

CANADA / JUDGMENT

Plett v. Davis

2022 BCSC 789

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Supreme Court of British Columbia

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2022 BCSC 789 Plett v. Davis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Plett v. Davis,

2022 BCSC 789

Date: 20220512

Docket: M164266

Registry: New Westminster

Between:

Brenda Plett

Plaintiff

And

Paul Davis and Doreen Lacey

Defendant

- and -

Docket: M185738

Registry: New Westminster

Between:

Brenda Plett

Plaintiff

And

Sharon Beard

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

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Place and Dates of Trial:

Port Coquitlam, B.C.

February 14-18, 22-25, 28, and March 1-4, 7-11, 2022

Place and Date of Judgment:

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May 12, 2022

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Introduction

- [1] The Plaintiff, Brenda Plett, seeks damages for injuries sustained in two motor vehicle accidents: one on September 29, 2011 and the other on May 4, 2016. The defendants admit liability for each. They also accept most of Ms. Plett's injuries but dispute their extent and the severity of their impact.
- [2] In particular, the defence admits Ms. Plett suffered soft-tissue injuries to her neck, shoulder, arm, and back, and that she is suffering from chronic pain as a result. They accept this chronic pain is unlikely to improve significantly and it inhibits her functioning such that she is unable to work full-time. However, they claim she has capacity to work part-time, up to 30 hours a week, doing the type of bookkeeping work she did before the accident. Ms. Plett disputes that.
- [3] The defendants also admit Ms. Plett suffered a Mild Traumatic Brain Injury ("MTBI"), also known as a concussion, as a result of the first accident but dispute the extent to which this injury has impaired her cognitive functioning and its long-term effect. Ms. Plett claims the MTBI caused significant and permanent cognitive impairments that have affected her personal life and left her unable to work as a bookkeeper.
- [4] Ms. Plett also suffers from frequent headaches, fatigue, anxiety and mood disorders, and depression (which is now intermittent). Again, the defendants only dispute the extent and effect of these injuries and not the fact she has sustained them.
- [5] Ms. Plett claims damages for loss of earning capacity (past and future), loss of housekeeping capacity (past and future), cost of future care, and non-pecuniary damages. Special damages in the amount of \$25,909 have been agreed to.

- [6] The style of cause in each of these proceedings originally identified Ms. Plett by her married name, Brenda McKerricher. She has since reverted to her original surname, Plett. At her request I made an order in the course of the trial amending the style of cause in both actions to reflect that.

The Accidents

The First Accident - September 29, 2012

- [7] The first accident occurred at around 6:00 p.m. on September 29, 2012. Ms. Plett was driving her 1992 Nissan Sentra sedan to a charity event. Her friend, Richie van Geeman, was in the passenger seat. They were travelling eastbound in the left lane on 64th Avenue in Surrey approaching 146th Street. Paul Davis, a defendant in the first action, was driving a 1989 Ford Probe southbound on 146th Street. When he reached the intersection at 64th Avenue, he ran a stop sign and attempted a left-hand turn to go west on 64th Avenue. As he did, he pulled in front of Ms. Plett's car causing her to "T-bone" the left side of Mr. Davis' vehicle.
- [8] Ms. Plett was thrown forward. Her head struck the rear-view mirror and, she says, the windshield. The rear-view mirror shattered, leaving glass particles embedded in her forehead. Some of these were removed at the hospital or later by her family doctor. The rest worked themselves out in the weeks and months after the accident.
- [9] There was a significant star-shaped shatter in the windshield immediately behind the rear-view mirror but the windshield did not splinter. The glass particles in Ms. Plett's forehead evidently came from the rear-view mirror.
- [10] The defence suggests the evidence does not establish Mr. Plett hit her head on the windshield. By this I infer them to be arguing that Mr. van Geeman's head that hit and cracked the windshield, but there is no evidence of that. The defence did not call Mr. van Geeman as a witness as they were apparently unable to locate him.
- [11] Given the location of the windshield crack, being immediately behind the rear-view mirror, I infer the crack was caused by Ms. Plett's head. Whether this was through direct contact with the windshield or indirect contact through the rear-view mirror is of no moment. I find Ms. Plett hit her head with enough force to shatter the rear-view mirror and crack the windshield. I am satisfied she sustained a significant blow to the head in the accident. As noted, the defendants concede Ms. Plett suffered a MTBI in the first accident.
- [12] Ms. Plett testified she was wearing her seatbelt but the shoulder strap did not lock on impact. This explains why she was thrown forward. She testified this was "very common" for this car and something she had experienced "often" with that vehicle.
- [13] Despite Ms. Plett knowing of an apparently faulty seatbelt, the defendants have not argued she was contributorily negligent for any of her injuries. The Response to Civil Claim contains boiler-plate pleadings that Ms. Plett failed wear or properly secure and/or adjust her seatbelt. It also contains boiler-plate allegations of contributory negligence. However,

there is no allegation that Ms. Plett was aware of defects in the seatbelt and no specific allegation of contributory negligence arising from this. The defendants have conceded liability for the first accident and, having received no other submission on the point, I conclude the defendants are 100% liable for it.

- [14] Ms. Plett does not recall the impact. She remembers Mr. van Geeman telling her they were going to crash and swerving in an effort to avoid the accident. She has some recollection immediately after the accident, including Mr. van Geeman jumping out of the car, seeing the car smoking, and hearing a "screaming noise" coming from the car before she turned the engine off. She believes an RCMP officer helped her out of the car, though the ambulance attendant's record reports that she got out of the car on her own.
- [15] She does not remember first responders arriving. She recalls sitting on a flower wall at the side of the road next to Mr. van Geeman and being attended by the ambulance crew. She said she almost fell over when she tried to walk. The ambulance crew put her on a gurney, fit her with a neck brace, and strapped her to a flat board before transporting her to the hospital.
- [16] Roberto Griffioen, a paramedic who attended Ms. Plett at the scene, was called to testify by the defence but had no independent recollection of the event. He identified the Patient Care Report he completed at the time and this was tendered as evidence by the defence. I do not find it to be particularly probative of any issue at trial. It records that Ms. Plett suffered no loss of consciousness and notes a full score of 15 on the Glasgow Coma Scale (a test administered to assess impaired consciousness). However, since the defence concedes Ms. Plett suffered a MTBI in the first accident, neither of these observations has any particular relevance. A perfect Glasgow Coma Scale score, assuming it is accurate, does not rule out a concussion, and an altered state consciousness, short of a full loss of consciousness, is sufficient for a MTBI diagnosis.
- [17] I am satisfied from Ms. Plett's intermittent memory of the accident and its immediate aftermath that she experienced at least an altered state of consciousness at the scene, although the defendants' admission that Ms. Plett suffered a MTBI makes this finding unnecessary. Since an altered state of consciousness is necessary for a MTBI diagnosis, the defendants have implicitly admitted Ms. Plett must have experienced at least that.
- [18] Dr. Raymond Ancill is a psychiatrist with particular expertise in, among other things, acquired brain injury. He was called as an expert by the plaintiff. Based on his review of the records and his interview with Ms. Plett, he opined that Ms. Plett did not suffer a loss of consciousness at the scene but did experience an altered state of consciousness. I agree the evidence does not establish Ms. Plett lost consciousness. However, Dr. Ancill also explained that a full loss of consciousness versus an altered state of consciousness does not predict the severity or the outcome of a concussion. He was not cross-examined on this point and I accept it. Thus, whether Ms. Plett experienced an altered state of consciousness or a loss of consciousness at the scene is of no real significance. The relevant question, which I will

address later in these reasons, is what were and are the impacts of the MTBI that all agree Ms. Plett suffered.

- [19] Ms. Plett was taken by ambulance to Royal Columbian Hospital, even though Surrey Memorial and Peace Arch Hospitals are both closer to the accident. There is no direct evidence of why she was taken to Royal Columbian. Mr. Griffioen agreed in cross-examination that the usual practice is to take a patient to the closest hospital but, depending on the seriousness of the injury, they might take a patient to a hospital further away if that hospital is better suited to respond to the type of trauma. As noted, he has no recollection of this event. To the extent that Ms. Plett asks me to make inferences about the severity of her injuries based on which hospital she was taken to, I find the evidence is insufficient to do so.
- [20] Ms. Plett was treated at Royal Columbian Hospital and released in the early hours of September 30, 2011.

The Second Accident - May 4, 2017

- [21] The second accident occurred as Ms. Plett was driving home from a shopping trip. She and her son, William Talley, had been at Costco together but were travelling in separate cars. Ms. Plett was driving a 2003 Saturn Ion sedan east on 64th Avenue in Surrey. She stopped at a red light at 194th Street and was hit from behind by the defendant, Sharon Beard, who was driving a 2008 Nissan Rogue SUV. The collision was significant and Ms. Plett's Saturn was written off.
- [22] Ms. Plett could see Ms. Beard coming in the rear-view mirror and saw she was not going to stop before a collision. She braced herself, pressing down on the brake pedal. She recalls a sudden pain in her knee, shoulder, and neck after the impact.
- [23] Ms. Beard admitted to Ms. Plett at the scene that the brakes in her Nissan were not working. Whether or not that is the case, the defence concedes liability and there is no suggestion of contributory negligence.
- [24] Ms. Plett phoned Mr. Talley from the accident scene. He attended and, after transferring the groceries to his car and securing Ms. Plett's trunk with zip ties (the trunk would not close after the accident) both returned home. No emergency responders were called or attended. Later that evening, Mr. Talley took Ms. Plett to Peace Arch Hospital to get checked out. She was discharged that night.

Credibility and Reliability

- [25] Before I make findings about Ms. Plett's condition and circumstances before and after the accidents, I will say a word about credibility of the lay witnesses since I rely primarily on their evidence for the narrative that follows. I will address the experts' credibility and reliability later in these reasons when I deal with their evidence.

[26] As sated in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, credibility assessments involve the examination of various factors:

such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally

[27] I have no concerns with the credibility of any of the lay witnesses, including Ms. Plett. Their evidence was clear, consistent both internally and with other evidence, thoughtful, and forthright. Two of Ms. Plett's (adult) children, Mr. Talley and her daughter Maralie Toth, testified as to Ms. Plett's condition before and after the accident. I found both to be credible. There were some minor inconsistencies between Mr. Talley's and Ms. Plett's evidence concerning Ms. Plett's abilities to cook and do lighter housework post-accident. In her direct examination, Ms. Plett indicated a somewhat higher level of functioning in this respect than Mr. Talley suggested. However, these differences were relatively minor and, if anything, enhance Ms. Plett's credibility.

[28] Mr. Talley's and Ms. Toth's evidence provides the most thorough source of information about Ms. Plett's condition and circumstances before and after the accident, other than Ms. Plett herself. Neither was seriously challenged in cross-examination.

[29] To the extent it may be said that Ms. Plett's children have some interest in this matter as family members, I find this does not affect their credibility or the reliability of their evidence. Their accounts of Ms. Plett's pre- and post-accident functioning were consistent with the evidence of Susan Sanderson who was Ms. Plett's employer both before and after the accident. They were also consistent with the evidence of Cherri McKechnie who was Ms. Plett's direct supervisor at a job she held after the second accident. Both of these women impressed me as careful, dispassionate, and reliable witnesses who directly interacted with and observed Ms. Plett on a daily basis for long periods of time. To the extent corroboration of Ms. Plett's evidence and that of her children is desirable, it certainly came from these two witnesses.

[30] I also observe that some of Ms. Plett's injuries, particularly as they relate to chronic myofascial pain, are premised on her self-report. There is no objective way to measure that pain, but the defendants acknowledge Ms. Plett suffers from chronic pain as a result of the accident, and only dispute the extent to which it impairs her function. Apart from the defendants' admissions in this respect, I found Ms. Plett's reports of her pain, though subjective, to be both credible and reliable. Her evidence in this respect is largely consistent with her many reports to physicians over the years, subject to some discrepancy regarding improvements in her headaches. She appropriately conceded some points, such as there being no post-accident change in her pre-existing tinnitus condition. Her evidence of the

pain she experiences was not seriously challenged on cross-examination and I substantially accept it.

Ms. Plett Before the Accidents

- [31] Ms. Plett was 55 at the time of trial. She was 44 at the time of the first accident and 49 at the time of the second. She had finished grade 12 in 1985 and completed a bookkeeping and secretarial program in 1994 from Canadian Career College.
- [32] Ms. Plett has four adult children. Ms. Toth was born in 1989, a daughter Andrea was born 1991, Mr. Talley was born 1995, and Mitchell McKerricher was born in 1998. Mr. Talley and Mr. McKerricher currently live with Ms. Plett. Ms. Toth lives in Alberta. She has two children - Ms. Plett's grandchildren - Devon (born 2015) and Joey (born 2016). Ms. Plett is not in contact with her daughter Andrea.
- [33] Ms. Plett grew up in the Lower Mainland. From 2000 to 2003 she lived in California and in 2006 to 2010 she lived in Winnipeg. She has otherwise lived in the Lower Mainland, primarily in Surrey.

Activities

- [34] While living in Winnipeg, Ms. Plett was in a relationship with an avid fisherman and she spent most of her weekends fishing on the Assiniboine or Red Rivers. She stopped fishing after she moved back to British Columbia ("I don't understand B.C. fishing", she said) but was an active walker on easy to moderate hiking trails. She also enjoyed camping and taking road trips with her family and friends.
- [35] Ms. Plett testified she was overweight for most of her adult life, although this did not interfere with the activities she liked to do. While in Winnipeg, she started to become more active, frequently going to the gym with Ms. Toth who was also living in Winnipeg at the time. She did mostly walking exercises, swimming, and some weight lifting. She and Ms. Toth also went for walks and hikes.
- [36] In 2011, when back in Vancouver, Ms. Plett became more focussed on her fitness. She went to the gym at the YMCA with Mr. Talley early each morning before starting work. She did weights and swimming. In 2012 she began running with the objective of participating in a 5-km run held every year at an annual Usana convention she regularly attended in Sault Lake City. She kept something of a journal of her training on Facebook, often posting about her runs and her growing fitness. She completed the run in August 2012, by which time she had dropped a significant amount of weight with her exercise and running regime. As demonstrated in her Facebook posts, she was obviously happy with her advancing fitness and proud of what she was achieving.

Medical Condition

- [37] Ms. Plett had some medical conditions that pre-dated the accidents. She experienced migraine headaches every month or six weeks. She also lived with vertigo which she attributes to a head injury she suffered at age 19 when she struck her head on a marble floor in an act of partner violence committed against her. She said the vertigo was "not bad" at the time of the first accident and that it would be triggered by changes in barometric pressure. She also has experienced tinnitus off and on since she was 19 (also related to the incident of partner violence) and said this has not changed since the accident.
- [38] Ms. Plett suffered from depression before the first accident, sometimes severely, but this was not present in the five years or so before the first accident. By that time she had made substantial changes in her personal life, including her religious and spiritual life, her fitness, and her relationships with at least three of her kids. All of this helped with her depression.

Work History

- [39] After completing her bookkeeping program in 1994, Ms. Plett did a number of bookkeeping contracts for various employers in Metro Vancouver (1997-1999 and 2003-2006), California (2000-2003), and Winnipeg (2006-2010).
- [40] After returning to Metro Vancouver in 2010, she set up "Brenda's Office Services", an unincorporated sole proprietorship she ran out of her home. As she had done in the past, she contracted her services to several different employers.
- [41] In April 2011, she began working on contract for Greybeard Plumbing which was owned by her brother and his business partner. They were just starting the business and hired Ms. Plett to set up and manage the accounting and bookkeeping systems. She also prepared the incorporation documents, established accounting and other software systems including Quickbooks and Microsoft Office, created letterhead and invoices, and did other start-up tasks. Once the business was running, Ms. Plett did all the bookkeeping, payroll, and invoicing.
- [42] In September 2011, Ms. Plett started working part-time for Realistic Success Society, which provides residential recovery services to persons dealing with addiction. Though she was a contractor, Ms. Plett worked on-site at Realistic Success' office. She was given the job in a competitive employment circumstance where others were interviewed and considered for the position.
- [43] Realistic Success was established by Susan Sanderson and her late husband Gary Sanderson. Mr. Sanderson was himself a recovering addict and he had a vision of establishing a recovery house to provide services in a way, based on his own experience, he considered would be beneficial and were not otherwise available. He and Ms. Sanderson devoted themselves to establishing the business. Ms. Sanderson described her own very personal

challenges with this. She is obviously very dedicated to the business and the services it provides.

- [44] Realistic Success is certified by the Ministry of Health. Ms. Sanderson said it was the first private recovery house in British Columbia to be certified after regulations were introduced in 2010 and 2011. As a result of this regulation, and the need to secure a line of credit to support the business, Realistic Success had to set up a new system of bookkeeping.
- [45] Before hiring Ms. Plett, Ms. Sanderson managed the books herself. She said they were poorly organized because she did not understand certain concepts of bookkeeping. She hired Ms. Plett on a contract basis for about 20 hours per week to set up a new bookkeeping system and manage that system once established. To meet the demands of the new regulations and the potential lender, it was important this be done properly and Ms. Plett met the challenge. Once established, Ms. Plett was responsible for managing the payroll, accounts payable and receivable, dealing with cash from clients, and managing the books to satisfy grant providers (mainly a B.C. Lottery Corporation gaming grant) and the lender.
- [46] Ms. Sanderson spoke very highly of Ms. Plett's skills as a bookkeeper prior to the accident. She assessed Ms. Plett as performing very well in the work and said the lender was happy with the company's books. Realistic Success was able to secure the needed line of credit. Ms. Sanderson described Ms. Plett's work and her attitude before the accident as dedicated, prompt, and fine, very much to Ms. Sanderson's satisfaction. She got on very well with others, including the resident clients. Ms. Sanderson has employed four bookkeepers since Ms. Plett left Realistic Success in 2015 and none has been as effective as Ms. Plett was before the first accident.
- [47] As I said earlier, I found Ms. Sanderson to be a very credible and reliable witness. She developed a friendly relationship with Ms. Plett over the years but, apart from following one another on social media, they did not socialize to any significant degree outside the office. They are not close now. They clearly enjoyed one another's company in the office. Despite her fondness for Ms. Plett, I found Ms. Sanderson to be an impartial and trustworthy witness. Her credibility has not been challenged by the defence, rightly so in my view. I accept Ms. Sanderson's evidence, including her observations of Ms. Plett's abilities before the accident, without hesitation.
- [48] In June 2012, Ms. Plett began some association with Usana, an international company that promotes and sells health and wellness products. As I understand it, Usana provides health products and supplements to members who then sell them to others. While Ms. Plett uses some of Usana's products and has participated in its annual conventions in Sault Lake City, she is not active in trying to sell the products and this has never been a significant source of income for her.

- [49] Ms. Plett's tax records prior to the accident show some inconsistency in her earnings, presumably due to the contract nature of her work. It ranged from an annual income in 2008 of \$25,676 (including \$7,545 in EI payments) to \$38,149 in 2009.

Housekeeping

- [50] Before the first accident, Ms. Plett kept a clean house. Ms. Toth testified it was always "spic and span, unless she was living with a guy". (This was a reference to a partner, not Ms. Plett's sons.) Ms. Plett cooked, cleaned, and did laundry for herself.
- [51] On special occasions, Ms. Plett cooked up a storm. By all accounts, Christmas was a big event for Ms. Plett. She decorated her home extensively and typically hosted her extended family for Christmas dinner. She did most if not all the work herself, serving around 10 or more people. Ms. Toth testified there was "always two of everything - turkey and stuffing but also ham". She said Ms. Plett would prepare the dinner largely on her own and without complaint.
- [52] Mr. Talley testified that when he was living with Ms. Plett prior to the accident, she did all the cooking. He spoke fondly of her home-made perogies, which she made several dozen at a time. He and his brother did some of the cleaning but Ms. Plett stepped in to properly clean that which they typically missed. He did not observe her having any trouble with these tasks.

Ms. Plett After the First Accident

Medical Condition

- [53] Ms. Plett testified she felt horrible immediately after the first accident. She said "everything kind of hurt" in the weeks and months after, particularly her legs, back, and neck. This pain continued in the months and years after the accident but improved leading to the second accident.
- [54] Ms. Plett had headaches "pretty much every day" after the first accident. She acknowledged a pre-accident history of migraines, which came on every month or six weeks, but after the accident these became worse, making her throw up. Her daily headaches were different to her pre-accident migraines and emanated from her neck and through her skull. She said they came on like a "vice grip" and intensified when she tried to focus on something. She saw some improvement leading to the second crash but still experienced them every other day or so. She said they interfered with her sleep and made her moody and unpleasant.
- [55] She often felt dizzy after the first accident. She said this was a different than the vertigo she had lived with.

- [56] Emotionally, Ms. Plett became depressed and found herself crying a lot after the first accident. She could not get out of bed and was easily irritated or angered. She spent long hours alone in her room in what Ms. Toth described as a "dark funk." Ms. Toth said the accident "sunk [Ms. Plett's] ship" and nothing positive ever came out of her mouth. Ms. Plett, Mr. Talley, and Ms. Toth described a marked change in Ms. Plett's mental state after the first accident. She became grumpy and easy to irritate.
- [57] Ms. Plett also became forgetful, telling and retelling stories and repeating herself multiple times in a day. Her children gave the nickname "Dory" after the character in the animated children's film "Finding Nemo". Dory was a fish who could not retain memories beyond a few minutes. The nickname was a matter of endearment and a way for the family, including Ms. Plett, to find some levity in her difficult condition. Mr. Talley and Ms. Toth have observed no improvement in Ms. Plett's memory.
- [58] Ms. Plett could not cope with significant light. At home, she kept the blinds low and the home dark. Ms. Toth said visiting her mother "was like sitting in the Batcave." At work, Ms. Sanderson accommodated Ms. Plett by locating her in an office where the lights could be turned off. Mr. Talley testified Ms. Plett was unable to sustain shopping trips to Costco where the lights were too bright. He said Ms. Plett needed to leave after half an hour or so and he would finish the shopping.
- [59] Ms. Plett's vertigo came on somewhat more often after the accident. She said she did not experience it in the summer (before or after the accident) but following the accident could come on in the winter for a month at a time.
- [60] Ms. Plett has struggled with sleep since the first accident. She could not shut her mind down at night. Stress and depression kept her awake, as did her headaches and the pain in her back and neck. She cannot recall ever sleeping through the night since the first accident.

Physical Activities

- [61] In the immediate aftermath of the accident, Ms. Plett ceased her physical activity and fitness pursuits due to her injuries. She did not return to regular running. After some time, she resumed less strenuous physical exercise such as walking and easy or moderate hikes. She eventually returned to the gym though her regiment was less intensive than before the accident. In August 2012 she went to the annual Usana convention in Sault Lake City where she walked (but did not run) the 5 km run. Mr. Talley, who accompanied her on the trip, testified she managed to complete the walk though not at a fast pace and she soaked in the hotel's hot tub afterwards.

Employment

- [62] Ms. Plett did not go back to work in the week following the accident. When she tried to go back after that week, she could not sustain her prior workload. She was unable to concentrate and was forgetful of what she was doing. She could not multitask. If she was interrupted in the middle of a task, she would need to restart it from the beginning once she got back to it.
- [63] Ms. Plett lost her contract with Greybeard Plumbing soon after the accident. Apart from her challenges with memory and concentration, she was unable to work out of her brother's home office because she could not cope with the lighting. Her brother eventually told her he needed to have someone full-time in the office to do the bookkeeping work and he let Ms. Plett go. I accept Ms. Plett's explanation for being let go from this job and find that she lost the job because of physical and cognitive problems that impaired her ability to attend and perform at the job.
- [64] When Ms. Plett attempted to return to Realistic Success, Ms. Sanderson sent her home because she did not look well. She continued to pay Ms. Plett as though she was an employee and not a contractor. Ms. Plett and Ms. Sanderson kept track of the hours Ms. Plett owed to Realistic Success and Ms. Plett eventually worked them off by adding some time to the beginning or end of an ordinary work day.
- [65] Ms. Sanderson said that over the first few months following the accident, Ms. Plett struggled with headaches and the light in her office bothered her. She wore a cap to keep out the brightness, something she had not done before the accident. She said Ms. Plett did not laugh or smile after the accident as she did before, and her physical bearing was different - more "hunched" and "into herself". She was less social at work and less patient with other people.
- [66] Ms. Sanderson testified the quality of Ms. Plett's work diminished markedly after the first accident. She took longer in completing tasks and made mistakes in the bookkeeping work she had been "very sharp" on before the accident. Ms. Sanderson had to review and correct Ms. Plett's work which is not something she ever needed to do before. She said Ms. Plett could not remember verbal instructions and Ms. Sanderson resorted to writing out instructions for Ms. Plett, again something she did not need to do pre-accident. Ms. Sanderson observed Ms. Plett's energy level to be lower and she was easily fatigued. Emotionally, Ms. Sanderson observed that Ms. Plett was upset and frustrated by her inability to perform at her pre-accident work levels and, on more than one occasion, Ms. Sanderson sent Ms. Plett home as she was unable to cope.
- [67] Tragically, in 2013, Gary Sanderson died suddenly at home after returning from playing hockey. As a result, Ms. Sanderson herself became very depressed and angry. She said she lost patience for many things, including Ms. Plett and, despite her fondness for her, the two fought often in the workplace. Things improved after a while as Ms. Sanderson learned to cope with her personal tragedy. Ms. Plett also started to make fewer mistakes and seemed less angry, though she never returned to her pre-accident level of performance. She was still

fatigued and struggled with her new limitations. Socially, Ms. Sanderson said Ms. Plett was "better, but never the same".

- [68] Ms. Sanderson is an extraordinarily caring person. When asked why she kept Ms. Plett on as a contract bookkeeper when her performance deteriorated post-accident, Ms. Sanderson said it is her duty as an employer to accommodate an employee with disabilities. When it was put to her that Ms. Plett was a contractor and not an employee, Ms. Sanderson said the legal distinction does not matter to her. Compassion is Realistic Success' *raison d'être*. Its business is to help people struggling with trauma. Ms. Sanderson said, "[Ms. Plett] was part of our family. You help them, support them, try to make their life better."
- [69] I find that Ms. Sanderson and Realistic Success was an extraordinary employer and it is unlikely a more conventional contract employer would have gone to similar lengths to accommodate Ms. Plett's condition and tolerate the difficulties she was having and the mistakes she was making at work, post-accident.
- [70] Ms. Plett left Realistic Success in June or July 2015 by her own choice. Ms. Plett attributed this to the conflict that had arisen with Ms. Sanderson after Gary Sanderson's death. However, Ms. Sanderson recalls things differently. She testified their inter-personal conflict had improved and Ms. Plett left because Realistic Success could not afford to offer Ms. Plett more hours that she was seeking. In June 2015, Ms. Plett started part-time work as a bookkeeper with a trucking company called G-Direct Freight. By July 2015 this was to evolve into full-time work. As Ms. Sanderson observed, with full-time hours on the offer, it made sense for Ms. Plett to leave.
- [71] It therefore cannot be said that Ms. Plett lost her job with Realistic Success because of the accident. However, I find as a fact that it was Ms. Sanderson's unique compassion that enabled Ms. Plett to remain in that job for as long as she did. Dr. Dean Powers, a Vocational Rehabilitation Consultant called as an expert by Ms. Plett, stated that, in his experience, the level of support offered by Ms. Sanderson is atypical of employers in the open labour market. I accept that evidence.
- [72] Ms. Sanderson testified that if Ms. Plett applied for the bookkeeping job at Realistic Success today, she (reluctantly) would not hire her, knowing what she does of her performance after the accident. She said the job has become more complicated with more grants to keep track of that require detailed accounting and large spreadsheets. Ms. Sanderson was confident the pre-accident Ms. Plett could have handled this more complicated work, but not the post-accident Ms. Plett.
- [73] As I have said, I accept Ms. Sanderson's evidence without qualification.
- [74] In November 2014, before leaving Realistic Success, Ms. Plett began working on contract as an assistant to the bookkeeper for Youth for Christ in Surrey doing data entry work. However, she was let go from the organization in July 2014. She was told by the human resources manager that the accuracy of her work could not be trusted.

- [75] As mentioned, Ms. Plett started at G-Direct Freight in June 2015 and transitioned to full-time by July 2015. She was let go from that position in November 2015. Ms. Plett testified she had not done bookkeeping for a trucking company before so she had lots to learn, but she could not remember some of the basic bookkeeping skills and practices she had been trained in that would provide a foundation for learning this new job. She said she was making a lot of mistakes and was eventually let go.
- [76] The defence questions whether Ms. Plett was let go for this reason, but there is no evidence to the contrary. Counsel for the defendants advised they were unsuccessful in efforts to speak with Ms. Plett's supervisor at G-Direct and he did not respond to a subpoena. Counsel did not pursue a warrant to compel his attendance at trial. I have no reason to question Ms. Plett's evidence that she considers her performance at the job to be substandard and, on this basis, likely the reason for losing it. This is consistent with other evidence of her post-accident abilities, including Ms. Sanderson's and, as I will discuss, Cherri McKechnie's. While the specific nature of the trucking business was new to Ms. Plett, the work was bookkeeping and Ms. Plett had done that type of work for many different businesses before the accident. I am satisfied that, pre-accident, she had the ability to adapt to different types of workplaces and I accept her evidence that her inability to remember aspects of her basic bookkeeping training, along with the other cognitive and physical challenges that were manifest while working at Realistic Success, were major factors in her inability to perform at G-Direct Trucking.
- [77] It is notable that Dr. Powers, the plaintiff's expert vocational consultant, produced a report while Ms. Plett was transitioning to G-Direct in which he predicted a real potential for this very outcome:

At the time of my vocational assessment, Ms. [Plett] was transitioning into full time employment with a new employer [G Direct] who was unaware of her medical condition. I find this happens often when persons with a disability hide their medical condition and restrictions in order to access a job hoping for the best outcome. Ms. [Plett] attempted full time hours resulting in increased neck and right shoulder pain symptoms, headaches, and fatigue. Ms. [Plett] identified issues with concentration multi-tasking, memory, word finding and alertness while on and off the job. The results of vocational testing have suggested diminished short-term memory and working memory, which together impact fundamental processes in occupations that work with numbers such as bookkeeping. The results of a mood inventory administered during my assessment indicated Ms. [Plett] is experiencing moderately elevated symptoms of depression, which will likely also affect memory.

I am guarded Ms. [Plett] has the functional strength and stamina to sustain beyond part time (i.e., up to 20 hours per week) gainful employment. Her ability to sustain full time employment for the foreseeable future is tenuous in my opinion. I am concerned that without jobsite accommodations that assist in regulating pain and fatigue, her work performance and accuracy will likely be unreliable.

[Emphasis added.]

It was after Dr. Powers has prepared this report that Ms. Plett was let by G-Direct.

Housekeeping

- [78] Following the first accident, Mr. Talley and Mr. McKechnie took on more of the household responsibilities. Mr. Talley testified he and his brother "did everything" including cooking and cleaning.
- [79] At Christmas in 2012, the first after the accident, Mr. Talley and Mr. McKerricher took over the cooking under Ms. Plett's direction. Mr. Talley also testified that decorations in the home were uncharacteristically sparse. In previous years, Ms. Plett went to great lengths to decorate the home for Christmas but was not able to in 2012 (or subsequent years).

Ms. Plett Before the Second Accident

- [80] In the months before the second crash, Ms. Plett had seen some improvement in her physical condition. She was less fatigued, was able to focus better on conversations, and she had returned to some of her pre-accident physical activity including some light weights, swimming and walking. She started losing weight again and her sleep improved, something she attributes to her return to physical activity. She had started cooking again and Mr. Talley observed no physical limitations in her doing so. The only area where her family members (Ms. Toth and Mr. Talley) saw no improvement was with memory and confusion.

Ms. Plett After the Second Accident

- [81] The second accident occurred on May 4, 2016. At the scene of the accident, Mr. Talley observed Ms. Plett to be shaking and very angry. He could not say whether this was related to her anger or a physical response to the accident. Ms. Plett was able to drive her car immediately after the second accident but ICBC later wrote it off.

Medical Condition and Physical Activity

- [82] The second accident largely exacerbated the same injuries from the first and was a major setback to Ms. Plett's progress. She also sustained a new injury to her ankle.
- [83] In the following weeks and months, Ms. Plett had trouble lifting objects over her head or reaching pots and pans from higher shelves. She stopped going to the gym again and was walking less. She was unable to manage long shopping trips and could not carry laundry to the laundromat.
- [84] The pain in her right shoulder and neck intensified and her sleep again became poor. Her back pain, which had improved with better conditioning before the second accident, returned and became worse.

- [85] Ms. Toth said Ms. Plett's problems with memory and confusion worsened after the second accident.
- [86] Ms. Plett's mood took another downturn. She again isolated herself in her bedroom writing and not interacting with her sons. Ms. Toth said her mother returned to her morose state and the only thing that seemed to give her joy was visiting with her grandsons (Ms. Toth's children). However, Ms. Plett's physical limitations affected her relationship with them. As she recovered from the first accident, Ms. Plett was able to spend time with her grandson, Devon. She played with him, picked him up, and babysat him. However, after the second accident, and the birth of her second grandson, she could not do these things. Ms. Toth felt it was unsafe to leave her kids with Ms. Plett due to her physical limitations so, with regret, she no longer allowed Ms. Plett to babysit. Ms. Plett understood her daughter's concern and was very upset about missing out on this opportunity due to her limitations.

Harley-Davidson Purchase

- [87] In 2019, Ms. Plett bought a Harley-Davidson Softail Classic motorcycle with some financial help from a friend. She had been deeply interested in motorcycles and the biking culture for much of her adult life and was thrilled to finally get a bike of her own. She enrolled in riding classes to learn to ride safely and prepare to take her motorcycle licence test. She obtained her licence in 2019 and, since then, riding has been a great joy in her life.
- [88] When she bought the bike, the dealership made a number of adjustments to it to accommodate Ms. Plett's physical limitations. The handlebars were adjusted to sit closer to her. The clutch and shifter were also adjusted to better accommodate her. She upgraded to a more comfortable seat, and Mr. Talley reversed the highway pegs so that her legs sat more comfortably when she was riding. Ms. Plett testified the adjustments allow her to ride the bike in comfort without aggravating her injuries and she gets great pleasure doing so.
- [89] Dr. Kim Waspe, Ms. Plett's treating physiatrist, inspected the bike and Ms. Plett while sitting on it. In her opinion, the modifications accommodated Ms. Plett's arm and neck pain by giving her arms better positioning than a car would provide. She said Ms. Plett's arms sat more relaxed and further apart on the modified bike than they would if she was driving a car.
- [90] Riding her motorcycle is a release for Ms. Plett. She is a member of several riding groups, and these get her out of the house and socializing with others. Mr. Talley spoke positively of his mother's riding because it gets her "out there" and she is not hiding in her room.

Employment

- [91] In September 2019, Ms. Plett was given a part-time job at Barnes Harley-Davidson in Langley where she had bought her bike. Barnes needed a part-time receptionist and a friend of Ms. Plett's put her in touch with Cherri McKechnie, the Controller at Barnes. Ms. McKechnie met with Ms. Plett and decided to try her out at the reception job. She did not receive or ask for a

C.V. and she did not interview other candidates. It was a serendipitous connection and, since Ms. McKechnie needed someone right away and was impressed with Ms. Plett's presentation and attitude, she hired her to work two days a week as the receptionist. As Ms. McKechnie stated in cross-examination, Ms. Plett was "in the right place at the right time".

- [92] Ms. Plett was forthright with Ms. McKechnie about her accident injuries. She explained she had suffered a brain injury in the accident and did not know what her abilities might be to perform the job. Ms. McKechnie appreciated Ms. Plett's candour and was sympathetic to her condition, in part because her uncle had also suffered a brain injury after being struck by a car while riding a motorcycle. She told Ms. Plett they would take things day-to-day and assess her abilities as they went.
- [93] Over time, Ms. McKechnie increased Ms. Plett's hours at Ms. Plett's request. She got up to four days a week but Ms. McKechnie observed Ms. Plett struggled with that and appeared to be in pain. With the assistance of ICBC, she was provided with some ergonomic accommodation which helped.
- [94] Ms. McKechnie could see that Ms. Plett was capable of handling the reception work so she gave her some basic filing and data-entry tasks to try out. Ms. McKechnie said Ms. Plett's performance on the data-entry task was good, though the work was repetitive and required little thinking. She also said that, unlike other receptionists who had worked at Barnes, Ms. Plett was not able to do the data-entry work concurrently with the reception duties. She had to take time away from the reception desk to do the data-entry work. Ms. McKechnie testified that Ms. Plett's inability to multi-task was pervasive throughout her time at Barnes. When Ms. Plett tried to take on too many tasks, she made errors.
- [95] Ms. McKechnie also trained Ms. Plett to do deposits and bank reconciliations and later accounts receivable work. To perform this work, Ms. Plett had to write out every step and went over the steps with Ms. McKechnie multiple times to ensure she would perform it correctly. Ms. McKechnie said if Ms. Plett failed to follow the written directions, she made mistakes. Verbal instructions were insufficient. It took some six months before Ms. Plett did not need to rely so heavily on her written notes. These tasks were ones that Ms. Plett performed as a matter of course in her pre-accident bookkeeping work without written aids.
- [96] Ms. McKechnie had to closely supervise Ms. Plett's work and assist her in remembering the processes she was to follow. If Ms. McKechnie was unavailable to help at a particular time, and Ms. Plett attempted a task in a manner she thought was appropriate, Ms. McKechnie would need to review and usually correct the work. Despite this, Ms. Plett was eager to take on more work but Ms. McKechnie had to remind her that she was making mistakes in her existing tasks and needed to stay focused on the work she was given.
- [97] With the increase in Ms. Plett's tasks and hours, Ms. McKechnie observed she became tired more easily. She reported headaches to Ms. McKechnie more frequently and it was not unusual for Ms. Plett to be unable to finish the day's work.

- [98] The defendants put in evidence a very positive work performance evaluation that Ms. McKechnie did of Ms. Plett. They suggest the evaluation shows Ms. Plett's abilities to be greater than Ms. Plett's or Ms. McKechnie's testimony would suggest. However, this evaluation was done only 90 days after Ms. Plett started at Barnes when she was doing only reception and data-entry work. She had only just started to take on some of the accounting work. I find this evaluation is of little assistance, other than to shed some light on Ms. Plett's abilities at the time for the reception work. I find Ms. McKechnie's evidence, based on her almost two-years' experience supervising Ms. Plett, to be much more informative.
- [99] In 2021 Barnes reorganized its internal management. It acquired another dealership in Edmonton and consolidated its accounting work under the direction of a financial controller in that new dealership. As a result, Ms. McKechnie's position became redundant and she was let go in July 2021. Ms. Plett's position also became redundant and she was let go on October 8, 2021.
- [100] Trevor Barnes is one of the owners of Barnes Harley-Davidson. He was called as a witness by the defence. He testified that Ms. Plett was let go because of the reorganization and not because of her abilities. However, Mr. Barnes did not supervise Ms. Plett directly. In fact, his management approach is to leave the supervision of non-management employees to the various departmental heads. He confirmed Ms. McKechnie was responsible for the general and day-to-day supervision of Ms. Plett and he had little direct knowledge of her specific work performance. Thus, Mr. Barnes' evidence, though sincere and trustworthy, provides little insight into Ms. Plett's ability to manage the day-to-day tasks of a bookkeeping-type job. In this respect, Ms. McKechnie's evidence is far more probative and informative of Ms. Plett's abilities to perform at Barnes.
- [101] Like Ms. Sanderson, I find Ms. McKechnie was a particularly compassionate and accommodating supervisor. She was a forthright and reliable witness whose credibility was not challenged. It is clear she has a fondness for Ms. Plett and they were friendly in the workplace and, to some degree, outside of work. They had personal conversations after work and shared religious views. They occasionally went out for dinner or coffee while Ms. McKechnie was still at Barnes but much less so now. Whether it was out of her fondness for Ms. Plett, empathy for persons who have suffered head injuries, Ms. Plett's positive attitude towards the work, or some combination of these, I find that Ms. McKechnie went out of her way to assist and support Ms. Plett in trying to help her succeed at Barnes. In this respect, Dr. Powers' opinion that Ms. Sanderson was an atypical employer can also be said of Ms. McKechnie.

Ovarian Surgery

- [102] In August 2016, Ms. Plett had major surgery to remove an ovarian cyst. Ms. Plett acknowledged in cross-examination that the surgery was more complex than doctors had anticipated and she was advised by one of the physicians that it was an extraordinarily difficult procedure with some unexpected complications. Her family doctor, Dr. John

Stockburger, opined this surgery likely contributed to depressive illness at the time. He said the recovery time is typically several months, though he rejected the defendants' suggestion that recovery would be six to 12 months. I find that Ms. Plett has downplayed her recovery time from the surgery and I find it likely took her at least three months to recover, based on Dr. Stockburger's opinion.

Housekeeping

- [103] Ms. Plett has struggled with housework since both accidents but particularly after the second. Mr. Talley did all the cooking after the second accident. Ms. Plett could not vacuum or do other cleaning tasks, which she left to Mr. Talley and Mr. McKerricher. Mr. Talley said the home started to get messy. He was working at the time and had less time to clean.
- [104] In 2016, Ms. Plett moved to a basement suite in East Newton with her two sons. There are no laundry facilities in the suite so the family had to take their laundry to a laundromat. After the second accident Mr. Talley and Mr. Mitchell did all the laundry, although Ms. Plett went with them to the laundromat for company.
- [105] She has seen improvement in this area and, as discussed below, Jerica Ditson, an expert occupational therapist called by the plaintiff, opines Ms. Plett has the physical capacity to do light housework and cleaning.

Ms. Plett Today

- [106] Ms. Plett continues to live with the physical pain she suffered in the accident, including her neck, back, shoulder, and headaches. She is unable to lift objects like a jug of milk or a full kettle. She can do some light housework but does so with pain. She leaves the heavier work to her sons. She said she is now able to manage cooking but sometimes needs to "tag out" and have one of her sons finish the meal preparation. She said she has the physical capacity to bake and make perogies but cannot remember the recipes she knew very well before the first accident and loses count of measurements as she is baking.
- [107] Her back, neck, and shoulder pain has persisted and not improved since the second accident. She experiences pain in her right arm and shoulder when using them, including to shower and wash her hair. It hurts to bend over to shave her legs. Her lower back hurts when she stands to do dishes and she finds anti-fatigue mats provided by ICBC do not assist.
- [108] She has taken prescription pain medications off and on but says her ability to sustain these is limited by her financial circumstances. In 2019 she reported to Dr. Waspe that she was feeling "1 million percent better" than the previous year, which was mostly related to her depressed mood, although she has also seen some improvements in her pain since the second accident. She also reported improvement in her headaches with medication, but she was not consistent in taking that medication. The reason for this was not entirely clear, though it appears to have at least some relationship to the cost of prescription medications.

- [109] Mr. Talley testified that Ms. Plett's physical condition is somewhat better now than immediately after the second accident. He said she is adapting well to her circumstances. She is cautious when going on shopping trips, bringing a cane in the car to assist with walking when and if she needs it. She is physically unable to withstand larger shopping trips and waiting in line at the cashier.
- [110] Her headaches are still frequent, though they "come and go". She continues to experience dizziness two or three times a week or sometimes more. She said it happens frequently enough that she is meticulous in her movements. Moving too quickly brings on the dizziness, although she does not experience it when riding her bike.
- [111] She testified her tinnitus is unchanged from before the first accident but at night she often hears the sound of a "freight train" in her head and sleeps with white noise to distract from it. None of the experts equated this sound with tinnitus, which is more of a ringing in the ear. Nor could they explain what was causing it.
- [112] She has trouble coping with noise like music, noise in a mall or restaurant, or even in a large church with lots of people.
- [113] She continues to be sensitive to light. She acknowledged that all her family members experience light sensitivity to a certain degree but, for her, it became much worse after the first accident. Fluorescent lights still bother her today. She still wears a brimmed hat to keep light out of her eyes and keeps the blinds low in her home.
- [114] Her mood continues to be unstable. She is pleasant around the home but short-tempered and easily irritated, especially when she is unable to do or remember something. She works at keeping her mood in check in an effort to be fair to her sons. She said it would not be fair to lash out at them just because she is in pain. She said her depression has subsided and she is not experiencing it now.
- [115] Her sleep is still poor, now largely because of the physical pain in her shoulder, neck, and hip, as well as her headaches. She said sleep is not restorative and she gets no joy by going to bed.
- [116] She is an anxious driver, although she does not experience this on her bike. For a time, she drove a substantial truck which gave her more comfort but says she otherwise feels anxious driving, particularly in the city. However, she has taken several extended road trips since both accidents, including to California and Oregon and thus appears to be coping to some extent with this anxiety.
- [117] Her difficulties with memory and concentration are largely unchanged from the first accident. She finds her thinking is foggy and has trouble following conversations. She still experiences short-term memory problems, as confirmed by Mr. Talley and Ms. Toth. She sometimes serves as a route captain for a motorcycle group called Langley HOGs (Harley Owners Group). She must plan out a route for the group's rides, follow the route and, with the assistance of a sweep, keep track of the riders. Sometimes she will forget the route and

where she is. When this happens, she must pull over and get her bearings. Another member of the group, Ross Dayton, who suffered a severe brain injury when he was young, confirmed this in his evidence and described how he is supportive of Ms. Plett when this happens. Given his experience with a brain injury, he understands and is empathetic to Ms. Plett's problems with memory loss and confusion. At the time of trial, he had known Ms. Plett for about a year and said there had been at least two and perhaps three instances of her losing track of their location since he has known her.

[118] The defendants argue Ms. Plett's role as a route captain in Langley HOGs suggests she has good cognitive abilities. However, apart from keeping track of the route, the task as Ms. Plett described it is fairly simple. She said once the leader and the sweep (who remains at the back of the group) are established, it is pretty much "follow the leader". Individual riders are to advise the captain if they are going to leave the ride but they are ultimately responsible for themselves. The most challenging part as captain is to follow the route and that is where she has had difficulties.

The Medical and Expert Evidence and Causation

[119] The defendants acknowledge Ms. Plett has suffered most of the injuries described above but dispute their extent and effect. With only a few exceptions, discussed below, they do not dispute these injuries were caused by the accidents, although they argue some conditions, like depression, migraines, and tinnitus, were pre-existing, and others, like her hip pain, are not accident related. I will address and make findings on these causation issues as I discuss the medical and expert evidence.

MTBI

[120] I find that Ms. Plett suffered a MTBI as a result of the first accident, which is conceded by the defendants. It is also the opinion of:

- Dr. Kim Waspe, Ms. Plett's treating psychiatrist who was specifically qualified by consent to give opinion evidence on matters that include musculoskeletal and neurological injuries and traumatic brain injuries;
- Dr. Raymond Ancill, a psychiatrist who was qualified by consent as having special expertise in the psychiatric consequences of trauma, injuries to the brain, chronic pain, and mood and anxiety disorders. Dr. Ancill's clinical practice focuses on treating patients with degenerative brain disorders, acquired brain injuries, PTSD, and chronic pain syndromes.
- Dr. John Stockburger, Ms. Plett's family doctor who saw her most frequently of all the medical experts.

[121] Dr. Waspe opines that the blow Ms. Plett took to her head in the first accident, coupled with the fact her body and head would have rotated as she was propelled forward, likely caused the concussion.

- [122] Dr. Stockburger has been Ms. Plett's family doctor since just after the first accident. In his first report, dated December 8, 2015 (before the second accident), he opined Ms. Plett suffered "severe concussion/post-concussion syndrome" leading to severe headaches, vertigo with upward gaze, severe fatigue, difficulties with focus and concentration, and some cognitive difficulties."
- [123] Dr. Ancill opines that Ms. Plett presents with a persistent post-concussion syndrome as supported by her report of fatigue, sensitivity to light, being physically slower, feeling in a mental fog, problems with concentration and memory, irritability, having tinnitus, and problems with decision-making and multi-tasking. I note Ms. Plett's tinnitus is a pre-existing condition and she testified she saw no change with it after the accidents. However, Dr. Ancill was not questioned on whether his opinion would change if tinnitus was singled out as a pre-existing and unchanged condition. In the absence of cross-examination on this point and in light of the many other indicators of post-concussion syndrome identified by Dr. Ancill, I accept his opinion in this respect.

Chronic Pain

- [124] I find as a fact, and it was not disputed, that Ms. Plett suffers chronic pain in her neck, shoulder, and back as a result of the accidents.
- [125] Dr. Waspe diagnosed Ms. Plett with chronic mechanical and soft tissue pain involving the neck and back and "whiplash associated disorder grade 3" (grade 3 meaning the whiplash involves neurological issues). She opines these were likely caused by the accident:
- Ms. Plett was involved in a tangential left sided impact in 2012 propelling her forward and tangentially into her rear-view mirror. This more likely than not resulted in not only the linear acceleration deceleration moment responsible for muscular whiplash but also a torsional component.
- [126] She opined that the second accident worsened the soft-tissue injury and, given the passage of time with only limited improvement, Ms. Plett's pain has become chronic. I accept her opinions.
- [127] In his 2015 report, Dr. Stockburger diagnosed Ms. Plett with soft-tissue injuries to the back and neck, a right knee contusion and a right shoulder sprain. In his 2017 report, which followed the second accident, he opines she suffered soft-tissue injuries to her neck, back, and pelvic area (which he presumed exacerbated an existing condition). He states the lasting myofascial pain associated with these injuries is likely chronic. He confirms this again in his final report dated March 17, 2020.
- [128] Dr. Stockburger opines that Ms. Plett suffered a probable sprain of the right ankle, which was a new injury after the second accident, with persistent pain that flares up but is not functionally limiting in most respects.

- [129] Dr. Waspe opined Ms. Plett's injuries have likely resulted in central sensitization and wind-up phenomenon, meaning her nerves have been permanently altered to send pain signals to the brain even when no physiological pain stimulus is present. This explains why the pain has become chronic. Dr. Ancill described the same phenomenon in his report, and Dr. Stockburger agreed Ms. Plett's condition "appears to have an element of central sensitization". None of this was significantly challenged by the defendants and I accept it.
- [130] Dr. Waspe also diagnosed chronic hip pain but was unable to opine that it was caused by the accident. She notes that Ms. Plett's complaints of hip pain only began to appear in the clinical records in 2015 and, in her opinion, it may be degenerative. She states: "the mechanism of impact in her initial 2012 subject accident was less likely to be a primary trigger for lateral bilateral hip complaints." I accept Dr. Waspe's opinion and find Ms. Plett has not proven that her hip pain was caused by the accident.
- [131] Dr. Ancill opines Ms. Plett suffers from chronic pain with a diagnosis of Somatic Symptom Disorder with predominant pain, which is a chronic psychiatric disorder with neurophysiological and neurochemical pathology. He states the effect of this is that Ms. Plett tries to ignore her pain but is not successful. She then becomes distressed. In this regard, he states her pain interferes with all aspects of her functioning. I accept this opinion. It is also the opinion of Dr. Jeanne LeBlanc, a psychologist called as an expert by the defendants.
- [132] The defendants' expert evidence supports the finding of chronic pain. Dr. Stephen Helper is a physiatrist called as an expert by the defendants. He conducted two independent medical examinations of Ms. Plett and provided two reports. He diagnosed Ms. Plett with chronic soft tissue mediated pain in her neck, shoulder, arm, and hip. He said she demonstrates broad distribution of pain in the cervical spine, upper back, and shoulder region bilaterally. He identified right knee pain which he diagnosed as patellofemoral joint pain. He also identified right ankle pain that he opined was non-specific but could be attributed to an underlying mechanical injury. He reported in 2021 that while Ms. Plett's pain was unchanged from his previous exam in 2017, the symptoms were less severe and some improvements were shown.
- [133] Dr. Helper opined that Ms. Plett's "collection of musculoskeletal complaints" is primarily attributable to the first accident and aggravated by the second. However, he opines her right ankle complaints are unlikely the result of the second accident, though acknowledges it as a possibility. Dr. Stockburger noted her ankle pain "has not been functionally limiting in most respects, but it does flare up if she has to have her foot in a similar position for many hours." He opines it originated with a sprain caused by the second accident as it is "consistent with the kind of collision in which she was involved".

- [134] Given the timing of the injury and Dr. Stockburger's opinion, I am satisfied Ms. Plett's ankle pain was likely caused by the second accident, probably from the force of having pressed her right foot on the brake pedal to brace for the foreseen impact. However, as Dr. Stockburger states, I find it has not been functionally limiting in most respects.
- [135] Dr. Helper opined that a full resolution of Ms. Plett's neck, shoulder, arm, and hip pain is poor and he does not expect significant improvement, even with formal rehabilitation. He initially (in 2017) thought there was a good prognosis for recovery of her knee with rehabilitation treatment but, with a lack of improvement to 2021, he was less optimistic and opined she will likely have knee pain for the foreseeable future.
- [136] Despite the chronic nature of Ms. Plett's pain, Dr. Helper observed that, by 2021, she was managing to cope with it better, noting a greatly improved mood which he attributed to improving her social network through her riding clubs and her positive work experience at Barnes Harley-Davidson. He suggested a course of treatment such as kinesiology and physical rehabilitation on the shoulder might show some improvement but he explained in his direct examination that it would be "difficult" to say she could get better. He said working on conditioning could help, and he would never discourage a patient from doing so, but that hope does not alter his prognosis for recovery being poor.
- [137] In cross-examination, Dr. Helper added that with pain, it is important to get treatment early and thoroughly. He said for some injuries, "the longer you wait the higher the mountain to climb." In his opinion, while Ms. Plett's compliance with treatment was not perfect, it was "good enough" and "reasonable within an average range." In his opinion, most people do not pursue treatment with the tenacity of a physiatrist who plays multiple sports (describing himself). I agree with Dr. Helper that a standard of perfection is not required or expected.
- [138] Before leaving Dr. Helper's evidence, I feel compelled to comment on the format of his 2021 expert report. Dr. Helper produced two reports: one in 2017 based on an examination of Ms. Plett that year and a second in 2021 based on a second examination. To his credit, Dr. Helper amalgamated all the relevant content of his 2017 report into his 2021 report so the Court only had to refer to the 2021 report. Unfortunately, this practice is rare amongst experts in cases of this nature, yet it makes the work of the Court and the parties much more efficient. I commend Dr. Helper for taking this approach and suggest that others should be encouraged to follow his example.

Headaches

- [139] Dr. Waspe opines that Ms. Plett suffered tension headaches as a result of the accident and "migrainous auras" which Dr. Waspe described as "quite debilitating". She opined that Ms. Plett experienced a marked increase in headache phenomenon after the first accident and the second aggravated their frequency and intensity. There are treatments and medications that help to prevent a headache with the onset of an aura but Dr. Waspe states that "for a number of reasons financial, personal preference and negligence Ms. Plett was unable to

comply with prophylactic or abortive measures".

- [140] Dr. Ancill opines that Ms. Plett suffered from post-traumatic headaches, which he says are common after a significant concussive injury and challenging to treat.
- [141] Dr. Stockburger reported Ms. Plett's headaches from the first accident had substantially resolved just before the second but returned afterwards with more intensity.
- [142] I accept these opinions as well as Ms. Plett's evidence of the headaches she continues to experience.

Mood and Depression

- [143] Dr. Stockburger opines in his first report (2015) that Ms. Plett suffered "depressive illness" post accident that waxed and waned but persisted to some extent as of the date of that report. He opines this is likely a consequence of the concussion as well as financial difficulties. He opined that her "depressive illness" has become "more prominent" since the second accident, though he suggests her 2016 surgery, which he says was difficult both physically and emotionally, may have indirectly contributed to her depressive illness.
- [144] Dr. Ancill noted Ms. Plett had a pre-accident history of depression but opined, based on her report and his discussion with her son, Mr. McKerricher, that she was not depressed or on anti-depressants at the time of the first accident. Dr. Ancill noted reports of an "unstable mood" throughout Ms. Plett's clinical records but opined she was not significantly depressed at the time his examination (2019). He opines, though, that the MTBI renders Ms. Plett "significantly more vulnerable to the emergence and persistence of mood disorder for the longer term."
- [145] Dr. Ancill opines Ms. Plett does not suffer from post-traumatic stress disorder but meets the criteria for a diagnosis of an "Adjustment Disorder - Anxiety with an enduring stressor (driving and traffic)". This diagnosis was specific to driving. He recommends a sustained treatment with medication with cognitive behaviour therapy once she shows a response to medications. He notes, though, that anxiety associated with chronic pain, such as in this case, is challenging to treat and prone to relapses of the pain persists.
- [146] I accept Ms. Plett experienced depression and certainly anxiety which waxed and waned after the accidents. I find the depression was severe in the months that followed each accident but much improved by 2019. It has not been a significant issue for her since. I attribute this to improvements she has made in her social life, including by becoming part of a supportive biker community, and to her coming to terms with her chronic pain and diminished functionality. However, I also accept Dr. Ancill's opinion that she is significantly more vulnerable to the emergence of mood disorder in the longer term and, in this respect, I note and accept Dr. Stockburger's evidence that Ms. Plett's depression goes up and down.

[147] I acknowledge depression was a pre-existing condition for Ms. Plett, but find it was not a problem for her in the few years before the first accident. I accept it probably made her more susceptible to episodes of depression in the future but I am not satisfied the evidence demonstrates a reoccurrence of major depression was inevitable or even a probably regardless of the accident, as Dr. LeBlanc opines. Dr. LeBlanc gave little explanation for this opinion and it is not explained in any medical evidence.

Sleep

[148] Dr. Waspe attributes Ms. Plett's sleep challenges with "a busy mind" and mental health issues, as well as pain that causes her problems with finding a comfortable sleeping position. She attributes the latter cause to a hip bursitis condition which she was unable to conclude was caused by the accident. She states Ms. Plett's lack of sleep contributes to problems of depression and pain.

[149] Dr. Ancill stated that poor sleep is a symptom of post-concussive syndrome and can "amplify" other symptoms. This opinion connects Ms. Plett's sleep challenges to the accident.

[150] I accept Ms. Plett's evidence that her neck and back pain and her headaches contribute to her poor sleep and that she did not have sleep difficulties before the accident. I find that her hip pain, which I am not able to find is caused by the accident, contributes to this poor sleep. However, this does not diminish the element of causation for the accident-related factors which materially contribute to the problem.

Cognitive Impairments

[151] Perhaps the most significant dispute amongst the parties is whether and to what extent Ms. Plett suffered cognitive impairments as a result of the MTBI. Ms. Plett maintains her cognitive impairment is significant, such that she is no longer able to work as a bookkeeper and cannot perform other daily tasks in life. As discussed earlier, she and two of her children testified she has experienced significant problems with memory, concentration, and mood since the first accident which have not significantly improved.

[152] As this is an area of considerable dispute, I propose to spend some time analyzing the expert evidence on the point.

The Plaintiff's Expert Evidence

[153] Dr. Waspe opines Ms. Plett's post-accident medical records (2012-2017) "describe a clear pattern of vocational difficulties due to impaired executive function necessitating cognitive investigation and concussion clinic attendance". She states Ms. Plett's executive function remained impaired during her course of care. She states that when Ms. Plett first attended at her clinic, six years after the initial accident, she presented with "multiple confounders impairing executive function" including "impaired sleep, exacerbated depressive

phenomenon, anxiety, chronic pain, headache phenomenon and financial distress limiting her capacity to pursue a multidisciplinary approach." She reported "significant improvement across the board" for mentation, though "significant challenges with cognitive function" have not resolved. Dr. Waspe's prognosis is that Ms. Plett will remain "markedly impaired by cognitive dysfunction and partially disabled to perform higher remunerated vocation."

[154] Dr. Stockburger opines that cognitive and depressive sequelae from the MTBI persist and, along with the 2016 ovarian surgery, likely interfere with Ms. Plett's ability to function at work or be competitively employable.

[155] As noted, Dr. Ancill opined the cognitive difficulties Ms. Plett has experienced likely result from the MTBI.

[156] Dr. Powers, the vocational consultant called by Ms. Plett, opines Ms. Plett is not competitively employable due to her cognitive and physical levels of functioning. Dr. Powers holds a Doctor of Psychology (Psy.D., which I understand to be different than a Ph.D.) from the College of Behavioral Sciences, California Southern University. He produced three primary reports dated July 24, 2015, February 28, 2017, and January 15, 2020, each of which followed an examination of Ms. Plett and the administration of a battery of psycho-vocational assessment testing aimed at assessing, among other things, Ms. Plett's cognitive functioning and abilities. Dr. Powers is not qualified to administer neuropsychological testing but his "level C" tests measure cognitive ability and aptitude and achievement norms. They form the basis for his opinion on her cognitive functioning.

[157] Dr. Powers does not purport to opine on whether the accident caused these impairments. He stated in cross-examination that his job is to take a snapshot of a person's abilities at the time of referral and assess the vocational prospects going forward.

The Defendants' Expert and Neuropsychological Testing

[158] Dr. Jeanne LeBlanc, an expert psychologist called by the defendants, disagrees that Ms. Plett suffered significant cognitive impairments from the accident or otherwise.

[159] Dr. LeBlanc professes expertise in neuropsychology and the defendants sought to qualify her as such. In a mid-trial ruling, I qualified her as an expert in psychology but declined to qualify her as an expert neuropsychologist for two main reasons. First, she acknowledged that neuropsychology is not recognized as a subspecialty of psychology by the British Columbia College of Psychologists. I did not consider it appropriate for me to recognize a subspecialty that is not acknowledged by the professional regulator in this jurisdiction.

[160] Second, while Dr. LeBlanc explained that neuropsychology is a recognized subspecialty by the American Board of Professional Psychology, she had not completed the oral component of the assessment process for that recognition due to a family illness. She testified her training and practice conforms with something called the Houston Conference Guidelines

for neuropsychology which, she states, outline how one is able to describe themselves as a neuropsychologist in Texas where she did her graduate work and training. However, she has no recognized designation as a neuropsychologist on her C.V. Her Ph.D., for example, is in clinical psychology, not neuropsychology, although her dissertation was a neuropsychological study.

- [161] Dr. LeBlanc examined Ms. Plett and administered a battery of neuropsychological tests to her on February 6 and 7, 2017. She provided a report dated July 6, 2017. She administered a second examination and round of testing on June 26, 2021 and produced a second report dated September 9, 2021.
- [162] Dr. LeBlanc said the first round of test results were invalid due to Ms. Plett's poor performance on measures of effort and validity. As a result, she said they can only reflect Ms. Plett's "minimal level of neuropsychological capability." She opined in her 2017 report that Ms. Plett "did not demonstrate the types of errors associated with low performance due to brain injury" and states there is "insufficient valid evidence to indicate presence of neurocognitive deficit as a result of traumatic brain injury."
- [163] However, Dr. LeBlanc opined that Ms. Plett's testing for emotional functioning was valid and she opined she was experiencing significant depression and anxiety at the time of examination. She said Ms. Plett has a great deal of concern and worry over her physical functioning and "endorsed symptoms consistent with having traumatic stress." She opined Ms. Plett "see[s] her medical situation and ongoing pain to be constant and disabling" and "has the perception that she is highly impaired cognitively." She opined "Ms. Plett's psychological condition (primarily depression) negatively impacts her perception of ability, and all aspects of daily functioning, including concentration, focus, energy level, motivation, and interest." In cross-examination, Dr. LeBlanc explained the word "perception" in this sentence applies only to Ms. Plett's "ability" and not to the remainder of the sentence.
- [164] Due to the issues with validity and effort testing, Dr. LeBlanc said she was unable to say whether Ms. Plett's vocational challenges were due to cognitive dysfunction but opined they are more likely related to her psychological status and depression.
- [165] Overall, Dr. LeBlanc opined that any cognitive deficits Ms. Plett might have are perceived, driven by her psychological condition. She opined that specialized psychiatric and psychological treatment was needed to address this.
- [166] After the second round of testing in 2021, Dr. LeBlanc reported that Ms. Plett largely met the effort and validity portions of the tests such that Dr. LeBlanc considered the 2021 results valid "for the most part". In her second report, which followed this round of testing, Dr. LeBlanc maintained her opinion that Ms. Plett's physical and cognitive functional impairments are perceived, referring to Ms. Plett's "belief" that she is "handicapped by poor health". She opined that Ms. Plett "does not demonstrate any significant cognitive deficiencies" though she "does have mild challenges with working memory/attention".

- [167] In both her reports, Dr. LeBlanc states her "diagnostic impressions" for Ms. Plett are that she is suffering from a Somatic Symptom Disorder and Major Depressive Disorder. Dr. LeBlanc opines in her 2021 report that Ms. Plett's Somatic Symptom Disorder has "been reinforced, unfortunately by the messaging that she is substantially cognitively impaired despite objective evidence of her performing in the normal range on the vast majority of tests given to her".
- [168] Dr. LeBlanc states in her 2021 report that "from a neuropsychological perspective, the data indicates that Ms. Plett is capable of performing well vocationally and with her daily functioning." She opines Ms. Plett "has the cognitive abilities to perform detailed tasks such as bookkeeping in a timely manner."
- [169] Counsel for Ms. Plett broadly attacks Dr. LeBlanc's credibility and the reliability of her evidence on many fronts. I do not propose to deal with all of these. Some of the attacks I find to be overstated. For example, counsel suggests Dr. LeBlanc failed to list every document she relied on in forming her opinion as required by the Supreme Court Civil Rules, pointing to the fact she did not list studies she claims exist that support the validity of the neuropsychological tests she administered. However, Dr. LeBlanc uses these standard neuropsychological tests in her daily practice and accepts their validity. It is fair for counsel to question their validity in cross-examination, but, since these are standard neuropsychological tests, Dr. LeBlanc did not set out in her report to first establish the validity of each one before applying them to Ms. Plett. It is not reasonable to expect her to have listed all the background literature supporting the validity of each test she administered in anticipation of potential cross-examination questions.
- [170] Dr. LeBlanc was subjected to a vigorous cross-examination over two-and-a-half days. At times she appeared reluctant to answer simple questions. Often, she answered questions by identifying potentially rare exceptions to propositions that are otherwise clear. Some of this may be attributed to caution or a defensive response to forceful cross-examining. I do not find it reflects an intention to be evasive or mislead the court. However, in as much as these answers identified rare exceptions or remote possibilities, much of the qualification she placed on her answers in cross-examination was unhelpful and prolonged the examination.
- [171] Counsel attacked many aspects of Dr. LeBlanc's neuropsychological testing. For example, it is pointed out that the tests are not specifically normed to account for the specific conditions Ms. Plett was experiencing or for the impact of medications she was taking. Further, since Dr. LeBlanc did not consider and was otherwise not able to identify the side effects of such medications, these potential effects were not factored into her consideration of the test results.

- [172] Nevertheless, as counsel for Ms. Plett points out in closing argument, and as Dr. Powers observed in his reply report to Dr. LeBlanc, the results of all her neuropsychological testing showed similar results to Dr. Powers' psycho-vocational tests, with Ms. Plett generally scoring in the mid-twenties to mid-thirties percentile. This is at the lower end of the "average range" which is the 25th to 75th percentile.
- [173] Respectfully, I prefer the opinions of Drs. Waspe, Ancill, and Stockburger in respect of Ms. Plett's cognitive abilities over those of Dr. LeBlanc for the simple reason that their opinions and observations are consistent with the lay evidence which I have accepted. By contrast, Dr. LeBlanc's opinion that Ms. Plett has not suffered cognitive impairments does not accord with Ms. Plett's "real world" lived experience, particularly as described by Ms. Sanderson.
- [174] In this respect, I find there are two frailties with Dr. LeBlanc's assessment, both of which were identified by Dr. Ancill and both of which relate to my view that her opinions do not accord with the lay evidence I have accepted. Those frailties are: (1) the lack (though not complete absence) of Ms. Plett's pre-accident cognitive functioning in Dr. LeBlanc's analysis; and (2) the lack of verification of the test results against Ms. Plett's "real world" lived experience. I explain both of these points with reference to Dr. Ancill's opinion and counsel's cross-examination of Dr. LeBlanc.

Dr. Ancill's Critique of Neuropsychological Testing

- [175] Dr. Ancill opined that neuropsychological test results are unhelpful because there is nothing to compare them to. He said unless there is detailed pre-accident neuropsychological testing (which would be extraordinary) or detailed evidence of pre-accident cognitive functioning, neuropsychological testing is of little value, and no value to him as a psychiatrist whose clinical practice involves, among other things, assisting patients with brain injuries with returning to work.
- [176] Dr. Ancill explained this problem in cross-examination. When asked to confirm that he would consider in his own assessment Ms. Plett's intellectual test scores from Dr. LeBlanc's neurological test battery, he responded as follows:

A. Well, consider for what?

Q. As an indication that the plaintiff was neurocognitively in the normal range?

A. Well that's the problem with neurocognitive assessment which is people try and, again, do a bit of a snapshot but unless you have pre-injury assessment, it is very hard to know what it means.

Now, if someone has a significant deficit as compared to other factors, then that can sometimes be helpful, but people who might move from the average to the low average or from the high average to the average is meaningless.

So I wouldn't rely on this because it's unhelpful. It's unhelpful in that it's insensitive. It doesn't tell me in what ways her intellect has -- where the detriment is because there's no pre-injury testing.

[177] While Dr. LeBlanc's test battery includes some tests that are aimed at assessing pre-morbid ability, the comparison is necessarily limited. For example, if a person scores in the 28th percentile for a particular test, there is no way of knowing if the person would have scored in the 50th or 75th percentile on the same test prior to the accident. These pre-morbid indicators of cognitive ability may have validity in other cases but here, where the lay evidence demonstrates a different cognitive picture of Ms. Plett before and after the accident, I am not persuaded they provide an effective measure of Ms. Plett's pre-morbid functioning.

[178] This leads me to Dr. Ancill's second critique of neuropsychological testing, which is that it does not tell you how a test subject will perform in a "real world" environment. Returning to the cross-examination on how the neuropsychological testing might be of value to Dr. Ancill's clinical work, he gave this evidence:

Q. What this [neuropsychological testing] would tell you is what her neurocognitive abilities are on the day they are tested?

A. Yes

Q. And that may be important in a consideration of her future in respect of work?

A. No. I'm not a neuropsych so I'll tell you how I would use that. I do not find neuropsychological test results helpful in predicting vocational or functional outcome because they don't measure that. I would in fact and I do order functional and vocational testing which specifically looks at the things you are asking about. With neuropsych testing, you have to make inferences of how that function -- how that test would show itself in the real world, and I don't know.

[Emphasis added]

[179] Later, it was suggested to Dr. Ancill that neuropsychological testing can indicate that Ms. Plett has the ability to do a number of skills. He disagreed, stating:

A. No it tells you she has ability to do a number of neuropsychological tests in a test environment. What it doesn't tell you is how that translates into a set of skills in the workplace. That's my point.

[Emphasis added]

[180] In her cross-examination, Dr. LeBlanc was confronted with an article she co-wrote stating: "Situational assessment is seen as a critical adjust to neuropsychological assessment in making 'real-world' predictions". She agreed this means that neuropsychological testing should be validated by observations of the test subject performing tasks in the "real world".

[181] One way to assess how neuropsychological testing might "show itself in the real world" (to use Dr. Ancill's language) is for the examiner to speak with so-called "collaterals", such as family members, friends, or co-workers who might provide independent insight into the subject's condition and functioning, either before or after the trauma.

- [182] In another case where Dr. LeBlanc gave expert evidence, she spoke of the importance of speaking with collaterals. In that case, Dr. LeBlanc spoke to two collaterals so she "can get real life examples of how a person is functioning in comparison to their test results." Dr. LeBlanc confirmed in cross-examination this summary (as stated by the arbitrator in that case) correctly described the opinion she gave and it is still her opinion of best practice.
- [183] In this case, Dr. LeBlanc made a note in her records of the need to speak to a collateral for Ms. Plett. She asked Ms. Plett to provide names but Ms. Plett, being cautious, told her to arrange that through legal counsel. Dr. LeBlanc said an inquiry was made with counsel but it appears this matter was not addressed and Dr. LeBlanc did not follow up. Thus, Dr. LeBlanc never spoke with a collateral for Ms. Plett.
- [184] The only "real world" verification Dr. LeBlanc got was her interview with Ms. Plett, her limited observations of Ms. Plett over the course of the examination days, and her review of her medical records. I do not disregard these but they are limited and no real match for the more intensive and daily observations of Mr. Talley, Ms. Toth, and Ms. Sanderson. I also find they were probably affected by a lack of rapport between Dr. LeBlanc and Ms. Plett. Ms. Plett described Dr. LeBlanc's 2017 examination as "one of the most uncomfortable interactions I have had with anyone for a long time." By contrast, other defence experts, notably Dr. Helper and Gerrard Kerr, developed a good rapport with Ms. Plett, despite the perception of them being adverse.

Conclusion on Cognitive Impairments

- [185] In my respectful view, Dr. Ancill's two critiques of neuropsychological testing, and particularly the latter, have very much played out in this case. Specifically, I am not able to reconcile Dr. LeBlanc's opinion that Ms. Plett has suffered no significant cognitive impairments with Ms. Plett's real world lived experience as described by the lay witnesses, especially (though not limited to) Ms. Sanderson. The opinions of Drs. Ancill, Waspe, and Stockburger are consistent with Ms. Sanderson's, Mr. Talley's, and Ms. Toth's direct observations of Ms. Plett's cognitive function both before and after the first accident. Having accepted this lay evidence, as well as the critiques offered by Dr. Ancill, I am unable to accept Dr. LeBlanc's conclusion that Ms. Plett has suffered no diminishment in her cognitive functioning.
- [186] A further reason I prefer the opinions of Drs. Ancill, Waspe, and Stockburger on Ms. Plett's cognitive impairments is Dr. LeBlanc's resistance to accepting Ms. Plett suffered a MTBI in the first accident. In her second report, Dr. LeBlanc acknowledges some cognitive impairment, which she describes as "occasional variations in attention (including working memory)" but says this is unlikely due to acquired brain injury. In cross-examination, she was very resistant to admitting Ms. Plett may have suffered a MTBI despite Ms. Plett's persistent reports of symptoms consistent with a MTBI.

- [187] I would add that Dr. Helper, Gerrard Kerr, an Occupational Therapist called by the defendants, and Ms. Gallagher, a vocational rehabilitation consultant called by the defendants, each opined that Ms. Plett displays intact cognitive capacity to perform as a bookkeeper, though Dr. Helper said he would defer to a neuropsychological assessment for that opinion. I respectfully do not accept these opinions for the same reasons I do not accept Dr. LeBlanc's opinion.
- [188] I would further add that Mr. Kerr was not qualified as having expertise in psychology or in making cognitive assessments and I do not accept his evidence that this specialty falls within his expertise as an occupational therapist. Further, his opinion is based on Ms. Plett having worked in bookkeeping and accounting at Barnes Harley-Davidson but Mr. Kerr did not have the benefit of Ms. McKechnie's evidence on that subject.
- [189] Dr. Ancill and Dr. Waspe, both of whom have extensive experience in diagnosing and treating MTBI patients, diagnosed Ms. Plett with cognitive impairments resulting from the accident, as did Dr. Stockbuger. Most significantly, perhaps, the defendants concede Ms. Plett suffered a MTBI notwithstanding the opinion of their expert, Dr. LeBlanc. In short, the weight of the medical evidence and the position of the defendants all acknowledge Ms. Plett suffered a MTBI and this provides a further basis for me to reject Dr. LeBlanc's opinion that Ms. Plett suffered no significant cognitive impairments in the accident.
- [190] I therefore accept Ms. Plett suffered cognitive impairments as a result of at least the first accident and these impairments explain her problems with memory and concentration. They are significant enough that they have profoundly affected her daily life and prevent her from returning to work as a bookkeeper or other jobs that require a similar level of cognitive ability.

Totality of Symptoms

- [191] Dr. Stockburger emphasized the importance of considering Ms. Plett's condition in its totality, having regard to the combined effect of the myofascial pain, headaches, depression, fatigue, and cognitive sequelae from the MTBI. All of these conditions were caused by the accidents and the defence concedes they are indivisible as between the two accidents.
- [192] As is widely accepted amongst the experts, the combination of chronic pain, depression, anxiety and poor function play off one another, negatively affecting each condition. Chronic pain inhibits function and both enhance anxiety and depression, which can then increase levels of pain. Dr. Stockburger and Dr. Helper both confirmed the interplay between pain and depression, noting each makes the other worse.

- [193] Dr. Stockburger says the totality of all of Ms. Plett's injuries and impairments "create an environment in which it is very difficult for [Ms. Plett] to recover some functional capacity." Even with a lengthy (several months) multidisciplinary rehabilitation program, it is unlikely that she could successfully return to competitive work.

Loss of Earning Capacity

- [194] Ms. Plett seeks both past and future loss of earning capacity. Justice Kent summarized the applicable principles in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 388 where he observed that it is not the loss of earnings for which the plaintiff is compensated but the loss of capacity to earn income. He said at paras. 389-390:
- [389] Valuation of the loss may be measured in different ways depending on the circumstances of each particular case. Generally speaking, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that he or she would have received, whether in the past or in the future, had the tort not been committed. The essential task of the court is to compare what would have been the plaintiff's past and future working life if the accident(s) had not happened with the plaintiff's actual past and likely future working life after the accident(s). The difference between the two scenarios represents the plaintiff's loss and the resulting monetary award is thus consistent with the basic principle of tort law compensation, which is to restore the injured plaintiff to the position he or she would have been in but for the defendant's negligence, at least insofar as a monetary award is capable of doing so.
- [390] Determining how a plaintiff's life would have proceeded had the accident(s) not occurred is an exercise in the hypothetical. So too, of course, is any determination of how the plaintiff's post-accident(s) future life will unfold following the trial.
- [195] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47 [Rab] the Court of Appeal restated the analysis, at least for future loss of earning capacity, in 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.
- [196] In *Grewal v. Naumann*, 2017 BCCA 158 [Grewal], Justice Goepel, dissenting but not on this point, discussed how this analysis is applied in the context of both past and future loss of earning capacity:

- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

Past Loss of Earning Capacity

- [197] A past loss of earning capacity claim is based on what the plaintiff would have, not could have, earned but for the injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. In determining what a plaintiff would have earned, hypothetical possibilities of past events will be taken into consideration as long as they are a real and substantial possibility, and are not merely speculative: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.
- [198] Ms. Plett argues her past loss of income should be assessed based on her working as a bookkeeper at "\$22 per hour (\$44,000 per annum)". This translates into 2,000 hours per year. Deducting the income Ms. Plett earned from 2012 through 2021, as well as disability benefits paid to her by ICBC, she argues her past loss of income totals \$375,705.
- [199] Having regard to Appendix B of Dr. Powers' 2015 report, I accept the \$44,000 per annum is a reasonable assessment of what a bookkeeper like Ms. Plett would have earned with full-time work. However, I am not persuaded this is what Ms. Plett herself would have earned but for the accident.
- [200] The defendants argue this is not a realistic scenario. They say Ms. Plett's pre-accident income is "consistent only by its inconsistency". They point out she had over a dozen separate employers between 2005 and the first accident in September 2012 and in four of the five years preceding the accident she spent time receiving employment insurance benefits.
- [201] At no time prior to the accident did Ms. Plett's income reach \$44,000. For example:
- in 2008 she earned \$25,676, which included \$7,545 in Employment Insurance benefits;
 - in 2009 she earned \$38,149, which included \$7,602 in EI benefits; and
 - in 2010 she earned \$31,283, which included \$2,706 in EI benefits

This represents Ms. Plett's pre-tax income, and one must keep in mind this was more than a decade ago so does not represent today's values.

[202] The defendants point to *Smith v. Knudsen*, 2004 BCCA 613 at para. 34 where the Court of Appeal accepted as a sound proposition that an assessment of past loss of earnings "had to be guided to some extent by the claimant's actual earnings prior to the accident". The defendants argue I should follow the approach taken by Justice Funt in *St. Denis v. Turner*, 2020 BCSC 603 at para. 134 where he assessed the plaintiff's future loss of earning capacity by taking the plaintiff's average annual earnings for the eight years prior to the accident. The plaintiff in that case also worked as a bookkeeper and suffered injuries very similar to Ms. Plett's.

[203] I agree that assessing Ms. Plett's loss from a starting point of \$44,000 disregards her actual past earnings. While past earnings do not necessarily dictate the post-accident loss, they must provide some guidance.

[204] In 2011, Ms. Plett earned \$26,984, including \$18,511 in E.I. benefits. She had started work with Greybeard Plumbing in April of that year and with Realistic Success in September.

[205] In 2012, Ms. Plett's income was only \$11,152, even though she had both the Greybeard and Realistic Success contracts up to the time of the accident on September 29 of that year. If these earnings represent a trajectory for the rest of the year, and noting her accident occurred after almost nine full months into the year, a further \$2,788 might be imputed to her income for 2011 to account for October through December. However, Realistic Success continued to pay Ms. Plett while she was off so that imputing \$2,788 to her 2012 income would be high. Nevertheless, for analysis purposes, the defendants propose that \$2,500 of additional income be imputed to Ms. Plett for 2012 to account for the loss of the Greybeard contract. This may be a little high but since it is proposed by the defendants, I accept it.

[206] I also note that in 2012 Ms. Plett had gross professional income of \$25,649 compared to her net professional income of \$11,152. Her business expenses are not in evidence but since she was travelling between contract jobs and, I gather, doing some of her work for Greybeard and perhaps others at home, she was likely getting some benefit in claiming her car and home office as an expense, which may also explain the lower income in 2011.

[207] In 2015, Ms. Plett reported \$11,630 in gross professional income and a loss of (\$325) in net professional income. She reported \$20,521 as total T4 earnings, which I take to be her earnings from G-Direct Trucking where she was an employee, not a contractor. This would indicate a fairly significant increase in her annual salary had she continued to work full time for G-Direct and she would have been on track to earn around \$44,00 per annum.

[208] Ms. Plett's 2021 income was \$17,772 while working up to four days per week at Barnes Harley-Davidson until October of that year. She was earning \$17 per hour when she was let go from Barnes. Had she been working full-time at this rate of pay, she would have been earning around \$35,000 a year. However, the employer knew she was working in a

compromised state and was largely experimenting with her potential ability to do bookkeeping-type work. Thus, her rate of pay at Barnes is likely not indicative of what she would have earned as a fully functioning bookkeeper.

[209] I agree that the defendants' approach to assessing Ms. Plett's past loss of earning capacity without the accidents is a reasonable one up to mid 2015. However, after that time, I find there is a real and substantial possibility that Ms. Plett's income would have gone up, given her earnings at G Direct Trucking. I have found that Ms. Plett was unable to maintain that job because of her cognitive disabilities resulting from the accident. I therefore find there is a real and substantial possibility that, but for the accident, she would have continued at that work or at approximately that rate of pay for another employer.

[210] As mentioned, I accept that \$22/hr is a reasonable hourly rate for a bookkeeper and that, by mid-2015, there is a real and substantial possibility Ms. Plett would have been working full-time hours. However, given her inconsistent employment history, I consider it necessary to apply a discount of approximately 15% to account for the contingency that she would not have been working full-time or would have had periods of when she was not employed, more consistent with her work history.

[211] Applying that contingency, I find \$19.00 per hour to be a reasonable basis on which to assess Ms. Plett's earning capacity after mid-2015. Using the same 2,000 hours per year proposed by the plaintiff, we arrive at an annual income of \$38,000.

[212] I therefore propose to assess Ms. Plett's past loss of earning capacity on the following basis:

- From the time of the first accident to the midpoint of 2015, when she started work for G Direct, I would assess Ms. Plett's earning capacity without the accident to be \$28,000 per annum, based on the approach suggested by the defendants;
- After the midpoint of 2015 to the date of trial, I would assess Ms. Plett's earning capacity to be \$38,000 per annum as just described. This gives effect to the contingency deduction for her inconsistent work history.

[213] The defendants argue there should be no imputation of income for 2016 because Ms. Plett had not been working up the time of the second accident in May of that year. However, she was let go from G-Direct Trucking in November 2015 and I have attributed this to the accident. I therefore find her period of unemployment between November 2015 and the May 2016 accident was related to her injuries from the first accident and would not make a further deduction to the hypothetical 2016 income on this basis.

[214] I would, however, make a deduction to account for Ms. Plett's surgery to remove the ovarian cyst. The defendants argue there should be no income imputed for 2016 because Ms. Plett was on "stand-by" for that surgery. However, that does not accord with the evidence. Ms. Plett was not told she should not work while awaiting the surgery. I accept that she likely would have worked, had she been able to, up to the time of the surgery. Based on Dr. Stockburger's evidence, though, I find there would have been a substantial period for

recovery and convalescence. Given that bookkeeping is not a physically demanding job, I would assess that period to be three months.

[215] I therefore assess Ms. Plett's past loss of earning capacity as follows:

Year

Imputed Income

Less Earnings

(including ICBC's TDDs)

Other Deduction

Total

2012

\$2,500

\$0

\$2,500

2013

\$28,000

(\$9,430)

\$18,570

2014

\$28,000

(\$7,507)

\$20,493

2015

\$33,000

6 months @\$28,000/annum 6 months @\$38,00/annum

(\$20,196)

\$12,804

2016

\$38,000

\$0

(\$9,500)

(25% for surgery convalescence)

\$28,500

2017

\$38,000

\$0

\$38,000

2018

\$38,000

\$0

\$38,000

2019

\$38,000

(\$4,373)

\$33,627

2020

\$38,000

(\$21,326)

\$16,674

2021

\$38,000

(\$17,772)

\$20,228

2022

\$9,500

(to March 2022)

\$9,500

Total

\$238,896

Future Loss of Earning Capacity

Legal Principles

- [216] As noted, Rab calls for three-step analysis to assess and quantify a future loss. In *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 52-54, Justice Grauer, who also wrote in Rab, said in some cases the first step may be "a given", and the second step may be "less challenging" where, for example, the evidence shows the plaintiff has suffered a significant and lasting injury that leaves her unable to work at the time of trial and in the foreseeable future. That is the case here.
- [217] Quantifying the loss involves "a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident happened": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11. This is an assessment, not a mathematical calculation, although economic and statistical evidence can be a helpful tool in determining what is fair and reasonable, and "factual mathematical anchors" should be a starting foundation for the assessment: *Grewal* at para. 49; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

Ms. Plett's Future Loss

- [218] Here, the defendants "take no issue with the plaintiff's entitlement to an award" for loss of future earning capacity. They acknowledge the evidence "clearly establishes a real and substantial possibility that the Plaintiff's MVA-related injuries will lead to some loss of earning capacity until her retirement." The issue is the extent of that loss.
- [219] The defendants argue Ms. Plett is not rendered competitively unemployable as a bookkeeper or in a similar administrative role. They argue her psychological outlook has improved and her ability to hold a position is demonstrated by her work at Barnes Harley-Davidson for over two years with increasing responsibilities. They concede she will be limited to part-time hours because of her injuries but, based on Dr. Helper and Mr. Kerr's evidence, they argue she is capable of working up to 30 hours per week.
- [220] I do not agree. This submission fails to account for to Ms. McKechnie's evidence of the significant accommodations and assistance she gave Ms. Plett while supervising her at Barnes. Nor does it account for Ms. Sanderson's evidence of the substantial change in Ms. Plett's performance and bookkeeping abilities after the accident. This lay evidence is supported by Dr. Stockburger's 2020 opinion that Ms. Plett's cognitive difficulties persisted to the extent she was unable to perform bookkeeping duties as before.

- [221] I accept Ms. Plett has some residual employability, but not as a bookkeeper and not for 30 hours a week. Jerica Ditson, an expert witness called by Ms. Plett, is an occupational therapist, work capacity evaluator, functional capacity evaluator, and cost of care assessor. She was qualified to give opinion evidence in these areas. She assessed Ms. Plett on April 26, 2017 and produced a report dated May 12, 2017. She examined Ms. Plett again on January 29, 2020 and produced a further report on March 18, 2020.
- [222] Ms. Ditson opined that Ms. Plett is likely capable of performing only part-time work for an employer who is willing to provide accommodations to manage her physical symptoms. She opines Ms. Plett is not competitively employable on a part-time or full-time basis as a bookkeeper or an administrator. However, she would be employable on a part-time basis (16-24 hours per week) with an accommodating employer who would allow for breaks to manage her neck, upper back, shoulder, lower back, and lower extremity symptoms, as well as ergonomic accommodations at her workstation. She will also require shorter workdays with days off in between her shifts to manage her symptoms. This opinion is based on the physical assessment of Ms. Plett and does not consider potential emotional, psychological or cognitive factors that may impact her ability to work. Ms. Ditson says those are outside her expertise.
- [223] Gerrard Kerr, an expert called by the defence, is also an occupational therapist and work capacity evaluator qualified to perform and assess cost of future care. He examined Ms. Plett on behalf of the defendants on August 13, 2021 and produced a report dated November 19, 2021.
- [224] Mr. Kerr opined Ms. Plett showed high effort in his examination. He generally found her self-reports of pain and function were consistent with objective observations during testing but said she "presented with a pessimistic view of her abilities compared to her demonstrated and reported functional abilities". In his opinion, this suggests Ms. Plett "may be capable of higher functional capacity than she perceives". He opines she is physically capable of meeting the demands of bookkeeping work, though acknowledges her chronic pain limits her function. He suggests she is capable of working 30 hours per week with the potential to increase to full-time.
- [225] In support of his opinion, Mr. Kerr relied heavily on the fact that Ms. Plett comfortably rides her motorcycle. He initially relied on this to suggest she has greater capacity to use her right arm than her test efforts indicated. However, he later referred to her riding the motorcycle three or four more times in his report with respect to her physical functioning more broadly including with respect to her neck pain and her activities of daily living (see Mr. Kerr's report lines 917-942, 595-963, 998-999, and possibly in the text box on p. 27). His opinion is, essentially, if she can manage the bike, she must have capacity to do other tasks.
- [226] Unlike Dr. Waspe, however, Mr. Kerr did not observe Ms. Plett on the motorcycle. He acknowledged the adjustments made to it and saw a photograph of the bike but did not measure the adjustments nor see Ms. Plett sitting on it or using it. He agreed that to assess

a person's ability to perform a particular movement, such as an extension of the arm at shoulder height, it would be important to actually observe that motion and measure it. As became clear in cross-examination, he drew heavily on his personal experience as a motorcycle enthusiast and rider, and thus based at least this aspect of opinion on facts and assumptions that are not stated in his report. The report and his evidence more broadly do not permit the Court to meaningfully understand how his personal experience with motorcycles may differ from Ms. Plett's actual experience with her adjusted bike. I therefore respectfully find Mr. Kerr's assessment is not helpful insofar as it is premised on assumptions about his own experience with motorcycles.

- [227] I also have misgivings about some of the physical function testing Mr. Kerr administered. On a "Multidimensional Task Ability Profile" and an "EPIC Hand Function Sort", Ms. Plett was asked to rank her perceived ability to perform certain tasks on a scale of 1 to 5. The tests offered a sixth option--a question mark--apparently denoting "I don't know". Ms. Plett circled the question mark for a large number of the tasks, but Mr. Kerr asked her to reconsider those answers because, in his view, the outcome of the test would be meaningless with so many "I don't know" answers. Ms. Plett testified she understood Mr. Kerr to have directed her to circle 5 (unable to perform the task) on any question for which she had previously circled the question mark. It became clear on cross-examination that Mr. Kerr was not aware that Ms. Plett misunderstood his instruction or that he may have miscommunicated it. Either way, Ms. Plett was operating on a different understanding than was Mr. Kerr in performing these tests and I am not able to discern how this might have affected Mr. Kerr's overall assessment of her.
- [228] For these reasons, I prefer Ms. Ditson's opinion on matters relating to Ms. Plett's physical functional capacity.
- [229] Dr. Helper opined that Ms. Plett would have difficulty maintaining full-time employment as maintaining a seated position for 40 hours a week, even with ergonomic accommodations, would be difficult. He suggested she could tolerate up to 24 to 30 hours per week in an office-based setting with a proper ergonomic assessment and flexibility to change positions frequently. However, in cross-examination he was unable to say how or why he came up with that range of hours. He has no training in vocational assessment or functional capacity evaluation.
- [230] I accept Ms. Ditson's evidence that Ms. Plett's physical limitations will restrict her to working approximately 16-24 hours per week with an accommodating employer and prefer it over Dr. Helper's opinion that she could work 24 to 30 hours per week since he could express no foundation for that opinion.
- [231] I accept the evidence of Dr. Waspe and Dr. Helper that Ms. Plett's physical injuries and chronic pain are not expected to improve significantly, even with formal rehabilitation.

- [232] I also accept Dr. Powers' opinion of Ms. Plett's limited prospects to return to work. Dr. Powers is a psychologist who was qualified as an expert in the assessment, rehabilitation and job placement of persons with impairments and disabilities, including those caused by traumatic injuries. He opined Ms. Plett is a "long way from being able to sustain full-time work" and she is likely "not competitively employable at this point in her recovery and likely to remain not competitively employable as a result of unresolved residual limitations and symptoms acquired in the accident(s)". He was "doubtful" she would ever return to pre-accident working levels, even with assistance, unless her medical condition improved substantively. Following his second assessment of Ms. Plett, he opined her "ability to work full time is likely firmly closed to her and her ability to work part-time in some capacity moving forward, likely very guarded."
- [233] Dr. Ancill takes a very dim view of Ms. Plett's ability to return to any form of work. He was asked in cross-examination about his success rate in his patients returning to work. He gave a rough estimate of variable success rate, concluding that most (around 75%) get back, usually with some accommodation. He was then asked (again in cross-examination) if that was his expectation and his plan for Ms. Plett. He responded:
- A. No, because the injury is too chronic and symptoms have been there too long. They are also complicated by other disorders such as Somatic Symptom Disorder.
- He went on to say the focus for her would be on palliation and improving her quality of life, a point he also made at the conclusion of his report. He acknowledged that some form of part-time work might be possible with an accommodating employer but, in his opinion, she is not competitively employable, even on a part-time basis.
- [234] With respect to Ms. Plett's cognitive impairments, I accept there is a very high probability that she will not be able to work as a bookkeeper. I accept the evidence of Dr. Waspe, Dr. Powers and Dr. Ancill that Ms. Plett has suffered cognitive impairments that limit her ability to work as she previously did. I accept Ms. Plett's evidence that she finds herself unable meet the cognitive requirements of bookkeeping work and, as I have said, I find her evidence to be well supported by Ms. Sanderson and Ms. McKechnie. It is only with an unusually accommodating employer or manager, like one of these two extraordinary women, who is willing to closely oversee, review, and correct Ms. Plett's bookkeeping work, that she could hope to be employed in this capacity. That is an unrealistic prospect in a competitive employment environment.
- [235] However, I also find Ms. Plett has some residual capacity to work part-time (16-24 hours per week) at a less cognitively-demanding job and where she has an accommodating employer who will permit her breaks to assist with managing her pain. The fact she was able to work successfully at the reception job at Barnes is a good indication of her employment potential in less skilled jobs than that of a bookkeeper. I assess that residual work capacity in a moment.

Ms. Plett's Likely (Hypothetical) Working Life without the Accident

- [236] As I have found earlier, I accept as a real and substantial possibility that, but for the accidents, Ms. Plett would have started full-time work in a bookkeeping or administrative role with similar remuneration by mid 2015.
- [237] Ms. Plett argues that, but for the accident, she likely would have worked to age 75. She points out that at the time of the accidents (and trial) she had no pension, no savings, and no way to support herself other than through work. On the other hand, bookkeeping is not physically demanding. She argues that if she had the cognitive ability to do so, she could have worked as a bookkeeper to age 75. I accept that is a real and substantial possibility. At the same time, Ms. Plett will qualify for Canada Pension benefits at age 60, although given her financial circumstances I accept she would likely seek to maximize those benefits and wait to collect them until at least age 65 or possibly 70. Given the availability of CPP entitlements and Old Age Security, there is a real and substantial possibility that she would move to at least part-time hours after age 65 and potentially retire at 70.
- [238] In the balance, I find Ms. Plett's lack of retirement savings and pension to be significant considerations, such that working to age 75 is the most likely scenario. However, to account for a contingency of her moving to part-time at an earlier age or retiring earlier, I propose to assess her future loss of earning capacity on the basis that she would work full-time to age 72.
- [239] Accepting that a bookkeeper is likely to earn \$22.00 per hour or \$44,000 per annum as suggested by plaintiff's counsel, I would apply a discount in the range of 12-15% to account for Ms. Plett's inconsistent work history which, in my view, gives rise to a real and substantial possibility that she would not have maintained full-time hours to age 72 either generally or from time to time between now and then. On this basis, I would reduce Ms. Plett's annual loss to \$38,000. I find it is appropriate to apply this discount before considering Ms. Plett's residual working capacity because her residual capacity is already premised on working fewer hours per week.

Residual Employability

- [240] I turn to Ms. Plett's residual employability. Her time at Barnes Harley-Davidson shows she was capable of managing the reception job on a part-time basis. It was only after bookkeeping and accounting tasks were added to her job that she ran into difficulty. This indicates she is capable of doing work that is less cognitively demanding, albeit on a part-time basis.
- [241] Moreover, Ms. Plett was well-liked at Barnes, which is one reason Ms. McKechnie went out of her way to accommodate her. Trevor Barnes testified he liked Ms. Plett, even with her tendency to chat with others and become a little loud from time-to-time. I believe he was sincere and speaking honestly when he said he would hire her again if a position was available. He acknowledged in cross-examination he has no direct knowledge of the quality

of her bookkeeping work. He also conceded that if he knew she had suffered a brain injury that affects her concentration and memory, and she may need sudden time off due to headaches, it would be difficult to hire her. However, the time that Ms. Plett was focused on reception duties suggests her circumstances were not then and are not now as bleak was put to Mr. Barnes in this hypothetical.

[242] That said, I also consider the fact that Ms. Plett got the job at Barnes through serendipity and not in a competitive process.

[243] Ms. Plett's ability to work even part-time in a less cognitively demanding job will require an accommodating employer and this reduces the opportunities that are open to her and the chances of her securing a job through a competitive process. I also accept that with a less skilled job, she would earn less money than as a bookkeeper.

[244] Taking these contingencies into account, I would assess Ms. Plett's residual work capacity as follows:

- I assess Ms. Plett's physical ability to sustain employment to approximately 20 hours a week, which is the mid point between the 16-24 hours per week assessed by Ms. Ditson.

- I then assess she will be working at a job that is less cognitively demanding than bookkeeping and thus will earn less. At Barnes Harley-Davidson, she earned \$17.00 per hour. Though she was doing some bookkeeping tasks, she was doing so with considerable accommodation which likely accounts for a lower wage than the range suggested in Dr. Power's report. I consider \$17.00 per hour to be a reasonable proxy for her residual work capacity. At 20 hours per week, this amounts to \$17,680 per year.

- I then consider the fact that she will need an employer who is willing to accommodate her physical and potentially cognitive impairments and this substantially reduces her competitive employability. I weigh this against the fact she was well liked at both Barnes and Realistic Success, which improves her prospects for work. Considering these factors, I apply a 50% reduction to her residual work capacity to account for these factors. This results in \$8,840 per annum, which I would round to \$8,850 as being the value of Ms. Plett's annual residual work capacity.

Conclusion on Future Loss of Earning Capacity

[245] Using the present value calculator provided by counsel, which incorporates Mr. Carson's present value tables, I arrive at a loss of future earning capacity at \$409,873.57. This is based on my assessment of her earning capacity without the accidents to be approximately \$38,000 per annum and her residual work capacity after the accidents being approximately \$8,850 per annum (net loss of \$29,150 per annum), to age 72. I have used three-quarters of these values for 2022 to account for the fact I have calculated past loss of earning capacity up to the end of March 2022. I round this amount up to \$410,000. This award reflects a loss of earning capacity of approximately 75% which I find is fair and consistent with the

findings I have made about Ms. Plett's injuries and her capacity.

Loss of Housekeeping Capacity

- [246] It is well established that an injured plaintiff is entitled to an award for loss of housekeeping capacity if such a loss is established: *Kim v. Lin*, 2016 BCSC 2405, aff'd 2018 BCCA 77 [Kim]; *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178; *McTavish v. MacGillivray*, 2000 BCCA 164.
- [247] An award may be made under one or more separate heads of damages, including pecuniary, non-pecuniary, and cost of future care. Whether a loss of housekeeping capacity should be assessed as a pecuniary or non-pecuniary loss is in the discretion of the trial judge, but the main guiding principle is this: where the plaintiff is capable of performing the housekeeping tasks but with difficulty, a non-pecuniary award is usually appropriate; where the plaintiff must have others perform or assist in the housekeeping tasks, be it through a paid service provider or gratuitously by friends or family members, a pecuniary award may be appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101; *Liu v. Bains*, 2016 BCCA 374 at para. 26 [Liu].
- [248] In *Kim* at para. 189 (BCSC), the court cautioned that care should be taken not to duplicate awards under different heads of damages. Likewise, in *Firman v. Asadi*, 2019 BCSC 270 at para. 236 [Firman] Justice Verhoeven said:
- [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made [as part of non-pecuniary damages].
- [249] As with loss of earning capacity, damages for loss of housekeeping capacity, even as pecuniary damages, are an assessment, not a rigid mathematical calculation. Nevertheless, it is acceptable to utilize labour force information regarding the value of replacement services in making that assessment: *Liu*, para. 28.
- [250] Thus, in *Kim*, where the plaintiff suffered a "profound loss of capacity" to perform household tasks and childcare, the trial judge assessed that a minimum of two to three hours per day of assistance at \$15 per hour was reasonable approach to compensate for the plaintiffs' loss. He awarded \$2,000 per month for the time that household and child care assistance was needed and reduced it to \$1,000 per month after the date when child care was no longer required. The calculation for future loss of capacity was made to age 70 on the assumption that the plaintiff would not have continued to use her skills after that age. I take it the assumption was that after age 70 she would have needed assistance with housekeeping even without the accident. Having made a pecuniary award for loss of housekeeping capacity, the trial judge made no award for this under cost of future care. His approach was upheld by the Court of Appeal.

- [251] More recently, in *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96 [Steinlauf], Justice Basran found the plaintiff was rendered incapable of performing household tasks, including light duties, and will require assistance from others to do this work indefinitely. He assessed the plaintiff's need for assistance to be five hours per week at a rate of \$20 per hour and assessed the future loss of capacity at \$164,000. Given the plaintiff was 29 years old at the time of trial, and assuming some kind of present value calculation was made, it seems Basran J. likely assessed the need to around age 70. He made no additional award for housekeeping assistance under cost of future care. His analysis and conclusion were upheld by the Court of Appeal, including his adoption of a \$20 per hour rate for the value of housekeeping services. Speaking for the Court of Appeal, Grauer J.A. said "[i]f anything, it seems to be a conservative estimate."
- [252] In *Xu v. Balaski*, 2020 BCSC 940 [Xu] Justice Ball segregated those tasks the plaintiff was able to perform with difficulty and those which she was unable to perform without assistance. He considered the former within non-pecuniary damages and the latter as a segregated pecuniary award. Relying on the evidence of occupational therapists, Ball J. assessed the plaintiff's need for housekeeping assistance at 1.5 hours/day at a rate of \$25 per hour to age 70 which he suggested is a "realistic age". Though not specifically mentioned, it appears that Ball J. made no additional award for housekeeping assistance under cost of future care since he considered the occupational therapists' recommendations under loss of housekeeping capacity.
- [253] In *Anssari v. Alborzpour*, 2019 BCSC 512 [Anssari] Justice Fleming found the plaintiff was incapable of performing all housekeeping duties. Though physically able to perform light cleaning and meal preparation, her psychological injuries precluded her from doing these. Fleming J. made a pecuniary award for past loss of housekeeping capacity and an award under cost of future care (to age 75, with certain contingency deductions to account for potential improvement). She recognized a distinction between a cost of future care award and a loss of future capacity award as follows:
- [152] The Court of Appeal has commented more than once on the distinction between loss of housekeeping capacity and the future cost of care, as well as the potential for overlap. In *O'Connell v. Yung*, 2012 BCCA 57, Justice Kirkpatrick wrote:
- [65] As explained by Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, the claims for loss of home making capacity and for cost of future care are distinct:

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered by the plaintiff, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered to the plaintiff. It is true that the two claims may overlap - just as the normal claim for loss of earnings and cost of care may do so - because the

cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of care. The loss is a "negative" loss, in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are "positive" losses - the addition of an extra expense - and they clearly fall under cost of care.

[Emphasis in original.]

- [254] Justice Fleming assessed the plaintiff's past loss of housekeeping capacity based on a need of 24 hours per week at a rate of \$20 per hour. She made no pecuniary award for future loss of housekeeping capacity, finding it appropriate to address this through non-pecuniary damages. In doing so she noted the risk of duplication with the cost of future care award.
- [255] Ms. Ditson opined that Ms. Plett is limited in her housekeeping activities and will need assistance for moderate to heavy indoor cleaning tasks. She says she is capable of performing light cleaning tasks independently, such as meal preparation, loading and unloading the dishwasher, sweeping, and wiping counters as long as she paces herself.
- [256] Dr. Waspe opines Ms. Plett will be challenged with lifting heavier grocery bags, vacuuming, and packing dishes overhead. She says household chores will be a challenge due to her neck and upper back pain. Tasks such as scrubbing tubs and floors are expected to trigger cervical dysfunction and pain
- [257] Earlier I have addressed Ms. Plett's housekeeping work before the accident and the limitations on her ability to do so after and I will not repeat that here. She is now able to do lighter cleaning duties and cooking, albeit with some difficulty and sometimes with assistance. There are times when she might start a task, such as cooking a meal, and need one of her sons to take over. Thus, she has challenges with housework and needs assistance with some heavier or more onerous tasks. However, consistent with Ms. Ditson's assessment, Ms. Plett's evidence indicates she is not completely disabled from doing all housework.
- [258] In her cost of future care assessment, Ms. Ditson recommends Ms. Plett receive two hours per week of housekeeping assistance. This provides some guidance on how to assess Ms. Plett's loss of housekeeping capacity

Past Loss of Housekeeping Capacity

[259] Following the approach in Kim, Steinlauf, Xu, and Anssari, and taking the benefit of Ms. Ditson's opinion, I begin my assessment of Ms. Plett's past loss of housekeeping capacity using the replacement value of two hours per week at \$20 per hour. To account for the fact that Ms. Plett's housekeeping abilities were more restrictive in the immediate aftermath of the accident, a point not assessed by Ms. Ditson, I would increase this to five hours per week for each one-year period following the accident.

[260] I therefore assess past loss of housekeeping capacity as follows:

October 1, 2011-September 30, 2012

5 hrs @ \$20/hr * 52 weeks

\$5,200

October 1, 2012 - May 4, 2016

2 hrs @ \$20/hr * 187 weeks

\$7,480

May 5, 2016 - May 4, 2017

5 hrs @ \$20/hr * 52 weeks

\$5,200

May 5, 2017 - March 11, 2022

2 hrs @ \$20/hr * 200 weeks

\$8,000

Total

\$25,880

[261] In my view, \$25,000 is reasonable compensation for Ms. Plett's past loss of housekeeping capacity.

Future Loss of Housekeeping Capacity

[262] With respect to loss of future housekeeping capacity, to avoid duplication of award as cautioned in Kim and Firman, I propose to deal with both the loss of capacity and the cost of future care for housekeeping together.

- [263] I accept Ms. Ditson's recommendation for housekeeping assistance as a cost of future care item based on two hours per week. I also accept this should be based on the cost of a licenced service provider for the reason Ms. Ditson suggests relating to the liability risk of hiring an uninsured service provider. Ms. Ditson estimates the annual cost for a licenced service at two hours per week to be between \$3,003 to \$3,576. I will assess it at the midpoint of this range (\$3,289.50) which I round up to \$3,300.
- [264] Ms. Plett argues that loss of housekeeping capacity should be assessed on the basis that she will require assistance to age 95. She relies on statistical evidence led through the defendants' expert economist, Mr. Szekeley, indicating the average life expectancy for women of Ms. Plett's birth year residing in B.C. is just over 88 years, but that 20% of such women are expected to live to age 95.
- [265] I reject this for two reasons. First, it disregards the other side of the median, including that there is an 8.5% chance a B.C.-resident woman in Ms. Plett's cohort may die at age 70, a 15% chance of dying at 75, and a 25% chance of dying die at 81.
- [266] Second, the authorities reviewed earlier end compensation for housekeeping services at age 70 or, in Anssari, at age 75 on the basis that assistance after that age would have been required regardless of the accident. Following Anssari, I propose to use 75. Using Mr. Carson's present value table, the present value of the yearly cost of housekeeping at \$3,300 to age 75 is \$54,018 (i.e. $3.3 * \$16,369 = \$54,018$).
- [267] Ms. Ditson recommends a one-time heavy cleaning of Ms. Plett's home to help organize and clear out accumulated clutter. After this one-time heavy clean, Ms. Ditson opines that the regular (two hours per week) service will suffice. Mr. Kerr recommends half the regular cleaning for Ms. Plett but also recommends an annual heavy clean. Ms. Plett seeks annual heavy cleaning notwithstanding Ms. Ditson's opinion. I agree that Ms. Ditson is optimistic that only a one-time heavy cleaning will suffice. In my view, an annual \$157.50 is reasonable. The present value of this to age 75 is \$2,578.
- [268] Rounding this up, I would award \$57,000 for cost of future care for housekeeping services.
- [269] I recognize there is a difference between the loss of housekeeping capacity, being a "negative" loss to the plaintiff, and the cost of future care, being a "positive" loss to the plaintiff. I also recognize that any award for loss of future capacity should be modest when provision is already made through cost of future care. Having made an award for cost of future care, which provides compensation for the provision of services in the future that others would need to perform, I propose to follow Justice Fleming's approach in Anssari and deal with most of the remaining aspects of future housekeeping capacity under non-pecuniary damages. I find that approach sensible since what is now being measured is the "lost the ability to work in a manner that would have been valuable to her": O'Connell v. Yung, 2012 BCCA 57, para. 65.

- [270] However, I would make a modest addition to the pecuniary amount of \$8,000 (being 15% of the cost of future care amount) on the basis that are times when Ms. Plett needs to "tag out" of doing a particular chore (usually cooking) and have someone else complete a task such as preparation of a meal. I also accept that she will need help in preparing larger meals like Christmas dinner which she previously did on her own. These two points were not considered in Ms. Ditson's assessment for cost of future care and I consider compensation for them is appropriate.
- [271] Based on the evidence of Dr. Waspe and Dr. Helper, I do not see an improvement in Ms. Plett's chronic pain and physical condition to be a real and substantial possibility and I thus make no discount for that contingency.

Cost of Future Care

- [272] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition to the extent that is possible. When full restoration cannot be achieved, such as in the case of chronic pain with no prognosis for improvement, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [273] The test for determining the appropriate award is objective, based on medical evidence. There must be a medical justification for each item claimed, and the claim must be reasonable: *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Justification means the cost is both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not used a service in the past, it may be inappropriate to include it in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [274] Cost of future care assessments and estimates have been made by both Ms. Ditson and Mr. Kerr, based on their own examinations of Ms. Plett and the recommendations of the medical professionals. As I have said, I prefer the evidence of Ms. Ditson. In addition to the reasons expressed earlier in that regard, I find Mr. Kerr he has not included in his list some basic items that have already proven to be effective for Ms. Plett.
- [275] Unless otherwise stated or qualified in the list below, I accept the cost and replacement frequency for the items listed by Ms. Ditson. Where a range is stated for cost or replacement frequency, I accept the midpoint. The defendants have not significantly challenged or questioned the reasonableness of most of these items, including their cost and replacement frequency.

[276] For the reasons explained above, I do not accept that it is reasonable to assess the present value for these items on the assumption that Ms. Plett will live to 95. There is no evidence to suggest she should be above or below the median life expectancy for women of her age. Unless otherwise specified, I would assess these items to age 88 which is close to the median life expectancy.

- Shower chair and long-handled sponge: Ms. Plett is able to stand in the shower but has difficulty bending down to wash and shave her legs. I accept these items is a reasonably necessary and will assist Ms. Plett with this task. In the written argument, the plaintiff seeks \$887.25 annually for hair removal, but Ms. Ditson opines that the shower chair permits Ms. Plett to shave her legs safely and more easily and thus, "does not recommend Hair Removal Services at this time." This opinion accords with Ms. Plett's testimony on the matter. I therefore accept the chair and sponge but not the hair removal.

- Back Rest: The back rest is aimed at making Ms. Plett more comfortable while driving and its replacement time is said to depend on the frequency of usage and the user's weight. I accept this is reasonable but since Ms. Plett now mostly commutes by motorcycle rather than car, I expect this item will be used relatively infrequently and thus I would assess the replacement cost to be every five years rather than two to three years.

- Supportive mattress: Ms. Ditson opines Ms. Plett will benefit physically from a supportive mattress, based on Ms. Plett's report of using one she has already obtained. I accept this is reasonable but Ms. Ditson has only provided the cost of the mattress itself (\$1,678.88) and not the differential cost between that and an ordinary mattress because "mattresses vary significantly in costs". I would allow \$1,000 for this item to account for the fact that Ms. Plett would need to acquire a mattress regardless of the accident. I assess the replacement frequency at the midpoint of 12.5 years.

- Lightweight Vacuum: Ms. Plett claims \$700 for a lightweight vacuum, with a replacement frequency of 10 years. (I base this on the proposed annual cost because the replacement frequency of every two years, stated in argument, appears incorrect.) Neither Ms. Ditson nor Mr. Plett recommended this item or provided a cost estimate. Given my assessment of Ms. Plett's loss of housekeeping capacity and cost of future care for housekeeping is premised on her doing light housekeeping duties, the item seems reasonable but I am not able to assess the cost in the absence of evidence. If the parties are unable to resolve this item, they may address it in settling the order, if necessary.

- Supportive pillows and heat packs: I accept both these items as recommended by Ms. Ditson who reports demonstrated benefits from Ms. Plett's prior use of them.

- Anti-fatigue mats: Ms. Plett is already using these as they were recommended by Ms. Marsden, an occupational therapist retained by ICBC to provide some accommodations to Ms. Plett. Ms. Plett testified that they do not make a difference, but she continues to use them and, given they were recommended by ICBC's occupational therapist, I accept they are reasonably necessary. Ms. Plett might well find that they did make a difference if she stopped using them.
- Laundry Service: In her 2017 report, Ms. Ditson recommended laundry service at an annual cost of \$1,569.88 to \$2,525.12 (midpoint \$2,048). This was based on Ms. Plett's limitations to lift loads of laundry and the fact she had to take her laundry to a laundromat. In her 2020 report she states: "Ms. [Plett] reported that she now has in-suite laundry. As such, she no longer requires laundry service." This is inconsistent with the evidence of Ms. Plett and Mr. Talley, both of whom I understood to say they still need to take their laundry to a laundromat. If Ms. Plett has in-home laundry facilities, I agree with Dr. Helper that she may break her laundry into manageable loads making laundry service unnecessary. However, if she does not have in-home laundry facilities, I accept this item, although I would limit it to age 75 for the same reason I have done do for housekeeping capacity. Alternatively, the defendants may prefer to pay the cost of purchasing and installing in-home facilities for Ms. Plett as that may be less expensive. If the parties cannot resolve this matter in settling the order, they may seek to address me further on it.
- Multi-disciplinary Rehab Program: This was recommended in Dr. Stockburger's 2017 report and, based on Ms. Ditson's 2017 report, Ms. Plett claims a one-time cost of \$13,500 for it. However, in her 2020 report Ms. Ditson opined that the full program was not necessary because Ms. Plett received reasonable support with kinesiology and occupational therapy services (both of which I would include in cost of future care). She also opines that aquatic therapy programs will help address this item as will a free Self-Management BC program for chronic pain management. Thus, in her 2020 Report, Ms. Ditson opined this item is unnecessary. On this basis, I would not include this claim as a cost of future care.
- Occupational therapy: This item is focuses mostly on facilitating workplace accommodations. Ms. Plett claims it as an annual cost (\$1,400) but Ms. Ditson recommends it as a one-time item. The recommendation was premised on the fact that Ms. Plett was still working at Barnes when Ms. Ditson wrote her second report. I would allow this as a one-time item on the basis I have found Ms. Plett has some residual work capacity and an OT assessment would be reasonable if she were able to find a job. I have considered discounting this item to account for my earlier finding that there is only a 50% probability that Ms. Plett will be able to find an accommodating employer willing to hire her for a less-skilled job. However, as this is a one-time item, I do not consider a discount to be appropriate since Ms. Plett may try more than one job each of which may require some OT assistance.

- Active exercise program: I accept Ms. Ditson's recommendation for Aqua Therapy as this has been beneficial to Ms. Plett in the past and she is likely to take advantage of it given its benefit and her enjoyment of swimming. However, I would not include the cost of a gym/pool pass as I find Ms. Plett would have incurred this expense without the accident, given her pre-accident dedication to attending the gym on a daily basis.

- Botox Treatments and Hip Injections: Ms. Plett seeks \$2,789.85 annually for Botox treatments. I decline to make an order for this. Dr. Stockburger testified he discussed botox injections with Ms. Plett but she had no interest in pursuing them. Ms. Ditson states she does not anticipate Ms. Plett will require them. I am not satisfied these are necessary and, even if they might be beneficial, I am not satisfied Ms. Plett will use them. Nor would I make provision for hip injections mentioned by Ms. Ditson given I have found it has not been proven that the accident caused Ms. Plett's hip pain.

- Prescription Medications: Medications present a challenge for assessment. The evidence was inconsistent as between whether Ms. Plett was resistant to prescription medications or whether she could not afford them. The evidence leads me to conclude that the truth is something of a combination of these. I find Ms. Plett benefited from prescription medication for her headaches and is likely to follow Dr. Waspe's advice to take these medications if she has regular access to them. In her closing argument, however, Ms. Plett has sought \$492.75 per year for Zoloft and \$547.50 per year for Sertraline which I understand are different names for the same anti-depressant medication. This may be an error in the plaintiff's submissions.

In my view, it is reasonable to provide cost for one prescription medication for Ms. Plett's headache/pain (such as the Duloxetine recommended by Dr. Waspe) and one, such as Sertraline/Zoloft, for mood and anxiety. I am not persuaded Ms. Plett will take more than this. Dr. Waspe recommended 30-60 mg per day of Duloxetine per day. Taking the midpoint of this and the midpoint of the range of costs for this medication from Ms. Ditson's report, I assess this annual cost to be \$533. The annual cost for Sertraline is \$547.50. I will therefore assess the annual cost for prescription medications at \$1,080.

- Non-prescription Medications: Ms. Ditson's report and Ms. Plett's submission appear to double-up on different types non-prescription pain relievers (e.g. taking both Advil and Tylenol nightly). I would assess \$165 per year for Tylenol or Advil. Some of the other non-prescription medications or nutraceuticals have questionable medical value according to Dr. Waspe, though may have a placebo effect for Ms. Plett. I accept Ms. Plett received benefit from some of these but, to account for Dr. Waspe's opinion, and the fact that Ms. Plett does not regularly take all of these, I would assess other non-prescription medications and supplements (such as melatonin and 5-HTP) at \$200 per year.

- MRI - Knee and Ankle: In his 2017 report, Dr. Helper recommended an MRI to assess Ms. Plett's right knee and ankle. Ms. Ditson states MRIs are available through MSP at no charge to the patient but there is a long waitlist so that obtaining imaging through a private service may be desirable at an estimated (midpoint) cost of \$1,531.98. I decline to include this item. It was

recommended in 2017, almost five years ago, and if Dr. Stockburger or Dr. Waspe thought it was important, presumably they would have had Ms. Plett on the public waitlist for an MRI. I do not know how long the waitlist is but it seems unlikely that Ms. Plett would had to have waited more than five years for an MRI if it was recommended by her own doctors.

- **Psychiatric Counselling:** Ms. Plett claims \$3,100 for this item. Her mood and depression were much improved at the time of trial but Dr. Ancill opined she remains vulnerable to mood disorder in the longer term. I accept there is a real and substantial possibility, in the range off 80%, of this happening. I would therefore order 80% of the amount claimed rounded up to \$2,500 as a one-time item.

- **Vocational Rehabilitation and Counselling:** This was recommended by Dr. Powers in the event (as of his 2020 report) that Ms. Plett should lose her job at Barnes Harley-Davidson, which of course she has. If there hope for Ms. Plett to have residual employment, I agree this is a necessary item and I would include it at the full amount claimed of \$3,675.

- **Ergonomic Assessment:** Should Ms. Plett be able to find employment, I accept she will require an ergonomic assessment for a new workplace. This is assessed as a one-time item of \$296.50. I would not apply a contingency discount to this for the reasons expressed earlier regarding the Occupational Therapist consultation.

- **Vocational/Ergonomic Items:** Ms. Plett claims for various vocational and ergonomic aids to assist with work. These are: a monitor riser, headset, document holder, ergonomic mouse, slant board, ergonomic keyboard, high back chair, and an articulating keyboard tray. She already has several of these items, provided, I understand it, by ICBC, so she should only be seeking the replacement value for some. Some of these may only be necessary if she returns to work. That too will affect the replacement frequency. However, I infer at least some of these items are of benefit to her at home, including for writing for her "Saddlebag Ministries" project. I propose to deal with these items globally. The annual cost of all of these items, with replacement costs, is \$270. As they are work related, I will assess this to age 72, which is the retirement age I have premised my loss of future earning capacity on. Thus, the present value of these items ($0.27 * 14,586$) is \$3,938.22. Taking into account she has some items already, the contingency of not working, and the potential benefit for home use, I will assess 65% of the cost of these items (\$2,559.84) which I will round to \$2,500.

Cost of Care Items

One-Time Items

Cost

Psych Counselling

\$2,500

Vocational Rehab & Counselling

\$3,675

Ergonomic Assessment*

\$296.50

Occupational Therapy

\$1,400

Vocational/Ergonomic Items

\$2,500

Total One-Time Items

\$10,371.50

Replacement Items

Cost

Replacement Frequency

Annual Cost

Laundry

\$2,430.00

1

\$2,430.50

Aqua Therapy

\$1,131.00

1

\$1,131.00

Prescription Medications

\$1,080.00

1

\$1,080.00

Tylenol/Advil

\$165

1

\$165.00

Non-prescription and supplements

\$200.00

1

\$200.00

Orthopaedic shoes

\$84.00

1.5

\$56.00

Light Weight Vacuum

\$TBD

10

\$TBD

Back Rest

\$134.40

2.5

\$53.76

Pillow

\$100.79

2.5

\$40.32

Heat pack

\$30.23

4

\$7.56

Footrest

\$44.74

4.5

\$9.94

Shower chair

\$89.00

5

\$17.80

Long-handled sponge

\$20.16

0.5

\$40.32

Anti-fatigue mats

\$123.18

10

\$12.32

Mattress

\$1,000.00

12.5

\$80.00

Total Annual Cost

5,324.52

Present Value to Age 88 (Laundry to 75)

\$116,612

Total Cost of Future Care (Rounded; excluding housekeeping; subject to resolution on vacuum)

\$126,984

Non-Pecuniary Damages

[277] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation should be fair to all parties. Fairness is measured against awards made in comparable cases, but these serve only as a rough guide since each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189

- [278] A common but non-exhaustive list of factors typically considered include the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital, or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [Stapley].
- [279] The assessment of non-pecuniary damages is necessarily influenced by each plaintiff's own experiences in dealing with the injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [280] Throughout these reasons, I have described Ms. Plett's condition before and after the accident in some detail. I will not repeat that here. Suffice to say here she has been significantly affected by the accidents both physically and cognitively.
- [281] On a positive side, Ms. Plett has continued to take lengthy road trips, though with some difficulty. She finds considerable joy in some activities, especially riding her Harley-Davidson. She has gained much with the purchase of this bike including social connections in her riding groups and an overall improved mental state from the joy of riding. I agree with Ms. Plett that these are not mitigating factors that reduce a non-pecuniary award of damages: *Guthrie v. Narayan*, 2012 BCSC 734; *Davidson v. 0969446 B.C. Ltd.*, 2021 BCSC 609 at para. 103. However, I mention them to describe the extent of Ms. Plett's injuries and disabilities and to point out that she is not completely disabled and unable to enjoy any activity.
- [282] Ms. Plett seeks a non-pecuniary award of \$300,000, or \$350,000 if loss of housekeeping is not awarded as separate head. She largely relies on Chief Justice Hinkson's recent decision in *Grabovac v. Fazio*, 2021 BCSC 2362 [Grabovac] which she argues is now the standard of non-pecuniary damages for injuries like those she has suffered.
- [283] Respectfully, I do not agree with counsel's interpretation of *Grabovac*.
- [284] In that case, a 26-year-old female dental hygienist was injured in two motor vehicle accidents. In the first she suffered soft tissue injuries to neck, shoulders, and back, headaches, fatigue, problems with memory and concentration, depression and anxiety. Her injuries had largely resolved by the time of the second accident when she suffered soft tissue injuries to neck, shoulders, upper and lower back, right arm (with hand tremors), left hip and leg. She had headaches three times a week or sometimes daily. She also suffered from fatigue, insomnia, problems with memory and concentration. Her pain was chronic which led to Major Depressive Disorder, Somatic Symptom Disorder, Post-Traumatic Stress Disorder and General Anxiety Disorder. She was awarded non-pecuniary damages of \$40,00 for the first accident and \$310,000 for the second.
- [285] However, a significant component of the award for the second accident was based on Hinkson C.J.S.C.'s finding that the plaintiff would be unable to have children because of the accident. Counsel for the plaintiff had, in fact, proposed \$225,000 as a global non-pecuniary

award for both accidents. However, Hinkson C.J.S.C. found that proposal did not account for his finding that the plaintiff now had no real prospect of having children. He said at para. 251 the plaintiff's proposal was "insufficient to compensate her for this loss" (emphasis added). If that very significant factor was removed, I would respectfully suggest the range proposed by the plaintiff in Grabovac was more in line with the range of non-pecuniary damages of the nature suffered by the plaintiff that parallel those suffered by Ms. Plett. That range was \$200,000 to \$250,000 based on *Martin v. Steunenbergh*, 2021 BCSC 1411, *Steinlauf v. Deol*, 2021 BCSC 1118, *Fletcher v. Biu*, 2020 BCSC 1304, and *Gill v. Apeldoorn*, 2019 BCSC 798.

- [286] I note also that Hinkson C.J.S.C.'s award of non-pecuniary damages also included loss of housekeeping capacity.
- [287] Ms. Plett also relies on *Wallman v. John Doe*, 2014 BCSC 79 where Justice G.C. Weatherill awarded a 53-year-old male E.R. physician non-pecuniary damages of \$210,000 (\$247,000 in today's values) for injuries suffered when his vehicle was rear-ended by a transit bus. The plaintiff suffered very severe consequences of an MTBI, including sustained blurred and double vision, nausea, light and noise sensitivity, irritability and depression, "unbearable" headaches, and cognitive impairments including problems with memory, concentration, multi-tasking. I find Ms. Plett has suffered a similar suite of injuries, though not as severe as the plaintiff in *Willman*.
- [288] Third, Ms. Plett relies on *Sirna v. Smolinski*, 2007 BCSC 967 where Justice Macauley awarded a 25-year-old female plaintiff \$200,000 (\$266,000 in today's values) for injuries she suffered when struck by the defendant's vehicle while rollerblading. The plaintiff was very physically active before the accident. She suffered similar injuries to Ms. Plett including a MTBI, soft tissue injuries, chronic pain, headache and various permanent cognitive impairments. She had difficulty doing laundry and cooking and had to significantly reduce her physical activity. No separate award was made for loss of housekeeping capacity, although the cost of future care award included an annual amount for home and yard maintenance.
- [289] The defendants argue that Ms. Plett's non-pecuniary damages, including for housekeeping capacity, should be assessed at \$145,000. However, this is based on the defendants' position that Ms. Plett's physical injuries, cognitive impairments, and overall functioning is less severe than I have found them to be.
- [290] Despite the defendants' position on the extent of Ms. Plett's injuries and losses, the two cases they cite on non-pecuniary damages are quite close to Ms. Plett's circumstances. In *Hawkins v. Kumar*, 2019 BCSC 1896 [Hawkins] a 50-year-old woman was awarded \$140,000 for injuries she suffered in two motor vehicle accidents. In the first she was found to have suffered a mild traumatic brain injury, soft-tissue injuries to her neck, upper back, lower back, and trapezius, and headaches. The plaintiff also suffered emotional difficulties and was diagnosed with adjustment disorder and driving anxiety. Her brain injury resulted in

vertigo, nausea, dizziness, headaches, double vision, weakness in learning, memory and concentration, and language difficulties. Her soft-tissue injuries caused pain and led to sleep difficulties. In the second collision she suffered a mild aggravation her soft-tissue injury to her shoulder but this resolved by trial. Her other injuries persisted, albeit with some improvement by the time of trial. The court found the effect of the collisions on her lifestyle and abilities was dramatic and ongoing.

- [291] Hawkins has close parallels to this case given both plaintiffs were of a similar age and the injuries closely match. The main distinction in Hawkins is the plaintiff's relative improvement in cognitive impairments and dyssomnia by the time of trial.
- [292] In *Gabert v. Krist*, 2018 BCSC 2109 [Gabert] a 71-year-old female plaintiff (64 at the time of the accident) was struck from behind in a motor vehicle accident and suffered soft tissue injuries to her neck, debilitating headaches, nausea, dizziness, tinnitus, and vertigo. As a result of her injuries she developed chronic fatigue and significant sleep interruption. Her pain became chronic and she was left suffering from chronic fatigue syndrome, fibromyalgia with constant pain, and relentless tinnitus and headaches, all of which had a debilitating impact on her emotional and physical well-being. Her prognosis for recovery was poor. Justice Devlin found the plaintiff's life had been dramatically changed by the accident, which deprived her of the retirement plans to travel with his husband. She was awarded \$160,000 (about \$175,000 in today's values) in non-pecuniary damages. A separate award of \$60,000 was made for loss of housekeeping capacity which was in addition to homemaking assistance as an item for cost of future care.
- [293] The impact on the plaintiff in *Gabert* was severe. One distinguishing feature is that the plaintiff there did not suffer a brain injury. In considering non-pecuniary damages, Justice Devlin distinguished *Burdett v. Eidse*, 2010 BCSC 219, var'd 2011 BCCA 191, which was cited to her by the plaintiff, on the basis that the plaintiff in *Burdett* "also suffered mild traumatic brain injury that severely undermined his executive functioning and rendered him competitively unemployable" (para. 88).
- [294] In my view, having regard to Ms. Plett's injuries and circumstances in light of the Stapley factors, accounting for a residual non-pecuniary element of future loss of housekeeping capacity, and considering the authorities just reviewed (though recognizing they are, at best, a guide), I find an award of \$210,000 for non-pecuniary damages is appropriate.

Conclusion

- [295] I therefore assess Ms. Plett's damages as follows:

Item

Damage Award

Non-Pecuniary Damages (including loss of future housekeeping capacity)

\$210,000

Past Loss of Earning Capacity

\$238,896

Future Loss of Earning Capacity

\$410,000

Past Loss of Housekeeping Capacity

\$25,000

Future Loss of Housekeeping Supplement

\$8,000

Cost of Future Care - Housekeeping

\$57,000

Cost of Future Care - Other (subject to resolution on lightweight vacuum and laundry)

\$126,984

Special Damages

\$25,909

[296] Counsel asked for the opportunity to address me on the issue of costs. Subject to those submissions, I would award costs to Ms. Plett. If counsel wish to address me, however, they may arrange that through Supreme Court Scheduling.

"Kirchner J."

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