

CANADA / JUDGMENT

Thomas v. McKee

2025 BCSC 598

COURT

Supreme Court of British Columbia

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2025 BCSC 598 Thomas v. McKee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thomas v. McKee,

2025 BCSC 598

Date: 20250401

Docket: M200570

Registry: Vancouver

Between:

Maria Rhodora Banada Thomas

Plaintiff

And

Jackson Patrick McKee

Defendant

And

Alexandra Taylor Thomas, Rodrigo Acosta, and John Doe

Third Party

- and -

Docket: M200571

Registry: Vancouver

Between:

Maria Rhodora Banada Thomas

Plaintiff

And

Aman Singh Panatch, Hallmark Ford Sales Limited,

Panatch Group Management Ltd.

Defendant

And

Jackson Patrick Mckee

Third Party

- and -

Docket: M212798

Registry: Vancouver

Between:

Maria Rhodora Banada Thomas

Plaintiff

And

Hwang Seo, Ingon Seo

Defendants

- and -

Docket: M223078

Registry: Vancouver

Between:

Maria Rhodora Banada Thomas

Plaintiff

And

Alexandra Thomas, Elvira Banada Acosta, Rodrigo A. Acosta

Defendants

Before: The Honourable Justice S. Ramsay

Reasons for Judgment

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Place and Date of Trial:

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Table of Contents

INTRODUCTION.. 5

INJURIES AND CAUSATION.. 5

Background. 5

Credibility and reliability. 7

Injuries and prognosis. 13

Expert evidence. 13

Plaintiff's injuries. 15

Causation. 18

Prognosis. 20

Mitigation. 22

ASSESSMENT OF DAMAGES. 23

Non-pecuniary damages. 23

Loss of earning capacity. 25

Past loss of earning capacity. 30

Future loss of earning capacity. 32

Cost of future care. 34

Botox injections. 35

Medication. 36

Rehabilitation services. 38

Home support 40

Special damages. 41

SUMMARY. 41

INTRODUCTION

- [1] This action arises out of four motor vehicle accidents that occurred on February 10, 2018 ("MVA1"), February 19, 2018 ("MVA2"), June 11, 2020 ("MVA3"), and December 16, 2020 ("MVA4") (together, "the Accidents"). The defendants all admit liability. The defendant in MVA2, Mr. Mckee, is represented by separate counsel from the defendants in MVA1, MVA3, and MVA4 (who I will refer to as "the other defendants" to the extent that I need to distinguish them from Mr. Mckee); however, the parties do not seek any findings regarding allocation of responsibility for the plaintiff's damages.
- [2] The plaintiff alleges the cumulative effect of the injuries she suffered in the Accidents has left her with chronic pain and severe psychological symptoms. She says her injuries render her totally disabled from working and significantly impair her ability to function in all aspects of her personal life.
- [3] The defendants question the plaintiff's credibility and dispute the severity and functional impact of her injuries. I must determine the nature and cause of the plaintiff's injuries and assess non-pecuniary damages, past and future loss of earning capacity, and cost of future care.

INJURIES AND CAUSATION

Background

- [4] The plaintiff was 42 years old at the time of MVA1. She was in a busy phase of life, working full time, maintaining a household, caring for her two daughters and her stepchildren, and helping with the needs of extended family members. She loved her job in nuclear medicine technology and had ambitious career goals. She was also passionate about exercise; she enjoyed physical fitness so much that she had obtained specialised yoga teacher certification. The plaintiff was close with her extended family and often hosted large gatherings at her home. By all accounts, she was a fun, happy, active person who excelled at work while also maintaining a busy social and recreational life.
- [5] On the day of MVA1, the plaintiff was taking her daughter to brunch. They were driving on Clark Drive when the defendant Mr. Mckee, attempting to cross Clark Drive at an uncontrolled intersection after stopping at a stop sign, struck the front passenger side of the plaintiff's vehicle, pushing it into oncoming traffic. For a moment the plaintiff thought they would be struck by an oncoming truck; she thought she and her daughter might die. Fortunately, the truck avoided colliding with the plaintiff's car. The plaintiff's memory is that she was extremely anxious and distressed after MVA1, but she did not immediately feel any physical symptoms. The next day she began to experience headaches and developed pain on the right side of her body, including in her neck, back, shoulder, arm, and leg. Her family doctor prescribed pain medication, physiotherapy, and massage therapy, and recommended some time off work.
- [6] MVA2 occurred nine days after MVA1. The plaintiff decided to attend work to help with an accreditation program that she had been working on for some time. She was driving a loaner vehicle, because her vehicle was having the damage from MVA1 repaired. The plaintiff was not able to work a full day because of her injuries from MVA1. She was on her way home when the defendant Mr. Panatch rear-ended her car as he made a lane change on the Alex Fraser Bridge. The plaintiff recalls feeling angry and upset because she was already in pain and had a headache, and MVA2 increased those symptoms.
- [7] The plaintiff did not return to work after MVA2. Her job as a nuclear medicine technician requires wearing heavy protective gear, and regularly involves sitting in an awkward position and reaching around a protective barrier to measure and mix radioactive material. Despite pursuing all recommended treatment after MVA1 and MVA2, her physical symptoms did not improve to the point where she could perform her job duties. In the months after MVA1 and MVA2 the plaintiff also started to experience depression, anxiety, and brain fog, all of which also impacted her ability to perform her job. She was not sleeping well and never felt well-rested.

- [8] As of June 2020, the plaintiff had experienced some partial recovery from her injuries sustained in MVA1 and MVA2, but not to the point that she could return to work. She was diligent about attending treatment recommended by her doctor, and she was feeling positive about the gains she was making. This all changed with MVA3, which occurred when the plaintiff was rear-ended by the defendant Seo as she was driving from one medical appointment to another. After MVA3, the plaintiff experienced increased pain and cognitive symptoms, and her depression and anxiety symptoms significantly worsened.
- [9] MVA4 occurred when the plaintiff's daughter, who had just received her driver's license the day before, rear-ended a minivan as she changed lanes. The plaintiff was seated in the rear passenger seat. The plaintiff says that she downplays this accident, because she does not want her daughter to feel bad about adding to the plaintiff's injuries. That is consistent with the evidence at trial; while the plaintiff testified generally that MVA4 added to her pain from the previous accidents and made her even more depressed, she did not provide much in the way of detailed evidence specifically related to MVA4.
- [10] Despite extensive treatment, the plaintiff's injuries, for the most part, have not improved since MVA3 and MVA4. She experiences chronic myofascial pain in her neck, back, and right hip, and debilitating headaches. Medication helps with the pain, but only to a degree. Botox treatment has offered some--but not total--relief from her headaches. The plaintiff experiences ongoing cognitive deficits and dizziness, and suffers from very serious depression, nightmares related to the Accidents, and anxiety. She has not accepted that her current physical state might be her new normal, and she continues to actively pursue treatment in the hope of returning to her pre-Accidents condition.

Credibility and reliability

- [11] I am mindful that I must carefully evaluate the reality of the plaintiff's complaints and the evidence in support of her injuries, particularly since the medical evidence is largely based on her self-report: *Gee v. Bock*, 2019 BCSC 1348 at para. 36; *Harry v. Powar*, 2018 BCSC 845 at para. 63. In doing so, I have considered the principles relevant to assessing credibility that are discussed in the frequently cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.) and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, [2012] S.C.C.A. No. 392.
- [12] The defendants say that the plaintiff is not a credible witness. Ultimately, as I explain below, I am not persuaded by the defendants' submissions on credibility.
- [13] I do not agree with the defendants' description of the plaintiff's direct evidence as vague and non-specific regarding her injuries and symptoms. This submission is difficult to reconcile with the defendants' submission that the plaintiff overstated her symptoms in her evidence, which I also reject as not reflecting my view of her testimony. In my view, the plaintiff's evidence was appropriately descriptive of her injuries and symptoms and their impact on

her life. I observed her to present as genuine in her testimony. She gave straightforward answers, and she did not appear prone to exaggeration when describing her injuries and their effect on her life.

- [14] With one exception discussed below, I also disagree with the defendants' assertion that the plaintiff was defensive and argumentative in cross-examination. I had no concerns with respect to her demeanour in direct or cross-examination. In fairness, I did observe that the plaintiff's tone was generally terser and less friendly in responding to questions from the defendants than it was in answering her own counsel's questions. However, this was not to a degree that was outside the normal range of how a witness might reasonably respond to the type of questions and style of questioning typically associated with cross-examination, particularly when the questions are designed to test credibility. It is not surprising when a witness who is being truthful is somewhat defensive in response to questions that assert or imply that their version of events is inaccurate, or when they refuse to accept counsel's suggestions about alternate versions of events.
- [15] I acknowledge that, on one occasion, the plaintiff did have an angry, argumentative outburst directed at counsel for Mr. McKee. This was in response to questions about the plaintiff's personal grooming (specifically, the fact that she has eyelash extensions and micro-bladed eyebrows). The clear implication of the questions was that the plaintiff must not be as injured as she says, because she is able to maintain her personal appearance--indeed, Mr. McKee advanced that very argument in closing submissions, which is something I will address later in these reasons. For the present purpose of assessing credibility, I find that the plaintiff's outburst in response to this line of questioning was understandable and not unreasonable.
- [16] Mr. McKee says that the plaintiff displayed virtually no pain behaviours during the first two days of trial, and notably changed her behaviour on day three. I do not agree. I carefully observed the plaintiff during all of her testimony. I saw that she held herself very stiffly and frequently shifted her position in her seat during the first two days of evidence. While it was only on day three that the plaintiff opted to stand during some of her evidence, despite being invited to do so at the beginning of day two, I find that there is a reasonable explanation for this: she testified to experiencing increased pain that day, which she attributed to sitting in the witness box for the previous two days. Overall, I observed that the plaintiff's physical presentation during both direct and cross examination was in the normal range for a witness with chronic pain symptoms, including the progression of behaviour over several days of testimony. Nothing about her behaviour struck me as calculated or exaggerated.
- [17] In their submissions on credibility, the defendants emphasize that the plaintiff failed to disclose information about personal financial stressors and her lifestyle (including hosting family celebrations and taking multiple vacations) to her treating medical practitioners and the independent medical examiners who gave expert evidence at trial. They say this is relevant to her credibility. I do not agree. While shortcomings in the history provided to the experts may be relevant to the weight I give their opinions, there is no basis in the evidence

for me to find that the plaintiff intentionally hid information from, or was untruthful with, her doctors or the experts in this trial.

- [18] The defendants say the plaintiff's mortgage debt was a significant stressor in her life that she should have disclosed to her doctors and the experts in this case. They suggest that her failure to do so was calculated to advance her position in this case. I reject this suggestion.
- [19] First, I find that the evidence does not establish that the debt was as prominent of a stressor for the plaintiff as the defendants suggest. I accept the plaintiff's explanation that because of how she and her partner, Ryan Carter, came to purchase their home--it was previously owned by her parents--she had nothing to do with payment of the mortgage over the property, which was solely the responsibility of Mr. Carter, despite being in both of their names. I find that Mr. Carter intentionally kept the extent of their mortgage debt from the plaintiff, in a misguided attempt to protect her from any additional stress given her condition after the Accidents. I accept the plaintiff's evidence that she did not know about financial issues related to the mortgage until she was served with the first foreclosure petition and that, even then, she did not read the materials, instead relying on Mr. Carter to handle things. I find that the plaintiff did not have a complete understanding of the true gravity of their mortgage debt until sometime in 2024. I find that the plaintiff continues to view the mortgage debt as Mr. Carter's responsibility, and I accept her evidence that, if necessary, she will sell the house rather than use any judgment received in this case to pay for that mortgage debt.
- [20] I also do not agree with the defendants' characterization of the plaintiff's testimony as downplaying the effect of the mortgage debt as a stressor in her life. The plaintiff readily acknowledged the impact of her financial situation--including the debt related to her home and her inability to earn income due to her injuries--on many occasions during her evidence. I did not observe any attempt on the plaintiff's part to downplay or hide her emotions when testifying about these issues. It was apparent from her demeanour in giving evidence on this topic that she is upset about the mortgage debt, and is particularly upset with Mr. Carter for keeping information from her. However, this topic of evidence did not cause the plaintiff to become anywhere near as distressed as she was on other occasions during her evidence. It was evident to me that the plaintiff's inability to work and exercise, and the way her injuries have impacted her relationship with her daughters, cause her significantly more stress and emotional upset than the mortgage debt.
- [21] Mr. Mckee points to several other examples of instances where he says the plaintiff's testimony is not credible and, taken together, reveal a pattern of the plaintiff misleading the Court. I do not agree. In my view, the following examples cited by Mr. Mckee are instances where the plaintiff's evidence is not reliable, as distinct from not credible.
- [22] First, Mr. Mckee observes that the plaintiff's evidence about the immediate aftermath of MVA1 cannot be reconciled with his own evidence. Specifically, the plaintiff testified that after the collision, Mr. Mckee pulled his car into a nearby parking lot, and she followed him.

She says he ripped off a piece of paper with his insurance information and gave it to her, and then left right away. Mr. Mckee's evidence was that after speaking with the plaintiff, he took a series of photos of the accident scene and then returned to his vehicle and waited quite some time before a tow truck arrived to tow his car away. In other words, he did not leave right away.

- [23] In my view, Mr. Mckee overstates the alleged conflict between his evidence and that of the plaintiff. I understood the plaintiff's evidence that Mr. Mckee left right away to mean that he walked away from her and her daughter and they did not interact any further. This interpretation is consistent with the plaintiff's overall evidence about MVA1, including her acknowledgement that it was Mr. Mckee who took the accident scene photos that were tendered in evidence by the parties (it follows that he must have remained at the scene to do so). If I am incorrect and there is a true conflict between the plaintiff's version of the events and that of Mr. Mckee, I do not find the plaintiff was purposely untruthful. Rather, I find that any such difference is attributable to their different states of mind at the time. The uncontroverted evidence is that the plaintiff was quite distressed following the accident--she was crying and, to use her words, "a little hysterical". She had briefly thought she and her daughter would die. In those circumstances, I accept that her memory of the immediate aftermath of the accident would most likely not be as reliable as that of Mr. Mckee, who was not as emotional at the time.
- [24] Mr. Mckee also points to the plaintiff's testimony that she had no memory of back pain in the two years prior to MVA1. When her memory was refreshed with reference to clinical records, she acknowledged there were some occasions of pre-accident back pain, but explained those were different than the pain she now experiences. While I accept that the plaintiff's original evidence about pre-existing back pain was therefore not reliable, there is no basis for a finding that she intentionally misled the Court. I accept the plaintiff's explanation that her episodes of back pain before MVA1 were different in nature, and not serious. This is consistent with the evidence of her friend, Ms. Shaw, who exercised with the plaintiff three to four days a week in the years leading up to MVA1 and had no memory of the plaintiff having any significant injuries or physical limitations.
- [25] Other topics that Mr. Mckee says demonstrate a pattern of credibility concerns are the reason why the plaintiff was prescribed Ozempic, the extent to which she can host family celebrations, and the extent to which she can go on vacation. I do not agree that the plaintiff's evidence was untruthful or misleading on any of those matters. When asked about these topics in cross-examination, the plaintiff answered directly and in a forthright manner. She readily acknowledged many of the propositions put to her by counsel--she continues to travel, host family in her home, and is able to help plan and oversee a home renovation project. In my view, Mr. Mckee's submissions on these aspects of the plaintiff's evidence goes not to credibility, but to whether the plaintiff has met the burden of proof, particularly in relation to her alleged functional limitations caused by the Accidents.

- [26] Finally, I accept as credible the plaintiff's denial that this proceeding is motivated by the debt related to her home. The uncontroverted evidence is that before the Accidents, the plaintiff was a hardworking, ambitious, driven person who placed significant value on her career, her physical fitness, and her financial independence. The defendants would have the Court find that she abandoned all of those things to dedicate years of her life (including constantly attending medical appointments and treatments) to advance an unmeritorious claim in the hope of securing a judgment to pay off a disadvantageous mortgage. She would have done so at significant and potentially irrevocable cost to both her career and her personal and family relationships. This version of events is simply not in accordance with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable" in the plaintiff's circumstances: Bradshaw at para. 187.
- [27] I have no concerns with the credibility and reliability of the other lay witnesses. The defendants suggest Mr. Carter has a substantial motive to exaggerate the plaintiff's injuries and their effect on her life--the significant mortgage debt. To my memory, the defendants did not confront Mr. Carter with this theory of the case during his testimony, which makes it difficult to assess. In any event, there is no evidence to suggest Mr. Carter expects the plaintiff to contribute to payment of the mortgage. His evidence is consistent with that of the plaintiff--he is responsible for the debt, the plaintiff had "no clue" about the mortgages, and they will sell the house if they have to. I find no reason to disbelieve Mr. Carter's evidence.

Injuries and prognosis

Expert evidence

- [28] The parties tendered evidence from a total of eight medical experts: the plaintiff's treating physician (Dr. Galanopoulos), her treating psychologist (Dr. Klubben), one neurologist (Dr. Cameron), two physiatrists (Dr. Khan and Dr. Winston), two psychiatrists (Dr. Spivak and Dr. Morgan), and an orthopaedic surgeon (Dr. McConkey). The court also received evidence from an occupational therapist (Ms. Rau) and a vocational rehabilitation consultant (Dr. Quee Newell).
- [29] For the reasons explained below, I have decided to give less weight to the opinion evidence of Dr. Klubben and Dr. Winston.
- [30] I agree with the defendants that Dr. Klubben lacked the independence required of an expert witness. Dr. Klubben herself acknowledged that she was not an independent expert. Further, she often did not answer questions directly in cross-examination, instead providing lengthy responses that seemed motivated, perhaps unconsciously, by a desire to advance the plaintiff's interests. While her apparent advocacy is understandable given her treating relationship with the plaintiff, I am of the view that she is not an impartial expert in this case. Dr. Klubben's two expert reports also suffer some deficits: they fail to clearly identify and delineate between different sources of facts and assumptions, they lack structure, and they would greatly benefit from improved organization and the use of headings, particularly

in the opinion section. For all of these reasons, I have not relied on Dr. Klubben's opinion evidence.

- [31] That said, I have no concerns with Dr. Klubben's fact evidence. In that regard, her oral testimony was clear and articulate. As the plaintiff's treating psychologist, I found Dr. Klubben's evidence regarding the plaintiff's symptoms and treatment to date to be reliable and overall helpful to understanding the plaintiff's psychological symptoms and presentation.
- [32] Turning to Dr. Winston, while I have no doubt as to his expertise as a physiatrist, in my view some aspects of his evidence crossed the line into advocacy in this case. For example, I view the commentary in his report about the severity of the Accidents and the plaintiff's work history since the Accidents as being in the nature of judgment, rather than opinion evidence; the comments are not directly responsive to the questions he was asked, nor does he explain how they might be relevant to his opinion. As another example, Dr. Winston's report includes what appear to be irrelevant, gratuitous comments about the plaintiff's physical appearance (he emphasizes that she was "well-dressed" and had a "well maintained manicure and pedicure"), again without any explanation of how these observations could possibly relate to his opinion evidence. While these are discrete examples from Dr. Winston's report, in my view they are notable and cause me concern as to his objectivity in this case. I have therefore approached Dr. Winston's evidence with caution, and I prefer the opinion evidence of other experts to the extent it differs from his.

Plaintiff's injuries

- [33] I find that the evidence establishes that the plaintiff suffered soft tissue and musculoskeletal whiplash injuries and psychological injuries in the Accidents, which have become chronic.
- [34] Some of the plaintiff's physical pain symptoms associated with her injuries have resolved, or largely resolved: her right shoulder pain, right knee pain, and left hip pain. However, the plaintiff continues to experience significant pain symptoms in her neck, back, and right hip, as well as debilitating headaches.
- [35] I accept the plaintiff's evidence regarding the pain symptoms she has experienced since the Accidents, and continues to experience today. As already stated, I consider the plaintiff's evidence to be credible. The expert witnesses all accept that the plaintiff experiences the pain she describes. To the extent the defendants urge findings that the plaintiff has exaggerated her symptoms, I find the evidence does not support their submissions.
- [36] Mr. McKee suggests that the attention the plaintiff pays to her physical appearance, including obtaining esthetic treatments such as eyebrow microblading and eyelash extensions, suggests that her level of functioning is higher than she says. I found this submission surprising and difficult to understand, since there is no evidence that anything the plaintiff does in relation to her appearance involves any degree of physical effort or discomfort. It should go without saying that an injured person is still allowed to care about

and maintain their physical appearance to the extent they are able to do so. There is no basis in the evidence to find the plaintiff's personal grooming choices are relevant to any issue in this case.

- [37] Mr. McKee's emphasis on the fact the plaintiff continues to take family vacations and host family gatherings is also unhelpful, because it ignores the evidence about the plaintiff's very different experience of those events before and after the accident. The plaintiff is entitled to--in fact, is expected to--continue living her life to the extent she can with her injuries. My task is to assess the extent to which the plaintiff's injuries have impacted her ability to live her life as she chose to before the Accidents and as she would like to live it in the future, not to judge the validity of her life choices. Vacations and family gatherings are no longer enjoyable for the plaintiff. She cannot participate in the same way she did previously. She spends much of the time resting alone in her room. She has to accept more help from others, rather than take on all hosting responsibilities.
- [38] While Dr. Winston and Dr. McConkey accept that the plaintiff experiences pain, they are of the view that her pain symptoms are explained by psychological, not physiological, causes. As discussed below, I accept that psychological diagnoses are a significant component of the plaintiff's pain. However, having considered the reports and testimony of the expert witnesses, I am satisfied that the evidence establishes, on a balance of probabilities, that the plaintiff has not fully recovered from her physiological musculoskeletal injuries, which have developed into chronic myofascial pain. I prefer the evidence of Dr. Galanopoulos, Dr. Khan, and Dr. Cameron over that of Dr. Winston in that regard, because of my concerns with Dr. Winston's opinion evidence. I also prefer their evidence over that of Dr. McConkey, whose opinion on this question appears to be based in part on the fact that the Accidents were at relatively low speed. There is no expert evidence before me regarding the force of impact of any of the Accidents, and Dr. McConkey was not qualified as an expert for the purpose of giving opinion evidence on the relationship between force of impact and expected course of recovery from soft tissue injuries.
- [39] I do, however, accept Dr. McConkey's evidence that the plaintiff's right hip pain is not caused by a labral tear. I prefer his opinion over that of Dr. Galanopoulos in this regard, given Dr. McConkey's training and specialized expertise in respect of that type of injury. I find that the plaintiff's right hip pain is related to her musculoskeletal injuries and resulting chronic myofascial pain, and not due to a labral tear.
- [40] I rely on Dr. Cameron's opinion evidence to find that the plaintiff has developed chronic recurrent post-traumatic headaches and chronic dizziness secondary to her whiplash injuries. I accept that the plaintiff also experiences some cognitive issues, but, contrary to the opinion of Dr. Galanopoulos, I do not find that this is due to post-concussion syndrome. I prefer Dr. Cameron's opinion that the plaintiff did not suffer a concussion, given his specialized expertise in the field of neurology. Rather, I find the evidence supports that the plaintiff's cognitive symptoms are related to her experience of pain and her psychological diagnoses, and potentially to side effects of medication she takes to manage her headaches

(Topiramate).

- [41] For the most part, Dr. Spivak and Dr. Morgan agree on the plaintiff's psychiatric diagnoses. Relying on their evidence, I find that the plaintiff suffers from major depressive disorder and severe somatic symptom disorder with predominant pain. I find the evidence establishes that a significant component of the plaintiff's chronic pain is her diagnosed somatic symptom disorder. In making this finding, I in no way suggest that the plaintiff does not truly experience the pain that she describes--as I have said, I accept her evidence in that regard. Rather, I find the degree and quality of pain is much worse due to the somatic symptom disorder.
- [42] I accept Dr. Spivak's opinion that the plaintiff's cognitive issues are most likely caused by her pain and depressive symptoms, and that, to the degree that these issues impact her ability to function, this symptomology is consistent with somatic symptom disorder. However, I also acknowledge Dr. Cameron's evidence on cross-examination that it is possible to experience negative cognitive side-effects with the plaintiff's headache medication, Topiramate, which I will address further when assessing cost of future care.
- [43] I accept Dr. Spivak's opinion that the plaintiff's pain and psychiatric injuries cause substantial impairment in all spheres of her life, and result in marked disability. This is consistent with the evidence overall regarding the plaintiff's experience since the Accidents. I also accept Dr. Spivak's evidence that the plaintiff's depressive symptoms and her pain and functional limitations are correlated.
- [44] I find that the plaintiff also suffers symptoms of anxiety, but not to the same degree as her depression and somatic symptom disorder, which are both severe and debilitating. The plaintiff's anxiety appears to be largely related to driving and riding in vehicles as a passenger, and she has had some success with treatment specifically targeted to driving anxiety.
- [45] Dr. Klubben also diagnoses the plaintiff with post-traumatic stress disorder. Dr. Morgan does not believe that the plaintiff's symptoms rise to the level necessary to support that diagnosis, and instead diagnoses unspecified trauma- and stressor-related disorder. I prefer Dr. Morgan's opinion and accept his diagnosis over that of Dr. Klubben, given my above comments regarding Dr. Klubben's evidence in this case.

Causation

- [46] The defendants agree that divisibility of the plaintiff's injuries as between the Accidents is not an issue in this trial, and I therefore make no findings in that regard.
- [47] I find that the evidence establishes that the Accidents caused all of the plaintiff's physical injuries. Her health was excellent before the Accidents. She was an extremely physically fit person at the time of MVA1. While the plaintiff suffered minor injuries from time to time prior to the Accidents, including a short bout of back pain and a shoulder injury, they did

not have had any meaningful impact on her employment or her overall ability to maintain a rigorous fitness regime. There is no evidence that any previous injuries were ongoing at the time of MVA1. I find that any pre-Accidents injuries or pain symptoms were fully resolved before MVA1.

- [48] The plaintiff experienced headaches before the Accidents, associated with her menstrual cycle. There is no evidence that those headaches interfered with the plaintiff's employment or her ability to maintain daily activities. I find that the plaintiff's pre-Accidents headaches were of an entirely different nature than her headaches since the Accidents. There is no evidence of any causal relationship between the two. I find that the plaintiff's current debilitating headaches were caused by the Accidents.
- [49] Turning to causation of the plaintiff's psychiatric diagnoses, the plaintiff had a past diagnosis of depression after suffering trauma and abuse in her first marriage, which ended in divorce around 2008. She took medication and attended counselling, and by about a year later, she had recovered. There is no evidence that the plaintiff was unable to work, exercise, or participate in the usual activities of life during that episode of depression. To the contrary, I find she used work and exercise to help manage her mental health and recover from this episode.
- [50] I find that the plaintiff's previous depression was situational (due to the circumstances of her marriage breakdown) and had resolved long before MVA1. The plaintiff had no mental health concerns at the time of MVA1, and there is no evidence that she was predisposed to developing depression after recovering from the 2008 diagnosis. I find that the previous depression had fully recovered and was not a pre-existing condition or injury that materially contributed to the plaintiff's post-Accidents depression. There is no evidence of any other relevant pre-existing psychiatric diagnoses.
- [51] Dr. Spivak and Dr. Morgan each attribute causation of the plaintiff's psychological injuries to some or all of the Accidents. However, the defendants submit that the plaintiff's serious financial debt related to her home caused or contributed to her current psychological conditions. There is no expert evidence to that effect. The defendants emphasize that is because the plaintiff did not disclose this information to Dr. Spivak and Dr. Morgan, and they say this non-disclosure should affect the weight given to their opinions.
- [52] In cross-examination, Dr. Spivak agreed that, as a general statement, significant financial stressors could cause or contribute to depression and anxiety. However, he also testified that he would have a hard time accepting that financial stressors would be the primary driving force of the plaintiff's symptoms unless she was not telling the truth about her pain. As I have said, I accept the plaintiff's evidence regarding the pain she experiences.
- [53] Having carefully considered the evidence, I am unable to accept the defendants' submission on causation of the plaintiff's psychological injuries.

- [54] I find the evidence establishes that the plaintiff's current depression would not have developed but for the loss of her career and the loss of her ability to exercise, both caused by the Accidents. The plaintiff's career and exercise were important stress-relief tools for the plaintiff prior to the Accidents. The Accidents eliminated the plaintiff's ability to rely on both. Her psychological symptoms manifested well before she gained full knowledge of the seriousness of the family's financial issues, due to Mr. Carter keeping that information from her. I agree with the plaintiff that the evidence does not establish even a real and substantial possibility that absent the Accidents, she would be in any way injured, disabled, or otherwise incapacitated or harmed solely as a result of the mortgage-related financial stressor.
- [55] While unmanageable mortgage debt and related foreclosure proceedings will obviously be very stressful for most people, I find that the evidence does not establish a real and substantial risk that this stress would have led to the plaintiff's current psychological diagnoses and associated functional impairment absent the Accidents: see *Quezada v. Quezada*, 2019 BCSC 1732 at paras. 106-109. This finding is consistent with the limited expert evidence on this question, and with the uncontroverted evidence regarding the plaintiff's previous experience with mental health issues.
- [56] In any event, I observe that the defendants' theory regarding financial issues causing or contributing to the plaintiff's depression would not extend to the plaintiff's severe somatic symptom disorder, or her anxiety around driving and being in vehicles. On the evidence, there is no question these diagnoses were caused by the Accidents. Of all the plaintiff's psychiatric diagnoses, I find the evidence establishes that her somatic symptom disorder is the most significant in terms of her current functional impairment. Even absent depression, it is clear that the plaintiff's experience of pain would leave her unable to return to her previous employment and exercise in the way she did prior to the Accidents.

Prognosis

- [57] Based on the expert medical evidence, I find that the plaintiff's prognosis for a full recovery is poor and she is unlikely to ever return to her pre-Accidents condition. However, as explained below, I find that there is a prospect for improvement from her current condition.
- [58] The plaintiff continues to actively pursue treatment, particularly for her physical symptoms. During her testimony, she became obviously distressed when asked about the future--specifically, she does not accept that recovery is not possible. However, at this stage I find that the medical evidence establishes that a full recovery is improbable. Dr. Galanopoulos opines that the plaintiff's symptoms have become chronic and she is unlikely to return to her previous state of full functioning. In Dr. Khan's opinion, the plaintiff's pain symptoms have become entrenched and more difficult to treat, and will likely persist into the future. Dr. Spivak believes the plaintiff's overall psychiatric prognosis is poor, citing the length of time that has passed without recovery despite the plaintiff having received appropriate treatment. Dr. Morgan's overall opinion is that the plaintiff's prognosis is guarded, and

dependant on whether she responds to treatment and can return to work. I accept these opinions regarding the plaintiff's prognosis.

- [59] That said, I believe the evidence reveals the plaintiff will experience some improvement. She has so far responded well to Botox treatment for her headaches. More importantly, it is clear that the plaintiff's psychiatric injuries are a very significant factor in her current functional impairment, particularly the somatic symptom disorder, and she has not exhausted all available treatment options in that regard. Dr. Morgan suggests that the plaintiff would benefit from a medication review by a psychiatrist, and a trial of an alternative antidepressant. He also recommends ongoing psychiatric treatment and exploring treatment with a new psychologist. Both Dr. Spivak and Dr. Morgan opine that improvement in the plaintiff's psychological condition would be expected if she can return to work--with Dr. Spivak clarifying that this means a return to work that is meaningful to the plaintiff.
- [60] I acknowledge that Dr. Galanopoulos opines that the plaintiff is unlikely to ever regain full functioning, but that does not foreclose a return to less physically demanding work in the future if her psychological injuries respond to treatment as hoped. I also acknowledge Dr. Khan's opinion that the plaintiff is likely permanently disabled from gainful employment; however, this opinion does not take into account the significant psychological aspect of the plaintiff's ongoing pain symptoms and the potential for this to decrease with continued psychological treatment.
- [61] I find there is a real and substantial possibility that the plaintiff's psychological injuries will improve if Dr. Morgan's recommendations are followed, such that a return to some form of work that the plaintiff finds meaningful will be possible. I find that with that return to work, the plaintiff will likely experience a corresponding improvement in her psychological symptoms. That said, I accept Dr. Morgan's opinion that even then, the plaintiff will unlikely recover to the point where she will be able to return to her previous lifestyle. Even with optimal recovery and a return to some form of work, I find there is a real and substantial possibility that the plaintiff will never recover to the point of being able to work full time or in a position with the same degree of responsibility, remuneration, and potential for advancement as prior to the Accidents.
- [62] To the extent Dr. Quee Newell's opinion is more optimistic regarding the plaintiff's ability to return to full-time employment, I prefer the evidence summarized above. Dr. Quee Newell's opinion does not account for the impact of the plaintiff's psychological injuries, which makes her evidence regarding the plaintiff's overall ability to return to work (as opposed to her ability to perform work from a physical perspective) of limited use.

Mitigation

- [63] Mr. McKee argues that the plaintiff failed to mitigate her psychiatric issues by taking no steps to engage in volunteer work or look for sedentary work.

- [64] The plaintiff has a duty to take reasonable steps to limit her loss. To establish that she has failed to do so, Mr. McKee has the burden of proving that the plaintiff acted unreasonably in not pursuing the proposed course of action, and the extent to which her loss would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [65] I find that the evidence does not establish that the plaintiff's failure to volunteer or look for sedentary work to date was unreasonable. To the contrary, I find that it would be unreasonable to expect the plaintiff to have sought out volunteer work or alternative employment in light of her symptoms. It was reasonable for the plaintiff to instead focus what energy she had, given her injuries, on treatment, in the hope of recovering so that she could return to her existing career.
- [66] In any event, the evidence also does not establish the extent to which the plaintiff's psychiatric issues would have been lessened had she taken the steps proposed by Mr. McKee. In that regard, Mr. McKee relies on the evidence of Dr. Quee Newell, Dr. Winston, and Dr. Spivak regarding the positive impact that productive activities can have on improving an individual's psychological symptoms. This evidence was of a general nature, and does not establish how the plaintiff's loss would have been reduced given her specific circumstances and diagnoses. This type of general evidence does not meet the burden required for reducing an award for failure to mitigate.

ASSESSMENT OF DAMAGES

Non-pecuniary damages

- [67] The purpose of non-pecuniary damages is to compensate the plaintiff to the date of trial and into the future for pain, suffering, loss of enjoyment of life, and loss of amenities. Comparable cases are helpful, but each case depends on its own unique facts. In assessing the plaintiff's loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 100.
- [68] The plaintiff was 42 years old at the time of MVA1. She was passionate about her career and her personal fitness regime. She was a driven, social, active, busy, happy person. Her chronic pain and psychological injuries have resulted in a drastic lifestyle change. Her psychiatric symptoms in particular are significant and profoundly disabling, and include suicidal ideation. While I have found that the plaintiff will experience some improvement in her symptoms, her prognosis means that she will suffer from some degree of chronic pain and psychological impairment for the rest of her life, given her physical injuries and somatic symptom disorder. She is unlikely to ever return to her previous condition and lifestyle.
- [69] The plaintiff's chosen profession is no longer available to her. She can no longer participate in the type of physical activity she previously enjoyed. She is now reclusive, unhappy, and difficult to be around. While she can still host family gatherings and vacation, her

experience of these events is significantly different--she requires more help, and spends much of the time retreating to rest alone rather than enjoying herself with her family and friends. The Accidents occurred at a time in the plaintiff's life when her mother was ill and ultimately passed away, and as her own daughters were transitioning from childhood into young adulthood. Her injuries meant she was not able to be fully present through those events.

- [70] The plaintiff says the appropriate quantum for non-pecuniary damages is \$300,000. She relies on the following cases: *Grabovac v. Fazio*, 2021 BCSC 2362; *Moen v. Grantham*, 2024 BCSC 937; *Matwijec v. Goodridge*, 2024 BCSC 2030; *Meckic v. Chan*, 2022 BCSC 182.
- [71] Mr. McKee says the following cases suggest that a more appropriate award would be in the \$125,000 to \$150,000 range: *Holt v. McLatchy*, 2022 BCSC 1421; *Pang v. Burns*, 2020 BCSC 356; *Porter v. Feizi*, 2023 BCSC 491; *Tolentino v. Nair*, 2021 BCSC 825; *Ziauddin v. Kuang*, 2022 BCSC 386.
- [72] The other defendants propose an award in the range of \$120,000 to \$140,000, citing the following cases: *McAuley v. Goodrich*, 2020 BCSC 2014; *Taylor v. Porter*, 2023 BCSC 777; *Guram v. Chanthavimone*, 2024 BCSC 1362; *Roberts v. Colbourne*, 2024 BCSC 1720.
- [73] I find that the circumstances in the cases relied on by the defendants do not compare to the severity of the plaintiff's injuries and their impact on her life. I consider the cases relied on by the plaintiff to be more comparable to the plaintiff's circumstances, with the qualification that the plaintiffs in *Grabovac* and *Moen* were quite a bit younger than the plaintiff, and the plaintiffs in *Matwijec* and *Meckic* were older. Taking into consideration all of the plaintiff's circumstances, and in particular the degree to which losing her career and fitness regime has impacted her life, including her ability to recover from her psychological injuries, and allowing for some further improvement in her symptoms, I find that \$250,000 for non-pecuniary damages is a fair and reasonable award.

Loss of earning capacity

- [74] Assessing the plaintiff's loss of earning capacity involves comparing her hypothetical career path absent the Accidents with her actual and prospective career path with the Accidents. Compensation is for lost capacity, not the actual loss of income: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. To the extent the exercise involves consideration of hypothetical events, those will be taken into consideration as long as they are real and substantial possibilities and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 46, 48.
- [75] The plaintiff's career was well-established at the time of MVA1. She graduated with a Diploma in Nuclear Medicine Technology from British Columbia Institute of Technology in 2000. From 2000 to 2014, she worked as a nuclear medicine technologist at various hospitals in the Lower Mainland.

- [76] Nuclear medicine is a specialized and safety-sensitive field that involves the use of radioactive chemicals. As a nuclear medicine technologist, the plaintiff worked in a circuit of roles within the department. It is a physically and cognitively demanding job; the consequences of mistakes can be serious for the individuals and locations involved. As a technologist, the plaintiff was responsible for preparing radiopharmaceuticals in a "hot lab"--the word "hot" is used because of the radioactive nature of the material being handled. This work takes focus and attention to detail; it requires knowledge and calculation of proper formulas, and careful preparation of the radiopharmaceuticals, using protective gear. The technologist works under a fume hood and behind lead glass that they must reach around with awkward body ergonomics. In addition to the hot lab work, nuclear medicine technologists inject patients with radiopharmaceuticals, position patients and operate scanning cameras, attend to cardiac patients performing stress-testing, and support patients who are uncomfortable or have difficulty with various procedures and testing. The plaintiff's role also involved safely packing and transporting radiopharmaceuticals in heavy lead-lined briefcases to other hospitals.
- [77] In January 2015, the plaintiff was promoted to the role of area supervisor at Peace Arch Hospital, which involved assuming managerial responsibilities in addition to her regular technologist job duties. The additional responsibilities in this position involved staff management, scheduling, student training, and liaising and coordinating with other hospital departments. Starting in 2017, from time to time the plaintiff also provided relief coverage for the position senior to hers, site coordinator. The site coordinator oversees all medical imaging departments at the hospital. The plaintiff felt honoured to be asked to work those relief shifts over people from other departments who were more senior than her. She received increased pay for the relief shifts, and felt it was a stepping stone to eventually becoming a fulltime site coordinator at Peace Arch Hospital or another Lower Mainland hospital.
- [78] The plaintiff loved working in nuclear medicine. She found the roles of supervisor and relief site coordinator to be rewarding, and believed she was well-liked and respected. Her ultimate career plan was to pursue further education and hopefully become a director within the health authority one day. Prior to the Accidents, the plaintiff had met with an executive director for coffee to discuss how to achieve this goal, and had looked into programs offering the master's degree required for a director position. She considered enrolling but had not taken any concrete steps in that regard at the time of the Accidents. However, she did participate in optional leadership courses through Vancouver Coastal Health in 2017. Around that same time, and at the suggestion of her director, the plaintiff also successfully applied for the co-chair role of an extended leadership team at work. The plaintiff took these opportunities because she knew they would add to her resume and allow her to move up in her career.

- [79] But for the Accidents, the plaintiff says that she would have continued to work full time to the date of trial as a nuclear medicine supervisor, with occasional relief shifts as a site coordinator.
- [80] Mr. McKee says there is a real possibility that the plaintiff's without-Accidents participation in the workforce would have been reduced because of caregiving responsibilities, or by personal choice to spend time with her family, vacation, and pursue hobbies and personal interests. I do not agree. The evidence does not support a finding of anything less than full-time employment for the plaintiff. There is no evidence that the plaintiff worked in any reduced capacity after having children, other than her maternity leaves.
- [81] To the contrary, the evidence establishes that the plaintiff has always had a strong connection to the workforce. She remained focused on advancing her career after having children and during her divorce, which was a period of significant personal crisis in her life. She readily assumed additional work responsibilities and educational opportunities. She maintained a very busy and full life--which included dedicating significant time to her physical fitness hobby and obtaining her yoga teacher certification--while working full time. The evidence does not reveal any reason to believe that would have changed absent the Accidents. I find that but for the Accidents, the plaintiff would have continued to work full time as an area supervisor, with occasional shifts as a relief site coordinator.
- [82] The plaintiff says she likely would have been promoted to full time site coordinator by the time of trial, and uses the salary for that position as the basis for her future loss of earning capacity claim. The plaintiff says the possibility of further advancement in her career should be considered as a contingency, which I will address below in relation to future loss of earning capacity.
- [83] The defendants say the evidence does not support that the plaintiff would have obtained a permanent site coordinator role. The other defendants observe the plaintiff had no training or experience in any of the medical imaging disciplines besides nuclear medicine. However, there is no evidence that formal training in other fields is a prerequisite for the role, and I find the fact that the plaintiff was asked to perform the job on a relief basis suggests that she was qualified. It also cannot be said that the plaintiff had no training or experience outside nuclear medicine--in performing the site coordinator role on a relief basis, she was obtaining on-the-ground training and experience.
- [84] Mr. McKee argues for an adverse inference against the plaintiff on the topic of work performance and anticipated ability to advance in the workplace, because the plaintiff did not call evidence from any workplace supervisors. He says these witnesses were not equally available to him, because the plaintiff is employed by an institutional employer that is subject to sophisticated privacy laws. There is no merit to this position. It was open to Mr. McKee to seek discovery of the names and contact information for the plaintiff's supervisors; he did not do so. Not having information that would have been available through pre-trial discovery cannot be used to advance an adverse inference argument at

trial. The plaintiff's supervisors were identifiable and available to Mr. Mckee to call as witnesses. There is no basis for me to draw the proposed adverse inference against the plaintiff.

- [85] I acknowledge that there is no direct evidence about the plaintiff's workplace performance from her supervisors. However, I find the evidence at trial is sufficient to establish a real and substantial possibility that the plaintiff would have eventually successfully applied for a site coordinator position at a Lower Mainland hospital. The opportunities being made available to the plaintiff at work, her career trajectory and personal traits, and expert and lay evidence to the effect that relief work suggests eventual promotion to a fulltime position all support that the plaintiff was on track to obtaining a site coordinator role. I find the date of trial is a reasonable point in time to expect that to have occurred, given the opportunities the plaintiff was being offered in the years leading up to MVA1.
- [86] The plaintiff says that, in the absence of the Accidents, she would also have eventually earned additional income as a fitness instructor. She points to the certification she obtained in February 2016, and the fact that the friend she obtained that certification with has gone on to earn side income teaching fitness classes. I find the evidence does not support a real and substantial possibility that the plaintiff would have done so herself. She took no steps to work as a fitness instructor between obtaining her certification and the date of MVA1. The workplace circumstances and career goals of the plaintiff and her friend are not comparable. I find that the plaintiff would not realistically have had the time available to pursue this side career because of the time commitments associated with pursuing her career goals at work, including the demands of additional education and committee work as discussed above.
- [87] The plaintiff says that as a result of the injuries suffered in the Accidents, she has become and remains totally disabled from working in any occupation. She says the evidence does not support a real and substantial possibility that she will return to competitive employment in the future. In the alternative, she says that if there is a finding that she will have some residual capacity to earn income in the future, the amount will be modest and is offset against the contingencies of possible further promotion in her former career had the Accidents never occurred.
- [88] The defendants do not appear to take issue with the plaintiff's disability from employment to date, and they agree that the plaintiff's former career is no longer available to her. However, they dispute that the plaintiff is totally disabled from working in any occupation in the future. The defendants say the evidence discloses a real and substantial possibility that the plaintiff could return to work in a light duty employment position.
- [89] While I agree that the plaintiff has skills, qualifications, and experience that should make her competitively employable in other less physically demanding jobs, the difficulty with the defendants' argument regarding future employment prospects is that they focus on the plaintiff's physical injuries and pain and ignore the very real implications of her

psychological injuries. Their submission that the plaintiff has "assumed" or "adopted" a "disabled person persona" reflects a misunderstanding of psychological injury. I reject the suggestion that I should attribute to the plaintiff any degree of choice about how her psychiatric symptoms have manifested. There is no basis on the evidence to conclude that the plaintiff's psychological symptoms are anything but genuine, unwanted, and life-altering. Mr. McKee's submission that the plaintiff is not motivated to work is impossible to reconcile with the evidence about her work history before the Accidents, the significant degree to which she has pursued treatment since the Accidents, and the plaintiff's stated desire to return to her job.

- [90] I find the expert and lay evidence establishes that the plaintiff has been and presently remains unable to work due to the injuries suffered in the Accidents. However, as already discussed, I find there is a real and substantial possibility for improvement of the plaintiff's psychological injuries, such that a return to some sort of work will be possible, at least part time, which will in turn have a corresponding positive impact on her psychological status. The plaintiff is strongly motivated to return to work, and there is every reason to believe she will pursue other employment options once she accepts that a return to her previous job is not possible.
- [91] The defendants urge certain findings regarding the specific types of employment the plaintiff might obtain in the future. While there is some expert evidence from Dr. Queen Newell regarding job categories that might be compatible with the plaintiff's qualifications and experience, in my view the evidence does not go so far as to establish a real and substantial possibility of the plaintiff actually obtaining work in those proposed fields. Importantly, there is insufficient evidence about the job market for any of the proposed fields of employment for me to assess the likelihood of the plaintiff actually obtaining work, particularly given the likelihood that the plaintiff would require some form of workplace accommodation and may only be available on a part-time basis.

Past loss of earning capacity

- [92] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [93] The plaintiff seeks \$565,000 for past loss of income earning capacity. This amount assumes she would have continued working full time as a nuclear medicine area supervisor until the date of trial, and applies a positive contingency on the basis of the additional income she would have earned as a relief site coordinator, which I have accepted, and also as a fitness instructor, which I have rejected.

- [94] Darren Benning gave expert economist evidence at trial. He calculates the plaintiff's net past income loss from her job as area supervisor at \$508,374, based on the assumption that but for the Accidents, the plaintiff would have continued to work full time as an area supervisor until the date of trial, receiving periodic salary increases as set out in the applicable collective bargaining agreement. This figure does not include additional income the plaintiff would have earned when working relief shifts as a site coordinator.
- [95] Mr. Benning's past wage loss calculations include general negative contingencies for non-participation in the labour force and unemployment. The plaintiff says no other negative contingencies reasonably apply.
- [96] The defendants say that I should apply a 20% to 22.5% (Mr. McKee) or 20% (the other defendants) contingency reduction to Mr. Benning's calculation, to account for time off work due to possible injuries, illnesses, extended trips and vacations (since the plaintiff often travelled), family caregiving responsibilities, and bereavement leave when her mother died. The difficulty with the defendants' position is that there is no evidence about the paid leave benefits available to the plaintiff through her employer. The plaintiff worked full time in a union environment under a collective agreement. There is no evidence that the plaintiff had to take unpaid leave from work prior to the Accidents to be able to attend to caregiving responsibilities, to take vacations, or to recover from illness or injury. In the circumstances, the evidence does not establish there should be a further contingency reduction beyond the contingencies already built in to Mr. Benning's calculations.
- [97] I therefore accept Mr. Benning's evidence and find that the plaintiff's past after-tax income loss from her job as area supervisor is \$508,374, which accounts for loss of both salary and non-wage benefits. I consider it appropriate to increase that figure to account for the plaintiff being paid at a higher pay scale for working occasional relief shifts as a site coordinator. I determine that \$528,000 is a fair and reasonable assessment of the plaintiff's total past loss of earning capacity.

Future loss of earning capacity

- [98] The defendants accept there has been some degree of past loss of capacity and that there is a real and substantial possibility of future loss of capacity; as such, the only issue is valuing that possible loss: *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421.
- [99] The plaintiff claims \$1,815,000 for future loss of income earning capacity, on the basis that she has no residual capacity to earn income. Her claim consists of the present value of a full-time site coordinator salary until the age of 67 (\$1,665,991, based on Mr. Benning's evidence) and approximately \$150,000 to account for a real and substantial possibility that she would have been promoted to director at some point in the future, and earned additional income as a fitness instructor. I have already declined to find a real and substantial possibility of fitness instructor income. I find the evidence also does not establish a real and substantial

possibility of the plaintiff becoming a director, which is a role that involved significant additional education and qualifications that the plaintiff did not have.

- [100] The plaintiff says that even if I find that she may earn income in the future, as I have, the amount is modest and offset against the contingency that her future salary would have been higher than expected.
- [101] The other defendants suggest two approaches to valuing the plaintiff's future loss of earning capacity. First, they suggest basing an award on the entire lifetime earning capacity of an area supervisor, deducting contingencies for expected absences from work and, most importantly they say, for the real and substantial possibility that the plaintiff will return to work in some other, sedentary role. They say that a realistic deduction for that contingency is significant--50%. The other defendants say that this method of assessment results in an award of \$600,000. This figure assumes the plaintiff retires at age 65, rather than age 67 as proposed by the plaintiff.
- [102] The second method proposed by the other defendants is to determine the with-Accidents future earning capacity of the plaintiff and deduct that from her without-Accidents future earning capacity as determined by Mr. Benning, as further adjusted for expected absences from full-time work. They say this approach results in an award of just over \$560,000. Mr. Mckee proposes using this second method to assess future loss of earning capacity, which he says supports an award in the range of \$420,000 to \$600,000. The difficulty with using this second proposed method of assessment is that it assumes the plaintiff will be able to secure full-time employment in the fields suggested by Dr. Quee Newell, and assesses the plaintiff's loss with reference to the average salaries in those fields. This analysis is not available on the findings I have made above. For that reason, I find the first approach proposed by the other defendants is appropriate in this case, but using the salary of a site coordinator and not an area supervisor, given my findings about the plaintiff's career path absent the Accidents.
- [103] In applying the first approach, the plaintiff has not established any reason to depart from the usual retirement age of 65. I therefore find the starting point for assessing the plaintiff's future loss of earning capacity is the anticipated future earnings of a full-time site coordinator from the date of trial to age 65. Relying on Mr. Benning's calculations, the present value of that loss is \$1,586,810.
- [104] I consider the other defendants' proposed 50% reduction to account for the possibility of return to alternative employment to be far too high. While I have found there is a real and substantial possibility the plaintiff will recover to the point where she can return to some sore of employment, there is also a real and substantial possibility that her recovery will not progress as hoped. A contingency reduction in assessing her future loss of earning capacity must reflect both possibilities. In my view, the possibility of the plaintiff's return to alternative employment is somewhat greater than the possibility of the plaintiff never returning to work, but not so much greater that a 50% reduction in her future loss of

earning capacity award is warranted.

[105] I have also considered the usual general contingencies and other contingencies specific to the plaintiff, including in particular the chance of future promotion or other pay increases (such as through the collective bargaining process) and the chance she would not have been promoted to site coordinator as expected. I find these other general and specific negative and positive contingencies are evenly balanced in this case.

[106] Having considered all of the evidence, I determine that a 20% reduction is a fair and reasonable reflection of the applicable contingencies in this case. This results in a future loss of earning capacity assessment of \$1,269,448 (80% of \$1,586,810).

Cost of future care

[107] The plaintiff seeks future care costs of \$756,000 (present value) over her lifetime, consisting of:

- a) Botox injections;
- b) Medications (Cymbalta, Cambia, Topiramate, and Tylenol 3);
- c) Rehabilitation services, including physiotherapy, massage therapy, occupational therapy, kinesiology, psychological counselling, and driver rehabilitation; and
- d) Home support services for deeper cleaning.

[108] I will address each of these categories below. For each, I am guided by the principles applicable to assessment of future care costs. The evidence must establish that the costs are reasonable and medically necessary: *Tsalamandris v. MacDonald*, 2012 BCCA 239 at para. 62, citing *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (B.C.S.C.), aff'd 49 B.C.L.R. (2d) 99, 1987 CarswellBC 450 (B.C.C.A.). A future care costs award should reflect a reasonable expectation of what is required to put a plaintiff in the position they would have been in but for the accident. The assessment is an objective one, based on the evidence, and must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[109] I must also be satisfied that the plaintiff will make use of the care item, that the plaintiff would not have incurred the expense in any event, regardless of the injuries, and that there is no significant overlap in the care items being sought: *Pang* at para. 57. Mr. McKee submits there is low likelihood of the plaintiff pursuing recommended treatments. The evidence does not support this position. Based on the plaintiff's diligent pursuit of recommended treatments to date and her continued focus on recovery, I am satisfied that the plaintiff will make use of all treatments that are available to her in the future.

Botox injections

- [110] The defendants do not take issue with the need for Botox injections. They have been recommended by the plaintiff's treating physicians, and treatment has resulted in significant improvement in the plaintiff's headaches.
- [111] The other defendants say the total present value of these injections as calculated by Mr. Benning would be about \$61,000, consisting of \$20,468 (injection fee) plus \$40,935 (medication fee). Mr. Mckee notes Ms. Rau's evidence that there are MSP-funded pain clinics that provide Botox injections, but have long wait lists (several years). Mr. Mckee says that an award for Botox injections should provide for two to three years of reimbursement, after which the plaintiff will then be able to obtain MSP-funded Botox injections. He says an appropriate award is therefore just under \$7,000.
- [112] The difficulty with Mr. Mckee's position is that the evidence does not establish the likelihood of the plaintiff being eligible for MSP-funded Botox injections, or the degree to which the treatment would be covered (i.e. whether the plaintiff would still incur some out-of-pocket costs despite MSP funding). In the absence of evidence permitting such findings, I decline to limit the plaintiff's recovery of this future care cost to only three years.
- [113] I find that the evidence establishes the Botox treatments are reasonable, medically necessary, and the plaintiff will continue to pursue this treatment. On the evidence, I find that full reimbursement of the cost is reasonably necessary to put the plaintiff in the position she would have been in but for the Accidents. I award the plaintiff \$61,403 (\$20,468 plus \$40,935) for this future care item.

Medication

- [114] The defendants accept that medications are likely necessary going forward, but not to the extent proposed by the plaintiff. They do not object to continued Cymbalta (used to manage the plaintiff's mood and pain) and occasional Tylenol #3 (used for pain management). Mr. Benning calculates the present value of these medication as \$11,800 and \$2,149, respectively.
- [115] Mr. Mckee says a multiplier to age 80 should be used to calculate this award, which results in a somewhat lower figure, whereas Mr. Benning's approach uses age 110. The difference is due to the methodology applied by Mr. Benning, whose opinion is the only expert evidence in this regard. Mr. Benning uses the probabilistic approach rather than the life certain method, which he explains as follows:

Note that our estimates are based on a probabilistic approach for life expectancy. This method extends the calculations to a maximum age of 110 years, but allows for the possibility of death in all years. This approach produces a lower net present value over the Plaintiff's life expectancy than the life certain method.

- [116] I accept Mr. Benning's evidence that age 110, and not age 80, is appropriate for assessing future care costs using the methodology he applied. I therefore award the plaintiff \$11,800 for the future cost of Cymbalta, and \$2,149 for the future cost of Tylenol #3.
- [117] The plaintiff also claims for Cambia and Topiramate, both of which are used to manage her headaches. The defendants observe that Dr. Cameron conceded that stopping Topiramate should be considered with the effective use of Botox injections. Likewise, they say effective Botox injections should reduce or eliminate the need for Cambia.
- [118] It is reasonable that the complexity of the plaintiff's condition, which includes both musculoskeletal and migraine headaches, will require treatment with both Botox and medication. That said, Dr. Cameron's evidence on cross-examination was that if a patient has success with Botox treatment of headaches and they are having side effects from Topiramate, it is realistic to withdraw Topiramate and try treatment only with Botox. He agreed that some people have negative cognitive side-effects associated with Topiramate. There is no question that the plaintiff experiences ongoing cognitive issues. I accept that these may be related to her use of Topiramate.
- [119] Given the plaintiff's ongoing cognitive symptoms, I accept that there is a real and substantial possibility that her treating physicians will trial a withdrawal from Topiramate to see if there is improvement in her cognitive function. However, there is also a real and substantial possibility that the plaintiff's cognitive issues are unrelated to Topiramate and do not improve with this withdrawal, or that she experiences a worsening of her headaches after discontinuing this treatment, such that her doctors recommend resuming it. In the circumstances, I consider it appropriate to make an award for future cost of Topiramate, but reduced by 25% to account for these contingencies. Using Mr. Benning's calculation, I award the plaintiff \$11,666 (75% of \$15,555, rounded to the nearest dollar) for the future cost of Topiramate.
- [120] Mr. McKee observes that the plaintiff led little evidence of her use of Cambia since starting Botox. However, there is no question that Cambia is being prescribed and taken by the plaintiff to treat her headaches, and, unlike Topiramate, there is no medical evidence suggesting the plaintiff should trial a withdrawal from Cambia. In the absence of expert opinion, there is no basis to find that the plaintiff should cease this treatment, even with successful Botox treatment. I find the evidence establishes the plaintiff's claim for the future cost of Cambia. Relying on Dr. Benning's calculations, I award her \$23,640 in that regard.

Rehabilitation services

- [121] From the plaintiff's perspective, she requires treatments such as massage therapy, physiotherapy, and counselling to function and maintain any gains she has made in her recovery. She says she feels the effects if she misses treatments, which was her experience when she had to go without regular treatment during the pandemic.

- [122] The defendants accept that psychological treatment is necessary, but say there is no medical justification for continued passive treatment services such as massage therapy and physiotherapy. The other defendants say that, at most, the plaintiff should receive three more years of treatment as part of the effort toward returning to the workforce. Using Mr. Benning's calculations, the other defendants say the plaintiff should receive \$15,000 for three years of weekly physiotherapy treatments, \$6,000 for three years of weekly kinesiology treatments, and \$21,000 for three years of weekly massage therapy. They also agree to \$1,475 for occupational therapy. With the exception of occupation therapy, Mr. Mckee does not agree that the evidence supports an award for any of these treatments.
- [123] I find that the need for ongoing physiotherapy and massage therapy at the plaintiff's current rate of once a week is established by the medical evidence--Dr. Galanopoulos and Dr. Khan each make this recommendation. Mr. Benning calculates the present value of these treatments as \$126,388 and \$181,600 respectively. However, I consider it appropriate to reduce these figures by 20%, given the real and substantial possibility that the plaintiff's chronic pain symptoms will decrease with successful treatment of her somatic symptom disorder. I decline to make any further reduction, because even with improvement in the plaintiff's chronic pain, maintenance of her physical function will be essential to her psychological recovery and ability to maintain any degree of employment. I therefore award \$101,110 (80% of \$126,388, rounded to the nearest dollar) for future physiotherapy, and \$145,280 (80% of \$181,600, rounded to the nearest dollar) for future massage therapy.
- [124] Dr. Khan also suggests kinesiology treatment. However, the benefit of this treatment appears duplicative of the anticipated benefit of physiotherapy, and I therefore decline to make any award for this treatment.
- [125] The defendants accept that the plaintiff will benefit from psychological treatment, but submit that continued counselling for the remainder of the plaintiff's life is excessive and not recommended by any of the experts. The other defendants submit that five years of further psychological counseling is realistic, for a total of about \$28,000 based on Mr. Benning's calculations. Mr. Mckee relies on Dr. Morgan's recommendation that the plaintiff receive 20 to 25 sessions initially, followed by three to four sessions a year for another two years. He estimates the cost for this treatment is \$7,425.
- [126] In my view, Dr. Morgan's recommendation is not realistic, given the trajectory of the plaintiff's psychological symptoms to date despite extensive targeted treatment. I prefer Dr. Spivak's opinion that ongoing supportive psychotherapy will be required long-term. As with her physical condition, maintenance of the plaintiff's psychological function will be essential to her ability to maintain future employment. I consider it appropriate to award ongoing psychological treatment costs as calculated by Mr. Benning, but with a reduction of 20% after the first year of treatment, to reflect the possibility of improvement in her symptoms. I therefore award \$11,574 for the plaintiff's first year of treatment, and \$79,689 for subsequent future psychological treatment costs (80% of \$99,611, rounded to the nearest dollar), for a total award of \$91,263.

- [127] The plaintiff also seeks damages for the cost of driver rehabilitation. The plaintiff has already successfully completed a course of driver rehabilitation treatment. I agree with the defendants that the evidence does not establish a need for further driving training, and I decline to make any award in that regard.
- [128] Finally, the plaintiff seeks 10 to 15 hours of occupational therapy every five years, as suggested by Dr. Galanopoulos and Dr. Khan. The defendants accept that occupational therapy should be awarded for three years, to facilitate the plaintiff's return to alternative employment, but say the evidence does not establish the need for indefinite ongoing occupational therapy. I agree. The plaintiff has received extensive occupational therapy to date, and I am not satisfied that the evidence supports that this treatment will be continue to be necessary into the future. I consider the defendants' proposed award of \$1,475 to be reasonable, and I assess damages for occupational therapy in that amount.

Home support

- [129] The plaintiff seeks three hours per week of house cleaning assistance for tasks she is unable to complete on her own, annually to age 80 for a total claim of \$134,726. The other defendants object, and say that while the plaintiff has paid for house cleaning services to date, there is no evidence that the plaintiff and her family are not able to maintain the cleanliness of their home without external assistance.
- [130] Mr. McKee also says that the evidence does not directly confirm that the plaintiff requires this support. In addition, he observes that while Ms. Rau recommends three hours a week, the Plaintiff's evidence is that the two and a half hours per week of cleaning services that she presently receives is sufficient. Finally, Mr. McKee submits that it is reasonable to apply a reduction to this item on the basis that the plaintiff's need for house cleaning will subside if symptom improvement is experienced. In the interest of letting the plaintiff focus on getting back to work, Mr. McKee submits that another five years of housecleaning may be appropriate (a present value of approximately \$30,000).
- [131] I do not agree with the defendants' submission that the evidence does not establish the plaintiff requires external assistance with cleaning tasks. The plaintiff's evidence is that she is unable to perform deep cleaning tasks that she was responsible for prior to the Accidents, because they are beyond her physical ability or aggravate her pain symptoms. Ms. Rau's evidence supports this. However, I find that the plaintiff does not require a level of support greater than what she is currently receiving, which is two and a half hours per week. I also find that it is reasonable to account for the possibility that the plaintiff's symptoms will improve to the point that she does not require the same degree of cleaning assistance. In the circumstances, I consider \$90,000 to be a reasonable award for the plaintiff's future home support needs.

Special damages

[132] The defendants agree to pay the plaintiff's claimed special damages. I therefore award special damages in the amount of \$22,601.18, as sought by the plaintiff.

SUMMARY

[133] In summary, I assess and award the plaintiff's damages as follows:

Non-pecuniary damages

\$250,000

Past loss of income

\$528,000

Loss of future earning capacity

\$1,269,448

Cost of future care

Botox injections

\$61,403

Medication

Cymbalta

\$11,800

Tylenol #3

\$2,149

Topiramate

\$11,666

Cambia

\$23,640

Rehabilitation services

Physiotherapy

\$101,110

Massage therapy

\$145,280

Psychological treatment

\$91,263

Occupational therapy

\$1,475

Home support

\$90,000

Special damages

\$22,601.18

[134] As the successful party, the plaintiff is presumptively entitled to her costs from the defendants, at Scale B. If any party seeks an alternative costs order, they have leave to request a further hearing before me within 30 days of the date of this judgment. In those circumstances, each party must provide a written argument to the other parties and to the Court at least seven days before the hearing date.

"Ramsay J."

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