available income tax return for 2022, but Ms. Pak said she earned around $30,000 that year, working at three different places.

Activities

[37] Ms. Pak's mother did the majority of household tasks after the accident. More recently, her husband also helped out, as he moved in with her in the family home in, it appears, 2022.

[38] She had no relationships with any friends for 18 months after the accident as she focused on herself.

[39] Ms. Pak said she has difficulties with sweeping, mopping or wiping the floor, doing laundry, or doing any activity involving crouching or bending. Lifting and carrying heavier items made her back "spasm out", and her leg would go numb. Chores take much longer. She is unable to clean the bathroom or bathtub.

[40] Her husband does any cleaning that involves bending and she does the rest, albeit slowly and in pain. He is not always available to help, as he works 13-14 hour shifts in his job as a truck driver.

[41] She said she cannot participate in Zumba anymore, or anything that involves a lot of low back impact, such as bouncing on a trampoline, or even long walks. She can only last 15 minutes on a bicycle. She also cannot sit or stand for long periods.

[42] She works out at home by doing some of the kinesiology and core strength workouts that she was taught during her physical rehabilitation.

[43] She participates in hunting and fishing with her husband, but they drive to the hunting or fishing spots and they will quit if it becomes too much for her. Her husband has accommodated her by getting comfortable seats for his vehicle.

Current Status

[44] Ms. Pak said her lower back pain is her most significant injury. It prevents her from sitting or standing for long periods, or going for walks. She cannot wear high heels. Her sitting tolerance is perhaps 30 minutes. She acknowledged she has good days and bad days, but said she is usually always sore. She feels her lower back has become worse. She has to sleep with a pillow between her knees or else her right side goes numb.

[45] The symptoms with her head have improved, but "everything has plateaued". The headaches and light sensitivity are not as bad, although she now wears sunglasses for the latter. She said "I still occasionally hear the crash".

[46] Ms. Pak said her left wrist is still a little weak. She said it gave out on her when she was lifting a plant pot to an upper shelf.

[47] As for her shoulder, she finds it is hard to work with both arms. Her shoulder is weak "in the rotating part". There are times when it feels like her shoulder has seized up. Sometimes it goes numb.

[48] Ms. Pak takes a mood stabilizer medication, as well as medications for depression, relaxing her muscles, pain and sleep. She said her mood has stabilized and "things don't bother me as much". She deals with her back pain by smoking marihuana or eating marihuana edibles, and by doing exercises and stretching. Her husband helps by providing massages of her neck, back and shoulder.

[49] Ms. Pak said she is now more impatient, gets mad more easily and is less compassionate. She also said she feels her memory and cognitive abilities have been affected. She is forgetful and will say things that she does not mean. She feels her life has changed.

[50] As for her future plans, Ms. Pak said she wants to finish her education as a social worker and then get part-time work, or perhaps open some sort of business, perhaps a food bank. The community support worker program would take one year and the social worker program would take two years. She is concerned that she may not be able to finish school due to her back issues and inability to maintain attention.

Social Relationships

[51] Ms. Pak said her impatience affects her relationships with her husband and parents. She is trying to work on it and believes she is getting better at it, though she still worries she is short and "sometimes unfair" with her husband.

[52] As for friends, she said "everyone used to flock to me", but now she is "grouchy and short-tempered". She does not see many people any more. She said she does not like people as she used to and now she tends to keep to herself. This has impacted her goal of being a community support worker because it is hard to help others "when you have your own issues".

Cross-Examination

[53] The following are some of the points of evidence that emerged from the cross-examination of Ms. Pak:

a) She acknowledged that she has said her head hit the windshield in the accident, and she testified to that effect at the liability trial, but she has no specific memory of that and all she can really say is that she hit her head. She had thought her head hit the windshield because her head was throbbing and the windshield was broken (the post-accident photos show a starburst pattern in a spot in front of the driver's seat). She said she had her seatbelt on properly at the time;

b) In addition to the support worker position she applied for in Hinton, she also applied for a job as a server at a Hinton restaurant but they wanted a full-time server who would work shifts. She offered to work two to three days a week, but that was not what they wanted;

c) She started taking psychological medications two years ago on the recommendations of specialists. Those medications have helped. She feels she is doing better psychologically than she was in 2019;

d) She met her husband Craig Coburn in 2019, they became engaged in December 2021 and were married in June 2022;

e) The first indication she had a compression fracture in her spine was when she had an x-ray in April 2022. She had the x-ray done because her back kept hurting and she kept complaining to her family doctor;

f) She had no back pain prior to the accident. When she was shown a document showing an x-ray done in December 2013, she said she had no memory of that x-ray and did not recall any back pain from that time;

g) Her neck pain and wrist pain have improved from the time of the accident, but they have plateaued. The same with her left shoulder pain, although with that area she has good days and bad days, and it depends what she is doing;

h) She saw an orthopedic surgeon, Dr. Kousaie, in November 2018. She told him that her low back pain was 70 percent improved;

i) At her examination for discovery in August 2021, she said her "biggest problem" was "the psychological aspect". At trial, she said that was the situation "at that time";

j) When she was being treated by a kinesiologist, she did low-impact or "relaxed" Zumba for a month or two, but said "it didn't work for me" in the longer term. She continues with regular exercise, which includes core training, stretching and using light weights. She also goes for walks and rides a bicycle for 10 or 15 minutes - 30 minutes on a good day - and would use a gym if an acceptable one were available in Hinton;

k) She does fewer activities with her son than she used to. At the time of the accident her son was 14 years old and was her "sidekick" and was with her all the time. She did not agree that the decline in activities done with her son was due to the typical decline associated with teenagers;

l) She was involved in another motor vehicle accident prior to the one in question. A semi truck fishtailed and collided with her vehicle. This caused her driving anxiety and she quit driving for a month. She "got over it" but is "still leery of semis";

m) During the time she lived with her parents, she was not paid for the work she did at their businesses. She took money as she saw fit, keeping a record of anything she took, and had income from the Canada Child Benefit. Her parents paid for household food and for her son's activities;

n) Her family doctor referred her to a psychologist in December 2017. She had a number of psychological treatments/counselling sessions from that and other referrals, but did not derive any benefit. She did not complete the counselling, saying at trial "I gather you have to find someone who fits". She acknowledged she stopped before completing the prescribed number of sessions, but she is willing to try it again;

o) In 2018, she was prescribed both Effexor and Cipralex. She took both, but discontinued the Cipralex after a couple of days as it made her feel "off". She later discontinued taking Effexor. She said "I'm not a pill person". She did continue with gabapentin and tramadol;

p) She said she gets headaches "off and on", perhaps two or three times a week. At her 2021 discovery she described headache frequency as "once every couple of months". She said they have improved since then, but they "depend on the seasons";

q) She was a regular marihuana user prior to the accident, consuming "a couple of joints a week". In June 2020, she was given a "final warning" by the Salvation Army for using marihuana at the worksite during work hours;

r) She did not work with physically disabled people prior to the accident. The people she helped at the Salvation Army were those dealing with addictions;

s) She applied for the community support worker program at UFV in November 2018, after the accident. At that time, she was not aware that a community support worker is a more physical job. Later, she learned the required practicum involved physical work;

t) She said the one-year community support worker program was just to "get me in the door" towards a four-year social work degree. She stopped going to school because of COVID-19. She thought about going back when others went back but did not follow up with it;

u) Although her high school marks were poor, this was not because she had difficulties with the work but was because she did not apply herself. She did not have difficulty when she went back to school years later;

v) She did not recall if she missed any food truck shifts after the accident. She told younger co-workers she could not lift things and they stepped up. In re-examination, she was directed to the fact she had no income from the food truck work in October 2017, but did have income in September, November and December, 2017;

w) She agreed that since the accident there have been various points when she has had the opportunity to look for work or take on a job, but she has not done so;

x) She agreed her last rehabilitation treatment for her accident injuries was in November 2018;

y) She fell on some stairs in 2021, landing on her rear. There were bushes underneath that moderated the impact but it was bad enough that she went to hospital. She was not in any more pain that she was from the accident and it did not aggravate her low back pain; and

z) She estimated her lifting tolerance with one hand was the weight of a four litre milk jug. Although at discovery she said she could lift 35 to 40 pounds, at trial she said this would be a one-time lift only and it would cause pain.

B. Craig Coburn

[54] Mr. Coburn is Ms. Pak's spouse. They met on a dating site and hit it off well. He found her to be personable, friendly, outgoing and compassionate.

[55] He learned of Ms. Pak's limitations a few months into their relationship. They were both active, but he noted she often could not walk for more than ten minutes. He suggested that cycling would be better and so they starting riding bicycles, where most times she can go for thirty minutes.

[56] They both enjoy hunting and fishing. He made up a rig for the boat so that there is no lifting involved in getting it onto the trailer. Hunting usually involves a lot of walking, but Ms. Pak sits in the truck. He does all the dressing and butchering. He said they work well as a team.

[57] They divide the household chores. He works long hours and so Ms. Pak does the cooking and he does the cleaning and laundry. Ms. Pak also does some of the laundry but "it can affect her". He does the work outside the house although sometimes Ms. Pak does too. If she does, "she pays for it". He said she is stubborn and sometimes does things she should not have done.

[58] He helps her back symptoms by rubbing her back; "it's part of our routine". He said "she takes great comfort from it".

[59] As for Ms. Pak's mental wellbeing, he said "some times are better than others", and sometimes she does not take her medications and is short-tempered. He said "she is forgetful with some things" and has difficulty saying certain words.

[60] In cross-examination, Mr. Coburn said they did a lot of activities early on, things like going to watch fireworks or attending the Richmond Night Market. They were always looking for things to do. He noted Ms. Pak was probably "more determined [at doing activities]" earlier in their relationship.

[61] Mr. Coburn is aware that Ms. Pak does not like driving.

C. Bai-Li Park

[62] Mr. Park is Ms. Pak's 20 year old son. He spells his surname differently from that of his mother. He lived with his mother until August 2022.

[63] He had a good relationship with his mother prior to the accident and they did many activities together.

[64] After the accident, he observed a change in her personality. Before, she was his best friend. Afterwards, they were "constantly butting heads". They no longer talked together much and he stayed in his room to avoid conflict. The end result of an otherwise easy conversation was yelling and screaming.

[65] Mr. Park described his mother as his "superhero" prior to the accident, but things changed in a way that left him uncomfortable being in the home and not talking to his mother. He saw his "superhero crumble".

[66] Mr. Park said his mother did everything around the house prior to the accident. Afterwards, "things stopped getting cleaned up as much".

[67] He has noticed her mother is now a nervous driver. She was a good driver before the accident, but now she will flinch if someone approaches from the side.

[68] In cross-examination, Mr. Park was asked what got his relationship with his mother back on track. He said "time passed and there was acceptance". He acknowledged that he changed ("I grew"), as is typical of anyone aged 16 to 20.

D. Dan Harrison

[69] Mr. Harrison is a former co-worker of Ms. Pak's at the Salvation Army shelter in Chilliwack. He met her in either 2019 or 2020. He had the same role and worked the same shifts as Ms. Pak. He left the position in August 2021 after having worked there for 18 months.

[70] He and Ms. Pak both worked 12-hour shifts for three days each week, but with one four-day work week each month. He said their duties changed during the pandemic because there was a lot more cleaning required. The job involves a lot of walking, sweeping, garbage removal and tasks involving repetitive movements.

[71] When asked about hazards associated with the work, Mr. Harrison said the clients are "rule challenged people", and are unpredictable. There is always a risk of physical confrontation.

[72] Mr. Harrison testified that he could see Ms. Pak struggling at work and, at times, not being able to do some tasks at all. He did any driving that had to be done as Ms. Pak was reluctant to drive.

[73] Mr. Harrison was involved with the event that resulted in Ms. Pak being given a "final warning" by the Salvation Army. On the day in question, Ms. Pak phoned to tell him she would be late due to back pain and, on arrival, she repeated her complaint. It dawned on Mr. Harrison that he had some marihuana with him, so he gave it to her. He said offering relief for her back pain was the only reason he did that, but they both were "written up" because of it.

[74] In cross-examination, Mr. Harrison said he only Ms. Pak after her accident. He saw her as much as twice a month; sometimes she was on the women's side of the shelter. He described her as being "sweet as a button" but often in pain, which she struggled with. She had good communication skills with clients and had "remarkable" skills in de-escalating conflict.

[75] He said there were cleaning duties at the shelter, which involved wiping down all surfaces that might have been touched. Deeper cleaning, such as scrubbing, was the job of the janitor. He said Ms. Pak would start the process of taking out the garbage, but he would usually take over to spare her having to lift or carry.

[76] Mr. Harrison said Ms. Pak did mention quitting, but that was a sentiment expressed by all staff. He did not recall her mentioning any desire to become a social worker, although he noted that was a "common second step". She never mentioned she was going to school.

E. Gerry Solomon

[77] Mr. Solomon is a friend of Ms. Pak. He is 78 years old and retired. He first met Ms. Pak six or seven years ago. She used to work in a laundromat, the same place where Mr. Solomon's wife worked.

[78] Mr. Solomon heard about Ms. Pak's accident when she phoned him from the scene. He attended there and saw Ms. Pak holding her head and "not making much sense". It seemed she was out of touch, or in shock. He comforted her until an ambulance arrived.

[79] When asked if he has observed any changes in Ms. Pak since the accident, Mr. Solomon said she is not as much of a "go getter" as she used to be. Before the accident, she was "always up" and going at 100 or 110 percent, but afterward she was "down more than up" and was going at 60 percent, or even 40 percent. She is "not on the ball as much", and is not the same person. Formerly, the two of them shared an interest in classic cars, but her interest in cars waned after the accident.

[80] Mr. Solomon said Ms. Pak has not lived in his area for almost two years, although he saw her for coffee around the time of an earlier trial date, which I note was in November 2022.

[81] In cross-examination, Mr. Solomon said he saw Ms. Pak about two or three times a week prior to the accident, and perhaps once a week after the accident.

F. Elaine Brown

[82] Ms. Brown works at the Salvation Army as a third party administrator for the Ministry of Social Services.

[83] Ms. Brown met Ms. Pak five or six years ago, when Ms. Pak was the coordinator of the kettle program. Ms. Brown said Ms. Pak was "a real go-getter", a happy individual who loved her job and "had it all together". Ms. Brown recalled that Ms. Pak was going to school at that time.

[84] She saw Ms. Pak after her accident. By that point, Ms. Pak was a support worker at the shelter, dealing with clients, distributing food and cleaning up. When she saw Ms. Pak after the accident she felt Ms. Pak had become "emotional and moody", she "wasn't herself" and had "lost her shine". Physically, she did not move as much as before, and she groaned about the discomfort she was having. She had always been well groomed, and now she looked more disheveled.

[85] When asked if there was work available at the shelter, Ms. Brown said there is always work available and the Salvation Army is always hiring.

[86] In cross-examination, Ms. Brown agreed Ms. Pak started work in the shelter in March 2020. She saw Ms. Pak about once a week at that point, on breaks, but she was unable to say if things were worse for Ms. Pak as a shelter worker because the two of them worked in separate buildings.

[87] Working in the shelter is quite different than working as the kettle coordinator because the people being dealt with are very different.

G. Dr. Gurpreet Palak - Physiatrist

[88] Dr. Palak is a specialist in physical medicine and rehabilitation. He assessed Ms. Pak on January 25, 2022 and subsequently prepared three reports in this matter, dated February 12, 2022, May 27, 2022 and September 2, 2022.

Report of February 12, 2022

[89] In his first report, Dr. Palak said Ms. Pak reported pain in various areas of her body, with the most severe area being her lower back, and intermittent pain radiating into her right leg. Ms. Pak reported that her pain symptoms were exacerbated by walking, bending, lifting, twisting, standing, sitting, carrying and mopping.

[90] Ms. Pak also reported pain in her lower left ribs, described as "uncomfortable" and constant, which was exacerbated by coughing, carrying, standing too long or taking deep breaths. Next in terms of severity were symptoms associated with head injury, including memory difficulties, forgetfulness, changes in mood, and increased anger, irritability and frustration.

[91] Ms. Pak told Dr. Palak that she was consuming a lot of medicinal cannabis to deal with her symptoms.

[92] Dr. Palak had a long list of diagnoses, including concussion (resolved), post-concussion symptoms, cervical spine sprain/strain and facet mediated pain, discogenic pain at C4-5, thoracic and lumbar spine sprain/strain with lumbar facet mediated pain, inflammation of lower left rib, chronic myofascial pain, pain-related sleep interference, severe depression and anxiety symptoms and clinically significant catastrophizing.

[93] In terms of causation, Dr. Palak was of the opinion that these various symptoms and conditions were caused by the accident.

[94] Dr. Palak also diagnosed the plaintiff with bilateral ulnar and median neuropathy, but said these conditions were unrelated to the accident.

[95] As to her non-physical symptoms, Dr. Palak said:

In addition to the physical symptoms, Ms. Pak has severe anxiety and depression symptoms, clinically significant kinesiophobia and catastrophizing, and pain related sleep interference. The presence of severe mood symptoms, pain behaviours and sleep issues are negative predictors for the development of chronic pain, delayed recovery and impaired functional recovery. Although Ms. Pak was prescribed medication for her anxiety, she is no longer using it; it is my opinion that medication would be helpful for her symptoms.

[96] As to functional and vocational impairment, Dr. Palak said:

Given her current symptoms, it is my opinion that work requiring prolonged or sustained postures, repetitive activities such as bending and lifting, and heavy work will likely aggravate her pain symptoms.

I suspect that her tolerance and durability may improve with the following coordinated management recommendations.

[97] Dr. Palak recommended "multimodal treatment" for the management of Ms. Pak's chronic pain symptoms, including passive therapies (massage, acupuncture, chiropractic), active therapies through an active rehabilitation program and cognitive therapies for her ongoing post concussion symptoms.

[98] Dr. Palak recommended Ms. Pak enroll in a community-based self management program, which would give her skills to help her live with chronic pain. He also recommended she be assessed by a psychologist and psychiatrist for her mood symptoms and provided with cognitive behavioural therapy.

[99] Dr. Palak also recommended a variety of different medications and, if symptoms persist at the same level, assessment by an interventional pain physician to determine if therapeutic injections and/or procedures may be appropriate.

[100] Dr. Palak said the following about prognosis:

It is my opinion that since Ms. Pak has had ongoing persistent pain symptoms for over four years, the likelihood of spontaneous resolution of her chronic pain symptoms is low given her current course. However, given that she has not undergone optimal management of her pain symptoms to date, it is my opinion that there may be further improvements in her symptom management [ ] if the recommended treatment is undertaken. I would strongly recommend Ms. Pak follow [my] recommendations to address her pain symptoms, mood issues, and sleep issues. Failure to address all three will result in persisting symptoms and sub optimal recovery.

The injury to the facet joints in the cervical spine and lumbar spine and the disc protrusion are likely to worsen/degenerate with time. Maintaining an ideal body weight and strengthening the associated musculature will slow down the rate of progression but she will experience degeneration at an accelerated rate compared to her uninjured peers.

Report of May 27, 2022

[101] Dr. Palak prepared a second report based on imaging results he received after writing his first report. The imaging in question was an x-ray done on April 8, 2022 and an MRI done on May 20, 2022. Both showed a wedge compression fracture at L1. He concluded:

Without a previous history of traumatic lower back pain reported, it is my opinion that Ms. Pak sustained a compression fracture to the L1 vertebral body as a result of the subject motor vehicle collision. As a result, she is prone to potential further reduction in vertebral body height and pain developing from the associated facet joints.

Report of September 2, 2022

[102] Dr. Palak prepared a third report in order to address several further issues raised by counsel. Among other things, he said:

a) Ms. Pak's pain symptoms are not located in the area of the L1 vertebral body, but instead are located lower in the lumbar spine at the lumbosacral junction; and

b) Reduction in vertebral height can lead to a number of negative issues. The compression fracture may worsen, and in that event the plaintiff would be at risk for developing adjacent compression fractures. This can also lead to the development of facet arthritis and associated pain.

Cross-Examination

[103] In cross-examination, Dr. Palak said:

a) Ms. Pak's mental health is a significant barrier to any physical improvement;

b) Her response to palpation was exaggerated, and she was emotional throughout the assessment;

c) If it is determined Ms. Pak's head did not hit the windshield in the accident, this would not affect his diagnosis of concussion;

d) "Catastrophizing" means ruminating or exaggerating pain. However, Dr. Palak emphasized that the patient still has the basic symptoms;

e) Ms. Pak needs to address all three of her major issues (mental health, physical health and sleep issues) in order to get meaningful recovery. If all three are addressed, he expects there to be recovery within two or three years; and

f) Two thirds of all compression fractures are asymptomatic.

H. Dr. Alexander Leung - Psychiatrist

[104] Dr. Leung assessed Ms. Pak on January 14, 2022 and prepared a report dated February 27, 2022.

[105] In his report, Dr. Leung detailed Ms. Pak's report of numerous mental health issues following the accident. These include: frequent nightmares, intrusive memories, driving anxiety, panic attacks, occasional dissociative experiences, persistent low mood lasting about 18 months post-accident, low energy, decreased enjoyment of activities, low motivation, a feeling of detachment from other people and a desire to isolate from them, emotional lability and irritability, poor concentration and attention, forgetfulness and impaired sleep.

[106] Dr. Leung opined that Ms. Pak developed post-traumatic stress disorder (PTSD) and major depressive disorder (MDD) as a result of the subject accident. He noted that Ms. Pak met the DSM-5 diagnostic criteria for each of these disorders.

[107] Dr. Leung also concluded, based on Ms. Pak's description of her accident injuries and subsequent symptoms, that Ms. Pak likely suffered a concussion in the accident and this was likely a contributing factor in her initially developing MDD after the accident.

[108] He noted that Ms. Pak likely did not continue with an adequate trial of Cipralex, a medication that would have addressed both disorders.

[109] Dr. Leung said Ms. Pak's PTSD and MDD symptoms likely affected her occupational functioning, educational studies and low motivation, and MDD likely negatively impacted her experience of physical pain which, in turn, exacerbated her MDD symptoms in an adversely reinforcing cycle.

[110] Dr. Leung commented on her significantly increased cannabis use, noting that this may exacerbate her PTSD, MDD and anxiety symptoms, including decreased motivation, concentration, memory issues and sleep disturbance, leaving aside other risks to her physical health.

[111] Dr. Leung said the following about prognosis:

PTSD symptoms are generally expected to improve over time.

In my opinion, it is likely that the aforementioned perpetuating factors, especially her ongoing physical pain issues and physical limitations, have contributed to the persistence of her symptoms. She has had some improvement in PTSD and MDD symptoms, likely due to the time course of the illnesses and support from family members and friends. However, she is likely to have persistent PTSD and MDD for as long as she continues to struggle with physical pain issues, without engaging in sufficient mental health treatment.

However, if Ms. Pak engages in a full bio-psycho-social mental health treatment plan, including engaging in further psychotherapy and medication treatment, she will increase the likelihood of having remission of PTSD and MDD symptoms within 1 to 2 years.

[112] Dr. Leung had a number of treatment recommendations, including:

a) Establishing a clinical relationship with a psychiatrist, with an initial assessment and follow-up appointments;

b) Engaging in a structured psychotherapeutic treatment program, based on cognitive behavioural therapy (CBT), for treatment of both PTSD and MDD. He recommended 10-session courses for each;

c) Engaging in group CBT sessions if she is not recovered after the CBT treatment;

d) A trial of Zoloft under the guidance of a psychiatrist, and to continue it until full resolution of her PTSD and MDD symptoms;

e) Instruction from a suitable clinician about the potential harms of cannabis use;

f) Having a regular exercise routine; and

g) Engaging in social interactions with others.

[113] In his testimony, Dr. Leung said PTSD is a trauma and stress related disorder that has five core symptom domains:

a) The trauma must be of a life threatening or serious injury nature and be directly experienced by the person;

b) There must be re-experiencing phenomena, such as intrusive memories, dissociative reactions, distressing recurrent dreams or strong physical reactions on recall of the event;

c) Avoidance behaviour;

d) Cognitive-emotional symptoms, such as dissociative amnesia; fear, anger or shame; self blame; persistent inability to enjoy pleasurable pursuits; social withdrawal; and irritability; and

e) Other aspects associated with the traumatic event, such as irritability, hypervigilance, exaggerated startle response, sleep disturbance; depressed mood; or reckless or self-destructive behaviour.

[114] MDD has different etiologies, and its diagnosis requires five or more symptoms from a list contained within the DSM-5.

Cross-Examination

[115] In cross-examination, Dr. Leung said:

a) He conducted his assessment of Ms. Pak by video. He said this had no significant effect on the quality of the assessment;

b) Ms. Pak would have benefitted from taking or continuing to take medications that had been prescribed to her;

c) Ms. Pak said she had increased her cannabis use to self-medicate for anxiety, but in general this is not an effective response because the evidence does not support it. He would recommend against doing that;

d) As for counselling, if all she had undergone was four sessions with two counsellors, then she would have benefitted from more counselling. The standard course is 10 to 20 sessions, though some cases can take years;

e) If she is now less emotional and irritable, this might be a sign her symptoms are better, but he would need more information before providing an opinion on that;

f) MDD is a description of a collection of symptoms. It has its own descriptors: mild, moderate and severe. He placed her in the moderate range of severity; and

g) When asked if Adjustment Disorder might be the more appropriate diagnosis, he said Adjustment Disorder is a broader catch-all for lesser versions of some of the same symptoms, usually involving a lower degree of stressor, but its specific criterion is that the symptoms do not linger more than six months after the stressor ends. Adjustment Disorder also does not usually indicate a need for medication or treatment. While she may have met some of the criteria for Adjustment Disorder, the key is that she met the criteria for PTSD and MDD and these superseded any diagnosis of Adjustment Disorder.

I. Aman Rangi - Occupational Therapist

[116] Mr. Rangi conducted a functional capacity evaluation of the plaintiff on June 28, 2022.

[117] Mr. Rangi's testing gave results that were suggestive of full effort on Ms. Pak's part. Her estimates of ability and limitation were generally consistent with objective test findings.

[118] The following are some of the comments made by Mr. Rangi in his report:

a) The results of reaching, handling, fingering and manual dexterity tests indicate Ms. Pak is functionally capable of such work, albeit with restrictions to work height, resistance and repetition;

b) Her current work endurance rating suggests reasonable cardiovascular tolerance to full day involvement in Medium strength work activity, if she were not limited by her physical injuries; and

c) In terms of lifting carrying, pushing and pulling, Ms. Pak is capable of work activity in the Sedentary and Light strength categories, with occasional Medium strength work if done close to her body and below shoulder height. In testimony, Mr. Rangi said "the key here is her durability".

[119] Mr. Rangi concluded that Ms. Pak's then-current job as a support worker in a shelter likely fell within the Light strength category.

[120] Mr. Rangi commented on Ms. Pak's work capacity for the job of community support

worker:

During FCE testing, Ms. Pak presented with primary limitations to her lower back, as well as her neck and mid back. As explained in the previous work capacity section, she also presented with difficulty meeting full unrestricted Medium strength demands [ ], related to her lower back pain, as well as signs of limitations during tests involving [bending]. These limitations would preclude her full access to community support worker jobs that involve a component of personal/physical care support. She would be better suited to jobs focused on working with clients who need support with a psychoeducational focus on support for daily living. This would include her current job with the Salvation army, as well as a job she was offered through the Elizabeth Frey Society, provided these jobs remain within the functional profile outlined in this report . She would also perform better with 8 hour shifts and avoid over-time exposure.

[121] Mr. Rangi also commented on Ms. Pak's work capacity for the role of social worker:

During FCE testing, Ms. Pak presented with a reasonable sitting tolerance of 1-2 hours. She presented with signs of limitations (i.e. postural accommodation with longer sitting intervals.) Overall however, her sitting tolerance would allow her access to this field of work. This type of work also has limited physical demands from a lifting and/or postural perspective (i.e. bending).

With the ability to alternate postures as needed, and/or with the provision of ergonomic supports [ ], her physical suitability for these types of jobs increases, as well as her durability. With these supports in place, FCE findings support that she could likely perform well in these types of jobs.

[122] Mr. Rangi made recommendations for an ergonomic chair and sit-stand desk.

[123] In cross-examination, Mr. Rangi said the following:

a) Ms. Pak did not report any cognitive difficulties in retaining information or in following instructions. He also did not observe difficulties of that sort;

b) Nothing in his testing suggested her bending limitations were due to anything other than low back pain;

c) At the end of the day she was both stiff and slower. He acknowledged that she probably had some stiffness from the start due to her long commute (1.75 hours) to get to testing that day;

d) Not all jobs categorized within the description "community support worker" require giving physical assistance to others;

e) With ergonomic accommodations, Ms. Pak has the capacity to work as an office administrator; and

f) She did not complain of any pain or discomfort with her wrist.

III. Defendants' Case

A. Scott Armstrong

[124] Mr. Armstrong is the manager of shelter and outreach programs with the Salvation Army in Chilliwack. He has held that role for four years.

[125] Mr. Armstrong hired Ms. Pak in 2020. He said "she was excited to try a different job" and she was "happy go lucky then". He was not aware she had been involved in an accident.

[126] Mr. Armstrong described Ms. Pak's duties as involving maintaining the shelter, encouraging the guests to follow the rules, cleaning (mopping, wiping, cleaning door handles), and taking out the garbage.

[127] Mr. Armstrong worked days, Monday to Friday. He saw Ms. Pak fairly often, either in passing or in conversation with her. He said he never observed Ms. Pak having any difficulties with her job. She never asked for any lighter duties.

[128] In cross-examination, Mr. Armstrong agreed that one of the other duties of Ms. Pak's job was to do patrols around the shelter, something that was done with a work partner.

[129] He recalled a disciplinary matter involving Ms. Pak smoking marihuana at work. He agreed he was told she was doing that because of back pain.

B. Bradley Heinrichs, Accident Reconstruction Engineer

[130] Mr. Heinrichs is a professional engineer with extensive experience in collision reconstruction. He authored a report dated March 3, 2022.

[131] Mr. Heinrichs's report is a full reconstruction of the accident in question, but since liability for the collision has already been determined, the focus of his testimony was on the question whether Ms. Pak struck her head on the windshield of her vehicle, as she reported.

[132] The accident occurred when the defendants' vehicle, which was exiting a driveway in reverse, collided with Ms. Pak's vehicle, which was proceeding along a residential street in Chilliwack. From the resulting damage and his other analysis, Mr. Heinrichs concluded the right front corner of Ms. Pak's vehicle struck the right rear corner of the defendants' vehicle at a nearly perpendicular angle.

[133] Mr. Heinrichs determined the vehicle speeds at impact to have been about 44 km/h for Ms. Pak's vehicle and about 8 km/h for the defendants' vehicle. The momentum of the vehicles carried them a short distance beyond the driveway. The impact resulted in about a 10 km/h change in velocity for Ms. Pak's vehicle.

[134] Assuming Ms. Pak was properly belted with a functioning seatbelt, Mr. Heinrichs concluded that Ms. Pak would not have moved far enough to strike the windshield. He also concluded that the vehicles collided in a manner that would have moved Ms. Pak's head forward and to the right, not forward and to the left.

[135] In cross-examination, Mr. Heinrichs said he used an computer program called PC Crash as part of his analysis. PC Crash provides simulations based on simplified assumptions of physics and movement. He acknowledged that PC Crash simplifies reality by assuming all forces are applied to the vehicles at a single point in time, whereas the collision would actually be one large impact followed by a number of smaller impacts. However, he said this simplification does not affect the analysis of occupant motion. In other words, the fact that there would have been a series of further small applications of force would make no difference to his opinion concerning occupant movement.

C. Dennis Chimich - Biomechanical Engineer

[136] Mr. Chimich is a biomechanical engineer. He wrote a report dated September 1, 2022. His report addresses three areas of alleged injury to Ms. Pak: a concussion, soft tissue injuries and a lumbar spine fracture.

[137] Mr. Chimich's report relies in part on the findings of Mr. Heinrichs; in particular that (a) Mr. Pak's vehicle sustained a speed change of 10 km/h in the accident; (b) the impact forces acted rearward and to the left on Ms. Pak's vehicle; the forces involved in the impact would have moved Ms. Pak forward and to the right relative to the interior of the vehicle; and (d) Ms. Pak's head would not have contacted the windshield in the collision if she was properly restrained.

[138] Mr. Chimich said that from a biomechanical perspective, he agreed with Mr. Heinrichs that if properly belted, Ms. Pak's head did not contact the windshield. He added that Ms. Pak likely did not impact her head with any other vehicle structure as the accident forces moved her to an open space within the vehicle.

[139] Mr. Chimich came to the same conclusion, for the same reasons, in terms of Ms. Pak's left shoulder interacting with the window or any other vehicle structures.

Concussion

[140] As for the alleged concussion injury, using the noted assumptions and conclusions, Mr. Chimich estimated the peak linear acceleration of Ms. Pak's head to be about 5 to 7g. He then referred to several concussion studies of (gridiron) football players, which showed that the risk of sustaining a concussion at an exposure of 5 to 7g is less than one percent.

[141] Mr. Chimich noted that these studies included cases where players had suffered concussions both with and without direct head impact. If, as is likely, Ms. Pak's head made no direct impact within the vehicle, the acceleration of her head would have developed over a longer period of time than if there had been a head impact. Generally, longer times to develop accelerations or forces is associated with a reduced injury risk. For that reason, Mr. Chimich concluded that the "less than one percent" estimate of concussion risk is an overestimate for Ms. Pak's non-contact head acceleration concussion exposure.

[142] Mr. Chimich noted there were several limitations associated with this conclusion. These are:

a) Football players may have higher or lower concussion tolerances than the general population; and

b) There is some evidence that female athletes may be at greater risk of concussion than their male counterparts, though the relevant studies are limited and the subject requires further study.

Soft Tissue Injuries

[143] Mr. Chimich said Ms. Pak's reported soft tissue injuries generally fall into two categories, being those typically referred to as whiplash associated disorder and those from direct seatbelt contact.

[144] Mr. Chimich concluded as follows:

[M]any of Ms. Pak's soft tissue injuries and symptoms are generally of the type reported by whiplash patients and thus are consistent with her collision exposure.

Ms. Pak's left shoulder/clavicle/chest swelling/abrasion/bruising type injuries were described as being from her seatbelt. This type of injury pattern and location is consistent with her collision exposure.

Lumbar Spine Fracture

[145] Mr. Chimich commented on Ms. Pak's later-diagnosed L1 fracture. He said:

Anterior wedge compression fractures generally result from an anterior (i.e. forward) flexion and compression loading of the spine.

While seated normally in an automobile seat, the lumbar spine is nearly straight, which is considered to be anteriorly flexed compared to its neutral position, [ ] however proper seatbelt use prevents any substantial increase in flexion from occurring.

[146] Mr. Chimich said that the estimated forces in the subject collision have been shown in studies to be "well below injury thresholds". He cited several studies, including one involving speed changes of 20 km/h or less where only one person out of the 3,485 persons studied suffered this type of injury.

[147] From this, Mr. Chimich concluded it is unlikely Ms. Pak sustained the documented L1 fracture as a result of the forces involved in this collision.

[148] In cross-examination, Mr. Chimich agreed that his g force calculations would not apply if Ms. Pak actually did strike part of the vehicle.

D. Dr. Simon Horlick - Orthopedic Surgeon

[149] Dr. Horlick provided an expert report based on his review of Ms. Pak's medical records. Dr. Horlick's report is dated January 26, 2023.

[150] Dr. Horlick noted that the records from various early post-accident medical appointments indicate Ms. Pak reported complaints associated with her cervical spine and left shoulder only, with no mention of any thoracic or lumbar discomfort. There are no records of lower back complaints until December 2017.

[151] Dr. Horlick also notes there are no documented indications of actual physical impairment beyond Ms. Pak's subjective complaints.

[152] An L1 anterior wedge compression fracture was first identified in April 2022, over four years after the accident. By this point, Ms. Pak's primary complaint was with her lower back, and specifically the lumbosacral junction, not at L1.

[153] Dr. Horlick said he had reviewed Mr. Chimich's report and agreed with Mr. Chimich's conclusion that the forces involved in this accident were unlikely to have resulted in the lumbar spine compression fracture. He added that the absence of immediate complaints post accident, focused on the thoracolumbar area, and associated restriction in range of motion, rules out a traumatic etiology. Had Ms. Pak sustained an acute lumbar spine compression fracture it would have been symptomatic at the time of the accident.

[154] Dr. Horlick also noted that there were references to other events involving back injuries, both in May 2017, which involved an attendance at hospital, and in December 2013.

[155] Dr. Horlick said that had Ms. Pak sustained an acute L1 compression fracture, this would have resulted in focal pain and restriction in range of motion for approximately six weeks. With only a loss of vertebral body height of 25 percent or less, this would not result in progression of pathology or progression of associated degenerative arthritis, if present.

[156] From his examination of records, Dr. Horlick concluded that Ms. Pak had a temporary disability from employment of approximately three to six months maximum and there would be no impediment to her return to work after that point. He concluded:

From review of the records she does not have any medically supportable vocational, avocational or recreational disability on the basis of her residual musculoskeletal complaints which are subjective only. No additional treatments are required with respect to her residual complaints.

[157] Dr. Horlick expressly stated that he was not opining on the influence of possible concussion, head injury, headache and/or anxiety and depression in terms of Ms. Pak's accident-related complaints.

[158] In cross-examination, Dr. Horlick said:

a) It is preferable to see a patient in person, as this results in a more accurate opinion;

b) There were several records not made available to him, including the medical legal report of Dr. Kousaie, the report of physiatrist Dr. Giantomaso, and the records of Karp Rehabilitation and Horizon Medical Clinic;

c) It is possible the GP left certain complaints out of his clinical notes; and

d) The record relating to the pre-accident hospital attendance by Ms. Pak on May 5, 2017 indicates the reported complaint was "pulled something on right side back". When it was suggested to Dr. Horlick that there was no reference to low back, he said the word "back" includes the low back.

E. Dr. Johann Brink - Psychiatrist

[159] Dr. Brink assessed Ms. Pak on February 11, 2022 and administered a variety of tests and conducted an in-person interview of Ms. Pak. His report is dated February 24, 2022.

[160] Dr. Brink concluded Ms. Pak meets the DSM-5 criteria for Adjustment Disorder with mixed anxiety and depression. He ruled out diagnoses for Neurocognitive Disorder due to traumatic brain injury, Somatic Symptom Disorder and opioid dependence. He said that while Ms. Pak has several trauma-related symptoms, she does not meet the criteria for PTSD. He also ruled out Major Depressive Episode with anxious distress because Ms. Pak did not meet five of the eight criteria required by the DSM-5 for such a diagnosis.

[161] Dr. Brink said his testing for Neurocognitive Disorder due to traumatic injury put her at the cut-off for cognitive impairment and "may indicate post-concussive disorder, the symptoms of which have persisted, or due to her anxiety and depressed mood. He said that without formal neurocognitive assessment he could not offer a clearer opinion than that.

[162] He ruled out Somatic Symptom Disorder, despite the fact that Ms. Pak "spends much time thinking and worrying about her pain", because she is able to work without her symptoms affecting her relationships with clients and has been able to maintain a romantic relationship.

[163] Dr. Brink expressed concern about Ms. Pak's daily consumption of Tramadol, which is an opioid pain medication, as it is dependence-producing and Ms. Pak is likely dependent on it. He recommended that she be weaned off Tramadol and her pain controlled with regular analgesics such as gabapentin.

[164] As to her level of disability, Dr. Brink deferred to physical experts concerning Ms. Pak's physical injuries. From a psychiatric perspective, he said:

[S]he developed traffic-related anxiety, worries about her future, and anxiety regarding her pain, and her son. She has become depressed, irritable, and angry, and this has impacted negatively on her relationship and her family. However, her symptoms have not affected her relationship with her clients .

[165] Later in his report, he said the plaintiff is presently able to work, and "a positive treatment response is expected to increase the resilience and ability to work full-time".

[166] Dr. Brink noted Ms. Pak had not complied with medications for anxiety and depression that would reliably have been expected to result in symptom relief, if not resolution. He said it was unclear whether her limited therapy adhered to CBT principles, but noted CBT "is a first-line and well validated treatment for trauma-related symptoms". He said, "the absence or non-implementation of a full course of CBT has deprived her of the opportunity to acquire and internalize the necessary skills to manage her pain and emotional dysregulation".

[167] Dr. Brink said the following about prognosis:

The prognosis for recovery from the injuries is favourable, provided full implementation of, and compliance with, recommended treatments. The injuries have caused permanent vulnerability to future anxiety and depression in the face of further accidents, disappointments, or failures. Should she not comply fully, or participate only partially, in recommended CBT-based treatments, she will not integrate the requisite skill sets and will continue to experience physical and psychiatric symptoms that she will believe to be out of her control. Failure to comply fully with psychiatric medications will lead to ongoing and possibly increasing anxiety and depression, which in turn, will escalate the risk of suicide.

[168] Dr. Brink recommended that she be referred to a psychiatrist so that her medications and mental health care are monitored and managed. He made various medication recommendations. He also recommended CBT-based therapy, to be provided by a CBT-trained clinician. He anticipated that at least 16 to 20 sessions would be required. In cross-examination, he said the hourly rates for this are in the range of $200 to $250 per hour. He encouraged Ms. Pak in her commitment to return to full-time work, completing studies, maintaining social connections and embarking on a new romantic relationship. Finally, he recommended Ms. Pak increase her level of exercise and social interactions.

[169] In direct testimony, Dr. Brink said PTSD is a complex diagnosis. There are so many criteria, and all criteria have to be met in each subsection of the DSM-5. He added that the DSM-5 reserves the diagnosis of PTSD for those who have psychiatric issues as a result of a severe traumatic or life-threatening event.

[170] In cross-examination, Dr. Brink said:

a) He agreed that chronic pain often has psychological co-morbidities and these can become intertwined. This can make management or treatment more challenging because improvement in one aspect may not mirror improvement in the other;

b) He felt that Ms. Pak did not meet at least five criteria for Major Depressive Disorder, as certain aspects of her symptoms are ambiguous. While Ms. Pak has trouble sleeping and has a lack of activity, two of the necessary criteria, in her case these may well be attributable to physical pain and not psychological issues;

c) For that reason, the question he asks patients is whether they are interested in doing activities. In Ms. Pak's case, she had not lost interest;

d) Dr. Brink acknowledged that if the diagnostic criteria for MDD with anxious distress were made out, that diagnosis would supersede a diagnosis of Adjustment Disorder with mixed anxiety and depression. Similarly, if the diagnostic criteria for PTSD were made out, that would supersede a diagnosis of Adjustment Disorder with mixed anxiety and depression;

e) He did not complete a full PTSD questionnaire with Ms. Pak because she did not meet the required first criteria of experiencing a major traumatic event. He disagreed that the person need only perceive a major traumatic event, noting that the DSM-5 does not say that;

f) In his view, PTSD is over diagnosed. It is a serious diagnosis that is reserved for severe cases. He said physicians often use a PTSD checklist and draw conclusions from that, but that checklist is a screening tool only and only if indicated does the clinician move to a full analysis; and

g) A person who shows PTSD symptoms without meeting the diagnostic criteria of major traumatic event would be better diagnosed as "other trauma and stressor related disorder", or perhaps Adjustment Disorder, but in the case of the latter, symptoms should last no more than six months after the stressor. If longer than that, then the proper diagnosis would be Chronic Adjustment Disorder.

IV. Positions of the Parties

A. Plaintiff

[171] As noted in the introduction, the plaintiff submits that as a result of the accident, she has been left in a state of chronic pain, primarily low back pain, post-concussion symptoms as a result of a concussion caused by the accident, depression, PTSD and a change in her personality. She also says the compression fracture of her L1 vertebra was caused by the accident.

[172] The plaintiff submits $135,000 is a fair assessment for her non-pecuniary damages, relying on Kam v. Van Keith, 2015 BCSC 1519 (where the non-pecuniary damages were assessed at $125,000); Broomfield v. Lof, 2019 BCSC 1155 ($130,000); and Scelsa v. Taylor, 2016 BCSC 1122 ($125,000).

[173] The plaintiff also cites Valdez v. Neron, 2022 BCCA 301, for the proposition that awards for non-pecuniary damages have continued to increase over the years at a rate that exceeds the rate of inflation.

[174] The plaintiff concedes the assessment of Ms. Pak's past income loss is not straightforward. At the time of the accident the plaintiff was working on an on-call basis, at minimum wage, at a catering business, and the evidence of post-accident loss of income from that source is not clear.

[175] The plaintiff says the accident "derailed her plan" to obtain work as a shelter support worker while going to school. Her claim for past loss of income rests on several assumptions, including that: (1) she would have worked a modest further amount at the catering business; (2) she would have secured shelter work from 2018 through to the first three months of 2020 (when she actually did secure that work); (3) despite the accident, she nonetheless had some residual capacity for work, estimated at 30 percent; (4) she would have secured work with the Elizabeth Fry Society, which paid more than her Salvation Army job; and (5) on moving to Alberta, she would have been able to secure the equivalent of full time work right away.

[176] According to the plaintiff's analysis, this results in a net loss of $75,000 on a rounded basis.

[177] As to loss of future earning capacity, the plaintiff submits she meets all four loss factors set out in Brown v. Golaiy, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.). She continues to have significant physical limitations and is limited in both the work she can do and in the amount of work she can endure.

[178] The plaintiff says the capital asset approach is the appropriate method for the assessment of her future loss. She presents several scenarios for her "without accident" future, based on the earnings of social workers without degrees or diplomas, social workers with degrees, community support workers with diplomas, and females having an undergraduate degree in social work but working in all occupations. Her analysis weights the earnings from these groups, with the social worker without degree or diploma assigned the most weight. This yields a weighted result for lifetime earnings of about $580,000.

[179] The plaintiff acknowledges she has a residual income earning capacity, which she suggests is appropriately assessed at 50 percent. This reduces the lost earnings figure to $290,000. On this point I note the figure actually presented in the plaintiff's written submissions is $240,000, but I assume this is an error.

[180] The plaintiff's cost of future care claim is based on weekly passive therapy treatments to age 70, private psychiatric consultations, 10 sessions of cognitive behavioural therapy, an ergonomic desk and chair, and medications. The present value of these costs is $83,250, rounded.

[181] The following is a summary of the plaintiff's claim:

Non-pecuniary damages:

$135,000.00

Past loss of earning capacity (net):

$75,000.00

Loss of future earning capacity:

$290,000.00

Cost of future care:

$83,250.00

Special damages (agreed):

$1,727.15

Total:

$584,977.15

B. Defendants

[182] While accepting the plaintiff is a generally credible witness, the defendants nonetheless submit that her evidence is unreliable. By way of example, the defendants refer to the plaintiff's testimony that her head struck the windshield in the accident, a circumstance that expert evidence has shown to be impossible.

[183] The defendants acknowledge the plaintiff suffered soft tissue injuries to her cervical, thoracic and lumbar areas, and that she developed a mild adjustment disorder with mixed anxiety and depression. They say the plaintiff's L1 compression fracture and a supposed wrist or hand injury have not been shown to be related to the accident, and the plaintiff's claim of concussion is unproven.

[184] The defendants maintain that the plaintiff failed to mitigate her losses because she failed to pursue psychological counselling or therapy, failed to take prescribed psychiatric medication, and failed to seek employment after the accident. They submit, in any event, that the plaintiff's psychiatric issues are mild and did not have a significant effect on her.

[185] The defendants submit that an appropriate award for non-pecuniary damages would be $70,000 to $90,000, depending on whether the Court finds the plaintiff's L1 compression fracture to have been caused by the accident. They cite the following cases in support: Tabatabaei-Zavarei v. Farina, 2021 BCSC 1082 ($50,000); Dutton-Jones v. Dha, 2023 BCSC 854 ($76,500); and Honeybourn v. Aghdasidehaji, 2022 BCSC 258 ($90,000). Should the Court find that the plaintiff's L1 compression fracture is accident related, they say Roy v. Storvick, 2013 BCSC 1198 ($75,000) and Singh v. Wu, 2015 BCSC 526 ($75,000) are apposite.

[186] On the matter of loss of future earning capacity, the defendants agree the loss of capital asset approach is the most suitable for the assessment of damages. The defendants concede the plaintiff meets the Brown factors, "but barely". They point to those parts of the expert

evidence supporting their position, together with the evidence of more recent improvement in symptoms and the positive prognoses for the future. They note, in particular, the evidence of the plaintiff that she felt she could have carried out the Elizabeth Fry job but for the long work commute. Finally, they submit that the wrist/hand issues reported by the plaintiff, which they argue are not related to the accident, also impair the plaintiff from some forms of physical work, catering and restaurant work in particular.

[187] The defendants note the plaintiff's income tax returns "demonstrate that the plaintiff had a fairly inconsistent relationship with paid work" and was "not particularly attached to the paid workforce". They say she is capable of performing the work of a community support worker, although perhaps not involving persons with disabilities, as that is more physical work. However, she was already averse to working with persons with disabilities, so there is no loss there.

[188] Given the difficulties in assessment, the defendants suggest that the assessment of future loss be based on the equivalent of one year's income. Based on the rough average of her incomes for 2020 and 2021, that figure is $20,000.

[189] As for past income loss or loss of capacity, the defendants again note that the plaintiff's unrelated wrist injury, and the personal issues she had with the owner of the catering business, were reasons given by the plaintiff as to why she could not or would not work. They also note the plaintiff failed to look for any work at all for a considerable time, and when she did find work with the Salvation Army, she made no inquiries about being accommodated for her injury-related physical limitations.

[190] The defendants submit that, given all these considerations, the sum of $20,000 is sufficient to compensate the plaintiff for past income loss.

[191] As for cost of future care, the defendants note a desk and chair are not called for given the uncertain nature of the plaintiff's employment; no additional passive treatments are warranted because the plaintiff discontinued those treatments in late 2018; the proposed psychiatric treatments should not be allowed because the plaintiff has demonstrated non-compliance with similar treatment recommendations; and there should be no award for the cost of medications as the plaintiff has had these supplied free of charge due to her low income. If the Court concludes an award should be made for cost of future care, it ought to be confined to psychiatric care, being 16 sessions at $219 per session, for a total of $3,504.

[192] The following is a summary of the defendants' position on damages:

Non-pecuniary damages:

$70,000.00 to $90,000.00

Past loss of income or earning capacity:

$20,000.00

Loss of future earning capacity:

$20,000.00

Cost of future care:

$3,504.00

Special damages (agreed):

$1,727.15

Total:

$115,231.15 to $135,231.15

V. Discussion

A. Credibility

[193] I found Ms. Pak to be an essentially truthful witness insofar as she told the truth as she saw it. I do have concerns about the reliability of her testimony, as she was not a very good historian. Her recollection was not strong, she was notably weak on specifics and she tended to give her evidence in an overly generalized manner. I have borne these matters in mind when making findings of fact.

B. Findings of Fact

[194] Beginning with the non-contentious matters, I find that the plaintiff suffered soft tissue sprains or strains to her cervical, thoracic and lumbar areas of her body. Her low back pain is by far her most significant physical symptom.

[195] I accept that her back issues effectively limit her work activity to sedentary and light strength work categories, as Mr. Rangi determined as a result of his functional capacity evaluation. I also accept that she is capable of very occasional heavier work, but again as Mr. Rangi noted, the key issue is Ms. Pak's limited durability for work in general, and heavier work in particular.

[196] Next, I address the plaintiff's L1 compression fracture. This fracture was first identified in an x-ray taken in April 2022, over four years after the accident. Importantly, it is not the source of the plaintiff's back pain. I accept the evidence of both Dr. Palak and Dr. Horlick in this regard. The cause of the compression fracture is a more difficult question, but I conclude the weight of the evidence is against a finding that it is accident-related. I base that conclusion primarily on the following:

a) The plaintiff's physiatrist, Dr. Palak, drew the connection between the accident and the compression fracture on the basis that there was no other reported history of traumatic lower back pain. However, Ms. Pak has had some other incidents involving impacts or injuries to her back (December 2013, May 2017 and on one occasion in 2021), two of which involved visits to the hospital. Ms. Pak's unreliability in accurate historical reporting is a factor here;

b) Both Mr. Chimich and Dr. Horlick concluded the forces involved in this accident were unlikely to have resulted in the compression fracture;

c) According to Mr. Heinrichs, the speed change associated with the collision was just 10 km/h, which Mr. Chimich noted involved a loading magnitude "well below injury thresholds" for spinal injuries, as found in studies;

d) Mr. Chimich noted that anterior wedge compression fractures generally result from a forward flexion and compression loading of the spine, something that proper use of a seatbelt will prevent, and Ms. Pak was wearing a seatbelt at the time of the collision; and

e) Dr. Horlick said that had Ms. Pak sustained an acute lumbar spine compression fracture, it would have been symptomatic at the time of the accident (an opinion that was not answered by Dr. Palak), and the plaintiff did not have those symptoms post-accident.

[197] Another controversial matter is whether the plaintiff suffered a concussion in the accident. While the plaintiff has, at various times, said that she hit her head on the windshield, I accept the opinion of Mr. Chimich (not seriously contested by the plaintiff) that this was not possible given that Ms. Pak was restrained by her seatbelt.

[198] The plaintiff instead argued she must have hit another part of the car's interior, which is most obviously the driver's side window or area. Again, the physics are not with her here, as Mr. Chimich noted the forces at play in this collision would have moved her body away from the window. I accept that opinion. Although the plaintiff points to Mr. Chimich's evidence in cross-examination that Ms. Pak's head might have hit something during the overall collision event (that is, the initial impact plus several further small impacts), his evidence was that this was unlikely. I find the plaintiff has not proven she hit her head anywhere in the vehicle during the accident.

[199] This is not the end of the matter, as Ms. Pak might still have suffered a concussion despite there being no direct impact to her head, as Dr. Palak opined. Dr. Leung also concluded Ms. Pak likely suffered a concussion in the accident, noting that this was consistent with her symptoms, but I find that his opinion lacks weight because he based it in part on Ms. Pak's report of hitting her head on the windshield.

[200] Mr. Chimich said that according to concussion studies involving football players, the forces involved in the subject collision were not at a level that would have caused a concussion, but he was careful to note the limited nature or scope of those studies.

[201] I accept that in the time after the accident, the plaintiff reported headaches and a sensitivity to light, symptoms which are consistent with concussion. Her friend Mr. Solomon, who saw the plaintiff at the scene, described her holding her head and "not making much sense", although he was very vague in that description. He thought she was out of touch, or in shock. I note that shock and confusion after an accident do not necessarily mean a vehicle occupant has suffered a concussion.

[202] Although the evidence is not strong, and despite the modest forces involved in the collision, based on her post-accident symptoms I find the plaintiff probably did suffer a concussion in the accident.

[203] I also find the plaintiff suffered a left shoulder/clavicle/chest injury as a result of the impact of her body against her seatbelt.

[204] The last area of alleged physical injury is to her right wrist. I accept that she suffered an injury to her right wrist in the accident, as she testified, as this was documented by her family doctor, Dr. du Toit, in a note dated October 2, 2017.

[205] Dr. Palak described the plaintiff as having bilateral neuropathy associated with her ulnar and median nerves but, importantly, he said this was unrelated to the accident.

[206] The significance of the injury to the right wrist is difficult to assess as there is relatively little information on it. Ms. Pak merely described it as having improved and then come to a plateau. Little or no mention was made of it in terms of functional limitation, aside from Ms. Pak's comment that her left wrist had given out on her at one point, something that seems more likely attributable to the later-diagnosed ulnar and median nerve neuropathy. Also, and notably, Mr. Rangi said:

[Ms. Pak] denied any significant difficulty with the following: hand or finger dexterity or strength .

[207] From this limited body of evidence, I find that the accident caused Ms. Pak to suffer an injury to her right wrist, likely a strain, which caused her pain and discomfort for a time, but then improved. On the available evidence I am unable to conclude that any further difficulties with her wrists or hands are attributable to the accident.

[208] Finally, I turn to the psychological issues arising in this case. I will state, at the outset, that I am satisfied Ms. Pak has developed some form of psychological disorder as a result of the accident. She suffers from depression and anxiety and she tends to be short-tempered, irritable and socially withdrawn. I am also satisfied that her psychological issues interact with her physical symptoms in a way whereby each exacerbates the other.

[209] On the evidence as a whole, I am satisfied the plaintiff's symptoms have significantly affected her in all areas of her life. I would not describe them as "mild", as urged by the defendants, but neither would I describe them as debilitating, given that she is capable of carrying out, and does carry out, normal functions and activities, albeit with limitations.

[210] The following is a small point perhaps, but I am unable to find that the breakdown in Ms. Pak's relationship with her son during his teen years is attributable to her accident-related symptoms. I accept that Ms. Pak may have been less patient and more irritable as a result of her injuries, but the mere fact that the relationship breakdown occurred post-accident does not mean it must have been caused by the accident. As the saying goes, correlation does not imply causation.

[211] The experts disagreed on the formal diagnosis to be made, but otherwise largely agreed on the nature, quality and prognosis for Ms. Pak's psychological symptoms. For that reason it may not be strictly necessary for me to decide which diagnosis is the correct one but, for what it is worth, I will say I am not satisfied the plaintiff has shown she has PTSD or MDD, largely for the reasons given by Dr. Brink. This leaves Chronic Adjustment Disorder with mixed anxiety and depression, which is the diagnosis Dr. Brink ultimately acknowledged.

[212] The opinions of Drs. Leung, Palak and Brink are well aligned on the topics of treatment recommendations and prognosis. Each physician recommended assessment and monitoring by a psychiatrist, psychiatric medication as recommended by the treating psychiatrist and CBT therapy by a properly qualified clinician. Both Dr. Leung and Dr. Brink recommended Ms. Pak maintain or increase her social interactions and level of exercise.

[213] As to prognosis, Dr. Leung said adherence to a treatment plan would increase the likelihood of remission in psychological symptoms within one to two years. Dr. Palak said there may be further improvements in her symptom management if Ms. Pak follows the recommended treatment. Although Dr. Palak, in cross-examination, said there could be "recovery" within two or three years, I took that to be synonymous with "improvement" rather than as a reference to a complete resolution of symptoms, given the manner in which he phrased the issue in his report. Dr. Brink described the prognosis as "favourable" provided there was full implementation and compliance with treatments.

[214] From these opinions, I conclude there is a reasonable prospect for improvement in Ms. Pak's symptom management and the symptoms themselves, both physical and psychological, provided that she implements and follows the treatment recommendations.

C. Failure to Mitigate

[215] As noted earlier, the defendants submit the plaintiff failed to mitigate her losses by failing to abide by treatment recommendations and failing to seek employment during times she had the ability to work.

[216] There is merit in this submission. Ms. Pak was referred to a psychologist in December 2017, but only completed a few sessions before stopping. Her evidence was to the effect that the two counsellors she tried did not "fit". She did not pursue any psychological sessions after that.

[217] She was prescribed Cipralex, a psychiatric medication, in 2018 but discontinued it after a few days. Dr. Leung noted Ms. Pak did not continue with an adequate trial of Cipralex, which is a medication he said would have addressed both PTSD and MDD. At trial, Ms. Pak said she did so because the medication made her feel "off" and that "I'm not a pill person".

[218] As already noted, three physicians have recommended that the plaintiff have psychological counselling (CBT therapy) and take medications designed to address her psychological disorders. She was prescribed these treatments in 2017 and 2018 but discontinued both aspects very early on.

[219] The applicable law is set out in Forghani-Esfahani v. Lester, 2019 BCSC 332:

[61] Therefore, on this basis it would appear that the defendant is obliged to establish that there is a real and substantial possibility that the plaintiff's failure to mitigate would have avoided some loss, and the degree of probability that the loss would have been avoided. In Ken Cooper-Stephenson and Elizabeth Adjin-Tettey, Personal Injury Damages in Canada, 3rd ed (Toronto: Carswell, 2018) at p. 1318, the test is described as follows:

The defendant has to establish on the balance of probabilities: (1) the steps which the plaintiff might have pursued to avert loss, and (2) the reasonableness of pursuing those steps. The defendant must also produce evidence to show (3) the degree of probability that the loss would thereby have been averted, and the extent that the loss would have been diminished. This element is then assessed on a simple probability basis whereby damages are awarded according to the degree of probability, whether more than or less than 50%, that, had the plaintiff taken proper steps to mitigate, the loss or damage would have been averted or diminished. However, it is not sufficient that there was a mere speculative possibility that the plaintiff would have been in a better position had he or she followed a particular course of treatment.

[Footnotes omitted.]

[220] I am satisfied that there are specific and identifiable steps the plaintiff ought to have pursued to mitigate her symptoms and resulting loss, and it was unreasonable of the plaintiff to have discontinued them early in the process. However, the third aspect of the test is much more difficult to analyse and quantify.

[221] As noted earlier, Dr. Leung said Cipralex would have addressed both of the disorders he diagnosed. He also said that if his recommendations (which included medications and CBT therapy) were properly implemented, Ms. Pak would increase the likelihood of remission of her psychological symptoms within one to two years. Dr. Palak said there may be further improvements in her symptom management if Ms. Pak follows the recommended treatment. Dr. Brink described the prognosis as "favourable" provided there was full implementation and compliance with treatments.

[222] From that evidence, I conclude there is a real and substantial possibility that the plaintiff could have mitigated her symptoms and consequential losses by pursuing the treatments recommended to her in 2017 and 2018. The more difficult question is the quantification of that possibility. Perhaps understandably, none of the three medical experts provided any specific quantification of the prospective improvement and so putting their opinions into concrete terms is challenging.

[223] Doing the best I can on the basis of the available evidence, I conclude that there is a 50 percent chance that the foregone treatments would have ameliorated the plaintiff's symptoms by 40 percent within two years, which when combined, results in a damages reduction of 20 percent.

[224] I will take that reduction into account when quantifying damages.

D. Non-Pecuniary Damages

[225] Based on the findings I have made, I assess non-pecuniary damages at $125,000, which I reduce by 20 percent to reflect the plaintiff's failure to mitigate her symptoms by pursuing recommended treatment. The net award is $100,000.

[226] I will deal briefly with the cases cited by the parties. I find the cases cited by the plaintiff to be generally comparable, though it was apparent they were cases where awards were made at the highest end of the range. Generally, in those cases there was less optimism for improvement than there is in the present case.

[227] The cases cited by the defendants are distinguishable from the present. In Tabatabaei-Zavarei the plaintiff was much older than Ms. Pak, had significant pre-existing issues, and her accident-related mood issues did not rise to the level of a clinical disorder. Similarly, in Roy the plaintiff had a pre-existing anxiety disorder that was aggravated by the accident, but the accident had not triggered an adjustment disorder, as the subject accident has done here. Honeybourn is similar in some ways to the present case, but it is distinguishable because that plaintiff was not diagnosed with any psychiatric or psychological disorders.

E. Past Loss of Income/Capacity

[228] The assessment of this loss is very challenging due to the plaintiff's sporadic pre and post accident work history, the friction she had with her employer at the catering business, her decision to embark on studies towards a support worker diploma, and her lack of effort at finding work in 2018 and 2019.

[229] I conclude the analysis is best conducted in stages.

[230] Post-accident in 2017, the plaintiff was working on an on-call basis with the catering outfit. The plaintiff concedes she cannot establish there was work available to her that she had to decline due to her injuries.

[231] In 2018 and 2019, the plaintiff focused on herself and her rehabilitation and did not seek or secure work. Instead, she pursued her pre-accident goal of obtaining a two-year diploma in community support work. She took three courses (totalling nine units) in each of the fall 2018 and spring 2019 semesters. Nonetheless, she argues that, but for the accident, she would have also worked full-time during these semesters. I conclude it is unlikely she would have done so.

[232] I come to that conclusion because academic studies have never come easily to Ms. Pak, as her high school marks and unsuccessful university year attest. Those marks show she failed six courses during high school. While she explained that she had the capacity to do better but simply did not apply herself, there is nothing in her record of performance that allows me to come to that conclusion.

[233] For that reason, I do not consider it likely Ms. Pak could have worked an average of 39 hours a week (as she did in 2020) and also successfully managed an effectively full time (nine unit) course load. I suspect the best she would have managed would have been half time work. I accept she would have been available for full time work from January to August 2018, prior to the start of her studies, and after April 2020, when her two year program would have finished. Accordingly, for 2018, 2019 and 2020 she would have been capable of working 20 months full time (2018, eight months; 2019, four months; and 2020, eight months), and 16 months half time (2018, four months; 2019, eight months; and 2020, four months).

[234] Using her 2020 ten-month income as a guide ($25,089), her annual earnings capability was $30,100, rounded, or $2,508 per month. Assuming no periods of unemployment, her earnings over those three years would be $70,224 ($2,508 x 20 + $1,254 x 16). These are her earnings under the "without accident" scenario.

[235] The next step is to assess income actually earned, and the income that could or should have been earned but for her failure to mitigate. Her actual employment income over those three years totals $25,749. I conclude she was likely capable of sedentary or light duty work at perhaps half time level during those times she was not attending UFV full-time (she attended full time for eight months), meaning she was available for 28 months of half time work during the three year period in question. I also assume she could have earned a similar wage as she actually earned, $17 per hour. This results in notional earnings of $35,112 (28 x $2,508 ÷ 2).

[236] Accordingly, the damages for lost capacity from the date of the accident to the end of 2020 total $9,363 ($70,224 - $25,749 - $35,112).

[237] For 2021, I accept the plaintiff's method of analysis, which uses the difference between her actual earnings at the Salvation Army and the greater earnings she could have achieved by working for the Elizabeth Fry Society as of July 2021. Her earnings from both sources on a "without accident" basis would have totalled $36,676, her actual earnings were $17,741, and the difference is $18,935.

[238] A similar analysis applies to 2022, where the loss is again reflected in the difference between the plaintiff's earnings from the Salvation Army and the level of earnings the plaintiff could have had at Elizabeth Fry, although for a six month period only as Ms. Pak moved to Alberta in July 2022. For this item, I use the plaintiff's figures (reflected in para. 74 of her submissions) for half year earnings at the Elizabeth Fry Society ($20,765) and subtract her earnings from the Salvation Army ($15,912), a difference of $4,853.

[239] What remains is the nine month period from July 2022 to the start of trial. The plaintiff calculates this aspect of her past loss by assuming that, but for the accident, she would have found full-time work paying $20 per hour. She calculates she would have had gross earnings of $28,800. However, she makes no allowance for her residual earning capacity, an omission that I do not consider reasonable. I conclude she has, and had, the capacity to work half time, albeit perhaps at a reduced hourly rate to reflect the more limited employment opportunities available to her. Using $15 per hour as that rate, her earnings would have been $10,800. The difference between the two figures is $18,000.

[240] The total of the various figures is $51,151 ($9,363 + $18,935 + $4,853 + $18,000). These are gross figures; I leave it to the parties to come to an agreement on the appropriate reduction for taxes, with leave to apply if they cannot agree.

[241] I emphasize that the figure I have derived is an assessment, not a calculation, of the plaintiff's loss of income earning capacity based on what I consider to be reasonable assumptions concerning her "without accident" earnings, her actual earnings during the relevant period, and notional earnings to reflect her residual capacity had she properly mitigated her losses. Because I have already accounted for her failure to mitigate in this particular part of the assessment, there is no need to further reduce the assessed amount by the percentage I identified earlier.

F. Loss of Future Earning Capacity

[242] The Court of Appeal clarified the law relating to the assessment of future losses of earning capacity in the following cases: Dornan v. Silva, 2021 BCCA 228; Rab v. Prescott, 2021 BCCA 345; and Lo v. Vos, 2021 BCCA 421.

[243] In Rab, the court articulated a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that

could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring - see the discussion in Dornan at paras 93-95.

[244] Addressing the first of those considerations, I am satisfied that as a result of the accident the plaintiff meets all four aspects set out in Brown. She is: (1) less capable overall of earning employment from all types of employment; (2) now a less attractive employee; (3) less able to take advantage of all job opportunities open to her; and (4) less valuable to herself in terms of earning income in a competitive labour market. All of these are evident and flow from my earlier findings of fact.

[245] The next step is to consider whether there is a real and substantial possibility that her accident-related injuries will cause a pecuniary loss in future. I am satisfied this has been met in this case. As I have concluded earlier, the plaintiff has limitations both in what she can do, insofar as she is limited to sedentary or light duty work, and in her tolerance for work. There is a real and substantial possibility these limitations will cause a future pecuniary loss in a similar way as they have done in the more than five years between the accident and the trial.

[246] The third step is to assess the value of that potential future loss, which also requires an assessment of the likelihood it will materialize. On this point, the parties agree that the "loss of capital asset" approach should be used. However, even with that approach the assessment of future loss must be grounded "as much as possible in factual and mathematical anchors": Knapp v. O'Neill, 2017 YKCA 10 at para 17.

[247] I do not consider that this case is one where a loss of future earning capacity is appropriately assessed by using a multiple of annual earnings. As I noted in Goss v. Sull, 2021 BCSC 1853 at para. 191, that approach has its genesis in, and is best suited to, cases involving relatively youthful plaintiffs where there has been no identifiable loss to the time of trial but there is potential for loss at some point in the future: see for example, Pallos v. Insurance Corp. of British Columbia, 1995 CanLII 2871 (B.C.C.A.). Here, the loss is readily identifiable as it has already manifested itself, although it is perhaps not that readily quantified.

[248] One of the many complications in assessing damages for the plaintiff's loss of capacity is that she has chosen to move to a small community where there are far fewer employment options for her. There is no job available to the plaintiff in Hinton similar to the one offered to her by the Elizabeth Fry Society, which was a job the plaintiff felt she was capable of managing on a full time basis, but for the lengthy commute that she was unable to handle.

[249] These various complications lead me to conclude that the plaintiff's methodology is the most appropriate one for this case. The plaintiff utilized the present values (to age 70) of four income scenarios based on levels of academic attainment, then ascribed probabilities to each scenario, and then took an average of the resulting figures. This was said to be the value of the plaintiff's capital asset on a "without accident" basis. The plaintiff then divided that figure by half to reflect what she submitted was the loss of half of her capacity to earn income.

[250] While I agree that this is a useful methodology in this case, I do not agree that two of the four income examples used are appropriate here, those being "social workers with an undergraduate degree in social work" and "Alberta females with social work degrees working in any occupation". Given Ms. Pak's age, history of limited attachment to employment and studies, and her past academic struggles, I do not consider there is a real and substantial likelihood that, but for the accident, she would have completed a four-year degree in social work.

[251] This leaves two of the four income scenarios: (1) full time work at $21 per hour, for which the present value of lifetime earnings to age 70 is about $528,500; and (2) an average income as a community support worker with a diploma, which has a present value of lifetime earnings to age 70 of about $637,500. I weight these in similar fashion to the plaintiff, with the first scenario having 70 percent likelihood and the second a 30 percent likelihood. The resulting weighted average for the present value of lifetime "without accident" earnings is therefore $561,200.

[252] Taking into account the findings of fact I have made, along with the prospects for improvement with proper treatment as described by the medical experts, I conclude the plaintiff's loss of lifetime earning capacity is appropriately assessed at 30 percent. I derive this figure, in a general sense, from my conclusion that the plaintiff is presently capable of working three days each week (60 percent of full time) and by increasing that figure to 70 percent to reflect the both the prospect of improvement and her ability to work more than 60 percent at a narrower range of employment in light or sedentary jobs. Applying that 30 percent loss figure to the "without accident" lifetime earnings figure results in an award for loss of future earning capacity of $168,360, or $168,400, rounded.

G. Cost of Future Care

[253] As for cost of future care, I agree with the recommendations of the medical experts that the plaintiff have both consultations with a psychiatrist and CBT sessions. I do not agree that an award for weekly passive treatments to age 70 is warranted because, based on the plaintiff having stopped passive treatments in late 2018, I expect she will not pursue this form of treatment even if an award is made.

[254] I accept that the plaintiff has also proved to be less than diligent with psychological treatments, but the plaintiff testified she would try again. I expect she will take heed of the clear and pointed recommendations of the medical experts, and so I conclude she is likely to pursue that form of treatment.

[255] Utilizing the figures provided by Dr. Leung, I would allow the sum of $3,382 for private psychiatric services ($538 for the initial consultation and $237 for 12 follow-up visits) and $4,500 for CBT therapy ($225 per session for 20 sessions), as per the recommendations of both Dr. Leung and Dr. Brink.

[256] As for the ergonomic furniture, I agree with the defendants that the need for these aids is not clear given the uncertain nature of the plaintiff's future employment.

[257] The evidence discloses a proven need for ongoing medications. The plaintiff has had little in the way of medication expense to date because her low income level has meant these costs were fully subsidized. The plaintiff acknowledged a difficulty of proof but suggested a "rough and ready" amount of $5,000 for medications. Because the plaintiff's continued eligibility for the subsidy is uncertain, I consider it appropriate that there be some award to reflect this cost. I conclude that $1,500 is adequate here, which reflects the low end of similar awards in other cases, but reduced by half to reflect the uncertainty.

[258] The total award for cost of future care is $9,382.

H. Special Damages

[259] Special damages have been agreed at $1,727.15.

VI. Summary

[260] I assess damages as follows:

Non-pecuniary damages:

$100,000.00

Past loss of capacity (gross):

$51,151.00

Loss of future earning capacity:

$168,400.00

Cost of future care:

$9,382.00

Special damages:

$1,727.15

Total:

$330,660.15

[261] The parties have leave to address any matters necessary to finalize the award.

[262] Costs will be to the plaintiff unless there are matters the parties wish to bring to my attention.

"Blok J."

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Prepared on 30 October 2026 · Esheria