

CANADA / JUDGMENT

Rix v. Koch

2020 BCSC 1976

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2020 BCSC 1976 Rix v. Koch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rix v. Koch,

2020 BCSC 1976

Date: 20201214

Docket: M182965

Registry: Vancouver

Between:

Kelly Marie Rix

Plaintiff

And

David Koch

Defendant

- and -

Docket: M1810580

Registry: Vancouver

Between:

Kelly Marie Rix

Plaintiff

And

Brandon Craig, Willowbrook Motors Ltd., and First Choice
Security & Audio Systems (2000) Ltd.

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

September 14-18, 21-25, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 14, 2020

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Introduction

- [1] The plaintiff, Kelly Marie Rix (also known as Kelli Rix), claims damages for personal injuries arising from two motor vehicle accidents (the "Accidents"). The first motor vehicle accident occurred on April 14, 2016 in Surrey (the "First Accident"). While stopped, Ms. Rix's vehicle was rear-ended by a vehicle driven by the defendant, David Koch. Mr. Koch has admitted liability for the First Accident.
- [2] The second motor vehicle accident occurred on May 30, 2017 in Delta (the "Second Accident"). Ms. Rix's vehicle was rear-ended again, this time by a vehicle driven by the defendant, Brandon Craig. Mr. Craig has admitted liability for the Second Accident.
- [3] Ms. Rix alleges she sustained the following injuries as a result of the Accidents:
- a. neck,
 - b. shoulders,
 - c. back,

- d. arms, and
 - e. legs.
- [4] She also alleges she suffers from headaches, anxiety, and depression.
- [5] The extent of Ms. Rix's injuries and symptoms is the subject of dispute, as is the quantum of damages.
- [6] Ms. Rix was 45 at the time of the First Accident and 46 at the time of the Second Accident. She is currently 50 years of age.
- [7] Prior to the First Accident, Ms. Rix had spent her entire career in the airline industry, much of it in the area of in-flight services. She was hard-working and passionate about her work. Prior to the First Accident, Ms. Rix was active, social, and devoted in her role as a mother and partner.
- [8] I accept that while she continues to work, and continues to be a good mother, she is not as social or as active as she was prior to the Accidents. Ms. Rix's injuries have also had an impact on her ability to work, but not to the extent claimed. I have awarded damages to Ms. Rix as a result of the injuries she sustained in the Accidents, including compensation for loss of future earning capacity.

Factual Background

Pre-Accident Employment and Lifestyle

- [9] Ms. Rix testified that aviation has always been a central aspect of her life. This began in early childhood because her father worked for Air Canada as a director of cargo. She testified that she loved the thrill of the airline industry and had always wanted to work in that field.
- [10] Ms. Rix graduated from high school in 1988. She does not have a post-secondary degree or diploma.
- [11] Ms. Rix has held the following positions in the past:
- a. Flight attendant and purser (senior flight attendant) for Canada 3000 from 1996 to 2001;
 - b. Manager (cabin crew supervisor) and cabin crew personnel for Harmony Airways from September 9, 2002, to April 9, 2007;
 - c. Performance manager and cabin crew personnel for Air Canada from September 17, 2007, to June 6, 2011;
 - d. Support services coordinator for Bombardier Aerospace working in military aviation from 2012 to 2013; and
 - e. Service delivery manager for G4S Secure Solutions (Canada) Inc. from December 17, 2013, to April 3, 2015.

- [12] Ms. Rix took a period of disability leave due to injuries when she worked at Air Canada and again when she worked at G4S Secure Solutions.
- [13] Ms. Rix began working as an employee for Canada Jetlines in October 2014 and was working at this company at the time of the First Accident. This was a unique opportunity for Ms. Rix. Canada Jetlines was a start-up airline that was attempting to compete with WestJet and Air Canada. Ms. Rix's role with the company was Manager of Training and Safety for in-flight services. Her position was largely sedentary during the planning and development stage of the airline. However, Ms. Rix would have progressed to a more physical role once Canada Jetlines was air-ready. She would have been required to fulfill all of the duties of a flight attendant for the purposes of training other flight attendants.
- [14] Prior to the Accidents, Ms. Rix was an active person. She swam, cycled, played catch with her son, attended yoga classes, and worked out several times per week. She also participated in recreational obstacle races such as the Rugged Maniac event.

PRE-ACCIDENT HEALTH

Neck

- [15] Ms. Rix testified that she damaged the C5-C7 area of her neck when she was 14 years old during a jive dancing incident. She was young and her symptoms resolved in less than one year.
- [16] I accept that Ms. Rix's neck was asymptomatic at the time of the First Accident, and had been for years.

Headaches

- [17] Ms. Rix testified that she has experienced migraine headaches since her early twenties. She gave evidence that before the Accidents she would experience migraines very occasionally and they would not last longer than a day. She estimated that from her early twenties until the time of the First Accident she had missed approximately five days, in total, from work due to these headaches.
- [18] Prior to the Accidents, Ms. Rix also had headaches that she would experience during stressful times. Her headaches were triggered by stressful life events like an injury to her knee (2011), the breakdown of her marriage (2012), and her son's health issues (2015). Ms. Rix would have a period of tension headaches daily due to the stress. She testified that they lasted a few months each time, but they eventually resolved.

Knee Surgeries

- [19] In 2007, when Ms. Rix was executing a yoga move, she injured her knee. This resulted in a number of surgeries,[1] which occurred while she was at Air Canada. Her job required her to be on her feet and she found this challenging. As a result, she went on disability benefits and was eventually terminated from this position. After a challenge to her termination, she received six months' severance pay and a letter of reference.
- [20] Dr. Stockburger[2], Ms. Rix's family physician, confirmed during his testimony that Ms. Rix had no active knee symptoms at the time of her first visit to him on August 14, 2012. In addition, Ms. Craig, a functional capacity evaluator, did not detect any functional limitations with respect to Ms. Rix's knee during her six-hour functional capacity testing.
- [21] I accept that Ms. Rix's knee symptoms did not impact her vocational pursuits after 2011.

Right Foot and Left Hand/Wrist

- [22] On June 13, 2014, Ms. Rix injured her right foot and left hand when she slipped while coming down the ladder of her son's loft bed. Her wrist pain lasted a few weeks. Her right foot was more problematic. For a period of time, she relied on crutches and took time off work at G4S Secure Solutions. She was eventually diagnosed with Chronic Regional Pain Syndrome.
- [23] Dr. Stockburger testified that by June 1, 2015, Ms. Rix's foot had improved quite a bit, but she continued to have some residual swelling. Her foot symptoms resolved soon thereafter. Dr. Stockburger confirmed that he has not discussed Ms. Rix's foot injury with her since that time.
- [24] I accept that by the time of the First Accident, Ms. Rix was not suffering from any ongoing limitations relating to her foot.

Depression and Sleep Issues

- [25] Ms. Rix testified that she suffered from postpartum depression in 2004 after the birth of her son. She testified that her symptoms lasted less than one year. According to Dr. Stockburger, she reported to him a history of eight months of postpartum depression following her son's birth.
- [26] Ms. Rix also had depressive symptoms around the time of her knee surgeries, when she was working at Air Canada.
- [27] Ms. Rix had disrupted sleep when she was working at G4S Secure Solutions. This was initially due to a difficult work schedule. Once Ms. Rix sorted that out with her employer, she injured her foot, which again disrupted her sleep.

THE PLAINTIFF'S INJURIES

First Accident

[28] On April 14, 2016, the First Accident occurred at the intersection of Highway 10 and 144th Street in Surrey. Her airbag did not deploy. Ms. Rix's vehicle was damaged but it was capable of being driven away from the accident scene and it was subsequently repaired. Neither the police nor an ambulance were called to attend the First Accident.

[29] Ms. Rix advised Dr. Gordon Robinson she hit her head on the head rest; she denied any blows to the head when later interviewed by Dr. Roy O'Shaughnessy.

[30] Almost immediately following the First Accident, Ms. Rix testified she experienced the following symptoms:

- head pain/pressure on her right side,
- nausea,
- ringing in the ears,
- neck pain,
- pain in the shoulders,
- back pain, and
- tingling and numbness in her arms and legs.

[31] Ms. Rix testified that her headaches worsened and her neck and shoulder pain intensified over the next few weeks. The ringing in her ears, tingling in her arm, and pain in her right leg resolved over time. Ms. Rix attended numerous sessions of physiotherapy, massage therapy, and kinesiology. She also had a private MRI of her neck at the urging of her physiotherapist.

[32] In the lead up to the Second Accident, Ms. Rix was improving. She was still experiencing neck and shoulder pain and she was experiencing regular headaches. These headaches are located on her right side behind her eye, extending down into her neck. She testified that they are different from the tension headaches she occasionally experienced during stressful periods before the First Accident.

[33] Her post-First Accident migraines were occurring at a rate of once to twice per month just before the Second Accident.

Second Accident

[34] The Second Accident occurred on May 30, 2017. It occurred near Highway 99 and the George Massey Tunnel in Delta. The plaintiff's vehicle was rear-ended by a vehicle driven by the Defendant, Mr. Craig. The vehicle driven by Mr. Craig was owned by the defendant, Willowbrook Motors Ltd. and leased by the defendant, First Choice Security & Audio Systems (2000) Ltd. Mr. Craig was operating the vehicle with the consent of the owner and

lessee. Ms. Rix's airbag did not deploy and her vehicle was subsequently repaired. Ms. Rix advised Dr. Robinson and Dr. Simonett she had hit her head on the steering wheel but she again denied any blows to the head when interviewed by Dr. O'Shaughnessy.

- [35] Immediately following the Second Accident, Ms. Rix testified that she first needed to compose herself and then exchanged information with Mr. Craig. Neither the police nor an ambulance was called to attend the Second Accident. Ms. Rix drove herself home. Ms. Rix testified that she vomited when she got home. She felt ringing in her ears and intense pain on the right side of her head. She had a significant headache. She also experienced pain across her shoulders.
- [36] Ms. Rix described neck pain, back pain, tingling in the arms and legs, and cognitive and emotional symptoms following the Second Accident. Her neck injury extended to the top of her head, along the right side, and down across her shoulders. The pain across her shoulder blades extended across her trapezius.
- [37] Ms. Rix described headaches that were worse than after the First Accident in terms of severity, duration, and frequency. These were, and still are, the most troublesome of her symptoms. Her migraines occurred at an increased rate. Ms. Rix testified on cross-examination that when her headache pain intensifies, she starts to feel incapacitated. She struggles to function. Sometimes she has to call in sick or leave work early.
- [38] In 2018, Ms. Rix started receiving Botox treatments for her headaches. She testified these treatments are beneficial. She receives them every three months.
- [39] Ms. Rix testified that after the Second Accident, she had a diminished attention span and sometimes had difficulty articulating her thoughts. She testified that it takes her longer to learn new things and she is sensitive to loud noise.
- [40] Ms. Rix testified that she also experienced sleep difficulties following the Accidents. She admitted that she has always been a light sleeper. She testified that her massage therapist and Dr. Stockburger recommended that she purchase a firmer mattress. On cross-examination, Ms. Rix testified that her sleep difficulties have improved with massage therapy and her new mattress.
- [41] Ms. Rix testified that since the Second Accident there are days when she feels pretty good and there are days when she feels incapacitated. She emphasized that March, April, and May 2020 were very difficult months because COVID-19 prevented her from accessing her usual treatments.
- [42] Ms. Rix testified that since the Second Accident she has experienced driving anxiety: her palms start to sweat; her stomach becomes upset; and she has an elevated heart rate. On cross-examination, Ms. Rix admitted that her driving anxiety has never stopped her from driving. She believes that she is now an overly cautious driver due to her fear. Her son confirmed that Ms. Rix sometimes hyperventilates in the car.

Credibility and Reliability

Legal Principles

- [43] Ms. Rix's credibility is an important consideration when evaluating the nature of her headaches and cognitive issues because the medical experts relied largely, although not exclusively, on Ms. Rix's subjective reports. It is the physician's function to take Ms. Rix's complaints at face value; it is for this Court to assess credibility: *Karim v. Li*, 2015 BCSC 498 at para. 89.
- [44] The leading authority on credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. Justice Dillon summarized the methodology applied when assessing credibility:
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.))
- [45] The validity of the evidence at trial depends on the overall consistency of the evidence with the probabilities affecting the case as a whole: *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1952] 4 W.W.R. 171 (B.C.C.A.).
- [46] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, Justice Dickson (as she then was) explained the difficulties that arise when a plaintiff deliberately misleads the court:
- [9] Where, as here, a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury the court must be exceedingly careful in examining the evidence and assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397. If deliberate falsehood is established it may be difficult to disentangle truth from deceit and some truthful aspects of the plaintiff's testimony may lose their force, particularly in the absence of corroboration. That being said, when a plaintiff is accused of deliberate deceit more than speculation or innuendo is required. A charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made: *Halteren v. Wilhelm*, 2000 BCCA 2; *Edmondson v. Payer*, 2011 BCSC 118; *Vasiliopoulos v. Dosangh*, 2008 BCCA 399.

[Emphasis added.]

- [47] In *Andrusko v. Alexander*, 2013 BCSC 985, Justice Fitzpatrick made a similar point:

- [49] If the plaintiff's account of his or her change in physical, mental, or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.
- [48] I am applying the principles expounded in these authorities when assessing the testimony tendered in this case.

Analysis

- [49] The defendants raised a number of problems with Ms. Rix's credibility. Some examples of the defendants' concerns are as follows:
- a. First, Ms. Rix was inconsistent in her testimony regarding why she left her position with Air Canada in 2011. On August 20, 2020, at her examination for discovery, Ms. Rix testified that she left her position due to stress, because she was burned out, and because she sought out a role that had a better work-life balance. At trial, Ms. Rix admitted that those answers were not true.

Ms. Rix explained that she did not think her reason for leaving Air Canada had anything to do with the current case so there was no need to disclose that she was terminated. It is true that Ms. Rix's termination does not affect this judgment and I understand why she did not want to be forthcoming. She settled her challenge to the termination and she received severance pay and a letter of reference. While she should have testified truthfully, I do not place significant weight on this inconsistency.

- b. Second, in the same examination for discovery, Ms. Rix was asked if she had experienced any depression between 2004, when she suffered from post-partum depression, and the date of the First Accident. She answered no. She also did not tell the independent medical examiners who assessed her, including Dr. O'Shaughnessy,[3] that she suffered from depressed mood in 2009.

Ms. Rix testified that her depressive symptoms in 2009 were a result of her knee injury. While not clinically diagnosed, she herself admitted at trial that she was suffering from depression around the time she was terminated from Air Canada. This was part of her explanation regarding why she was not more forthcoming regarding her termination. Regardless of her explanation, I find Ms. Rix was withholding relevant information from the medical experts.

- c. Third, Ms. Rix worked at Canada Jetlines between October 2014 and September 2019. At her July 8, 2019 examination for discovery, she stated that she was no longer working for Canada Jetlines as of July 2019. While it is true that she had resigned from Canada Jetlines in January 2019, she continued to work on contract with this company until the fall of 2019. Since Ms. Rix was working on contract with this company at the time of the discovery, it is hard to believe she just forgot this relevant piece of information.

Ms. Rix explained her answer by stating she thought counsel was questioning her about employment, not contract work. There are two problems with this explanation. Ms. Rix testified about other individuals who worked at Canada Jetlines and did not make a distinction between employees and contractors (e.g., Susan Smart). Ms. Rix also has considerable human resources experience and I would expect her to understand the simple question put to her regarding her work history. I found her testimony about her history with Canada Jetlines to be evasive. There was a likely motivation for her omission: despite her injuries, in 2019 she was able to work two jobs as well as commute over an hour each way to Burnaby each day.

- d. Fourth, Ms. Rix testified that she left Canada Jetlines primarily due to her injuries. She did not believe she was capable of the physical work involved in being a flight attendant which she would have to do once the airline was launched (i.e., was air-ready). It was put to her in cross-examination that her primary reason for leaving Canada Jetlines was due to the company's lack of necessary funding. She testified that funding was a reason, but not her primary reason. She maintained that her primary reason was that she felt she could no longer do the physical aspects of the job.

Ms. Rix's testimony is inconsistent with her own contemporaneous emails and the testimony of other witnesses. Ms. Smart, a co-worker at Jetlines, testified that Ms. Rix resigned due to her concern about the financial viability of the company, as well as her injuries. Mr. Dutton, her common law spouse, testified that Ms. Rix was concerned that she would arrive at work one day to find the company doors locked. He did not mention any concern about her injuries.

It is likely that the primary reason Ms. Rix resigned from Canada Jetlines was because she was worried it would not survive due to a lack of funding.

[50] Ms. Rix was less than forthcoming about certain aspects of her past. In doing so, Ms. Rix succumbed to the temptation to testify in a way that would further her case. The difficulty with stretching the truth, especially when testifying under oath, is that it means I must be more cautious in assessing her testimony.

[51] Most of Ms. Rix's injuries are those for which there is little or no objective evidence. While the subjective nature of injury claims does not constitute a barrier to a plaintiff proving their claim, it does mean I must examine the evidence carefully and critically: *Prince v. Quinn*, 2013 BCSC 716 at paras. 26-27. Together with my concerns regarding credibility, I must carefully scrutinize Ms. Rix's testimony to ensure her evidence is consistent with the evidence of other witnesses, the preponderance of probabilities, and general reasonableness: *Faryna*.

CAUSATION

Legal Principles

- [52] The law of causation is well established. Before assessing damages, the "plaintiff must establish a causal connection between the defendant's negligence and [the plaintiff's] pain": *Farrant v. Laktin*, 2011 BCCA 336 at para. 8. The plaintiff bears the onus of proving that the defendant's negligence was the cause of her current symptoms: *Warkentin v. Riggs*, 2010 BCSC 1706 at para. 107.
- [53] The generally accepted test for causation is the "but for" test: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 [Athey cited to S.C.R.]; *Blackwater v. Plint*, 2005 SCC 58. Causation is found if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8. The plaintiff need not establish that the defendant's negligence was the sole cause of the injury: *Athey* at para. 17.
- [54] In *Athey*, the Supreme Court of Canada discussed the need to take a pre-existing condition of the plaintiff into account:
- [32] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the Plaintiff is not to be placed in a position better than his or her original position.
- [35] The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
- [Emphasis in original.]
- [55] The defendant is not required to put the plaintiff in a better position than they would have been in but for the accident. The defendant need not compensate the plaintiff for the effects of a pre-existing condition if those effects would have occurred without the accident: *Clayton v. Barefoot*, 2018 BCSC 239 at para. 23.
- [56] In *Karim*, Justice Abrioux (as he then was) explained the difference between the thin and crumbling skull doctrines:

- [199] It is a basic principle of tort law that the plaintiff must be placed in the position he or she would have been in had the defendant's tortious act not occurred: *Athey* at 466; *Blackwater* (SCC) at para. 81. The thin skull rule provides that a defendant must take his or her victim as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person. However, the crumbling skull rule provides that the defendants need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced whether or not injury was sustained by the defendant's tortious act. See *Athey* at 473.
- [100] The name "crumbling skull" doctrine can be misleading and it should not be assumed to contrast manifest and disabling conditions with latent conditions triggered by the tort: *T.W.N.A. v. Canada (Ministry of Indian Affairs)* (sub nom *A. (T.W.N.) v. Clarke*), 2003 BCCA 670 at para. 26. In *T.W.N.A.*, Smith J.A. for the Court of Appeal observed that both latent and active pre-existing conditions must be considered in assessing the plaintiff's original position and the difference between the two conditions only arises in the assessment of damages: paras. 29-30. See also *York v. Johnston* (1997), 37 B.C.L.R. (3d) 235.

Parties' Positions

- [57] As of the time of trial, Ms. Rix submits that her current symptoms are: headaches, neck and trapezius pain, sleep difficulties, driving anxiety, depression, and cognitive issues. She argues the medical and lay evidence establishes that these injuries were directly caused by the Accidents and persist today.
- [58] The defendants dispute the nature and extent of Ms. Rix's injuries.

Analysis

Soft Tissue Injuries

- [59] Dr. Stockburger, Ms. Rix's family doctor, testified that following the First Accident, Ms. Rix suffered from soft tissue injuries and headaches. He testified that Ms. Rix had X-rays which revealed a loss of normal curvature in her neck.
- [60] Dr. Stockburger opined that Ms. Rix has had persistent posttraumatic headaches as well as neck and back pain since the Accidents. He stated that Ms. Rix's condition has not changed significantly in the past couple of years. In his February 8, 2020 report, Dr. Stockburger summarized Ms. Rix's issues as follows:

At the time of her second accident, Ms. Rix experienced re-injury to the soft tissues of her neck and back as well as new injuries to her lower back and her anterior chest. The lower back and anterior chest symptoms resolved over time but the neck and back issues persisted. Her posttraumatic headaches, which had been settling after her first accident, returned quite significantly and have remained a persistent problem with significant functional limitation since that time.

- [61] Dr. Stockburger testified that Ms. Rix had a setback during the first few months of the COVID-19 pandemic due to an inability to attend her regular treatments.
- [62] Dr. Gillian Simonett,[4] a physiatrist, testified regarding Ms. Rix's physical conditions. She diagnosed Ms. Rix with neck, upper-back, and mid-back mechanical pain. Dr. Simonett emphasized on a physical examination of Ms. Rix there were objective findings of neck pain. She had "palpable taut bands with associated muscle twitches" and reddening of the skin characteristic of myofascial pain. However, Dr. Simonett recommended a Functional Capacity Evaluation to fully assess Ms. Rix's physical limitations as a result of her physical pain.
- [63] Based on the medical evidence and Ms. Rix's testimony, I find a causal connection between the Accidents and Ms. Rix's neck, back, and shoulder injuries.

Headaches

- [64] The central issue today is Ms. Rix's headaches. They are chronic and they are the primary cause of Ms. Rix's ongoing pain and disability. Dr. Robinson, a neurologist,[5] testified that Ms. Rix's headaches are related to the soft tissue injury to her neck, which she sustained in both Accidents.
- [65] Dr. Robinson opined that there was a close temporal relationship between Ms. Rix's Accident-related soft tissue injury to her neck and her headache disorder. In his June 19, 2018 report, he states, "I believe that her history and examination is consistent with a diagnosis of persistent posttraumatic headache related to soft tissue injury to her neck sustained in the motor vehicle accidents. "
- [66] Dr. Robinson provided two medical legal reports at the plaintiff's request. At the time of Dr. Robinson's first report, he was not yet treating Ms. Rix with Botox injections. He administered seven injections between October 25, 2018, and August 2020.
- [67] In Dr. Robinson's May 22, 2020 report he opines:

She continues to have a constant right-sided headache arising from her upper neck spreading into her head and behind her eye. The headaches are aggravated by physical activity as well as maintaining a sedentary position such as working on a computer.

She began treatment with Botox in October 2018. She has continued to have neurotoxin therapy every three months and this has been associated with a reduction in the frequency of her severe headaches

I would recommend that she continue to receive Botox every three months. The neurotoxin has reduced the frequency of her incapacitating headaches although these continue to remain problematic

I continue to believe that more successful management of her anxiety and depression would probably improve her posttraumatic headaches

I believe that she will probably be able to continue to work full-time in her current occupation

[68] There was an issue regarding the frequency of Ms. Rix's headaches. Dr. Simonett noted that prior to Ms. Rix receiving Botox treatments, she "described her headaches as being most days", and approximately twice a month these headaches would progress to a migraine. According to what Ms. Rix advised the various experts, she is not in fact experiencing headaches daily since the Accidents.

[69] I have no doubt that Ms. Rix is experiencing headaches from the Accidents and at times they are very painful and restrict her daily activities. However, based on the evidence before me, I believe Ms. Rix has exaggerated their frequency. That said, I accept that they are painful, regular, and resulted from the Accidents.

Depression, Anxiety, and Sleep Issues

[70] Dr. Stockburger stated in his report that after the Second Accident, in addition to "the chronicity of her headaches and her chronic neck and back pain", Ms. Rix began to experience mood issues. He diagnosed her with depression and anxiety. He mentioned Ms. Rix's driving anxiety. Dr. O'Shaughnessy noted that Ms. Rix is able to drive without restrictions despite her anxiety. This is consistent with her own evidence and that provided by her son and spouse. Her cousin also testified that Ms. Rix drives back and forth to the interior to visit her family. Ms. Rix also drove to Burnaby, over an hour away from her home, on a daily basis when she was working for the City of Burnaby. This does not demonstrate serious driving anxiety.

[71] Dr. O'Shaughnessy's December 16, 2019 report addressed Ms. Rix's anxiety, depression, and sleep issues:

While she has had issues in the past developing sleep problems and headaches with stress, these were relatively short-lived and not producing any clear-cut psychiatric illness or disorder. It is evident the accidents in question caused soft tissue injuries impacting her lifestyle and functioning as well as impacting her capacity to maintain sleep that I think has been a critical factor in her ongoing difficulties. She certainly did develop symptoms of depressed mood with

some anxiety following the 2016 accident with worsened symptoms following the 2017 accident. These have in fact progressively increased in 2019 to the point where she is now experiencing daily symptoms of depressed mood and anxiety.

- [72] Dr. O'Shaughnessy did not diagnose Ms. Rix with major depressive disorder or post-traumatic stress disorder, but found that her sleep and mood issues were causing her dysfunction. He diagnosed an adjustment disorder with anxiety and depression, at the moderately severe level. He opined that the Accidents were a direct cause of her psychological injuries.
- [73] I note that Ms. Rix did not disclose any prior psychiatric history to Dr. O'Shaughnessy, despite having a history of postpartum depression and depressive symptoms in 2009 at the time of her knee injury. Dr. O'Shaughnessy admitted in cross-examination that this could change his opinion and this lack of knowledge detracts from his opinion on causation.
- [74] In terms of depression, I accept that Ms. Rix has suffered from depressed mood and anxiety since the Accidents. Dr. O'Shaughnessy believes it is related to her non-restorative sleep. Ms. Rix has always suffered from stress-related insomnia. Ms. Rix recently began using anti-anxiety medication that has proven beneficial. She is also seeing a new counsellor. Based on her functionality, Ms. Rix's depression is not severe. Dr. O'Shaughnessy did not diagnose her with major depressive disorder. This is consistent with my finding that her anxiety and depression, while caused by the Accidents, is not severe.

Cognitive Difficulties

- [75] Dr. Stockburger offered very general evidence of Ms. Rix sustaining a concussion after the First Accident. In his opinion, even without a concussion, an emotional response to a stressful situation can cause changes to neurological function. Dr. Simonett opined that Ms. Rix suffered a concussion when she hit her head on the steering wheel in the Second Accident. Ms. Rix scored below average on the Montreal Cognitive Assessment (MoCa)--the primary cognitive screening tool to assess acquired brain injuries. Dr. Simonett testified that Ms. Rix's score was lower than expected. Further, in Dr. Simonett's November 30, 2017 report, she stated that "Ms. Rix has multiple risk factors for changes in cognition, including ongoing pain, headaches, potential side effects of medications, and changes in mood." Dr. Simonett testified that Ms. Rix's cognitive disturbance is "multi-factorial" and involves pain, headaches, medication, mood, and sleep disruption--all of which can "independently impact cognition".
- [76] Dr. O'Shaughnessy found any cognitive difficulties were likely due to Ms. Rix's pain and sleep disturbances, and are mild in nature. He does not believe she has a brain injury. Dr. O'Shaughnessy stated if there was a concussive injury it was not clinically significant or suggestive of a brain injury.

- [77] Dr. Robinson testified that Ms. Rix's cognitive inefficiencies are better explained by her chronic pain (including headache pain) and psychological issues, rather than a brain injury. He testified that both pain and psychological distress can interfere with concentration.
- [78] In terms of the lay evidence, Mr. Dutton testified regarding Ms. Rix's cognitive issues, with memory and articulation, but no other witness found Ms. Rix was having difficulties. In fact, the opposite was true: she is a fast learner, a good worker, takes initiative with respect to projects, and she has a good rapport with clients. She is well liked and engaging. This was obvious during her testimony. Ms. Rix's former employers would rehire her.
- [79] I do not accept that Ms. Rix is suffering from serious cognitive deficits since the Accidents. There was little evidence of a concussive injury in the medical evidence. While I accept that Ms. Rix may have had some short-term cognitive issues immediately following the Second Accident, I believe Ms. Rix has exaggerated this symptom both at trial and to the medical experts. To the extent she had any cognitive impairment, I am not persuaded that it has persisted.

Intolerance to Loud Sounds

- [80] Ms. Rix says she has an intolerance to sounds. This is inconsistent with watching loud movies, going to musicals, and taking trips to Disneyland at times when the park would be crowded and noisy. Ms. Rix admitted to participating in all these activities. The evidence before me demonstrates that Ms. Rix does not have a serious issue with noise.

Prognosis

- [81] In terms of Ms. Rix's soft tissue injuries, Ms. Craig, a functional capacity evaluator, testified for the plaintiff.[6] Ms. Craig provided three reports. Ms. Craig's response report is in evidence despite the defendants' mid-trial decision not to rely on Dr. Waseem's report. Ms. Craig's supplemental report dated July 22, 2020 did not impact her original opinion.
- [82] Regarding work capacity, Ms. Craig found that Ms. Rix's strength capacity was limited. She testified that Ms. Rix could not do the physical work of a flight attendant, such as lifting luggage, opening doors, and moving carts, on a regular basis. Ms. Craig testified Ms. Rix may be able to do a sedentary job, but she will not be as productive as other employees. She will be at a competitive disadvantage.
- [83] One of the problems with Ms. Craig's June 18, 2020 report is that her assessment was conducted in May 2020. This was when Ms. Rix had her setback because she was not receiving any treatments during the early days of COVID-19. In contrast to Ms. Craig, Dr. Simonett reported that Ms. Rix reported no limitations when she worked for the City of Burnaby. She also reported no limitations when she worked at Saxon Aerospace. These were both sedentary positions.

- [84] In terms of prognosis and future needs, Dr. Stockburger opined that Ms. Rix will continue to have neck and back pain and this will require therapy. I agree that Ms. Rix will have neck and shoulder pain indefinitely. However, this pain is mild to moderate in nature.
- [85] Dr. O'Shaughnessy testified that Ms. Rix's primary issue is her headaches. Dr. Stockburger testified Ms. Rix's headaches are somewhat managed with Botox injections but she does still experience them regularly. Ms. Rix's headaches will continue for an indeterminate length of time, but will probably be a chronic problem. He also believes she will need some counselling for her mood disorder.
- [86] Dr. O'Shaughnessy opined that if Ms. Rix continues having headaches she will continue to have psychological difficulties. The Botox treatments are one way in which Ms. Rix can alleviate the pain.
- [87] Based on the medical evidence, I accept that Ms. Rix's ongoing headaches will likely persist into the future and on occasion cause her dysfunction. I will address her treatments under "Cost of Future Care".

Pre-Existing Conditions

- [88] The defendants argue that Ms. Rix had a number of conditions that were pre-existing at the time of the First Accident: depression, migraines, stress-induced headaches, and disrupted sleep. The plaintiff denies that these conditions were affecting her in the time period leading up to the First Accident or, alternatively, denies that they would have worsened without the Accidents. Ms. Rix also had an injury to her knee, an injury to her neck, and an injury to her foot prior to the Accidents. The expert and lay evidence supports Ms. Rix's testimony that these injuries did not impact her ability to function or work in the few years leading up to the First Accident. There is no evidence that absent the Accidents, Ms. Rix's work or lifestyle would have been affected in the future as a result of these injuries.
- [89] In terms of her headaches, Dr. Stockburger initially opined that Ms. Rix had migraines no more than once per month prior to the First Accident. He stated Ms. Rix also had several periods when she had tension headaches as a result of stress. However, Ms. Rix did not miss work from these headaches and they did not significantly limit her function. Prior to writing a second report, Dr. Stockburger asked Ms. Rix to attend his office. They reviewed her history carefully. At the meeting he confirmed that Ms. Rix's pre-Accident headaches were infrequent, less than "once per month". Since the Second Accident, Ms. Rix testified that she gets migraine headaches approximately two to three times per month. These are helped by the Botox treatments.
- [90] I find that Ms. Rix's headaches, which were present pre-First Accident, fall within the thin skull doctrine. She had a pre-disposition to headaches, but the defendant has not established that Ms. Rix would have suffered from ongoing headaches regardless of the Accidents. Although she may have continued to have some headaches I do not think it likely they would be regular or incapacitating. A "measurable risk" must be based upon the accepted evidence

and be a real and substantial possibility. It cannot be based on mere speculation. It would be speculative to assume Ms. Rix would have had functionally impairing headaches without the Accidents. I accept that Ms. Rix's pre-Accident headaches and migraines were relatively rare, and prior to the Accidents, they did not limit her functionality in any meaningful way. There is no basis to reduce Ms. Rix's compensation due to pre-existing headaches.

- [91] Ms. Rix had some pre-existing sleep issues and depression prior to the First Accident. These conditions are not significant today because they are not affecting her ability to work and they are not significantly impeding her lifestyle. If her headaches improve, and she keeps her stress levels down, these conditions will also improve.
- [92] In summary, Ms. Rix was not suffering from any of her pre-Accident health issues at the time of the First Accident apart from headaches. Her headaches fall within the thin skull doctrine. Ms. Rix does not have a diagnosis of major depressive disorder and her mood issues are related to her headaches and pain. Ms. Rix's sleep issues are roughly the same as they were prior to the Accidents. Ms. Rix's award of damages is based very little on her depressed mood and sleep issues. As a result, there is no basis to reduce Ms. Rix's award due to any pre-existing conditions.

DUTY TO MITIGATE

- [93] There is no issue with respect to the duty to mitigate. Ms. Rix has undergone multiple forms of therapy, taken a number of medications, received Botox injections, and attended counselling sessions. Ms. Rix has been diligent in following her treatment providers' recommendations, including adherence to a regular stretching/exercise regime.
- [94] Importantly, Ms. Rix has continued to work since the Accidents. Mr. Walters testified that when working at Saxon Aerospace, on approximately 10 to 12 occasions Ms. Rix missed either a partial or full day of work due to her symptoms. When Ms. Rix missed time from work during the work week, she would typically make it up on the weekends at home. The timesheets confirm Ms. Rix made up the time.
- [95] Ms. Rix is a model plaintiff when it comes to mitigating her damages. She is to be commended for her efforts.

DAMAGES

- [96] Ms. Rix seeks an award under the following heads of damages:
- non-pecuniary damages for pain and suffering and loss of enjoyment of life;
 - damages for past loss of income;
 - damages for future loss of income earning capacity;
 - damages for loss of housekeeping capacity;

- e. special damages; and
- f. damages for cost of future care.

Non-Pecuniary Damages

Legal Principles

- [97] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188. They do not compensate a plaintiff for losses that have a monetary value. Further, because "the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfill this function, should be moderate": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 639-640, 129 D.L.R. (3d) 263. An award of non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases.
- [98] Non-pecuniary damages do not focus on the injury alone but include a number of factors. As set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the factors that influence an award of non-pecuniary damages include:
- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;
 - d) disability;
 - e) emotional suffering;
 - f) loss or impairment of life;
 - g) impairment of family, marital, and social relationships;
 - h) impairment of physical and mental abilities;
 - i) loss of lifestyle; and
 - j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff).
- [99] In *Lindal*, Dickson J. (as he then was) stated that an award for non-pecuniary damages does not depend only on the seriousness of the injury, it also depends on the seriousness of the individual's loss (at 637):

the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury*

Damages in Canada (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case"

Parties' Positions

- [100] Ms. Rix argues that her injuries have had a significant impact upon many aspects of her life. She testified that she has been in pain, less active, less capable of handling stress, and depressed since the Accidents. Her injuries have had an effect on her family and her personal life.
- [101] The defendants argue that Ms. Rix is entitled to compensation for her injuries, but on a more modest level than she claims.

Analysis

- [102] Ms. Rix sustained injuries in the Accidents. In particular, Ms. Rix sustained various soft tissues injuries and headaches. Her frequent headaches fluctuate in intensity. At the time of the Second Accident, Ms. Rix had not fully recovered from the First Accident. The Second Accident acted as a significant set-back in her recovery. Since the Second Accident, her right side dominant headaches continue to plague her. The experts who assessed Ms. Rix reported that she will likely never be pain free. She will continue to have functional limitations at home and in the workforce. Ms. Rix's headaches will need to be managed for the rest of her life.
- [103] Ms. Rix deserves compensation; the question is how much. This involves an examination of her function and lifestyle pre- and post-Accidents.
- [104] Ms. Rix was physically active prior to the Accidents. She was engaged in the following activities: swimming, weight training, yoga, basketball, zip-lining, and mud racing. She described physical activity as a way to manage stressors.
- [105] Since the Accidents, Ms. Rix has returned to swimming, but not at the same frequency. Her workouts no longer involve weight training. She has continued with yoga, but at a diminished frequency and different style. She has done the Rugged Maniac event on two occasions since the Accidents. However, she could no longer do all of the obstacles.
- [106] Before the Accidents, Ms. Rix was very social. Although she continues to attend functions, her attendance is dependent on her pain. She sometimes leaves mid-way through events. While she still enjoys spending time with family and friends, her ability to enjoy this time is somewhat diminished.

[107] Ms. Rix's injuries have impacted her role as a mother. When she is in pain, her patience is lower. Her son is often excited to share the events of his day when he gets home from school, but Ms. Rix finds she does not have the energy she feels she should. Ms. Rix is not able to be the active and physical role model she once was to her son. This is something that was very important to Ms. Rix. As Dr. Robinson opined in his May 2020 report:

Her quality-of-life has been compromised and her ability to function as a wife and mother continues to be challenging. She requires assistance for household tasks and has never been able to return to her previously highly active physical lifestyle. These changes are probably permanent unless there is a substantial improvement in her condition.

[108] Ms. Rix's injuries and mood issues have impacted her role as a spouse to Mr. Dutton. Their intimacy has been negatively affected. Mr. Dutton testified that Ms. Rix's injuries have put a strain on their relationship.

[109] Ms. Rix is functioning relatively well, but her pain continues to plague her. While her injuries have had some impact on her functionality at work, Ms. Rix has continued to work with success. Her performance indicates that her injuries are moderate in nature. To her credit, she has demonstrated resilience by continuing to work full-time since the Accidents. The impact of her work is addressed in the next two sections.

[110] While her functionality is a factor under non-pecuniary damages, I am not to take Ms. Rix's stoicism into account under this head of damages. Ms. Rix should not be punished for her work ethic.

[111] Ms. Rix seeks non-pecuniary damages of \$140,000 and the defendants argue she is entitled to between \$60,000 and \$75,000.

[112] Ms. Rix is entitled to fair and reasonable compensation for her pain and suffering, loss of enjoyment of life, and the loss of amenities that have arisen as a result of her injuries.

[113] After reviewing the cases the parties relied upon and considering the principles in Stapley, I find that an award of \$80,000 is appropriate in this case. This award reflects the duration of Ms. Rix's chronic pain, her frustration with her limitations, the emotional toll the Accidents have had on Ms. Rix due to her frequent headaches, and her reduced function.

[114] This award includes damages for loss of housekeeping capacity, for the reasons discussed under that heading below.

Loss of Past Income Earning Capacity

General Legal Principles

[115] A claim for past loss of income is a claim for loss of earning capacity. It is a claim for the loss of the value of the work the plaintiff would have performed but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. A plaintiff is only entitled to recover the net amount of their damages: s. 98 Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [IVA]; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 152-186, leave to appeal ref'd [2009] S.C.C.A. No. 197.

Subrogated Claims

[116] If there is no contractual or legislative right to a subrogated claim, any claim must rest on equitable principles. The principles of an equitable right to subrogation were outlined by the majority in *Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd.*, 2001 BCCA 600:

[45] In basic terms, subrogation means "the substitution of one party for another whose debt the party pays, entitling the paying party to all of the rights, remedies or securities that would otherwise belong to the debtor." see *Black's Law Dictionary*, 7th ed. (St. Paul: West Group, 1999) at 1441. It has long been available as an "empirical remedy" to prevent unjust enrichment in a variety of circumstances where the doctrine of privity would otherwise prevent recovery for the party who suffered a loss: *Orakpo v. Manson Investments Ltd.*, [1978] A.C. 95 (H.L.) at 104, per Lord Diplock. *Coyne J.A.* described the historical origins of the doctrine in *Morrison v. Canadian Surety Co.* (1954), 12 W.W.R. (N.S.) 57 (Man. C.A.):

It was invented as a means to avoid injustice by enabling a person, not previously entitled, to sue in law or equity by giving him a status to assert against a person or property a claim recognized as fair and just but not maintainable as a contractual or tortious claim. It was a device necessary to avoid injustice, by imposing on the unjust, as a matter of law or equity, an obligation quasi ex contractu to do right where no obligation ex contractu existed.

[46] The right of subrogation does not depend on the existence of a contractual term, but arises independently upon payment of the indemnity: see *Ryan v. MacGregor*, [1926] 1 D.L.R. 476 (Ont. C.A.) at 482. Although the doctrine of subrogation is most commonly associated with insurance cases, it has a more general application: see *Morrison*, supra. I think that it is equally applicable to private indemnity agreements, which are similar to insurance contracts.

[117] Justice Tammen recently discussed the nature of a subrogated claim by an employer for past wages paid in personal injury cases in *Tomas v. Sticha*, 2019 BCSC 1204:

99 The general rule thus requires a reduction in damages equivalent to the amount of wage benefits received by a plaintiff from their employer while that plaintiff is off work due to accident-related injuries. An exception to the general rule is engaged when the employer is entitled to be reimbursed for such wage benefits due to the right of subrogation.

102 It matters not whether the employer paid the wage loss benefits voluntarily or pursuant to the collective bargaining agreement. The important questions are the existence in equity of a right to subrogation, and whether or not such right has been waived.

[118] The view of the employer as to their right of subrogation is irrelevant as to whether the equitable right to subrogation exists: *Provost v. Bolton*, 2018 BCSC 1090 at para. 58.

[119] If there is an equitable right to subrogation and this right has not been waived, a court should not make a deduction for the wage loss benefits, regardless of whether the employer eventually seeks recovery from the plaintiff: *Provost* at para. 61.

Analysis

[120] At the time of the First Accident, Ms. Rix was working as a Manager of Training and Recruitment for Canada Jetlines. She was not yet working full-time. As a result, she was augmenting her income by working part-time cleaning houses with her friend. Ms. Rix suffered from headaches after the First Accident and she had neck and shoulder pain. Between April 15, 2016, and June 10, 2016, Ms. Rix missed 82.5 hours of work from Canada Jetlines, representing \$2,538.53.[7] Ms. Rix ceased working as a housecleaner due to the physical demands.

[121] After the Second Accident, Ms. Rix continued to experience neck and shoulder pain and she was experiencing regular headaches. Between May 30, 2017, and July 12, 2017, Ms. Rix missed 195 hours of work from Canada Jetlines, representing \$6,000.15.

[122] I agree with the defendants that, apart from the immediate post-Accident period, Ms. Rix did not lose significant income as a result of the Accidents. Following the immediate post-Accident period, Ms. Rix continued to miss one or two days per month on account of her symptoms after the Second Accident. She testified that she made up for any missed time by working from home in the evenings or on the weekends.

[123] After Ms. Rix left Canada Jetlines as an employee, her income increased and she was working more than full-time hours by working for the City of Burnaby and working in a consultant role at Canada Jetlines. There is no evidence of any missed work in these positions.

[124] Ms. Rix made up for any missed time at Saxon Aerospace, her most recent employment, by again working from home in the evenings or on the weekends. This was confirmed by the evidence of Mr. Walters, her employer at Saxon.

[125] Ms. Rix was laid off from Saxon Aerospace as a direct result of the COVID-19 pandemic, not as a result of her injuries.

[126] In terms of the missed work at Canada Jetlines following the Accidents, Ms. Rix was paid by her former employer because she was a salaried employee.

[127] She therefore was not out of pocket due to her injuries.

Subrogated Claim

[128] Ms. Rix limits her claim for past losses to the time she missed from Canada Jetlines immediately following each Accident.[8] This totals \$8,538.68. Ms. Rix argues that Global Crossing Airlines Inc. ("Global Crossing"), the successor company to Canada Jetlines, has a subrogated claim for the wages she was paid when she missed work post-Accidents.

[129] Mr. Lawson, in his position with Canada Jetlines, wrote a letter dated October 4, 2017, advising that Canada Jetlines wished to be paid back for the salary paid to Ms. Rix during her time off after the Accidents.

[130] Sheila Paine is the corporate secretary of Global Crossing. After the transition to Global Crossing, Ms. Paine did not realize that the amount paid to Ms. Rix while she was injured had already been quantified, and she indicated Global Crossing would not be pursuing such a claim. Upon being informed that the amount had been quantified by Mr. Lawson, she changed her view. She testified at trial that Global Crossing is seeking repayment of the amount of the salary paid to Ms. Rix during her Accident-related absences.

[131] The plaintiff relies on *Kask v. Tam*, [1996] 7 W.W.R. 494, 72 B.C.A.C. 133 which cites *Chan v. Butcher* (1984), 11 D.L.R. (4th) 233, 51 B.C.L.R. 337 (C.A.) and states:

[24] There will be few cases where the tortfeasor can escape paying compensation to an employee for lost time at work when the absence was covered by the employer or its insurer. Either the employer was obliged by contract to pay or to provide insurance coverage, in which case it can be easily shown that the benefit formed part of the overall compensation package, or the employer was under no obligation but continued the salary *ex gratia*, in which case the law says that the tortfeasor cannot take the benefit of another's generosity.

[132] The defendants argue that there is no right of subrogation on behalf of Global Crossing. The defendants point to the lack of a subrogation contract or a subrogation clause in Ms. Rix's employment contract. Therefore, they argue, any subrogation right must be an equitable one, and this has not been established. Relying on *Slater v. Gorden*, 2017 BCSC 2265, the defendants argue that there was insufficient evidence led by the plaintiff to establish a right of subrogation on behalf of Global Crossing. Alternatively, they argue that the subrogated claim was abandoned/waived when Ms. Paine indicated Global Crossing was not pursuing repayment.

[133] I agree with the defendants that the payments made by Canada Jetlines were not in the nature of insurance, nor were they made pursuant to an express subrogation agreement or clause. However, I find the plaintiff has established an equitable right to subrogation on behalf of Global Crossing.

[134] This case is distinguishable from Slater, in that here there was evidence presented as to the right of subrogation. In Slater, there was no evidence led on this point whatsoever, such that the plaintiff did not meet their burden to establish the right to subrogation. I am supported in the conclusion that Slater is confined to cases where no evidence is led on the question of subrogation by the analysis conducted in Provost and later followed in Tomas and Sahota v. Slupskyy, 2019 BCSC 2215. Justice Butler in Provost considered the seemingly contradictory rulings in Slater and X. v. Y., 2011 BCSC 944:

55 Surprisingly, the two British Columbia cases arrived at contrary decisions when applying Ratych and Cunningham to similar facts. In X. v. Y., the court heard evidence from a senior officer who stated that the RCMP had a right of subrogation that it was not pursuing. The plaintiff did not know if the RCMP was seeking reimbursement. The court concluded that the senior officer's evidence did not establish a waiver of the right of subrogation; no one with authority had made a clear and unequivocal informed decision to waive the right of subrogation. Accordingly, even though the RCMP was not actively pursuing recovery of the benefit, the full amount of the wages paid were recoverable by the plaintiff. As noted in Cunningham at 415, "[i]t does not matter whether the right of subrogation is exercised or not."

56 In Slater, there was no evidence before the court about subrogation or the right of the RCMP to reclaim the amount paid to the plaintiff. On this basis, the court distinguished X. v. Y. at para. 115:

[115] The evidence in this case does not support a finding that the amount paid was in the nature of insurance. Furthermore, unlike the evidence in X. v. Y., the evidence in this case does not support a finding that the RCMP has the right of subrogation to reclaim the amount paid to the plaintiff. There was no evidence whatsoever led on these issues. There remains an onus on the plaintiff to lead some evidence and she has failed to do so.

57 With contradictory rulings on similar facts, I cannot resolve this issue on the basis of judicial comity. As noted by Justice Wilson in *Hansard Spruce Mills Ltd., Re*, [1954] 4 D.L.R. 590 (B.C. S.C.), it is possible to go against the decision of a brother or sister judge if a subsequent decision has affected the validity of the impugned judgment. I must consider which of the two decisions to follow.

58 While no evidence was presented about the RCMP's right of subrogation in the present case, this is of little consequence. The right of subrogation does not depend on the views of a senior officer as to its existence; it is an equitable right that arises in particular circumstances. The evidence about the employer's view of its right of subrogation (as in X. v. Y.) does not establish that right, just as the absence of that kind of evidence (as in Slater) does not disprove the existence of the right.

- [135] The plaintiff has presented evidence showing that Global Crossing has an equitable right to subrogation. The evidence shows that Global Crossing (then Canada Jetlines) fully indemnified Ms. Rix for her loss of income caused by the defendants' negligence. They were not contractually obligated to do so, nor were the payments made in the nature of insurance. The equitable doctrine of subrogation prevents the defendants from being unjustly enriched by the actions of Canada Jetlines: Provost at para. 60.
- [136] The letter from Mr. Lawson in 2017 and the evidence of Ms. Paine at trial are both evidence that Global Crossing is asserting its right to subrogation. This is similar to the evidence which established a right to subrogation in Tomas: at para. 103.
- [137] I reject the defendants' argument that Global Crossing waived its right to subrogation. A third party does not have to be a party to the action in order to assert a subrogated claim of this type: X. v. Y.; Tomas. Even though Ms. Paine, at one point, did not believe that Global Crossing had the ability to make a subrogated claim, her belief as to the right of subrogation is irrelevant: Provost at para. 58. At no time was there a clear waiver of the right to subrogation, as supported by Ms. Paine's assertion at trial that Global Crossing intended to pursue the subrogated claim.
- [138] I note that Justice Kent in Sahota considered whether s. 83 of the IVA could apply to a past wage loss "benefit", subjecting it to a "deemed release", such that the plaintiff could not make a claim for these benefits. As in Sahota, I find this section does not apply in this case because, at the time of the Accidents, it only applied to benefits received under vehicle insurance, not employment. Section 83 was amended on May 17, 2018, and now has a much broader scope. However, I need not consider whether it would apply to defeat the subrogated claim in this case and I decline to do so.
- [139] Since Global Crossing has established a right to subrogation, and I have not found this right was waived, Ms. Rix's lost wages should be included in her damage award, as an exception to the usual rule requiring a deduction: Provost at para. 61; Tomas at para. 99. This award is subject to the right of subrogation asserted by Global Crossing, but whether Global Crossing chooses to pursue the claim is a matter strictly between Ms. Rix and Global Crossing: Provost at para. 61.
- [140] However, as in Tomas, I must make a deduction to this damage award as required by s. 98 of the IVA, which only allows recovery of the net amount of the plaintiff's damages. I leave it to the parties to calculate the net amount of this award.

Future Loss of Income Earning Capacity

Legal Principles

- [141] A plaintiff must prove a loss of earning capacity, not an actual loss of earnings. An assessment of both past and future loss of income involves a consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of

probabilities. Rather, the assessment of loss is determined by weighing the possibility and probability of the event. The future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Karim* at para. 133; *Grewal v. Naumann*, 2017 BCCA 158; *Findlay v. Sun*, 2020 BCSC 1330.

[142] A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having resumed their pre-injury employment: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[143] If the plaintiff establishes a real and substantial possibility of loss, the court must determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48. Depending on the facts of the case, a loss may be quantified either on an earnings approach or using a capital asset approach. The capital asset approach is typically used where a loss is not easily measurable: *Perren* at para. 32. Damages under this head must be assessed and not calculated: *Grewal* at para. 49.

[144] Justice Finch (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8, [1986] B.C.W.L.D. 349 (S.C.) set out the factors to be considered when the court applies the capital asset approach:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to [them], had [they] not been injured; and
4. The plaintiff is less valuable to [themselves] as a person capable of earning income in a competitive labour market.

Parties' Positions

[145] Ms. Rix argues the safety responsibilities of a flight attendant, as regulated by Transport Canada, are wide ranging. Flight attendants must be prepared to address such contingencies as medical emergencies, the need for evacuation, fire on the aircraft, and security issues. Physically, a flight attendant has to be able to move an unconscious passenger out of their seat and on to the floor. In the event of an evacuation, flight attendants must open the emergency doors, including the over-wing doors. The doors can weigh up to 55 lbs, depending on the aircraft. Aside from the physical duties that arise in emergency scenarios, the regular duties of flight attendants involve physical elements. For example, they have to stow heavy passenger bags in overhead bins, load the food and beverage carts, and negotiate carts down the aisles. The medical and lay evidence establishes that Ms. Rix can no longer perform these tasks.

- [146] The plaintiff argues she has suffered a significant loss of income earning capacity because she can no longer work in a job with physical demands and she is limited even with respect to sedentary work. Ms. Rix contends that she is forced to set aside over 20 years of expertise in the aviation industry.
- [147] The defendants take the position that Ms. Rix has not established that her income earning capacity has been impaired.
- [148] In assessing her loss, the plaintiff submits that using the earnings approach is appropriate. Ms. Rix's loss is measureable and there are factual anchors which can act as a foundation to quantify her loss. The defendants submit the capital asset approach is appropriate because her future loss cannot be assessed with any degree of confidence.

Analysis

- [149] The lay and medical evidence demonstrates that Ms. Rix is unable to perform the duties associated with a flight attendant or the duties of a trainer of flight attendants. For example, Ms. Smart testified she would not consider hiring Ms. Rix as a flight attendant. She personally witnessed Ms. Rix's physical difficulties. Mr. Lawson testified that Ms. Rix complained of shoulder and back pain, as well as headaches. There were times when she went home early. The lay witnesses who testified observed a change in Ms. Rix's physical condition following the Accidents. Ms. Craig confirmed that Ms. Rix did not meet the physical demands of a flight attendant as a result of her injuries. Ms. Craig stated:

I do not anticipate that Ms. Rix will return to work of this nature without improvement to her strength, body positional capacity, neck movements and symptoms management including improved management of her headaches.

- [150] The medical evidence establishes that Ms. Rix's medical condition is unlikely to improve and that she will remain at a reduced level of work capacity due to her physical injuries. This means she will be unable to perform the duties of a flight attendant, a flight manager, or a purser/supervisor because they also include physical duties.
- [151] Ms. Rix relies on *J.D. v. Chandra*, 2014 BCSC 466 at para. 184, *aff'd* 2015 BCCA 131 where Justice Griffin, as she then was, determined that the plaintiff in *J.D.* would continue to suffer from chronic pain. She held that her pain would not prevent her from pursuing her chosen career but it would "lead her to hold back from extra activities or taking on work that might advance her legal career, as she will not have the energy to do what other young lawyers could do". Justice Griffin found that there was a "real and substantial possibility that this reticence would lead to her being overlooked by her superiors for work assignments". It would "inhibit her ability to advance as quickly or to the same salary level as her peers."
- [152] On occasion, Ms. Rix goes home early, works from home, and finds other ways to manage her symptoms. Dr. Robinson believes the pattern of posttraumatic headaches will continue indefinitely. I accept that Ms. Rix will continue to suffer from chronic pain in the form of

headaches, as well as neck and shoulder pain, which will impose some limits on her over the course of her career. However, I was presented with little evidence that her injuries will prevent her from advancing in a sedentary career. The defendants point out that Ms. Rix worked from February 25, 2019 to April 18, 2019 without a single full day off. This is a span of 52 days where Ms. Rix managed to work a full-time job, as well as performing consulting work, without missing any days due to illness. She was not incapacitated at any point due to headaches or due to her neck and shoulder issues.

- [153] Further, while I agree that Ms. Rix is no longer capable of working as a flight attendant, I do not agree that Ms. Rix is precluded from working in jobs in her chosen field permanently. Mr. Beishuizen testified that most in-flight service positions require the individual to be able to perform the duties of a flight attendant. However, there are positions in the aviation industry that are sedentary. Ms. Rix has worked in such positions since the Accidents, and her income has increased every year since the Accidents.
- [154] I do not accept that Ms. Rix is forced to set aside over 20 years of expertise in the aviation industry. Ms. Rix is capable of working in sedentary positions in the airline industry. Mr. Lawson, co-founder of Canada Jetlines, testified that Ms. Rix's position was largely sedentary and she performed her duties well. Dr. Stockburger stated in his report that Ms. Rix "tolerates sedentary duties" for the most part. Ms. Rix's career trajectory has been altered but not to the extent argued by her counsel.
- [155] Mr. Lawson testified that Ms. Rix's skills and experience at Canada Jetlines are transferable to other airlines. I agree. To the extent such positions are not currently available, it is because the industry has been "decimated" (the words of several witnesses) by COVID-19, not because Ms. Rix cannot perform in such positions. It is not a reflection of Ms. Rix being unable to perform any job in the industry.
- [156] There was no evidence that Ms. Rix will be overlooked by her superiors, or that she will be less competitive than employees of similar skills and vintage, at least in the short-term. To Ms. Rix's credit, she has performed well in all her post-Accident positions.
- [157] While Ms. Rix has had occasional symptom-related absences, Ms. Rix is not at a serious competitive disadvantage vis-à-vis other employees. The only medical evidence before the Court establishes that Ms. Rix continues to work, albeit with minor limitations. All her former employers would hire her again immediately, if given the chance.
- [158] In summary, Ms. Rix has not allowed her injuries to significantly affect her income. She has continued to work since the Accidents, following an initial period of absence after each Accident. Most recently, Ms. Rix has accepted a position as HR Assistant with Kwantlen Polytechnic University. Her official start date was September 28, 2020.

- [159] That said, Ms. Rix could at some point become less competitive. Continuing at her current pace may prove to be more difficult over time. Already Ms. Rix needs to take breaks, she often stands when working on the computer, and she dims the office lights due to her photosensitivity. These limitations will likely persist, and could increase with age. A court may rely on common sense to determine if there is a real and substantial possibility of future loss of income: *Morlan v. Barrett*, 2012 BCCA 66 at paras. 40-41.
- [160] I find that Ms. Rix is unable to take advantage of all job opportunities that would otherwise have been open to her because she is restricted to sedentary positions. She has been rendered less capable because she can no longer perform the physical aspects of the flight attendant role or other physically-demanding positions. I find that Ms. Rix faces a real and substantial possibility of future loss of income due to her restrictions.
- [161] I also find there is a real and substantial possibility that Ms. Rix will become less marketable and competitive as she ages. She may well become less attractive as a potential employee as time progresses.
- [162] Consequently, I award Ms. Rix compensation for diminishment of her capital asset and for a potential loss of income earning capacity as she ages. Because her loss cannot be easily quantified, I am applying the capital asset approach. I find there is too much uncertainty to apply a math oriented methodology.
- [163] My best assessment, taking into account both positive and negative contingencies, is to provide Ms. Rix with two years' salary. Based on her average annual salary over the past three years, I award \$138,000.

Special Damages

- [164] Ms. Rix's gross special damages are \$26,668.63 as per the Schedule of Special Damages, some of which have already been reimbursed by ICBC. The plaintiff is seeking recovery of the remaining net special damages in the amount of \$18,242.96.
- [165] Based on the above claim, the defendants agree that \$11,561 was reasonable and properly incurred as a result of the Accidents. The amounts pertaining to her private MRI (\$900) and items from Sleep Country (\$5,781.65) remain in dispute.
- [166] Special damages are only recoverable to the extent the expense was required because of the defendant's negligence and was reasonably necessary: *Wright v. Mistry*, 2017 BCSC 239 at para. 81.

- [167] I find that the new mattress from Sleep Country was a reasonable expense as it was recommended by Ms. Rix's massage therapist and it has assisted Ms. Rix with her sleep difficulties. I do not find the pillows, the bedframe, or the private MRI were reasonable expenses. The pillows and bedframe were not medically necessary, nor were they recommended by a treating professional. The MRI was, according to Dr. Stockburger, not urgent. Ms. Rix could have waited and had it paid for by the BC Medical Services Plan.
- [168] Adding the cost of the mattress of \$3,592, the total amount of the remaining special damages Ms. Rix can recover is \$15,153.

Cost of Future Care

- [169] Ms. Rix seeks damages to compensate her for the cost she will incur in managing her pain and discomfort into the future.
- [170] Since the Accidents, Ms. Rix has undergone 48 sessions of physiotherapy, 107 sessions of registered massage therapy, eight sessions of kinesiology, seven Botox injections, and eight counselling sessions. She has also done home-based exercises and taken various medications. Ms. Rix found value in many of the treatments. Massage therapy and Botox injections are the most helpful in managing her symptoms.
- [171] Ms. Craig prepared a Cost of Future Care report. Her report outlines her care and treatment recommendations. Some of the items are one-time costs, some are for a fixed period, and others are ongoing. Darren Benning, an economist, testified for the plaintiff.[9] Mr. Benning provided multipliers for future loss of earning capacity. He also estimated the net present value of Ms. Rix's future care expenses based on Ms. Craig's report.
- [172] Ms. Craig testified that the purpose of her recommendations is to help Ms. Rix maintain her function, rely less on her family for assistance, and avoid exposing herself to tasks that aggravate her pain.
- [173] Mr. Benning reviewed Ms. Craig's report and provided the present value calculations. It takes into consideration applicable taxes, frequency, and the applicable discount rate. I will review each of the items to which Ms. Rix is entitled. Some items I have not included because I am not persuaded that she needs them going forward, or that the defendants should pay for them (e.g., gym membership).

Botox

- [174] Ms. Rix relies on Botox injections to reduce her headache pain. Botox is recommended by Dr. Robinson. Botox treatments are also supported by Dr. Stockburger and Dr. Simonett.
- [175] Ms. Rix receives Botox injections from Dr. Robinson every three to four months to treat her headaches. She has had seven injections since she started seeing Dr. Robinson in 2018. The Botox injections give her some relief in terms of the intensity of her headaches, but her headaches do not disappear. Ms. Rix testified it provides only short-term benefits. Dr.

Robinson testified that Botox is not a cure. Rather, it temporarily suppresses headaches. Ms. Rix also testified that the treatments have not had a significant impact on the frequency of her migraines. Nevertheless, Ms. Rix testified that she went through a period of several months during COVID-19 where she could not access Botox and her pain increased. She wishes to continue with Botox treatments.

- [176] Dr. Robinson opines that Ms. Rix will require Botox treatments every three months indefinitely. This is consistent with Ms. Craig's recommendation.
- [177] Claudia Walker, an occupational therapist, critiqued Ms. Craig's report. She did not assess or speak with Ms. Rix when preparing her report. Ms. Walker is largely in agreement with Ms. Craig's recommendations, including Botox treatments and physical therapy. She disagreed with Ms. Craig's cost estimate of \$6,000 annually for Botox treatments, and instead indicated a \$4,000 annual cost was a reasonable estimate.
- [178] I am prepared to assume an injection fee of \$450 and a medication cost of \$850, for a total of \$1,300. At a rate of four times per year, as recommended by Dr. Robinson, the ongoing yearly costs amount to \$5,200.
- [179] I agree with Justice Pearlman in *Parhar v. Clarke*, 2017 BCSC 550, that where the Botox injections only provide temporary relief and Ms. Rix derives only short-term benefits, this amount must be reduced because there is "a substantial contingency that she would not avail herself of this therapy in the long term": *Parhar* at para. 279. Instead of assuming the use of Botox over Ms. Rix's lifetime, I award Botox treatments for 10 years: *Sharpe v. Koomson*, 2019 BCSC 558. I leave it to the parties to calculate the actual cost for these treatments over ten years.

Ergonomic Assessment and Equipment

- [180] I accept the plaintiff's claims for a work ergonomic assessment and home ergonomic assessment at the rate set out in Ms. Craig's report. Ms. Rix is awarded \$375 total for the two ergonomic assessments.
- [181] Ms. Rix testified that she is willing to try recommended ergonomic equipment in her home and at the office. I accept that Ms. Rix is entitled to \$3,000 for ergonomic equipment. While this is lower than that recommended in the report of Ms. Craig, as stated earlier, Ms. Craig overestimated Ms. Rix's needs because she assessed her when she had a setback in May 2020. Further, Ms. Rix never requested ergonomic equipment at her places of employment and seems to be coping well without significant accommodations. This amount should be enough to purchase a sit-stand desk for Ms. Rix which will likely be helpful for her.

Massage Therapy

[182] Ms. Craig recommended 5-6 sessions per year. At the rates supplied by Ms. Craig, this represents an annual amount of \$399-\$473. Given that this is a passive modality, I agree with the defendants that I should award only a nominal amount for massage therapy sessions. Ms. Rix is awarded \$3,000 for massage therapy.

Kinesiology

[183] Ms. Rix found kinesiology to be painful and that it worsened her pain. In these circumstances, I am not persuaded an award for kinesiology is appropriate.

Physiotherapy

[184] Ms. Rix testified that she was not receiving any benefit from her physiotherapy treatments and stopped going to physiotherapy sessions altogether. Although Ms. Rix testified that she is willing to try physiotherapy again, based on her testimony, I am not prepared to award any amount for physiotherapy treatments.

Driving Education

[185] I am not persuaded that Ms. Rix needs driver education. Ms. Rix knows how to drive and was not at fault in either of the Accidents before me. She also drives regularly, albeit with some anxiety. Her anxiety would be better addressed through counselling.

Counselling

[186] Dr. Stockburger and Dr. O'Shaughnessy recommended counselling for Ms. Rix's mood disorder. Counselling is claimed as per Ms. Craig's report of 12 sessions initially at a rate of \$195, for a total of \$2,340. Ms. Craig also recommends two to three sessions per year on an ongoing basis.

[187] I believe two sessions per year for ten years is reasonable. Using the multiplier of 9,761 (to age 60), this equates to \$3,807. I believe this is reasonable. The combined total of the initial block of sessions and the ongoing sessions is \$6,147.

Medication

[188] Ms. Rix currently relies on Tylenol and Rizatriptan to treat her headaches. She is also currently taking Effexor, which is an SNRI.

[189] Dr. O'Shaughnessy recommends SNRI medication for Ms. Rix. Ms. Rix testified that she is willing to use any medication that is prescribed to her. However, there was limited information provided to me regarding medications. I understood Ms. Rix does not take much Tylenol today but does rely on Effexor. I do not see an estimate of the cost of Effexor in Ms. Craig's report.

[190] I would provide a minimal amount of Tylenol and the recommended amount of Effexor for Ms. Rix. I would use the multiplier of 25.194 (life). I leave it to the parties to calculate the actual amount for this item. In terms of Rizatriptan, I accept Ms. Craig's estimate of \$246.64 per year, based on taking it once per week. Applying the life multiplier, I calculate that amount to be \$6,214.

Loss of Housekeeping Capacity

[191] A cautious approach should be taken when assessing loss of housekeeping capacity claims: *Liu v. Bains*, 2016 BCCA 374 at para. 29. In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal addressed the difference between a pecuniary award for loss of housekeeping capacity and the inclusion of damages as part of a general award for non-pecuniary damages. The court's conclusion was as follows:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[192] There was inconsistent testimony regarding housecleaning responsibilities before the Accidents. It is not unusual that spouses each believe they are doing more of the household chores than the other spouse is willing to give them credit for. Since the Accidents, Ms. Rix testified that she struggles with the heavier chores. Her strata maintains most of the outdoor space.

[193] I find that Ms. Rix can do most housekeeping chores with limited assistance. Based on the above principles, I conclude that Ms. Rix's loss of housekeeping capacity is in keeping with a loss of amenities. I have included her loss of housekeeping capacity in her award for non-pecuniary damages.

Conclusion

[194] Ms. Rix is entitled to the following damages:

Non-pecuniary damages

\$80,000

Past wage loss

As awarded (parties to calculate the net amount)

Future loss of earning capacity

\$138,000

Special damages

\$15,153

Cost of future care

As awarded (parties to calculate precise amount)

[195] I leave it to the parties to make any appropriate adjustments and to calculate pre-judgment interest on the award.

Costs

[196] Subject to any issues the parties wish to raise, the plaintiff is entitled to costs. Within 45 days of this judgment, either party is at liberty to file an application to address costs.

"D. MacDonald J."

- [1] In September of 2011, Ms. Rix had meniscectomy and tibial osteotomy surgery. The surgery was successful and six months after this surgery, aside from some residual tenderness, her knee symptoms resolved. She had a final surgery approximately two years before the First Accident when hardware was removed from her knee.s
- [2] Dr. Mark Stockburger was qualified as a family doctor qualified to give expert testimony in the area of general medicine. He has been a doctor for over 20 years and has been the plaintiff's family doctor since August 14, 2012.
- [3] Dr. Roy O'Shaughnessy was qualified as a psychiatrist qualified to give expert evidence in the field of psychiatry. Dr. O'Shaughnessy provided two medical legal reports at the Plaintiff's request: the first is dated December 16, 2019 and the second is dated May 3, 2020.
- [4] Dr. Simonett was qualified as a physiatrist qualified to give expert opinion evidence in physical medicine and rehabilitation. As part of her experience, she regularly diagnoses and treats musculoskeletal injuries, as well as brain injuries. She was retained by the plaintiff and conducted two assessments on November 22, 2017 and February 25, 2020. Dr. Simonett provided three medical legal reports dated November 30, 2017, March 3, 2020, and a response report dated July 3, 2020. Her response report is in evidence, but is not tendered for her opinion. After the close of the plaintiff's case, the defendants decided not to rely on Dr. Waseem's report. This created a situation where experts had already testified about their response opinions in relation to Dr. Waseem's report. Accordingly, the reports remained in evidence for the sake of the completeness of the evidentiary record.

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- [5] Dr. Gordon Robinson was qualified as a neurologist qualified to give expert testimony in the field of neurology, with an interest in the diagnosis, prognosis, and treatment of headache conditions. He has been treating the plaintiff's headaches with Botox injections since October 25, 2018.
- [6] Louise Craig was qualified as a functional capacity evaluator and life care planner qualified to give expert evidence in the field of functional capacity evaluation and cost of future care analysis. She was retained by the plaintiff and conducted a functional evaluation on April 30, 2020. Ms. Craig is a physiotherapist who has been performing functional capacity evaluations since 1994.
- [7] The October 4, 2017 letter from Ms. Rix's employer, Dix Lawson, indicated a slightly different figure at \$2,690.78. The parties agree that this was a slight miscalculation.
- [8] The plaintiff made no claim for loss of income as a result of giving up her work as a cleaner.
- [9] Mr. Benning was qualified as an economist qualified as an expert in the field of economics and the assessment of economic damages and net present value in personal injury cases. He was retained by the plaintiff and provided a report dated June 23, 2020.
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