

CANADA / JUDGMENT

Wootton v. Fisher

2025 BCSC 1161

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1161 Wootton v. Fisher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wootton v. Fisher,

2025 BCSC 1161

Date: 20250623

Docket: M199441

Registry: Vancouver

Between:

Heather Patricia Wootton

Plaintiff

And

Terrance Herbert Fisher

and City of Chilliwack

Defendants

Corrected Judgment: The counsel names for the plaintiff on the cover page of the judgment was corrected on July 24, 2025

Before: The Honourable Madam Justice Burke

Reasons for Judgment

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I. Introduction

- [1] The plaintiff, Heather Wootton, is 34 years old and resides in Chilliwack, BC with her 35-year-old husband. She has two children--an eight-year-old daughter and a six-year-old son. Ms. Wootton suffered a motor vehicle accident on March 15, 2018, when she was 28 years old (the "Accident").
- [2] Liability is admitted for the Accident, but the causation and extent of the plaintiff's injuries are at issue, as well as the quantum of associated damages, if any--including non-pecuniary damages, past loss of income, cost of future care, and loss of future earning capacity.
- [3] While the defendants acknowledge that the plaintiff sustained some injury as a result of the Accident, they dispute the nature of her injuries, the degree to which they continue to impact her daily life and work, and the extent to which her ongoing symptoms are related to the Accident. The defendants argue that because the plaintiff was diagnosed with mental health issues and received treatment for them prior to the Accident, there is a significant question about the extent to which the plaintiff's ongoing symptoms are related to the Accident.
- [4] The defendants also say that the plaintiff has experienced improvement of her symptoms and that, with appropriate treatment, there is every reason to believe she will experience further recovery in the future.

II. Issues

- [5] The issues in this matter are:
 - 1. What is the nature, extent, and duration of the injuries the plaintiff suffered from the Accident?
 - 2. What is the appropriate award, if any, for non-pecuniary damages for pain and suffering?

3. What is the appropriate award, if any, for past loss of income?
4. What is the appropriate award, if any, for future loss of income earning capacity?
5. What is the appropriate award, if any, for cost of future care?
6. Should the plaintiff's award for damages, if any, be reduced due to a failure to mitigate?
7. What amount, if any, should be awarded for special damages?

III. Background

Plaintiff's evidence

- [6] Ms. Wootton was born in Vancouver and primarily raised in Chilliwack, BC. During Ms. Wootton's childhood, her family moved to the Bahamas for approximately 18 months before returning to settle in Chilliwack. Ms. Wootton described a family life that focused on a hard work ethic, and described how she, as the eldest of four children, took care of her siblings. The family also did things together and instilled values of kindness, love, and hard work. Ms. Wootton consistently worked three to four days a week through high school. She was fit and healthy throughout this period and in her free time went to the gym. Ms. Wootton also volunteered at school activities, including coaching volleyball and the Terry Fox run.
- [7] Upon graduating from high school, the plaintiff moved out of home and worked two jobs to fund an independent life. She indicated she worked "all the time"; working day shifts as a hostess and server at Ricky's and night shifts making sandwiches and taking care of the cash intake at Quiznos.
- [8] Ms. Wootton regularly walked the 10km Vedder River trail with her boyfriend, Brandon, who is now her husband. The two liked to be outside. As Brandon was an avid fisherman, the couple would regularly participate in outdoor activities prior to the Accident.
- [9] In 2013, Ms. Wootton married Brandon, her high school boyfriend. The couple had a good relationship and continued many of their outdoor activities. They purchased their first townhouse and lived there for three years. During that time, Ms. Wootton did most of the housework in the three-level house.
- [10] The couple's daughter Emery was born in 2015. The couple then purchased a 2,000 square foot house on a fifth of an acre, sight unseen, that required a lot of renovations. Before moving in, the couple did a lot of that work themselves, including painting the house, ripping out the carpets, and generally cleaning it up. The house has two levels and a basement. The main level is an open concept with a family room and kitchen.
- [11] Once moved in, the couple did all the house cleaning, and yard work, with the plaintiff undertaking the majority of the housework, including making family meals, vacuuming, and laundry.

- [12] The plaintiff recalls a very happy time after the birth of her daughter. She would take her for walks along the Vedder trail and regularly participate in a hands-on mother/baby group or circle. She says she was a relaxed, happy parent during this time.
- [13] The couple's son was born in 2017. The plaintiff said her activities continued after his birth, with the same walks and her daughter riding a tricycle while she pushed the stroller. She also described a fulfilling social life with her friends who had babies around the same age and with whom she would get together for play dates. The plaintiff and her spouse participated in regular activities together as a family, including outdoor activities in the Vedder area.
- [14] Being a mother was important to the plaintiff. She was devastated after suffering a miscarriage in her first pregnancy and it was emotionally very difficult. As a result, she sought psychological counselling, which she said helped her get over the pain of the miscarriage. The plaintiff continued with counselling, indicating she saw her psychologist for "daily life problems", such as issues with her husband and coping with daily life stresses.
- [15] The plaintiff also said she suffered possible post-partum depression or "baby blues" after the birth of her son. She visited her family physician, Dr. Lynch, who prescribed her a low dose of Zoloft. The plaintiff said she felt much happier after starting the medication; had more energy and was able to do more. As a result, she felt she had no functional limitations before the Accident.
- [16] After observing her mother complete a health care administration program at the University of Fraser Valley, the plaintiff became interested and signed up for the program. Ms. Wootton completed the program in 2012, graduating as a health care assistant at the top of her class, with a 4.0 GPA. She was also awarded a spot on the Dean's List.
- [17] After completing this program, Ms. Wootton registered to become a BC care aide and was employed as a healthcare aide in two facilities. In addition, she undertook a two-week training program in home support. However, she worked in home healthcare for less than a year, as she preferred a fast-paced environment.
- [18] Later in 2012, the plaintiff became employed as a care aide/home support worker at Menno Home, a large healthcare facility for seniors located in Abbotsford. Menno Home had both assisted and long-term care. The plaintiff worked in the long-term care division on what has been described as the "heavy" ward. This involved the care of residents who were heavy in weight, and plaintiff was in this job (although on maternity leave) at the time of the Accident at issue.
- [19] The plaintiff's duties at Menno Home included providing personal care to the residents, such as clothing them, brushing their teeth, and preparing them for bed. As many had mobility issues, it was necessary to lift the heavy residents, which required two care aides. Prior to the Accident, the plaintiff had no trouble participating in this lifting, other than accommodating her co-workers' heights. The plaintiff is tall, at five feet ten inches, and the

lifting mechanism had to be at a compatible height for both care aides, some of whom were considerably shorter.

- [20] Prior to the Accident, the plaintiff was in good health and able to fully participate in her work, recreational, and household activities. She went camping, swimming, to the gym, and did yoga. She had a very strong work ethic and continued to work while taking care of her young children. The plaintiff described herself as physically fit, healthy, and weighing a lot less than she does now. She said she was more able, happy, and present. She was active, had energy, and enjoyed seeing her kids play. Her confidence level was high and overall, she was full of life, drive, ambition, and strength, both physically and mentally.
- [21] While the plaintiff did suffer from Trichotillomania--a condition whereby a person pulls out the hair on their body, including from their eyebrows and eyelashes--she says she had been to a psychologist for treatment and was doing well. In addition, while she had a history of migraines and anxiety, along with some pain symptoms from a prior motor vehicle accident, she says she had no limitations with respect to her work, home, and family responsibilities, nor recreational activities.

Other witnesses

- [22] Much of this evidence was corroborated by the plaintiff's husband, mother, and friend. I will detail some of their evidence now.
- [23] Mr. Wootton, the plaintiff's husband, described his wife as a vibrant, driven partner who worked hard and was committed to fulfilling the family's long-term plans and self-sufficiency. He says this included being able to provide for their childrens' long-term future, including education and property, in a way that their respective parents had been unable to do for them.
- [24] Mr. Wootton testified that since the Accident, the plaintiff has been listless and anxious. Mr. Wootton said that once he was able to run his own business from home, he was shocked to discover that the children automatically went down to their grandmother's basement suite for breakfast in the morning, as the plaintiff did not get up until 9 or 9:30 a.m. While the plaintiff now takes the children to school, both the plaintiff's husband and her mother largely take care of the household work such as laundry, vacuuming, and the like, as the plaintiff is unable to undertake these heavier duties.
- [25] Mr. Wootton said the couple are no longer able to pursue activities as a family and he largely takes the children out to play or to their activities. While the plaintiff takes her daughter to dance lessons, she remains in the car while waiting to pick up her daughter. When Mr. Wootton is able to persuade the plaintiff to leave home and participate in a family activity, such as visiting a special playground, she will spend most of the next day resting, as this activity has exhausted her. There is no longer any intimacy and Mr. Wootton is worried for the future of the family.

- [26] Jamee Fitzpatrick, a close friend of the plaintiff since high school, testified that Ms. Wootton was very social when they first met, and introduced her to many people in high school. They have been friends ever since. She described Ms. Wootton as very bubbly and funny, always up for anything, and spontaneous, adventurous, and boisterous. Ms. Fitzpatrick confirmed they would partake in activities such as camping, hiking, and parties with their significant others. This level of activity continued after their respective children were born, with the two friends planning baby showers and various activities, including dancing, swimming, and games, with the children. Ms. Fitzpatrick noted that Ms. Wootton was the person who would plan and throw parties, such as birthdays, showers, engagement parties, and barbecues.
- [27] Ms. Fitzpatrick said Ms. Wootton now not only doesn't plan those events, but also if she attends any, she arrives late and leaves early. On at least one occasion, Ms. Wootton forgot about the gender reveal party Ms. Fitzpatrick invited her to when Ms. Fitzpatrick was pregnant with her second child three years ago.
- [28] Ms. Fitzpatrick has also known Ms. Wootton's husband since high school. She said Mr. Wootton was also very social and entertaining. While still a good supportive husband, Ms. Fitzpatrick testified that the difficulties arising from the Accident have taken their toll on Mr. Wootton. Mr. Wootton has taken on the bulk of the load in supporting the household, as Ms. Wootton, who was very independent, now relies on him to do so.
- [29] Ms. Wootton now largely stays at home and Ms. Fitzpatrick says their socialization is limited to coffee dates at Ms. Wootton's home. Ms. Fitzpatrick visits Ms. Wootton's home after they have both dropped off their children at school at around 8:30 a.m. Ms. Fitzpatrick stays for one to two hours, and Ms. Wootton will then ask her to leave as she needs to nap before the children come home. Ms. Fitzpatrick also noted that if Ms. Wootton agrees to attend any particular event, Ms. Fitzpatrick has to remind her of the event--a week in advance, a day in advance and the day of--to ensure she does not forget.
- [30] Ms. Fitzpatrick noted that Ms. Wootton only has a talking relationship with her younger son, who was born after the Accident. Prior to that, she had a hands-on, physical play relationship with Ms. Fitzpatrick's first child, who was born around the same time as Ms. Wootton's daughter.
- [31] Much of Ms. Fitzpatrick's evidence is consistent with that of Debbie Sturgeon, Ms. Wootton's mother. Ms. Sturgeon testified in the last few months, Ms. Wootton may leave the house with her younger son and leave her daughter at home, forgetting that she has not checked that Ms. Sturgeon, who lives in the basement, will be there to take care of her nine-year-old daughter. Ms. Sturgeon also noted that Ms. Wootton is short-tempered with family, particularly with herself. This has adversely impacted their relationship to the point that Ms. Sturgeon does not seek out Ms. Wootton's company, as she is not that pleasant to be around. Ms. Sturgeon says the two women fight and may not talk for a week. Despite this, the children see Ms. Sturgeon every day, as they come into the basement suite for breakfast

every morning.

- [32] Ms. Sturgeon also said she hides her Tylenol from Ms. Wootton, as Ms. Wootton takes so much Tylenol and Advil. Ms. Sturgeon noted Ms. Wootton no longer consistently keeps a tidy house, as she is often too tired or in too much pain to undertake daily household tasks.
- [33] Ms. Sturgeon testified Ms. Wootton will not let anyone but her husband and mother drive the children. In addition, if Ms. Sturgeon is driving on the highway with the children, Ms. Wootton instructs her to always stay in the slow lane. Ms. Sturgeon also testified that Ms. Wootton's young daughter has significant anxiety about driving anywhere, to the point where she will ask her grandmother if she can stay at home rather than go to a birthday party.

IV. The Motor Vehicle Accident and Aftermath

- [34] I now turn to the particulars of the Accident.
- [35] On March 15, 2018, Ms. Wootton was driving home from Winners in Chilliwack with her two children in the back seat of a car. It was a sunny day. Her daughter was two and her son was a baby--seven to eight months old.
- [36] Ms. Wootton was driving on Airport Road in her new vehicle when the defendant, an employee of the City of Chilliwack, hit Ms. Wootton's vehicle. The defendant was attempting to turn right and drive into a parking lot, but instead turned into and hit the right side of Ms. Wootton's car and pushed it to the right side of the road.
- [37] When the vehicle came to stop, Ms. Wootton says she was screaming and trying to get out of the vehicle, as she thought she could smell fluids and was worried the car would catch on fire. She could not get her car door open, and a witness and his wife ran up and opened the door for her. The wife got Ms. Wootton's daughter, who was screaming, out of the back seat of the car. The wife tried to comfort the plaintiff's daughter, while the husband kept reassuring the plaintiff.
- [38] Immediately before the Accident, the plaintiff recalls seeing the driver in the other lane; slammed on the brakes, and saw a bag of chips in the car going flying. She remembers this all in slow motion and says she panicked; couldn't breathe and wondered why this was happening.
- [39] Once outside the vehicle, the local police arrived and told Ms. Wootton to place her hands on the motor vehicle and breathe. Ms. Wootton felt the local police were unkind and treated her like a criminal. When the RCMP and an ambulance arrived, in contrast, Ms. Wootton said the ambulance drivers were very kind. Ms. Wootton remained panicked for some time, as she was still worried the vehicle would blow up.
- [40] The defendant driver did not get out of his vehicle and the plaintiff recalls him laughing with the local police officers, who had told her he was a nice guy. A witness to the Accident, Richard Linton, called her husband, as the plaintiff could not dial her phone. The plaintiff

felt safer once her husband arrived in his truck. The couple's daughter was still upset and did not want to get in the truck. The car seats had been broken in the Accident, but since Mr. Wootton had another set in his truck, the family were able to travel home together after the Accident. The plaintiff's vehicle was a write off.

- [41] Once the plaintiff returned home, she went to her mother's suite in the house, and her mother comforted her. The plaintiff's husband stayed home and took a week off work to help her and the children. The plaintiff said she was "stiff as a board", couldn't move, and lay on the couch while her husband took care of her and the children. She said she was "just frozen; paralyzed almost".
- [42] The plaintiff said she did not leave the house for days but she did rent a vehicle from March 14 to April 9, 2018. When cross-examined on this, Ms. Wootton said she left the house only when necessary, but not otherwise. The plaintiff again said she couldn't move, was very stiff like she was "duct taped to a surfboard", and continued to be very sleepy and shattered. She said it took a while for her to be able to breathe properly and for her heart to slow down.
- [43] The couple's daughter was shaken up and kept asking questions such as, "where is our car", "why did we have to have an accident", and "is Mommy ok".
- [44] The plaintiff saw Dr. Lynch, her family doctor, some days later. Dr. Lynch prescribed her pain medication and told her to take it easy after observing bruising from the seat belt across her chest and on her knee. Dr. Lynch also told her she was still in shock, which the plaintiff found surprising. The plaintiff advised Dr. Lynch she had pain and shakiness and felt upset, anxious, and isolated. In addition, she was stiff and could not move her body like she used to be able to. She had limited range of motion, particularly in her neck, arms, collarbone area, upper back, and lower back. She said she felt like the middle of her back would break.
- [45] Ms. Wootton said she still has constant neck pain; it is always tight and uncomfortable. She says her neck pain gets worse if she does too much and lifts too much. Ms. Wootton said if she does too much housework or does too much in a day, her body reacts negatively, and she must rest. She now has massage chairs and a number of devices to help her at home, including an acupressure mat.
- [46] Ms. Wootton also indicated she still has upper, lower, and mid back pain, which she describes as a constant nagging, stabbing-type pain that is aggravated when she has to pick up her children. She has tried treatments such as muscle relaxants, creams, and medication for her pain.
- [47] The plaintiff says as her neck pain is constant, she has tried "everything" to help alleviate it-- medications, physiotherapy, a chiropractor, IMS, trigger point therapy, acupressure and acupuncture, kinesiology, and topical creams. She says Botox is the most helpful.

- [48] While the plaintiff says she had headaches on occasion before the Accident, she indicated these would be alleviated by Tylenol and she would proceed with her life as normal. Since the Accident, she says her head is much tighter, she sees spots, gets nauseous, and throws up. These headaches/migraines last much longer and she is not able to function while they last. Ms. Wootton says they are frequent and debilitating, but lessen with the help of Botox injections.
- [49] Ms. Wootton testified this all makes her feel "pitiful, angry, and frustrated". Initially after the Accident, Ms. Wootton said she slept all day. At present, she needs a nap every day and finds it hard to sleep through the night. She is obsessed with trying to find the miracle pillow that she can sleep on without pain.
- [50] Ms. Wootton testified her anxiety has worsened since the Accident. She struggles with anxiety; her emotions and cannot multitask. She is jumpy; scares easily and can't cope with too many things. Ms. Wootton says she can't focus, has memory issues, and needs to write down "everything she has to do or she will forget". All of this, she says she did not previously suffer from before the Accident.
- [51] Ms. Wootton no longer trusts others and is overly protective of her children, which she recognizes hinders them. She only allows her mother or husband to drive her children and constantly worries about safety. She rarely goes anywhere other than Chilliwack, and no longer sees certain relatives as a result. These restrictions have impaired her and her family's life, as they limit the family's activities.
- [52] Ms. Wootton's relationship with both her mother and her husband have seriously deteriorated. She is short with both and gets upset with them, even though both do a lot to help her and support the family. Her daughter sees a counsellor for anxiety following the Accident, which makes the plaintiff sad for her daughter. The plaintiff says she is sad all the time, which affects her children and family.

V. Employment and Return to Work

- [53] As noted above, the plaintiff commenced work at Menno Home in 2012. In 2013, she also commenced casual, part-time employment at Birchwood, an independent living facility close to her home. In 2015, she took maternity leave from Menno Home for the birth of her daughter. She returned to work at both facilities in 2016. In 2017, due to the impending birth of her son, she took maternity leave again.
- [54] The plaintiff was on this second maternity leave from her care aide position at Menno Home at the time of the Accident in March 2018.
- [55] The plaintiff's leave ended in June of 2018. She attempted to return to work at Menno Home and undertook a few shifts. She found however the work was too physical following the Accident. As described above, the floor she worked on was known as the "heavy floor", as it had very heavy residents (with most over 200 lbs) that required lifting as part of their care.

This lifting required two people, which was now ergonomically difficult for Ms. Wootton. Given her tall height, she would have to lean over to complete these lifts with her coworkers. She needed more breaks; and was always checking her phone, worried that something would happen at home.

- [56] Ms. Wootton also struggled with the drive to work. As Menno Home was in Abbotsford, she had to drive 30 minutes on the highway to get to work. Ms. Wootton said during this drive, she was very anxious and was shaking by the time she started her shift. She was sweating, her heart was racing, and she was frustrated by what she perceived as unsafe drivers. Her anxiety was also high driving home from work, as most of the time the drive was in the dark.
- [57] In contrast, prior to the Accident, the plaintiff enjoyed the drive. It was a time for coffee, music, and a break from the children. She also noted she had no difficulty doing her job before the Accident, including meeting the required physical demands of the job.
- [58] The plaintiff did not, however, seek accommodation as part of her return to work at Menno Home after the Accident. She said she got quite upset when talking about it, so would rather people did not know about the Accident. She didn't want to be treated differently or have people feel sorry for her. The plaintiff therefore initially returned to a "casual" position, saying she "couldn't physically do her job".
- [59] As noted above, the plaintiff also had a casual part-time position at Birchwood, an independent living facility, where she would pick up shifts as needed. That position did not involve heavy lifting. She assisted with medications, completed administrative work, did daily checks, and provided companionship. The plaintiff said she was much slower doing this job after the Accident. She was not able to multi-task as much and would have to double check if she had done certain things. While the plaintiff was interested in being the activities manager at the facility--a Monday to Friday job where she would plan activities for the seniors such as arranging bus trips--she did not pursue this opportunity.
- [60] Subsequently, in 2019, the plaintiff started a home-based daycare for approximately one year. She took care of two young boys in addition to her own two children. Ultimately, she found this overwhelming and physically demanding, and did not continue this business.
- [61] In 2020, Ms. Wootton was a server at White Spot restaurant. When the restaurant closed due to the Covid pandemic, she received CERB benefits and attempted to return to Menno Home. However, this only lasted one shift, and she then returned to Birchwood. As she was only working minimal hours at Birchwood, she also picked up serving shifts at "Toni's Restaurant".
- [62] Ultimately, Ms. Wootton decided to try something different and applied for an administrative position at ZealCan Enterprises, a call center's head office. She successfully worked three days a week doing administrative work, including invoicing. Despite accommodation from the employer for time off and ergonomic equipment, Ms. Wootton dropped to two days a week. Eventually, Ms. Wootton quit this job in October 2023, finding it

"too much". She found this departure very difficult, as she had enjoyed both the work and the workplace.

- [63] Ms. Wootton commenced work in 2024 as a noon-hour supervisor at her children's school. She continued in that position, working five hours a week.
- [64] Ms. Wootton said her career plans before the Accident were to work as a healthcare assistant full time, or at least 75% of the time, picking up four shifts a week. She said she planned to work until she was 65 or 70 years old. She pointed to her mother, who is still working as a care aide at 70.
- [65] The plaintiff suffered an earlier motor vehicle accident on January 11, 2017, while she was pregnant with her son. The records indicate she had tenderness and stiffness to neck and shoulders, as well as worsening anxiety and migraines. The plaintiff was seeing a psychologist for her anxiety at this time. While she indicated some difficulty with housework, she said this was because her son was a "giant baby". While her physio records indicate she found migraines debilitating at times, the plaintiff says, unlike after the 2018 Accident, she was able to function.

VI. Discussion

What is the nature, extent, and duration of the injuries the plaintiff suffered in the Accident?

- [66] As a consequence of the Accident, the plaintiff says she experiences a number of significant symptoms. These include headaches, debilitating neck pain, upper and lower back pain, and heightened anxiety, all of which have impacted her ability to work, recreate, and essentially be part of the family unit.
- [67] The defendants submit that much of the plaintiff's evidence at trial lacked reliability and/or was not credible, and accordingly, should be viewed with caution. The defendants say all of the plaintiff's alleged accident-related symptoms are entirely subjective in nature and reliant on her self-report. In general, the defendants say that the plaintiff overstated her pre-accident level of function and understated the significance of her pre-accident health issues. Conversely, the plaintiff understated her post-accident level of function and overstated the significance of her post-accident health issues.
- [68] The defendants undertook a detailed review of the plaintiff's evidence and contrasted it with her examination for discovery transcript, medical records, and history she provided the medical experts in this case. This detailed review, the defendants maintain, demonstrates the unreliability of the plaintiff's evidence and may otherwise impact adversely on the plaintiff's credibility.

Credibility

- [69] The defendants submit that the plaintiff suffered injuries from the Accident, including soft tissue injuries, but that these injuries substantially improved or resolved within six to 12 months. To the extent that the plaintiff has continued to complain of ongoing soft tissue pain and stiffness, the defendants say these complaints are not disabling and are related to other factors, including pre-existing medical conditions and deconditioning.
- [70] With respect to headaches, the defendants say the plaintiff has admitted that, apart from a few occasions when she experienced more significant headaches following the Accident, her headaches before and after the Accident were "about the same". Accordingly, if the plaintiff is entitled to any damages in relation to headaches, the Court should only award a nominal amount.
- [71] In contrast, the plaintiff says the defendants' misapprehension and mischaracterization of the relevant evidence permeates their analysis and submissions, including those related to credibility. She says this mischaracterization is material, as it goes to the substance of the case. If the Court accepts the defendants' mischaracterization of the evidence, the plaintiff says this would amount to a miscarriage of justice, per *R. v. Burns*, 2012 BCCA 483. The plaintiff says the evidence as a whole is consistent, despite any discrepancies in the evidence.
- [72] The plaintiff also says the defendants have not produced evidence to support their points and mischaracterized what she said. As an example, while the plaintiff says she "may" have missed work due to headaches before the Accident, she never resigned from the many different jobs she held prior to the Accident due to these headaches, nor is the evidence definitive that she missed work due to these headaches.
- [73] In considering this point, I note the following from *Price v. Kostryba*, 70 B.C.L.R. 397, 1982 CanLII 36 (B.C.S.C.) at 2-4, which was also cited by the defendants:

Perhaps no injury has been the subject of so much judicial consideration as the whiplash .it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at fair and reasonable compensation.

the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery

- [74] The defendants also rely on *Le v. Milburn*, (Unreported) Vancouver Registry No. B861193, December 15, 1987, and maintain the plaintiff engaged in significant exaggeration and deception which makes it difficult to disentangle the truth from the "web of deceit and exaggeration".

- [75] In determining the facts in a given matter, the court's role is to assess both the credibility of witnesses and the reliability of their evidence. Credibility requires an assessment of truthfulness and reliability refers to accuracy.
- [76] As noted by the plaintiff, the Court in *Karim v. Li*, 2015 BCSC 498, provided helpful guidance for assessing a plaintiff's credibility with respect to medical evidence:
- [86] As is common in these types of cases, the medical and expert evidence in this proceeding is based to a significant degree on the history provided to the various professionals by Mr. Karim and his account with respect to his physical and speech condition prior to the Accident and its effects thereafter.
- [87] In this case, there are little, if any, objective findings. In light of this, it is necessary to assess Mr. Karim's credibility.
- [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S.* (R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). 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).
- [89] In addition, the following principles should be taken into account by the trier of fact:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostyba* (1982), 1982 CanLII 36 (BC SC), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
 - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;

- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

See also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 23-25.

- [90] Where injuries contain a psychological component - which is often the case in situations of chronic pain - the principles set out in *Maslen v. Rubinstein* (1993), 1993 CanLII 2465 (BC CA), 83 B.C.L.R. (2d) 131 at 133-135 (C.A.), should also be considered. These will be dealt with below in the analysis of the causation of a psychological injury.
- [77] The plaintiff in this case testified in a truthful, forthright, and stoic manner. She clearly found many of the details of the Accident, especially as they involved her young children, very difficult. This was evident throughout her testimony.
- [78] Some contradictions in the plaintiff's testimony exist, however, as demonstrated during her cross-examination. To establish this, the defendant focused on what the plaintiff had said to her treating and other physicians, as well as what she said during her examination for discovery. There were no doubt differences that were pointed out to the plaintiff. This, however, is not unusual in a case where the plaintiff has recounted her situation to numerous different medical individuals over the years. In examining those differences, the fundamental question is whether the core of that testimony is consistent and reflects "the probabilities affecting the case as a whole and shown to be in existence at the time": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356, 1951 CanLII 252 (B.C.C.A.) [*Faryna*].
- [79] In assessing these alleged contradictions, I agree with the plaintiff that where the defendants point to the plaintiff's statements made to Dr. Lynch and argue these contradict her testimony, it was incumbent on the defendants to call Dr. Lynch as a witness in light of the plaintiff's denial. In addition, I note that the plaintiff answered questions as to how she was feeling on the day when she was examined by medical professionals, including Dr. Lynch. This reality must be considered when assessing the plaintiff's overall testimony. It is important that the plaintiff's evidence be put in this context as part of the assessment of credibility and reliability.

- [80] As an example, with respect to the plaintiff's headaches, the defendants point to differences in what the plaintiff said in her examination for discovery on March 19, 2021, and in her testimony. Specifically, the defendants say her evidence that her headaches worsened after the time of her discovery was not mentioned by the plaintiff during her direct examination, and only came to light after "she was confronted with her testimony" from examination for discovery on cross. In addition, the defendants point out that the plaintiff was unable to reconcile her explanation of worsening headaches with Dr. Wiseman's report of October 31, 2023, in which he recorded that "over time they had improved". The defendants also point out that the plaintiff testified she did not actually know whether she had told Dr. Wiseman this.
- [81] While these on their face appear to be contradictions, it is difficult to find they establish the plaintiff's lack of credibility. With regard to the first example, the plaintiff would have had to remember when her discovery took place, something which may very well be unlikely. With regard to the second, it cannot be expected an individual will recall the specifics of what they told a particular doctor at a particular time to the level of detail essentially argued by the defendants. While these discrepancies may reflect some inherent uncertainty in such circumstances, this cannot without more, be definitively relied upon to establish a lack of credibility.
- [82] Further the evidence of the plaintiff's family members and friend establishes that Ms. Wootton suffers from a significant degree of forgetfulness that affects her entire life. As noted by Ms. Fitzpatrick and set out earlier in this judgment, Ms. Wootton, who was formerly very organized, now has to be reminded of any event she has agreed to go to. Additionally, as her mother noted, she sometimes leaves one of her children at home while forgetting to check that her mother is in the basement suite before doing so. The details of Mr. Wootton, Ms. Fitzpatrick and Ms. Sturgeon's evidence add to and support Ms. Wootton's credibility and the Defendants have no answer for that reality.
- [83] While this makes the assessment of evidence more challenging, these considerations must be kept in mind as part of an assessment of the medical evidence in particular, which I turn to now.

What is the legal causation of Ms. Wootton's injuries?

Legal Principles

- [84] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. As pointed out by the plaintiff, the defendants' negligence need not be the sole cause of the injury, so long as it is part of the cause beyond the de minimis range: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [Athey] at paras. 15, 17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9. Causation need not be determined with scientific precision: *Athey* at para. 16; *Zwinge v. Neylan*, 2017 BCSC 1861 [Zwinge] at para. 44; *Clements v. Clements*, 2012 SCC 32 [Clements] at para. 49. Causation is a practical question

of fact that can best be answered by ordinary common-sense: Athey at para. 16.

[85] The test for causation asks "but for" the defendants' negligence, would the plaintiff have suffered the injury? This test recognizes that compensation for negligent conduct should only be made where a substantial connection exists between the injury and the plaintiff's conduct: *Resurfce Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23; *Zwinge* at para. 45.

[86] The defendant points out that a plaintiff's damages are to be reduced if there is a "measurable risk" that the pre-existing condition would have detrimentally affected the plaintiff, regardless of the defendant's negligence: Athey at para. 36. Measurable risk, however must be based on the accepted evidence and must rise above speculation: *Zacharias v. Leys*, 2005 BCCA 560 at para. 16. Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person. This is also known as the thin skull rule: Athey at para. 34.

[87] The plaintiff maintains the evidence establishes that the Accident caused the plaintiff's current physical and psychological conditions. The defendants are, therefore, liable for causing her injuries and for the resultant consequences of those injuries.

Expert Medical Evidence

[88] A number of medical experts testified in this matter: Dr. David Morgan, a psychiatrist with a sub-speciality in forensic psychiatry; Dr. Wiseman, a psychiatrist; Dr. Finlayson, a physiatrist; Dr. Paramanoff, a physiatrist; Nathalie Hull, an occupational therapist; Dr. Quee Newell, a vocationalist; and Dr. van den Berg, a psycho-vocationalist.

[89] There is significant debate as to the extent and causation of the symptoms detailed by the plaintiff. Overall, I conclude that the plaintiff's symptoms are supported by the medical evidence, including objective findings by various experts and treating physicians. I will now provide a summary of that evidence.

Dr. Morgan

[90] Dr. David Morgan is a psychiatrist who testified as one of the plaintiff's experts. There was a significant dispute between the parties as to whether Dr. Morgan's evidence should be admitted.

[91] At a very late stage in the proceedings, indeed in final argument, the defendants argued that Dr. Morgan's report of December 22, 2023 was inadmissible because he failed to adequately set out the facts and assumptions upon which his opinions are based and adopts the role of an advocate in finding facts that support his opinions, while ignoring facts that do not, in contravention of Rule 11-6(1)(f) of the Supreme Court Civil Rules. The defendants submit that Dr. Morgan's report fails to satisfy the test in *Mazur v. Lucas*, 2010 BCCA 473.

- [92] The plaintiff argues that the defendants are now essentially bringing an admissibility application with respect to Dr. Morgan's report under the guise of closing submissions, which is a significant contravention of the rules of evidence. The plaintiffs maintain this is inappropriate at closing stage of trial and prejudicial to the plaintiff.
- [93] More specifically, the plaintiffs point out that the defendants did not bring an application at the time Dr. Morgan was due to testify. They had the benefit of cross-examining Dr. Morgan during the trial and did not object to Dr. Morgan being accepted as an expert. Dr. Morgan's report was entered into evidence as an exhibit and the defendants had the opportunity to object to the admissibility of Dr. Morgan's report at the time and did not do so. The plaintiff submits the failure to admit Dr. Morgan's report now will produce substantial and irreparable harm.
- [94] I agree. The defendants seek to have Dr. Morgan's report ruled inadmissible at a very late stage in the proceedings, after the report had been entered into evidence, the evidence had been closed, and the plaintiff had made her argument. Dr. Morgan's qualifications were outlined at trial, and he was accepted as an expert in psychiatry with a subspecialty in forensic psychiatry without objection from the defendants.
- [95] The defendants further had an opportunity to object to the admissibility of the report but did not do so. To now bring an admissibility application during closing submissions is a significant contravention of the rules of evidence. Failure to admit Dr. Morgan's report now will produce substantial, irregular prejudice to the plaintiff. The report has been admitted and remains entered into evidence.
- [96] I will deal with any alleged pertinent defects in Dr. Morgan's report as part of my analysis, which will go to the weight of the conclusions in the report.
- [97] I will now deal with the medical evidence of Dr. Morgan.
- [98] With respect to the plaintiff's psychological injuries, Dr. Morgan produced an independent medical legal report dated December 22, 2023, in which he diagnosed the plaintiff with a number of psychiatric conditions as a result of the Accident, which I list shortly. In his report, Dr. Morgan noted this was a complex case and said, at para. 174:

From the information available to me, Ms. Wootton developed anxiety when pregnant with her son. She did not develop any anxiety while pregnant with her daughter some three years earlier. Whilst pregnant with her son she was involved in a motor vehicle accident in January 2017, and worried that her unborn baby had suffered harm. Ms. Wootton had previously suffered a miscarriage. She worried about potential obstetric complications.

- [99] While he then noted that these anxieties ameliorated completely after Ms. Wootton gave birth to her son, he corrected this in cross-examination. His corrected finding was that the anxiety had not completely gone away, but would have if the subject Accident had not occurred.

- [100] Dr. Morgan noted that Ms. Wootton did not suffer from an anxiety disorder prior to the Accident in 2018. Rather, she developed symptoms of anxiety and depression in the context of being pregnant and her mother and brother having to move in with her. He opined that "her clinical presentation was probably consistent with an Adjustment Disorder": at para. 178. His clinical opinion is that Ms. Wootton would probably have fully recovered once her brother moved out and she became used to her mother living in the basement suite. Dr. Morgan also noted that the plaintiff "probably developed Major Depressive Disorder following the MVA of March 15, 2018 and her symptoms were of moderate intensity": at para. 180.
- [101] Ultimately, Dr. Morgan concluded that Ms. Wootton fulfils the DSM-5 diagnostic criteria for: Adjustment Disorder (Pre-Accident), Major Depressive Disorder (Single Episode, Moderate), Generalized Anxiety Disorder; Unspecified Trauma and Stressor Related Disorder, and Somatic Symptom Disorder (Persistent).
- [102] With respect to causality, Dr. Morgan notes at para. 198 that "[h]ad the motor vehicle accident not happened, there is nothing which leads me to conclude that she would have gone on to develop any of these conditions at that time". It is therefore "medically more likely than not" that the plaintiff developed the above disorders (except for the adjustment disorder) as a result of the Accident: at para. 198.
- [103] Dr. Morgan opined that if the plaintiff receives no treatment, her current situation is unlikely to improve and will probably continue. If the plaintiff responds well to pharmacological and psychological treatment, her quality of life may improve, but she will probably continue to experience ongoing pain and other physical symptoms in the future. Dr. Morgan concluded by noting that in his clinical opinion, her "prognosis is probably guarded": at para. 207
- [104] Dr. Morgan was extensively cross-examined on his diagnosis of Ms. Wootton's adjustment disorder prior to the Accident. He was firm in his opinion that her symptoms of anxiety and depression associated with the adjustment disorder would have resolved with the removal of certain stressors, if not for the Accident. Those stressors included her mother and brother moving in and her anxiety from suffering a previous motor vehicle accident while pregnant. She was very concerned for her pregnancy, but this concern was allayed after an ultrasound confirmed no problems with the pregnancy. Throughout cross-examination, Dr. Morgan noted that Ms. Wootton was highly functional despite her anxiety and previous depressive episodes, which was a critical part of his evaluation and led to his conclusion that she did not suffer from an anxiety disorder prior to the Accident.

Dr. Wiseman

- [105] Dr. Stephen Wiseman, a psychiatrist, prepared an independent medical expert report in this matter and a rebuttal report to that of Dr. Morgan. Dr. Wiseman testified on behalf of the defendants. He noted the plaintiff's complex medical history, which included long standing anxiety symptoms, clinical depression, migraine-type headaches, and thyroid dysfunction.
- [106] In his report of October 13, 2023, he concluded that Ms. Wootton had pre-existing conditions at the time of the Accident, including, social anxiety disorder, unspecified obsessive compulsive and related disorder, major depressive disorder with peripartum onset (in partial remission).
- [107] As a result of the Accident, Dr. Wiseman opined that the plaintiff developed some clinically-significant PTSD symptoms, but that these did not reach the pervasiveness or severity to support a formal diagnosis of PTSD. Dr. Wiseman categorized the symptoms as part of a self-limiting adjustment disorder.
- [108] Dr. Wiseman is of the view that the Accident probably delayed the full resolution of the plaintiff's pre-existing postpartum depression by a few months. However, once her mood stabilized, the plaintiff was able to function appropriately from a psychiatric perspective and currently does not have any significant residual symptoms of her mood disorder. Dr. Wiseman is of the view that her condition is stable and should remain so, provided she continues her antidepressant medication. Her chronic pain will, however, increase her risk of future depressive mood and anxiety symptoms.
- [109] In cross-examination, Dr. Wiseman indicated that Ms. Wootton may have generalized anxiety disorder. He said he may not have probed into this enough, as he did not know about her Trichotillomania. He also indicated this was a complex case. He agreed that Ms. Wootton clearly was a hard worker and had an attachment to the workforce. He said her history of functioning well prior to the Accident played a role in his prognosis.
- [110] In his rebuttal report to Dr. Morgan, Dr. Wiseman noted that Dr. Morgan's report did not indicate that a proper mental status interview was carried out. However, after Dr. Morgan's notes were pointed out to him, Dr. Wiseman agreed that it appeared Dr. Morgan did undertake a mental status interview. Dr. Wiseman agreed that while he had diagnosed Ms. Wootton with major depressive disorder prior to the Accident and Dr. Morgan diagnosed an adjustment disorder, that these were just different diagnoses for major depressive disorder.
- [111] Dr. Wiseman disagreed with Dr. Morgan's diagnosis of generalized anxiety disorder, saying that "just doesn't arise".
- [112] The defendants say the opinions of Dr. Wiseman should be preferred over those of Dr. Morgan. They argue Dr. Morgan's opinions are seriously flawed because he failed to include the results of his psychiatric mental status examination of the plaintiff, he obtained limited information from the plaintiff regarding her pre- and post-accident history, and he

acknowledged relying primarily on the clinical records in providing opinions in his report. In addition, the defendants maintain there is little evidence to support Dr. Morgan's finding that familial tensions caused the plaintiff to develop adjustment disorder.

- [113] I have reviewed the differences in the reports of Dr. Morgan and Dr. Wiseman, and where there are differences, I prefer that of Dr. Morgan. I am satisfied that Dr. Morgan conducted an extensive review of clinical information and considered important information regarding the plaintiff's mental health issues while pregnant and following the birth of her son. Additionally, an expert may rely on hearsay and documents in arriving at his or her opinion: *Maras. v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 [Maras] at para. 18.
- [114] Dr. Morgan had information and drew inferences from facts which were established at trial, including familial tension between the plaintiff and her brother and/or mother prior to the Accident: *Maras.* at paras. 17-18. These familial tensions were clearly outlined and supported by the plaintiff's evidence, to which the defendants give little credence.
- [115] Dr. Morgan also took into account whether Ms. Wootton was "functioning well" at various times, including during his testimony, which he indicated was important and impacts on a diagnosis. While Dr. Wisemen took this into account in his prognosis. It is not clear how or whether Dr. Wisemen took this into account in his diagnosis.
- [116] Furthermore, Dr. Wisemen agreed in cross-examination that Ms. Wootton may have generalized anxiety disorder, as this was a complex case and he had perhaps not probed this sufficiently. He also resiled from his critique that Dr. Morgan had not conducted a proper mental status interview. Finally, Dr. Wiseman stated he did not know if Ms. Wootton was taking any anxiety medication pre-accident until 2017, and there is no evidence that Ms. Wootton took sertraline before November 2017.
- [117] The defendants criticize Dr. Morgan's opinion regarding causation for the plaintiff's mood-related complaints following the Accident as lacking preciseness and being based on generalizations. I disagree. For example, as noted at para. 180 of his report, Dr. Morgan says:
- Ms. Wootton experienced significant low mood following the motor vehicle accident. She lost motivation, had little energy and was easily fatigued. Her concentration was affected. She felt very guilty about not being able to perform as a mother or wife, and she endorsed scores of 14 on the PHQ-9 on two separate occasions, these being in July 2019 and in May 2022.
- [118] The evidence clearly established these facts. The plaintiff testified to this and her evidence on these points was corroborated by friends and family members.
- [119] Accordingly, I conclude that based on the evidence set out above, which is consistent with Dr. Morgan's report and findings, the plaintiff suffered psychological injuries as diagnosed and set out in Dr. Morgan's reports.

Dr. Finlayson

- [120] Dr. Heather Finlayson, a physical medicine and rehabilitation specialist, produced two expert reports after evaluating Ms. Wootton on June 11, 2020, and October 5, 2023. Her conclusions were essentially the same in each of the reports, with the second reflecting the effect of the passage of time.
- [121] In her second report, Dr. Finlayson opined that based on her assessment and review of the facts, Ms. Wootton probably suffers a number of injuries following the Accident, including neck and shoulder myofascial pain syndrome, worsening of migraine headaches, and worsening of mood and anxiety symptoms. While Ms. Wootton had a history of migraines prior to the Accident, she reported that her headaches had become much more severe after the Accident, which is consistent with the expected effects of head and neck injuries for people with pre-existing migraines. She often feels nauseous and sensitive to light and sound, sometimes seeing black and white dots in her vision during severe headaches.
- [122] With respect to the plaintiff's mood and anxiety symptoms, Dr. Finlayson noted that Ms. Wootton feels very overwhelmed, angers easily, and is short tempered and irritable. While Zoloft has helped, her mood is still a problem and her energy is very poor. Dr. Finlayson also noted that while Ms. Wootton may have felt sad in the past, she did not have an official diagnosis of depression or anxiety, as per the DSM-5, prior to the Accident. Dr. Finlayson noted there is a difference between symptoms of anxiety/depression and a formal diagnosis of depression/anxiety disorders.
- [123] Dr. Finlayson noted it was reasonable and appropriate for Ms. Wootton to leave the care aide job she had to seek a different type of job in a different location, in view of the heavy physical demands at Menno Home and the need to drive from Chilliwack to Abbotsford, thereby exacerbating her driving related anxiety.
- [124] With respect to prognosis, Dr. Finlayson noted that the above symptoms had worsened over the five years since the Accident. It is highly unlikely that there will be a complete resolution of the plaintiff's symptoms and she will require pain management modalities such as physiotherapy, medication, and additional psychological counselling into the foreseeable future. Dr. Finlayson deferred to a psychiatrist regarding the prognosis of Ms. Wootton's mood disorder

Dr. Paramonoff

- [125] Dr. Paramonoff, a physiatrist, saw the plaintiff for an independent medical examination on November 17, 2023, and produced a medical legal report at the request of the defendants, dated February 2024. In her report, Dr. Paramonoff diagnosed the plaintiff with the following related to the Accident: musculoligamentous injuries at the neck, myofascial injuries at the back, and headache (multifactorial, with contribution from cervicogenic and myofascial sources).

- [126] Dr. Paramonoff also noted that the documents she reviewed detailed the plaintiff's symptoms during the time leading up to the Accident, including migraines, achy jaw, neck and mid-back tightness, and feeling overwhelmed. The documents also noted that she took an increased sertraline dose for mood symptoms.
- [127] With regard to post-Accident clinical presentation, Dr. Paramonoff opined as follows:
confounding factors are likely also significantly contributory to the ongoing overall symptom presentation. Such factors include mood symptoms, psychological issues, and decreased sleep. Such factors can negatively affect a person's experience of pain, thereby contributing to an ongoing chronic pain presentation. Regarding mood symptoms/psychological issues - I will ultimately defer to psychiatry and psychology; however, I will note the effects of such issues acting as confounding factors, and contributing to the overall symptom presentation.
- [128] With respect to causation regarding the neck and back pain, Dr. Paramonoff opined that the plaintiff's current presentation likely represents an aggravation of a pre-existing baseline of symptoms. In the absence of a history of the mid-back pain, she also opined that the symptoms are likely sequelae of the Accident. With respect to the headaches, she opined that there is also contribution from medication overuse, given the plaintiff's currently described frequent analgesic use. She noted the current headache presentation likely represents an aggravation of the pre-Accident baseline of once-weekly headaches.
- [129] With respect to prognosis, Dr. Paramonoff opined that Ms. Wootton would likely have a prolonged course of recovery given the cumulative effect of superimposed soft tissue injuries (as well as her history of pre-existing symptoms, predisposition, and susceptibility), post-Accident muscle imbalance/decommissioning, and significant compounding factors. Notwithstanding the time elapsed since the Accident, Dr. Paramonoff opined that Ms. Wootton could have moderate symptom/symptom management improvement with the implementation and regular maintenance of an increased independent exercise program to decrease the residual musculoskeletal symptoms and optimize tolerance of activity.
- [130] Dr. Paramonoff however concluded the plaintiff will likely have a residual baseline of symptoms above the pre-Accident baseline, due to the injuries sustained in the Accident.
- [131] With respect to functioning, Dr. Paramonoff also noted that the plaintiff will not have a contraindication from participating in activities as a result of the injuries sustained from the Accident, but would require activity adaptations which include taking medical breaks, pacing, and ensuring optimal ergonomics. Dr. Paramonoff also concluded it was medically appropriate for the plaintiff to carry out homemaking activities, supported by strengthening, reconditioning, and the above adaptations. In addition, Dr. Paramonoff opined that there is no contraindication for the plaintiff to work going forward in her described career path, with activity adaptations to improve comfort and strength. With regard to heavy physical work, Dr. Paramonoff noted that a greater extent of adaptations would likely be required, with the ultimate extent of such adaptations to be determined

once strengthening has been optimized.

- [132] While Dr. Paramonoff noted the plaintiff's medical overuse headaches due to the use of frequent analgesic medication, she agreed she did not know the dosage of Tylenol or the Advil that the plaintiff was taking. She agreed that the plaintiff was not taking extra strength medication. In her view, however, the pattern of taking medication was important.
- [133] Despite being referred to the numerous treatment options that plaintiff had already undertaken, including physiotherapy, chiropractic treatment, and trigger point injections, Dr. Paramonoff remained of the view that the plaintiff could achieve moderate improvement of her symptoms with strength exercises. She agreed that she did not consider stretching to be strength exercises. Ultimately, she agreed that regardless of the adaptations Ms. Wootton would require, she would not achieve her pre-Accident condition.
- [134] The plaintiff pointed to the fact that 90% of Dr. Paramonoff's work in the last 12 months has been for defendants, and she has done very little clinical work. In addition, the plaintiff submits that Dr. Paramonoff did not take a thorough and reliable history with respect to Ms. Wootton's post-Accident function and did not query her with respect to the dosages of her medication use. The plaintiff also submits that Dr. Paramonoff cannot give an opinion in relation to Ms. Wootton's functional and vocational capacity, as she was qualified exclusively as an expert in "physical medicine and rehabilitation". Accordingly, the plaintiff says little or no weight should be afforded to these aspects of Dr. Paramonoff's expert opinions: *Preston v. Kontzamanis*, 2015 BCSC 2219.
- [135] The defendants say the key difference between the physical medicine experts is that Dr. Paramonoff assumes that the plaintiff suffered from some prior, ongoing neck and upper-back symptoms before the Accident, whereas Dr. Finlayson did not make this assumption.
- [136] Ultimately however, regardless of any differences in the assumptions of Dr. Finlayson and Dr. Paramonoff, the evidence in both reports establishes an aggravation of Ms. Wootton's neck and upper-back symptoms as a result of the Accident. In addition, Dr. Paramonoff concluded that even if the plaintiff's symptoms could improve with exercise and management of the symptoms, she would likely have a residual baseline of symptoms above the pre-Accident baseline due to injuries from the Accident.

Ms. Natalie Hull

- [137] Ms. Natalie Hull, an occupational therapist/certified work capacity evaluator, produced a functional capacity evaluation and cost of future care report dated January 30, 2024. After examining, Ms. Wootton on November 29, 2023, she concluded, at page 7 of her report:

Based on the results of this functional capacity evaluation, Ms. Wootton does not meet the full essential job demands for her pre-accident job as a care aide, even on a part-time basis. She does not meet the full strength demands for medium level work, nor does she demonstrate the requisite postural tolerances associated with stooping and neck flexion Ms. Wootton

demonstrates a low activity tolerance in general and appears to be impacted a great deal by fatigue factors. Based on her presentation during testing, she is unlikely to sustain work requiring weight bearing demands beyond on an occasional basis.

[138] Ms. Hull went on to note:

It is my understanding that Ms. Wootton quit this job [administrative assistant in an office setting] in October 2023 as a result of symptom aggravation and feeling overwhelmed, even after reducing her hours to 2 shifts per week (total of 16 hours per week). Based on the result of functional capacity testing, Ms. Wootton is not suited for work requiring extensive prolonged work intensive sitting. Her demonstrated typing proficiency requires visual reference to the keyboard resulting in repetitive mild neck flexion (i.e., to look down at the keyboard and then back up to the computer screen). During work simulation testing, she demonstrated frequent postural readjustments of her neck and shoulders, resulting in pauses in typing. The frequency of her postural adjustments is likely to have significant adverse impacts on her productivity in this type of work. I understand that she trialed various ergonomic office equipment (e.g., sit-stand desk, different chairs), without sufficient alleviation of her symptoms. Given her limitations for static standing, and neck flexion, a height adjustable workstation is unlikely to result in improved tolerance for computer work.

Based on her demonstrated level of functioning during testing, she is not suited for work in an office environment requiring extensive computer work. I recommend assessment by a vocational expert to explore suitable alternative vocations that meet the limitations outlined in this report.

Dr. van den Berg

[139] Dr. Pieter van den Berg, a registered psychologist and certified vocational rehabilitation professional, also testified in this matter. He examined Ms. Wootton to determine the impact of the Accident on her vocational capacity. His assessment consisted of a one and a half hour interview with Ms. Wootton, approximately three hours of psychometric testing conducted by a psychometrist in his employ, and a review of documents provided by Ms. Wootton's counsel.

[140] After reviewing her educational, vocational, medical, and psychological history and conditions, he concluded, at paras. 69-70:

In terms of Ms. Wootton's vocational trajectory absent the MVA, she likely would have continued working as a full-time health care aide. Ms. Wootton was sufficiently qualified through her training and experience, she enjoyed her job and planned to continue after she had completed her maternity leave, there is no history of job performance issues, she had the cognitive abilities for her occupation, the occupation aligns with her vocational interests, and the employment outlook is good. Ms. Wootton has a history of anxiety, depression, headaches and low back pain; however, the employment records do not indicate any significant vocational interference from these.

In terms of Ms. Wootton's vocational trajectory post-MVA, she has sustained a reduction in her vocational capacity, range of jobs, and competitive employability. Ms. Wootton does not meet the core physical requirements of her occupation as a health care aide and considering her poor medical prognosis and the fact that the occupation does not lend itself well to accommodations, she has sustained a loss of opportunity to return to his occupation. Following the MVA, Ms. Wootton attempted to work as a food server and day-care operator. She struggled with pain from lifting and carrying trays of food and with fatigue from working as a day-care operator. Also, she does not meet the standing or walking requirements for server while day-care operator requires frequent lifting, below shoulder reaching, and low level positioning, which are precluded.

[141] In his summary at para. 74, he further concluded:

Ms. Wootton has the capacity for part-time employment in a select range of occupations within her vocational profile and residual abilities at 50 to 60% of full-time. Further, because she faces a reduced range of jobs, she is at an elevated risk for repeated and prolonged periods of unemployment in the future. In my opinion, she has sustained permanent partial vocational disability as a result of her symptoms and functional limitations from the March 15, 2018 MVA.

[142] Dr. van den Berg was cross-examined as to why he did not reference the fact that the plaintiff appeared to be "having fun and laughing" during the assessment. He said while he likely should have, these observations were more important to the psychometric testing process, which asks about individual interests and skills. He noted this was not unusual, as this part of the testing gave individuals a reprieve from focussing on issues and problems that were explored as part of the initial interview process. When asked why he omitted this from para. 39, which refers to low mood, he noted he referenced proper "affect regulation", which would indicate she was able to appropriately regulate her emotions according to the circumstances.

[143] With respect to his lack of reference to the plaintiff sitting on the floor during the virtual interview, he noted that the important indicators with respect to stamina, strength, and pain are shifting and appearing to be in pain, rather than whether she sat on the floor or not.

Dr. Quee Newell

[144] Dr. Colleen Quee Newell, a registered clinical counsellor and vocational rehabilitation consultant, was called by the defendants to provide a responsive analysis to Dr. van den Berg's vocational assessment report. She provides reports 75% of the time for defendants and 25% for plaintiffs. She did not meet or assess Ms. Wootton, and her understanding of the facts and assumptions was based on a document review.

[145] Dr. van den Berg conducted the vocational assessment of the plaintiff virtually. While Dr. Quee Newell agreed this could be used as a practice, she was of the view that an in-person meeting is the preferred assessment option. She also criticized the use of the Career Ability Placement Survey (CAPS) test, noting it was developed for use in career exploration of

young people, and the results are normed on a population of high school and community college students in the USA. It is also considered a Level A test and, in her view, a Level B or C test should be used. A Level A test is for exploration, while Level B and C tests are for decision making.

- [146] Dr. Quee Newell indicated that Ms. Wootton was working .75 FTE before the Accident. When it was pointed out to her in cross-examination that some of the documents reference a higher number of hours worked, she indicated she would defer to the Court as to the actual hours worked and whether Ms. Wootton was working full time or .75 FTE before the Accident.
- [147] Dr. Quee Newell also disagreed with Dr. van den Berg that it would take the plaintiff three to five years to achieve a median wage in the new occupations he had cited for her. I note these latter comments were not very convincing, as Dr. Quee Newell used random examples without referencing data in support.
- [148] The plaintiff points out that Dr. Quee Newell's comments about the CAPS testing ignores the fact that the plaintiff has a college degree/diploma. In addition, the plaintiff submits that Dr. Quee Newell's preference regarding Level B or C versus A is simply that--a preference, not an industry standard. The plaintiff also says that Dr. Quee Newell's opinion should be discounted because she cherry picked information and records, which is inconsistent with the role of an expert: *Jones v. Colonna*, 2021 BCSC 1175 at para. 39; *Wallman v. John Doe*, 2014 BCSC 79 at para. 449. The plaintiff submits Dr. Quee Newell was also defensive on cross-examination and did not make concessions when appropriate.
- [149] I agree and prefer Dr. van den Berg's opinion in this matter for the reasons pointed out by the plaintiff. I note in particular that Dr. Quee Newell's disagreement with points in Dr. van den Berg's report were not sufficiently supported to be persuasive. I also note that while Dr. Van den Berg's assessment was virtual and therefore not perfect, he conducted a thorough interview supplemented by appropriate testing, such that his opinion and vocational assessment in this matter is preferable.

Findings on causation of injuries from expert medical evidence

- [150] In considering the medical and other evidence, the defendants acknowledge that the plaintiff suffered some clinically significant post-traumatic stress symptoms from the Accident. However, the defendants say that the plaintiff's baseline psychiatric conditions of pre-existing clinical depression and various manifestations of anxiety were probably aggravated for only a few months by the Accident. The defendants also say that the plaintiff has failed to attend treatment to specifically address her driving anxiety, and has therefore failed to mitigate her alleged losses.
- [151] I am satisfied that the evidence supports many of the plaintiff's complaints. I do not agree with the defendants that the plaintiff's testimony regarding the onset of worsening depression after the Accident is misleading. The defendants say that at the time of the

plaintiff's assessment by Dr. Finlayson in June 2020 and during the plaintiff's discovery, she did not report any symptoms of depression related to the Accident and testified that those symptoms had improved with medication, remaining stable as at November 2021, over three and a half years after the Accident. However, I conclude this mischaracterizes the evidence. The plaintiff indicated she felt the positive effects of sertraline within five to six weeks, but this is far different from the conclusion the defendants now seek to draw.

[152] The defendants also critique their own expert Dr. Paramonff's conclusion that the plaintiff will likely have a residual baseline of symptoms above the pre-Accident baseline, on the basis that Dr. Paramonff's understanding of the plaintiff's pre-Accident baseline is based largely on what she was told by the plaintiff and what the plaintiff has self-reported to other medical practitioners. Dr. Paramonoff, however, examined the plaintiff in addition to reviewing the clinical records. The defendants have also agreed that the diagnoses provided by Dr. Finlayson and Dr. Paramonoff are not substantially different. All of this further supports the plaintiff's credibility with respect to her injuries, which I have also dealt with earlier.

[153] Furthermore, as noted earlier and as helpfully outlined in *Edmondson v. Payer*, 2011 BCSC 118 [Edmondson]:

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[154] So too in this case. As noted earlier, it is not surprising that some differences exist in the clinical notes and the plaintiff's testimony over the years, as well as in some discovery references undertaken some time ago. The clinical records date back to 2016, and since then, Ms. Wootton has seen a number of different medical practitioners, including treating physicians, specialists, and those for the purposes of independent medical examinations.

As in Edmondson, "inconsistencies are almost inevitable because few people when asked to describe their condition on numerous occasions will use exactly the same words or emphasis each time": at para 35. I agree that despite some inconsistencies, the evidence as a whole is consistent and establishes the plaintiff's injuries. None of the inconsistencies are such as to seriously undermine the plaintiff's credibility. In addition, Ms. Wootton's evidence is consistent with and corroborated by the evidence of her family members and her best friend, Ms. Fitzpatrick.

[155] To a certain extent, the defendants are seeking to rely on documents divorced from the plaintiff's testimony and the evidence overall. A prime example was the defendants' argument that:

the timing of when the plaintiff says she decided to give up her permanent position is not consistent with the employment records, which indicate that the plaintiff had contemplated the possibility of not returning to her permanent position at Menno in April 2017 and chose to give up her permanent part-time position to work on a casual basis in May 2018.

I do not agree. As the plaintiff argues, there is no evidence of this. Rather, the plaintiff clearly stated in her testimony that if she didn't sign the document, she would continue to receive benefits which she would have to pay back, and did not wish to be in that position. She also testified that she intended to return to work after her maternity leave and would have signed a similar maternity leave waiver for her first maternity leave if available.

[156] Similarly, with respect to the Heritage Chiropractic records, the defendants seek to impeach Ms. Wootton's credibility with reference to a document alone, the words of which are open to interpretation and the author of which is not called as a witness. The weight of this document for those purposes is therefore suspect.

[157] I will not recite each documentary discrepancy set out by the defendants. Suffice it to say, I have considered them, some of which have been set out above. I conclude that overall, the core of the plaintiff's testimony is consistent with and reflects "the probabilities affecting the case as a whole and shown to be in existence at the time": Faryna at 356.

[158] Causation is essentially a practical question of fact that can best be answered by ordinary common-sense: Athey at para. 16. The trial judge is to take a robust and pragmatic approach to determining if the plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required: Clements at para. 46. Furthermore, a plaintiff is not required to establish the defendant's negligence as the sole cause of his injuries. It is sufficient if the defendant's negligence was a cause of the harm: Athey at paras. 17, 19.

[159] In my view, the medical evidence set out above establishes the Accident caused the plaintiff's current physical and psychological conditions. I have dealt with the adverse comments the defendants seek to rely on and conclude they are not persuasive for the reasons set out above. The defendants are, therefore, liable for the plaintiff's injuries arising from the Accident and the consequences that flow from those injuries.

What is the appropriate award of non-pecuniary damages?

[160] The plaintiff seeks an award of \$210,000-\$230,000 in non-pecuniary damages, arguing that her injuries fall within the scope and severity of the injuries in the following cases:

- a) Sebaa v. Ricci, 2015 BCSC 1492;
- b) Ali v. Padam, 2017 BCSC 1849;
- c) Wang v. McNaught, 2017 BCSC 454;
- d) Gill v. Apeldoorn, 2019 BCSC 798;
- e) Ranahan v. Oceguera, 2019 BCSC 228;
- f) Kempton v. Struke Estate, 2020 BCSC 2094;
- g) Martin v. Steunenbergh, 2021 BCSC 1411; and
- h) Danks v. Middelveen, 2024 BCSC 174.

[161] In contrast, the defendants submit that, assuming the plaintiff is able to establish causation for her alleged post-traumatic headaches, an award in the amount of \$50,000 to \$75,000 may be appropriate. If she is not able to establish causation for the headaches, the damage award should be less. The defendants rely on the following cases:

- a) Gartener v. Baumeister, 2019 BCSC 1291;
- b) Carleton v. Warner, 2020 BCSC 436;
- c) Hinder v. Yellow Cab Company, 2015 BCSC 2069;
- d) LaRocque v. LaRocque, 2019 BCSC 655;
- e) Lacroix v. Bourdon, 2021 BCSC 586; and
- f) Bates v. Buchanan, 2023 BCSC 687.

[162] The defendants point to the 2023 Bates case, where the plaintiff was a 37-year-old care aide who suffered a significant motor vehicle accident in which her car was spun around. She suffered pain and injury to her left shoulder, neck, and back, and worsening headaches, and developed general anxiety, including driving anxiety. She had to change careers, and her previous happy bubbly personality had changed to become irritable and short tempered due to pain. She had difficulty with household and simple tasks associated with taking care of her 16-month-old daughter. She was awarded non-pecuniary damages of

\$100,000, which included housekeeping (reduced by a 50% split in liability).

- [163] In this case, the defendants say the plaintiff has not been able to establish causation for her alleged post-traumatic headaches and that the medical experts suggest potential for significant improvements with appropriate treatment. The defendants also maintain that the plaintiff has not engaged in an active rehabilitation program, which could significantly improve the plaintiff's physical symptoms. As a result, the defendants submit that non-pecuniary damages in this matter should be less than those set out in the cases relied upon by the plaintiff.
- [164] The principles for an award of non-pecuniary damages are set out in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 100 [Stapley]. In *Stapley*, the Court of Appeal outlined an extensive list of factors to consider in determining the appropriate award of non-pecuniary damages, including the plaintiff's age, the nature of injury, the severity and duration of pain, impairment of life, impairment of family and social relationships, and impairment of physical and mental abilities, amongst other things: para. 46. The Court of Appeal also noted that the plaintiff's stoicism should not penalize them in the assessment of damages.
- [165] The evidence establishes that prior to the Accident, the plaintiff was an energetic, social, and active mother. She was confident and outgoing, and worked hard while raising a young family. Her Accident-related injuries have had a life-altering impact on her. She continues to suffer from chronic pain and fatigue, along with headaches, sleep disruption, and functional limitations in her neck, back, and shoulders. Dr. Morgan also opined that she suffers from moderate major depressive disorder.
- [166] All of this negatively impacts her relationships, including with her family and friends, and her work and recreational activities. As she testified and as Dr. Morgan noted, she had a good relationship with her husband, including regular intimacy, which has now been adversely affected. Dr. Morgan opined that "Ms. Wootton's relationship function was probably affected by her pain, depression and anxiety following the motor vehicle accident". Ms. Wootton's testimony made clear the depth of this impact on her and her family and her pain in realizing its effect.
- [167] As Mr. Wootton and Ms. Fitzpatrick described, the plaintiff is now a very different person than she was before the Accident and participates minimally, if at all, in family and social activities. Overall, the plaintiff appears consumed by her anxiety and depression which directly impacts on her ability to participate in family life, both with the children and her husband.

- [168] Her injuries have also significantly affected her regular activities and ability to work. She no longer hikes or walks the Vedder River, does not leave the house often for family activities, and is limited in socializing with friends and family. Indeed, Ms. Fitzpatrick testified that while previously the plaintiff would organize and be central to many social activities, she now only sees her occasionally for coffee at the plaintiff's house and is asked to leave after a couple of hours so the plaintiff can take a nap.
- [169] While each case is unique, the cases cited by the plaintiffs in this area are more similar to the facts before this Court, and I therefore prefer them in determining an award for non-pecuniary damages. The compensable injuries in these cases are generally similar to those suffered by the plaintiff. For example, some deal with the plaintiff's anxiety and depression, which have resulted in them becoming socially withdrawn and short-tempered with adverse consequences on both the plaintiffs and their families--as is the case with Ms. Wootton. The cases relied upon by the defendants largely do not include such parallel circumstances, with the exception of Lacroix and Bates, which both awarded non-pecuniary damages of \$100,000. However, this is on the lower end of the spectrum when compared to those cited by the plaintiff, and none of the cases cited by the defendants are adjusted for inflation.
- [170] In view of all the above, and after applying the factors in Stapley and reviewing the decisions where the plaintiffs have sustained injuries of a similar nature as the present case, I conclude that an award of \$200,000 is appropriate for the plaintiff's pain and suffering.

Mitigation

- [171] The defendants argue that the plaintiff failed to mitigate her alleged non-pecuniary losses by not attending counselling focused on her fear of driving, which can be effectively dealt with by cognitive behavioural therapy, and by not attending sufficient active rehabilitation therapy.
- [172] A plaintiff in a personal injury action has a positive duty to take reasonable steps to limit their loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal to SCC ref'd, [2001] S.C.C.A. No. 467.
- [173] As noted in *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26, while the test is objective, the mitigation question must be "what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment".

[174] In this case, it is clear the plaintiff's fear of driving was and is a significant issue that has impeded her recovery, family, and work life. As noted by the defendants, shortly after the Accident, the plaintiff was advised to attend psychological counselling to address her anxiety with respite to driving. She did not do so, which I find contributed to the difficulties in her recovery.

[175] I conclude that a reasonable person in the circumstances would have been expected to take this advice and attend psychological counselling to address her anxiety with respect to driving. As per the jurisprudence, the plaintiff's award for non-pecuniary damages is therefore reduced by 10% for failing to participate in counselling to address her anxiety with respect to driving. This results in an award of \$180,000 in non pecuniary damages (\$200,000 less 10%).

What is the appropriate award for past loss of income earning capacity?

[176] Ms. Wootton had a robust employment history. She clearly had a strong work ethic and attempted to return to work in a variety of capacities after the Accident, including to her care aide job at Menno Home. While Ms. Wootton was on maternity leave at the time of the Accident, she demonstrated commitment to that work and a desire to continue. There is no doubt that the various issues explained by the plaintiff and medical experts have impacted her functionality at work.

[177] Ms. Wootton described her chronic physical and mental issues and the limitations that have arisen since the Accident. These include neck and shoulder myofascial pain, worsening of migraine headaches and anxiety symptoms, reduced mood and social engagement, sleep reduction/quality and reduced intimacy, and decreased energy and chronic fatigue. As noted, Dr. Morgan also diagnosed her with somatic symptom disorder, major depressive disorder, generalized anxiety disorder, and unspecific trauma and stressor related disorder.

[178] The plaintiff maintains that both the lay and expert evidence demonstrate there is a real and substantial possibility that her injuries and impairments resulted in and will continue to result in a pecuniary loss.

[179] The plaintiff notes that claims for both past and future loss of income capacity are subject to the same legal test. The plaintiff must demonstrate that the injuries suffered in the Accident have impaired her ability to earn income and that this impairment has resulted in a pecuniary loss. The onus is not heavy, but must be met to justify a pecuniary award: *Perren v. Lalari*, 2010 BCCA 140. The Court of Appeal in *Gao v. Dietrich*, 2018 BCCA 372 [Gao] also set out the relevant considerations in assessing past losses at paragraphs 34-39.

- [180] Mr. Derren Benning, an economist, provided expert evidence regarding Ms. Wootton's past wage loss. The plaintiff says this evidence is relatively straightforward. The plaintiff acknowledges that expert reports are only as useful as the reliability and applicability of the factual assumptions utilized to provide support or foundation for the opinions provided. She also acknowledged that there are a number of past and future earnings scenarios that could be applicable to her.
- [181] Mr. Benning assessed Ms. Wootton's past loss of income as a result of the Accident to be \$179,692. Mr. Benning used June 5, 2024 (Ms. Wootton's 35th birthday) as a reference date to separate past and future loss estimates.
- [182] He reviewed Ms. Wootton's reported income as derived from her tax return information, summarized her T4 slips from 2013 to 2022, and set these numbers out in a chart. Table 2 of his report sets out estimates of Ms. Wootton's past and future employment income in the absence of the Accident, based on the assumption she would have returned to working as a care aide from her maternity leave by June 18 on a full-time basis (as she was on maternity leave at the time of the Accident). Prior to her maternity leave, she held a regular part-time position with Menno Home, earning \$23.82 per hour, at 29 hours per week or .77 FTE. Table 3 of the report set out his estimates of Ms. Wootton's past income loss, expressed on a post-tax basis.
- [183] There has been much debate as to whether Ms. Wootton worked part time or full time before the Accident. This debate is somewhat artificial, as .77 FTE can be considered full time in certain circumstances as noted by Dr. Van den Berg. The evidence establishes that Ms. Wootton was working .77 FTE and would continue to do so absent the Accident.
- [184] Evidence of Ms. Wootton's employment after the Accident has been set out above, including her efforts to return to Menno Home, her work as a restaurant server, her time as a care aide with Birchwood from 2019-2022, her daycare operation, and her work at ZealCan from December 2021 to October 2023. She has only recently commenced subsequent employment as a noon-hour supervisor at her childrens' school.
- [185] The defendants accept the plaintiff has suffered some past loss of income as a result of the Accident, but they dispute the amount submitted. The defendants say that while the plaintiff maintains she was consistently employed on a full-time basis before the Accident, the evidence establishes she was only employed on a part-time basis. The defendants also submit that absent the Accident, it is unlikely the plaintiff would have maintained her pre-Accident work schedule of .75 to .77 FTE at Menno Home because of her long-standing health issues, including headaches and mental health issues.
- [186] The defendants also say that the extent to which the plaintiff has not worked since the Accident can be explained by factors unrelated to the Accident. These include the plaintiff's pre-existing medical conditions, deconditioning, and personal childcare choices. The defendants point out that the plaintiff is the primary caregiver to her two young children, currently six and nine years old. They say the evidence demonstrates the plaintiff would

never allow her children to be cared for by strangers or daycare, which has reduced her availability for work--particularly given the challenges in making childcare arrangements after Mr. Wootton started his own business, working long hours with a less-fixed schedule

- [187] I disagree. The defendants' submission that the plaintiff's childcare responsibilities would lead to reduced work has not been established and is not supported by the evidence. While the plaintiff is clearly devoted to her children, the evidence establishes her attachment and evident commitment to work throughout her working life. Ms. Wootton's mother moved into the household, in part to assist with childcare. The plaintiff also valued her financial contribution to the household and continues to do so. I have earlier dealt with the point the defendants seek to make that the plaintiff had planned to give up her permanent part-time position in April 2017 on the basis of her request to cancel her benefits during maternity leave. The plaintiff said she only cancelled these benefits so she would not have to pay back any monies after her maternity leave, and would have signed the same waiver during her first maternity leave if that had been offered to her. I take this to demonstrate her concern about the economics of her situation and the family finances, as well as her dedication to continue working.
- [188] The defendants' argument on these points is not persuasive and I prefer the assumptions of Mr. Benning with respect to her attachment to work, which I find to be established on the evidence. I therefore ultimately accept his expert report on this topic. Mr. Benning has made his calculations with respect to past income loss on the basis of a full-time position. While I have found that .77 FTE is more applicable in this situation, that number of 29-30 hours is close to or can be considered full-time work, such that I conclude it does not interfere with these particular assumptions used by Mr. Benning in his report.
- [189] I also note that, contrary to the defendant's argument, the plaintiff did not start her daycare business as part of a plan that was in place before the Accident. There is simply no evidence to establish this proposition. In addition, it is also conjecture that the plaintiff did not report all her income on her tax return, including tips. The defendants set out a table of some of these propositions and describe them as "additional contingencies" that should be taken into account. There is nothing that establishes either the specific amounts of the contingency notions or percentages set out therein, and I am not prepared to apply them in this instance.
- [190] The calculation of past and future income loss is not a precise mathematical calculation. As noted by the defendants, Mr. Benning based his calculations on the assumption that absent the Accident, the plaintiff would have continued working full time as a care aide at Menno Home, from the date she was scheduled to return to work after her maternity leave until the time of trial, with 100% participation.

- [191] The defendants' expert, Mr. Mark Gosling, also an economist, authored a responsive report to Mr. Benning's report, dated April 11, 2024. In it, he notes that "Mr. Benning assumes 100% labour force participation with no possibility of unemployment or part-time work": at para. 5. In contrast, Mr. Gosling calculates the plaintiff's past loss of income to be \$97,535, which takes into account the average labour market contingencies for BC females of similar age and education.
- [192] Mr. Benning agreed in cross-examination that application of average labour market contingencies for the past income loss period would reduce his total of \$179,692 by 40%, netting to approximately \$107,816. This is close to the figure calculated by Mr. Gosling.
- [193] In this case, I find it is reasonable to apply those average labour market participation rates to the calculation of the plaintiff's projected income loss, as done by Mr. Gosling. While the plaintiff had a strong work history prior to the Accident, the length of this time to assess this is somewhat limited due to her young age at the time of the Accident. Applying the statistical average labour market participation for BC females of similar age and education is therefore eminently reasonable in these circumstances. With this labour market contingency reduction applied, the plaintiff's past loss of income therefore amounts to \$107,816, which I round up to \$108,000.00.
- [194] I therefore award the plaintiff \$108,000 for past income pecuniary loss.

What is the appropriate award for future loss of income earning capacity?

- [195] With respect to future income loss, the plaintiff submits that she has met the threshold required in law of showing there is a real and substantial possibility that her ongoing, chronic injuries and corresponding functional limitations will affect her income over the remainder of her career as a care aide or in any competitive form of future employment.
- [196] Specifically, the plaintiff submits that the evidence demonstrates there is a real and substantial possibility that she will need flexible employment to manage her physical and emotional symptoms, make the necessary adjustments, and undertake the ongoing treatment and symptom management strategies that she much now implement. The prospect of an early retirement is also a real negative contingency in the future, which is largely dependent on the progression of Ms. Wootton's physical and emotional symptoms and psychiatric disorders, which are expected to be impacted by a number of future events.
- [197] As set out by the defendants, a helpful summary of the law with respect to loss of capacity is set out in *Dhaliwal v. Greyhound*, 2015 BCSC 2147:
- [335] In *Perren v. Lalari*, 2010 BCCA 140 (B.C.C.A.) ("*Perren*"), the Court summarized the basic principles that should be considered in assessing damages for future loss of income earning capacity and the burden of proof on a plaintiff advancing such a claim.
- [336] In *Parker v. Lemmon*, 2012 BCSC 27 (B.C.S.C.), Savage J. gave a useful summary of the principals involved for the Court to consider an award for loss of earning capacity:

[42] The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 at paras. 25-32, which I summarize as follows:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss of income is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

[337] The plaintiff bears the onus of establishing a real and substantial possibility that he will suffer a loss of income-earning capacity in the future as a result of the injuries sustained in the Accident. A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss.

Perren v. Lalari, 2010 BCCA 140

[338] If the plaintiff is unable to prove a real and substantial possibility of a future event leading to an income loss, the inquiry ends. If established, the plaintiff may prove the quantification of such loss either on an "earnings approach" or a "capital assets approach".

Morgan v. Galbraith, 2013 BCCA 305

[339] An award for future loss of income-earning capacity should not be based on the plaintiff's own perceptions of loss, but must show a realistic possibility that he is less able to compete in the marketplace, with real economic consequences.

Kim v. Morier, 2014 BCCA 63

[340] There must be evidence and an analysis of the earnings the plaintiff would have realistically achieved but for the Accident.

Schenker v. Scott, 2014 BCCA 203

[341] Ongoing symptoms alone do not mandate an award for loss of earning capacity. There must be some cogent evidence to trigger any of the four considerations set out in *Brown v. Golaiy*, 1985 CanLII 149 (BC SC), [1985] B.C.J. No. 31. Paragraph 8 of that case states the following:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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

[198] In a trilogy of cases, the Court of Appeal clarified the law relating to the assessment of future losses of earning capacity: see *Rab v. Prescott*, 2021 BCCA 345 [Rab]; *Lo v. Vos*, 2021 BCCA 421; and *Dornan v. Silva*, 2021 BCCA 228.

[199] More recently, in *Boucher v. Bemister*, 2023 BCCA 17 [Bemister] at para. 5, the Court of Appeal confirmed this trilogy of cases as follows, citing *Rab* at para. 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 ... must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras. 93-95.

[200] The defendants submit that the plaintiff has not proven any future income loss or loss of earning capacity. The defendants say the plaintiff substantially recovered from her Accident-related injuries within six to 12 months, and that any significant ongoing complaints that she has are not related to the Accident. To the extent that the plaintiff has reported ongoing difficulties working in her pre-accident occupation as a care aide, the defendants say that any difficulties she has are unrelated to the Accident and are rather related to her pre-existing medical conditions, deconditioning, and personal choice.

- [201] The defendants say that the plaintiff's claim for loss of earning capacity is speculative at best, and there is not a real or substantial possibility that she will suffer future loss of income as a result of the Accident. Alternatively, in the event the Court finds the plaintiff has suffered a loss of earning capacity, the defendants say that the proper award should be equivalent to one to two years of her average annual pre-tax income.
- [202] The defendants point out Natalie Hull's opinion that, "Ms. Wootton's work capacity is impacted not only by her physical functioning but also by her ability to manage her headaches, migraines, and mood". The defendants say the plaintiff's issue with headaches, migraines, and mood are clearly unrelated and pre-date the Accident. They say the plaintiff's alleged injuries are entirely subjective in nature and to the extent the expert opinions are based on these, they should be given little weight in light of concerns regarding the credibility and reliability of the plaintiff's evidence.
- [203] The defendants also say that if the Court finds the plaintiff does have some ongoing Accident-related complaints, those complaints are not functionally limiting.
- [204] Furthermore, the defendants say the results of the plaintiff's functional capacity evaluation with Natalie Hull can be explained largely on the basis of her being deconditioned at the time of testing. The defendants also point out that despite her alleged injuries, the plaintiff had no difficulty performing her work duties at Birchwood, and she is capable of working full-time hours at a variety of care aide positions. In addition, as per Dr. van den Berg's report and the critique by Dr. Quee Newell, the defendants submit that the plaintiff is suited to a variety of job positions with comparable pay, in the event she does not want to return to work as a care aide.
- [205] The defendants maintain the plaintiff's claim that she is now limited to part-time work is undermined by the fact she worked full-time for a year running her own daycare while working part-time as a server. These jobs had physical demands that the plaintiff indicated she was able to handle. The defendants therefore say that even if the plaintiff has some residual injuries and functional limitations, she is able to work, and therefore should only be awarded two years of her average pre-accident income of \$30,000 to \$60,000.
- [206] In assessing future loss of income, the first step, as per Rab, is whether the evidence discloses a potential future event that could lead to a loss of capacity. The Court of Appeal has confirmed that a "chronic injury" can be sufficient to satisfy this step. I agree that Ms. Wootton has suffered a loss of capacity due to a chronic injury from her Accident-related injuries and symptoms, making her less valuable as a care aide in a competitive labour market. She is less marketable as a potential employee, as she has less energy, drive, motivation, and efficiency. She feels overwhelmed and is less able to undertake the heavier tasks of a care aide. I therefore accept that the plaintiff has both chronic physical and psychological injuries that impact her ability to work.

- [207] With respect to the second part of the test, the Court must consider whether there is a real and substantial possibility that a future event will cause pecuniary loss. The standard of proof is "a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": Gao at para. 34.
- [208] Evidence of ongoing pain can be sufficient to ground a substantial possibility that a plaintiff's pain will adversely affect his or her future ability to work: Clark v. Kouba, 2014 BCCA 50 at para. 33; Williamson v. Suna, 2009 BCSC 576 at paras. 52-55 and 62.
- [209] Both Dr. Morgan and Dr. van den Berg opine that Ms. Wootton has suffered a reduction in her employability. Dr. van den Berg said she has, "sustained a reduction in vocational capacity, range of jobs, and competitive employability as a result of her symptoms and functional limitations from the March 15, 2018 MVA": at para. 62. In Dr. Morgan's report, he says that, "as a result of her ongoing symptoms, Ms. Wootton is probably impaired in terms of her competitive employment".
- [210] Durability is also a factor. This was set out by Ms. Hull in her expert report, at page 7:
- Ms. Wootton does not meet the full essential job demands for her pre-accident job as a care aide, even on a part-time basis. She does not meet the full strength demands for medium level work, nor does she demonstrate the requisite postural tolerances associated with stooping and neck flexion Ms. Wootton demonstrates a low activity tolerance in general and appears to be impacted a great deal by fatigue factors
- [211] I am therefore satisfied that the first two steps of the test are met in the present case. First, there is clearly a real and substantial possibility that the plaintiff has suffered a loss of capacity that will continue into the future. In addition, the evidence set out above establishes there is a real and substantial possibility that Ms. Wootton is and will be unable to maintain her profession as a care aide as a result of her Accident-related injuries. While she has attempted other employment opportunities, her inability to continue in her trained profession has and will likely result in a pecuniary loss. I find that these steps have been met on the standard of a real and substantial possibility, which is a lower standard than a balance of probabilities, but a higher threshold than mere speculation: Bemister at para. 12
- [212] The final step is to assess or quantify the plaintiff's loss.
- [213] An assessment of future income loss is an exercise in judgement and assessment, and not a mathematically precise calculation: Parypa v. Wickware, 1999 BCCA 88 at para. 36. If, however, there are mathematical aides that may be of assistance, the Court should start its analysis by considering them: Jurczak v. Mauro, 2013 BCCA 507 at para. 37.
- [214] While there are two different approaches in assessing future income loss--the "earnings approach" or the "capital asset approach"--the relevant factors underlying the analyses remain the same.

- [215] As was the case in *Ranahan v. Ocegüera*, 2019 BCSC 228, the plaintiff says she would have worked more once her young children became older. She relies on Mr. Benning's expert report as an economist with expertise in the quantification of pecuniary damages and loss.
- [216] Mr. Benning estimates the plaintiff's future income loss as between \$1,090,307 to \$1,100,288. This estimation is based on a number of assumptions, including that Ms. Wootton would have returned to working as a care aide from her maternity leave by June 2018 on a full-time basis, been promoted at 45 to a supervisory role, and would have worked full time until age 65 and part time from 65 to 70.
- [217] In contrast, as a result of the Accident, the plaintiff says she may work part-time, as per Dr. van den Berg's opinion, as a customer service clerk or, with formal retraining, as an optician, hearing aid practitioner, or medical office assistant. She says she may work these occupations up to age 60, earning between \$21 and \$24 per hour.
- [218] As discussed, the evidence establishes that Ms. Wootton does not meet the full-time essential job demands for her pre-accident job as a care aide. I note in particular the expert evidence of Ms. Hull, who opined that Ms. Wootton is capable of work activity in select sedentary, light and medium strength occupational categories, and that she can perform limited, select light and medium strength work. Ms. Hull also opined that Ms. Wootton demonstrates limitations for sustained stooping activity and is capable of flexible part-time work in jobs that meet the limitations outlined in the report.
- [219] The defendants point out that Ms. Wootton worked at Birchwood as a care aide subsequent to the Accident in a lighter position, and submit that she is therefore capable of working full time hours at a variety of care aide positions. However, Ms. Wootton's employment history subsequent to this position is consistent with Ms. Hull's opinion. She left her job at ZealCan, which she loved and which had provided her workplace accommodations, in October 2023. This cannot be ignored. Ms. Wootton testified she was overwhelmed and found the juggle between her work and home obligations very difficult, as the employer was unable to accommodate a flexible work schedule.
- [220] The defendants argue that if the Court finds a loss of earning capacity, the appropriate award should be one to two years of average pre-Accident income, totalling \$30,000 to \$60,000. With respect to Mr. Benning's report, the defendants point out that Mr. Benning has assumed that with the Accident, the plaintiff will only work part time at 55% for the remainder of her working life and will retire early at age 60. The defendants say this is an assumption proposed by counsel to promote a large award for loss of earning capacity. They once again point to the plaintiff's credibility issues to dismiss experts reports on these points. I have dealt with the credibility issue earlier. I reiterate that I do not agree with the defendants' point of view, which relies too much on the simple proposition that if there is no objective evidence of an issue, it must be discounted or is not credible.

- [221] In his responsive report, the defendants' expert Mr. Gosling has calculated the plaintiff's loss if she works as a customer service representative as opposed to a care aide for the remainder of her working life, subject to the standard labour market participation rates. Mr. Gosling concluded that the plaintiff's loss if she works 55% of full time until retirement would be \$395,075. If she worked full time until retirement, the loss would be \$59,397. The defendants argue the latter figure should apply and corresponds to the two year loss suggested above of \$60,000.
- [222] The defendants say that Mr. Benning was instructed not to apply the standard labour market participation contingency rates for BC females with a similar education level to that of the plaintiff, and that there is no reason, given the plaintiff's age and pre-Accident work history, that these rates should not apply. The defendants say that the application of this contingency reduces the plaintiff's prospective loss by approximately 30%, supported by the opinion of Mr. Gosling.
- [223] The assessment of future loss is not a mathematical exercise. Where there are mathematical aides, however, the Court should start by considering them. I have done so, and in my view, it is likely the plaintiff will work 50-55% of full time, due to her limitations, which I find have been established on the evidence. However, I also note that there is nothing to support the view that the plaintiff would have been promoted to supervisor at age 45, and that there is no evidence as to why the above noted labour contingencies were not applied in Mr. Benning's report. Accordingly, I draw assistance from Mr. Gosling's report and conclude that a more likely future pecuniary loss is in the range of \$395,000. The evidence makes clear the plaintiff was very attached to work, and despite her family responsibilities, would have continued to work. However, while I agree the plaintiff was clearly a hard worker, her most recent work at the time of the Accident was at .75-.77 FTE, and I find this would have been her more likely course of employment, which in some instances is considered full time work.
- [224] I do not find an appropriate award would be one to two years of salary as the defendants argue, as this is contrary to the plaintiff's limitations as established by both the lay and expert evidence.
- [225] Accordingly, I am satisfied an award of \$395,000 for future loss of income is appropriate in the circumstances of this case.

What amount, if any, should be awarded for cost of future care?

- [226] As set out in numerous cases, including *Sendher v. Wong*, 2014 BCSC 140 and *Alagar v. Mackay* 2023 BCSC 209, there must be a medical justification for cost of future care and the claims must be reasonable. The Court in *Warick v. Diwell*, 2017 BCSC 68, *aff'd* 2018 BCCA 53, provided the following helpful guidance:

- [203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.
- [227] Furthermore, an assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [228] The plaintiff points to the medical experts who evaluated Ms. Wootton and made several recommendations for her future care requirements. In Ms. Hull's expert report, the cost of the treatment recommendations for Ms. Wootton is set out in a Summary of Costs table. In Mr. Benning's expert report, the cost is set out as a lump sum of about \$209,013. I will explain shortly how Mr. Benning used the costs set out by Ms. Hull to arrive at this lump sum.
- [229] The plaintiff also says she is entitled to compensation for loss of housekeeping or domestic capacity as a result of the injuries sustained in the Accident.
- [230] The defendants say that the plaintiff has failed to prove that she is entitled to an award for cost of future care or loss of housekeeping capacity. To the extent that Ms. Hull made cost of future care recommendations, the defendants say these are based on the opinions of the plaintiff's family doctor, Dr. Lynch, whose medical legal report is not in evidence, and other experts who have relied upon what the plaintiff told them about her symptoms. Given the issues with respect to the plaintiff's reliability and credibility, the defendants say little weight can be placed on the recommendations of her experts with respect to future care.
- [231] In considering this matter, I reiterate that I have found the plaintiff credible. Accordingly, I will consider the plaintiff's experts' recommendations with respect to future cost of care.
- [232] First while the plaintiff's headaches pre-dated the Accident to a certain extent, the evidence establishes they were adversely impacted by the Accident. This evidence was fleshed out in detail at trial. The plaintiff's very brief mention to the contrary during her examination for discovery does not establish, as the defendants argue, the plaintiff's headaches were not significantly changed by the Accident. The plaintiff was clear she had "really bad" post-accident headaches where she "wanted to call 911", and this evidence was discounted by the defendants. The plaintiff's evidence, both in chief and in cross-examination, made clear the duration of her headaches, along with the intensity and frequency, before the Accident were not the same as her headaches after the Accident.

- [233] While the defendants argue Dr. Paramonoff said that Botox was likely not indicated for the plaintiff, and the cornerstone of managing her symptoms should be an exercise program, this ignores, to a great degree, the evidence of the plaintiff that Botox is of significant assistance to her in managing her headaches. She also testified that she has tried exercise programs such as spin classes, which have not alleviated her symptoms. Dr. Finlayson opined that Ms. Wootton will require an allowance for Botox injections every three months for the foreseeable future. Dr. Lynch has been administering Botox injections every three to four months, along with trigger point injections.
- [234] I have reviewed and agree with Ms. Hull's summary of costs overall, which is consistent with expert recommendations. These include 15-20 psychological counselling sessions, with subsequent maintenance sessions three to four times per year, for up to two years, as recommended by Dr. Morgan; 20-24 sessions with a kinesiologist for active rehabilitation, as recommended by Dr. Finlayson; 6-12 physiotherapy treatment sessions yearly; and prescription and non-prescription medication yearly as medically indicated.
- [235] With respect to housekeeping support, Ms. Hull noted that Dr. Finlayson opined that absent the additional support provided by Ms. Wootton's family, she would likely require hired assistance for heavy cleaning tasks, laundry, and yard work. Ms. Hull recommended a modest two to four hours of clearing assistance monthly to support her overall durability and to help replace some of her regular pre-accident contributions to the household.
- [236] I agree. While the defendants have argued there is no medical evidence to suggest that the plaintiff is incapable of or limited in performing regular housework, and the plaintiff has continued to perform work around the home, this ignores the evidence of her family and friends who indicate that her husband and mother have largely stepped in to assist and carry out their chores. They also provided evidence that the plaintiff's house is not cleaned at the level it was prior to the Accident. Ms. Fitzpatrick also corroborated and added to this evidence, all of which support Ms. Hull's recommendations.
- [237] As noted by Ms. Hull in her report, and supported by the plaintiff's evidence, Ms. Wootton was responsible for most of the cooking, cleaning, laundry, and grocery shopping in her household. Since the Accident, Ms. Wootton avoids the laundry and carrying groceries up the stairs. While she does sweep and vacuum, and has resumed cooking, she has difficulties bending, stooping, and lifting. As Ms. Hull noted, she requires a paced approach with frequent breaks for these activities.
- [238] The Court of Appeal stated the following in *Kim v. Lin* 2018 BCCA 77 in quoting *McTavish v. McGillivray*, 2000 BCCA 164:

When family members have gratuitously done the work the plaintiff can no longer do and the task they perform have a market value, that value provided a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss

- [239] That is more than evident in this case, and supports the plaintiff's claim for loss of housekeeping capacity as a result of the injuries she suffered in the Accident.
- [240] In addition to the above, I am inclined to allow an in-trust claim in the modest amount of \$5,000 as compensation to the family members for additional work done by them as a result of the plaintiff's impaired capacity to perform housekeeping: *Kroecker v. Jansen*, 123 D.L.R. (4th) 652, 1995 CanLII 761; *Bradley v. Bath*, 2010 BCCA 10; *Popove v. Attisha*, 2019 BCSC 1587.
- [241] There is no doubt that Ms. Wootton's husband has provided essential support with their children and household, and continues to do so. Indeed, he is largely the parent who ensures the children have some outdoor activities and participate in the community. Ms. Wootton is reluctant to do so, which, as she herself noted with sadness, impairs the children's growth and opportunities.
- [242] In Mr. Benning's report, he uses future cost of care multipliers to calculate the present value of future expenses at a given reference date, starting in 2024. The multipliers are expressed per thousand dollars of annual cost of care expenses. Table 6 of his report sets out the calculation of the applicable multiplier values, with provision only for the contingency respecting the plaintiff's premature death. Mr. Benning notes that this is the traditional way in which such multiplier values have been expressed in litigation matters.
- [243] Ms. Hull set out a summary of costs at Appendix C in her report. She listed a range of services, as indicated above, which she says are as medically needed based on the expert recommendations. Mr. Benning has taken those amounts, applied the relevant future cost of care multipliers, and provided a total "present value" lump sum in the amount of \$209,013. I have considered that report as a guideline and concluded that the recommendations for the listed treatments up to age 60 are sound, based on the expert recommendations. As this is not solely a mathematical exercise, I conclude the amount should be rounded down to \$200,000 as a present value of the future care cost recommendations.
- [244] Accordingly, I award \$200,000 for the plaintiff's cost of future care.

What amount, if any, should be awarded for special damages?

- [245] There was some dispute as to whether the parties have agreed on special damages in the amount of \$14,194.49. In final argument, the defendants said that special damages after December 2018 the plaintiff had substantially recovered from her Accident related injuries. In addition, the defendants noted some of the counselling sessions dealt with the same type of things she discussed before the Accident.

[246] On this point, I note the plaintiff testified as to nature and attendance of treatments and the above points were not put to the plaintiff in cross-examination. I am satisfied that the special damages as set out are appropriate. The defendants seek to parse out appointments on the basis of what was discussed in those appointments without sufficient evidence to sustain this objection.

[247] In view of the above, I am inclined to award the plaintiff special damages of \$14,194.49 as set out in her list of special damages.

VII. Conclusion

[248] In summary, the plaintiff is awarded as follows:

a) non-pecuniary damages:

\$180,000 (\$200,000 less 10%)

b) past loss of earnings:

c) future loss of earnings capacity:

\$108,000

\$395,000

d) cost of future care:

\$200,000

e) special damages:

\$14,194.49

TOTAL:

\$897,194.49

[249] In the normal course, the successful party is awarded costs. If however there is something the court should consider on the issue of costs, the parties are at liberty to apply to have that matter determined if such an application is filed within 45 days of this judgment.

"Burke J."

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