

CANADA / JUDGMENT

Theobald v. Coffey-Lewis

2021 BCSC 2491

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2491 Theobald v. Coffey-Lewis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Theobald v. Coffey-Lewis,

2021 BCSC 2491

Date: 20211223

Docket: M144224

Registry: Victoria

Between:

Sandra Theobald

Plaintiff

And

Galina Coffey-Lewis and Radomir Vrana

Defendants

- and

Docket: M180980

Registry: Victoria

Between:

Sandra Theobald

Plaintiff

And

Julian Eckford and Victoria Stevens

Defendants

And

Mill Bay Marine Group Ltd.

Third Party

- and -

Docket: S183310

Registry: Victoria

Between:

Sandra Theobald

Plaintiff

And

Mill Bay Marine Group Ltd.

Defendants

And

Galina Coffey-Lewis, Radomir Vrana,

Julian Eckford and Victoria Stevens

Third Parties

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

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Introduction

- [1] Sandra Marshall was injured in two motor vehicle accidents. The first was on December 7, 2012 (the "2012 MVA"), and the second was on March 1, 2016 (the "2016 MVA"). The two MVA actions were heard at the same time pursuant to a consent order. The defendants admit liability in respect of both MVAs.
- [2] Ms. Marshall was also injured in a slip and fall accident at a restaurant on August 1, 2016 (the "2016 Slip and Fall"). The 2016 Slip and Fall was the subject of a third action against the owner of the restaurant, Mill Bay Marine Group Ltd., which was also named as a third party to the two MVA actions. The 2016 Slip and Fall action was resolved by way of a "BC Ferry" Agreement. Ms. Marshall seeks no contribution or indemnity from the third party.

- [3] There is no question that Ms. Marshall suffered injuries in the two MVAs, in particular to her right shoulder, neck and back. Ms. Marshall had a chronic pre-existing knee condition. She also has suffered two subsequent injuries, an avulsion fracture of her right ankle in July 2017, and an injury to her knee July 2020 when she hit her knee into a door.
- [4] Within this factual context, the Court must determine which of Ms. Marshall's injuries were caused by the defendants' negligence, and the extent of her damages arising from those injuries. This will require a detailed consideration of the evidence related to the various injuries and their impact on Ms. Marshall.
- [5] Ms. Marshall was 36 years old at trial. She is the mother of two children, aged 8 and 12. The elder of her two children has significant behavioural issues related to a neural developmental disorder. He currently lives in an assisted living facility. Ms. Marshall separated from her husband, Brian Theobald, who is the father of her two boys, in August 2016, after the two MVAs. Among the issues the Court will have to consider is the impact of the MVAs on Ms. Marshall's relationships with her ex-spouse and children, and on her ability to care for her children, especially the elder.
- [6] In this decision, I refer to the plaintiff as Ms. Marshall, as that is her preference following her divorce.
- [7] Ms. Marshall is a registered nurse. She graduated with her Bachelor of Science in Nursing ("BSN") in April 2015, in between the two MVAs. She has experienced significant difficulty in working in her chosen profession, especially since the 2016 MVA. The Court will have to consider to what extent those difficulties are the result of the injuries suffered in the MVAs, and how her career path might have been different in the absence of the MVAs.

Credibility and Reliability

- [8] Prior to discussing the witness testimony, it is important to bear in mind the law regarding assessing the reliability of testimony. As discussed in *Lensu v. Victoria*, 2019 BCSC 59 at para. 148, relying on *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:
- [148] . . . The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross -examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally ... Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time . . .

- [9] The defendants submit that Ms. Marshall has "over-attributed" to the MVA and "under-attributed" to her non-MVA injuries. While I found Ms. Marshall to be a generally credible and reliable witness, I accept that she had a tendency to minimize the impact of her non-MVA knee injuries. Her view of her future career prospects may also be somewhat unduly pessimistic. I address these and any other concerns I had about the reliability of any witnesses' testimony in the course of my reasons.

Pre-MVA Background

- [10] Ms. Marshall was born in 1985, making her approximately 27 at the time of the 2012 MVA, 31 at the time of the 2016 MVA, and 36 years old at time of trial. She is the mother of two sons: C., who is now 12, and M., now eight years old. C. has a neural developmental disorder, which causes some challenging behaviours. As a result of those behaviours, and Ms. Marshall's present functional limitations, she is currently unable to care for C. at home, and he is living in a specialized care home. She hopes to be able to have him return to live at home.
- [11] Ms. Marshall was married to the boys' father, Mr. Theobald. Mr. Theobald is a civilian employee of the Department of National Defence. They separated in late August 2016. Since that time, Ms. Marshall has been a single parent.
- [12] Ms. Marshall was an active teenager. While in high school, when she was 13 or 14 years old, Ms. Marshall twisted her right knee while playing basketball. She had her first knee surgery in 2005, when an orthopaedic surgeon, Dr. Bruce Yoneda, performed an arthroscopic debridement and lateral retinacular release on her right knee. Dr. Yoneda diagnosed her at that time with Grade II chondromalacia patella and medial and lateral plica affecting the right knee. Ms. Marshall's evidence was that while she had knee problems in high school, they did not hold her back.
- [13] Ms. Marshall currently lives with M. in a three-bedroom home on a large lot which she rents from her father in Esquimalt. She has always lived in the Greater Victoria area. She moved out of her parents' home when she was 16 years old as a result of difficulties at that time between her and her mother. Ms. Marshall lived on her own after that, supporting herself by working as a chambermaid while finishing high school. She graduated with honours in 2003. Ms. Marshall and her mother have since reconciled.
- [14] Ms. Marshall started a criminology program at Camosun College ("Camosun") in 2003, but left after a semester to support her older sister who was having health issues. By that time, Ms. Marshall was living with her future husband. They bought a condo in 2006, which they renovated together. Ms. Marshall took an active role in the physical work required for the renovations. Although she was having some problems with instability in her knee at the time, Ms. Marshall did not struggle with the renovations or walking to work. At this time, she was working at Health Insurance BC.

- [15] In 2006, Ms. Marshall applied for the unit clerk program at Camosun, and completed a medical terminology course, which was a prerequisite for the program. She started the unit clerk program in September 2007. It was part-time, with classes two evenings a week and all-day Saturday. She completed the unit clerk program in May 2008. She worked throughout most of the program, initially with Health Insurance BC, which she left just after she started school, and then with Vancouver Island Health Authority ("VIHA", now known as "Island Health") starting in December 2007.
- [16] The unit clerk position was fairly sedentary. There was little direct patient care, although the unit clerk is the main communicator with families telephoning the unit. Ms. Marshall characterized it as a clerical position focussed on dealing with patient charts.
- [17] Ms. Marshall got married in 2007, and in April 2008, Ms. Marshall and her husband bought a house and moved to Sidney. They lived in the house while they did some renovations on it. Once again, Ms. Marshall was involved in the physical work of moving and renovating, although, as she was pregnant at the time, she did lighter tasks. They rented out their condo.
- [18] Shortly after graduation, in May 2008, Ms. Marshall obtained a regular part-time position as a unit clerk with VIHA. She and her husband travelled to Calgary for a wedding that summer. Ms. Marshall was pregnant at the time, and she testified she was fine on that trip other than a little heat stroke. Her maternity leave began in August, and C. was born in October 2008. Ms. Marshall stayed on maternity leave for only about four months after C's birth, returning to work in or about February 2009. She had a permanent part-time position, and was picking up additional shifts in other areas, working more than 100 hours per month between March and August 2009. Ms. Marshall and her husband were still paying for the renovations to the condo, and the family needed the money.
- [19] Ms. Marshall worked fewer hours between September and December 2009. By this time, she had applied to nursing school, and it was recommended to her that she take a biology course before starting the program, which she started to do that fall. She did not complete the biology course, as she decided to defer the start of her nursing program. By July 2010, she had a regular, full-time unit clerk position with a desirable Monday to Friday eight-hour dayshift.
- [20] After high school, Ms. Marshall continued to have some problems with her knees. In April 15, 2011, Ms. Marshall underwent bilateral knee surgery, consisting of arthroscopic debridement. The surgery was performed by Dr. Yoneda. At that time, Dr. Yoneda noted Grade II chondromalacia patella in the right knee, and Grade I chondromalacia patella in the left knee. Ms. Marshall testified that she recovered within four to six weeks, and went to physiotherapy a few times a week. Ms. Marshall saw Dr. Yoneda for follow-up visits related to that surgery in July and August 2011. That summer, the family took a driving vacation to Winnipeg for a wedding, and Ms. Marshall testified that she was fine on that trip. According to Dr. Bas Masri's report, which I discuss in greater detail below, Ms. Marshall told him that there was no significant improvement in the pain in the right knee, but the left knee

eventually resolved following this surgery.

- [21] Ms. Marshall testified that nursing was always her goal, and she was passionate about it. She worked as a unit clerk as a stepping stone to that goal. She wanted to work directly with patients and to help them through the recovery process. She started the nursing program in September 2011. It was a combined program through Camosun and the University of Victoria ("UVic"), with students attending Camosun for roughly the first two years, and UVic for the final two years. There were three semesters a year, two of which were primarily in-class with clinical placements one or two days a week, and a third semester consisting of a practicum each May-June.
- [22] In January 2012, Ms. Marshall slipped and fell on ice while walking to school. She testified that she landed on her "butt". She saw a doctor three or four days later because she was pregnant and wanted to make sure the medications she was taking were appropriate. She was experiencing some radiating back pain. She testified that the pain lasted only a few days, and that she went skiing with her sister six weeks later without any difficulty associated with the slip and fall. She said she did have some minor instability in her knee, and fell, but was able to get up and continue skiing for the rest of the day.
- [23] In her practicums and clinical placements, Ms. Marshall was required to do the physical tasks required both of care aides and nurses, including patient personal care, morning care, and transferring and mobilizing patients. She testified she had no difficulties with these tasks in May-June 2012, even though she was pregnant. She was not experiencing any difficulties with her knees.
- [24] Ms. Marshall gave up her permanent unit clerk position in order to go to nursing school. However, she continued to work hours as a unit clerk on a casual basis. She averaged 59 hours a month between September 2011 and July 2012, when she went on her second maternity leave from her unit clerk work.
- [25] In August 2012, while pregnant with M., Ms. Marshall went camping on two occasions alone with C. She was able to set up camp, move a cooler and do all the other tasks associated with tent camping while looking after her nearly four-year-old son.
- [26] In September 2012, Ms. Marshall returned to nursing school for her second year. M. was born in October 2012, in the middle of midterms. Ms. Marshall testified that some of her instructors were not supportive of her continuing to attend school while having a baby. Ms. Marshall nonetheless managed to successfully complete her midterms. She took M. to school to school with her, and would breastfeed him between classes. Mr. Theobald would look after him while she was in classes she could not bring M. to.

2012 MVA

- [27] On December 7, 2012, Ms. Marshall was involved in the first MVA. She was stopped at a red light when her car was struck from behind by car driven by the defendant Mr. Radomir Vrana. She was driving a 2002 Nissan Sentra, and Mr. Vrana was driving a four-door sedan. Ms. Marshall testified that she saw the car in her rear-view mirror before the impact, and was holding on to the steering wheel "for dear life". Photographs of Ms. Marshall's car show some damage to the left rear bumper. Her car was a "write-off".
- [28] Ms. Marshall testified that, immediately after the collision, she was really shaken up. She did not initially realize what had happened to her body. The accident happened on her last day of classes in the semester, and she was focussed on getting to her clinical placement, as she was worried that she would fail if she did not get to it. A few hours later she went to see the doctor because she was really sore in her neck and back, and shortly after that in her right knee as well. She had hit her right knee against the dashboard, which made it more painful than it had been prior to the collision.

Period between two MVAs

- [29] In the months that followed the first MVA, Ms. Marshall testified that the pain increased in her neck, back and right knee, with pain radiating into her shoulder and down her left arm. She said that it was really challenging as this was a busy time in her family's life. She had difficulties holding M., and could no longer breastfeed him or pump breast milk as she could not hold him or the breast pump. She had not planned to wean M. this early, and believes that doing so made it harder to be connected with him. She had difficulties picking him up and putting him down in his crib.
- [30] In the aftermath of the first MVA, Ms. Marshall also had challenges caring for C., who was experiencing increasing behavioural challenges. She could not pick up C., who weighed over 40 pounds, and who was needing a lot more attention from her. She found it difficult to bend down and tuck him in. He preferred Ms. Marshall to bathe him, which she could not do, rather than having his father do it. She found it difficult to deal with the laundry caused by C. having toileting accidents. She could not properly engage in non-violent crisis intervention such as restraining him and removing him from dangerous situations. She could only pick him up in emergent situations. On one occasion, in 2014, C. ran into the street in downtown Sidney. At the time, Ms. Marshall was in Sidney to see her doctor to get disability forms filled out. Ms. Marshall had to carry C. to the side of the road, which caused severe pain in her neck, back, and left arm and shoulder. She talked to her doctor about it.
- [31] Ms. Marshall experienced pain while studying, reading and while attending her clinical placement in January 2013. It was more difficult for her to read, concentrate and take notes in class. She had difficulties with some physical tasks in her clinical placements related to patient care, reaching and bending.

- [32] Ms. Marshall testified that the injuries she suffered in the 2012 MVA affected her relationship with Mr. Theobald. She was not able to complete all of the housework she did before the 2012 MVA, and her husband had to do it by himself. According to her, Mr. Theobald had difficulties empathizing with the pain she was experiencing, was frustrated and impatient dealing with the children, and was frustrated she was not doing household chores or contributing financially. She had planned to return to work early from her second maternity leave, as she had with her first, but was unable to do so because she was still experiencing pain in her neck, back and shoulder.
- [33] After her maternity leave ended in August 2013, Ms. Marshall started to pick up some four-hour unit clerk shifts. She worked about 16 hours a month until the spring of 2014. Although she was struggling, she went back to work because the family needed the money, including to pay for behavioural therapy for C. which was not funded by the government. She did not work as much as she would have liked, and when and how much she worked was dependent on the pain she was experiencing.
- [34] Ms. Marshall testified that the symptoms from her injuries improved between April 2014 and April 2015. She attended 100 appointments with her general practitioner, physiotherapist, kinesiologist, chiropractor, massage therapist and counsellor between the first and the second MVA. While she may have seen her general practitioner for other reasons, all of the allied health practitioner appointments were related to the 2012 MVA. She found the therapies helpful.
- [35] Ms. Marshall had a clinical pediatrics placement in January 2015 in which she did not have many issues, experiencing only manageable and slight pain in her neck and back. By this time, Ms. Marshall was starting to get to the point that she believed she would be able to successfully complete nursing school and practice as a nurse. The future was looking up.
- [36] Ms. Marshall graduated with her BSN in April 2015. She testified that she chose to work as a casual employee rather than take a permanent position after graduation. Between May 2015 and February 2016 she worked an average of 128 hours a month as a nurse. This includes a period in when she went away for a family trip in the summer of 2015, after which she took a temporary part-time position. Her temporary part-time position was in transitional care, which Ms. Marshall testified involved lighter duties. For the five months between September 2015 and February 2016 she picked up additional shifts in general medicine and day surgery to work essentially full-time hours. General medicine and day surgery were not light duty roles, and included patient assessments, morning care, wound care, administering medications, and pre and post-operative care. None of the roles she was working in had modified duties. Ms. Marshall testified she had some pain, but was able to complete full duties.

- [37] The incumbent in the transitional care position Ms. Marshall had obtained on a temporary basis was on long-term disability and due to retire. Ms. Marshall hoped to be able to obtain that same position on a permanent basis once it was posted. She enjoyed surgical day care the most of the areas she was working in at the time, including working with patients, and helping them in their recovery.
- [38] By this point, pre-second MVA, Ms. Marshall testified that she had gotten back to a new baseline or a new normal. She still had some pain, but was able to complete her duties. It was not what she had expected before going to nursing school, but she could see it working for her and her family.
- [39] Ms. Marshall testified that she experienced anxiety while driving after the 2012 MVA, for which she saw a psychologist, Dr. Caines, who provided cognitive behavioural therapy. She saw Dr. Caines on three occasions in early 2016 before the 2016 MVA. She denied any depression in the period following the 2012 MVA.

2016 MVA

- [40] The second MVA occurred on March 1, 2016. Ms. Marshall was driving her car, leaving a parking lot. She was stopped, and the car in front of her, which was driven by the defendant Mr. Julian Eckford, backed up to let a pedestrian go by, and in doing so backed into her vehicle. The car in front of her was a larger SUV, and Ms. Marshall was in a smaller car. As she realized the car was not stopping, Ms. Marshall had her left hand on the steering wheel, and was using her right hand to honk the horn. She prepared for impact. The impact and the damage to Ms. Marshall's car were both minor.
- [41] Ms. Marshall testified that when the 2016 MVA was happening, she felt anxious as she realized the car in front of her was not going to stop and was going to back up into her.

After the 2016 MVA

- [42] Ms. Marshall saw Dr. Caines on one more occasion shortly after the 2016 MVA. In cross-examination, Ms. Marshall testified that the sessions with Dr. Caines mildly helped her with driving-related anxiety prior to the 2016 MVA. She did not recall that she had had a "nice decrease in peak anxiety level over course of exposures" as indicated in Dr. Caines' notes from their last session. Ms. Marshall did feel that the sessions had been mildly helpful prior to the 2016 MVA. Ms. Marshall testified that the sessions with Dr. Caines cost \$175.00, and she could not afford to continue counselling with her. Since then, Ms. Marshall has had counselling, at no cost to her, through two agencies. She testified this counselling related generally to dealing with chronic pain and her inability to care for C.
- [43] Ms. Marshall testified that initially after the 2016 MVA, she was shaken up, and had a flare up of pain in her neck, back and left shoulder. In the hours and days thereafter, she was really sore, treated the affected areas with heat and ice, and called in sick to work on the day after the accident, March 2, 2016.

- [44] The pain did not resolve in the next few days. Ms. Marshall attempted to return to work on March 12, 2016, when she did light duties, with the assistance of some care aides to perform heavier tasks. She worked a 12-hour shift, but by the end of the shift, Ms. Marshall described herself as hardly able to walk out of the hospital, and she had to call her husband to come and pick her up. She tried to work again on March 29, 2016, which aggravated her symptoms, and then remained off work in consultation with her physician and Island Health.
- [45] Also at this time, Ms. Marshall was studying for a nursing exam she was required to take one year after graduation. Her husband drove her to Vancouver to take the exam.
- [46] Ms. Marshall attempted a graduated return to work in May 2016. Her duties were modified, and she was a supernumerary nurse with a lighter load of patients. She started with four-hour shifts and attempted to move up to 12-hours shifts, for a total of 23 hours in May. The graduated return to work was unsuccessful. She did not work for Island Health again until October 31, 2017. Unfortunately, the full-time permanent position in transitional care that Ms. Marshall was hoping to obtain was posted while she was off work, with the result that she did not obtain that position.
- [47] Ms. Marshall testified that the pain was very difficult to manage. While there was some initial improvement with the various therapies and rehabilitation program she was engaging in the summer of 2016, it ended up getting worse, with increasing pain and weakness in her left shoulder. Ms. Marshall testified that the pain was more intense than after the 2012 MVA: she had headaches more frequently, more pain in her shoulder, and she was affected a lot more, both physically and emotionally.
- [48] Her pain affected her home life. C. was having increasing issues and needed more care, and Ms. Marshall was unable to do housework and could hardly drive. Her husband was having to do most of the work at home, which caused him to become frustrated and resentful.
- [49] In cross-examination, Ms. Marshall denied that she had been able to walk one-and-a-half to two hours around a lake just prior to the August 2016 Slip and Fall, which I will describe next. She testified that the note to that effect in Dr. Masri's report, which I summarize elsewhere, was inaccurate, and that she was able to walk that far before the 2012 MVA, not just before the August 2016 Slip and Fall. She testified that she was able to walk for an hour on flat ground in 2015.

August 2016 Slip and Fall

- [50] On August 1, 2016, Ms. Marshall slipped and fell in a restaurant (the "August 2016 Slip and Fall"). She was carrying M. with her left arm, and slipped in a puddle and fell down on her right knee. It was this incident that led to the third parties being named in these actions. Ms. Marshall went to emergency that day, and saw her family physician, Dr. Draga Jovic, the next day.

- [51] Ms. Marshall adopted Dr. Jovic's description in her August 7, 2017 report of this injury and its consequences as accurate. According to Dr. Jovic, the plan had been for Ms. Marshall to complete a seven-week rehabilitation program over the summer, and return to work on September 3, 2016. The August 2016 Slip and Fall complicated this plan, with her right knee pain putting her rehabilitation and planned return to work on hold. Dr. Jovic wrote that Ms. Marshall became more unconditioned, with the result that her MVA-related injuries of neck, back and left shoulder pain worsened. Ms. Marshall was referred to Dr. Yoneda for assessment of her right knee, whom she saw on four occasions between August 26, 2016 and April 18, 2017. She as referred to Dr. Filbey for her neck, back and shoulder pain. As of the date of Dr. Jovic's August 7, 2017 report, Ms. Marshall had been in a very stressful period, was now waiting to complete her rehabilitation program, assessment by Dr. Filbey, and accommodation in order to be able to return to work. Her right knee had healed, and was not barring her return to work at this point.
- [52] In apparent contradiction to Dr. Jovic's report, Ms. Marshall testified that her right knee injury did not impede her rehabilitation. I do not accept Ms. Marshall's evidence on this point. Clearly, the August 1, 2016 knee injury did delay her rehabilitation program.
- [53] In cross-examination, Ms. Marshall testified that the August 2016 Slip and Fall made the pain in her right knee worse, because by then she had not been having much pain in her knee, which she said had been a lot better. She testified that in the year prior to the August 2016 Slip and Fall, her right knee did not impair her work function or mobility, although she did occasionally have some pain. I accept that description.
- [54] Ms. Marshall and Mr. Theobald's relationship continued to worsen, and they separated in August 2016. He moved out of the family home on August 26, 2016.
- [55] Ms. Marshall attended emergency after the August 2016 Slip and Fall, and was referred to an orthopaedic surgeon who recommended she use crutches. Ms. Marshall testified she stayed on them till the end of August 2016. They were difficult to use with her shoulder pain.
- [56] Ms. Marshall testified about which of the various physician and allied health professional appointments she attended after the August 2016 Slip and Fall were related to that incident, and which were related to her MVA-related injuries. The difficulty the Court faces in assessing this evidence is that complete clinical records were not introduced, so there is no independent evidence about what the various appointments related to. Overall, my impression was that Ms. Marshall minimized the number of appointments that were related to her knee as opposed to her other injuries.
- [57] Ms. Marshall was able to travel to Alberta with her family in August 2016, although she said she only went on the trip because she was not sufficiently mobile to stay home on her own. She also attended her father's wedding on September 3, 2016.

- [58] Ms. Marshall testified that she began her rehabilitation program in October 2016. She said that by this time she had been off crutches for six weeks. She was doing core strengthening, weights and cardio. The program was for her neck, back and shoulder, and she testified her knee did not limit her.
- [59] Ms. Marshall testified that her pain continued to worsen after the 2016 MVA, and that the pain in her left shoulder, including pain radiating down her left arm and weakness in the arm, deteriorated until she underwent shoulder surgery in April 2019. She was still experiencing neck and shoulder pain when she attempted her second graduated return to work starting on October 31, 2017. She did experience some short-term relief from IMS treatments from a physiotherapist.

July 2017 Avulsion Fracture

- [60] In July 2017, while she was in her rehabilitation program, Ms. Marshall suffered an avulsion fracture of her right ankle. She had some ongoing weakness in her leg at the time, which she was seeing a physiotherapist for. She was walking down a set of two steps to take her son to day care, and twisted her ankle, which caused the fracture. She wore an air cast for about six weeks. For two weeks she used a knee walker as she could not bear weight on her right foot, and then progressed to walking using the air cast. Towards the end of that period she could remove the air cast when necessary, for example when driving. As a result of this fracture and recovery period, Ms. Marshall's graduated return to work, which was supposed to have begun in September 2017, was delayed until October 31, 2017. While wearing the air cast, she could not have worked as a nurse. She did not believe that the injury to her ankle impeded her mobility after the cast came off. Nor did she believe that her knee was limiting her ability to work at this time.

Attempted Return to Work in 2017

- [61] The October 2017 graduated return to work was unsuccessful. Ms. Marshall testified that she had increased pain in her neck, back and shoulder, and difficulties performing even modified tasks. She testified that in communications with her union and Nancy Leadingham, a disability manager with Island Health, she was told that she had to be able to do full duties, which she was unable to do. She was unable to do tasks such as hooking up IVs, changing IV bags and wound care on her own.
- [62] The graduated return to work program ended after four weeks at the end of November 2017. She worked 34 hours in November. She picked up two night shifts in December 2017, for a total of 22 hours. She had chosen night shifts because they are typically lighter, but even those proved too challenging for Ms. Marshall. Ms. Marshall stopped working at that time.
- [63] On December 8, 2017, Ms. Marshall emailed Ms. Leadingham. In her email, she wrote that Ms. Leadingham had told her that if she needed modified duties, she could not complete her return to work. Ms. Marshall reported that she could still use her left shoulder, but she had

some pain and limited movement. She said it bothered her more during some transfers and patient care. She asked about the employer's duty to accommodate. Ms. Leadingham replied, referring Ms. Marshall to Brian Connon, "as the file is now with him as the RTW has ended".

- [64] Ms. Marshall followed up with Mr. Connon on February 22, 2018, as she had not heard from him. She reported that she had now had an MRI on her shoulder and Dr. Filbey had ordered a further MRI with contrast which would take some time. She stated she had not picked up any shifts since December due to increasing shoulder pain, and pain in her neck and back. Ms. Marshall wrote "I just cannot work 12 hours at this point." She asked Mr. Connon to update her on the status of everything, and referred to the need to renew her nursing licence. Mr. Connon replied that day, stating that he was not sure why he would have contacted Ms. Marshall, as "[y]our GRTW was deemed successful and according to Nancy you were ready to go full duties at it's completion". He stated that all he could do was advise Ms. Marshall to continue with her treatments. He asked if she was saying she could do eight-hour shifts on her home unit if they were available.
- [65] There is no explanation as to why Mr. Connon would have been told that the graduated return to work was successful or that Ms. Marshall was ready to return to full duties. That was clearly not the case.
- [66] Ms. Marshall emailed Mr. Connon again on May 17, 2018. She told Mr. Connon that Ms. Leadingham knew she was not able to do full duties. She explained that she had now been referred to Dr. Saliken and was awaiting surgery on her shoulder. She told Mr. Connon that she was able to work shorter shifts, but needed modified duties, which Ms. Leadingham had told her was not possible. She said that her occupational therapist had suggested eight-hour shifts in long term care, but she did not know how to do that, given she might still require modified duties. She referred to taking medications for chronic pain, and her concern that night shifts would interfere with them. She asked who she should be talking to at VIHA, and stated that she was at a loss about what to do. She said she would have contacted him sooner, but referred to various follow-up appointments with Dr. Filbey and Dr. Saliken, and Dr. Jovic's upcoming retirement.
- [67] Mr. Connon replied to Ms. Marshall that same day. He stated that, in general, modified duties are not available to casual RNs unless the manager of her home unit had a funded, special project needing attention. As Ms. Marshall's home unit was not in residential care, it was unlikely she could work there as a casual if she was unable to perform full duties. He had no suggestion other than for her to wait to see her surgeon. Mr. Connon asked Ms. Marshall to keep him updated.

April 2019 Shoulder Surgery and Difficulties with Care of Children

- [68] Ms. Marshall was not able to have surgery with Dr. Saliken until April 1, 2019. In the meantime, she continued to undergo various treatments. She testified her neck, back and shoulder continued to deteriorate while she was awaiting surgery. She had increasing physical limitations, and needed more assistance at home. She was unable to do all of the housekeeping. She was using a TENS machine which provided some pain relief.
- [69] In this period, Ms. Marshall found it increasingly difficult to care for her children, especially C., as she was physically unable to restrain him or enforce discipline. He was having increasing challenges with incontinence, which Ms. Marshall found difficult to manage. She said that at times she would just throw out his laundry because she could not deal with it. She could not engage with the children in physical ways like playing baseball or soccer or pushing them on a swing or merry-go-round.
- [70] Ms. Marshall testified that she had been diagnosed with depression in 2017, and found that she lacked patience with the children due to pain, and felt detached at times. Earlier, in January 2017, C. had started attending a program at Queen Alexandra for children with neural development issues. M.'s behaviours were also becoming more challenging. Ms. Marshall started a child-parent relationship therapy program in the spring of 2018 to assist her in managing M.'s behaviours. C. was not qualified to attend that program due to his development delays.
- [71] After an incident in a grocery store where M. had a temper tantrum, the Ministry of Children and Family Development ("MCFD") received a third party report of inappropriate physical discipline by Ms. Marshall. It was not clear on the evidence precisely when this occurred. Both children were removed from Ms. Marshall's care while the report was investigated. She testified that MCFD found there were no concerns, and both children were returned to her care in May 2019, following her shoulder surgery.
- [72] Ms. Marshall testified that she ended up being unable to care for C. at home alone. She received funding for respite care from MCFD for C. Ms. Marshall testified that C. was "kicked out" of a respite home in July 2019 due to his behaviour.
- [73] In the aftermath of the children being removed from her care, M.'s attachment to his mother increased, and he would not leave to go to school or elsewhere. Reportedly, M. was diagnosed with an adjustment disorder resulting from C.'s behaviour and the incident with MCFD. As for C., Ms. Marshall testified that she made the very hard decision for him to remain in care as she could not care for him properly at home. She said he returned about six weeks after her April 1, 2019 surgery, and her older sister came and lived in her home for a period to help her care for him. But by sometime later in 2019 she entered into a voluntary care agreement for C. to live in a group home. This followed what she described as having to call the police on a daily basis due to his aggressive behaviour and her inability to restrain him. She had C. at home at Christmas, which demonstrated to her how challenging it is to have C. at home, and that she is not physically able to do so at present. She is unsure to what

extent C.'s behaviours might have become more challenging absent the accidents, saying that it is hard to tell, and that with pain her patience and tolerance certainly went down.

- [74] In the immediate aftermath of the April 1, 2019 surgery, Ms. Marshall had to use a complicated sling for her shoulder. She had to sleep upright with a pillow system recommended by her occupational therapist so she did not disturb her shoulder while sleeping. Initially, while she could not look after herself, Ms. Marshall stayed with her friends, Melanie and David Hon, for about a week, while M. stayed with her mother. She left the Hons and returned home when she did because M. wanted to be home with her.
- [75] Dr. Saliken had told Ms. Marshall that recovery from the surgery could take a full year. Ms. Marshall felt that she had recovered as much as she was going to after about nine months, when she felt she plateaued. At that point, she still had some pain inside the shoulder joint. She could not reach above her shoulder or lift a heavier grocery bag with her left arm. Putting her hair up or carrying laundry downstairs remained difficult. She did experience some benefits from surgery, as she no longer had numbness, tingling or pain radiating down her left arm. She could do a bit more, such as driving. The surgery did improve her quality of life, although some aspects of her shoulder issues remained.
- [76] On Dr. Saliken's advice, Ms. Marshall did not immediately start physiotherapy after surgery due to the release of the biceps tendon, but she did do stretches. She started physiotherapy about four weeks later. She testified that she did not have as much physiotherapy as she would have liked at this point due to a dispute with ICBC. She was on social assistance, and could not afford to continue the sessions. She eventually resumed treatment when ICBC agreed to pay.
- [77] Ms. Marshall was assessed by Dr. Saliken post-operatively in November 2019. In his report, which I summarize elsewhere, Dr. Saliken wrote that Ms. Marshall was at that time "still dealing with some mild to moderate amounts of pain to her left shoulder, particularly with overhead exercises." In cross-examination, Ms. Marshall denied describing her pain to Dr. Saliken in those terms. She testified that Dr. Saliken's perception of her pain was different than her perception of her pain.
- [78] Notes from Ms. Marshall's physiotherapist between March 16 and November 6, 2020, were introduced into evidence. On March 16, 2020, the physiotherapist recorded that Ms. Marshall reported "her standard level of pain in her right knee and left shoulder". On June 26, 2020, Ms. Marshall reported she had been able to ride a bicycle, slowly and with breaks, for two hours. She was very sore in her shoulder.

July 2020 Knee Injury

- [79] In July 2020, Ms. Marshall testified that she dislocated her right knee when she hit her knee on a door in a park bathroom. She said this was minor injury, that the knee reduced on its own, and she was able to get up and walk back to the car with the aid of a friend. She went to emergency where the doctor advised partial weightbearing as tolerated. She used a crutch

for a month-and-a-half or so. After that, she had some difficulties going up and down stairs. She was not getting benefit from physiotherapy. She felt that by October, she was close to the baseline prior to the dislocation.

- [80] Returning to the physiotherapist's notes, on August 7, 2020, Ms. Marshall was walking with a brace on her right knee as a result of the door incident. She was limited in walking and driving as a result. Range of motion of her left shoulder was full, but painful above 90 degrees. On August 21, 2020, her arm abduction was reportedly smoother. On September 4, 2020, Ms. Marshall's knee was reportedly getting better and her shoulder was really sore. On September 14, 2020, her knee was reported not to have any new damage, but was still quite sore. So were Ms. Marshall's shoulder and neck. Her posture was described as quite hunched and guarded.
- [81] On September 18, 2020, Ms. Marshall was reported to be slowly getting better by the physiotherapist, but her shoulder and knee pain remained significant. This particular note was put to Ms. Marshall in cross-examination, who said she could not recall that day, and could not interpret the note, but pointed out the note indicated she was still able to do ten minutes on the bike. I found Ms. Marshall's evidence in respect of this note rather unpersuasive, as she appeared to be attempting to minimize the knee pain she was experiencing at this time.
- [82] On September 21, 2020, Ms. Marshall's knee was reported by the physiotherapist to be sore, and her shoulder remained "crunchy" during pendulums. On October 7, 2020, Ms. Marshall's neck was feeling better, but her shoulder had not changed. On October 14, 2020, Ms. Marshall was reported to be far less sore than the previous week, with her neck moving better again. The note indicates that she had "officially lost 50lbs as of today", and had secured a contact tracing position. This note was also put to Ms. Marshall in cross-examination. She testified that she gained a significant amount of weight after the accidents, and had lost more than that by the time of trial. She said she only wore the knee brace for a few weeks as it stopped fitting due to weight loss.
- [83] There are two physiotherapist notes dated November 6, 2020. In the first, Ms. Marshall was noted to have reported that her neck had flared up in the past four days, and was slowly improving. In the second, Ms. Marshall's neck and shoulder were reported to be both quite sore, as well as pain in her lower back. Her knee was reported to be painful. She hoped to get a synovial fluid injection in her knee that day.
- [84] Ms. Marshall testified that she saw Dr. Nelson, an orthopaedic surgeon, in November 2020 for her knee. He gave her a synovial fluid injection in her right knee on November 6, 2020, to which she had a very bad reaction. She had to have two cortisone shots, which relieved the pain, and her knee drained three times, as a result. She testified that by December 2020 she was able to start moving around more, although she was still using crutches when seen again by Dr. Nelson on December 1, 2020. She testified she was off crutches entirely by Christmas. By March 2021, she testified that her knee was back to baseline, with some pain

with stairs. Her knee did not stop her performing her work as a contact tracer, which began on November 17, 2020. She testified that she does not have any current limitations relating to this knee injury. In terms of stairs, her back hurts going up or down. She has difficulties with kneeling or squatting, as she has had over the years. She did not believe her knee would prevent her from performing normal nursing tasks today.

- [85] Ms. Marshall was recalled to the stand to be asked about an Emergency Report from Victoria General Hospital, dated November 25, 2020, which was disclosed by the third parties in the middle of the trial. Ms. Marshall attended the emergency department for the third time in about a week for right knee pain. Her knee was swollen and tender, with impaired range of motion. This was after the November 6, 2020 injection, to which she had an adverse reaction starting November 14, 2020. She had had the knee drained for the first time on November 18, 2020 and again on November 24, 2020. She had been given a number of pain-killers, including dilaudid and hydromorphone, reportedly without benefit.
- [86] The Emergency Report stated that "[s]he presents today with ongoing pain, stating that she is not able to manage her duties at work and looking after her 8-year-old child that she is a single parent". Ms. Marshall was examined about this note, and was adamant that she had explained to the emergency room physician that she was unable to manage her duties at work due to her neck, back and shoulder pain, and not due to the pain in her right knee.
- [87] I am unable to accept Ms. Marshall's testimony on this point. There is no reference in the two-page document to her neck, back or shoulder. She was attending at emergency in significant distress due to her knee. She was described in the report as "crying and uncomfortable, and difficult to console". Given those difficult circumstances, I doubt that Ms. Marshall had the very specific recall she claimed on the witness stand about what she told the emergency room physician. I find it more probable that Ms. Marshall told the emergency room physician that she was unable to manage her usual work duties at that time due to her knee, given that this was the presenting problem.
- [88] Ms. Marshall was assessed by Dr. Masri on January 14, 2021. At the time her right knee showed marked tenderness in the patellofemoral joint with diffuse swelling through the knee. This was noted to be due to the synovial fluid injection.
- [89] I find that Ms. Marshall consistently tended to minimize her knee pain and associated limitations in her testimony before me. The physiotherapy reports summarized above demonstrate that she was having knee pain between March and November 2020. It was aggravated by the dislocation in July 2020, and aggravated again by the adverse reaction to the synovial fluid injection in November 2020, but was present throughout. Ms. Marshall submitted that the knee symptoms and limitations described by Ms. Wilson in her February 2021 functional capacity evaluation report should be disregarded, as they were the sole result of the adverse reaction to the synovial fluid injection, from which she fully recovered by March 2021. Ms. Wilson's report does not contain any indication that Ms. Marshall's knee pain and related limitations during that assessment were solely due to the lingering effects

of the synovial fluid injection. I do not accept that they were. I find that Ms. Marshall had then and continues to have recurrent difficulties with her right knee, as she has had, to lesser or greater degree, since high school.

Return to work in 2020

- [90] Ms. Marshall testified that her initial plan following her shoulder surgery was to return to work with accommodations as recommended by her doctor. At an unspecified date, which may have been in the spring of 2020, she said she had a meeting with Valerie Chambers, the manager of her floor, and a union representative.
- [91] Ms. Chambers is a medical duty to accommodate specialist with Island Health. She has been in that position since September 2020, having worked her way up within Island Health over 29 years. Ms. Marshall was on her caseload as a duty to accommodate candidate when she started in the position in September 2020. Ms. Chambers was called as a witness by the defendants. She gave her evidence in an objective and even-handed fashion and I rely on it without hesitation.
- [92] In general terms, Ms. Chambers engages in job searches for duty to accommodate candidates, consults with the client (in this case Ms. Marshall), collaborates with the union, and has conversations with the managers who make hiring decisions, all with a view to attempting to obtain an appropriate position for the candidate.
- [93] Returning to the meeting, Ms. Marshall said she was told that the manager could not give her any positions because her floor could not accommodate her physical limitations. It did not appear that Island Health could accommodate her in any nursing positions that met her limitations at that time, although a unit clerk position was suggested as a possibility. The particular nursing function mentioned was her inability to do CPR if required. Ms. Chambers was not asked about this particular meeting.
- [94] Ms. Marshall testified that in order to maintain registration as an RN, it is necessary to be certified annually in CPR. She was last certified in September or October 2020. She said that certification was very difficult and painful, even though they use plastic dummies which are much easier to perform CPR on than human beings, and she was allowed to work on a table rather than the floor. Due to her concerns about being able to perform CPR, Ms. Marshall testified that she told a "DTA person" that she would not feel comfortable working with patients unless they were "DNR"; in other words, she does not feel competent to perform CPR in a life or death situation.
- [95] As mentioned above, Ms. Marshall began working as a contact tracer on November 17, 2020. Ms. Chambers was instrumental in assisting Ms. Marshall to obtain this position. Obtaining this position meant that Ms. Marshall was able to meet the College of Nurses licensing requirement that a nurse work 1125 hours in a five-year period. A nurse who fails to work that number of hours may lose their licence.

- [96] It is a full-time project position in which Ms. Marshall works from home. It is a sedentary desk job, and as she is working from home, she has the flexibility to take breaks as necessary. She works 11-hour shifts in blocks of days which may vary. Ms. Marshall testified that she has found it beneficial to be able to work from home, but she gets very sore, especially if she works for three or more days straight. She believes her shoulder slows down her typing speed. She attends physiotherapy outside of work hours for IMS, which she finds beneficial, as well as using a TENS machine and heat. Despite this, Ms. Marshall finds that by the end of the day she is too sore to do anything else. Fortunately, M. is very helpful around the house.
- [97] According to Ms. Marshall, in comparison to being a unit clerk, the contact tracer position has lighter duties and is more relaxed. There is no comparison to the much heavier duties associated with a typical nursing position.

Future Career Prospects

- [98] At time of trial, Ms. Chambers was actively involved in seeking an ongoing casual position in which Ms. Marshall could be accommodated. The position sought would be casual because Ms. Marshall was a casual employee when she went off work due to disability.
- [99] Emails between Ms. Chambers and Ms. Marshall between March 23 and July 2, 2021, show that Ms. Chambers' efforts to find Ms. Marshall a suitable position continued to the time of trial. In recent emails they have discussed the possibility of Ms. Marshall being redeployed in a COVID testing or immunization role, although Ms. Marshall has expressed concerns about those roles on the basis of her experience being deployed in a vaccination centre on a temporary basis. She testified she had experienced difficulties with prolonged standing or sitting, and a lack of willingness on the part of staff and clinical leaders to accommodate her limitations by permitting breaks or mini-breaks to stretch. I agree with the defendants that some of the concerns she expressed about this role seemed somewhat exaggerated. They have also discussed positions in Home Health Monitoring or Access and Transitions which do not require hands-on patient care, but none have come open as of yet.
- [100] The projected contract end date for Ms. Marshall's work as a contact tracer has changed over the course of the pandemic. Most recently, on July 2, 2021, Ms. Marshall was given 28-day notice of the project ending, by way of an email from Katie Kelcher, who is part of the management of the Contact Management Team. Ms. Marshall was not sure whether, given that she was in a duty to accommodate position as a contact tracer, she would have a position after that date.
- [101] Ms. Chambers testified about the July 2, 2021 email from Ms. Kelcher, in which Ms. Marshall was advised that her temporary assignment would be ending July 30, 2021. She was asked about the sentence in that email that reads "People working under a Duty to Accommodate (DTA) agreement will remain with the team but may work in a different capacity." Ms. Chambers testified that the goal was to keep such persons working on the project as long as

possible, so that they would be the "last men standing". She could not say how long the project will continue, or how long Ms. Marshall in particular will be working within it. While she is working on the project, Ms. Chambers confirmed that Ms. Marshall is accruing seniority.

- [102] Once Ms. Marshall's employment in the project eventually comes to an end, Ms. Chambers will continue trying to find an ongoing casual position for her which meets her limitations.
- [103] Ms. Chambers testified that Island Health has 25,000 employees, and a number of RN positions which require different skills, experience and education. Some of those positions do not require physical patient care, including long term care case manager, pre-admission clinic, some positions in community health services, and hospital liaison. Those are the sorts of positions she would consider for Ms. Marshall. They become available from time to time, and it is not predictable when they will become available.
- [104] Ms. Chambers testified that on rare occasions, when a nurse cannot be accommodated in a nursing position, they may be accommodated in a non-nursing position such as a unit clerk.
- [105] When seeking an accommodated position for a candidate, Ms. Chambers will advocate with the hiring manager to exercise some flexibility with respect to experience requirements. Seniority is a factor, but not a determinative one in accommodation situations.
- [106] In her testimony, Ms. Marshall emphasized her comparative lack of seniority and clinical experience, which she suggested meant she would not meet the requirements to apply for or obtain some positions. Ms. Chambers' evidence made clear that managers have the ability to relax experience requirements, and that seniority, while a factor, is not determinative in accommodations, and it is Ms. Chambers' role to advocate with managers to agree to relax requirements, as they have the final decision.
- [107] Ms. Marshall testified that she did not believe she had the experience necessary to obtain any of the roles considered by Mr. Bhopal in his report, which I summarize below. They all require additional education, and she thought that usually 5-10 years of clinical experience was required. She did not think she would have any chance of obtaining such a position. In respect of the clinical social worker position, Ms. Marshall testified that she did not believe she had the emotional capacity, based on her current circumstances, to perform such a role. She also testified that leaving Victoria was not an option, as her children are here, with one son living in a specialized resource home, and her separation agreement requires the children to remain here.
- [108] Ms. Marshall does not know what she will do for a job when the contact tracing position finally ends. She has always wanted to be a nurse. Her plan, prior to the MVAs, had been to work for a couple of years after graduation, then go back to university to earn her Masters. After the 2012 MVA, she had come to believe she could still fulfil this plan, but after the 2016 MVA and the breakdown of her marriage, she is no longer sure she can do so. She lacks

clinical knowledge, having only worked for less than a year in bedside nursing, and is not sure if she could withstand the physical demands of the studying involved in pursuing a Masters degree. She finds it hard to see the future as things now stand.

Current Symptoms and Challenges

- [109] Ms. Marshall described her current symptoms as including significant neck and back pain, as well as pain inside the left shoulder joint. She has headaches on a daily basis. She said that on average the pain in her back and neck is a 6-8 out of 10, and in her shoulder is an 8-10 out of 10. The pain varies, but she has no days without pain. She has difficulty with sleeping, including difficulties falling asleep as well as waking in the night. Driving, sitting and standing for prolonged periods of time all affect her symptoms. Ms. Marshall testified that pain limits everything she does, including making it difficult to engage in personal care and housekeeping.
- [110] I have described elsewhere some of the challenges Ms. Marshall has faced caring for her children. She believes that her injuries have affected how her sons see her - as a person who cannot do things, which has caused them to push boundaries and be more disruptive. C. has called her "lazy" because she cannot engage in the fun activities, like hiking, that he enjoys. Her hobbies now are watching TV or sitting, which he does not like doing.
- [111] Ms. Marshall has experienced significant financial hardship since the 2016 MVA. She exhausted her employment insurance after her marriage broke down. She was unable to buy her husband out of their house, so they had to sell their house in Sidney. The proceeds were tied up for a year while they negotiated their separation agreement in 2017. She did not qualify for social assistance when she first applied because of the proceeds from the sale of the house, which she was required to exhaust first. Although she was unsure of the date, she believes she finally started to receive social assistance in 2019, and remained in receipt until she started the contact tracing job in November 2020. She had to withdraw all of her funds from her RRSP, and rely on family who helped her out. She racked up a lot of debt. All of this was especially difficult on Ms. Marshall, who had been financially self-sufficient since she moved out the family home when she was 16, and had worked hard to buy first the condo and then the house while still quite young.

Plaintiff's Lay Evidence

- [112] A number of friends and family members of Ms. Marshall testified. In this section, I summarize their evidence.

Shannon and Matthew Childs

- [113] Shannon Childs is Ms. Marshall's sister. Both she and her husband, Matthew Childs, testified. It is convenient to summarize their evidence together. I find them both to be reliable witnesses, who testified without embellishment. They were straightforward, even when dealing with evidence about difficult personal matters such as Ms. Child's falling out with Ms. Marshall.
- [114] Ms. Childs was born in 1986, and is approximately a year-and-a-half younger than Ms. Marshall. Ms. Childs is a personal financial planner who works as a civilian employee of the Department of National Defence providing financial services to serving and veteran members of the Canadian Armed Forces. Mr. Childs is a Petty Officer Second Class, and works as a marine technician with the Royal Canadian Navy. He is 32 years old. Mr. Childs' work takes him away from home from time to time on deployment. They have two children: a son who was born in September 2015, and a second son who was born in June 2017.
- [115] Ms. Childs was very close to her sister growing up. After Ms. Marshall moved out of the family home when she was 16 years old, they did not see one another for approximately a year, but later resumed their close relationship. That close relationship continued until approximately 2018, when unfortunately a rift developed between them. They have not seen one another much since then, although very recently they have started to reconcile.
- [116] Ms. Childs described Ms. Marshall prior to the 2012 MVA as very bubbly, friendly, engaging and always there for other people. She said she was a very determined person, with a strong work ethic, who got things done and was supportive of others. She said Ms. Marshall was a very active person, always going for walks. While Mr. Childs only met Ms. Marshall in 2009 or 2010, he described her in similar terms, as a strong, independent person, who speaks her mind.
- [117] Ms. Childs was aware that Ms. Marshall had knee problems when she was younger, but testified that those problems did not hold her back physically while she was growing up, although there were times when her knees may have been sore. She was not aware of Ms. Marshall having any difficulties with her shoulder, neck or back while they were growing up.
- [118] Ms. Childs met Mr. Childs in about 2009. Mr. Childs met Ms. Marshall while he was dating Ms. Childs. The Childs got married in 2013. Prior to their marriage, Mr. Childs moved in with Ms. Childs in the Esquimalt property owned by Mr. Marshall. They bought and moved into their own home 2011, at which time Ms. Marshall and her family moved into the Esquimalt property, and rented out their Sidney home. The two sisters and their families spent time at one another's homes, for family dinners, to play board games and for other activities. Ms. Childs saw Ms. Marshall approximately twice a week, and they were in phone or text contact almost daily. For a period, Mr. Childs played poker on a weekly basis with Ms. Marshall and her father. They testified that Ms. Marshall did most of the cooking and cleaning in her home, and the home was generally kept very clean.

- [119] After C. was born in October 2008, the families would go on walks and hikes together, and Ms. Marshall would carry C. in a hiking back pack. Ms. Childs did not observe Ms. Marshall having any difficulties doing so or otherwise taking care of C.
- [120] Both of the Childs were aware of the first MVA occurring in December 2012. Ms. Childs said that Ms. Marshall was frustrated, depressed and curt in the months following the 2012 MVA. Ms. Childs said that Ms. Marshall was a "self-sufferer" and mostly suffered in silence.
- [121] Ms. Childs was pregnant with her first child in 2014-2015, who was born in September 2015. At that time, the sisters were still spending a lot of time together. In May 2015, they went together to Las Vegas when Ms. Childs was five months pregnant, where they walked around a lot. Other than it being hot, Ms. Childs did not recall any difficulties during that trip, or that anything stood out about Ms. Marshall's physical abilities at that time. During her pregnancy, Ms. Childs attended weekly aquafit classes with Ms. Marshall. Ms. Marshall did not struggle in the water. Ms. Marshall was very active with Ms. Child's son when he was little.
- [122] From the Childs' evidence, it appears that Ms. Marshall's injuries from the 2012 MVA had largely resolved prior to the 2016 MVA.
- [123] The Childs were also aware of the March 2016 MVA. The sisters were still in close contact at that time. Ms. Childs said that in the months after the 2016 MVA, Ms. Marshall became more reclusive. While Ms. Marshall is wonderful with babies and young children, and had been very hands on with Ms. Child's first son, Ms. Marshall was far less so with her second son, born in 2017. She could not do as much physically.
- [124] As discussed elsewhere, Ms. Marshall's marriage broke down in 2016, with her husband leaving in late August of that year. Ms. Childs thought that Ms. Marshall's injuries played a role, as she was no longer able to take part in the outdoors physical activities Mr. Theobald liked, and they began to live separate lives. She also thought tension grew between them as Ms. Marshall was unable to help around the house as much as she used to, they were experiencing challenges with C., and he was upset that she was not working which forced him to be the family's sole breadwinner.
- [125] In terms of child rearing, Ms. Childs testified that as C. got older, his developmental issues became harder to deal with. He became more violent and aggressive towards Ms. Marshall, and Ms. Marshall had to rely on the police or other professionals to deal with him. He would run away and act up, and it was harder for Ms. Marshall to cope. Ms. Childs testified that M. also began to have behavioural challenges roughly when he entered grade one. Mr. Childs thought M. did so in emulation of his older brother. He recalled one occasion at a family event when he had to grab C. and remove him from the situation.
- [126] Both of the Childs noted that Ms. Marshall put on a lot of weight after the 2016 MVA or the separation. It was not clear on their evidence exactly when the weight gain started. Ms. Childs thought it was because Ms. Marshall was unable to exercise. Ms. Childs testified the

weight gain was a problem for Mr. Theobald, who reportedly felt that Ms. Marshall just didn't want to do what she needed to do to lose weight. Ms. Childs thought that the weight made it harder for Ms. Marshall to go to physiotherapy or exercise. After her April 1, 2019 shoulder surgery, Ms. Childs thought Ms. Marshall was better, and was able to get on an exercise plan and lose weight, which was better for her mentally. It should be noted, however, that the two sisters have not seen much of each other since that surgery.

- [127] Prior to the surgery, Ms. Childs recalled Ms. Marshall grabbing at her shoulder (she could not recall which one), finding it harder to lift groceries or the children, and that her back would get sore if she moved too much or was in certain positions for a prolonged period of time.
- [128] After Mr. Theobald left, Ms. Marshall became much more reliant on others to assist with tasks such as moving furniture and yard maintenance. Ms. Childs frequently asked Mr. Childs to go to the Esquimalt property to help Ms. Marshall with such tasks. Mr. Childs thought he did so perhaps twice a month on average. While Mr. Childs was prepared to help, this put some strain on him, as he was frequently away from home on deployments with the Navy, and did not always feel like going to help Ms. Marshall when he was able to be home and wanted to spend time with his own family. Ms. Childs recalled that their older sister Angela came to live with Ms. Marshall at one point to help with the children, but she did not think she was very helpful.
- [129] Mr. Childs thought the year after Mr. Theobald left was very stressful for Ms. Marshall. In this connection he referred to the two boys, her weight gain, the separation, her injuries, and other personal matters of which he was not sure of the details.
- [130] Ms. Childs had little recollection of Ms. Marshall breaking her foot or ankle in 2017, but did recall driving her to pick up the knee walker she used after that incident. The Childs heard about the August 2016 Slip and Fall, but knew little about it.
- [131] Ms. Childs found it increasingly difficult to be with Ms. Marshall as she was constantly complaining about pain and other issues. Their interactions became more negative. After her accidents and other struggles, Ms. Childs felt Ms. Marshall manifested a different kind of personality. They had their first falling out when Ms. Marshall's younger son was about to go into kindergarten in 2016 or 2017, after which they did not speak for about six months. They reconnected, but fell out again after tensions arose between Ms. Marshall and their father after M. had been living with him and left his house to live with Ms. Marshall. They had some contact after Ms. Childs' second child was born in June 2017. Pre-COVID, they were seeing one another only very occasionally. They are now in sporadic contact by text. Mr. Childs says that he now sees Ms. Marshall at times, referring to going to her home to move some chairs that she had purchased and chatting when he goes to the Esquimalt property to do yard work. He expressed the hope that the two sisters would reconcile, and mentioned some hopeful signs in this regard.

Melanie and David Hon

- [132] Mr. and Ms. Hon met Ms. Marshall in the summer of 2017 through their mutual love of Pokemon Go. They therefore did not know Ms. Marshall prior to the 2016 MVA.
- [133] Ms. Hon is a CPA in public practice, and Mr. Hon is an IT professional. They developed a close friendship with Ms. Marshall over the months that followed meeting while playing Pokemon. Ms. Marshall and Ms. Hon had both taken up the game to get out, and improve their fitness by walking more. Prior to the COVID pandemic, they saw one another very frequently. Even since the pandemic began, Ms. Hon and Ms. Marshall are still in contact, at least by text, every day.
- [134] Mr. and Ms. Hon have been extremely good friends to Ms. Marshall, helping her in many ways over the years since they met. Ms. Hon describes Ms. Marshall as her best friend. Both Mr. and Ms. Hon say that Ms. Hon and Ms. Marshall share a number of qualities, including independence and pride.
- [135] I found both Mr. and Ms. Hon to be intelligent, careful witnesses. I rely on their evidence, although I have been mindful of occasions on which either of them was repeating information provided to them by Ms. Marshall or each other. Ms. Hon had slightly more first hand information than her husband, but it is convenient to deal with their evidence together.
- [136] The Hons observed that Ms. Marshall appeared to be in pain at times. They observed wincing, rubbing and other pain-related behaviours, focussed on Ms. Marshall's left shoulder. Ms. Hon recalled that Ms. Marshall was wearing some kind of boot on what she believed was her right leg when they first met, but neither Mr. Hon or Ms. Hon were aware of any significant or ongoing problems with Ms. Marshall's ankle or knee. This would be the aircast Ms. Marshall wore after the July 2017 avulsion fracture.
- [137] While they played Pokemon together frequently, for periods ranging from 15 minutes to several hours on occasion, they noticed that Ms. Marshall would experience pain from holding her cell phone in her hand for prolonged periods to play the game, and would need to either shift her phone to the other hand or take a rest break. They noticed this in particular when they travelled together for a Pokemon special event in Seattle in September 2018.
- [138] Both of the Hons testified that Ms. Marshall did not frequently complain of pain, and was reluctant to ask for help. They were aware of her injuries, however, and would try to head things off at the pass by offering to help her before she had to ask. Ms. Hon would occasionally pick up Ms. Marshall's younger son M. from school or drop him off at home. When they drove together, for example to go shopping, Ms. Hon was aware Ms. Marshall would experience increased pain in her shoulder from driving, so she would drive instead.

- [139] When they went shopping, Mr. or Ms. Hon would assist Ms. Marshall. Ms. Hon said she would put items in the cart, put them on to the cashier's table, put them in the car, and unload them at Ms. Marshall's house. Mr. Hon said that he would carry heavier items such as flats of water or kitty litter, including carrying them into Ms. Marshall's house. On other occasions, the Hons have picked up prescriptions for Ms. Marshall at the drug store.
- [140] Ms. Hon said that Ms. Marshall would more often come to their house than them visiting her at her house. She would cook meals for Ms. Marshall at the Hons' home. When she dropped by Ms. Marshall's home for a visit, she often observed dirty dishes in the sink, and would sometimes wash them for Ms. Marshall. She has cooked for Ms. Marshall at Ms. Marshall's home. She cleaned her toilet on one occasion. She has vacuumed her house. Both Hons would empty the kitty litter box and refill it. They both described an occasion on which a cat had peed on a rug on the lower floor of Ms. Marshall's home. Ms. Hon moved boxes off a storage shelf, pulled the rug out from underneath it, dusted, and vacuumed, and Mr. Hon took the rug upstairs. Ms. Hon assembled a BBQ for Ms. Marshall.
- [141] Both of the Hons testified that Ms. Marshall's shoulder pain and mood appeared to worsen between when they met her in the summer of 2017, and her April 1, 2019 shoulder surgery. After the surgery, they picked Ms. Marshall up at the hospital, and cared for her in their home for close to a week while she was incapacitated from surgery. Ms. Hon provided personal care to Ms. Marshall, including setting up the wedge pillows for her to sleep, washing her hair, assisting her into the shower, assisting with changing the dressing on the surgical wounds, and helping her dress. They also cooked for her. Ms. Marshall left their home because M. was feeling lonesome for her (he was staying with his grandmother), and Ms. Marshall did not want to be a burden.
- [142] Following the initial surgical recovery period, Ms. Hon testified that Ms. Marshall's shoulder was better, although not 100%. She thought that she stopped experiencing further improvement after about six months.
- [143] Both of the Hons described difficulties experienced by Ms. Marshall in parenting her sons due to her injuries. Ms. Hon described C. pulling down hard on Ms. Marshall's arm in order to hurt her. Mr. Hon described M., when he was excited playing Pokemon, pulling on Ms. Marshall's arm to show her something, which caused her pain. Ms. Marshall would tell the boys not to pull on her arm because she was injured, but they continued to do so. Ms. Hon said that Ms. Marshall could not physically control the boys - she could not run after them when they ran away, get them in the van, or force them to put their seat belts on. She felt the boys knew this, and took advantage of it.
- [144] The Hons have been very generous to Ms. Marshall, not only in relation to their efforts to assist her physically, but also in material terms. Ms. Hon testified that Ms. Marshall had no income before she started working as a contact tracer in November 2020, and was living off the proceeds of the sale of the house following the separation from her ex-husband. Ms. Hon lent her \$4,000.00 for a year to help her buy a used car when her van broke down. She

lent her \$900.00 to allow her to join their family on a one week cruise in the Caribbean in November 2019. Ms. Marshall paid back both loans. They gave her a recliner chair so she could sleep upright, a mattress topper because her mattress needed to be replaced, and a computer for M., which Mr. Hon set up in his room.

- [145] Ms. Hon also described her observations of Ms. Marshall's mood. She described her as generally an outgoing, pleasant person to be around, with a good sense of humour. However, when she had not slept well due to pain or was experiencing more pain, Ms. Marshall became cranky and more easily frustrated. Her mood varied. Ms. Hon testified that Ms. Marshall was sometimes depressed, and when depressed would become withdrawn. If Ms. Marshall was not in contact with her before 10:00 am she would reach out to her. She would try to bring her out of her shell.

Johanna Wigen

- [146] Johanna Wigen is a long-term friend of Ms. Marshall. They went to high school together for a year or two. They lost touch after high school and reconnected in about 2006 through work. At the time, Ms. Wigen was working as a medic/driver for a private ambulance company and between 2006 and 2008 would run into Ms. Marshall from time to time while she was working on wards at Victoria General and Royal Jubilee Hospitals.
- [147] Ms. Wigen and Ms. Marshall began to spend more time together in 2016, shortly after the second MVA. Their children would play together in the park, and they occasionally visited one another's homes. In March 2017 they went on a road trip together with their children to visit a friend from high school in Grande Prairie.
- [148] Leaving aside high school, Ms. Wigen's opportunities to observe Ms. Marshall prior to the MVAs were relatively limited. Even once they started to spend more time together in 2016, they saw one another relatively sporadically - Ms. Wigen had no recollection of seeing Ms. Marshall use crutches or any other mobility aids, so she must not have seen her in the months immediately following the August 2016 Slip and Fall, the July 2017 avulsion fracture, or the July 2020 incident in which Ms. Marshall hit her knee on the door.
- [149] I accept Ms. Wigen's evidence that when they started to spend more time together after the 2016 MVA, Ms. Marshall appeared to be sore and in quite a lot of pain, particularly in her shoulder and upper body. She observed that this had a tremendous impact on Ms. Marshall, both because it prevented her from working as a nurse, which she wanted to do very badly, and because it affected her physical ability to parent her children, especially C. Ms. Wigen observed Ms. Marshall have difficulties restraining C., and protecting M. from him.
- [150] I also accept Ms. Wigen's evidence that Ms. Marshall appeared to be in pain when driving to Grande Prairie in March 2017, and that as a result Ms. Wigen offered and in fact did a fair bit of the driving, despite the fact they were travelling in Ms. Marshall's minivan.

- [151] I also accept Ms. Wigen's evidence that Ms. Marshall's limitations have been emotionally difficult for her to bear.

James Buckle

- [152] James Buckle is a friend of Ms. Marshall, who first met her in late 2010 or early 2011 through the poker group that met at the Legion on Thursday nights. Mr. Buckle clearly had relatively limited interaction with Ms. Marshall in 2011, as he was not aware of her knee surgery in April of that year. They became increasingly close friends between 2012 and 2018. Mr. Buckle moved back to Alberta in February 2018. After that, they remained in telephone contact, but had not seen one another in person except once at Christmas 2018 until the trial.
- [153] Mr. Buckle was one year behind Ms. Marshall in nursing school, which he started in September 2012, and they became closer friends as he sought her out for assistance and advice about his studies. They would meet for coffee or to study quite frequently. In April 2016, Mr. Buckle dropped out of nursing school due to personal difficulties he was having at the time, and he did not return to nursing studies in Victoria. He is now in a licensed practical nursing program at Bow Valley College while working full-time as a server.
- [154] Much of Mr. Buckle's evidence focussed on matters outside his direct knowledge, such as BCNU wage rates, or was in the nature of opinion evidence which he was not qualified to give, such as technical evidence about Ms. Marshall's range of motion. I also did not find Mr. Buckle's evidence about his experience with performing CPR to be of assistance. I have disregarded all such evidence. In doing so I do not wish to be taken as critical of Mr. Buckle, who was merely doing his best to answer the questions put to him by counsel.
- [155] Mr. Buckle did give some relevant evidence about his observations of Ms. Marshall at various times. He described her before the 2012 MVA as a very motivated person who worked very hard. She was vibrant, positive and had a lot of energy. I note that Mr. Buckle had relatively limited opportunity to observe Ms. Marshall before the 2012 MVA, as it was only in the fall of 2012 that he began his nursing studies, and in addition to going to school full-time, Mr. Buckle was also working full-time as a server at that time. M. was born in October 2012, although Mr. Buckle could not recall when he was born. He testified that he did not see Ms. Marshall for a few months after M.'s birth, until sometime around Christmas 2012. It will be recalled that the 2012 MVA was on December 7, 2012. He also said that he heard about the 2012 MVA first from Ms. Marshall's sister or father, and that he did not see her for a month or two after that when he saw her at school and then at poker. It is difficult to reconcile this evidence about when Mr. Buckle first saw Ms. Marshall after the 2012 MVA.
- [156] Mr. Buckle testified that after the 2012 MVA, Ms. Marshall had difficulties dealing cards or turning her neck playing poker. She had problems with her neck and back and had to get up frequently. Her posture was poor.

- [157] Between the summer of 2013 and 2014, Mr. Buckle said that they saw one another three or four times a week. They lived close together and would see one another at poker or Tim Horton's or elsewhere in the neighbourhood. He thought that the impacts of her injuries worsened in that period, and she became irritable and cranky. She had difficulties with her boys, including controlling them when they were out of hand. He described a dramatic occasion on which M. had a temper tantrum in Tim Horton's and flopped limp to the ground. According to Mr. Buckle, Ms. Marshall literally dragged M. by the wrist to the door, at which point he picked him up and carried him to the van. He said that M. was three or four years old at the time. Mr. Buckle started going with Ms. Marshall to the grocery store to help her. She was driving more than walking, even for short trips to the grocery store or park.
- [158] By 2015, Mr. Buckle thought that Ms. Marshall's limitations had improved. He was very busy in 2015, working full time and going to school full time. He first saw her about a month or two after the 2016 MVA, in mid to late April 2016. At that time, she was wearing a sling/brace on her shoulder, and she looked like she had regressed. She had difficulties lifting her left arm, or carrying things with it.
- [159] Mr. Buckle gave the impression that he saw more of Ms. Marshall in the summer of 2016, as he was no longer going to school. However, he was working three jobs at the time, so one must question how much time they spent together. He was aware of the August 2016 Slip and Fall accident, and saw her on crutches around that time. On one occasion, he said she dropped a cup of tea at Tim Horton's. He helped her shop at Costco two or three times a month. By this time, C. was getting older, and becoming more aggressive with both M. and Ms. Marshall. Ms. Marshall had increasing difficulties managing C.'s behaviour, particularly when she was wearing a sling. He testified that she wore that sling from time to time for three or four years. No one else suggested she wore a sling for that long. Ms. Marshall did not have the strength to carry the children if necessary. He was aware that Ms. Marshall had to call the police on more than one occasion to subdue C.
- [160] He was aware that Ms. Marshall was wearing a cast on her foot at some point, but did not know it was in relation to the avulsion fracture of her foot in July 2017. He just knew she had hurt her foot.
- [161] Mr. Buckle took Ms. Marshall on a trip to Mexico as a friend in December 2017 after her divorce as a thank you present for the assistance she had provided him in nursing school. She was limited in what she could do on that trip; for example, she could not go ziplining or on long bus excursions. She was reluctant to go into the water past her knees in case she fell.
- [162] Ms. Marshall came over to Mr. Buckle's home to help him before he moved in February 2018. He said that she could not even fold a t-shirt. When he asked her to toss a salad, she had to do it with one hand.

[163] Overall, I found Mr. Buckle tended to exaggerate his evidence in a conscious or unconscious effort to help his good friend Ms. Marshall. I have placed limited weight on it although I do accept the general tenor of his evidence that Ms. Marshall's condition had improved significantly from the 2012 MVA by the time 2016 MVA occurred in March 2016, and that it worsened again after that.

Joel Batten

[164] Joel Batten worked for Ms. Marshall's father doing renovations, appliance installation and some landscaping. He was laid off when the pandemic hit in March 2020, but now works for Mr. Marshall as an independent sub-contractor.

[165] Mr. Batten had poor recollection of dates, and was rather vague in his testimony, and I am cautious about relying on his evidence.

[166] Mr. Batten believed that he met Ms. Marshall soon after he started working for Mr. Marshall in about 2011. He testified that he and Ms. Marshall are friends. He testified about performing work on the Esquimalt property, both before and after Ms. Marshall moved in. Mr. Marshall paid him for some of that work, including all yard work prior to Ms. Marshall moving in, and the more recent installation of a new dishwasher.

[167] Mr. Batten testified that Ms. Marshall has paid him what she could for some work he performed since she moved in. He believed she needed assistance due to pain in her shoulder and knee, and difficulties with carrying things and walking. He provided her more assistance after her husband moved out because he was no longer available to help. Mr. Batten testified that he did a variety of tasks for Ms. Marshall, including some yard work, carrying groceries and other shopping into the house, changing lightbulbs, fixing a closet, doing some grouting, and patching some holes in the walls. Ms. Marshall paid him for some but not all of that work.

[168] I accept that Mr. Batten has provided Ms. Marshall assistance of the kind described by him. Given the vagueness of Mr. Batten's evidence I am unable to conclude how frequently he performed such tasks for Ms. Marshall, or how often or much she or Mr. Marshall paid him for his help.

Brennen McNamara

[169] Brennen McNamara rented the downstairs suite in the Esquimalt home from Mr. Marshall between 2015 and 2020. He became friendly with Ms. Marshall while living there. Mr. McNamara is a Naval Warfare Officer, currently serving as an Acting Sub Lieutenant. He gave his evidence in a straightforward and objective manner, and was not given to exaggeration or embellishment. I find his evidence reliable within the limits of his opportunities for observation.

- [170] Mr. McNamara interacted quite frequently with Ms. Marshall while he was living in the downstairs suite, depending on his work schedule. They got to know one another better playing Pokemon Go together, walking in neighbouring parks and chatting. They played about once a week, and more after Ms. Marshall split up from her husband.
- [171] At first, Mr. McNamara rarely assisted Ms. Marshall with household tasks. Mr. Theobald was still living in the family home, and he could do most things.
- [172] Mr. McNamara was aware that Ms. Marshall was in the 2016 MVA in August 2016. He was told about it by her husband, whom he ran into from time to time at work. After that, he would quite frequently help with things like bringing groceries inside the house, moving furniture or helping in the yard. On occasion she would text him and ask him to run an errand because she was in too much pain. Usually, however, she would not ask him, but he would volunteer to help.
- [173] Mr. McNamara observed that someone he referred to as "PO" helped in the yard. I take this to be a reference to Petty Officer Childs. He also knew Mr. Marshall's employee, Mr. Batten, did work in the yard and maintenance and repair work in the house.
- [174] After the 2016 MVA, Mr. McNamara observed that Ms. Marshall seemed like she was in pain. She was not able to move as much, and her knee and shoulder were sore. He noticed that she had difficulty going up stairs because she needed to put the majority of her weight on her good leg rather than her bad leg. He was not sure which leg was the good and which one the bad.
- [175] By contrast, Mr. McNamara testified that before the 2016 MVA he never noticed any struggles of the sort he noticed after it. He was unaware of her history prior to the 2016 MVA.
- [176] Given that Ms. Marshall did not injure her leg in the 2016 MVA, Mr. McNamara's observations of her having difficulty climbing stairs and favouring one leg must relate either to the period after the August 2016 Slip and Fall, in which she hurt her right knee, and after which she used crutches for a period of time, or the period after she fractured her right ankle in July 2017, following which she used a knee walker and then an air cast. Mr. McNamara heard about a slip and fall, but did not know when it was. He was deployed at sea when Ms. Marshall fractured her foot in July 2017, and did not know about it. Mr. McNamara gave the impression that he is a private person, and not one to press others for details. Whether related to the August 2016 Slip and Fall or the July 2017 avulsion fracture, the difficulties with stair climbing and weight bearing on one leg which he observed were not the result of the MVAs.

- [177] Mr. McNamara observed that Ms. Marshall was less active with her children after the 2016 MVA. He would play Pokemon with the family, and Ms. Marshall would sit while he would walk with the boys and catch Pokemon. She did not seem to be able to stay out as long because of pain, and was more static. His interactions with the children were positive, although he was aware of an incident in which the police were called due to C.'s behaviour.
- [178] Mr. McNamara was living in the downstairs suite when Ms. Marshall had her April 2019 shoulder surgery. Just before the surgery, she was having problems with her arm and could not carry anything with it. He noticed she was using a sling when she came back from surgery. He gave her a hand whenever he could.
- [179] Over time, Mr. McNamara thought that Ms. Marshall slowly started to get better. At one point he went away on deployment, and she was on crutches when he returned. This could be either of the two incidents just described, or the period following her adverse reaction to the synovial fluid injection in November 2020. She slowly progressed, but never got to the baseline he observed prior to the 2016 MVA. Nonetheless, she appeared to be feeling a lot better than in the past, and was capable of more movement and activity. She continued to have pain and had good and bad days. She still wore a knee brace, but the greater issue was with her shoulder and reaching and picking things up.
- [180] Mr. McNamara moved out of the downstairs suite in 2020, but lives only a couple of blocks away. Ms. Marshall used to be a very active walker, but he does not see her out in the neighbourhood very often now.

Expert Medical Evidence

Dr. Draga Jovic

- [181] Dr. Draga Jovic was Ms. Marshall's family physician from February 18, 2009 to August 1, 2018, when Dr. Jovic closed her practice. Dr. Jovic was accepted as an expert general practitioner. In that capacity, she wrote three expert reports which were introduced into evidence. She also gave evidence about her treatment of Ms. Marshall. Some of her clinical notes were also introduced into evidence.
- [182] Dr. Jovic testified that in the three years she was Ms. Marshall's doctor prior to the 2012 MVA, she had no recollection of her complaining of neck, back or shoulder pain, but she did have chronic knee issues, for which she had referred her to Dr. Yoneda. He performed bilateral arthroscopic debridement of both knees after which, in Dr. Jovic's view, Ms. Marshall's knees were relatively stable and she was able to walk. In the year prior to the 2012 MVA, Dr. Jovic saw Ms. Marshall three times, once in preparation for her April 2011 knee surgery, and twice in relation to pregnancy in 2012.

[183] In her first report, dated June 5, 2015, Dr. Jovic described the treatment she had provided Ms. Marshall since the 2012 MVA, and provided various opinions, including regarding her prognosis. She first assessed Ms. Marshall in relation to the 2012 MVA on December 17, 2012, ten days after the accident. Dr. Jovic wrote in respect of that assessment:

She immediately felt jittery then experienced low back pain and one hour later experienced back and neck pain and right knee discomfort. She had bilateral knee surgery April 15, 2011 in the form of bilateral arthroscopic debridement. On examination she was not able to turn her head to the left and had low back stiffness. She was assessed with soft tissue injury and was prescribed physiotherapy/chiropractor and exercises. At that time Ms. Theobald was only 6 weeks after giving birth to her second child as well as returning to school to study Nursing. Caring for her infant baby was made more difficult due to pain.

[184] Dr. Jovic saw Ms. Marshall nine more times in relation to injuries caused by the 2012 MVA between December 17, 2012, and writing her first report on June 5, 2015. Ms. Marshall continued to report neck, thoracic and back pain and right knee pain. Various treatment modalities and medications were prescribed. The first specific reference to left shoulder pain in the clinical notes in evidence was on August 26, 2013, when Ms. Marshall reported that that pain worsened while trying to carry her baby. Dr. Jovic noted at that time that attending nursing school and looking after two young children had hindered Ms. Marshall's recovery. Also on August 26, 2013, Dr. Jovic completed an ICBC medical report. It was consistent with her expert report. In it, she noted that while she had not discussed Ms. Marshall's specific work duties with her, her MVA-related injuries had prevented her from working full-time between the date of the accident and the date of the report. Specifically, she noted that Ms. Marshall had been unable to sit for prolonged periods of time.

[185] On August 7, 2014, Dr. Jovic prescribed amitriptyline for chronic pain secondary to soft tissue injury. The last assessment noted in Dr. Jovic's first report was on December 9, 2014, at which time she noted that Ms. Marshall was still experiencing anxiety related to the MVA and Dr. Jovic recommended she see a psychologist to deal with anxiety and chronic pain. Her clinical note of that date referred to "PTSD", although in her testimony Dr. Jovic stated that she would need to review the DSM IV to determine if Ms. Marshall met the diagnostic criteria for a formal diagnosis of PTSD.

[186] Dr. Jovic stated the following opinion in her first report:

As a result of the MVA on December 7, 2012, Ms. Theobald sustained soft tissue injury of neck, back, left shoulder and contusion of right knee. Recovery was impeded as this MVA occurred 6 weeks after the birth of her second child. Ms. Theobald was also a full time nursing student and had a first child with special needs. Despite her pain and school and family responsibilities, Ms. Theobald was very conscientious in attending her exercise and rehab programs. Pain related to soft tissue injury beyond 6-12 months is considered chronic pain. Medication has relieved some of these symptoms. Ms. Theobald still has symptoms of anxiety that might be relieved by seeking counseling from a trained Psychologist.

- [187] In terms of prognosis and future care, Dr. Jovic opined that Ms. Marshall had a prognosis for full recovery but some symptoms and neck and back pain and stiffness might persistent on an intermittent basis. She recommended that an exercise program be continued, with intermittent use of physiotherapy, chiropractor and massage therapy. Dr. Jovic believed Ms. Marshall would need to remain on medication for the symptoms of chronic pain. She noted Ms. Marshall was very motivated to achieve full recovery.
- [188] In her second report, dated August 14, 2016, Dr. Jovic dealt with Ms. Marshall's injuries from both MVAs. Since the time of the first report, Dr. Jovic had seen Ms. Marshall on three occasions in 2015 in respect of the 2012 MVA. She noted that Ms. Marshall had begun working regular hours as a casual RN. She had some residual chronic pain in her mid-thoracic and neck regions, and some tingling in her right leg. The only medication noted was an occasional muscle relaxant.
- [189] Dr. Jovic saw Ms. Marshall on March 1, 2016, the same day the 2016 MVA occurred. Ms. Marshall reported to her that it was a low impact collision, but she had a flare up of pain in her mid-thoracic area. In reviewing her clinical notes, Dr. Jovic stated that at this time Ms. Marshall was reporting nervousness about driving and what she called some mild PTSD.
- [190] Dr. Jovic saw Ms. Marshall on a number of occasions thereafter in 2016. On March 16, 2016, Dr. Jovic noted that Ms. Marshall needed a letter for psychological counselling. The reasons for that were not included in Dr. Jovic's clinical notes. She explained in cross-examination that they would have been included in the letter she wrote, but unfortunately, not all of Dr. Jovic's clinical records have been located since she closed her practice. She testified that Ms. Marshall did have a number of reasons she might have depression or anxiety, including problems in her marriage, not being able to work as a nurse, having two children, one of whom has special needs, and post traumatic stress related to the MVAs. Dr. Jovic saw Ms. Marshall again on May 24, 2016, at which time Ms. Marshall reported tinnitus in her left ear since the MVA. Dr. Jovic recommended that Ms. Marshall discontinue all non-steroidal anti-inflammatory medications. Her last appointment prior to writing the second report was on August 2, 2016. Dr. Jovic's clinical notes indicate that at that time Ms. Marshall told her that she had begun to experience left arm pain (which would include her shoulder) similar to after the 2012 MVA two months previously.
- [191] At the time of writing the second report, Dr. Jovic continued to believe that Ms. Marshall had a prognosis for full recovery as stated in her second report. She suggested that acupuncture might provide some relief. She remained hopeful that Ms. Marshall would be able to return to her position as an RN as she had prior to the second MVA.
- [192] Dr. Jovic's third report was dated August 7, 2017, and it took into account the two MVAs, as well as the August 2016 Slip and Fall. She indicated she had reviewed her own clinical notes, Dr. Yoneda's clinical reports, and two occupational therapist reports by Jennifer Babcock.

- [193] Dr. Jovic wrote that the August 2016 Slip and Fall complicated Ms. Marshall's planned rehabilitation and return to work. Her primary injury in the Slip and Fall was stated to be right knee pain. Dr. Jovic stated that Ms. Marshall became more unconditioned, with the result that her MVA injuries of neck, left shoulder and back pain worsened.
- [194] After referring to Ms. Marshall not having returned to her previous nursing position since March 2016, and being the single parent of two young boys, one of whom has special needs, Dr. Jovic stated that "this has been a very stressful period".
- [195] Dr. Jovic wrote that Ms. Marshall's knee had healed from the August 2016 Slip and Fall, and was not now compromising her ambition to return to work.
- [196] While Dr. Jovic's reports, especially the first one, have a number of references to Ms. Marshall experiencing anxiety-related symptoms, it is notable that there is no reference to depression in any of them.

Dr. James Filbey

- [197] Dr. James Filbey was called by the plaintiff. Dr. Filbey is a physiatrist, and was accepted as an expert in physical medicine and rehabilitation.
- [198] Dr. Filbey has been Ms. Marshall's treating physiatrist since November 1, 2017. In his report, dated February 1, 2021, he outlined his office visits with Ms. Marshall since that time and provided his expert opinion. He saw Ms. Marshall for the purposes of his expert report on February 1, 2021. He has treated Ms. Marshall's left shoulder, and his opinion evidence focussed on her shoulder complaints rather than her knee or other injuries. I found Dr. Filbey to be a very fair and balanced expert witness, and I rely on his reports and evidence, especially with respect to Ms. Marshall's upper body injuries.
- [199] Dr. Filbey noted that Ms. Marshall's symptoms, as of February 1, 2021, consisted of cervicospinal/shoulder pain, which was worse on the left. The pain was described as not constant, which he explained meant it was not always present and varied in intensity when present. Ms. Marshall also reported lower back pain and depressed mood, the latter of which was stable and for which she was on medication.
- [200] Ms. Marshall told Dr. Filbey that she was walking for exercise for 30 to 60 minutes and that her knee was the most limiting factor in walking. She was also limited by her neck and upper back symptoms to about 30-45 minutes.
- [201] On examination, Ms. Marshall presented with an elevated BMI. Her range of movement in the cervical spine was $\frac{3}{4}$ normal for flexion and right rotation. She experienced discomfort with her range of motion. Her lower back moved normally, with some pain noted at the end range. Her left shoulder lacked 10 degrees full abduction as compared to her right.

- [202] Dr. Filbey diagnosed Ms. Marshall with cervicospinal myofascial pain syndrome left lateralizing and left shoulder SLAP - post status surgical repair, which he explained referred to a tear of the posterior left labrum. It was this tear that Dr. Saliken repaired on April 1, 2019. Ms. Marshall had a good response to the surgery, and no longer had clicking or popping in her shoulder. However, her overall symptom burden in the cervicospinal region had not improved. In Dr. Filbey's opinion, this suggested that her symptoms are more related to soft-tissue/myofascial pain than the labral pathology.
- [203] Dr. Filbey did not treat Ms. Marshall for back pain, but on evaluation found that her lower back pain was a mechanical/musculoligamentous back pain syndrome.
- [204] Dr. Filbey opined that Ms. Marshall was best described as having chronic pain syndrome with features related to cervicospinal pain, lower back pain, post SLAP repair, and the knee pain history she described to him (but which he did not independently treat or assess).
- [205] In Dr. Filbey's opinion, Ms. Marshall was able to return to activities on an as tolerated basis. In his report, he wrote that "there are no absolute medical contraindications to any specific task or activity". In his testimony, he explained that in terms of "worklessness", some people are workless due to medical necessity, some are workless when that is medically unnecessary, and some are medically discretionary. Ms. Marshall fell in this last group, which means that work would not do her progressive harm, and her ability to work would be based on her symptom tolerance. She would likely have reduced symptoms by reducing her exposure to activities which predictably exacerbate her symptoms.
- [206] In terms of future care, Dr. Filbey recommended active exercise programs under the guidance of a personal trainer or kinesiologist, including intermittent future assistance in modifying the exercise program as needed in the future. He thought access to passive treatment, such as physiotherapy or massage, would not be unreasonable to deal with flare ups, amounting to not more than 12 sessions in any year.
- [207] In terms of prognosis, Dr. Filbey thought it unlikely that Ms. Marshall's symptoms would worsen over time, and that she would identify her own symptom tolerance and accommodate her pace, tasks and activities to maintain a steady and tolerable symptom burden. He did not think she would ever return entirely to her pre-accident state, but the treatments he recommended would assist in maintaining her function as much as possible.

Dr. David Saliken

- [208] Dr. David Saliken is an orthopaedic surgeon who was tendered by Ms. Marshall as an expert.

- [209] Dr. Saliken performed shoulder surgery on Ms. Marshall on April 1, 2019, and saw her as his patient on multiple occasions pre and post-operatively. He also assessed and examined Ms. Marshall on November 28, 2019, producing an expert report of the same date. He assessed and examined her a second time and produced a supplementary report dated February 10, 2021.
- [210] I rely on Dr. Saliken's evidence and opinions, in particular with respect to the causation of Ms. Marshall's shoulder symptoms, the limitations caused by them.
- [211] Dr. Saliken diagnosed Ms. Marshall with a posterior labral tear in her left shoulder by an MR arthrogram on April 11, 2018. On April 1, 2019, he performed arthroscopic surgery on her left shoulder, including an arthroscopic biceps tenotomy, posterior labral repair and subacromial decompression. At that time, their goal was for Ms. Marshall to return to work by January 2020.
- [212] As of the date of his supplementary report in February 2021, Dr. Saliken stated that Ms. Marshall was still dealing with moderate amounts of pain in her left shoulder, particularly with overhead exercises. This contrasts with his November 2019 report, at which time Dr. Saliken stated that Ms. Marshall was dealing with mild to moderate amounts of pain. This would indicate that, from Ms. Marshall's subjective point of view, her shoulder pain had worsened in the intervening period.
- [213] In February 2021, Ms. Marshall estimated that her left shoulder was about 50% of her pre-injury state. This contrasts with her estimate at the time of Dr. Saliken's November 2019 report that her left shoulder was 80% improved. In other words, by her subjective estimate, her shoulder had worsened between November 2019 and February 2021.
- [214] Ms. Marshall had no signs of posterior shoulder instability, and the surgery had succeeded in stabilizing her shoulder. In Dr. Saliken's opinion, no further surgery was indicated.
- [215] In Dr. Saliken's opinion, the most likely cause of Ms. Marshall's shoulder symptoms, in particular the posterior labral tear, was a motor vehicle accident with a load on the shoulder, consistent with both MVAs.
- [216] Moving forward, Dr. Saliken opined that Ms. Marshall would likely have some chronic shoulder pain and dysfunction, as she had reached a plateau that was likely to be long-lasting. He thought that massage therapy, kinesiology and physiotherapy would be beneficial for her in the long-term, as she had received benefit from them in the past. He also recommended TENS therapy and IMS, as well as NSAIDs or acetaminophen as needed. He wrote that her shoulder symptoms may limit her ability to perform full nursing duties, referring in particular to positioning high acuity patients. However, Dr. Saliken testified that he would defer to an occupational therapist in terms of Ms. Marshall's restrictions and limitations related to work.

[217] Dr. Saliken indicated that Ms. Marshall did not have shoulder arthritis at present, but her risk of developing it was increased as a result of trauma to her posterior labrum. It was unpredictable whether she would develop arthritis.

Dr. Bas Masri

[218] Dr. Bas Masri is an orthopaedic surgeon called as a witness by Ms. Marshall. He was accepted as an expert in the field of orthopaedic surgery.

[219] Dr. Masri assessed Ms. Marshall on January 14, 2021, at the request of the defendants in the August 2016 Slip and Fall Action. As a result, his report, dated January 20, 2021, focusses on Ms. Marshall's knee, as that was the part of her body injured in the August 2016 Slip and Fall.

[220] I found Dr. Masri's evidence of great assistance in understanding Ms. Marshall's chronic knee condition. He was fair and balanced in his evidence.

[221] In his report, Dr. Masri provided the following helpful summary of Ms. Marshall's knee history pre-MVA:

Right knee: Ms. Theobald has had an extensive history with reference to her right knee. At the age of 14, she injured her right knee playing basketball, and she was on crutches and had a knee brace for approximately 6 weeks. She did not have any surgery as a teenager, despite an erroneous entry in Dr. Yoneda's records. At the age of 17, she saw Dr. Shane Zarzour for right anterior knee pain. She also saw a few other doctors between the age of 14 and approximately the age of 19 or so when she saw Dr. Yoneda, orthopaedic surgeon, for the first time. Dr. Yoneda performed an arthroscopic debridement and a lateral retinacular release on May 31, 2005 and noted that she had Grade II chondromalacia patella as well as a medial and lateral plica affecting the right knee. She tells me that the surgery was mildly effective with no complete pain relief, but she recalls that she had subluxation of the patella before the surgery, and she cannot recall if the subluxation stopped after the surgery. She used a knee brace on occasion, and because of the lack of resolution of her pain, she started visco-supplementation injections by Dr. Yoneda, and she tells me that there was some pain improvement. She was seen again by Dr. Yoneda on December 15, 2010 at which point he noted that she was 5 foot 3 inches tall and weighed 224 pounds. He noted that she was having increasing patellofemoral pain in her left knee as well as her right knee. She tells me that the right knee was always worse than the left knee. He booked her for bilateral arthroscopic debridements of both knees, and this was done on April 15, 2011. At the time of surgery, he noted Grade II chondromalacia patella on the right knee and Grade I chondromalacia patella on the left knee in addition to what he reported as plicas. There was no significant improvement in the pain in the right knee, but the left knee pain eventually resolved. She then resumed visco-supplementation injections, and her last Durolane injections were done on both knees on July 6, 2011.

[222] Ms. Marshall reported to Dr. Masri that she hit her right knee on the dashboard in the 2012 MVA, and that her right knee took approximately two years to return to its baseline prior to the first MVA. She reported to him that by 2015 she had tolerable pain in the front of her right knee. Ms. Marshall also reported to Dr. Masri that the 2016 MVA had no effect on her right knee. She reported that the August 2016 Slip and Fall caused significant pain in her right knee, and she was on crutches until the late fall of 2016. Severe pain in her right knee resulted in her stopping rehabilitation treatments for the injuries suffered in the two MVAs, and they were only resumed in November or December 2016, by which point she was off crutches.

[223] Dr. Masri reviewed imaging done of Ms. Marshall's right knee. An x-ray done on August 4, 2016, showed no significant osteoarthritis and only slight lateral tilting of the patella. An MRI on October 2, 2016, showed mild chondromalacia patella with no significant degeneration.

[224] Dr. Masri referred to Ms. Marshall's consultation with Dr. Yoneda following the August 2016 Slip and Fall, as follows:

Consultation with Dr. Yoneda: On November 4, 2016, she saw Dr. Yoneda once again. He noted that her weight was 250 pounds at the time, and he made a diagnosis of a right knee patellar contusion after the slip and fall. He noted that the MRI scan of October 2, 2016 was negative and commented that she has had long lasting bilateral patellofemoral syndrome since 1997. The left knee had resolved 2 years prior. Dr. Yoneda commented that the knees were okay until the motor vehicle accident in March 2016 with neck, back and right knee pain, and she was "off on ICBC" until May 2016, and that the slip and fall aggravated her right knee. This is different from what Ms. Theobald told me in that the 2016 motor vehicle accident did not aggravate her right knee, but it was the 2012 motor vehicle accident that aggravated her right knee. Dr. Yoneda injected her right knee with steroids and prescribed her Celebrex.

[225] Ms. Marshall reported to Dr. Masri that while the right knee pain improved, it continued to be worse than before the August 2016 Slip and Fall. He noted that in July 2017, Ms. Marshall's right knee almost gave way, and she tripped, suffering a lateral talar avulsion fracture affecting her right ankle. She was treated by another orthopaedic surgeon, and wore a walking boot, non-weightbearing for four weeks, and with gradual weightbearing for another two weeks. She reported that the pain in her right ankle resolved with no further problems.

[226] In July 2020, Ms. Marshall had another right knee injury when she hit her knee against a door. She felt she dislocated the kneecap, but it reduced on its own. She experienced significant pain. She saw another orthopaedic surgeon, who ordered another MRI, which showed no changes since 2016. She had a synovial fluid injection in November 2020, which she had a severe reaction to, causing pain and swelling. Her knee had to be drained on three occasions. She had to use crutches, which she had just gotten off of at the time she saw Dr. Masri. She had two steroid injections into the knee in December 2020 for the pain.

Ms. Marshall reported to Dr. Masri that at the time of the assessment, her right knee pain was much worse than it was before the July 2020 incident.

[227] Ms. Marshall told Dr. Masri that her left shoulder gives her the most pain and prevents her from working as a ward nurse. Her right knee was not the limiting factor in her employment. He wrote that she told him that before the 2016 MVA, she was able to walk for one-and-a-half to two hours, that just after the 2016 MVA she could walk for an hour on flat ground, and that just before the 2020 accident, she was only able to walk for about half an hour.

[228] Of note because of the evidence about Ms. Marshall's weight gain since the MVAs, Dr. Masri recorded her as weighing 207 pounds, as compared to 215 pounds in December 2010, and down substantially from the 250 pounds she weighed in November 2016.

[229] Dr. Masri's examination of Ms. Marshall's right knee showed marked tenderness in the patellofemoral joint with diffuse swelling. Her range of motion in the right knee was diminished.

[230] In his testimony, Dr. Masri explained that while he did not know how Ms. Marshall had progressed since his January 2021 assessment, he anticipated that the right knee pain caused by the July 2020 injury and subsequent adverse reaction to treatment would resolve.

[231] While not the focus of his report, Dr. Masri did examine Ms. Marshall's back and shoulder. She had diffuse tenderness in the paraspinal muscles in the neck and in the trapezius muscles, worse on the left than on the right. She also had diffuse tenderness in the parascapular muscles as well as minimal paraspinal tenderness in the lumbar spine. Examination of the left shoulder showed diffuse muscular tenderness with tenderness over the biceps tendon and the front of the shoulder. Range of motion of the shoulder was full.

[232] Dr. Masri diagnosed Ms. Marshall with chronic patellofemoral pain that was aggravated by the 2012 MVA. The August 2016 Slip and Fall worsened her pre-existing condition, but not to the point of causing significant disability. Her main problem was being unable to walk down stairs, but she was still able to walk a half hour, and had difficulty kneeling, which is typical with patellofemoral pain syndrome. As a result of the two MVAs, she had significant problems with soft tissue injuries, primarily with the left shoulder, which were the main reasons for her current disability and inability to work. Absent the MVAs, he did not believe she would have an occupational disability in terms of her ability to work as a nurse.

Functional Capacity Expert Evidence and Findings

[233] Beverley Wilson is an occupational therapist who performed a functional capacity evaluation of Ms. Marshall on February 10, 2021, and a cost of future care assessment in Ms. Marshall's home on February 11, 2021. At the request of Ms. Marshall, she wrote an expert report dated February 26, 2021, and provided oral testimony.

- [234] At the request of the defendants, Sheila Branscombe, who is also an occupational therapist, wrote a rebuttal report, dated May 13, 2021.
- [235] For the reasons that follow, I prefer Ms. Wilson's evidence with respect to Ms. Marshall's functional capacities and the cost of her future care to Ms. Branscombe's evidence.
- [236] Ms. Branscombe's evidence has been criticized in this Court on a number of occasions in recent years. In *Dhudwal v. Davis*, 2021 BCSC 374, at para. 62, Mr. Justice Milman held that Ms. Branscombe's report was of little assistance to him. He adopted the comments of Madam Justice Shergill in *L.A.F. v. G.M.F.C. Ltd.*, 2019 BCSC 2252:
- [164] The defendants rely on the evidence of Sheila Branscombe, an occupational therapist, to challenge Ms. Szarkiewicz's opinion. Ms. Branscombe authored a Cost of Future Care Analysis - Response Report, dated April 19, 2019. This is essentially a critique report of Ms. Szarkiewicz's methodology. I found Ms. Branscombe's evidence unhelpful and unreliable, and have placed no weight on it. Ms. Branscombe has never met Ms. F. and did not review any of the source documents in preparing her report, which is essentially argument in the guise of opinion. In addition, her testimony lacked objectivity, and exhibited an obvious bias in favour of the defendants.
- [237] Similarly, in *Guenther v. Lasota*, 2021 BCSC 1048, at para. 98, Mr. Justice Davies preferred the evidence of others on the basis that "Ms. Branscombe had an unfortunate tendency to advocate for the positions advanced by the defendant". Finally, I would refer to *Amaral v. Glaser*, 2020 BCSC 639 at paras. 179-182, where Madam Justice Adair recognized Ms. Branscombe's expertise, but noted that she was unable to provide the Court with any informed conclusions or opinions of her own concerning the plaintiff's functional capacity.
- [238] Ms. Branscombe was cross-examined about these cases. I found her response to them troubling. Essentially, she said that the Court apparently determined she was an advocate for the defence, but she did not believe she was. She attempted to minimize them, as being only four of a large number of defence rebuttal reports she has written.
- [239] Of course, a person is entitled to disagree with a court's assessment of their evidence in any given case. But for a person who has been qualified as an expert witness to be so dismissive of the concerns expressed by judges in four cases suggests to me that they have a fundamental lack of understanding of the role of an expert witness, and that they have failed to take on board the court's concerns, or to modify their practice to address them.
- [240] I find the comments of the judges in the four cases just mentioned to be applicable to Ms. Branscombe's evidence in this case. I have not relied on her report or oral testimony, except where indicated.
- [241] In her report, Ms. Wilson provided the following opinion about Ms. Marshall's functional limitations, which I accept as accurate:

Ms. Theobald's objective results revealed mild range of motion limitations in the cervical spine and moderate to severe range of motion in the left shoulder. Her tolerances for sitting, standing and walking were noted to be functional for activities of daily living. She was observed to tolerate lifting/carrying within the modified "sedentary" level. Due to the nature of her injuries, she was unable to lift weight using both hands. She was able to lift 10lbs from floor to above shoulder height in the right. Grip strength, although functional for activities of daily living, was noted to be decreased bilaterally. Her tolerances for reaching at and above shoulder height was functional on the right, however, limited on the left. Gross/fine motor coordination were noted to be functional bilaterally.

- [242] During the functional capacity evaluation, Ms. Marshall reported an increase in her neck and shoulder pain and fatigue after performing lifting, carrying, pushing, pulling and working above shoulder height with her right arm.
- [243] Ms. Wilson opined that, from a purely physical perspective, Ms. Marshall does not demonstrate sufficient strength or tolerance to manage her pre-MVA position as a RN working as an active patient care nurse, which is classified as a medium position. Ms. Wilson did not assess Ms. Marshall's physical ability to work in any other sorts of nursing positions or other occupations.
- [244] Ms. Wilson stated that Ms. Marshall "is unable to reach above shoulder height on the left, she is unable to lift any significant weight in the left, her right knee pain prevents her from kneeling/squatting, she has difficulty with stair climbing and her walking speed is slowed." Ms. Marshall's self-perception is that she is moderately to severely limited from various activities of daily living. Her responses on questionnaires suggested moderate depression and low anxiety. Ms. Marshall was noted to be frustrated in discussing her pre-incident life as compared to her life today.
- [245] In Ms. Wilson's opinion, Ms. Marshall would be able to manage a modified sedentary position with accommodations for overhead work on the left. She is unable to lift anything of significant weight on her left side. She is unable to kneel, squat or crouch due to pain in her right knee. As a result of her limitations, she was entirely unable to perform some physical tests, and the functional capacity examination was shortened from its typical six to eight hours to four-and-a-half hours as a result.
- [246] Ms. Wilson also performed an in-home functional assessment for the purposes of assessing Ms. Marshall's cost of future care. Based on her assessment, and her review of the expert reports filed in this case, Ms. Wilson made a number of recommendations, including the current costs of the various items, treatments and services recommended. I deal with those in considering Ms. Marshall's claims for the cost of future care.

Assessment of Damages

Causation - the law

- [247] The law regarding causation is summarized in *Sharma v. Bhullar*, 2020 BCSC 379 [Sharma], at paras. 69-70:
- [69] The legal test for causation is the "but for" test-the plaintiff must prove on a balance of probabilities that, but for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 sec 32 at paras. 8-10; *Ediger v. Johnston*, 2013 sec 18 at paras. 28-29; and *Resurice Corp. v. Hanke*, 2007 sec 7 at paras. 21-23.
- [70] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: " ... causation need not be determined by scientific precision ... ". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [248] As long as a defendant's negligence forms part of the cause of an injury, a sufficient nexus will have been established and the defendant will be liable "for all injuries caused or contributed to by their negligence.": *Lensu v. Victorio*, 2019 BCSC 59, at para. 205.
- [249] In *Blackwater v. Plint*, 2005 SCC 58, the Supreme Court of Canada summarized the role of causation in the assessment of damages as follows:
- [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway . . .

Divisibility of Injuries - the law

- [250] Chief Justice Hinkson very recently provided the following summary of the law relating to the divisibility of injuries in *Grabovac v. Fazio*, 2021 BCSC 2362 [Grabovac] at paras. 204-209:
- [204] Whether an injury is divisible is a question of fact. Divisible injuries are those where damages can be assessed independently. In *Bradley v. Groves*, 2010 BCCA 361, the Court wrote:

[20] In the course of the discussion, Major J. (for the Court) described injuries produced by more than one cause as either "divisible" or "indivisible". Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes. At paras. 22-25, he commented on apportionment between multiple causes and the issue of divisibility:

(1) Multiple Tortious Causes

[22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

[...]

(2) Divisible Injuries

[24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

[25] In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

[Emphasis in the original.]

[205] Later in the judgment, the Court stated:

[34] If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.

[]

[37] If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[206] More recently, in *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 [Neufeldt], the Court of Appeal considered whether the trial judge erred in law in concluding that the damages suffered in two motor vehicle accidents were indivisible. In that case, the plaintiff suffered injuries in the first accident that caused pain in his low back, mid back, neck and headaches that remained unresolved at the time of the second accident. The plaintiff suffered a mild traumatic brain injury, pain, and depression in the second accident. The Court of Appeal applied a three-part analysis regarding the divisibility of the plaintiff's injuries and damages.

[207] Writing for the Division, Justice Willcock J.A. stated as follows:

[68] A second insult that aggravates an existing injury is frequently and correctly considered to contribute to an injury indivisible from the initial injury

[69] The injuries sustained in the first accident had not entirely resolved and were aggravated by the second accident. There was support in the evidence and in the law for the trial judge's conclusion that the respondent's back and neck injuries were indivisible.

[70] In my view, it was not an error to find the back and neck injury suffered by the respondent as a result of the two accidents to be indivisible.

[208] Willcock J.A. explained at paras. 72-78 that the trial judge erred in law by failing to grapple with the question of whether the mild traumatic brain injury and its symptoms were a distinct, divisible injury, for which the first tortfeasor could not be held liable. In particular, Willcock J.A. held that the trial judge erred by failing to address whether the first accident in any way caused the plaintiff's concussion symptoms, or consider uncontradicted evidence to the contrary: *Neufeldt* at paras. 72-73.

- [209] In addition, Willcock J.A. declined to follow the reasoning in *Lakatos v. Lakatos*, 2017 BCSC 1990 [Lakatos], a case in which the plaintiff's initial injuries were aggravated by a subsequent accident. In *Lakatos*, the trial judge found the injuries to be indivisible, but did not attribute any loss of future income earning capacity to the first accident. Willcock J.A. held that such a "result is difficult to reconcile in principle with a finding that there is only one injury" and that "[i]f injuries are truly indivisible, then it will be impossible to attribute specific heads of cumulative (post-second accident) damages to one injury or the other": Neufeldt at paras. 90, 94.
- [251] In some cases, it will be possible to divide up injuries, notwithstanding the fact that a subsequent accident aggravated a pre-existing injury. Such a case was *Derksen v. Nicholson*, 2015 BCSC 1268 [Derksen], which was discussed by the Court of Appeal in its recent decision in *Alragheb v. Francis*, 2021 BCCA 457 [Alragheb], at paras. 72-74. In *Derksen*, Mr. Justice Grauer wrote at para. 52:
- [52] What is different about this case is that notwithstanding that the third accident aggravated a pre-existing injury, and notwithstanding the position of counsel, I find I am able to divide up the injuries. This is not a case like *Bradley*, *Athey* or *Demidas* where the injury was the result of consecutive cumulative incidents leading to a collective whole. Rather, there were two blips of exacerbation, each of which dissipated, leaving the plaintiff in a state referable entirely to the first accident. Accordingly, I conclude that the effects are divisible.
- [252] Justice Marzari, in *Conarro v. Tallack*, 2020 BCSC 626, provides a thorough summary of the relevant case law addressing divisibility of injuries at paras. 128-132. The Court stated at paras. 131-132:
- [131] Whether injuries are divisible or indivisible is a question of fact. If the trier of fact can determine the extent to which each defendant caused or contributed to the plaintiff's injuries on the available evidence, the injuries are divisible.
- [132] The principle of divisibility can apply most obviously to injuries to different parts of the body. Divisibility may also be possible where injuries are to the same part of the body where the evidence is sufficient to establish distinct causes of each aspect of the injury: *Khudabux v. McClary*, 2018 BCCA 234 at para. 34; *Deol v. Sheikh*, 2016 BCSC 2404 at para. 19; *Fleming v. McAllister*, 2017 BCSC 753. It can also be possible in relation to sequential injuries, where the evidence is sufficient to establish a baseline: *Uppal v. Judge*, 2016 BCSC 642 at para. 86; *Dunne v. Sharma*, 2014 BCSC 1106 at para. 99. Finally, even where a physical injury is indivisible, specific heads of damages may still be divisible where the evidence permits such a division: *Scoates v. Dermott*, 2012 BCSC 485 at paras. 164-169; *Rajan v. Hudon*, 2014 BCSC 1678; *Lakatos v. Lakatos*, 2017 BCSC 1990.

Apportionment - the law

- [253] In *Alragheb*, the Court of Appeal stated the following fundamental principles with respect to the apportionment of liability:

- [25] At the outset of the apportionment analysis, it is important that the issues on this appeal be placed in context.
- [26] First, the law does not apportion liability for damages between tortious and non-tortious conduct: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 22-23.
- [27] Second, the rule that damages are assessed with a view toward putting the plaintiff in the position they would have occupied but for the tort is a rule that governs the assessment of damages, not the apportionment of liability. It is the means by which allowance is made for non-tortious causes. Cases in which pre-existing conditions or prior injuries are weighed in the assessment of damages are not of assistance in understanding the principles of apportionment.
- [28] Third, where by the fault of two or more persons damage or loss is caused to one or more of them (as is the case where concurrent torts cause an indivisible injury), the liability to make good the damage or loss is in proportion to the degree to which each person was at fault. That is our statutory regime.
- [254] The Court went on to state:
- [41] The awarding of damage or loss in every action to which s. 1 applies is governed by the following rules:
- [42] An "action" is the civil proceeding itself (Supreme Court Civil Rules, R. 1-1(1)), whereas the "cause of action" is the factual situation that entitles one person to obtain a remedy in court from another person: *Coulter v. Ball*, 2003 BCSC 1629 at para. 23. Section 2 of the Negligence Act does not call for apportionment of liability for an indivisible injury on an "accident by accident" basis--i.e., looking at each cause of action--but, rather, governs the awarding of damages "in every action to which section 1 applies".
- [43] In this case, the finding that the damages arising from the concurrent torts are indivisible is a finding that such damage or loss "has been caused by the fault of 2 or more persons". Section 1 of the Act thus applies to this action and the liability of each person who is liable to make good the damage or loss must be apportioned by the degree to which each person was at fault, expressed as a percentage of the total fault.
- [255] The Court referred to *Sharma*, cited earlier in this decision, in the following terms:
- [64] In *Sharma*, the plaintiff suffered an indivisible injury as a result of two accidents. Liability for the first accident was admitted by the defendants. Liability for the second accident was undetermined and was not before the court. The second accident was treated as a non-tortious contributing cause and a deduction made for its effect in assessing damages. The trial judge accurately summarized the salient apportionment principles as follows:
- [89] The situation in *Athey*, where tortious and non-tortious factors contributed to the plaintiff's injury, is not analogous to one where an injury has multiple tortious causes. Apportionment between multiple tortious causes is both consistent with general principles of tort law and is

expressly permitted by provincial negligence statutes (in British Columbia, s. 1(1) of the Negligence Act, R.S.B.C. 1996, c. 333). Where an injury is caused by multiple tortfeasors, each remains fully liable to the plaintiff for the injury. The legislation simply permits the defendants to seek indemnity from one another.

- [90] An indivisible injury cannot, by definition, be divided into distinct parts. Defendants are jointly liable to the plaintiff because it is impossible to divide the injury up into constituent causes or points in time: *Bradley v. Groves*, 2010 BCCA 361 at para. 34 [Bradley]. Where damages for a single, indivisible injury are apportioned between tortfeasors pursuant to the Negligence Act, the inquiry is into fault, rather than causation, with "fault" meaning blameworthiness.
- [91] Tortfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measureable risk" that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.
- [92] A weakness inherent in the position of the plaintiff that might realistically contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in assessing damages. Such a contingency does not have to be proven to a certainty; it is given weight according to its relative likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48.

[Emphasis original.]

Summary of parties' positions in respect of the application of these principles

Plaintiff

- [256] Ms. Marshall submits that the 2012 MVA caused her to have shoulder, neck, back, tinnitus and migraine injuries, and that they were exacerbated by the 2016 MVA. She submits that these injuries are indivisible as between the two MVAs, and that she did not suffer intervening injuries to these body parts.
- [257] With respect to her right knee, Ms. Marshall submits that she had a pre-existing condition, patellofemoral syndrome, which predated the 2012 MVA. She submits that her right knee was aggravated by the 2012 MVA, the August 2016 Slip and Fall, the July 2020 knee injury and the adverse reaction to the synovial fluid injection in November 2020. She submits that each of the right knee aggravations, including the 2012 MVA, were flare-ups of her pre-existing condition, and that none of them caused significant functional impairments beyond the period of immediate convalescence, which subsided and returned to baseline.

- [258] Ms. Marshall submits that if the Court accepts that position, then the right knee injury caused by the 2012 MVA is divisible from those caused by the non-MVA events, including the August 2016 Slip and Fall. In that case, the Court should assess the impacts of the non-MVA events on Ms. Marshall, and determine whether there should be a reduction under any particular heads of damages, relying on *T.W.N.A. v. Clarke*, 2003 BCCA 670 at para. 36.
- [259] In the alternative, Ms. Marshall submits that if the Court concludes that her right knee injury is indivisible as between the 2012 MVA and the non-MVA events, then the defendants to the 2012 MVA are liable for any damages flowing from her knee injury. In that event, the amount of the BC Ferry settlement with the third party, excluding costs and disbursements, would be deducted from the applicable head of damage.

Defendants

- [260] The defendants say that the parties have agreed that the injuries caused by the two MVAs are divisible from Ms. Marshall's knee and foot injuries. They submit that Ms. Marshall suffered injuries to her neck, back and shoulder in the two MVAs, but no injuries to her knee or foot. On this basis, they submit that apportionment is necessary.
- [261] The defendants submit that the best way to approach the apportionment of damages is to assess damages for all of Ms. Marshall's current symptoms and limitations as if they were caused by the MVA (the "Starting Position"). Then, there must be a reduction to account for Ms. Marshall's pre-existing conditions. After that, they submit there must be a further reduction or reapportionment to account for her subsequent non-MVA injuries. They submit that given that the MVAs did not cause any significant aggravation of her knee injuries, the assessment can be easily done by assessing the impact of knee problems and deducting that from the Starting Position.
- [262] Ultimately, the defendants submit that it would be reasonable to apportion on the basis of a 35% reduction for non-pecuniary damages, housekeeping and cost of future care. They acknowledge the calculation for economic losses would be more complicated.

Analysis of Injuries and their Causation

Findings of Fact

- [263] Ms. Marshall had a pre-existing knee condition. Dr. Yoneda performed an arthroscopic debridement and a lateral retinacular release on May 31, 2005, and noted that she had Grade II chondromalacia patella as well as a medial and lateral plica affecting the right knee. Dr. Yoneda performed bilateral arthroscopic debridements of both knees on April 15, 2011. At that time, he noted Grade II chondromalacia patella on the right knee and Grade I chondromalacia patella on the left knee in addition to what he reported as plicas.

- [264] The primary injuries Ms. Marshall suffered in the 2012 MVA were to her neck, back and left shoulder. She also hit her right knee against the dashboard of the car. Dr. Jovic saw Ms. Marshall ten days after the 2012 MVA, at which time she assessed her with soft tissue injury. A month later, Dr. Jovic noted that Ms. Marshall reported neck, thoracic and back pain, and right knee pain. By August 2013, Ms. Marshall reported left shoulder pain that worsened while carrying her baby. I accept Dr. Jovic's diagnosis that the 2012 MVA caused Ms. Marshall to have soft tissue injuries to her neck, back and left shoulder, and a contusion of her right knee. She also had some anxiety caused by the 2012 MVA.
- [265] The contusion to Ms. Marshall's right knee appears to have cleared up fairly quickly. In her ICBC Medical Report dated August 26, 2013, Dr. Jovic reported that Ms. Marshall had initially reported back and neck pain, and Dr. Jovic had observed lumbar stiffness and limited rotation of the neck. As of the date of her report, Ms. Marshall reported neck and thoracic back stiffness and pain, and left shoulder pain. Dr. Jovic also noted that the injury had caused a right knee contusion, but Ms. Marshall was not complaining of it at the time of her report. By the time of Dr. Jovic's January 5, 2015 report, Dr. Jovic's opinion was that Ms. Marshall had a prognosis for full recovery, but some neck and back pain with stiffness might persist. There was no mention of Ms. Marshall's right knee causing pain or limitations at that time.
- [266] I accept Dr. Masri's opinion that the 2012 MVA aggravated Ms. Marshall's pre-existing condition of chronic patellofemoral pain. Such aggravation was relatively minor and can rightly be called a "blip" in the context of Ms. Marshall's ongoing knee issues.
- [267] The 2016 MVA aggravated Ms. Marshall's neck, back and left shoulder pain that had been caused by the 2012 MVA. The 2016 MVA did not aggravate her right knee.
- [268] I accept Dr. Masri's opinion that the August 2016 Slip and Fall, during which she fell on her right knee, worsened Ms. Marshall's pre-existing condition of chronic patellofemoral pain, but not to the point of causing significant disability to her right knee.
- [269] In this connection, I also refer to and rely on Dr. Yoneda's November 4, 2016, January 6, 2017 and April 19, 2017 letters to Dr. Jovic. They indicate that in November 2016 Ms. Marshall's knee got sore with pivoting and walking and that she avoided squatting or kneeling, but she walked without an obvious limp. By January 2017, her knee was gradually albeit slowly improving with physiotherapy, and she was having less pain. By April 2017, her knee was clinically stable and she was taking reduced amounts of pain-killers for her knee. I also rely upon the reports from Jennifer Babcock, occupational therapist, to ICBC in this time period, and in particular the December 9, 2016 report which noted Ms. Marshall's rehabilitation program for the injuries related to the two MVAs was on hold between August 29, 2016 and December 2, 2016 due to the August 2016 Slip and Fall, but that by December 9, 2016 she was recovered from that accident and had returned to her work conditioning program.

- [270] The July 2017 avular fracture to Ms. Marshall's right ankle occurred when her right knee almost but not quite gave way, causing her to trip. She had to wear a walking boot, and was unable to bear any weight on her right foot for four weeks, followed by two weeks of gradual weightbearing. That injury resolved by the fall of 2017.
- [271] The July 2020 knee injury occurred when Ms. Marshall hit her knee on a door, causing her kneecap to dislocate. This injury caused significant pain, and she had to use crutches for a period of time. Due to the pain, Ms. Marshall had a synovial fluid injection in her knee in November 2020, to which she had a severe adverse reaction. She received two steroid injections in the knee in December 2020, which improved the pain. Her knee was also drained on three occasions. As late as her assessment with Dr. Masri on January 14, 2021, Ms. Marshall continued to experience pain and swelling in her right knee.
- [272] With the exception of the right knee contusion suffered in the 2012 MVA, none of Ms. Marshall's knee complaints are related to the two MVAs, nor is the avular fracture. I accept Dr. Masri's opinion that Ms. Marshall's current occupational disabilities in terms of working as a nurse are related to the soft tissue injuries caused by the two MVAs, and not by her chronic knee condition.
- [273] Ms. Marshall's knee condition does, however prevent her from kneeling. Dr. Masri's opinion, which I accept, is that the inability to kneel is common in patients with chronic patellofemoral pain syndrome. Ms. Wilson's functional capacity evaluation, carried out on February 10, 2021, indicated that Ms. Marshall was unable to kneel, squat or crouch due to knee pain. She also had some difficulties with stair climbing and reduced walking speed. Accepting that Ms. Marshall at that time may still have been hindered, to some extent, by the lingering effects of the adverse reaction to the synovial fluid injection, I find that her chronic knee condition does limit her ability to squat, crouch or kneel. These limitations, however, are not ones which prevent her working as a registered nurse on an ongoing basis.
- [274] Ms. Marshall did not testify about playing Pokemon Go, although several of her witnesses did at length. I do not draw any kind of adverse inference about her not testifying about it, as she was not asked about it. Certainly, this is an activity she engages in frequently, and it is doubtless good exercise for her. She has sufficient ability to walk to play Pokemon Go. I do not agree with the defendants' submission that she "walks for hours" playing this game; rather, as her witnesses testified, she takes breaks as necessary. She may also change her phone from one hand to another if she grows tired from holding it up to play the game.
- [275] In terms of Ms. Marshall's upper body injuries, Dr. Filbey diagnosed Ms. Marshall with cervicospinal myofascial pain syndrome left lateralizing and opined that Ms. Marshall was best described as having chronic pain syndrome with features related to cervicospinal pain, lower back pain, post SLAP repair and the knee pain history which she described to him. I accept that opinion. All of those conditions, with the exception of the knee pain, were caused by the two MVAs.

- [276] Dr. Saliken diagnosed Ms. Marshall with a posterior labral tear in her left shoulder by an MR anthrogram on April 11, 2018. On April 1, 2019, he performed arthroscopic surgery on her left shoulder, including an arthroscopic biceps tenotomy, posterior labral repair and subacromial decompression. I accept Dr. Saliken's opinion that the most likely cause of Ms. Marshall's shoulder symptoms, in particular the posterior labral tear, was a motor vehicle accident with a load on the shoulder, consistent with both MVAs.
- [277] in February 2021, Dr. Saliken stated that Ms. Marshall was still dealing with moderate amounts of pain in her left shoulder, in particular with overhead exercises. This contrasts with his November 2019 report, at which time Dr. Saliken stated that Ms. Marshall was dealing with mild to moderate amounts of pain in her left shoulder. From this, it would appear that while the shoulder surgery was successful, in so far as it stabilized her shoulder, the pain in her shoulder has worsened over time.
- [278] Ms. Marshall also submitted that she suffered tinnitus and migraines as a result of the two MVAs. The tinnitus was mentioned in Dr. Jovic's second report, although Ms. Marshall testified it did not interfere with her function. No medical professional appears to have diagnosed Ms. Marshall with migraines, although it is reasonable that her soft tissue upper body injuries may cause her to have headaches. In this regard, I note that she reported to Dr. Filbey that her headaches were less now than in the past, and were related to her neck and upper back muscle pain.
- [279] In her testimony, Ms. Marshall referred to having been diagnosed with depression in 2017 and being prescribed Celexa to treat it. There is no medical evidence of a doctor having diagnosed her with depression, or any expert psychiatric evidence before the Court. Dr. Jovic did refer to anxiety caused by the MVAs, and some symptoms which could relate to post traumatic stress disorder ("PTSD"). She did not diagnose Ms. Marshall with PTSD. She does not refer to depression in any of her three reports. Ms. Marshall saw Dr. Caines for three sessions in early 2016 to address the driving-related anxiety. I accept that Ms. Marshall experienced anxiety related to the two MVAs, and the effect of the injuries caused by the two MVAs contributed to feelings of low mood, negativity and general unhappiness. While Ms. Marshall may well have depression, the evidence before me is insufficient for me to conclude that it was caused by the two MVAs.

Divisibility of Injuries and Apportionment

- [280] As stated by Hinkson C.J. in *Grabovac* at para. 204, "whether an injury is divisible is a question of fact. Divisible injuries are those where damages can be assessed independently."

- [281] I find that the injuries Ms. Marshall suffered to her upper body in the two MVAs are indivisible as between themselves. The upper body injuries caused by the 2012 MVA, although they had improved, had not resolved by the time of the 2016 MVA. The 2016 MVA, although minor on its own, aggravated the 2012 MVA upper body injuries. The injuries are indivisible.
- [282] I find that Ms. Marshall's chronic knee condition, which has been aggravated repeatedly by the 2012 MVA, the August 2016 Slip and Fall, the July 2020 knee injury, and the adverse reaction to the synovial fluid injection, is divisible from the MVA-related upper body injuries. The injuries are to different parts of Ms. Marshall's body, have distinct and discernable causes, and distinct impacts on her.
- [283] Considering the knee contusion suffered in the 2012 MVA, which mildly aggravated Ms. Marshall's chronic knee condition, and had resolved to baseline within a year or two of the 2012 MVA, I find that this case is like Derksen, in which Grauer J. wrote:
- [52] What is different about this case is that notwithstanding that the third accident aggravated a pre-existing injury, and notwithstanding the position of counsel, I find I am able to divide up the injuries. This is not a case like Bradley, Athey or Demidas where the injury was the result of consecutive cumulative incidents leading to a collective whole. Rather, there were two blips of exacerbation, each of which dissipated, leaving the plaintiff in a state referable entirely to the first accident. Accordingly, I conclude that the effects are divisible.
- [284] The blip of the right knee contusion is divisible from Ms. Marshall's ongoing chronic knee condition.
- [285] In light of these findings, this is not a case in which the Court must concern itself with apportionment of liability, as that concept was explained by the Court of Appeal in Alragheb. I have determined which indivisible injuries were caused by the negligence of the defendants, being essentially the upper body injuries caused in the two MVAs. I will assess the damages to which Ms. Marshall is entitled for the injuries caused by the defendants' negligence, being careful to distinguish those injuries from her pre-existing chronic knee condition, and the various events that have aggravated it. To the minor extent it was temporarily aggravated by the right knee contusion caused by the 2012 MVA, I will factor that into my assessment.
- [286] Analysed in this way, it is neither necessary nor appropriate, as the defendants have submitted, to assess Ms. Marshall's damages globally and then "apportion" them to account for her pre-existing condition and subsequent non-MVA-related injuries. As explained in Alragheb, the law does not apportion liability between tortious and non-tortious causes. Rather, I weigh those conditions and injuries in assessing Ms. Marshall's damages caused as a result of the defendants' negligence.

Non-pecuniary Damages

[287] Ms. Marshall submits that an award in the range of \$185,000.00-\$210,000.00 is appropriate for non-pecuniary damages. The defendants submit that an appropriate award would be in the range of \$70,000-\$95,000.00, with a reduction of 35% for non-MVA factors.

[288] The Court of Appeal, in *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46, set out a non-exhaustive list of factors to consider in assessing non-pecuniary damages, including the age of the plaintiff, the nature of the injury, the severity and duration of pain, disability, emotional suffering, impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle.

[289] In support of her position, Ms. Marshall relies upon:

- *Best v. Thomas*, 2014 BCSC 1033 [Best]

\$225,000.00

- *Culver v. Skrypnyk*, 2019 BCSC 807 [Culver]

\$175,000.00

- *Felix v. Hearne*, 2011 BCSC 1236 [Felix]

\$200,000.00

- *Moges v. Sanderson*, 2020 BCSC 1511 [Moges]

\$200,000.00

- *Raedwulf v. Kelly*, 2020 BCSC 915 [Raedwulf]

\$175,000.00

[290] Ms. Marshall suggested that, of these cases, Felix and Raedwulf were of particular assistance.

[291] In support of their position, the defendants rely upon:

- *Scarfe v. Fernco Developments Ltd.*, 2015 BCSC 2310 [Scarfe]

\$50,000.00

- *Ayles v. Vanderkooi*, 2021 BCSC 838 [Ayles]

\$70,000.00

- *Sidhu v. Panasar*, 2021 BCSC 890 [Sidhu]

\$90,000.00

- *Ploskon-Ciesla v. Brophy*, 2020 BCSC 1873 [Ploskon]

\$90,000.00

· Merko v. Plummer, 2016 BCSC 1403 [Merko]

\$95,000.00

· Moon v. Yaranon, 2021 BCSC 818 [Moon]

\$100,000.00

[292] I have reviewed the cases relied upon by both parties. Of course, each case is factually unique, and must be decided on its own facts. Certainly, none of the cases cited by either party are on all fours with the present case.

[293] Ms. Marshall suffered a number of injuries as a result of the two MVAs. I have accepted Dr. Filbey's diagnosis of a chronic pain syndrome with cervicospinal and lower back pain. She also suffered a SLAP tear as a result of the two MVAs, which required surgery in April 2019. While the surgery was successful, insofar as it stabilized her shoulder, Ms. Marshall continues to have moderate pain in her left shoulder, especially when reaching overhead. Dr. Filbey's opinion, which I accept, is that Ms. Marshall's current and ongoing symptoms are unlikely to worsen or progress with time. Stability, and a slow reduction in symptoms, are expected to occur over time. That said, she is unlikely ever to return to her pre-MVA state of function.

[294] The MVA-related injuries have had a significant impact on Ms. Marshall. At the time of the 2012 MVA, Ms. Marshall was only 27 years old. She was married, and the mother of a young child, C., who had been born in October 2008. She returned to work only a few months after C's birth.

[295] Ms. Marshall was an ambitious, independent, self-sufficient and hard-working person prior to the 2012 MVA. She had finished high school while living on her own and supporting herself with her earnings as a chambermaid. She had pursued post-secondary education, and become a unit clerk, and at the time of the 2012 MVA was studying to become a registered nurse, while continuing to work as a unit clerk. Her second child, M. was born in October 2012, and she continued her studies without interruption while taking a maternity leave from her work as a unit clerk.

[296] Ms. Marshall persevered in her nursing studies after the 2012 MVA, despite the physical difficulties posed by her injuries. She graduated in April 2015, and began work as a casual nurse, working a variety of departments. Her injuries hampered her to some extent, but she was able to work successfully as a nurse. By the spring of 2016, prior to the 2016 MVA, she felt she was getting back to a "new normal".

[297] Unfortunately, the 2016 MVA set Ms. Marshall back significantly. While it was a minor accident, it aggravated the injuries caused by the 2012 MVA. She attempted to return to work, but was unable to do so. Not until October 2017 was Ms. Marshall able to attempt a graduated return to work as a nurse, but it was ultimately unsuccessful. She needed

shoulder surgery, which was delayed until April 2019, and which took her almost a year to recover from. It was only in November 2020 that Ms. Marshall was able to begin work as a contact tracer, working from home, where she was able to pace herself and take breaks as required.

- [298] All of this has had a significant impact on Ms. Marshall. She had been an active person, who despite her chronic knee condition, was able to engage in a wide variety of activities. Her pain limits her ability to engage in recreational activities. Her limitations contributed to Ms. Marshall gaining weight, which would have had the effect of further limiting her ability to be active.
- [299] While I have no psychiatric evidence, and the medical evidence before me does not establish that Ms. Marshall has been diagnosed with depression, I note that she reported to Dr. Filbey that she had depressed mood, and was taking medication for this. I accept that the injuries suffered in the two MVAs have adversely affected Ms. Marshall's mood. She experienced driving anxiety for which she received counselling.
- [300] Ms. Marshall is less tolerant and patient with her children than she would like to be. She was unable to continue breastfeeding M. She is unable to physically manage C.'s behavioural issues, and has had to make the difficult decision to place him in a residential facility. Her children have taken advantage of her physical limitations, and were described as intentionally trying to hurt Ms. Marshall at times, and to have called her "lazy" due to her inability to engage in fun activities with them.
- [301] Ms. Marshall's ability to do housekeeping has been affected, and she has had to rely on friends to assist with tasks such as carrying groceries and various odd jobs around the house. She is unable to do yard work.
- [302] Ms. Marshall's social relationships have been adversely affected. From the fun-loving, positive, supportive person described by her friends and sister prior to the two MVAs, she has become a much more negative person. She has had several fallings out with her sister Ms. Childs, who found it difficult to be around Ms. Marshall due to her constant complaints of pain and general negativity. Mr. Childs also found it difficult to be around Ms. Marshall at times, and resented her constant requests for help around the house when he was home from deployments.
- [303] Ms. Marshall's husband left her in August 2016. While, understandably, I did not hear from Mr. Theobald, I accept the evidence of other witnesses, in particular Ms. Childs, that the two MVAs put a strain on their relationship, with Mr. Theobald having to pick up a larger share of housework and childcare, and Ms. Marshall less able to contribute financially.
- [304] Ms. Marshall is a resilient person. She was able to cope with moving out of the family home before graduating from high school due to the breakdown in her relationship with her mother. She was able to cope with her chronic knee condition, which, while it periodically affected her, and required two surgeries, did not impede her educational, personal and

professional achievements. The pain and limitations caused by the two MVAs, and especially the exacerbation of her injuries caused by the 2016 MVA, pushed her past her ability to cope as she would otherwise have been able to with the challenges caused by C.'s behavioural issues and the breakup with her husband.

- [305] Fortunately, Ms. Marshall has continued to persevere. She enjoys playing Pokemon Go with her friends, which enables her to socialize and to get exercise while walking. Not coincidentally, she has lost a significant amount of weight. She has attended many forms of therapy to try to get better and improve her function, including seeing three different counsellors. She retains the support of family and friends. She has been able to return to full time work as a contact tracer, and it is reasonable to expect that with her character and abilities she will be able to pursue meaningful work in future. Dr. Filbey's prognosis is that she will have stability, and a slow reduction in symptom burden. All of these factors point to a brighter future for Ms. Marshall, albeit one where she will continue to be hampered by the effects of the two MVAs.
- [306] I found that the plaintiffs in the cases relied upon by Ms. Marshall generally had more significant injuries that had a more significant impact on their lives than Ms. Marshall. For example, the plaintiff in Best had a spinal injury and conversion disorder which left him in constant pain, unemployable and unable to walk without the use of a cane. The plaintiff in Felix suffered more severe injuries than Ms. Marshall in a roll-over accident that killed her boyfriend. In addition to her upper and lower body physical injuries, Ms. Felix was being treated for depression and PTSD, for which the prognosis was poor. Likewise, the plaintiff in Moges suffered more severe injuries than Ms. Marshall, described at para. 176 as "pain in his neck, low back, right shoulder, knee, and left ankle; migraine headaches; myofascial pain; chronic pain; central sensitization; moderately severe major depressive disorder; moderately severe generalized anxiety disorder; and somatic symptom disorder with predominate pain of moderate severity. These, in turn, have lead to kinesiophobia, insomnia, fatigue, and difficulties with concentration and memory. His physical activities are restricted to short walks, limited driving, and sedentary tasks lasting less than an hour in duration." Happily, Ms. Marshall is less severely limited than these plaintiffs.
- [307] The case relied upon by Ms. Marshall which I find of most assistance is Raedwulf. Ms. Raedwulf's injuries were somewhat different from Ms. Marshall. They both suffer from chronic pain, but Ms. Raedwulf was also diagnosed with a minor traumatic brain injury. Both were in two accidents, with the second accident significantly worsening the effects of the first. Both were mothers of young children, just embarking on their careers. They both were less able to enjoy their lives, had become withdrawn and had impaired social relationships as a result of their injuries.
- [308] On the other hand, I found the impact of the injuries to the plaintiffs in the cases relied upon by the defendants to be generally less significant than in Ms. Marshall's case. The plaintiff in Scarfe, for example, injured his knee and shoulder, but did not appear to have mitigated his damages. In their submissions, the defendants recognized that the damages

in his case were lower than one might expect, and I do not find it helpful in assessing Ms. Marshall's damages. The plaintiff in Merko had lost enjoyment in life as a result of her injuries, but was able to continue full-time employment.

[309] Perhaps the most on point of the defendants' cases is Moon. The plaintiff in that case was a nurse who was 30 years old at the time of the accident. She suffered from chronic neck, back and shoulder pain. Unlike Ms. Marshall, however, Ms. Moon had been able to maintain full-time employment. Her athletic activities were limited, although she was still able to run a half marathon. Her relationships with her spouse and child had been adversely affected, although not to the extent of Ms. Marshall's relationships. In their submissions, the defendants note that Ms. Moon's injuries were less significant than Ms. Marshall's, but not significantly so.

[310] I find the following statement of Madam Justice Murray in *Raedwulf* of assistance in assessing Ms. Marshall's damages:

[109] An award of non-pecuniary damages does not depend upon the seriousness of the injury, but on its ability to ameliorate the condition of the victim considering his or her particular situation. The gravity of the injury alone is not determinative. An appreciation of the individual's loss is the key. There is no "tariff". An award will vary in each case to meet the specific circumstances of the individual case: *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629 at 637.

[311] Taking into account the fact that the plaintiff in *Raedwulf* suffered a traumatic brain injury, which had cognitive impacts on her not found in Ms. Marshall's case, I conclude that an award of \$160,000.00 is appropriate in this case. In making this assessment, I emphasize that I am awarding damages solely for the injuries Ms. Marshall suffered in the two MVAs, and not for her chronic knee condition or the aggravations she suffered of that condition in the August 2016 Slip and Fall and the July 2020 knee injury or the other non-tortious injuries suffered by her, in particular the 2017 avulsion fracture.

Loss of Earning Capacity

[312] The parties are some distance apart with respect to Ms. Marshall's loss of earning capacity, both past and future. Ms. Marshall seeks an award of \$368,775.00 net for past loss of capacity, and an award in the range of \$1,400,000.00-\$1,800,00.00 for future loss of capacity. The defendants submit that Ms. Marshall is entitled to an award in the range of \$81,000.00-\$188,000.00, less a 15% reduction for a failure to mitigate, for past loss of capacity. They submit an award of \$50,000.00-\$230,000.00 is appropriate for future loss of capacity.

Vocational Rehabilitation Expert Evidence and Findings

- [313] Two witnesses were accepted as experts with respect to vocational assessment, rehabilitation and return to work plans: Mr. Mark Bhopal, who performed a comprehensive vocational assessment of Ms. Marshall on March 10 and 11, 2021, and provided a report dated March 29, 2021, and Mr. Anthony DeMartines, who provided a rebuttal report, dated May 13, 2021.
- [314] Mr. DeMartines agreed with the majority of Mr. Bhopal's report. There was one exception, which was based upon Mr. DeMartines' assertion that Mr. Bhopal had identified the incorrect National Occupational Classification numbers ("NOC"s) for the vocational options he considered for Ms. Marshall. Neither report included copies of the actual NOCs referred to by Mr. Bhopal and Mr. DeMartines, and the Court is accordingly not in a position to determine what the correct NOCs are. In my view, it does not matter, as regardless of the correct NOCs, I accept that Mr. Bhopal's report is a generally reliable assessment of Ms. Marshall's vocational options.
- [315] One limited exception to that observation is that Mr. Bhopal wrote that he was not aware of any related pre-existing conditions that were evident prior to the two MVAs. On the evidence before the Court, it is apparent that Ms. Marshall did have a pre-existing knee condition, for which she had received surgery prior to the first MVA.
- [316] I accept Mr. Bhopal's opinion that Ms. Marshall is, as a result of the two MVAs, unable to tolerate the general physical demands of the nursing profession. Her work capacity has been reduced. Nursing is a medium strength position, which may include heavy strength requirements.
- [317] It is clear from Mr. Bhopal's report that Ms. Marshall was well-suited to nursing, and happy in that career. Her goal had been to advance her career by returning to university to obtain a relevant Masters degree. She is now unable to work full-time as a registered nurse. I accept that as a result of the MVAs, she will be required to explore suitable, alternative long-term options.
- [318] Nursing is, as indicated in Mr. Bhopal's report, a high opportunity profession.
- [319] Ms. Marshall would prefer to remain in a healthcare capacity. This is understandable, in light of the time she has invested in nursing, and her aptitudes and interests.
- [320] Mr. Bhopal identified four vocational options which he believed Ms. Marshall may wish to consider: clinical nurse educator, nurse practitioner, public health nurse manager, and clinical social worker. Mr. Bhopal stated in relation to these occupations:

From a physical perspective, the occupations listed are light duty in nature and will allow Ms. Theobald to likely remain competitively employable. However, her lack of experience as a registered nurse and the significant amount of experience required in the occupations above will hamper her employability especially when competing with other applicants who possess considerable experience. If she is unable to obtain employment in one of these occupations, it is likely she would be best suited as a nursing unit clerk.

[321] All of these occupations, save for the unit clerk, for which Ms. Marshall is already amply qualified, would require a Masters degree, which would take two years to complete full-time, or part-time within five years. Mr. Bhopal's opinion, which I accept, is that it would be reasonable for Ms. Marshall to apply for a Master's program in the healthcare field. In this regard, I do not accept Mr. DeMartines' suggestion that Ms. Marshall may not need further training in order to pursue the occupations identified by Mr. Bhopal. Whatever NOC might be correct, these are clearly all occupations which would require further education.

[322] Mr. Bhopal opined that Ms. Marshall's lack of experience as a registered nurse would put her at a significant disadvantage in these fields. I accept that she would be at some disadvantage as a result of her comparative lack of experience as a nurse. However, I do not believe that that disadvantage is necessarily as significant as suggested by Mr. Bhopal. Nursing is broader than just bedside direct patient care. Ms. Marshall has been gaining experience and seniority since November 2020 as a nurse while working as a contact tracer. Further, she has strong academic skills, and is a hard worker, who is able to achieve the goals she sets herself. In my view, these traits would serve Ms. Marshall well in any future career path she may set herself.

[323] Mr. Bhopal opined, and I accept, that at present relocation to another community to gain experience is not a viable option for her, given that C. is living in a group home in Victoria. This may change in future, as Ms. Marshall testified that it is her goal to have C. live at home again. It is also possible that a similar group home could be found in another community.

[324] Ms. Marshall testified that her separation agreement requires her to remain in the Victoria area. I have not seen the separation agreement and do not know its specific terms. Whatever its terms, it is possible she could apply to be able to relocate to pursue academic and vocational pursuits.

[325] I accept Mr. Bhopal's opinion that Ms. Marshall would benefit from meeting a disability student advisor at a relevant university to discuss program details and obtain further information.

Economist Expert Evidence

[326] Doug Hildebrandt provided an expert report, dated April 8, 2021, dealing with both Ms. Marshall's past and future loss of capacity, and the cost of her future care. Robert Wickson provided a responsive report, dated May 13, 2021. Mr. Wickson generally agreed with Mr.

Hildebrandt's calculations, with only two exceptions. Those had to do with the chances that Ms. Marshall would voluntarily work part-time in future or voluntarily choose not to participate in the labour force through to age 67. In Mr. Wickson's view, allowing for voluntary part-time work and assuming that possible non-participation in the labour force would move to the average for women of Ms. Marshall's age and education over a period of ten years would allow for labour market contingencies about 15% lower than those used by Mr. Hildebrandt in his calculations. I address this issue in my analysis of Ms. Marshall's future loss of capacity.

Past Loss of Earning Capacity - the law

- [327] An award for past loss of earning capacity is intended to compensate a plaintiff for the value of the work they would have performed but were unable to perform because of injuries caused by the defendant's negligence: *Matias v. Lou*, 2015 BCSC 544 at para. 83. Lost income can be a way to measure past loss of capacity: at para. 84. It is a hypothetical assessment guided by the plaintiff's earnings prior to the accident, not an exact calculation: *Stoneson v. Testa Estate*, 2015 BCSC 1549 at para. 44.
- [328] As stated by Mr. Justice Abrioux in *Karim v. Li*, 2015 BCSC 498 at para. 133:
- [133] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at 470.
- [329] This is consistent with Grauer J.A.'s statement in *Rab v. Prescott*, 2021 BCCA 345 [Rab] at paras. 27 and 28, with respect to hypothetical events, past and future:
- [27] As this Court observed in *Dornan v Silva*, 2021 BCCA 228 at para 134, the process of determining whether a hypothetical future event is a real and substantial possibility can be a difficult task:

By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence .

- [28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v Naumann*, 2017 BCCA 158:
- [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.

Past Loss of Earning Capacity Facts and Findings

[330] In this section, I summarize the key facts relevant to the assessment of Ms. Marshall's past loss of earning capacity, and make my findings with respect to those losses.

2012 MVA to April 2015 graduation from nursing school

[331] In 2010, Ms. Marshall earned \$38,110.00; in 2011, \$35,910.00; and in 2012, \$13,457.00, all as a unit clerk. In those years, she worked 1,398, 1,203 and 451 hours respectively. Her hourly wage was \$20.77, so her gross income in those years must have included some overtime or other premium shift work.

[332] Ms. Marshall started her nursing program in September 2011. Ms. Marshall continued her work as a unit clerk on a casual basis while in nursing school. Between September 2011 and July 2012, she worked approximately 59 hours per month as a unit clerk. In August 2012, Ms. Marshall took maternity leave from her unit clerk casual position.

[333] She gave birth to her child, M., in October 2012, and continued her nursing studies uninterrupted. The 2012 MVA occurred on the last day of classes in the 2012 fall semester. She continued her studies in January 2013.

[334] Ms. Marshall did not return to work as a unit clerk until August 2013. Ms. Marshall testified, and I accept, that she had intended to return to work earlier, as she had done after the birth of C., but she was unable to do so due to pain in her neck, back and shoulder caused by the 2012 MVA. I find that there is a real and substantial possibility she would have returned to work as a unit clerk in or about February 2013, absent the 2012 MVA.

[335] Ms. Marshall testified, and I accept, that she was unable to work as many hours as a unit clerk after her return to work as she would have liked, again due to pain in her neck, back and shoulder caused by the 2012 MVA. I find that there is a real and substantial possibility she would have worked the same number of hours on average, absent the 2012 MVA. As it was, she worked approximately 16 hours per month between August 2013 and April 2015.

[336] Considering the period between the 2012 MVA and Ms. Marshall's graduation from nursing school, I find that she would have worked between February 2013 and April 2015 as a unit clerk, for an average of 59 hours per month, for a total of 1,534 hours. With the 2012 MVA, she worked 344 hours in that period. Therefore, she worked approximately 1,190 hours less in that period because of the 2012 MVA. At an hourly rate of \$20.77, this amounts to a gross loss of \$24,716.30. Deducting income tax and employment insurance contributions on the percentage basis suggested by Mr. Hildebrand, one arrives at an approximate net loss for this period of \$23,777.00.

- [337] There is no evidence that Ms. Marshall suffered any limitations in this period by virtue of her knee that did or would have affected her income.

April 2015 graduation from nursing school to trial

- [338] Ms. Marshall graduated with her BSN in April 2015. She began working as an RN for VIHA at the end of May 2015. Between June 2015 and February 2016, Ms. Marshall worked an average of approximately 138 hours per month, for a total of 1245 hours.
- [339] The 2016 MVA occurred on March 1, 2016. Ms. Marshall worked 23 hours in March 2016 and 23 hours again in May 2016. She worked no other hours between March 2016 and October 2017.
- [340] The Slip and Fall occurred on August 1, 2016. The parties agree that Ms. Marshall was unable to work from September 2016 to October 2017. I find that between August 2016 and in or about November 2016 she would likely have been unable to work due to the Slip and Fall, as she was on crutches and then recovering from the effects of the Slip and Fall. However, she was also unable to work during that period due to the two MVAs. Either the August 2016 Slip and Fall or the two MVAs would have been sufficient, on their own, to render her unable to work in that period. After she recovered from the August 2016 Slip and Fall, Ms. Marshall continued to be unable to work due to the two MVAs.
- [341] In July 2017, Ms. Marshall suffered the avulsion fracture to her right ankle. She wore a walking boot for six weeks, during which time she would have been unable to work due to the avulsion fracture. The avulsion fracture delayed her planned graduated return to work from September 2017 to October 31, 2017.
- [342] Starting on October 31, 2017, Ms. Marshall attempted a graduated return to work. She worked 34 hours in November and 22 hours in December 2017. The graduated return to work was unsuccessful, and Ms. Marshall was unable to work between December 9, 2017 and November 2020. In November 2020, Ms. Marshall started work as a COVID-19 contact tracing RN. She continued to work in that position as of trial in July 2021. At time of trial, it was uncertain how long that position would continue.
- [343] In July 2020, Ms. Marshall suffered a knee injury. She was on crutches and suffered significant pain. In November 2020, she had the synovial fluid injection to which she had such an adverse reaction. I find that she would have been unable to work due to the knee injury from July 2020 to in or about November 2020, when she began work as a contact tracer. It is fortunate that she was able to obtain the contact tracer position at that time, and a testament to her work ethic that she was able to continue in it, given the pain she was experiencing in her knee in November and December 2020.

- [344] A significant factor in assessing Ms. Marshall's past loss of earning capacity after her graduation from nursing school, and her future loss of earning capacity, is considering what her educational and career trajectory might have been but for the MVAs, and what it may be now, in light of the two MVAs.
- [345] Ms. Marshall testified, and I accept, that her intention was to work as a nurse for two to three years following graduation with her BSN, and then to return to university to obtain her Masters in public health nursing or a nurse practitioner program. She testified that she planned to continue working part-time while studying. Given her track record of working as a unit clerk while studying for her BSN, and continuing her BSN studies uninterrupted following both the 2012 MVA and the birth of her child M., I find that there is a real and substantial possibility she would have done so.
- [346] A Masters in public health would have taken five years of study on a part-time basis. A nurse practitioner program would have required two years of full-time study. Depending on which program Ms. Marshall chose to pursue, and whether she began the program two or three years following her graduation, Ms. Marshall may or may not have finished her further degree by the time of trial, absent the MVAs. It is obviously impossible to know for certain whether she would have done so. The Court must concern itself with real and substantial possibilities.
- [347] Mr. Hildebrandt provided several scenarios in his report. Assuming Ms. Marshall completed her Masters by trial, her cumulative adjusted and discounted income to trial would have been \$261,325.00. From that, one would have to deduct her actual income in that period, which was \$132,924.00, to arrive at a figure of \$128,401.00.
- [348] Assuming Ms. Marshall did not return to university, and worked as a registered nurse to time of trial, her cumulative adjusted and discounted income for the same period would have been \$422,164.00. Deducting her actual income in that period, one arrives at a gross total of \$289,240.00.
- [349] Mr. Hildebrandt was not asked to take into account any periods of time Ms. Marshall would not have worked due to non-MVA-related causes in this time period. I find that she would have been unable to work due to non-MVA-related causes for approximately four months following the August 2016 Slip and Fall, for at least six weeks following the July 2017 avulsion fracture, and for at least two months after the July 2020 knee injury. This is a total of approximately seven-and-a-half months during which Ms. Marshall would have been unable to work as nurse for non-MVA-related reasons in this approximately 73-month period. This means that she would have been unable to work due to non-MVA-related reasons for approximately 10% of this period. I consider it appropriate to reduce her claim for past loss of earning capacity for this period by that amount, under either scenario.
- [350] Ms. Marshall submitted that her past loss of earning capacity, on either scenario, should be increased by 40% to factor in the loss of overtime and statutory holiday and other shift premiums. The defendants submitted that there was an insufficient evidentiary basis to do

so, noting that Ms. Marshall's calculations of these amounts appeared only in final submissions, and the factual foundation for them was not put to Mr. Hildebrand or any other witness. The only evidentiary basis for them is Ms. Marshall's total earnings in 2011, 2012 and 2013, which were greater than her hourly rate. But those were her earnings as a unit clerk, and not as a registered nurse, and there was no evidence of the makeup of her total earnings, for example the amount of overtime worked. Further, as the defendants point out, those years were before the birth of Ms. Marshall's second child or the end of her marriage. I find that Ms. Marshall has not established the evidentiary foundation necessary for me to accept that her award for past loss of capacity should be increased by 40%.

- [351] Considering the real and substantial possibilities that, absent the MVAs, Ms. Marshall may have completed her Masters by trial, but also may have been delayed in doing so by virtue of her separation from her former spouse and childcare responsibilities, I find that it is reasonable to assess her loss of income capacity for the period May 2015 to trial on the basis that there is a 50% likelihood she would have completed her Masters by trial. I therefore arrive at a gross loss of \$208,829.50. I reduce this by 10% to take account of work time lost due to non-MVA causes, to arrive at a gross figure of \$187,946.55. Applying the 13.7% figure provided by Mr. Hildebrandt to assess income taxes and EI contributions, I arrive at a net figure of \$162,197.87 for the period May 2015 to trial.
- [352] The defendants submitted that Ms. Marshall's past loss of capacity should be reduced by 35% to account for non-MVA-related medical challenges. They also submitted that her award should be reduced by 15% due to her alleged failure to mitigate. They based this submission on the fact that Ms. Marshall testified she has not looked for work outside of Island Health, such as in private health care or non-health care related fields.
- [353] In dealing with Ms. Marshall's past loss of capacity, I took into account the time periods she was unable to work due to non-MVA-related reasons, and reduced her award by 10% to account for them. No further reduction is warranted.
- [354] The defendants bear the burden of establishing a failure to mitigate: *Mullens v. Toor*, 2016 BCSC 1645 at para. 102. They must show that the plaintiff failed to take reasonable steps that would have likely reduced her damages. I am not persuaded that Ms. Marshall has failed to mitigate her damages. She has trained to become a nurse, a career she is passionate about. It is reasonable that she has chosen, to this point, to focus her return to work efforts on returning to work with her employer, Island Health, as a nurse, especially in light of their rigorous duty to accommodate program, a program which she has actively participated in and which enabled her to obtain her position as a contact tracer. The defendants did not establish that there were other positions available to Ms. Marshall to date which she ought reasonably to have accepted.

Conclusion on past loss of capacity

[355] As indicated above, I have determined that Ms. Marshall's net income loss between the 2012 MVA and her graduation from nursing school was \$23,777.00. Her net income loss between graduation and trial was \$162,197.87. This amounts to a total of \$185,974.87. I round this up to \$186,000.00 as my assessment of Ms. Marshall's loss of earning capacity to trial. In my view, this is a fair and reasonable assessment of her total loss of earning capacity to trial.

Future Loss of Earning Capacity

[356] The Court in *Parypa v. Wickware*, 1999 BCCA 88 [Parypa] at paras. 62 and 63 stated:

[62] The principles relevant to determining the quantum of damages for future loss of earning capacity are well established. It is clear that this determination is not a precise or mechanical exercise. The difficult and inherently uncertain task of predicting the future is described in the following oft quoted passage by Dickson J, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?

[63] This passage makes clear the principle that it is not the lost earnings themselves that must be compensated, but loss of earning capacity as a capital asset that requires compensation. There are several cases in this court which confirm that the capital asset approach is correct: *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 380; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44; and *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393.

[357] The court "must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence": *Parypa* at para. 67. The court must further consider all appropriate contingencies, both positive and negative, general and specific: *Djukic v. Hahn*, 2006 BCSC 154 [Djukic] at paras. 104 to 108, *aff'd* 2007 BCCA 203. General contingencies include "the potential for improvement in health, opportunities for advancement and the 'usual chances and hazards of life.' [citation omitted]": *Djukic* para. 105.

[358] An award for loss of earning capacity must be based on an assessment rather than a mathematical calculation, although mathematical calculation can be an acceptable starting point and useful tool for arriving at a best estimate, in appropriate cases: *Parypa* at paras. 68, 69 and *Djukic* at para. 105. The court must come to a conclusion that is fair and reasonable in light of the evidence and all of the circumstances: *Parypa* at para. 70.

[359] Recently, in *Rab*, the Court of Appeal restated the analytical structure to be employed in assessing loss of future earning capacity. The Court stated:

- [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.
- [48] In this case, as we have seen, the judge correctly stated the test at para 88: he must determine "whether the respondent had proven that there is a real and substantial possibility of a future event leading to an income loss." But, in effect, he skipped that step altogether. He concluded at para 89 that the respondent had suffered a loss of capacity due to the aggravation of her pain, increased migraines, and reduced energy, thereby becoming "less valuable to [her]self as a person capable of earning income in a competitive labour market". That loss of capacity was the future event in question. What he did not articulate was any analysis of whether there was a real and substantial possibility that this loss of capacity would cause a pecuniary loss in the future, nor did he proceed to articulate an assessment of the relative likelihood of any such possibility occurring.
- [360] In some cases, such as this one, the first step is relatively obvious and straightforward. As *Grauer J.A.* stated at para. 29:
- [29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* was such a case.
- [361] I would add that the second step is obvious in some cases as well. *Ms. Marshall's* is a case in point, as there is no issue that she will suffer some pecuniary loss in future. The real question arises in her case at the third step, which is assessing the value of her possible future losses.
- [362] Both parties cited Mr. Justice Voith's decision in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 [Pololos], as setting out the relevant legal principles at para. 133:
- [133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [363] I note the Court of Appeal in *Rab* referred to *Pololos* with approval at paras. 65 and 74. It is consistent with the Court of Appeal's restatement of the approach to assessing future loss of capacity in *Rab*.
- [364] The defendants submitted that a capital asset approach is appropriate in this case, while Ms. Marshall submitted an earning approach was preferable. I agree with Ms. Marshall on this point. She already had a clear career trajectory in nursing prior to the MVAs. While the 2012 MVA had some impact on the trajectory, by the time the 2016 MVA occurred, she was on the road to a "new normal" for her career plans. She was clearly dedicated to pursuing her nursing career, continuing her education despite both the 2012 MVA and the birth of her second child, M. There is every reason to believe that, absent the MVAs, that path would have continued as she planned, including returning to university to earn a Masters in public health or to enter a nurse practitioner program.
- [365] That said, this is a complex case for a number of reasons, and the Court must be alive to all the real and substantial possibilities, negative and positive, in assessing Ms. Marshall's future loss of capacity.

- [366] In assessing Ms. Marshall's past loss of capacity, I held that there was a fifty percent chance she would have completed her Masters by time of trial, absent the MVA. I find there is a real and substantial likelihood that if she had not completed it by the time of trial, should would have done so within three years of trial.
- [367] Mr. Hildebrand provided the following calculations of possible future income projections for Ms. Marshall. Absent the MVAs, if Ms. Marshall had worked as a registered nurse to retirement at age 67, the projected income would be \$1,829,579.00. If she had completed her Masters degree by trial, the projected income would be \$2,191,357.00 or \$2,261,585.00 to retirement, depending on the specific degree she obtained and career path she took. Turning to with MVA scenarios, if she completed her Masters degree by January 1, 2024, the projected future income would be \$1,962,271.00 or \$2,018,152.00, again depending on the specific degree she obtained and the career path she took. If she completed her Masters degree by January 1, 2027, then the projected future income would be \$1,777,590.00 or \$1,818,587.00, depending on the same variables. Finally, if she worked as a unit clerk from January 1, 2022, the projected future income would be \$971,000.00.
- [368] Given my finding that, absent the MVAs, there is a real and substantial likelihood Ms. Marshall would have completed her Masters, if not by the time of trial, then within three years of trial, I am going to base her without MVA projected income on a mid-point between those two possibilities. I am also going to base her without MVA projected income on an average of the two amounts in each stream. The average of the Masters completed by trial figures is \$2,226,471.00. The average of the Masters completed by January 1, 2024 figures is \$1,990,211.50. Averaging those two figures, one arrives at a without MVA projected future income of \$2,108,341.25.
- [369] I turn to Ms. Marshall's projected future income with the MVAs. As Dickson J. wrote in *Andrews*, we must now gaze more deeply into the crystal ball. Her likely worst case scenario is that she works as a unit clerk. She is qualified, her employer is prepared to have her return to the position, and her MVA-related injuries should not be a barrier. It is possible, however, that her employer will succeed in finding her a nursing position in which she can work with accommodations. It is also possible that she will choose to return to university, and obtain a Masters degree by 2027, and work at a higher wage as a nurse. These are all real and substantial possibilities.
- [370] In my view, it is roughly equally likely that Ms. Marshall will work as a unit clerk as that she will follow one of the two nursing streams. I also think it is roughly equally likely that Ms. Marshall will take either of the two nursing streams. Given the delay she has experienced in returning to university, the Masters stream is becoming progressively less financially preferable to working as registered nurse. That said, it is likely that Ms. Marshall could obtain a less physically taxing nursing position with a Masters, and she has always been highly motivated to further her education, so that may be an option she chooses.

- [371] I will therefore weight the future possibilities, as 50% unit clerk (\$971,000.00), 25% registered nurse (\$1,829,579.00) and 25% Masters by 2027 (\$1,789,088.50) (taking the average of those two figures). One arrives at a weighted average of \$1,390,166.88. Deducting this figure from what I already determined was Ms. Marshall's likely without MVA future income of \$2,108,341.25, one arrives at a figure of \$718,174.37.
- [372] I now consider several arguments made by both parties with respect to the award for future loss of capacity. Ms. Marshall submitted all figures should be increased by 40% to account for overtime and other premium rates of pay. She has not provided the evidentiary foundation necessary to ground this argument, and I reject it.
- [373] The defendants, as mentioned earlier, submitted that a capital asset approach was appropriate. For the reasons already given, I do not agree.
- [374] Relying on Mr. Wickson's opinion, the defendants submitted that there should be a 15% reduction in future loss of capacity. I do not agree, and prefer the approach taken by Mr. Hildebrand. Ms. Marshall has a very strong attachment to the workforce. As a single mother with a special needs child she is most unlikely to voluntarily choose part-time employment. Given the delays she has experienced in her career, she is not likely to voluntarily withdraw from the labour force early. There is no basis to increase the contingencies to take account of these unlikely events.
- [375] The defendants submitted that Ms. Marshall's future loss of capacity should be reduced by 35% to account for non-MVA-related medical challenges. They also submitted that her award should be reduced by 15% due to her alleged failure to mitigate. I have already dealt with substantively the same submissions in dealing with Ms. Marshall's past loss of capacity.
- [376] In dealing with Ms. Marshall's past loss of capacity, I took into account the time periods she was unable to work due to non-MVA-related reasons, and reduced her award by 10% to account for them. Given her history of chronic knee problems, I will reduce her award for future loss of capacity by the same amount to account for the real and substantial possibility those problems will recur, and cause her to lose some time from work.
- [377] I am not persuaded that Ms. Marshall will fail to mitigate her damages. There is no reason to think that if Island Health, in future, is unable to offer Ms. Marshall permanent work in a nursing position that meets her accommodation needs, that she will not take a unit clerk or some other position that meets her physical limitations.
- [378] Reducing the figure earlier arrived at for future loss of capacity by 10%, one arrives at a figure of \$646,356.93. Standing back, and considering what is fair and reasonable in all of the circumstances, I consider it appropriate to increase that to \$650,000.00 as Ms. Marshall's award for future loss of capacity. In my view, this fairly takes into account the various future real and substantial possibilities, including those related to how long Ms. Marshall's contact tracer position will continue.

Cost of Future Care

[379] Ms. Wilson made future care recommendations in her report. Mr. Hildebrand provided multipliers to assist the Court in assessing the present value of any future care items awarded. Ms. Marshall adopted Ms. Wilson's recommendations, totalling \$778,770.00, plus \$26,278.00 for over-the-counter medications. The defendants made submissions about each of the items recommended by Ms. Wilson. The total value of the items they submit should be awarded is \$32,706.70.

[380] The law is clear that the test for a claim for the cost of future care is whether there is a medical justification for the claim, and whether the claim is reasonable: *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33 (S.C.) at para. 84. The applicable principles were summarized by Mr. Justice Schultes in *Warick v. Diwell*, 2017 BCSC 68, aff'd 2018 BCCA 53, at paras. 202-209. Of note is that evidence of the specific care need not be provided by a doctor, but there must be some evidentiary link between a physician's assessment of pain, disability and treatment, and the care recommended by a qualified health care professional. Further, damages are to be assessed, not mathematically calculated.

[381] By way of context in considering Ms. Wilson's recommendations, it is helpful to summarize the care Ms. Marshall has received to date. According to the agreed statement of facts, Ms. Marshall has had the following treatments since the first MVA:

Item

MVA1-2013

2014

2015

2016

2017

2018

2019

2020

Total

Physiotherapy

11

1

9

18

27

54

Chiropractic

21

12

4

17

4

4

9

38

Massage Therapy

16

3

9

7

16

Counselling

3

3

Kinesiology

12

14

11

33

58

General Practitioner

9

7

3

21

15

5

2

62

Occupational Therapy

3

4

1

8

TOTAL:

57

35

7

76

34

6

24

76

239

[382] Not all of those treatments have been related to the MVAs, but there is no agreement on how many have been. In addition to the 239 treatments included in the agreed statement of facts, Ms. Marshall testified that she saw a physiotherapist in 2017 for approximately 20 sessions, and attended a work conditioning program in 2017 or 2018, prior to her shoulder surgery, which was five days a week for seven weeks. Also not included in the agreed statement of facts are Ms. Marshall's 2021 treatments. She testified that she has been to physiotherapy, kinesiology and massage therapy in 2021, for an estimated 50 sessions to time of trial, but has not seen a chiropractor because funding ended when the pandemic

struck. At time of trial she had not yet gone back to the chiropractor, although she has the necessary note. There were some gaps in other treatments due to the COVID pandemic, and she testified she deteriorated in the absence of treatment. The physiotherapist performs IMS and strengthening. She finds the IMS helpful.

[383] Ms. Marshall testified that she would attend all the treatments recommended in Ms. Wilson's report.

[384] I will review each of the items recommended by Ms. Wilson and make my decision with respect to each of them.

Occupational Therapy

[385] Ms. Wilson recommended a one-time item of four sessions with an occupational therapist to educate Ms. Marshall on matters such as body mechanics. Ms. Branscombe agreed this was reasonable. The defendants accepted that they were, but submitted no report or travel costs were appropriate. They agreed to the \$480.00 recommended for the four sessions, and submitted that this should be split 65/35, on the assumption that the training would relate to both the upper and lower body.

[386] I agree that the four training sessions are appropriate at a cost of \$480.00. I also accept the need for some kind of reports documenting the training, for the benefit of both Ms. Marshall and her other health care providers, at a cost of \$120.00. No basis for the travel cost has been established, as there is no information about the identity or location of the provider. Using Mr. Hildebrand's multiplier, the present value of the training and reports is \$594.00.

[387] I accept that some reduction of this occupational therapy cost is appropriate, as it is reasonable to assume that at least some of the training would relate to Ms. Marshall's lower body, particularly given Ms. Wilson's findings with respect to Ms. Marshall's limitations with kneeling, stooping and crouching. I reduce this item by 10%, to arrive at an award of \$534.60.

[388] Ms. Wilson also recommended a one time only cost of \$240.00 for an occupational therapist supervising a kinesiologist. I agree with the defendants that this is unnecessary, and decline to order it.

Kinesiologist

[389] Ms. Wilson recommended that a kinesiologist provide Ms. Marshall with eight sessions over four months, followed by six sessions over the following six months. This would have a total cost of \$1050.00. Mr. Hildebrand calculates a present value of \$1091.00. This recommendation is supported by both Dr. Saliken and Dr. Filbey.

- [390] The defendants accept that this recommendation is reasonable. I agree with them that some reduction of this item is necessary, and again do so by 10%, for an award of \$981.90.

Yoga

- [391] Ms. Wilson recommended six sessions of therapeutic yoga with a meditation component. The total cost would be \$270.00. This recommendation is consistent with Dr. Filbey's report, and Ms. Branscombe agreed with it. Despite this, the defendants oppose it, on the basis Ms. Marshall has shown no interest in yoga.
- [392] I consider this recommendation to be reasonable. I accept Mr. Hildebrand's calculation of the present value of the cost at \$281.00. Once again, I reduce this item by 10%, particularly as Ms. Wilson specifically mentions Ms. Marshall's knee pain in connection with it, for an award of \$252.90.

Multi-disciplinary pain program

- [393] Ms. Wilson recommends a multi-disciplinary pain program consisting of 20 sessions. She notes it would cost between \$100.00 and \$2,500.00 after MSP contribution or \$14,500.00 if fully funded.
- [394] No other experts recommend such a program. Such programs may be available through publicly funded sources, albeit with wait times. There would be inevitable overlap between the services offered as part of such a program and other future care costs I am awarding. In the circumstances, I am not persuaded that it is reasonably necessary, and decline to order it.

Physiotherapy, Massage, Chiropractic and Acupuncture

- [395] It is convenient to deal with these four types of treatments together. Ms. Wilson recommends 12 sessions per annum of each of physiotherapy, massage therapy, chiropractic and acupuncture, as needed until symptoms resolve. She provided a cost per session of \$75.00 for physiotherapy and chiropractic, \$105.00 for massage therapy, and \$55.00 for acupuncture.
- [396] The defendants oppose all of these items on the basis of Ms. Branscombe's opinion that these therapies provide only transient pain management with no improvement in functional performance. In my view, that does not render such treatments not medically necessary, as transient pain management may be an important component of an overall treatment plan. Clearly, such therapies have been of assistance to Ms. Marshall in the past, as she has attended all of them.

- [397] Dr. Filbey recommended access to a passive modality for acute or chronic worsening. He foresaw a need for not more than 12 sessions per year. He did not specify which kinds of passive therapies. Dr. Saliken recommended long term massage therapy, chiropractic and physiotherapy for Ms. Marshall's shoulder region symptoms.
- [398] Dr. Jovic did refer Ms. Marshall to acupuncture early on, but it is not recommended by Dr. Filbey or Dr. Saliken. The defendants note that Ms. Marshall has not attended acupuncture since 2016, although Ms. Marshall submits that is because ICBC stopped paying for such sessions at that time.
- [399] I do not consider acupuncture to be medically justifiable in this case, and decline to order it.
- [400] On the basis of Dr. Filbey and Dr. Saliken's opinions, I find that Ms. Marshall should have access to massage therapy, chiropractic and physiotherapy, and order compensation for 12 sessions of each on an annual basis. There is no suggestion any of these therapies would be for Ms. Marshall's knee condition, I therefore do not reduce these items. I accept Mr. Hildebrand's present value calculations of \$27,856.00 for physiotherapy, \$27,856.00 for chiropractic, and \$38,999.00 for massage therapy.

Counselling

- [401] Ms. Wilson recommends 12 counselling sessions initially, to be followed by four blocks of eight sessions, to be utilized as needed over Ms. Marshall's lifetime. She provides a cost of \$1,800.00 for the initial block, and \$4,800.00 for the following four blocks. She writes that such sessions may be used for depressive symptoms or life stressors related to her limitations while caring for a special needs' child while managing her own physical disability.
- [402] The defendants oppose this award. They note that no other experts, except for Dr. Jovic early on, recommended counselling. Ms. Marshall is also receiving counselling at no cost.
- [403] In terms of her mental health, Ms. Marshall testified that she has had some counselling, which helped. She described a number of circumstances that she believes have contributed to her depression, including chronic pain, financial problems, the accidents and everything piling on top. She has been negative at times, and has lost friendships and family over the circumstances in her life, which she says some people don't want to hear about. She also referred in this connection to her decision to put her son into care, which was very challenging.
- [404] In the absence of evidence of a psychiatric diagnosis, or any doctor recommending counselling recently, and given that Ms. Marshall has been receiving counselling from public sources at no cost, I am not persuaded that this item is medically justifiable, and decline to order it.

- [405] Ms. Wilson also recommended group sessions with a psychologist known as BCALM. Dr. Filbey specifically recommended this program, and the defendants accept it is reasonable. The cost is only \$32.00 for a workbook, as the program itself is covered by MSP. I see no reason that this item should be reduced, and it will be born solely by the defendants. Its present value, as calculated by Mr. Hildebrand, is \$35.00.

Transferable Skills Analysis, Labour Market Study and Job Coach

- [406] Ms. Wilson recommends a transferrable skills analysis at a cost of \$800.00, a labour market study at a cost of \$550.00, and a job coach for eight sessions for a total cost of \$600.00. All of these recommendations are designed to assist Ms. Marshall in assessing potential alternative career paths, in light of her physical limitations.
- [407] I agree with the defendants that the labour market study is unnecessary. Ms. Wilson writes that it would review suitable positions, within Island Health if possible. Given the support Ms. Marshall has through her employer and union in exploring suitable positions within Island Health, this would be redundant.
- [408] I agree with Ms. Wilson's other two recommendations, however. Ms. Marshall does have significant ongoing limitations, and may well need to explore options outside of Island Health. She gives the impression of being somewhat "stuck", and these services may help her to move forward.
- [409] I therefore order compensation for the transferrable skills analysis and job coach. I accept Mr. Hildebrand's calculation of their present value as \$544.00 and \$624.00, respectively. There is no basis to reduce these items, as it is the MVA-related injuries that have caused Ms. Marshall's vocational challenges.

Gym membership

- [410] Ms. Wilson recommend a gym membership with access to aqua therapy for three years. She provides a cost per year of \$548.00.
- [411] The defendants oppose this item on the basis that Ms. Marshall had a gym membership before the MVAs.
- [412] Dr. Filbey recommended an active exercise program. I find this item is medically necessary for the limited time period recommended by Ms. Wilson. I accept Mr. Hildebrand's calculation of the present value of a gym membership for three years of \$1,674.00. I reduce this item by 10%, for an award of \$1,506.60.

Transportation

- [413] Ms. Wilson recommended an award to compensate Ms. Marshall for the cost of transportation to the various therapies she recommended. She assumed that Ms. Marshall would have to drive 15 kilometres to each appointment.

[414] I accept the defendants' submission that insufficient evidence has been provided to substantiate transportation costs. I decline to order them.

Trigger point, steroid or IMS injections

[415] Ms. Wilson recommend trigger point, steroid or IMS injections. Her stated source for this recommendation was "as per client". Dr. Saliken did recommend IMS therapy for Ms. Marshall's shoulder symptoms. Ms. Wilson noted that such injections are provided under MSP if prescribed and administered by a physician. The private cost on an annual basis would be \$9,792.00.

[416] Given that such injections are paid for by MSP if prescribed by a physician, I do not find it appropriate to order compensation for this item.

Miscellaneous items

[417] Ms. Wilson recommends magic bags for pain management at an annual cost of \$39.00, to be replaced every three years. She also recommends a TENS machine, at a cost of \$159.00, to be replaced every three years, and TENS pads at a cost of \$18.00 twice a year.

[418] In addition, Ms. Wilson recommends a body pillow at a cost of \$39.00 every five years, a cervical pillow at a cost of \$89.00 every three years, and a large rear view mirror, for a one time cost of \$49.00.

[419] The defendants oppose all of these items. Ms. Branscombe agreed with some of them, in particular, the magic bag and TENS machine. With respect to the latter, the defendants submit that Ms. Marshall has already purchased a machine. Given that TENS machines need to be replaced periodically, that is not a basis for not ordering it. I also note that Dr. Saliken recommended TENS therapy for Ms. Marshall's shoulder symptoms.

[420] I accept that all of these items are medically justifiable. As the defendants concede, they are all for the upper body, so it is not necessary to consider any reduction. I accept Mr. Hildebrand's calculation of their present value at \$831.00 (magic bags), TENS machine (\$1,048.00), TENS pads (\$1,114), body pillow (\$257.00), cervical pillow (\$948.00), and rear view mirror (\$49.00).

Medications

[421] Ms. Wilson reported that Ms. Marshall told her she takes Celexa, amitriptyline, Flexeril, Aleve, Tylenol, vitamins and Tramacet. Ms. Wilson provided prices for each, but quite properly deferred to Ms. Marshall's treating physicians with respect to what medications she requires.

- [422] Ms. Wilson says in her report that Dr. Filbey recommended amitriptyline, but I am unable to find such a recommendation in his report. He does note that Ms. Marshall currently takes amitriptyline and Celexa, as does Dr. Saliken. Dr. Saliken wrote in his report that NSAIDs or acetaminophen may be indicated as needed.
- [423] The defendants accepted that an award for amitriptyline was reasonable, but it or any other pain medication should be apportioned.
- [424] Ms. Marshall testified she has taken Tylenol and Advil daily since 2012 at a yearly cost of about \$850.00-\$950.00. She also takes Celexa, an anti-depressant, since 2017, as well as amitriptyline for chronic and neuropathic pain, since 2014. She also takes Flexeril, a prescription muscle relaxant, as needed since 2014.
- [425] On the evidence before me, I find that amitriptyline, Flexeril, Tylenol and Aleve are all medically necessary to treat pain and muscle tightness caused by the MVAs. I am unable to find the necessary causal link to Celexa.
- [426] Mr. Hildebrand did not provide a present value calculation for any medications. Ms. Marshall submits that she should be compensated for over-the-counter medications at a cost of \$850.00 per year, and that using Mr. Hildebrand's multiplier, this results in a total award of \$26,278.00. Given the per tablet costs provided by Ms. Wilson, this seems excessive.
- [427] I find that \$250.00 per year is a reasonable amount for over-the-counter medications. Using Mr. Hildebrand's multiplier, this results in a total amount of \$7,728.75 for medications. I accept that this item should be reduced by 10%, for an award of \$6,955.88.

House-keeping and other assistance

- [428] Ms. Wilson recommended a number of forms of house-keeping and other assistance as follows. First, she recommended three hours of house-keeping every two weeks, 48 weeks a year, for an annual cost of \$4,608.00 to age 75, with gradually reduced hours for the remainder of Ms. Marshall's life. Second, she recommended 12 hours of outdoor maintenance at an annual cost of \$456.00 to age 75, with gradually reduced hours for the remainder of Ms. Marshall's life. Third, she recommended eight hours of seasonal maintenance at an annual cost of \$240.00 to age 75, again gradually reduced for the remainder of Ms. Marshall's life. Fourth, she recommended garden care three hours per week from April to September, and two hours per week in October, at an annual cost of \$3,040.00 to age 75, once again gradually reduced for the remainder of Ms. Marshall's life. Fifth, Ms. Wilson recommended payment for a carer in the home when C. is home, four to six hours a week, twice a week, for five years at an annual cost of \$11,232.00 to \$16,848.00.

- [429] The defendants oppose all such awards. Their basic position is that any award for house-keeping should be rolled into Ms. Marshall's non-pecuniary damages. They also submit that the evidence does not substantiate that Ms. Marshall is so limited as to require the amount of assistance recommended.
- [430] Ms. Marshall testified that, before the accidents, she was able to manage the yard with her husband's help, but that after the accidents, he had to do everything, and since their separation she or her father has hired help, or her friends or her father have done the yard work. She testified she would use house-keeping and yard work assistance. While she acknowledged that she lives in a house she rents from her father, and that he has done some work or paid Mr. Batten to do some work, she may not always live in that house or have her father to look to for assistance.
- [431] I accept that some award for house-keeping and yard work assistance is warranted. A number of witnesses testified to assisting Ms. Marshall with in-home and outdoor tasks including carrying groceries, yard work, odd jobs in the house, washing dishes, making meals, and changing cat litter. Ms. Wilson performed an in-home functional assessment. While Ms. Marshall was described as independent in performing most tasks, she was not able to perform all tasks, performed some of them less frequently than before the MVAs, and was slower in performing many of them. She required assistance from her son or a neighbour in performing some tasks, such as taking recycling to the curb, carrying laundry baskets up and down stairs, and carrying heavier groceries. Due to a snow storm, Ms. Wilson was not able to observe Ms. Marshall perform any outdoor tasks. The evidence of Mr. Batten and Mr. Childs establishes, however, that she does require assistance with yard work.
- [432] That said, I find Ms. Wilson's recommendations for the amount of assistance required excessive. By my rough count, Ms. Wilson recommends 72 hours of house-keeping assistance per year, and approximately 106 hours of outdoor assistance per year. The latter figure, in particular, seems unreasonably large. For example, I doubt that it is necessary to have eight hours of assistance every year to set up and take down lawn furniture and garden equipment. Nor do I think the defendants should be responsible for assistance for the rest of Ms. Marshall's life.
- [433] I find that two hours a week of house-keeping to age 75 is a reasonable amount. Using Ms. Wilson's hourly rates, and Mr. Hildebrand's multipliers, this has a present value of \$85,463.19. I accept Ms. Wilson's recommendations for garden care to age 75. I accept Mr. Hildebrand's present value calculation of \$84,561.00. I decline to order additional amounts for outdoor maintenance and seasonal maintenance, as those tasks can be encompassed within the house-keeping and garden care assistance, or to order the continuation of any of these services past age 75. Both of the two items I have ordered are to be reduced by 10% to reflect the fact that Ms. Marshall's chronic knee condition plays some part in her limitations. This results in an award of \$76,916.87 for house-keeping, and \$76,104.90 for yard work.

[434] Finally, I turn to a consideration of Ms. Wilson's recommendation for a carer in the home when C. is present. Ms. Marshall testified that she found it beneficial when her sister was being paid by MCFD to assist her. C. is turning 13, and Ms. Marshall testified they can only get funding for six hours of care in the summer and there is no funding for after school care. The point of his care plan is for him to eventually return home to live, and that is what she wants.

[435] The evidence certainly reflects that Ms. Marshall has had significant challenges in caring for C. The evidence does not go so far as to establish, however, that but for the MVAs Ms. Marshall would not still have faced these challenges. Nor does Ms. Wilson's report indicate how having a carer in the home when C. is present would mitigate those challenges. Ms. Wilson did not observe Ms. Marshall interact with C., so the factual basis for this recommendation has not been established. Nor is it apparent how this recommendation would flow from Ms. Wilson's expertise. I decline to order this item.

Summary on Cost of Future Care

Item

Present Value

· Occupational Therapy

\$534.60

· Kinesiologist

\$981.90

· Yoga

\$252.90

· Physiotherapy

\$27,856.00

· Chiropractic

\$27,856.00

· Massage Therapy

\$38,999.00

· BCALM

\$35.00

· Transferable Skills Analysis

· Job Coach

\$544.00

\$624.00

· Gym membership

\$1,504.60

· Miscellaneous items

\$4,247.00

· Medications

\$6,955.88

· Housekeeping

\$76,916.87

· Yard work

\$76,104.90

Total

\$263,414.65

Special Damages

[436] The parties agree that Ms. Marshall is entitled to \$10,435.33 in special damages.

Conclusion

[437] In summary, I award damages as follows:

· Non-pecuniary damages

\$160,000.00

· Past loss of earning capacity

\$186,000.00

· Future loss of earning capacity

\$650,000.00

· Cost of future care

\$263,414.65

· Special damages

\$10,435.33

Total

\$1,269,849.98

[438] Absent any circumstances of which I am unaware, Ms. Marshall is entitled to her costs. Should the parties be unable to agree with respect to costs, or should any matters dealt with in this decision require clarification or mathematical correction, they may contact Supreme Court Scheduling to arrange a hearing to speak to any outstanding issues within 30 days of the date of this decision.

"Lyster J."

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