

CANADA / JUDGMENT

van Tol v. Rodway

2022 BCSC 1173

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1173 van Tol v. Rodway

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

van Tol v. Rodway,

2022 BCSC 1173

Date: 20220714

Docket: M35025

Registry: Chilliwack

Between:

Andrea Rosalyne van Tol

Plaintiff

And

David Charles Rodway and

Douglas Ray Johnson

Defendants

- and -

Docket: M38955

Registry: Chilliwack

Between:

Andrea Rosalynn van Tol

Plaintiff

And

Loria Louise Townend

Defendant

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:

A. Pappin

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C. Godwin

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Place and Dates of Trial:

Abbotsford, B.C.

May 2-6, 9, 11 and 12, 2022

Place and Date of Judgment:

Chilliwack, B.C.

July 14, 2022

Introduction

- [1] The plaintiff Ms. Andrea van Tol seeks damages for injuries she suffered in two motor vehicle accidents on September 23, 2016 and December 5, 2019. Liability for the accidents has been admitted. Ms. van Tol seeks awards for non-pecuniary damages, past and future loss of work capacity, and special damages.
- [2] Following the first accident, Ms. van Tol suffered from headaches, pain in her neck, shoulders and upper arms, upper and lower back extending to her hips, pain and numbness in her hands, blurred vision, imbalance, and depressed mood. Three years later she was diagnosed as having fibromyalgia syndrome ("FM") and central sensitization ("CS"). She claims a complete inability to work. The defendants challenge the extent of Ms. van Tol's complaints and injuries. They submit that her claims of chronic pain, headache and FM are all entirely subjective in nature and exaggerated and should be considered with caution. They also submit that Ms. van Tol has failed to mitigate her damages.

Ms. van Tol evidence

Pre-accidents

- [3] Ms. Van Tol is currently 50 years old and lives in Maple Ridge, B.C. She started working as a teenager and worked at various entry level jobs for the next 10 years until her first child was born in 1996. She had two more children in 2001 and 2003. Once she had children, she did some child minding in her home, but did not work outside the home except for a brief time as a night clerk at a hotel.
- [4] In 2005 she attended Vancouver Career College and obtained a community health care diploma and a resident care attendant diploma. This is an 11-month course. She had children to support and she wanted job security.
- [5] Following graduation, she was hired at a long-term care facility and then a group home in Chilliwack, where she subsequently worked for nine years until the home closed. Prior to the home closing, she was hired on a casual part-time basis by We Care Home Health Services ("We Care"), and then was hired for a full-time position at Colony Farm, the provincial forensic psychiatric facility. She did not like working at Colony Farm and quit after about six months, but then increased her hours at We Care to the equivalent of casual full-time work. At We Care she helped people in their homes and in assisted living facilities with personal care and administration of medications. She liked working at We Care and found the work rewarding. She did not have any difficulties with the physical aspects of the job.
- [6] At the time of the first accident she was living with Mr. Kelly Guest, her spouse now for 10 years, and her youngest daughter, then a young teenager. Mr. Guest is currently 61 years old and has been employed by the City of Maple Ridge for the past 10 years as a pipefitter.
- [7] Ms. van Tol's career plans were to continue to work for We Care and possibly do some additional part-time work. She had considered a second job with HandyDART, however there was no evidence she had applied for a position there.
- [8] Ms. van Tol and Mr. Guest had plans for retirement. They planned for Mr. Guest to retire when he was 65 or 67, and then to move to the Okanagan, where Mr. Guest's brother has a home, to a "nice quiet farm" and "enjoy his retirement". Ms. van Tol said that was "Mr. Guest's part", and she was thinking of "maybe possibly" continuing to work. She then said "I mean - let me rephrase that. I planned on continuing to work until I retired but I could have switched jobs up there. There's so much work out there, so it wasn't a concrete plan because it's still quite a ways away". She later said that she is 11 years younger than Mr. Guest, and she "doubted very much" she would retire or slow down in her work once he retired.
- [9] Ms. van Tol did most of the household tasks, both inside and outside their home. She did the cooking, cleaning, laundry, yard work, and house maintenance.

- [10] Ms. van Tol enjoyed walking, hiking, swimming, dancing, cardiovascular exercises, and mixed martial arts. She previously worked out at a gym with one of her children, but on cross-examination agreed that she had not done so for four years prior to the accident. She had a punching bag and mats in her home and worked out there doing mixed martial arts. She considered herself to be in good shape at the time of the accident. She said her weight at the time was 190 to 210 pounds, but as will be discussed, that is a contested fact. Ms. van Tol referred to pictures of herself when she was thinner and younger.
- [11] Ms. van Tol had one prior motor vehicle accident in 2001 or 2002. She "went through a lot of grief for a couple of years" with headaches and back pain, but within three years was back to "fairly normal". In May 2016 she twisted her back at work. She went to a chiropractor two or three times and then she was fine. She missed some time from work. Her pay stubs for the weeks leading up to the accident show that she was working a little more than full-time. She only took medications occasionally, for example when she had slipped on some mud going to a client's home and twisted her ankle.

Accidents

- [12] In the first accident, Ms. van Tol was driving her Honda Civic with Mr. Guest as a passenger. She was stopped at a red light and noticed in the rear-view mirror that a car was coming up behind her faster than it should. Her foot was on the brake. She tensed up and there was a "huge jolt to the car". She agreed at her examination for discovery that her car was not forced forward into the intersection but stated that it may have been in the stop line area. The next thing she remembers is the other driver at her side window. She is not sure of the length of time between the impact and this. She does not recall events directly after the hit and is not sure if she lost consciousness.
- [13] After the impact, she and Mr. Guest got out of their car and spoke with the other driver. Ms. van Tol then drove to the other side of the intersection where she exchanged information with the other driver. She took photographs of the vehicles. Ms. van Tol and Mr. Guest went to a nearby shopping centre and Mr. Guest got coffee and they went home. The accident took place about 5:45 pm. That evening at 8:20 pm, Ms. van Tol attended at the emergency room of the Ridge Meadows Hospital. Subsequent repair costs for her car were less than \$2,000. The air bags did not deploy.
- [14] In the second accident, Ms. van Tol was the driver of her Honda Civic and was stopped at the exit of a mall waiting to turn onto the road. Her youngest daughter was a passenger. Her car was rear-ended. It was a "bit of a jolt", but "nothing like the first accident". Her symptoms from the first accident, especially in the shoulders and neck, were aggravated for two to three weeks. She did not see the other car prior to impact and agrees there was a speed bump the other car would have had to go over prior to impacting her car. Pictures of the cars show little visible damage.

- [15] Given that the injuries from the second accident are a brief aggravation of the pre-existing injuries suffered in the first accident, there is no need to specifically refer to the second accident again in these reasons. Almost all evidence was in reference to the first accident. I have taken the second accident into account in assessing damages. Defendants' counsel advised that while the second accident occurred during the applicability of the Minor Injury Regulation, B.C. Reg. 234/2018, the defendants do not require a determination of whether the injuries claimed by Ms. van Tol from the second accident amount to "minor injuries" such that damages recoverable would be statutorily limited. The defendants are content for the court to assess Ms. van Tol's damages on a global basis without allocation between the two accidents. The injuries in the accidents are indivisible and I find it is in the interests of justice and fairness for this court to proceed as the defendants propose. Unless indicated otherwise, any reference to the "accident" in the reasons below refers to the first accident.

Post-accident

- [16] In the week following the accident, Ms. van Tol had: headaches; pain in her neck, shoulders, back, right knee, and ankles; and dizziness, imbalance, some nausea, and blurred vision. Ms. van Tol was "exasperated" and in a "lot of pain". After the first week she developed numbness in her hands, wrist and left leg.
- [17] Since the accident, Ms. van Tol has seen an optometrist, ophthalmologist, neurologist, otolaryngologist, rheumatologist, and an occupational therapist. Ms. van Tol attended many sessions of physiotherapy, massage therapy, and vision and vestibular therapy.
- [18] Neither the physiotherapy nor the massage therapy was helpful in improving Ms. van Tol's pain. She found them aggravating and expensive and agreed that she stopped going by the end of 2017, and has not gone since. She said it was more her body deciding. She thought the therapy was causing harm. The vestibular therapy did not help her balance, and if anything made it a little bit worse.
- [19] Ms. van Tol did not describe any significant improvement in her symptoms over time. None of her symptoms have resolved. Presently, Ms. van Tol describes her symptoms as pain, headaches, fatigue, blurred vision, imbalance, numbness in her hands, and feeling down.
- [20] Most of the pain is in her shoulders, the top of her arms and lower back. The pain in her shoulders is always there and the ligaments feel like guitar strings. It often feels like she is weighed down with a sack of potatoes on her shoulder. She has "intense pain", inflammation, and tightness. She has tried pain relievers such as Tylenol #3, muscle relaxants, and anti-inflammatories such as naproxen. She still takes Tylenol #3 occasionally.

- [21] Her headaches initially did not go away for "months". She described it as "very brutal". She now has "regular intense headaches". In 2018, she saw a neurologist, Dr. McDowell, who told her she was taking too much medication and it may be contributing to the headaches. She stopped taking the naproxen, and stated she probably stopped taking all medications for a while, but the headaches did not go away. She now occasionally takes Tylenol #3 for the headaches.
- [22] She described the fatigue as "very debilitating". She has "zero energy after doing minor things". Doing a simple task such as tidying the kitchen takes her energy level from 80% to 20% and that has to last her the day. If she does something more intense like mowing the lawn, she gets more pain and it seems to take all her energy away. She generally gets nausea along with it. The pain and energy loss go hand in hand. She loses energy on a daily basis and loses 50% of her energy by lunchtime, depending on what she is doing. At least once a week, she wakes up with "zero energy". She tends to take naps because sometimes it is the only way she can get relief. It takes an inordinate amount of time to do anything when she feels extremely fatigued. On a regular basis, walking and cooking is a lot slower. Then she will take a break and sometimes she will get her energy back and sometimes she will not, and it feels like she "weighs a ton".
- [23] She described her blurred vision as an inability to focus, as "kind of a double vision that goes in and out" where there are hazy borders around objects. The vision therapy helped her focus but it has not resolved. This causes strain on her eyes and impacts her leisure. Usually after a couple of hours of watching a screen, her eyes have a burning feeling like something is in them. She also feels her peripheral vision is not as good. She feels safe enough to drive, but "physically it's a chore".
- [24] She feels "pretty down about not being able to work" and not recuperating from the accident, and "living in pain all the time and having the issues that I have". She saw a psychiatrist in 2018. She was prescribed an anti-depressant (Cymbalta) in 2019 and took it for about two years but then quit on her own initiative in early in 2021, rather than on the recommendation of a doctor. Part of the reason she stopped was because she thought it was causing her to sweat and she was uncomfortable. She was also concerned regarding the effects of the drug on her liver. She preferred not to take medications before the accident, and instead would take "something herbal". She agreed her mood improved while she was on Cymbalta, and it worsened again when she stopped taking it. Since then she has "tried to have a better outlook" and deal with her issues on a day-to-day basis, be positive, practice deep breathing, and relax.
- [25] Ms. van Tol saw Dr. Stolar, a rheumatologist, in early 2019 and was diagnosed as having FM. Dr. Stolar told her of the benefits of low impact exercise, cessation of smoking, and weight loss. She has never signed up for low impact exercise because that would require her to do something on a regular basis, which she "can't do". When asked what she has been doing since 2017 to manage her condition, Ms. van Tol said she does the best she can by doing stretching exercises the physiotherapist showed her to do at home. She said she "can't really

afford" therapy and she had discussed with her GP that she is "managing on a day-to-day basis being a disabled person". She does what she can at home, and does not know what more she can do. She has tried all sorts of things and nothing has improved her condition. When asked what exercise she does at home other than stretches, she said she walks around the back yard and she has stairs. She has not attended a gym. She agreed that in 2017 her GP told her that she will have pain initially while conditioning herself, but that this was not a reason to give up and there would be no cure without buy-in from her. She said that is what she tries to do everyday. She has tried several times unsuccessfully to quit smoking. She has recently lost about 10 pounds.

- [26] Ms. van Tol has not returned to work since the accident. She had discussions with We Care about returning to work, and was offered a light duty position at some point after the accident, but she did not think she could do it so she did not try. The job was also "far away" on the "other side of Surrey" which was a long drive she was "unable to do". She also had fatigue and We Care would not have allowed her to nap and take rests during the day. She also recalls being dizzy during the day at that time.
- [27] Ms. van Tol has not applied for any other employment, or attempted any retraining, or any volunteer work, since the accident. She said she can't do even a part-time light-duty job close to her home because she knows her body, and how she is throughout the day. It is very difficult for her to get up and do simple tasks in her home without becoming completely unenergetic. She said she cannot do anything on a reliable basis and some days she "can't physically do anything". She does not think there is anyone who would hire someone who would constantly call in sick. ICBC sent an occupational therapist to her home and they worked together once per week for weeks, but this was not successful in returning Ms. van Tol to work.
- [28] Her typical day is to tidy the kitchen in the morning, take a break, have something to eat, relax, maybe do some laundry, do what is necessary such as get groceries because her abilities are "so limited". After she cooks dinner she is "pretty much done". Most of the time she has assistance from her son or Mr. Guest to load and unload the groceries. She does what she has to do at home. She tries to putter around at her pace according to what her body allows because she does not want to sit and do nothing. She tries to garden, but it is very limited.
- [29] She agreed she does all the cooking in her household five nights a week because "nobody in the house knows how to cook except me". They order in a lot because sometimes she is too tired. She does most of the cleaning, but it is "very minimal" and not to her previous standard. Her daughter and Mr. Guest will carry heavy items such as the laundry baskets up and down stairs. They now empty the dishwasher and vacuum. She cannot clean all the bathrooms and wash all the walls in one day. She has to do simple tasks throughout the day. Ms. Van Tol still does the yard work, but she gets her daughter to help with any heavy digging. Once in a while her daughter mows the lawn, but otherwise Ms. van Tol does it with a self-propelled lawn mower. She said yard maintenance has "gone out of the window". It

"wipes [her] out" but she still tries to do it because she wants to stay busy. She said her symptoms are aggravated, her leg goes numb and she has difficulty walking.

- [30] She described her current life as "managing what I've got going on with me on a day to day basis. It is difficult no doubt". She stated that "pretty much everything" she does she has to be "super careful" because she is not steady. Stairs are difficult. Driving exacerbates her condition, so Mr. Guest does most of the driving. Heavy lifting causes her "a ton of grief. Lifting of anything generally actually." She stated, "I just try to manage my day the best I can with what I got."
- [31] The injuries from the accident have affected her family life as she now spends less time with extended family members. Travelling has been difficult. Her relationship with Mr. Guest has changed a little because he is more concerned about her, and their financial situation is stressful, but it might have also brought them closer together because of their love. She has a hard time dealing with "stress and drama" and is easily emotional, and short tempered at times. She never broke down and cried before. Her mother has come to her house to help her, when usually it would be a grown child helping a parent.
- [32] Her financial situation has been a struggle since the accident. She received weekly benefits from ICBC until she got Canada Pension Plan ("CPP") disability benefits in 2019, retroactive to 2017. She receives about \$1,000 per month now.

Family evidence

- [33] A number of members of Ms. van Tol's family testified regarding her condition before and after the first accident. These were Ms. Kindra Christensen (her youngest child), Ms. Gwendolyn Coey (her sister), Mr. Guest, Ms. Linda Chow (her mother) and Mr. Samuel Chow (Ms. Chow's husband). They all testified that: prior to the accident Ms. van Tol was active and energetic, and that after the accident Ms. van Tol was much less active and in pain. They described the recreational activities they did with Ms. van Tol, such as dancing and going to the gym (Ms. Christensen), going for walks (Ms. and Mr. Chow and Ms. Coey), or hiking and basketball (Mr. Guest), consistent with Ms. van Tol's evidence.
- [34] Ms. Christensen currently lives with Ms. van Tol and Mr. Guest, but had not done so for much of the time since the accident. She said her mother was definitely more energetic before and now is typically in a lot of pain, and slow to do things around the house. Ms. Christensen agreed that her mother has continued to do all the cooking in their household; does household chores such as cleaning the bathtub, shower and toilet; and has continued to cut the grass most of the time. She described minimal assistance from her and Mr. Guest for household chores.

- [35] Up until the end of 2018, Ms. Coey saw her sister two or three times per year at family dinners at Easter, Christmas, and for a summer picnic. She has not personally seen her sister since Christmas 2018 because in 2019 Ms. Coey had a serious illness, and the COVID-19 pandemic started shortly after that. She said her sister stopped being the kind of vibrant person she used to know. Ms. Coey and her mother started cooking more for family dinners. They used to go for walks at those events, and now her sister does not go.
- [36] Mr. Guest met Ms. van Tol 12 to 14 years ago. Prior to the accident Ms. van Tol did 90% of the inside and outside chores about their home. Since the accident, Ms. van Tol continues do the cooking and household chores, but she tires easily and is in pain. He gave similar evidence to Ms. van Tol regarding the tasks he now helps her with about the home. He said his spouse is nothing like she was before the accident.
- [37] Ms. and Mr. Chow stated that prior to the accident they saw Ms. van Tol two to three times a month at each other's homes. They described Ms. van Tol as fit. Ms. Chow had bought her daughter a punching bag. Contact decreased to once a month after the accident when Ms. van Tol was in pain and had headaches and was even less after the COVID-19 pandemic started. Because Ms. van Tol was nervous driving, sometimes they drove Ms. van Tol to appointments. Ms. Chow described that one of the last times she and Ms. van Tol went shopping, her daughter could not walk the length of the mall and had to stop, sit down and rest.

Expert evidence

Dr. Timothy McDowell

- [38] Dr. McDowell is a neurologist and evaluated Ms. van Tol on one occasion on March 23, 2018 at the request of Ms. van Tol's counsel. He provided an expert report dated May 16, 2018. He has not seen Ms. van Tol since.
- [39] Dr. McDowell diagnosed post-traumatic headaches and subsequent medication overuse headaches, both caused by the accident. He stated in his report:

Ms. van [Tol] did not report any significant transient neurologic symptoms at the time of the accident which makes a diagnosis of concussion unlikely in my opinion. With the emergence of chronic headaches that began within 7 days after the accident, along with poor balance and nausea, she meets the criteria for post traumatic headaches. The course of these headaches is likely prolonged due to her regular analgesic use which can lead to medication overuse headaches. Taking an abortive headache medication (i.e. Tylenol #3, naproxen in this case) more than 15 days per month for greater than 3 months fulfills the criteria for medication overuse headache. In my opinion, this is currently the predominant headache issue.

- [40] He recommended that Ms. van Tol reduced her use of pain medication to no more than two days per week, and suggested that a headache preventative therapy could be considered, such as nortriptyline, amitriptyline, topiramate, or propranolol. The goal would be to get

about a 50% reduction in frequency and severity, which happens to a significant number of patients treated, but not for all. Dr. McDowell opined that he expected that with "appropriate treatment of her chronic headaches, particularly reducing naproxen use she will improve in the coming months".

- [41] Dr. McDowell agreed that headaches are very subjective, and there is no test to refute or confirm a patient is having a headache, although there are tests for secondary causes of headaches. Headaches can be severe. He agreed his opinion that Ms. van Tol was disabled from headaches was based solely on Ms. van Tol's report to him that her headaches made her unable to work.
- [42] Dr. McDowell did not have a neurological explanation for Ms. van Tol's visual symptoms, and suspected that a non-neurological diagnosis was most likely. He deferred comment on her soft tissue injuries and anxiety symptoms as they are outside his scope of expertise.

Dr. Rhonda Shuckett

- [43] Dr. Shuckett is a rheumatologist. Because of the COVID-19 pandemic restrictions, she obtained a history from Ms. van Tol by phone on April 21, 2020, and examined her in person on June 25, 2020 at the request of Ms. van Tol's counsel. She provided an expert report dated March 7, 2021. She has not seen Ms. van Tol since.
- [44] Dr. Shuckett described Ms. van Tol's reports to her of: headaches (frequent, persistent, lasting days, and which can be intense); imbalance and episodes of vertigo; blurred vision; neck pain (constant and moderate to severe); shoulder and upper back pain (constant); low back pain into the hip and buttock areas (constant, moderate to severe, and increased with activity); "pain all over the body at once" (occasionally); random and intermittent numbness in the thighs; random knee pain which started just days before the interview with Dr. Shuckett; cramps in the lower legs, abdomen and arms; pain in the arms and hands, including numbness in all the fingers and the wrist area; difficulty with sleep and fatigue; "brain fog"; and depressed mood and anxiety. and Dr. Shuckett diagnosed the following which she opined were caused by the accidents:
- (1) a combination of largely cervicogenic/post-traumatic vascular migraine headaches related to whiplash injury;
 - (2) neck whiplash injury with myofascial pain of the neck and shoulders and palpable muscle spasm;
 - (3) right shoulder rotator cuff tendinopathy and impingement;

- (4) signs of "muscular" thoracic outlet syndrome ("TOS") on the left side. The numbness and paresthesia in Ms. van Tol's hands are due to myofascial pain and muscle spasm at the neck and shoulder girdle areas. The symptoms of numbness are not major and the TOS on the left is quite mild and would be treated conservatively, directed to treating her myofascial pain of the neck;
 - (5) mechanical low back pain with combined musculoligamentous and facet injury and some right sacroiliac ligament sprain. Ms. van Tol has become very deconditioned and has gained considerable weight since the accident. The deconditioning and weak core muscles and weight gain are further contributing to the mechanical low back pain, general pain, and FM; and
 - (6) FM and CS. CS results in an "amplified cycle of pain". Most cases of FM are considered to have CS as the mechanism of pain.
- [45] Dr. Shuckett agreed that on the basis of Ms. van Tol meeting the American College of Rheumatology criteria for FM, she made the diagnosis. She agreed the criteria are entirely dependent on the subjective report of Ms. van Tol regarding her pain and the severity of it. Dr. Shuckett agreed she has no way to objectively test for pain.
- [46] She agreed some of Ms. van Tol's descriptions of her symptoms were dramatic, but she cannot say they were a basis for concluding Ms. van Tol was exaggerating. She opined that Ms. van Tol was "pain-focused" but said this is her subjective comment and when she was assessing Ms. van Tol they were focused on her pain. Dr. Shuckett suspected that Ms. van Tol exhibited some "pain behaviour" at a couple of points during the physical exam. It does not necessarily imply exaggeration. She noted that Ms. van Tol was "so deconditioned that it was hard for her to get up from the examining table from lying down and I had to have her lean on my shoulder for me to give her a shoulder and hoist her up from the table". Although she could not rule out this as a pain behaviour, she did not think it was.
- [47] Dr. Shuckett opined that the causal link between physical trauma and FM is a contentious debatable topic with some studies supporting and some studies refuting causation. However, in Dr. Shuckett opinion, Ms. van Tol developed FM and CS because of the injuries suffered in the accident. She stated:

I believe that in the aftermath of the 2016 motor vehicle collision, she developed new areas of spinal and soft tissue injury with referred pain with myofascial pain. Her sleep was more interrupted. She told me that she became anxious and depressed. She became overweight and deconditioned. Her deconditioning, lack of exercise and possible emotional health issues are likely contributing, causative factors to her development of fibromyalgia. In this way, I believe that these factors after the subject MVA's have played a causative role in her development of fibromyalgia and central sensitization.

Why some patients decompensate so much in the aftermath of an MVA and develop central sensitization and chronic pain of fibromyalgia, or what is often termed "primary chronic pain", is not well understood.

She does have at least 2 positive Waddell's tests for non-organic pain signs. Usually, 2 positive tests are not considered particularly significant. Main and Waddell, in a position paper, have suggested that 3 or more positive Waddell's tests can suggest that some psychosocial issue contributing to a patient's pain presentation. [...] Fishbain and other authors have countered the very significance of doing Waddell's tests for non-organic pain signs. [].

[48] Dr. Shuckett acknowledged that Ms. van Tol was not diagnosed with FM until early 2019. She agreed that usually physicians will look at 12 to 18 months for the development of FM if they are making a link to an inciting event, but it is not unusual for a diagnosis of FM to be made years after an event and not until the patient sees a rheumatologist. FM usually takes a year to develop. Just because Ms. van Tol's FM was diagnosed in 2019 does not mean that it began in 2019.

[49] With respect to prognosis, Dr. Shuckett opined that ongoing pain beyond three years from the accident in general "does not bode well" for further improvement, and that Ms. van Tol has likely attained maximum medical improvement. Dr. Shuckett suspects that Ms. van Tol's psychosocial and emotional health is playing a role in her clinical presentation, but deferred opinion to other specialists on the degree to which this is contributing to her symptoms. Emotional health and physical symptoms are intertwined. She believes Ms. van Tol has had difficulty adapting to the effects of her injuries. She noted that Ms. van Tol reported improvement in her mood while on Cymbalta. Cymbalta will often help FM and chronic pain, but it has not resulted in an improvement for Ms. van Tol's.

[50] Dr. Shuckett opined that with Ms. van Tol's current symptoms, she would not be able to work as a care aide, and it is unlikely that Ms. van Tol will return to any form of remunerative employment in the future. She again deferred comment on the degree to which emotional health may affect Ms. van Tol's return to work. Dr. Shuckett agreed it is possible Ms. van Tol could return to some form of remunerative employment with treatment, but she did not think it was probable. She agreed motivation is important. When it was suggested that taking Cymbalta would improve Ms. van Tol's chances of returning to work, she said taking Cymbalta assisted Ms. van Tol's mood but it did not assist her pain and had not converted her ability to return to work. She did not think weight loss would convert her into an employable situation, but it might help with her general level of function. She agreed that regular low impact exercise is an important modality of non-medical treatment for FM.

[51] Dr. Shuckett suggested the following treatment options be considered by Ms. van Tol and her treating physicians. First, a trial of low dose gabapentin or pregabalin to see if that would help her pain. Second, referral to a multidisciplinary interventional pain clinic. Possibly a physician may elect to do trigger point injections in the neck or low back. These interventions may improve Ms. van Tol's quality of life, but she does not believe that they

will translate to a return to work because targeted injection therapy has a diminished role in patients with pain all over and FM. Third, a supervised weight loss program and an exercise program.

- [52] She does not recommend physiotherapy, massage therapy, or chiropractic treatment. Any physical treatment should be orientated towards exercise and not passive modalities. She would defer to Ms. van Tol's other healthcare providers and specialists as to whether she should have further counselling, resume anti-depressants, or any treatment for headaches, and her vision and balance issues.

Dr. Briar Sexton

- [53] Dr. Sexton is a neuro-ophthalmologist. She assessed Ms. van Tol on January 6, 2022, at the request of defendants' counsel and provided an expert report dated January 26, 2022. She has not seen Ms. van Tol since.
- [54] Dr. Sexton opined that Ms. van Tol has chronic post-traumatic headaches with a "migrainous phenotype". She opined that Ms. van Tol did not sustain a mild traumatic brain injury as she neither had post-traumatic amnesia nor an altered state of consciousness at the time of the accident. With respect to the blurred vision, Dr. Sexton stated:

Ms. Van Tol reports that there is an aura or blur around the edges of objects since the subject motor vehicle accident. It is present with either eye closed which eliminates binocular dysfunction as a cause. It persists at present with a normal binocular vision examination. It improves, but does not resolve, with pinhole. This suggests there is a component of refractive error (a need for glasses). I do not attribute refractive error to the accident. It is likely that this component is "sudden notice" in a state of hypervigilance rather than sudden onset.

Ms. Van Tol reports that print on the screen is clear and that images on the television are clear but that the phone and television themselves are blurred. I can not identify an organic cause for this [complaint] nor of the failure of pinhole occlusion to resolve the auto around a fixation light on the date of my examination of Mr. Van Tol. Ms. Van Tol has a normal examination with no ocular or neuro-ophthalmic pathology. Given the lack of diagnosis it is difficult to assign causality.

- [55] Dr. Sexton opined that it is unlikely that visual exercises were indicated at any point after the accident.
- [56] Dr. Sexton opined that while Ms. van Tol now medicates infrequently it is possible that there is a component of medication overuse headache. If Ms. van Tol had ceased taking medications for 21 days, and was still having headaches, that would rule out medication overuse headaches. She also emphasized that a diagnosis of medication overuse headaches does not imply any sort of addiction. It is the body's response to the medication. The primary diagnosis here is chronic post-traumatic headaches.

- [57] The approach to chronic migraine type headache is preventative. By Ms. van Tol's report, no one has yet attempted that. In the absence of appropriate treatment, she cannot conclude that the headaches are permanent. Botox and CGRP inhibitors are both first line treatments for chronic migraine headache. Both reduce headache frequency and intensity by about 50% in about 50% of individuals. These include a beta blocker, calcium channel blocker, tricyclic antidepressant in sub-therapeutic doses for depression, topiramate and gabapentin.
- [58] Finally, Dr. Sexton opined that she was concerned about Ms. van Tol's report to her of "high anxiety" and the fact that she had not yet reported this to her treating physician.

Dr. William Craig

- [59] Dr. Craig is a physiatrist. He assessed Ms. van Tol on one occasion on December 16, 2021 at the request of defendants' counsel and provided an expert report dated the same day. He has not seen Ms. van Tol since.
- [60] Dr. Craig agreed with Dr. Shuckett's diagnosis of FM, but not the extent to which Ms. van Tol is functionally disabled. Ms. van Tol exhibited frequent pain behaviours. He did not comment on the other diagnoses of Dr. Shuckett but said he did not make any findings of rotator cuff tendinopathy or shoulder arthropathy. Dr. Craig stated:

I would agree with Dr. Shuckett that she has fibromyalgia. This condition typically presents with widespread pain and tenderness and often vague sensory symptoms. There can be other physical symptoms associated with this such as headaches and gastrointestinal symptoms.

She endorses ongoing mood issues and struck me as being quite anxious and pain focused. There appears to be a large element of anxiety surrounding her pain. I would recommend follow up with a psychiatrist to optimize management of her mood. If she improves from a mood perspective, there is greater room for improvement in her physical symptoms.

She also has become quite deconditioned. She states that she has tolerated a pool exercise program and I would encourage this. I would agree with Dr. Shuckett that she should avoid long-term passive therapies. I do not think she would benefit from any injection therapies as her symptoms are widespread and I do not think she would tolerate them. I am also not recommending any further imaging as it is unlikely to alter management.

She is not reporting any cognitive symptoms at present so I do not think that this needs any further investigations.

She endorses ongoing visual and vestibular symptoms. I would defer to the appropriate specialities for comments on whether further investigations or treatment would be warranted.

I would recommend referral to the Chronic Disease Program at BC Women's Hospital.

[61] Dr. Craig opined that the FM likely developed from the injuries in the accidents. Dr. Craig opined that Ms. van Tol likely did not suffer an acquired brain injury. There were no initial reports of altered cognition or cognitive symptoms. These were not reported until sometime after the accident.

[62] As for treatment options and prognosis, Dr. Craig stated:

I do not feel that she has reached her point of maximum medical improvement. There are a number of treatment options available to her. I would suggest a trial of nortriptyline, gabapentin, or pregabalin. I would encourage her to become more physically active. Prognosis will also depend on how she does from a mood perspective. If she improves with regards to her mood, there is greater room for improvement in her physical symptoms. I would defer comments with regard to mood and prognosis to a psychologist or a psychiatrist.

Ms. van Tol likely will not return to working as a care aide. I would suggest a vocational assessment, if not already done. The chart did comment about previous work in mental health. One option would be a community support worker where she does not have to physically assist the client. She should be capable of other sedentary-to-light physical-demand employment.

I would see no contraindications to her becoming more physically active. She could note some initial increase in her pain as she starts to become more active, but over time should better tolerate it. This could help with both pain and mood. She probably would not be able to tolerate a return to the mixed martial arts. She should be able to cycle, swim, and hike, and I would recommend building up gradually.

Physically, she should be capable of her routine household tasks. Her reported level of disability is much greater than what I would expect. She should be capable of light yardwork with pacing.

Mr. Darren Benning

[63] Mr. Darren Benning is an economist. He provided a report dated September 30, 2021 at the request of Ms. van Tol's counsel.

[64] Mr. Benning provided illustrative calculations of past and future income loss based on the assumptions that: (a) absent the accident, Ms. van Tol would have continued to work slightly more than full-time (41.29 hours per week - the average in the weeks before the accident) as a care aide until age 65; and (b) Ms. van Tol has not worked since the accident and will have no earnings in the future.

[65] Mr. Benning made calculations of loss based on the wage rate and benefits Ms. van Tol was earning at We Care and what she would have earned under a new collective agreement with the Fraser Health Authority ("FHA"). Mr. Benning obtained information from the BC General Employees' Union ("BCGEU") website that in 2019 the contracts between several health authorities, We Care, and a number of other agencies, were terminated, and employees of those agencies were offered employment with the health authorities. This also resulted in an increase in wages. As the defendants took issue with Mr. Benning relying on this

information, Ms. van Tol called Mr. Brent Camilleri as a witness to authenticate these documents and speak to what happened. Mr. Camilleri is employed by the BCGEU and since 2014 has been the coordinator of negotiations. Mr. Camilleri was familiar with the documents, having been involved in either the negotiation or finalization of them, and drafted the memoranda relied upon by Mr. Benning. I am satisfied that Mr. Benning's assumptions that Ms. van Tol would have been offered to transfer employment to the FHA are established.

- [66] Mr. Benning was asked to assume a labour force participation rate of 100% except for the risk of prolonged disability. Other reasons for non-participation, such as for voluntary retirement, absences to care for other family members, or to pursue other interests were therefore not included in his calculations. I note from Table 2 that the net deduction was therefore about 3% rather than 24% (see note 9, page 14) that would be made if the full contingency for labour force participation had been applied.
- [67] Based on the above, Mr. Benning calculated past loss of income to be \$247,585 net of taxes; and the present value of future loss of income to be \$776,809 to age 65, plus \$10,383 in lost CPP retirement benefits.

Ms. Samantha Gallagher

- [68] Ms. Gallagher is a vocational rehabilitation counsellor. She interviewed Ms. van Tol and administered a number of vocational tests on December 14, 2021, at the request of defendants' counsel. She authored a report dated January 10, 2022.
- [69] Ms. Gallagher stated that she was retained "to provide an opinion regarding the present and future employment potential" of Ms. van Tol. I note that in the letter of instruction, she was asked to identify a "realistic and obtainable vocation that would provide meaningful employment prospects for Ms. van Tol" and the "need, nature, duration and cost of a vocational/employment support program".
- [70] Ms. Gallagher noted that the results of the test of effort indicated a score just outside of the accepted cut-off which suggests that Ms. van Tol's scores may not be a true representation of her abilities.
- [71] Ms. Gallagher opined that from a vocational rehabilitation perspective, one of the most important factors in determining a person's potential to return to work is what they have demonstrated the ability to do since the accident. In this case Ms. van Tol has not attempted to return to paid work or volunteer work.
- [72] Ms. Gallagher opined:

In summary, Ms. Van Tol has not returned to work in any capacity since the motor vehicle accident. It is acknowledged that the medical reports reviewed are not positive with regard to Ms. Van Tol's potential to return to work. However, it would likely be beneficial for her to be involved in some volunteer work both to improve her overall well-being and also to provide a better

evaluation of her abilities in a real-life work setting which could be used to evaluate her ability to return to work. As noted, above, Ms. Van Tol's receipt of CP Disability Benefits may be a deterrent to a return to paid employment. In addition, Ms. Van Tol demonstrates no motivation to return to employment in any capacity which makes it highly unlikely that she will make a successful return to work. Absent the motivation to return to work and successful reintegration to vocational activity through volunteer work, it is most likely that Ms. Van Tol will remain on long-term disability benefits.

[73] Ms. Gallagher stated that in her experience, people who are motivated to return to work take steps such as volunteering, updating skills, and checking the job market. Ms. van Tol told her several times she had no plans to return to work. In Ms. Gallagher's opinion, receipt of CPP disability often is a deterrent to return to work as recipients can be fearful of losing their benefits should they return to paid employment. Ms. Gallagher agreed that she never explored with Ms. van Tol whether Ms. van Tol wanted to return to work, whether she liked her job, her feelings about not working, or her financial position and how much money she was getting from CPP. She agreed that Ms. van Tol told her the reason she was not attempting a return to work is because she thought she was not capable of doing so. She did not consider Ms. van Tol's attempts at rehabilitation through therapy.

Credibility and reliability

[74] Much of the defendants' position is based on the argument that Ms. van Tol has exaggerated her complaints, and because her diagnoses are based on subjective complaints, these opinions should also be carefully scrutinized. Ms. van Tol's counsel submits that Ms. van Tol was credible, earnest, not a sophisticated witness, and she satisfied the experts who came to same diagnosis that she has FM. Counsel submits that Ms. van Tol was not exaggerating but using vernacular to explain what she cannot express otherwise.

[75] The defendants refer to *Bhandal v. Charlebois*, 2015 BCSC 2315 at paras. 66-67, *McLean v. Kraft*, 2015 BCSC 2212 at paras. 139-141, and *Buttar v. Brennan*, 2012 BCSC 531 at paras. 24-25 for their discussion of the approach the court should take when there are little if any objective findings, but a claim of a moderate to severe disability, and how this may affect the weight of expert opinions. The court should be careful in assessing whether the plaintiff's and other evidence are true reflections of the injuries alleged, make findings of fact, and then determine if there is congruence between those facts and facts upon which the medical opinions are based. An assessment of the plaintiff's credibility is critical. If a plaintiff's evidence regarding the injuries and effects of those injuries is not accepted, then any expert opinions that are based upon that evidence will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 43-44 and 49.

[76] In assessing the credibility and reliability of evidence, I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296. This includes:

- [186] 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 (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). 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 (*Faryna* at para. 356).
- [77] Ms. van Tol did not agree she exaggerated her symptoms when she described them to physicians. She testified that when she told Dr. Shuckett she was a "walking pain machine", and her "brain has turned to mush", and another physician that noise from a mill that was "boring into her brain", these were how she felt.
- [78] While I agree that Ms. van Tol tended to describe her injuries in dramatic terms, I found her to be generally credible. However, I find some of her evidence was not always reliable. I accept that Ms. van Tol has suffered significant symptoms, and I find that Ms. van Tol has had an emotional or psychological response to her injuries, with frustration and anxiety, which has not only impacted her recovery, but also her perception of pre-accident and post-accident circumstances. I therefore view her evidence concerning her injuries, and hence the medical opinions based solely on her subjective complaints, with that caution in mind. I do not conclude this is a situation of intentional exaggeration on the part of Ms. van Tol. This is the way she perceives events. The following are the more significant evidence and arguments I have considered in coming to these conclusions.
- [79] Ms. van Tol is currently about 240 pounds. She testified that she was between 190 and 210 pounds at the time of the accident, and in "pretty good" shape. She attributed this weight gain to lack of exercise and eating comfort foods as a result of the injuries. She has repeated this to her treating and expert physicians, for example Dr. Shuckett. Some of her family members testified that she was very fit prior to the accident, and she had a significant weight gain which they also attributed to the accident. Her mother's evidence was so similar on this point, it appeared she and Ms. van Tol had discussed it. In contrast, the objective clinical records show that one month after the accident, Ms. van Tol weighed 235 pounds. Several entries over the next years show similar weights. Ms. van Tol initially stated she gained weight "rather rapidly". When it was put to her that on the date of the accident she was not between 190 to 210 pounds, she said that was "roughly around where I hovered", so she could not agree or disagree. When it was put to her that just a month following the accident she weighed approximately the same as before the accident, she said "I would say I guess so, because I don't recall". The evidence is significant for the change in it, and because it is one of the few areas where objective evidence of complaints would be available, and it did not support Ms. van Tol's or her family's version of events.

- [80] At some point Ms. van Tol gained weight. She may even have gained and lost some weight after the accident. The photographs show that when Ms. van Tol was younger, she was thinner. Ms. van Tol's counsel argued that there was no evidence that such a rapid weight gain was not possible. However, common experience tells us that it is very unlikely that someone who, as Ms. van Tol described it, had severe constant headaches, nausea, dizziness, imbalance and severe pain, would in the course of one month gain between 25 and 45 pounds. In my view, it is much more likely that Ms. van Tol had gained weight prior to the accident and was not as recreationally active as she portrayed. She agreed she had not attended a gym for four years, although she had workout equipment in her home. I conclude from this that Ms. van Tol's perception of her life before the accidents and the effects of her injuries is not always reliable. This similarly calls into question the reliability of her family's evidence and their willingness to attribute negative events to the accident.
- [81] Defendants' counsel cross-examined Ms. van Tol on the minimal damage to the cars in the two accidents. It is well-established that even low-impact collisions can cause injuries. The extent of damage can be relevant in assessing the credibility of a plaintiff and the injuries claimed: *Cahoon v. Brideaux*, 2010 BCCA 228 at paras. 84-86; *Pearlman v. Phelps Leasing Ltd.*, 2011 BCSC 1696 at para. 12; and *Carter v. Zhan*, 2012 BCSC 595 at para. 60. While the extent of the damage may be a factor to consider amongst the evidence as a whole, in the absence of evidence that the injuries are inconsistent with such a force, "asking the court to draw such an inference will usually not be a constructive approach": *Newman v. Johal*, 2021 BCSC 65 at para. 23; *Lorenz v. Pabla*, 2021 BCSC 1553 at para. 100; *Thomas v. Wormsley*, 2009 BCSC 919 at paras. 2-3. There was no expert evidence in this case that the force of impact was inconsistent with the injuries, but the force was likely not significant. However, the lasting injury here is not the original soft tissue injuries, but the subsequent development of FM following those injuries.
- [82] Defendants' counsel cross-examined Ms. van Tol on the fact that the hospital records on the evening of the accident do not contain complaints of imbalance, blurred vision, or any cognitive issues. Ms. van Tol also did not report these symptoms in a written statement the day after the accident. Ms. van Tol said she had these symptoms then. She listed her main injuries. I do not find this discrepancy significant. Clinical records are not intended to be a verbatim record of a plaintiff's words, or a complete record of the circumstances and questioning that led to those notes: *Edmonson v. Payer*, 2011 BCSC 118 at paras. 32-35. I am reinforced in my view by the fact that, three days later (when Ms. van Tol attended hospital a second time), she complained of blurred vision, nausea, and imbalance since the accident. The statement to ICBC is very brief. There was no evidence that Ms. van Tol was instructed to provide an exhaustive list of her symptoms at that time.
- [83] Ms. van Tol was cross-examined on her requests to her GP for treatments and assessments, with the suggestion that she was the person directing investigations into her injuries even if her GP disagreed. These included repeated requests for referral to a concussion clinic, concussion specialists, and for MRIs. Ms. van Tol said some of these were at the suggestion

of her physiotherapist, and for others, she felt that she needed further investigation because her symptoms were not resolving with therapies. I find that she was requesting referrals because she was initially concerned that there was something more sinister going on when she did not improve, and until she finally received the diagnosis of FM in 2019.

- [84] The defendants submitted that Ms. van Tol was vague, non-specific and spoke in generalities regarding her symptoms, and gave few examples of actual restrictions in her ability to perform work or homemaking tasks. They characterize her evidence as defensive and argumentative. I do not agree her descriptions were non-specific. I agree she occasionally responded in a manner that could be seen as defensive, but she also was uncomfortable and clearly frustrated, which possibly caused her to be short-tempered. I agree there is some inconsistency between Ms. van Tol's description of her limitations and her demonstrated ability to do almost all of the housework and outside chores at her home. It is significant that in a three-person household, with two other capable adults, Ms. van Tol still does almost all of these tasks, but she testified that she does them because she does not want to sit and do nothing, and she has pain and fatigue from doing them.
- [85] Dr. Shuckett and Dr. Craig, both of whom I found were credible witnesses, found that Ms. van Tol exhibited some pain behaviours. However, both still diagnosed FM. Both suspected there were emotional or psychological factors contributing to Ms. van Tol's presentation. I accept that Ms. van Tol demonstrated some exaggerated pain responses, there are likely some emotional or psychological factors contributing to her condition, and she is deconditioned.
- [86] Finally, Ms. van Tol is someone who has demonstrated a strong attachment to the workforce and enjoyed being active. She liked her work, and I find that she would not have easily given it up if she was not having symptoms that she perceives as significant. Her attendance at therapies and requests for referrals are consistent with her wanting to get better and return to work.

Causation and assessment of damages

- [73] A plaintiff must establish liability and causation on a balance of probabilities. That is, a defendant's tortious conduct in whole or in part, caused the accident, and the injuries the plaintiff suffered in the accident caused or contributed to the loss for which the damages are claimed: *Smith v. Knudsen*, 2004 BCCA 613 at para. 26; *Grewal v. Naumann*, 2017 BCCA 158 at para. 45. In this case liability is admitted, and causation and assessment of damages are in issue.
- [74] The basic test for causation is the "but for" test: *Clements v. Clements*, 2012 SCC 32. A plaintiff must establish that but for the defendant's tortious act, the injury would not have occurred. A plaintiff is not required to establish that the defendant's tortious act was the sole cause of the injuries so long as it is part of the cause beyond de minimus: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, 1996 CanLII 183 [Athey].

- [87] The basic principle of assessment of damages is that a plaintiff is entitled to be put in the position he or she would have been in had the tortious act not taken place: *Athey* at para. 32.
- [77] In *Blackwater v. Plint*, 2005 SCC 58 at para. 78, the Court discussed the difference between causation and the assessment of damages in tort:
- [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: *Athey*.
- [88] In considering the plaintiff's original position, tortfeasors must take their victims as they find them, even if the injuries are more severe than would otherwise be expected (the "thin skull" rule). But tortfeasors are not responsible for the consequences of a pre-existing condition that the plaintiff would have experienced in any event (the "crumbling skull" rule): *Athey* at paras. 34-35; *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 24-28.
- [89] In this case, the evidence establishes that except for the vision complaints, the accidents caused Ms. van Tol to suffer initially primarily soft tissue injuries which caused pain in her neck, shoulders and upper arms, upper and lower back extending to her hips, post-traumatic headaches with migraine features, fatigue, occasional pain and some numbness in her hands, some imbalance, and depressed mood. I accept Dr. Shuckett's and Dr. Craig's opinion that as a result of the initial injuries, Ms. van Tol developed FM and CS. I accept Dr. Shuckett's opinion that Ms. van Tol developed impingement in her right shoulder and left TOS, and this has caused occasional pain and some limited numbness in her left hand. I further accept that Ms. van Tol suffered a sufficiently depressed mood that she was placed on antidepressants, although there was no psychiatric expert opinion in evidence. The evidence does not establish on a balance of probabilities that the vision complaints are a result of the accidents. Dr. Sexton's evidence, which I accept, is that the etiology of the vision problems is not clear.
- [90] Prior to the accidents, Ms. van Tol had suffered injuries in a motor vehicle accident many years earlier, and had the occasional sprain or injury more recently. These injuries had fully resolved by the time of the accident. She had some pre-existing degenerative conditions in her spine. There is no suggestion that these pre-accident injuries and conditions would have manifest themselves, if the accidents had not occurred.
- [91] I turn now to the assessment of damages.

Mitigation

- [92] A plaintiff has a duty to mitigate damages. A plaintiff can only claim damages in respect of losses that he or she could not have avoided by taking reasonable measures, including undergoing treatment to alleviate or cure the injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. The defendant has the burden of establishing that a plaintiff acted unreasonably in not following a certain course of conduct, and that damages would have been reduced if the plaintiff followed that course: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 [Chiu]. It is a subjective/objective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56 [Gregory]. In determining the reasonableness of a refusal of medical treatment, relevant considerations are the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 SCR 146 at para. 31, 1985 CanLII 62.
- [93] The defendants allege that Ms. van Tol failed to mitigate by failing to undertake any form of exercise since 2017, and by stopping the Cymbalta on her own accord in early 2021. The defendants submit that the test in *Chiu* and *Gregory* has been met, and that a deduction of 30-40% should be taken from damages. Ms. van Tol's counsel submits there was no failure to mitigate.
- [94] Exercise was recommended to Ms. van Tol by her GP in 2017, and Dr. Stolar in 2018. Dr. Shuckett opined that Ms. van Tol had likely reached maximum improvement but recommended exercise as an important non-medical modality of treatment for FM as it releases endorphins, and improves cardiovascular fitness and overall well-being. I therefore conclude that despite Dr. Shuckett's opinion that Ms. van Tol has reached maximum improvement, there is room for some improvement with exercise. Similarly, Dr. Craig recommended exercise and opined this would likely improve her pain and mood.
- [95] I find that the defendants have established that Ms. van Tol has failed to mitigate by not undertaking any meaningful exercise for the past more than four years, as recommended to her by her GP and Dr. Stolar. Dr. Shuckett and Dr. Craig both opined that Ms. van Tol was quite deconditioned. Ms. van Tol advanced no compelling reason as to why she did not exercise and I find it was unreasonable for her not to do so. Further, the expert evidence establishes that there likely would have been, and still will be some improvement in her condition if she exercises. However, given the uncertainty as to how much Ms. van Tol would improve, and that the onus is on the defendants, I make only a modest deduction for this, which I will discuss further under the heads of damages to which it is applicable.
- [96] Ms. van Tol stopped taking Cymbalta in early 2021. She acknowledged that her mood had improved when she was on the medication, and declined after she went off. She testified that she stopped taking it for fear of liver problems and because she was sweating. There is no medical evidence from the defendants refuting this evidence, for example that the Cymbalta did not cause or could not cause these side effects. While Ms. van Tol agreed her

emotional condition declined after she stopped the medication, she also stated that she was now coping with other techniques. There is no expert evidence stating that Ms. van Tol's decision was not medically appropriate, or that she would be prescribed an anti-depressant again now. I therefore find that the defendants have not established a failure to mitigate with respect to Ms. van Tol's decision to stop taking Cymbalta.

- [97] Finally, although the defendants did not raise the following evidence as a failure to mitigate past losses, the defendants did raise this as other aspects of treatment that are relevant to consider in assessing future loss.
- [98] First, both Dr. McDowell and Dr. Sexton recommended a trial of certain preventative headache medications to treat Ms. van Tol's headaches, and both opined that these offered a good chance of a reduction in severity and duration. Dr. McDowell said a significant number of patients will see a 50% improvement. Dr. Sexton similarly opined that about 50% of people will have a 50% improvement. There was no suggestion that it would not be reasonable for Ms. van Tol to try these preventative headache medications.
- [99] Second, both Dr. Shuckett and Dr. Craig recommended a trial of certain medications to treat Ms. van Tol's pain. I conclude neither physician would have recommended these without some expectation of a reasonable chance of improvement, although the extent of the improvement was not established by the evidence. Again, there was no suggestion that it would not be reasonable for Ms. van Tol to try these medications.

Non-pecuniary damages

- [100] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The amount does not depend solely upon the seriousness of the injury, but upon the court's assessment of loss and its ability to provide solace and ameliorate the condition of the plaintiff in his or her particular circumstances. While awards in other cases provide guidance, each case must be determined on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. A list of factors to consider in determining awards is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. Those include the: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle.
- [101] Ms. van Tol seeks general damages in the amount of \$200,000. She relies upon the following cases which all involved female plaintiffs in their 40s: *Courdin v. Meyers*, 2005 BCCA 91 [Courdin] (\$200,000; \$280,151 today's dollars); *Tompkins v. Meisters*, 2021 BCSC 2080 [Tompkins] (\$190,000); *Cantin v. Petersen*, 2012 BCSC 549 [Cantin] (\$150,000; \$183,525 today's dollars); and *S.R. v. Trasolini*, 2013 BCSC 1135 [Trasolini] (\$130,000; \$157,502 today's dollars).

- [102] The defendants submit non-pecuniary damages should be in the range of \$80,000 to \$120,000. They rely upon *McAuley v. Goodrich*, 2020 BCSC 2014 [McAuley] (\$120,000); *McHatten v. McCrea*, 2021 BCSC 1471 [McHatten] (\$100,000); *Healey v. Mault*, 2021 BCSC 2197 [Healey] (\$100,000); and *Chaudhry v. Hahnville*, 2021 BCSC 2318 [Chaudhry] (\$80,000).
- [103] Some of the cases cited by Ms. van Tol involved more serious and functionally disabling injuries, and the cases cited by the defendants involved less serious and functionally disabling injuries or are otherwise distinguishable. In *Courdin*, the FM was described as "severe" and the plaintiff's decline as "shocking". The plaintiff was continuing to decline at trial. *Courdin* was also a successful appeal of a jury award where the non-pecuniary jury award was far in excess of the rough upper limit. In assessing the award, the Court was deferential to what appeared were the jury's findings of fact. In *Cantin*, the plaintiff was described as suffering "severe" and "extreme" chronic pain syndrome and FM to the extent that at one point she could no longer care for her two teenaged children and had to move to her sister's home to be cared for. There was also a significant pre-existing condition in *Cantin*. *Tompkins* and *Trasolini* are closer in comparison to the injuries in this case.
- [104] On the other hand, in *McAuley*, the plaintiff was diagnosed with FM, but the court found she tended to exaggerate her symptoms and there was a real and substantial possibility she could return to part-time work. Similarly, in *McHatten* the plaintiff was much younger and was able to work for 15 months following the accident, then was off work, but shortly before she was cleared to return to work three years later, suffered a serious unrelated medical event. In *Healey* and *Chaudhry* the plaintiffs had chronic myofascial pain, and either had or were found to have the ability to return to work.
- [105] Each case must be considered on its own facts. At the time of the accidents, Ms. van Tol was in her mid-40s and at a point in her life when her children were close to grown and she was able to focus on her career which she found rewarding. The injuries were initially primarily soft tissue. She is one of the unfortunate people who go on to develop FM and CS and she is now in a cycle of pain and associated emotional upset. I accept Ms. van Tol's evidence that the pain, particularly for the headaches, was significant and constant initially, and while it is still significant at times, has fluctuated. I accept that she was disabled initially from work, and once the FM developed has continued to be disabled from resuming her job as a care aide. I find it is very unlikely she will be able to resume work as a care aide. She is clearly frustrated and anxious and suffered a depressed mood sufficient to be prescribed antidepressants by a psychiatrist. Her former active lifestyle to some extent has been foreclosed and will continue to be diminished in the future. Her relationship with her family remains strong, but she no longer is able to enjoy all the active outings she previously did with them.
- [106] Ms. van Tol has not yet embarked on an active exercise program as recommended by her treating physicians, and if she had she would have had some improvement in her function, and if she does so in the future, she will likely have some improvement. Two physicians have recommended preventative medications for her headaches which she has not yet

undertaken, and there is a good chance the headaches will improve if the medications are tried. The two other expert physicians have recommended trials of other medications for her pain. Considering all the evidence, which includes the failure to mitigate by exercising, I assess non-pecuniary damages at \$150,000.

Loss of work capacity

- [107] In assessing damages, past events must be proven on a balance of probabilities: *Athey* at para. 28. However, the test to be applied for assessing damages for both past and future hypothetical events is whether there is a real and substantial possibility, not speculation, of an event leading to a loss. The plaintiff is not required to establish these hypothetical events on a balance of probabilities. The events are given weight according to their relative likelihood: *Athey* at para. 27; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13-17.
- [108] A loss of earning capacity may be quantified either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach may be more useful when the loss is more easily measurable; the capital asset approach will be more useful when the loss is not easily measurable, for example where the plaintiff has returned to his or her former employment, but has still established a loss of capacity.
- [109] While the assessment is not a mathematical exercise, economic or statistical evidence if available, may be a useful tool as a starting point, and in assessing what is fair and reasonable: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [110] At the end of the analysis, the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.
- [111] In keeping with the principle that the plaintiff is to be put in the position he or she would have been in absent the tortious conduct, damages for loss of earning capacity are to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28-30.
- [112] Claims of loss of earning capacity have recently been addressed in three B.C. Court of Appeal cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the Court set out the three-step process for assessing loss of earning capacity:
- [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.

- [113] Relying upon Dr. Shuckett's opinion that it is unlikely Ms. van Tol is capable of returning to remunerative employment, and Mr. Benning's calculations, Ms. van Tol submits an income approach is appropriate and seeks \$247,585 for net loss of past earning capacity, and \$787,192 for loss of future earning capacity.
- [114] The defendants acknowledge that there is a real and substantial possibility of an income loss in the past and an income loss in the future. However, the defendants argue that proof of actual disability is lacking and that the basis of the opinions of Ms. van Tol's experts that she is disabled is Ms. van Tol herself telling her experts that she feels disabled. There were no objective findings on the examinations. Ms. van Tol exhibited pain behaviours indicating a lack of insight regarding her own abilities. Ms. Gallagher's testing suggested some exaggeration of memory problems. They submit in the context of this weak evidence, despite Ms. van Tol's earnings history, it would be inappropriate to use an income approach or Mr. Benning's figures as a starting point, and that a capital asset approach is more appropriate. They submit that Ms. van Tol could have returned to remunerative employment, and still can. The defendants submit there should be substantial deductions for Ms. van Tol's residual earning capacity and her likely early retirement absent the accidents. Ms. van Tol could have and still could follow the advice of the many physicians and improve her condition through exercise and medication.
- [115] The defendants submit an appropriate award for past loss of capacity is based on one year until approximately the time they estimate Ms. van Tol was offered a lighter duty position with We Care. This is \$45,000. I note the evidence was not clear when the discussion with We Care took place. Alternatively, if the court is inclined to base past loss on the time up to trial, there should be a significant contingency deduction for the real and substantial possibility that Ms. van Tol could have but did not return to work at some point after the first accident. As for future loss, the defendants submit the same arguments apply, and an appropriate award would be three to five years of pre-accident salary, being \$135,000 to \$225,000. They submit that by that time, Ms. van Tol would likely have moved to the Okanagan and retired.
- [116] Given Ms. van Tol's established earning potential, in my view, the income approach is the appropriate method. Mr. Benning's calculations provide helpful starting information. I turn to an assessment of the real and substantial possibilities as they may impact Ms. van Tol's without-accidents earning capacity, and her with-accidents residual earning capacity.
- [117] I find there is a real and substantial possibility that absent the accidents, Ms. van Tol would have continued to work full-time for We Care and that she would have transferred employment to the FHA when the contract between We Care and the FHA ended. Ms. van Tol had a strong attachment to the workforce and had worked full-time for a number of years. The transfer to the FHA meant a significant increase in her wage rate. I do not find

there is a real and substantial possibility that she would have taken on a second job at HandyDART, as there was no evidence of any concrete steps toward this. Further, she was already working slightly more than full-time at We Care.

- [118] The real and substantial negative possibility that must be considered with respect to without-accidents earning capacity, is a future event, that being when Ms. van Tol would have retired. Despite Ms. van Tol's revised evidence that it is very doubtful she would have retired earlier than age 65, I find that there is a real and substantial possibility she would have done so. I do not suggest that Ms. van Tol would have retired simply because Mr. Guest is planning to retire in four or six years. In my view, such reasoning would risk relying on unproven negative assumptions regarding women's commitment to the workforce. Rather, I rely on Ms. van Tol's evidence and how it changed. I find Ms. van Tol's original evidence that "maybe possibly" she might work after Mr. Guest retired to be the most likely scenario for the following reasons. First, a move to the Okanagan would require Ms. van Tol to quit employment with the FHA. Second, she said that both of them would enjoy Mr. Guest's retirement, not that Mr. Guest would enjoy his retirement. The implication was either that both of them would not be working or she would at least be working less. I do not accede to the suggestion of Ms. van Tol's counsel that the "maybe possibly" referred to whether work was available, as she said there was "so much work" available. The change in Ms. van Tol's evidence is also significant. It went from "maybe possibly" she would work, to "very doubtful" that she would retire or even work less than full-time. I find this is an example where her perception of her life before the accidents and what might have been, is not reliable. Ms. van Tol is 11 years younger than Mr. Guest, and it is possible that Ms. van Tol may have worked as a care aide in the Okanagan for a different facility. She had a strong attachment to the workforce. Further, she liked being a care aide. These factors point away from a complete early retirement.
- [119] Considering all of the above, I find there is a real and substantial possibility, and the most likely without-accidents event is, that Ms. van Tol would have quit her employment with the FHA when Mr. Guest retires in four to six years, and that she would have continued part-time employment thereafter for some period of time, possibly a few years. Mr. Guest is 11 years older than Ms. van Tol and they planned to enjoy retirement together so I do not consider it likely that Ms. van Tol would have continued working until she was 65 and Mr. Guest was 76. I consider part-time work after Mr. Guest retired to be far more likely than the other possibilities which are that she would continue to work full-time for 10 years after he retired, or that she would cease to work entirely when he retired.
- [120] One way of applying these possibilities to Mr. Benning's calculations is to assume full-time income for the next five and a half years (assuming Mr. Guest will retire at age 66) and then make an allowance for some part-time work after that until Ms. van Tol is age 59, and Mr. Guest is 70. Using Mr. Benning's Table 2 (which does not take into account any labour market participation contingency except the risk of permanent disability, and the small risk of unemployment), the present value of full-time work for the next five and a half years is

\$351,260. The present value of full-time work for the next four years after that until age 59 is \$213,090 (see Table 5: \$564,350 - \$351,260). At 50%, representing half-time work the resulting figure is \$106,545, for a total of \$457,805.

- [121] Another way of considering these possibilities is to apply full labour market contingencies (which reflect statistical averages for non-participation in the labour force, such as for early retirement and part-time work) to Mr. Benning's calculations. Mr. Benning does not provide this multiplier in a table, but it can be approximated using the information in his report. Note 9 of his report states that full labour market contingencies would reduce the actuarial multiplier to age 65 by a cumulative total of 40%. The actuarial multiplier to age 65 is 12.701, and applying a 40% reduction to this and using total employment income including benefits of \$66,832 per year, results in a without-accidents calculation of \$509,300. This would overstate the loss because the calculation is to age 65 and not age 60. I also note that the \$66,832 reflects slightly more than full-time which I do not find is likely, but I have also not included the small loss of CPP benefits. The actuarial multiplier to age 60 is 9.185 and applying a 40% deduction to this results in a without-accident calculation of \$368,311. This would understate the loss, because it is unlikely the cumulative labour market non-participation contingency would be as great at age 60 as it is at age 65.
- [122] In summary, I find the likely without-accident loss of capacity before any consideration of mitigation and any real and substantial possibilities associated with residual capacity is: for past loss, as calculated by Mr. Benning, being about \$248,000; and for future loss, in the range of \$450,000.
- [123] Turning to with-accidents work capacity, the real and substantial possibilities concern Ms. van Tol's ability since the accidents and her ability in the future, to work and/or to improve her condition and work. The expert evidence is consistent, and I accept that Ms. van Tol was not capable of and will not in the future be capable of returning to her job as a care aide. In my view, there is no real and substantial possibility that she will be able to do so now or even with improvement. This is physically demanding work, and the expert evidence does not support a conclusion that she may improve to that degree.
- [124] The next possible event is whether Ms. van Tol could have in the past, and will in the future be capable of returning to any other form of remunerative employment. Dr. Shuckett opines that it is unlikely that Ms. van Tol will be able to do so, but concedes the possibility although she thought it was quite unlikely. Dr. Craig opined that Ms. van Tol could return to work as a type of care aide that did not have to do physically demanding work. There was no evidence that such a position exists, or if it does, the availability of such work. More significantly, Ms. Gallagher did not opine there was such a job. Dr. Craig also opines that Ms. van Tol could work in "another similar sedentary or light duty employment position". However, despite being asked to opine on jobs that Ms. van Tol could do, Ms. Gallagher did not suggest any occupation in her report that Ms. van Tol would be capable of doing in her present condition.

- [125] Ms. van Tol was offered a lighter position with We Care. However, the evidence with respect to this was vague. No one from We Care was called as a witness. The nature of the lighter job, how many hours were offered, and how long We Care was willing to accommodate Ms. van Tol was not in evidence. Ms. van Tol's evidence that she determined that she could not do the job before even trying to do it, therefore similarly had little evidentiary foundation.
- [126] The defendants point to the fact that for about a year, Ms. van Tol and Mr. Guest had a 17-year-old foster child, a friend of Ms. van Tol's daughter and son, living with them. The defendants submit this demonstrates that Ms. van Tol can work. I disagree that this evidence supports this conclusion. There was no evidence that this teenager required any special care beyond the services Ms. van Tol was already providing to her family.
- [127] Despite that Ms. van Tol claims a complete inability to work, she has a demonstrated ability to do almost all inside housework and outside chores. This includes daily cooking, cleaning bathrooms, and mowing the lawn. I am mindful that this does not necessarily translate to being able to perform a full-time job outside the home. Ms. van Tol does the housework and chores with breaks and fatigue. However, it indicates some work tolerance for a part-time sedentary or lighter job if there is improvement in her function. Ms. van Tol stated that the pain and fatigue go hand in hand, and I therefore conclude that if she had an improvement in her headaches and pain, she will likely have an improvement in her fatigue.
- [128] As for future ability, the expert evidence supports the potential for and likely improvement in her pain and mood, to some degree, if Ms. van Tol engages in exercise. This recommendation was made to Ms. van Tol by treating physicians well prior to this trial, and the defendants have established failure to mitigate for the past with respect to exercise. The extent of the improvement is not clear, so any adjustment for the possibility that she would have improved enough to work outside the home must be small. The same possibility of improvement exists for the future if she engages in exercise.
- [129] The expert evidence also supports the real and substantial possibility of improvement in Ms. van Tol's headaches if she tries the medications suggested by the experts. The evidence here is more defined for improvement. I find that if this possibility materializes, it will lead to an increased ability to work in some capacity.
- [130] Finally, the expert evidence also supports a real and substantial possibility of improvement in Ms. van Tol's pain if she tries the other medications suggested by Dr. Shuckett and Dr. Craig. However, like the exercise regime, the extent of the improvement is not well defined so the adjustment for the possibility that she would improve enough to work outside the home must be small.
- [131] In considering all of the above, for past loss I conclude that had Ms. van Tol engaged in an exercise regime as directed by her physicians, and had she actually tried to work, there is a real and substantial possibility that Ms. van Tol had or would have had the residual capacity to return to some form of part-time sedentary or lighter remunerative employment other than a care aide, but that the possibility is small. I assess the possibility as being in the

range of 10%. I have also considered that any part-time work will likely be closer to minimum wage and less than what Ms. van Tol was earning as a care aide. I assess net past loss of earning capacity at \$225,000, being slightly less than a 10% deduction from Mr. Benning's calculation.

[132] As for future loss, the same possibilities apply. In addition, there is the potential for improvement and her ability to work if she trials the medication for her headaches and for the pain. I find there is a real and substantial possibility that Ms. van Tol will be able to work part-time at a more sedentary job, although again given the lack of specific jobs suggested by the defendants, this must be a small possibility and deduction, although greater than the deduction for past capacity because it includes possible improvement in her headaches and pain. I assess the possibility at 15%, and again consider that any job will likely be closer to minimum wage than the wages Ms. van Tol was earning as a care aide. I assess future loss of capacity at \$400,000. I have considered the overall fairness and reasonableness of these awards.

Special damages

[133] The parties have reached an agreement that special damages are \$10,229.09.

Orders

[134] Ms. van Tol will have judgment against the defendants as follows:

a)

Non-pecuniary damages:

\$150,000.00

b)

Past loss of capacity:

\$225,000.00

c)

Future loss of capacity:

\$400,000.00

d)

Special damages:

\$10,229.09

Total:

\$785,229.09

[135] Unless there are settlement offers or other matters of which I am unaware, Ms. van Tol will have her costs of this action at Scale B. If the parties need to address costs, they may make arrangements through Supreme Court Scheduling to speak to the matter in the next 60 days.

"Norell J."

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