

CANADA / JUDGMENT

Roth v. Cape Scott Cedar Products Ltd.

2024 BCSC 1431

COURT

Supreme Court of British Columbia

DECIDED

7 August 2024

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2024 BCSC 1431 Roth v. Cape Scott Cedar Products Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roth v. Cape Scott Cedar Products Ltd.,

2024 BCSC 1431

Date: 20240807

Docket: M82181

Registry: Nanaimo

Between:

Karen Lynn Roth

Plaintiff

And

Cape Scott Cedar Products Ltd. and

Theodore Deveau

Defendants

Corrected Judgment: The cover page of the judgment was corrected on

September 11, 2024

Before: The Honourable Justice Kirchner

Reasons for Judgment

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Place and Dates of Trial:

Nanaimo, B.C.

April 29-30, 2024

May 2-3 and 6-8, 2024

Place and Date of Judgment:

Nanaimo, B.C.

August 7, 2024

Table of Contents

Introduction.. 3

Background.. 3

Ms. Roth before the Accident 3

The Accident 5

Social Life and Activities. 6

Post-Accident Work History. 7

Medical Treatments. 9

Present Condition. 9

Expert Reports. 10

Dr. Ross Davidson- Physical Medicine. 10

Dr. Ingrid Friesen - Neuropsychology. 11

Dr. Amarjit Arneja. 12

Timothy Winter - Occupational Therapy and Functional Capacity. 13

Findings on Injuries. 14

Non-Pecuniary Damages. 17

Loss of Housekeeping Capacity. 22

Loss of Earning Capacity. 23

General 23

Legal Principles. 24

Past Loss of Earning Capacity. 25

Accident to April 30, 2017. 26

May 1, 2017 to December 2018. 27

January 2019 to Trial 30

Total Past Loss of Earning Capacity. 36

Loss of Future Earning Capacity. 36

Mitigation.. 39

Summary and Costs. 40

Introduction

- [1] The plaintiff, Karen Roth, seeks damages against the defendants for injuries she sustained in a motor vehicle accident on October 22, 2015. The accident happened on the Island Highway near Nanoose Bay. Ms. Roth was travelling south from Parksville. She had stopped at the light at Northwest Bay Road when she was rear-ended by a truck owned by the defendant Cape Scott Cedar Products Ltd. and operated by the defendant, Theodore Deveau. It was semi-loaded trailer truck carrying cedar shakes.
- [2] Ms. Roth suffered soft tissue injuries to her neck and lower back that continue to give her pain. She also claims to have suffered a concussion with associated cognitive impairments that she says interfere with her ability to work. She seeks damages for past and future loss of earning capacity and non-pecuniary damages. She makes no claim for special damages or cost of future care.
- [3] The defendants admit liability for the accident and some of Ms. Roth's soft tissue injuries but deny she suffered a concussion or any cognitive impairments. They acknowledge her work capacity was impacted immediately after the accident but claim she could do full time work with no impairment by May 2017, about 18 months after the accident. They concede she is entitled to some damages for past loss of earning capacity and non-pecuniary damages but nothing more.

Background

Ms. Roth before the Accident

- [4] Ms. Roth was 35 at the time of the accident and 43 at the time of trial. She was born in Terrace but grew up in Qualicum Beach where she lived with her mother and stepfather. She graduated from high school in Qualicum in 1998 and enrolled in cosmetology (hair dressing) at Malaspina College (now Vancouver Island University). After graduating from that program she worked at various hair dressing jobs in Nanaimo, Qualicum, and on a cruise ship.
- [5] By 2008 she found herself unfilled by hairdressing so she started looking for other lines of work. She worked in reception at an office equipment company in Qualicum but left that job when her work environment changed and she moved in with her then-future husband, Grant Eshelby, in Nanaimo. She took an unpleasant job in a customer service call centre but soon left. She worked for a time at Purdy's Chocolates in Nanaimo. In July 2010 she registered to write the Canadian Accredited insurance Brokers Exam, Level 1 but deferred that for more study time. She wrote the exam in September 2010 but did not pass. She attributes this to not first taking a "Fundamentals of ICBC" course which she says should be done before taking the Level 1 Brokers exam.
- [6] In 2012 she enrolled in an insurance sales course at Malaspina College which she completed in 2013. She then started a job at Waypoint Insurance in Parksville around March 2013 and stayed there until after the October 2015 accident. She and Mr. Eshelby married in 2014, before the accident, and moved to Parksville.
- [7] Ms. Roth loved her job at Waypoint. She felt it was a good career for her and found the work challenging. She was doing mostly ICBC retail insurance work and looking to grow into other areas including home and boat insurance. In 2014 she attended a two-day introduction to home insurance seminar. She was studying to get a licence to sell home insurance in 2015 but did not complete that before the accident. Her supervisor at the time, Karren Lehmann, testified that Ms. Roth was an average-performing employee who was progressing normally within the business.
- [8] Ms. Roth had some issues with anxiety and insomnia before the accident. She was using a CPAP machine for sleep apnea. She had been diagnosed with Seasonal Affective Disorder Syndrome for which she took antidepressants from time to time. She had also been prescribed medication for anxiety in 2007, 2011, and 2015. She suffered a low back injury while working on the cruise ship around 2002 but that had resolved long before the accident.
- [9] Ms. Roth agreed she has never been an athletic person but she used to walk and go kayaking with Mr. Eshelby. Her friends and mother describe her as having been a fun, energetic and outgoing person before the accident who liked to socialize with friends.

The Accident

- [10] The rear-end accident happened on October 22, 2015. Ms. Roth's car was pushed into the intersection by the force of the impact and she pitched forward. She says she hit her head on the steering wheel, although she was wearing a seatbelt. She said it all happened very quickly and she recalls feeling panicky. She felt pain in her neck and head, and tingling down her arm. She started to cry and felt embarrassed about that. She said she felt dazed, foggy, and confused. She said as someone who worked in insurance - and Autoplan work in particular - she knew she ought to have phoned 911 after the accident but she did not think to do so in the immediate aftermath. Instead she drove the car out of the intersection to the side of the road and called Mr. Eshelby to come pick her up.
- [11] The driver of the truck, Mr. Deveau, pulled the truck over and came to check on Ms. Roth. They exchanged information but Mr. Deveau was anxious to make a ferry so he left shortly after the accident. When Mr. Eshelby arrived, he moved the car to the nearby gas station and drove Ms. Roth home. He had to leave Ms. Roth at home while he drove his son back to Nanaimo. Ms. Roth said she felt nauseous and disoriented while at home and was in pain. She called a family friend, Deborah Adams, a nurse who happened to be in Parksville that evening. Ms. Adams came over right away, saw that Ms. Roth needed medical help, and called 911.
- [12] The 911 dispatcher told Ms. Adams that she should take Ms. Roth to the urgent care clinic in Parksville. Ms. Adams said at the clinic Ms. Roth was not able to remember her address when the intake nurse asked for it, but the contemporaneous note made by medical staff at the clinic puts this more mildly, stating that she "had a little trouble with her address at first".
- [13] Ms. Roth said she felt foggy at the urgent care clinic and pain in her neck and arm. The medical staff put a neck brace on her and sent her for an X-ray. Ms. Adams did not see her in the clinic after this. She left once Mr. Eshelby arrived back from Nanaimo. A police officer attended the clinic and took a statement from Ms. Roth. Mr. Eshelby then drove Ms. Roth home.
- [14] Ms. Roth said that night and in the days that followed she rested at home. She said she was feeling a lot of pain in her back, neck, and jaw, and her ears were ringing. She saw her doctor after a few days and went for massage therapy but said it did not help.
- [15] Ms. Adams said she saw Ms. Roth the day after the accident and several times thereafter. She described those visits as being short and in dark rooms. She said this went on for years and Ms. Roth's condition deteriorated over time but I am unable to accept this evidence. Ms. Adam's recollection of Ms. Roth's ongoing condition does not accord with those who saw Ms. Roth much more frequently, including Ms. Roth's mother and friends. None of those witnesses, and not even Ms. Roth herself, testified that she was only able to manage short visits with friends in dark rooms. Nor did they describe a deteriorating medical condition. I find that Ms. Adams' recollection of Ms. Roth's post-accident condition is not accurate or at

least not representative of Ms. Roth's day-to-day condition as she and others who saw her frequently described it.

Social Life and Activities

- [16] Prior to the accident Ms. Roth had an active social life with many friends. She said after the accident she stopped going out much. Her mother and friends testified that she socialized much less after the accident. They observed that she did not cope well when there was noise and lots of people around and would often excuse herself from the room to lie down when she seemed to be getting overwhelmed. They said she would become distracted and lose her train of thought, which was not characteristic of her before the accident. She also grew impatient and was easily irritated. Social gatherings became less frequent and with fewer people.
- [17] Ms. Roth said her accident injuries strained her relationship with Mr. Eshelby. She said she was in a lot of pain from the accident and unable to do the regular activities they did together, like walking on the beach and kayaking. They stopped being intimate because of her neck and back pain and this put a strain on the marriage. She said Mr. Eshelby grew less supportive of her condition and they began to fight. In the spring of 2016 they split up and later divorced.
- [18] Ms. Roth said her social life is now better and she is largely back to going out with friends although there are some she no longer sees. She said she generally does not have any restrictions on her social activities at present but this can depend. She said every day is different and sometimes she will have a hard day at work and is not up to seeing anyone. She said she has returned to all her pre-accident activities, except for kayaking which she thought would be difficult with her back pain and she does not do longer hikes.

Post-Accident Work History

- [19] Around January 2016 Ms. Roth tried to return to work but that failed. She started with two hours a day but found it hard to focus. She had trouble concentrating with background noise and could not multi-task. She had panic attacks and was crying in her supervisor's office by the fourth day. She decided she had tried to return to work too soon so she went off again.
- [20] She applied for disability benefits shortly after that. In a medical report submitted with the application, her family doctor reported she was able to drive, crouch, balance, bend, twist, stoop, kneel, squat, climb stairs, and reach above and below shoulder level. She agreed in cross-examination that she told her doctor she could do all these things at that time.
- [21] Around September 2016 she started another gradual return to work, starting with training on a new Autoplan insurance system. This was done in the back of the office where it is relatively quiet and it seemed to go well. However, once she was trained on the new system and moved to the busier front of the office she says she started to struggle with work. She again found it hard to multi-task, had to take frequent breaks, and was getting regular

headaches. Despite this Ms. Roth worked her way back up to full time but said her problems with concentration persisted. She started to have panic attacks again and developed migraines. After seeing her doctor she decided to leave her job again. She could not remember the precise timing of this but it appears she left Waypoint around April 2017. She then applied for some office jobs but ultimately decided to go back to school.

- [22] In February 2018 Ms. Roth enrolled in a 10-month Pharmacy Technician program at Stenberg College in Surrey. The course was mostly online with some in-class programming plus two four-week practicums: one in a hospital and one in a community pharmacy. The program application form asked her to report if she had any medical condition that might affect her ability to work as a pharmacy technician and she did not identify anything. A medical form submitted with the application describes the job demands as follows:

The job duties involved in this career are very demanding and may include activities such as bending, lifting, stretching and standing for extended periods of time and will require that the candidate be in good physical health and free from chronic pain problems and latex allergies. The emotional environment of the field also requires that the student be able to cope with all the demands and stressors involved.

- [23] Ms. Roth's family doctor signed this form certifying that Mr. Roth is "mentally, physically and emotionally capable of performing the work of a Pharmacy Technician " as described. Ms. Roth said she thought she was capable of doing the work at the time, including the practicums.

- [24] Indeed Ms. Roth did exceptionally well in the program, earning marks in the low to mid 90s. She earned a 98 in Pharmaceutical Calculations. Her lowest mark was 89 in Anatomy and Physiology. She said she worked very hard at the course and had a quiet study area at home. She completed the program, including the two practicums, in December 2018.

- [25] The following month Ms. Roth started work at a pharmaceutical supply company in Nanaimo but left after three months to work at the pharmacy in a Save-on-Foods in Nanaimo. That went well initially, working four-days a week in a well-staffed pharmacy, but after a couple of years the work intensified due to staff shortages and Ms. Roth found it hard to cope with more hours and a busier work environment. She had trouble concentrating and was having regular headaches. After about two-and-a-half years at Save-on-Foods she went on medical leave. While on leave she found her present job at Parkville Pharmacy where she works three days a week with a supportive employer. This has worked well for her.

- [26] I will explore this post-accident work history in more detail when addressing Ms. Roth's claim for loss of earning capacity.

Medical Treatments

[27] In the year following the accident Ms. Roth attended physiotherapy and some cognitive therapy. She had counselling sessions to help her through the stress of the accident, including post-accident driving anxiety. She stopped receiving physiotherapy, cognitive therapy, and counselling when the insurer ceased paying for these sessions. She continued seeing her family doctor and was referred to a neurologist, Dr. William Eardly, in 2018. Dr. Eardly expressed doubt that Ms. Roth had suffered a concussion but, in view of ongoing complainants of cognitive challenges, he suggested a neurocognitive assessment would be reasonable.

Present Condition

[28] Ms. Roth says she continues to feel pain in her neck and lower back, although this does not always bother her. She was getting quite bad migraines for some years after the accident but had reported to one medical professional that these migraines were not debilitating. She says her migraines are now managed with medication and are "mostly fine". She says she still has trouble concentrating when there is noise or lots of activity at work and she finds it difficult to manage social settings when there are many people present, such as at large family gatherings. She finds that she needs to take time out from such events to rest. However, as mentioned, she does not find this significantly limits her present social activities.

[29] Other conditions she attributes to the accident - including numbness in her arm, pain in her chest from the seatbelt, and some bruising on her leg - cleared up within a few months of the accident.

Expert Reports

Dr. Ross Davidson- Physical Medicine

[30] Dr. Davidson is a physical medicine specialist called by Ms. Roth. He opined that Ms. Roth suffered a grade 3 whiplash associated disorder and she continues to feel the effects of that in the form of persistent myofascial neck pain. He explained in his report that the difference between a grade 2 and grade 3 whiplash relates to neurological symptoms present after the accident. In Ms. Roth's case, the neurological symptom took the form of left arm paresthesias (tingling). He agreed that since the arm tingling resolved within a few months of the accident, her long-term diagnosis is for a grade 2 whiplash associated disorder rather than a grade 3. Dr. Amarjit Arneja, a physical medicine specialist called by the defence, also diagnosed grade 2 whiplash associated disorder.

- [31] Dr. Davidson attributes Ms. Roth's headaches and migraines to the whiplash injury and suggests there may be improvement with a treatment of botox injections. However, Ms. Roth's own evidence is that her headaches and migraines are now under control with medication.
- [32] Dr. Davidson opines that Ms. Roth suffered a concussion based on the Zurich guidelines which require impulsive force to the head that causes the brain to move coupled with loss of consciousness, post-traumatic amnesia or abnormal mental status such as confusion.
- [33] It was put to Dr. Davidson in cross-examination that the standard diagnostic tool used in Canada is the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and not the Zurich guidelines. He said the Zurich guidelines tend to apply for sports-related concussions but they can be applied elsewhere. He agreed that the DSM-5 is typically used but maintained that the Zurich guidelines are a valid diagnostic tool. Nevertheless, he maintained Ms. Roth's symptoms would support a concussion diagnosis under either the DSM-5 or the Zurich guidelines.
- [34] Dr. Davidson agreed there was no medical notation of bruising or a mark on Ms. Roth's forehead following the accident and he was unsure if she actually struck her head but said that is not essential for a concussion diagnosis. He said a concussion can happen with a rapid movement of the head that displaces the brain within the skull. In his opinion, the jolt from the accident would have been sufficient to cause that.
- [35] Dr. Davidson opines that "at least a portion" of Ms. Roth's cognitive complaints are attributable to the accident. As to their long-term effects, he opines:

with the neuropsychology testing that has been completed [by Dr. Friesen, discussed below], I am reasonably confident saying that it is likely she will not return to her pre-accident cognitive baseline. She will likely be able to maintain her basic self-care and independent function at home. She will likely continue to have some struggles with social situations and forgetfulness. She will likely continue to have difficulties on an indefinite basis with multitasking or maintaining attention in loud environments. This has implications for her work-related and social-related function.

- [36] Dr. Davidson spoke of other conditions, such as a knee injury that had resolved and anxiety and depression but I heard no evidence from Ms. Roth about these conditions. She testified she injured her shin in the accident but that soon resolved and the only evidence she gave about anxiety and depression, apart from some post-accident driving anxiety, was about her pre-existing Seasonal Affective Disorder Syndrome. To the extent Dr. Davidson opines that Ms. Roth suffers from anxiety or depression because of the accident, the factual basis for that opinion was not established in the evidence.

Dr. Ingrid Friesen - Neuropsychology

- [37] Dr. Friesen is a psychologist with expertise in neuropsychology retained by Ms. Roth. She opined that neuropsychological testing of Ms. Roth indicates deficits in complex auditory attention, selective attention, sustained attention, organizing visual stimuli, inhibition, and motor speed for her left hand. She also opined that memory and language testing were consistent with relative frontal lobe dysfunction.
- [38] She opined that these conditions are consistent with Ms. Roth having suffered a mild traumatic brain injury (concussion) and post-concussion syndrome. She suggests that the sudden onset of symptoms consistent with the test results - including challenges in concentrating, decreased memory, and difficulty multi-tasking - indicate a concussion. Overall, she opined that Ms. Roth had a mild neurocognitive disorder due to a traumatic brain injury.

Dr. Amarjit Arneja

- [39] Dr. Arneja is a physical medicine specialist called by the defendants.
- [40] Dr. Arneja opined that Ms. Roth sustained soft-tissue injuries from the accident with a grade 2 whiplash associated disorder that manifests itself in her neck pain. He also opined that her headaches and low back pain are the result of the accident. He says it is unlikely that she will return to 100% capacity but suggests there is room for her to improve with certain treatments he recommends, including trigger point release treatments by an experienced massage therapist and, if necessary, trigger point dry needling or injections with a local anesthetic followed by gentle stretching and heat application. He recommends this be followed by active rehabilitation, conditioning and weight loss. He also suggests an interdisciplinary intervention with physiatrist/pain specialist, kinesiologist, an occupational therapist and a psychologist. He also recommended a battery of blood tests to rule out systemic perpetuating factors that may be contributing to her soft tissue symptoms and pain.
- [41] Dr. Arneja did not comment on a concussion diagnosis in his report but was asked about it in cross-examination. He explained that he did not address a concussion in his report because he would not have diagnosed one. In his opinion, Ms. Roth's symptoms did not support the DSM-5 diagnostic criteria for a concussion. In particular, he said there is no evidence of an altered state of consciousness within the prescribed time after the accident. He also questioned whether Ms. Roth struck her forehead on the steering wheel noting the absence of any notation of bruising or marks on her forehead in the urgent care clinic records.
- [42] Dr. Arneja was also asked in cross-examination about his summary of Dr. Eardly's consult report. Dr. Eardly is a neurologist to whom Ms. Roth was referred by her family doctor to examine her for her cognitive complaints. Neither Dr. Eardly nor the family doctor were called to testify and thus Dr. Eardly's clinical report, on its own, is evidence only that the

diagnosis was made. The court cannot accept that diagnosis was correct without properly admitted opinion evidence supporting the diagnosis: *Edmonston v. Payer*, 2011 BCSC 118, para. 38. However, Dr. Arneja considered Dr. Eardly's diagnosis when preparing his report and largely endorsed its content during cross-examination.

- [43] Dr. Eardly said "[t]echnically speaking, the patient would not meet the diagnostic criteria for concussion, based on DSM-V criteria". He suggested Ms. Roth's cognitive symptoms may relate to other active issues, including her chronic pain, headaches, anxiety, and poor sleep. He added that it would be reasonable for Ms. Roth to undergo neurocognitive testing.
- [44] In cross-examination, Dr. Arneja agreed with Dr. Eardly's diagnosis and agreed that neurocognitive testing would be reasonable. Dr. Arneja suggested that Dr. Friesen's identification of a mild cognitive impairment gave more reason to conduct the blood tests Dr. Arneja recommended since, in his view, a mild cognitive impairment could be related to conditions other than her whiplash injuries and chronic pain. I took his evidence to be agreement with Dr. Eardley that chronic pain, headaches, anxiety, and poor sleep may contribute to Ms. Roth's cognitive symptoms but he would have liked to see blood testing to rule out other potential causes.

Timothy Winter - Occupational Therapy and Functional Capacity

- [45] Mr. Winter is an occupational therapist and functional capacity evaluator called by the defendants. He performed a full-day functional capacity evaluation of Ms. Roth in December 2023. He opined that she is capable of performing physical demands of full-time work as a pharmacy assistant and working in a retail insurance broker but acknowledged in cross-examination that this would have to be in a supportive work environment. He said she demonstrates "grossly intact cognition" including adequate planning and organizational skills, effective attention to maintain concentration, and produces work accurately. In cross-examination, though, he acknowledged that his testing showed some amount of cognitive weakness when Ms. Roth was placed in a stressful environment with distractions. In other testing, though, he found she was capable of working through distractions but acknowledged she reported a headache following this stage of testing. He noted that he did a full day of testing after she had completed two full consecutive days of work and she also worked the day after the assessment. Based on a follow-up consult with Ms. Roth after that subsequent day of work, Mr. Winter formed the opinion that:

she is capable of full-time work in a sedentary office position (insurance industry), or as a Pharmacy Assistant. Ms. [Roth] demonstrated the ability to work four consecutive days the week of the FCE (i.e. two shifts prior to testing, the FCE, and a third shift the day following testing). Typical work demands and schedules were encountered.

He added that the demands of the functional capacity evaluation tests exceeded those of her current work.

[46] In cross-examination Mr. Winter confirmed he would defer to Dr. Friesen in terms of diagnosis and prognosis. Counsel put to him Dr. Friesen's opinion that Ms. Roth showed weak complex auditory attention that will cause her to miss information that is conveyed to her and weak selective attention that will make her easily distracted. Mr. Winter acknowledged these are limitations on her function consistent with what he observed in the one task in his functional capacity evaluation when she struggled with distractions. However, he said there were other tests with a similar cognitive load and distractions where she performed well. Ultimately, as I discuss below, he said this means she will need a supportive work environment that is not overly taxing but he considers she is capable of full-time work in that environment.

Findings on Injuries

- [47] There is agreement among the experts that Ms. Roth suffered at least a grade 2 whiplash associated disorder and she continues to feel the effects of that in the form of persistent myofascial neck pain. I accept Dr. Davidson's opinion that she sustained a grade 3 whiplash associated disorder in the accident but with the resolution of the left arm paresthesias (tingling) in the months after the accident, the long term diagnosis is of a grade 2 disorder. This has left Ms. Roth with chronic pain in her neck.
- [48] There is also agreement that Ms. Roth's lower back was injured in the accident and it too continues to give her pain and is unlikely to resolve. She had a pre-existing back injury and the medical experts agree that the accident rekindled that earlier injury. Mr. Roth's evidence on this point, which I accept, is that the pre-accident back injury was a one-time event that has not given her trouble since it resolved more than a decade ago. Thus, this was a latent condition that reignited by the accident. There is no evidence that this latent condition would otherwise have given her trouble. I therefore find that her present back pain was caused by the accident.
- [49] I accept that Ms. Roth has suffered some cognitive impairment because of the accident. Her lower tolerance for noise and activity is genuine and came about only after the accident. Her evidence in this respect was corroborated by her friends, Caralee Spencer and Kristen Hewer, her mother, and her former work supervisor, Karren Lehmann.
- [50] I am not persuaded that Ms. Roth's cognitive impairments are the result of a concussion. Whether a concussion diagnosis is based on the DSM-5 criteria or the Zurich guidelines, some form of altered state of consciousness immediately following the accident is a necessary symptom to support the diagnosis. Dr. Davidson states the Zurich guidelines will support a concussion diagnosis even in the absence of post-traumatic amnesia or loss of consciousness where there is a "clear period of acute onset, abnormal mental status after an impulse injury the brain."

- [51] In support of the diagnosis, Dr. Davidson points to Ms. Roth's apparent inability to recall her address when she was at the Parksville urgent care clinic but he agreed in cross-examination that this was some hours after the accident and would therefore not meet the diagnostic criteria. I would add that the evidence that Ms. Roth could not remember her address is inconsistent with the contemporaneous note made by the intake nurse in the medical file which states that she "had a little trouble with her address at first" (emphasis added).
- [52] Second Dr. Davidson points to the fact that Ms. Roth reported being disoriented after the accident and did not think to call 911, even though, as a person who sold auto insurance, she would rationally have known this to be the appropriate response. Again, I do not find this persuasive evidence of an altered state of consciousness, let alone a "clear period of acute onset" of "abnormal mental status" after the accident. Some measure of disorientation and confusion is to be expected after an accident, particularly one that occurs on a busy highway.
- [53] In his consult report, Dr. Eardly (neurologist) stated that it is unlikely that Ms. Roth suffered from a concussion as her symptoms do not meet the DSM-5 diagnostic criteria but he attributed her cognitive complaints to the ongoing soft-tissue injuries from the whiplash. While this consult report is not evidence for the truth of Dr. Eardly's opinion (since Dr. Eardly did not provide an expert report and did not testify), Dr. Arneja largely adopted it in cross-examination.
- [54] I am satisfied that Ms. Roth has suffered minor cognitive impairments as a result of the accident (albeit not because of a concussion) and these minor impairments are ongoing. These have contributed to her challenges with concentration at work when there are distractions and her ability to fully engage in busy social events. I find they are a result of the accident because she only began to experience these problems following the accident and the medical evidence endorsed by Dr. Arneja indicates that a whiplash disorder and its ongoing effects can cause these impairments. That said, I am not persuaded Ms. Roth's cognitive impairments are as extensive as Dr. Friesen suggests and I will address that when dealing with loss of earning capacity.
- [55] Dr. Davidson opined that Ms. Roth is likely to experience her whiplash associated neck pain indefinitely given that it has persisted more than two years post-accident. He suggests her related headaches are best managed with medication (and that has in fact been the case since he wrote his report). He opines she is unlikely to return to her pre-accident cognitive baseline and will likely continue to struggle in loud environments.
- [56] Dr. Arneja is optimistic that Ms. Roth would see improvement through trigger point release treatments and, if necessary, dry needling treatments but also said her pain is likely to persist. Ms. Roth's soft-tissue neck and back pain have persisted for almost nine years since the accident and she received physiotherapy treatments early on while the insurer was willing to pay that cost. I find that while there are various treatments that might offer some palliative relief for Ms. Roth's symptoms, her neck and back pain are likely to persist

indefinitely.

- [57] I also find that Ms. Roth's cognitive difficulties are unlikely to fully resolve. Dr. Friesen opined she is unlikely to improve at this stage given the time that has elapsed since the accident. She bases this largely on the prospects of recovery from a mild-traumatic brain injury, which I have found has not been established on the evidence. However, Dr. Friesen adds that "there are no empirically-validated treatments to address her neurocognitive deficits/weaknesses" which I take to be a more general statement about treating the kind of cognitive weakness indicated by Dr. Friesen's testing and, to a lesser extent, Mr. Winter's functional capacity evaluation. There is no expert evidence before me suggesting that this cognitive deficit will resolve.
- [58] Finally, while Ms. Roth's headaches are now well controlled with medication, I find she continues to be susceptible to them, especially when confronted with stressful or physically demanding tasks. In this respect I note that it took many years before she was able to bring them under control with effective medication.

Non-Pecuniary Damages

- [59] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Money awarded does not place a dollar value on the loss but rather is intended to provide a plaintiff with reasonable solace for injuries and substitute other enjoyments and pleasures for those that have been lost: *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 262; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636. A common but non-exhaustive list of factors typically considered in assessing non-pecuniary damages 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.
- [60] 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. 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.
- [61] As I have found above, Ms. Roth suffered a grade 3 whiplash disorder in the accident that became a grade 2 disorder in the months that followed. She continues to experience regular neck pain and lower back pain as a result. For several years she suffered from headaches - often migraines - related to these soft-tissue injuries and she is still prone to such headaches but they are now largely controlled through medication. She has suffered ongoing mild cognitive impairments, likely related to the whiplash disorder, that makes it difficult for her to concentrate in noisy or busy work environments and have affected her ability to fully participate in larger social gatherings.

- [62] I accept that these injuries have negatively impacted Ms. Roth's enjoyment of life. It is clear that as a younger person and before the accident she had an active social life and thrived in large gatherings of friends and family. I accept she could no longer enjoy these activities in the same way in the years following the accident, although she is still able to socialize and has enjoyed shorter and quieter gatherings and trips with a few friends and some family. She feels there are now fewer restrictions on her social life than there were in the years following the accident, but this can depend on the day.
- [63] Ms. Roth has continued to walk but says it is more challenging to do longer walks or hikes and she feels she can no longer kayak because of her neck and back injuries. I accept this evidence and I accept that these were activities she enjoyed before the accident but there was little or no evidence of the frequency of these activities or that they were especially important to her pre-accident lifestyle.
- [64] Ms. Roth testified briefly that her diminished capacity to do physical activities such as walking or kayaking contributed to the end of her marriage. She also said her injuries impaired her ability to be intimate with her former husband which also strained the marriage. While I accept Ms. Roth's evidence that these were contributing factors to her marriage ending, there was so little evidence led about the relationship itself and the circumstances and factors that led to its breakdown that I have difficulty concluding that the accident injuries were a substantial cause of the marriage breakdown. I note also that the relationship ended only about six months after the accident which suggests there were other difficulties that pre-dated the accident.
- [65] Ms. Roth seeks \$200,000 in non-pecuniary damages. Her counsel cites *Plett v. Davis*, 2022 BCSC 789 (\$210,000), *Danks v. Middelveen*, 2024 BCSC 174 (\$190,000), and *Oliver v. Loewen*, 2024 BCSC 604 (\$185,000) in support.
- [66] *Plett* and *Danks* were both decisions of mine. In both cases, the plaintiffs' injuries were more severe and debilitating than were Ms. Roth's. In *Plett*, the plaintiff suffered significant neck, back, and shoulder injuries with daily chronic pain and resulting physical limitations (such as lifting relatively light objects like a kettle or a jug of milk), severe frequent headaches, vertigo, substantial cognitive impairments including problems with memory and concentration, a concussion (which was supported by the medical evidence and conceded by defence), an inability to cope with lights, sleep disruption, and anxiety and depression for several years following the accident. The impact of the accident on Ms. *Plett*'s daily life was much more substantial than Ms. Roth's accident has been on her life.
- [67] In *Danks*, the plaintiff was a high-performing athlete and a co-owner and operator of a successful daycare business before the accident. She suffered from whiplash injuries that gave her serious daily neck and shoulder pain as well as headaches and a sleep disorder. She was unable to continue with the same level of athletic activity that was integral to her daily life and her relationships. This took a toll on her daily life and her relationship with her husband and children who are also highly athletic. It also impacted her own self-image as

she had always defined herself in part by her athleticism. She became easily irritable and anxious at home and in her business which also affecting her relationships. She developed significant (though not debilitating) anxiety and depression that also took a toll on her relationships. Some of this is also true for Ms. Roth to a certain extent but the plaintiff's injuries in Danks and their effect on her life were much more severe than the evidence indicates for Ms. Roth.

- [68] I find that neither Plett nor Danks are good comparators to this case.
- [69] In *Oliver*, the plaintiff was a pedestrian who was struck by the defendant's car while in a crosswalk. She suffered from ongoing hip, neck, shoulder, and back pain as well as headaches that "dramatically and permanently altered her life for the worse" (para. 2) and cognitive problems that affected her memory (para. 43). Her chronic pain impacted her ability to sit, stand, and participate in sporting activities that she had done regularly before the accident (paras. 36 and 40). She was unable to do household chores (para. 36). She suffered from a lack of sleep due to her hip pain that made difficult to find a comfortable position (para. 42). Her social life changed markedly (para. 50). The medical evidence supported a conclusion that the plaintiff suffered from a concussion that caused a minor neurocognitive disorder. I find that Ms. Roth's injuries and their impact on her life are not as severe or extensive as they were in *Oliver*.
- [70] The defendants submit an award of between \$68,000 and \$85,000 is appropriate. They rely on *Bains v. Innes*, 2021 BCSC 2037 (\$68,000), *Han v. Dular*, 2023 BCSC 108 (\$85,000), and *Thind v. Mole*, 2022 BCSC 979 (\$75,000).
- [71] In *Bains* the plaintiff was a pedestrian who was struck while crossing the road. Justice Giaschi found there were serious problems with her credibly, that she had significantly exaggerated her injuries to her doctors and to the court, and that she misled the court in several respects. Contrary to her evidence, he found that she continued with her pre-accident athletic pursuits. He found that she did not suffer significant pain in her neck as she claimed. He found she had ongoing neck, shoulder, low back and leg pain from soft tissue injuries but, while this pain was initially severe, it improved over time such that it was minor and infrequent within about three years post-accident. It did not interfere with her physical activities. He accepted she suffered from some cognitive impairment due to accident-related headaches but those headaches, together with cognitive problems, subsided to pre-accident levels within a few years of the accident. He also found she suffered from depression caused by the accident that was severe at times but also subsided within a few years. He would have awarded \$80,000 in damages but applied a 15% discount for pre-existing conditions and intervening events that contributed to her injuries and their effects.
- [72] In *Han*, the plaintiff was injured in a rear-end accident. She suffered soft-tissue injuries to her right shoulder, arm, and right knee but fully recovered from those injuries. She had ongoing neck and back pain but it was infrequent and not disabling. She had some cognitive issues relating to concentration while reading and trouble focussing. This did not interfere

with her work or recreational pursuits but it did take her longer to read something than she could pre-accident. She had ongoing headaches that occurred only a few times a month and for a short duration. Justice Forth awarded \$85,000 in non-pecuniary damages.

- [73] In *Thind*, the plaintiff had lived with chronic pain from soft-tissue injuries sustained in several different motor vehicle accidents that predated the one at issue in the case. The subject accident resulted in "a permanent aggravation" of those pre-existing chronic soft tissue injuries in her neck, shoulder, and back, as well as a permanent aggravation of pre-existing driving anxiety and a new headache disorder. Justice Thomas found these new and aggravating conditions resulted in "a relatively minor reduction" in the plaintiff's functioning. He found the chronic pain from the aggravated soft tissue injuries was largely managed with deep tissue massage treatments. He awarded \$75,000 in non-pecuniary damages.
- [74] In this case, I am satisfied that Ms. Roth has sustained soft-tissue injuries resulting in chronic pain in her neck and lower back. While there are some potential treatment options, I accept Dr. Davidson's evidence that these conditions are likely permanent. I also accept that Ms. Roth has suffered from significant headaches, including migraines, as a result of her accident injuries and, while these are now controlled with medication, it is unlikely that she will be free of this condition. I accept that these injuries have contributed to minor cognitive impairments that impact her ability to concentrate in noisy environments and have limited her ability to fully participate in larger social gatherings. As a highly social person, I accept these impairments have had a negative impact on her quality of life. I find her injuries have had some impact on her recreational activities but the evidence does not suggest this has profoundly affected her way of life. I also accept that her injuries had some effect on her relationship with her former spouse but the evidence is insufficient to show they were a significant cause of the breakdown of that relationship. I find her injuries and their impact on her life are somewhat more severe than in the three cases cited by the defendants but substantially less than the three cases cited by Ms. Roth.
- [75] In my view, having regard to all the *Stapley* factors, an award of \$95,000 is appropriate for non-pecuniary damages.

Loss of Housekeeping Capacity

- [76] Ms. Roth claims \$10,000 for loss of housekeeping capacity. No explanation was given for how this proposed award was quantified.
- [77] Ms. Roth lives in a largely self-contained living area in her parents' home. Her grandmother also lives in that home. Her mother does most of the cooking for the family but this has nothing to do with Ms. Roth's abilities relating to her accident injuries. The evidence is Ms. Roth cleans her own area of the house and does the dishes for the family. There is no evidence that she is unable to do housework because of her injuries or even that she struggles with it. I make no award for loss of housekeeping capacity.

Loss of Earning Capacity

General

- [78] Ms. Roth claims damages for past and future loss of earning capacity. At the time of the accident, she was working full time for Waypoint Insurance and had been for about a year-and-a-half. She went off work immediately following the accident, had a failed attempt to return three months later, made a second attempt to return almost a year after the accident, but ultimately left her job in 2017 citing injury-related problems with coping at work. There is no evidence of the precise dates that Ms. Roth attempted her returns to work or when she ultimately left but it appears that she decided to leave Waypoint for good around March or April 2017. For the purposes of this analysis, I will assume it was April 30, 2017.
- [79] Ms. Roth then considered other lines of work and applied for some jobs but did not work again in 2017. In February 2018 she enrolled in a 10-month Pharmacy Technician program which she completed in December 2018. She started work in that field in January 2019, first with Remedy's Pharmacy and later in the Save-on-Foods pharmacy in Nanaimo where she worked four days a week and occasionally five. The Save-on-Foods job initially went well but she said after some time the work intensified due to staff shortages and she then had trouble coping with the job. She took a medical leave during which she found new work at Parksville Pharmacy where she has worked three and occasionally four days a week ever since.
- [80] The Parksville Pharmacy job has worked out well for Ms. Roth. She finds that the part time work and the supportive environment suits her abilities and challenges. She claims that before the accident she was capable of working five days a week and was doing well at Waypoint Insurance. She claims she now can only work three or sometimes four days a week. If she pushes herself to do more she develops headaches and becomes exhausted. She claims damages for past and future loss of earning capacity based on the difference between working five days a week (the without-accident scenario) and working three or, alternatively, four days a week (the with-accident scenario). On this basis, and using economist Darren Benning's present-value multipliers and general contingency deductions, she claims \$166,000 in past loss of earning capacity and between \$585,685 (to age 65) and \$739,394 (to age 70) in future loss of earning capacity.
- [81] The defendants concede that Ms. Roth reasonably took time off work following the accident and that a graduated return to work at Waypoint was reasonable. However, they argue Mr. Roth was capable of working full time at Waypoint and it was her own choice to leave in 2017. They argue that damages for her past loss of earning capacity should be confined to the period before she left Waypoint in 2017. They argue she has been capable of full-time work since then and therefore has no claim to future loss of earning capacity.

Legal Principles

- [82] In *Kallstrom v. Yip*, 2016 BCSC 829 Justice Kent summarized the general principles behind valuing a claim for loss of earning capacity:
- [389] 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
- [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.
- [83] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47 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.
- [84] In *Grewal v. Naumann*, 2017 BCCA 158, Justice Goepel, dissenting but not on this point, discussed how the assessment of real and substantial possibilities and relative likelihoods 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

[85] I propose to address Ms. Roth's claim for past loss of earning capacity in three periods. First, I will address the period that is not in dispute: October 22, 2015 to April 30, 2017. Second I will address period from May 1, 2017 to December 2018 which is after she left Waypoint through to the time she completed the pharmacy technician course in December 2018. Third I will address the period from January 2019 to the present when she has been working as a pharmacy technician.

Accident to April 30, 2017

[86] The defendants concede Ms. Roth was reasonably off work or doing a gradual return to work during this time. Thus, a loss is acknowledged for this period. However, the assessment of this loss is made difficult by the imprecision with dates and the lack of evidence of Ms. Roth's employment records at Waypoint. There is no evidence of her salary or hourly rate of pay at Waypoint or of the hours and dates she worked after the accident.

[87] Given this shortage of evidence, the best the Court can do is to estimate Ms. Roth's loss by comparing her earnings immediately before the accident with her earnings in the year-and-a-half after. Pursuant to s. 95 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, this must be based on her net earnings after taxes and Employment Insurance deductions.

[88] According to Ms. Roth's tax return summaries, she had a gross annual income of about \$32,000 in 2014 and about \$27,500 in 2015. Adjusting to account for the fact that she did not work after the October 22, 2015 accident, I estimate her full-year gross income in 2015 would have been approximately \$34,000 (or about \$640 per week).

[89] She missed 10 weeks of work in 2015 with a pre-tax loss that I estimate at \$6,400. However, she collected \$2,332 in employment insurance benefits, netting a pre-tax loss of \$4,068.

[90] In 2016 she had gross employment income of \$7,331 plus employment insurance benefits of \$3,304. Assuming her without-accident income would have remained at \$34,000, I estimate her pre-tax loss in 2016 to be \$23,365.

[91] In 2017 she earned \$8,447 in employment income which would have been up to the time she left Waypoint in April 2017 (17 weeks). Had she been working full time in those four months at her 2015 rate, she would have earned almost \$11,000 for a before-tax loss of approximately \$2,500.

[92] Thus, up to April 30, 2017, I estimate Ms. Roth's before tax loss of earnings was \$29,933 which I round up to \$30,000. From this I must make a deduction for taxes and EI premiums. The defendants suggest a 20% deduction is appropriate but I note that on Ms. Roth's 2014 and 2015 tax return summaries her average federal tax rate is around 10.8%. Factoring in Provincial taxes and E.I. premiums, I consider a 15% deduction is appropriate and I assess her past loss of earning capacity up to April 30, 2017 to be \$25,500.

May 1, 2017 to December 2018

- [93] Ms. Roth claims that she was unable to continue working at Waypoint because of her accident injuries and, in particular, her inability to cope in the busy office environment. She claims for loss of income for the period between leaving Waypoint and starting in the pharmacy business in January 2019. The defendants, as I have said, deny any loss of earning capacity for this period.
- [94] I accept Ms. Roth's evidence that she left her job at Waypoint because she was struggling with the noise, her concentration, and was having anxiety attacks. I accept that her challenges with concentration and noise are a result of her accident injuries based on the expert evidence and the fact this was not an issue for her before the accident. I therefore accept that she had a diminished capacity to work after May 2017 as a result of her accident-related injuries.
- [95] I base this on her own evidence, which I accept, and also the evidence of Mr. Winter, the functional capacity evaluator called by the defendants. While his evaluation was some years later, his findings about her limitations are helpful in understanding her ability to work during an earlier time when her condition was worse. I will discuss Mr. Winter's evidence in more detail in a moment but, in brief, he acknowledged in cross-examination that Ms. Roth had some cognitive weaknesses and she would need a supportive work environment to work full-time. That was in 2023. In 2017 and 2018, Ms. Roth was still experiencing frequent headaches and her condition was generally worse than it was when Mr. Winter evaluated her. I accept that she was not able to continue in the Waypoint work environment because of her accident-related condition.
- [96] That said, I am not able to find that Ms. Roth was completely disabled from working at this time. One reason for this conclusion is a dearth of evidence about the time period between Ms. Roth's departure from Waypoint around April 2017 and her starting the pharmacy technician program in February 2018. She was asked almost no questions about this period during her direct examination and she gave no evidence about it, other than to say that she had some assistance in updating her resume and applied to a few places for work. Nor was she asked to give evidence about her physical or mental condition during this time. She indicated that she continued with some cognitive therapies she was receiving and that she had been suffering from fatigue, anxiety, and headaches while at Waypoint, but the Court has almost no insight into what Ms. Roth was doing or what her condition was between her departure from Waypoint and her starting the pharmacy technician program. I infer she must have thought she had some capacity to work since she updated her resume and applied for jobs during this time.
- [97] There is also a lack of evidence to explain the anxiety attacks Ms. Roth experienced while at Waypoint. I accept her evidence that she had these attacks but there was no evidence from her or any medical expert to explain why they were happening or how they might have been managed. Anxiety was not new to Ms. Roth. She has long suffered from Seasonal Affective

Disorder Syndrome and had been prescribed anxiety medication on several occasions before the accident. She was seeing her family doctor regularly during 2018 but, despite commissioning and serving a report from him, Ms. Roth did not tender that report or call her family doctor as a fact witness.

- [98] It is Ms. Roth's burden to prove her loss. While I accept that her capacity to work was diminished in 2017, the evidence does not show she was entirely incapable of working at that time.
- [99] In February 2018 Ms. Roth enrolled in the pharmacy technician program. The medical certifications she submitted with her application indicate she had significant physical and cognitive capacity to do challenging work. She excelled in the program, receiving very high marks throughout. Much of the program was done remotely and Ms. Roth was able to study and do her work in the quiet of her home which is different to the busy Waypoint office. However, there was also an in-class element to the program and two practicums, one in a pharmacy and one in a hospital. The fact Ms. Roth did exceptionally well in this program suggests that she had capacity to work in the time between leaving Waypoint and starting the program.
- [100] Through the pharmacy technician program, Ms. Roth was able to retrain to do a job that she was capable of doing. However, I am not persuaded this was the only career option open to her in 2017 and 2018. Ms. Roth had done a number of jobs throughout her working life and had explored different opportunities and interests. I accept that insurance was an area she found rewarding but I also find that working as a pharmacy technician and learning a new area of work was a personal interest for Ms. Roth but not entirely a necessary one to restore her work capacity after the accident.
- [101] I accept that Ms. Roth was unable to cope with work at Waypoint in 2017 due to her accident-related cognitive weaknesses and headaches. In this respect, I do not agree with the defendants that her decision to leave Waypoint was entirely voluntary but nor do I accept that she was incapable of doing any work at this time. Her work capacity was compromised but she was not disabled from working altogether. She has not proven that the pharmacy technician program was the only answer to restoring her work capacity. I find that she reasonably required some period of adjustment to find work that would suit her condition following her departure from Waypoint but I do not accept that her loss amounts to almost two years of income until she began work in the pharmacy business.
- [102] I would therefore assess Ms. Roth's work capacity for 2017 to about half of her full capacity. Thus, for the remainder of 2017 after she left Waypoint, I would award her \$10,000 in loss of earning capacity. That is about one half of her pre-accident salary (with an increase to account for a cost of living salary adjustment), adjusted for the 8 months she was not working in 2017 and with a 15% deduction for taxes and E.I. premiums.

[103] For 2018 Ms. Roth was enrolled in full time school with the pharmacy technician program. While this helped her shift to a new and more suitable line of work, I find that enrolling in the program was substantially for her own benefit. A full year of lost employment while she was enrolled in the course is not a loss that should be visited on the defendants. I therefore make no award for loss of earning capacity for 2018.

January 2019 to Trial

[104] Ms. Roth completed the pharmacy technology course in December 2018. Starting in January 2019 she worked at Remedy's for about three months and then at Save-on-Foods, mostly at four days a week but sometimes five. At first she found the work to be very good but says she later developed migraines and back pain. She attributed this to staff shortages which required her to work more hours and she says she became tired and fatigued.

[105] Ms. Roth had difficulty remembering how many days a week she worked at different jobs after the accident. Throughout her direct examination she said she worked three days a week at the Save-on-Foods pharmacy and later did more four day weeks that she found were taxing on her. However, in cross-examination, after having her memory refreshed from her 2020 examination for discovery, she confirmed that it must have been four days a week (32 hours) that she worked at Save-on-Foods and that she occasionally worked five days. I take from this that with adequate staffing levels she could manage four days a week but struggled with five days a week.

[106] In cross-examination, Mr. Winter opined that the environment at the Save-on-Foods pharmacy was likely unsuitable for Ms. Roth to work full time because of her cognitive challenges with concentration and noise. He opined that she requires a supportive environment to work full time and the circumstances at Save-on-Foods did not appear to provide that. He said this in cross-examination:

the work environment will need to be considered for her. It has to be a supportive work environment. One that is not going to be overly taxing, stressing, high risk of errors -- you know -- all the things she was describing related to the Save-on-Foods job. Because under different conditions when she is well supported and familiar, she is tolerating that type of cognitive load.

So while I don't disagree that there is selective attention weakness identified on standardized testing [done by Dr. Freisen], we need to understand how that is going to affect her under work conditions or performance scenarios. This is what the FCE [Functional Capacity Evaluation] is showing, that it is not consistently affecting her. The distractibility does occur but it occurred when there were higher levels of stress or anxiety.

[107] That said, it is important not to overstate Mr. Winter's opinion. While he said one test he administered during his functional capacity evaluation suggests Ms. Roth has some cognitive weakness when in a stressful or distracted environment, she performed well in other testing with a similar cognitive load. He opined that she "demonstrates grossly intact cognition."

[108] Ms. Roth eventually took a medical leave from Save-on-Foods and during that leave found her present job at the Parksville Pharmacy where she works three and occasionally four days a week. Parksville Pharmacy provides the kind of supportive work environment that Mr. Winter opines Ms. Roth needs.

[109] I accept Mr. Winter's opinions and find that it helps explain the challenges Ms. Roth had with the Save-on-Foods pharmacy job as the staffing levels there began to decline placing more stress on Ms. Roth. This was also a time before her headaches were largely under control with medication. Even now, with her headaches under control, she remains vulnerable to them because of her chronic myofascial neck pain. I accept Dr. Davidson's opinion in this respect.

[110] Dr. Davidson also said this about Ms. Roth's work limitations:

I would expect moderate to significant limitations with respect to the type of job she will be able to sustain or maintain, limitations with respect to the tasks she will be to accomplish at work, and limitations with respect to the number of hours she will tolerate without having significant flares of migraine or posttraumatic headache. I therefore suggest restrictions in the amount of time she is working, the number of breaks, and activities such as sitting for prolonged periods, standing for long periods, lifting heavy items from the ground, and at least for the time, engaging in tasks with a significant element of unpredictability. Further restrictions may be guided by an occupational therapist. This can be classified as a moderate, indefinite, partial disability.

I would classify her vocational-related disability as a significant, indefinite, partial disability.

[111] Dr. Davidson's report is dated February 7, 2022, about eight months before Ms. Roth moved to the Parksville Pharmacy. He therefore did not have the benefit of learning how she had performed in that supportive work environment. Having heard her evidence about this new job, I find that some of what Dr. Davidson suggests in this passage is overly pessimistic. However, Ms. Roth has testified that she experiences fatigue and can develop headaches when she works more, although apart from a bit of fatigue, she did not experience a significant headache after four straight days of work and Mr. Winter's (relatively intense) functional capacity testing. On balance, I accept there is a real and substantial possibility that Ms. Roth might see a return of her migraines with a full-time work load even in a supportive work environment but, in my view, the greater likelihood is that she is capable of full-time work in that environment.

- [112] In her 2021 report, Dr. Friesen opines that Ms. Roth will likely experience a number of problems in her future work due to the neurocognitive deficits Dr. Friesen identifies. This is essentially a 2021 prediction of how Ms. Roth will function in the workplace with the cognitive weaknesses Dr. Friesen identified in her report. Some of these identified weaknesses are consistent with Ms. Roth's evidence of her lived experience since the accident, including finding herself easily distracted or more challenged to work in a busy or noisy environment. However, many of the weakness Dr. Friesen suggests (at para. 75 of her report) are simply not part of Ms. Roth's profile, at least as Ms. Roth and other witnesses testified. For example, there is no evidence of Ms. Roth misremembering information that is conveyed to her at work. There is no evidence of Ms. Roth having an "increased rate of errors" in her work. In fact, the evidence suggests that errors in her work pre-accident were not unusual. There is no evidence that weak motor speed in Ms. Roth's non-dominant hand impacts her work ability such as keyboarding. In fact, a typing speed test she took as part of the entrance assessment for the pharmacy technician program indicated her typing speed was "fluent" or, as Mr. Roth said, "not bad for my second try". There is no evidence of any interpersonal conflict or impulsive behavior in the workplace and, while she certainly reports fatigue with full-time work hours, there is no evidence of high absenteeism other than her extended medical leaves from Waypoint and Save-on-Foods.
- [113] In short, Ms. Roth's lived experience in the workplace does not reflect the more pessimistic outlook predicted by Dr. Friesen in 2021.
- [114] Based largely on Mr. Winter's and Dr. Davidson's evidence and my findings about Ms. Roth's condition at the time, I accept it was reasonable for her to work four days a week at Save-on-Foods and she could not regularly sustain a full five-day week in those circumstances. In fact, the job became overwhelming when she did take on more hours with a heavier stress load. I therefore accept there is a past loss of earning capacity for 2019 when she started work in pharmacy sector and until October 2022 when she began working at Parksville Pharmacy.
- [115] Quantifying this loss is again challenging due to the limited evidence about Ms. Roth's earnings, the hours she worked, and her rate of pay. In his September 2022 report, economist Darren Benning states that Ms. Roth was earning \$21.40 per hour at Save-on-Foods. It is evident that Mr. Benning had employment records and pay stubs for Ms. Roth that were not tendered in evidence at trial. Mr. Benning's report was admitted into evidence without objection or cross-examination but its factual content must be proved independently. Without admissible evidence of Ms. Roth's rate of pay and specific hours I can only look to her annual tax return summaries to infer her income loss.
- [116] Ms. Roth's gross annual employment income for 2019 was \$25,000, for 2020 it was \$28,000, and for 2021 it was \$32,000 (all rounded). In 2022 her gross employment income was \$27,000 (rounded) but she worked part of the year at Save-on-Foods, was on medical leave for part of the year, and started working at Parksville Pharmacy three days a week in October of that year. Without more evidence of how this annual income was broken down I cannot

extrapolate what her potential without accident income at Save-on-Foods would have been in 2022 except by reference to previous years' tax return summaries. Thus, the best indicators of her income are 2020, when she likely worked mostly four days a week at Save-on-Foods, and 2021 when she probably had more five-day weeks.

- [117] Doing the best I can with this evidence, I assume Ms. Roth worked mostly four days a week in 2020. Based on four-day week, her annual income that year of \$28,000 would work out to \$538 a week or \$134.50 per day. (This works out to just under \$17.00 per hour which is less than the \$21.40 per hour that Mr. Benning identified. However, since the employment file Mr. Benning apparently had access to is not in evidence, I am unable to find a factual basis for any higher earning potential than can be gleaned from the tax returns.) Extending this \$134.50 per day to a five-day week (in a without-accident scenario) Ms. Roth could have earned a gross income of about \$672.50 per week or about \$35,000 (rounded) annually in 2019 and 2020 had she been able to work full time. This would generate a pre-tax loss of \$10,000 in 2019 and \$7,000 in 2020. Applying a 15% deduction for tax and E.I. premiums results in a loss of \$8,500 for 2019 and \$5,950 for 2020.
- [118] For 2021 I assume she worked a mix of four-day weeks and some five-day weeks. For the purpose of this assessment, I assume that she worked two thirds of the time in four-day weeks and one third in five-day weeks. On this basis, her annual income for the year of \$32,000 would average \$615 per week which I divide by 4.33 (to account for the mix of four and five day weeks) to arrive at a daily rate of \$142 (or \$17.75 an hour). On this basis, had she been able to work full time in 2021, she would have earned approximately \$36,920. This would generate a pre-tax loss of \$4,920 for 2021 and \$4,200 (rounded) after a 15% deduction for tax and E.I.
- [119] For 2022 I would prorate the 2021 potential without accident earnings to the first nine months of the year to account for the time before she started at Parksville Pharmacy in October 2022. The prorated amount is \$26,667. Her actual income for 2022 is \$27,339 and prorated to 10 months is \$20,500 suggesting a pre-tax loss of approximately \$6,000 and \$5,100 after the 15% deduction.
- [120] I accept Mr. Winter's opinion that Ms. Roth was likely capable of sustaining full time work at Parksville Pharmacy. I find it is reasonable that she would have started part-time to see how she could manage the environment but it would not have taken long to realize it was a supportive place that could accommodate her working full time. According to Mr. Winter, working several days in a row is not what strains Ms. Roth's cognitive difficulties. Rather, it is stressors in the work environment itself. I heard no evidence of significant stressors in the Parksville Pharmacy. Ms. Roth has not met her onus of establishing that she lacked the capacity to work full time in the Parksville Pharmacy environment from October 2022 to the date of trial. That said, I accept Dr. Davidson's opinion that because of her myofascial neck pain, working longer hours puts her at risk of developing headaches or migraines. At present, though, she generally does not experience this at the end of a working day but suggests that if she works a four-day week she can sometimes start to experience

headaches.

- [121] I find that Ms. Roth has largely not proven a past loss of earning capacity for the period of October 2022 to the date of trial while working at Parksville Pharmacy because she was capable of working full time. However, based on Dr. Davidson's opinion, I accept there is a real and substantial possibility that she could redevelop migraines with full time hours. I find there is a real and substantial possibility that she would have to confine herself to a four-day work week. I would assess the relative likelihood of that to be around 20%. I find there is no real and substantial possibility that she would have to confine herself to her current three-day week given that she sustained four days for some two years at Save-on-Foods before running into problems when she had to work longer and given that she sustained four straight days of work and relatively intensive functional capacity testing in 2023.
- [122] Again, no evidence was led from Ms. Roth about her actual hours or rate of pay at Parksville Pharmacy. Her 2023 tax return summary shows \$25,575 in employment income for that year. She testified that she works mostly three days a week but sometimes four. That annual salary suggests daily earnings of \$164 based on a three-day week.
- [123] On this basis, Ms. Roth could earn about \$43,000 per year working full time. Working only four days a week suggests an annual pre-tax loss of approximately \$10,000. Since I find there is a 20% relative likelihood of her having to do this in the supportive environment of Parkville Pharmacy, I assess the annual loss of capacity to be \$2,000. I therefore assess Ms. Roth's pre-tax annual loss for the period between October 2022 to trial (18 months) to be \$3,000 which nets out to just under \$2,550 after the 15% deduction for tax and E.I. premiums. Thus, for the 18 months between October 2022 and trial in April 2024, I assess Ms. Roth's loss of earning capacity to be \$2,550.

Total Past Loss of Earning Capacity

- [124] In summary, I assess Ms. Roth's past loss of earning capacity from the date of accident to the date of trial to valued at \$61,800 (after tax and EI deductions) which I round to \$60,000.

Loss of Future Earning Capacity

- [125] I have found that Ms. Roth is capable of working full-time in a supported work environment like her present employment at Parksville Pharmacy, subject to a 20% probability that she may have to reduce her time to four days a week. I have also found that she would require a supportive work environment like her present employer. If she had to leave that employment, the real and substantial possibility that she would have to work only four days a week would be substantially higher than the 20% probability because she would need to find a employment in a supportive work environment. This makes her less capable overall from earning income from all types of employment opportunities that might reasonably be available to her as a pharmacy technician: *Brown v. Golaiy*, 1985 CanLII 148 (B.C.S.C.).

- [126] Ms. Roth's experience at Save-on-Foods shows that there are realistic alternative occupations that she is capable of performing but, because of the accident, she has a diminished capacity to do so. Should she lose her employment at Parksville Pharmacy or if it cannot offer her full-time hours, she will be limited in her ability to find other work in that she will likely require a supportive work environment as suggested by Mr. Winter. That is a limitation on Ms. Roth's future earning capacity that is compensable.
- [127] Thus, I find Ms. Roth's chronic accident-related conditions give rise to a real and substantial possibility of a future loss. I find there are two elements to this: one is the risk that she will need to confine herself to four days a week while working in her present supportive employment at Parksville Pharmacy and the other is the much greater risk that she will have to confine herself to a four-day work week if she had to leave Parksville Pharmacy.
- [128] To quantify this loss, I will start with the first element. I have already valued the annual loss of capacity for this element at \$2,000 annually (see para. 123 above). As I am now assessing future loss of earning capacity I make no discount for tax and E.I. premiums. Ms. Roth gave no evidence about her retirement plans either before the accident or what they might be now. This is another issue that was simply not addressed in her testimony. In the absence of any evidence on this point, I will assume a conventional retirement age of 65. Applying Mr. Benning's present value multiplier for future earnings (17.553), an annual loss of \$3,000 to age 65 has a present value of \$35,000 (rounded).
- [129] However, leaving the assessment there would undervalue Ms. Roth's loss of future earning capacity because it assesses only the first element of the loss of capacity, namely the relative likelihood of her having to work four days a week in her current supportive employment. The relative likelihood of the loss increases - significantly, in my view - if Ms. Roth had to leave Parksville Pharmacy or if Parksville Pharmacy could not offer her full-time hours. In those circumstances she would likely need to find another similarly supportive employer or take a job in a less supportive pharmacy. If she had to work at a less supportive pharmacy, the evidence satisfies me that there is a high probability that she would have to work reduced hours.
- [130] The evidence does not permit me to assess the relative likelihood of her having to leave Parksville Pharmacy or of finding another supportive employer in that field. Indeed the relative likelihood of at least the latter point would be difficult for any plaintiff to prove. It is clear, though, that Ms. Roth has suffered a loss of earning capacity because, as I have said, she is less capable overall from earning income from all types of employment opportunities that might reasonably be available to her as a pharmacy technician outside the context of her current employment. This second element of her loss must also be valued.
- [131] To do so, I find that the capital asset approach of assessing the loss is appropriate. Justice Grauer explained this approach in Rab:

[30] But in other cases, assessing the possibility of a future income loss is less straightforward. Among these are cases involving plaintiffs whose injuries have led to continuing deficits, or have exposed them to future problems, yet whose income at the time of the trial is at or near the level of earnings they enjoyed before the accident. These tend to be cases that lend themselves to the capital asset approach to quantifying the loss.

[Emphasis added]

[132] In these types of cases where the loss is challenging to quantify, a "rough and ready" approach of awarding one or two years of the plaintiff's salary to compensate for the loss of future earning capacity: *Pallos v. ICBC*, 1995 CanLII 2871 at para. 43 (B.C.C.A.); *Brown* at paras. 5-6. In *Rab* at paras. 66-71 *Grauer J.A.* discussed this approach and said at para. 72:

[72] These are the sort of cases this Court had in mind in *Pallos*, where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future. In such cases, using the plaintiff's immediate pre-accident income as a tool in assessing her lost capacity makes sense

[133] I have inferred from Ms. Roth's 2023 tax return summary that she is making \$27,500 working three or sometimes four days a week at Parksville pharmacy and could be making \$43,000 full time. The mid-point of this is \$35,200.

[134] To arrive at the global assessment for both elements of Ms. Roth's loss of future earning capacity, I would not simply add up the numbers I arrived at for each element (\$35,000 + \$35,200) for two reasons. First, Ms. Roth's track record of sustained full-time employment before the accident is somewhat thin. Second, this is an assessment, and not a calculation, and the assessment must be fair to all parties. I consider \$65,000 to be a fair representation of Ms. Roth's loss of future earning capacity.

[135] In using these two different approaches to quantify the two elements of Ms. Roth's loss of future earning capacity, I have not double-counted that loss. Had I used only the *Pallos* approach to quantify the global loss, I would have awarded something closer to two years of Ms. Roth's salary since, in my view, one year of salary would not adequately compensate for that loss. However, I prefer this two-part approach because it uses a more rigorous evidence-based method with consideration of contingencies to the extent I am able to do so (on the first element) and confines the use of the less rigorous *Pallos* approach to only the second element of the loss.

Mitigation

[136] The defendants submit that Ms. Roth failed to mitigate her damages by not following some recommendations in Dr. Davidson's report, including reading a book about managing pain and pursuing trigger point injections.

[137] The onus is on the defendants to prove Ms. Roth failed mitigate her damages. The defendants must show she refused a course of medical treatments recommended to her by doctors. Specifically, it must be shown that: (1) Ms. Roth acted unreasonably in eschewing the recommended treatments; and (2) the extent, if any, to which the damages would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. As Justice Dickson said in *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 201, the duty "includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her injuries."

[138] I am not persuaded that Ms. Roth refused treatments that were recommended to her by her medical providers. The recommendations the defendants point to were made in Dr. Davidson's 2022 expert report for this case, not by her family doctor or any other treating physician. There is no evidence she was even aware of these recommendations. I find the defendants have failed to prove a failure to mitigate.

Summary and Costs

[139] In summary, I award Ms. Roth the following damages:

Non-Pecuniary Damages

\$95,000

Loss of Housekeeping Capacity

\$0

Past Loss of Earning Capacity

\$60,000

Loss of Future Earning Capacity

\$65,000

Total

\$220,000

[140] Ms. Roth makes no claim for special damages or cost of future care.

[141] If the parties wish to address the Court on costs, they may provide written submissions through Supreme Court Scheduling no later than 30 days after the date of this judgment. Submissions must not exceed five pages (double spaced) exclusive of any relevant offers to settle which may be appended to the submissions. If counsel wish to speak to the issue of costs, they may request the opportunity to do so by submitting a request to appear within five days of providing their written submissions.

"Kirchner J."

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Prepared on 29 October 2026 · Esheria