

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Paleshnuik v. Dulay*,  
2023 BCSC 714

Date: 20230501  
Docket: M186204  
Registry: Vancouver

Between:

**Leah Paleshnuik**

Plaintiff

And

**Davinder Singh Dulay**

Defendant

Before: The Honourable Justice Basran

## Reasons for Judgment

Counsel for the Plaintiff:

C.H. McDougall

Counsel for the Defendant:

C.J. Bolan

Place and Dates of Trial:

Vancouver, B.C.  
November 21–24, 28–30,  
December 1–2, 5–8, 2022

Place and Date of Judgment:

Vancouver, B.C.  
May 1, 2023

**Table of Contents**

**INTRODUCTION ..... 4**

**CREDIBILITY ASSESSMENT..... 5**

    Legal Principles ..... 5

    The Parties’ Positions and Analysis of Credibility ..... 6

**NON-PECUNIARY DAMAGES ..... 8**

    Relevant Legal Principles ..... 8

    Ms. Paleshnuik’s Position on Non-Pecuniary Damages ..... 9

    The Defendant’s Position on Non-Pecuniary Damages ..... 9

    Findings of Fact on Non-Pecuniary Damages ..... 10

        Ms. Paleshnuik’s Pre-Accident Condition ..... 10

        Circumstances of the Accident ..... 15

        Ms. Paleshnuik’s Post-Accident Condition..... 16

**Medical Expert Evidence ..... 23**

        Dr. Manu Mehdiratta – Neurologist ..... 23

        Dr. Frank Kemble – Neurologist..... 26

        Dr. Lawrence Kei – Psychiatrist..... 29

        Dr. Vance Tsai – Otolaryngologist ..... 31

        Dr. Eyton David – Otolaryngologist..... 32

        Dr. Krista Schultz – Psychologist..... 32

**Analysis of Non-Pecuniary Damages ..... 35**

**LOSS OF INCOME-EARNING CAPACITY ..... 41**

**Factual Findings..... 41**

        Functional Capacity Evaluation..... 44

**Past Loss of Income-Earning Capacity ..... 45**

        Relevant Legal Principles ..... 45

        The Parties’ Positions on Past Loss of Income-Earning Capacity ..... 46

        Analysis of Past Loss of Income-Earning Capacity..... 46

**Future Loss of Income-Earning Capacity..... 48**

        Relevant Legal Principles ..... 48

        The Parties’ Positions on Future Loss of Income-Earning Capacity ..... 49

        Analysis of Future Loss of Income-Earning Capacity ..... 51

**LOSS OF HOUSEKEEPING CAPACITY ..... 53**

**Relevant Legal Principles** ..... 53

**The Parties’ Positions on Loss of Housekeeping Capacity**..... 53

Factual Findings and Analysis on Loss of Housekeeping Capacity..... 54

**COST OF FUTURE CARE** ..... **55**

**Relevant Legal Principles** ..... 55

**The Parties’ Positions** ..... 56

**Factual Findings**..... 56

Analysis..... 58

**SPECIAL DAMAGES** ..... **60**

**CONCLUSION**..... **60**

**COSTS** ..... **60**

**Introduction**

[1] On May 12, 2016, Ms. Paleshnuik, the plaintiff, was driving to her workplace when she was rear-ended by a vehicle driven by Mr. Dulay, the defendant (the “Accident”). Mr. Dulay admits his liability for the Accident.

[2] Prior to the Accident, Ms. Paleshnuik enjoyed good mental and emotional health. She was energetic, outgoing, and enthusiastic in her personal, social, and vocational activities.

[3] Ms. Paleshnuik had some pre-existing physical limitations, primarily thoracic outlet syndrome (“TOS”) and some occasional pain on the right side of her upper body and extremities, caused by a motor vehicle accident in 1996 (the “1996 Accident”). She also suffered from endometriosis.

[4] Ms. Paleshnuik worked as a healthcare provider employed by the provincial government starting in 1988. The 1996 Accident caused her to change her career to a more sedentary role. She worked full-time in an administrative position in a hospital after returning to work in 1999. In 2012, she began working as a client service worker for a provincial government agency. Aside from a maternity leave and a flare-up of her TOS symptoms in 2015 (the “August 2015 TOS flare-up”) that she had mostly recovered from, Ms. Paleshnuik worked full-time in the capacity of an office worker for approximately 17 years until the Accident. She has been unable to work since the Accident.

[5] The most significant impacts of the Accident on Ms. Paleshnuik were neurological, psychological, and emotional symptoms. To a lesser extent, it also exacerbated some of her pain symptoms on her right side.

[6] Ms. Paleshnuik seeks damages for her pain and suffering, past and future loss of income-earning capacity, loss of housekeeping capacity, and cost of future care. She also seeks special damages.

[7] For the reasons that follow, I have concluded that Ms. Paleshnuik is entitled to:

a) Non-pecuniary damages:	\$210,000
b) Past loss of income-earning capacity:	\$91,120
c) Future loss of income-earning capacity:	\$200,000
d) Loss of Housekeeping Capacity	\$40,000
e) Cost of future care	\$121,000
f) Special damages:	<u>\$1,150</u>
<b>Total:</b>	<b><u>\$663,270</u></b>

### **Credibility Assessment**

#### **Legal Principles**

[8] It is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any witness, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...]. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[9] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

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), 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*, [1952] 2 D.L.R. [354] (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

**The Parties' Positions and Analysis of Credibility**

[10] I understand Ms. Paleshnuik's position on the credibility of her evidence to be that it was entirely credible and reliable to the best of her abilities. This issue was not specifically addressed during the plaintiff's closing submissions and in my view for good reason.

[11] The defendant's theory of this case rests largely on his position that Ms. Paleshnuik fabricated and exaggerated her evidence in order to relieve herself from the financial pressure of returning to work by instead obtaining disability benefits and a substantial damage award. He points to asserted inconsistencies in her evidence regarding her head hitting the steering wheel and the passenger seat beside the driver seat during the collision. He also suggests that she concocted the description of a range of cognitive symptoms she did not have after being "triggered" to do so when she attended a concussion clinic on June 16, 2016.

[12] Ms. Paleshnuik testified that the Accident caused her to hit her head on the headrest, steering wheel, and passenger seat beside the driver seat. She provided this evidence on direct examination and confirmed it on cross-examination. She indicated that her head hit the steering wheel because she positioned her seat close to it. I accept her evidence in this regard and more generally on the circumstances of the Accident.

[13] The defendant relies on "basic physics" to assert that Ms. Paleshnuik's description of the collision is not credible because of her recollection of the sequencing of these head collisions. While I agree that it is unlikely that she hit the steering wheel first, then the headrest followed by a collision with the passenger seat beside the driver seat, I am satisfied that she did hit her head in these three places, and quite violently. She may have been confused about the sequence, which is not surprising given how quickly and unexpectedly a collision such as this occurred. But a possible minor mistake in the sequencing of the head collisions does not support the assertion that her evidence is generally not credible. This is particularly so in the

context of all of the lay and expert evidence discussed later in these Reasons of the substantial effects of the Accident on Ms. Paleshnuik.

[14] I am similarly unconvinced that Ms. Paleshnuik fabricated her description of cognitive and neurological symptoms after filling out a questionnaire at a concussion clinic in June 2016. This assertion lacks any specific evidentiary foundation, runs counter to virtually all of the evidence adduced at trial, and is nothing more than speculation and conjecture.

[15] Ms. Paleshnuik presented as an entirely credible witness. Her evidence was reasonable and rational and she did not seem to be exaggerating any of her symptoms or the impact they have had on her work or other activities. Over the five days that she testified, her evidence was forthright, specific, and consistent in respect of the effects of the Accident. Her evidence is also consistent with the evidence provided by her husband, Mr. Paleshnuik, by her son, Cole Paleshnuik (“Cole”), by her friends, Laura Arneson and Corinne Wojtun, as well as the expert evidence and reports of Dr. Krista Schultz, Dr. Lawrence Kei, Dr. Vance Tsai, and Dr. Manu Mehdiratta. Dr. Eyton David reviewed Ms. Paleshnuik’s medical records but did not examine Ms. Paleshnuik and as discussed later in these Reasons, I find the evidence of Dr. Frank Kemble to be of limited utility.

[16] Mr. Paleshnuik, Ms. Paleshnuik’s husband, admitted that he embellished some information on his LinkedIn profile and he took responsibility for this misstep. I am not concerned that this lapse in judgment raises any concerns about the credibility of the evidence he provided at trial, particularly because it was consistent with the other evidence I accepted. Mr. Paleshnuik testified in a candid and specific manner. He provided careful details of the changes in Ms. Paleshnuik’s abilities and presentation. I am satisfied that his evidence was honest, sincere, and truthful.

[17] There is no reasonable basis for suggesting that Ms. Paleshnuik’s evidence, or the evidence of her husband, son, and friends, was anything less than completely credible. The defendant’s suggestion to the contrary is entirely meritless. Any further suggestion that Ms. Paleshnuik’s family and friends somehow conspired to

weave a false narrative is speculative and unsupported by the evidence at trial. I accept the credibility of Ms. Paleshnuik and the lay witnesses' evidence unreservedly.

**Non-Pecuniary Damages**

**Relevant Legal Principles**

[18] Ms. Paleshnuik must prove that the Accident caused her injuries. She need not establish that the admitted negligence of the defendant was the sole cause of his injuries, but she must demonstrate a substantial connection between the Accident and her physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[19] Some of the relevant factors in assessing non-pecuniary damages include:

- a) the plaintiff's age;
- b) nature of the injury;
- c) severity and duration of the pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff)

See *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[20] The “thin skull” rule provides that defendants must take their victims as they find them, while the “crumbling skull” rule provides that defendants are not required to compensate a plaintiff for the consequences of a pre-existing condition that the plaintiff would have experienced regardless of the defendant's negligence: *Dornan v.*



*Silva*, 2021 BCCA 228 at para. 40; *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 34–35.

**Ms. Paleshnuik’s Position on Non-Pecuniary Damages**

[21] Ms. Paleshnuik asserts that her significant cognitive, speech, hearing, and chronic pain symptoms, caused by the Accident, have dramatically affected her. She is no longer able to work, and has become withdrawn, irritable, and sad. She is a shadow of her former self.

[22] On the quantum of non-pecuniary damages, Ms. Paleshnuik relies on the following cases and submits that the Court should award her \$250,000 for her pain and suffering caused by the Accident:

- *Grabovac v. Fazio*, 2021 BCSC 2362 (\$350,000);
- *Plett v. Davis*, 2022 BCSC 789 (\$210,000);
- *Choi v. Ottahal*, 2022 BCSC 237 (\$210,000);
- *Mellesmoen v. Cullen*, 2022 BCSC 1985 (\$220,000);
- *Kim v. Basi*, 2022 BCSC 1793 (\$215,000); and
- *Wright v. Admiraal*, 2022 BCSC 742 (\$200,000)

**The Defendant’s Position on Non-Pecuniary Damages**

[23] The defendant submits that at the time of the Accident, Ms. Paleshnuik had a long history of health-related complaints, including endometriosis and TOS. He also asserts that Ms. Paleshnuik fabricated a recollection of hitting her head on the steering wheel and passenger seat beside the driver seat. He bases this submission on “basic physics” and asserts that she has not discharged her burden of establishing that the Accident was of a sufficient force to cause a head injury. He, therefore, submits that Ms. Paleshnuik is only entitled to compensation in respect of some aggravation of her soft tissue injuries. He points to the asserted lack of memory or cognitive complaints on the day of the Accident as support for this proposition.

[24] The defendant also submits that Ms. Paleshnuik's neck and back pain are not consistently established in the contemporaneous records and that any such complaints are not significant in terms of her functioning. He further submits that her pre-existing complaints of pain in her right quadrant combined with an asserted lack of evidence that these symptoms have worsened suggests that her current symptoms were not caused by the Accident.

[25] With respect to the quantum of her non-pecuniary damages, the defendant did not provide any factually similar cases in support of his position. I understand from the defendant's written submission that he asserts that the Court should award Ms. Paleshnuik no more than \$100,000, but it is unclear if this amount is in respect of non-pecuniary, pecuniary damages, or both.

### **Findings of Fact on Non-Pecuniary Damages**

#### **Ms. Paleshnuik's Pre-Accident Condition**

[26] Ms. Paleshnuik was born in 1969. She met Mr. Paleshnuik in high school, they married in the early 2000s and their son, Cole, was born in 2004.

[27] Ms. Paleshnuik suffered from endometriosis and although it caused her to take a day off work approximately every two months, it did not affect her ability to work or participate in a range of activities.

[28] In the 1996 Accident, Ms. Paleshnuik was rear-ended by someone driving a stolen car. Since then, she has been suffering from pain on the right side of her neck and upper right quadrant, as well as occasional numbness, tingling, and weakness in her right arm and hand. She also experienced some soreness and pain in the back of her neck and upper back, particularly if she worked a lot of overtime or sat for extended periods. Dr. Kei and Dr. Mehdiratta identify this pre-existing condition as TOS.

[29] After the 1996 Accident, Ms. Paleshnuik returned to work in 1999. She was limited to sedentary work with specified restrictions on lifting and overhead work.

[30] TOS did not affect her ability to look after her own home, including cooking, cleaning, and grocery shopping. She managed her activities and worked around the weakness in her right arm.

[31] Cole, as noted, was born in 2004 and is currently 18 years old. Ms. Paleshnuik was his primary caregiver. Her TOS symptoms did not affect her child-rearing.

[32] Mr. and Ms. Paleshnuik have been married for over 20 years and have known each other for approximately 35 years. Prior to the Accident, Ms. Paleshnuik was interactive, bright, and engaging. Her hobbies included dancing, yoga, walking, light hiking, and exercising in a gym.

[33] Throughout his childhood, Ms. Paleshnuik actively participated in Cole's activities. She took him to all of his practices and games, volunteered by scorekeeping, and provided rides for other children. By the time he was seven years old, Cole was involved in activities four days a week and she attended all of them. She thoroughly enjoyed attending these events, and was known for her loud and enthusiastic support of Cole and the teams he played on.

[34] Prior to Cole's birth, Ms. Paleshnuik worked full-time, had no chronic health conditions, and was outgoing and sociable. She had many friends and enjoyed parties and interacting with lots of people. She also enjoyed walking in her neighbourhood, going to movies, and having dinners with family and friends.

[35] Mr. Paleshnuik described his wife as hard working, energetic, and a fantastic mother. He recalled that she enjoyed initiating conversations with strangers and that she did not speak slowly. Instead, she was animated, engaging, and opinionated.

[36] Mr. Paleshnuik also testified that Ms. Paleshnuik had no difficulties with her memory, ability to focus, or mood prior to the Accident. Mr. Paleshnuik described her as bubbly, outgoing, and caring.

[37] Ms. Arneson is a good friend of Ms. Paleshnuik and their sons are best friends. The two mothers have a lot in common because they both work full-time and were quite involved in their sons' lives. They are also friends with several other mothers in their community. To this day, they celebrate birthdays together and remain good friends.

[38] Ms. Arneson described Ms. Paleshnuik as a very devoted mother. She was the coordinator of the baseball league that their sons played in and was on its board of directors. Ms. Arneson recalls that Ms. Paleshnuik organized photo days, worked the concession stand, frequently did scorekeeping, and was always very loud when cheering for the children's team. Ms. Paleshnuik taught others how to score keep and was extremely active, outgoing, and passionate.

[39] Ms. Arneson also recalled that Ms. Paleshnuik used to schedule many things and was high functioning, gregarious, and the type of person that other people gravitated toward. She specifically recalls Ms. Paleshnuik's loud laugh and that she used to be an excellent conversationalist. She enjoyed talking about politics, religion, and current events. She was always very positive and enjoyed discussing a range of topics.

[40] Ms. Paleshnuik's social life between 2005 and 2012 was quite busy with many activities centred around Cole's sports teams, including barbecues, tournaments on weekends, dinners, and other get-togethers with other families. Because she only had one child, she often assisted other parents by providing rides and meals for their children.

[41] From 2012 to 2015, Cole was involved in activities approximately six days per week. He played on a high-level baseball team from the spring until October and then played basketball throughout the winter. Ms. Paleshnuik attended all of these activities. Cole described his mother at that time as attentive, caring, carefree, joyful and pleasant to be around. He recalls that they frequently had long discussions and she often struck up conversations with people she had just met.

[42] Ms. Paleshnuik's recreational activities included yoga, socializing with friends, dancing, and walks. She did yoga approximately once a week. She had a very steady and busy routine each day.

[43] Ms. Paleshnuik did not miss any notable period of time from work due to her TOS symptoms between 1999 and the August 2015 TOS flare-up.

[44] From 1999 to 2004 and between 2007 and 2011, Corinne Wojtun worked in close proximity to Ms. Paleshnuik as both a co-worker and supervisor. She does not recall Ms. Paleshnuik suffering from any physical problems nor did she have any attendance issues.

[45] Ms. Wojtun worked at the former Riverview Hospital in Coquitlam, BC with Ms. Paleshnuik in the staffing office from 1999 until 2011. They became friends and worked closely with one another. Ms. Wojtun described Ms. Paleshnuik as an excellent employee who worked hard, stayed late, and was a very good team player. She recalls that Ms. Paleshnuik was an efficient worker who was enthusiastic about starting new projects. Ms. Wojtun described Ms. Paleshnuik as positive and an uplifting presence in the office. She was talkative, optimistic, and enjoyed good conversations. Ms. Wojtun specifically recalls that Ms. Paleshnuik used to speak at a very high speed, particularly when she was passionate about something.

[46] Throughout the time they worked together, Ms. Wojtun did not see Ms. Paleshnuik exhibit any pain behaviours or other indications that she was injured.

[47] Mr. Paleshnuik, Cole, and Ms. Arneson, did not observe Ms. Paleshnuik having any physical limitations or health issues prior to her August 2015 TOS flare-up.

[48] In mid-August 2015, Ms. Paleshnuik woke up one morning with a flare-up of her TOS symptoms in her neck and chest. She was also unable to lift her right arm. In the period leading up to the August 2015 TOS flare-up, she had been busy at work, taking on additional tasks, and her ability to pace herself had diminished.

[49] As a result of the August 2015 TOS flare-up, Ms. Paleshnuik was off work between mid-August 2015 until she commenced a graduated return to work program on November 30, 2015. She resumed her full-time duties by December 25, 2015.

[50] On January 9, 2016, Ms. Paleshnuik reported to her general practitioner, Dr. Barron, that she was managing her work responsibilities but struggling to work within the limits of her abilities given the amount of work required to be done.

[51] Ms. Paleshnuik testified that she might have had some increased weakness in her right arm and right hand at the time of the Accident, but she was able to perform all of her work activities.

[52] Prior to May 12, 2016, the date of the Accident, Ms. Paleshnuik was working full-time and was able to do most household tasks. She did not have symptoms of a TOS flare-up prior to the Accident and she was doing all the things she was previously able to do. Specifically, she was working full-time, doing all of her household tasks, and attending all of Cole's games and practices.

[53] Ms. Paleshnuik recalls that prior to the Accident, she had a good memory, better than most people she knew. Her balance was very good, owing largely to her history as a dancer. She also had good hearing and vision, and a strong ability to concentrate. For example, she worked in a very loud office and could manage and focus as required to complete her tasks. The speed and cadence of her speech was very quick. She recalls that her grandfather used to implore her to slow down because she spoke too quickly. Her energy level was very high and she always had many things going on.

[54] Ms. Paleshnuik recalls that prior to the Accident, she used to laugh a lot and that she was gregarious. She and Mr. Paleshnuik used to tease each other and enjoyed lighter moments with one another but they do not do this anymore.

**Circumstances of the Accident**

[55] On May 12, 2016, Ms. Paleshnuik was driving towards her workplace, westbound on 72nd Avenue in Surrey, BC. At or near the intersection with 144<sup>th</sup> Street, she was rear-ended by a vehicle owned and operated by Mr. Dulay, who admits liability for the Accident.

[56] Ms. Paleshnuik recalls hitting her head on the headrest, steering wheel and on the passenger seat beside the driver seat. She recalls that she ended up lying on her right side with her seat belt on such that the right side of her body collided with some part of the interior of the vehicle she was driving. She does not recall undoing her seat belt. She recalls a buzzing sound and not being able to hear properly. She also remembers papers and napkins flying onto the floor of her vehicle.

[57] The driver of the other vehicle, Mr. Dulay, came to Ms. Paleshnuik's window and asked if she was okay but she could not make out what he was saying and could not think clearly. She was not sure what had happened and recalled that she could not get her words out. Mr. Dulay gave her his phone number and name but she does not remember giving him her contact information. She does not recall if she got out of her car at the scene of the Accident. She also has no memory of leaving the scene of the Accident and driving to her workplace.

[58] Ms. Paleshnuik's symptoms immediately after the Accident consisted of pain on the right side of her head, confusion, a high pitched ringing in her ear, nausea, and she was unable to find the words to express herself. She also experienced pain on the right side of her face and it swelled at the hospital. She does not clearly remember the precise details of the Accident and at this point in her direct evidence, she had difficulty conveying this information. Her speech became slow, somewhat slurred, and halting.

[59] Ms. Paleshnuik also experienced dizziness immediately after impact, and recalls feeling this when Mr. Dulay approached her window. She had a headache

and pain on the side of her head and neck as well as in the back of her neck and upper back and along the right side of her body down to the hip.

[60] Ms. Paleshnuik now understands that she drove to her office and advised her colleagues that she had just been in an accident and was not feeling well. They called an ambulance and she was taken to a local hospital. She is not sure how long she was at her office before being taken to the hospital.

[61] Ms. Paleshnuik has several gaps in her memory. She does not recall driving to her workplace after the Accident. She does not recall doing any work at her office. She recalls being taken into the ambulance and vomiting into a bag while in it but she does not remember the trip to the hospital. She thinks that she might have also vomited in the washroom at her workplace but she is not sure of this.

#### **Ms. Paleshnuik's Post-Accident Condition**

[62] To summarize, in the immediate aftermath of the Accident, Ms. Paleshnuik had a headache, pain on the side of her head, back of her neck, upper back, and on her right side including her right hip. Ms. Paleshnuik also experienced dizziness. She had a headache and pain on the side of her head and neck, as well as in the back of her neck and upper back and along the right side of her body down to the hip.

[63] After the Accident, Ms. Paleshnuik was no longer able to take Cole to his activities because she suffered from driving anxiety and she could not attend for the duration of his games. When she did occasionally try to attend one of his activities by going late to it and leaving early, she often had to go sit in her car at some point to get away from the noise and other people.

[64] Ms. Paleshnuik estimates that in the year after the Accident, she attended approximately half of Cole's activities but usually would not be able to stay and watch for the duration. She found this very difficult because she had never missed any of his activities before and it was frustrating for her that she was not able to find



a way to get through her symptoms. She wanted to be there as much as she could for her son.

[65] While testifying about attending Cole's activities, Ms. Paleshnuik had difficulty finding the words to describe her condition. Her speech presentation was quite slow, searching, and deliberate.

[66] Ms. Paleshnuik's diet was significantly affected by the Accident. Most foods did not taste good and she did not have much energy so she began consuming a lot of sugar to keep her energy levels up. She found that consuming a lot of candy licorice enabled her to think more clearly and helped her participate in some of her previous activities. She also regularly consumed several cans of pop and cups of coffee with a lot of sugar, licorice, candy, ice cream, and mints. As a result, she gained weight.

[67] Prior to the Accident, she enjoyed planning and preparing meals but after the Accident, she frequently picks up food and is no longer able to plan home-cooked meals.

[68] In 2016, her mental health suffered. She was frustrated because her condition was not improving and she became short-tempered and said things to people she cared about that she later regretted.

[69] Ms. Paleshnuik did not return to work on the day after the Accident and she has not been back at work since it took place. The symptoms that have kept her from working over the past six-and-a-half years are ongoing concussion symptoms, vision and hearing problems, difficulty with memory and processing information, dizziness, headaches, neck pain, increased weakness in her right arm including increased numbness, and difficulty grasping. While describing these symptoms, Ms. Paleshnuik's speech slowed and she had difficulty finding the correct words.

[70] Throughout the rest of 2016, Ms. Paleshnuik experienced dizziness and difficulty with thinking clearly. She needed to sleep a lot and did not have the energy to do most things. She found it difficult to hold her head up because her neck was

weak. She frequently needed breaks and had a hard time with bright lights so she could not watch much television or tolerate a lot of noise. She felt nauseous and found that most foods tasted rotten or mouldy. She had difficulty doing most day-to-day activities. She had the uncomfortable feeling of looking at things that were happening to her but feeling like she was not there. She had a hard time thinking clearly and getting words out. She did not feel like herself and was often short-tempered and would yell at people. She had never behaved in this way prior to the Accident. She also could not drive regularly and did not want to be a passenger in a motor vehicle. She did not drive for “a while” after the Accident.

[71] For the remainder of 2016, Ms. Paleshnuik experienced dizziness, headaches, cognitive and speech difficulties, light and sound sensitivity, and fatigue.

[72] By the end of 2016, she had tried different medications for the pain and attended a concussion class. She also tried to follow the instructions to take “brain breaks”. She underwent physiotherapy and vestibular therapy. However, her symptoms did not improve and instead worsened.

[73] In 2017, Ms. Paleshnuik was unable to read as much as she previously enjoyed. She used to read a lot of books and help Cole with schoolwork. After the Accident, it was difficult for her to read full books because of problems with her concentration and vision. She had difficulty focusing with the right eye and had to cover it while reading. This created fatigue for her left eye so she could only do small amounts of reading at a time.

[74] Ms. Paleshnuik previously enjoyed going to movies with Cole but found this difficult after the Accident. When watching movies at home, she sometimes closed her eyes and listened to the movie while Cole described what was happening. She stopped watching most television programs because she found it difficult to focus with her right eye. Doing this activity for extended periods also made her dizzy and nauseous.

[75] In 2017, Cole played baseball, basketball, volleyball, and did some swimming. He was involved in these activities three to four days per week and sometimes more often. She tried to go to most of his activities but still she could only watch for short periods and then would have to return to her car.

[76] Cole recalls that after the Accident, his mother became quiet, withdrawn, and appeared to be shaken up. She frequently lost her train of thought, and was less joyful. Her speech slowed and she had to think carefully about each word.

[77] Cole also recalls that after the Accident, his mother was never as happy as she was before it, and was significantly more melancholy, dissatisfied, and angry with her situation. This made it more difficult for them to have conversations because she was quick to agitate so they had more frequent arguments. Cole gave an example of how Ms. Paleshnuik would criticize him when he did not put his dishes in the dishwasher or his laundry away, whereas, prior to the Accident, she was gentler and more encouraging.

[78] Cole also recalls that his mother attended his sporting events less frequently and when she did attend, she was quieter than she had been prior to the Accident.

[79] When comparing her condition now to the way Ms. Paleshnuik was prior to the Accident, Cole says that she used to be patient and articulate but now she is quicker to agitate and it takes her longer to communicate her thoughts. Cole noted that his mother also continues to have problems with finding words and she did not have this difficulty prior to the Accident. Her memory has deteriorated and Cole often has to say things to her two or three times because she is forgetful. Her demeanour and mood is frustrated, angry, and less happy than she was prior to the Accident. Cole has not noticed any significant improvement in her symptoms since the Accident.

[80] After the Accident, Mr. Paleshnuik noted a series of significant changes in Ms. Paleshnuik. Her speech slowed considerably and she had difficulty finding her words. She is no longer bubbly and engaging. She is measured and reserved when

speaking. She is not outgoing and she avoids social situations. Her memory is poor, for example, she would often forget what they had decided to have for dinner.

[81] Mr. Paleshnuik recalled that his wife had no issues with her balance before the Accident but she now has to hold onto a counter or railing because she often becomes dizzy. He also observed that her mood has become sullen and withdrawn and she remains in the background instead of leading conversations. Her temperament has also changed because she becomes argumentative and frustrated with her memory issues and when she is unable to find words to communicate effectively.

[82] Ms. Paleshnuik is now dependent on her husband for keeping their household functioning. She has become quite withdrawn and this is in sharp contrast to before the Accident, when she used to be very outgoing and had a fiery personality. Now, she is overcome by concern and worry for the future, particularly because in the six years have passed since the Accident, her condition has not improved and she has not been able to return to work. Mr. Paleshnuik described becoming a caretaker to his wife, who is now dependent on him to do most things for her. He describes her as withdrawn, forgetful, periodically dizzy, and prone to losing her balance.

[83] In 2017, Ms. Paleshnuik continued to have difficulty with her vision and this caused dizziness and imbalance. Also in that year, her mental health deteriorated. She was quite frustrated and angry because her condition was not improving and although she tried different treatments, her condition worsened and she suffered setbacks. She tried to ignore her symptoms and fight through them because she thought at some point things would get better. She described herself as being frequently angry and not very nice to Cole because she yelled at him a lot. She says that she previously had a very good relationship with him but their relationship deteriorated because of the way she treated him.

[84] In 2017, Ms. Paleshnuik focused on strengthening her neck so that she would not need as many breaks. She also tried to resume driving. She tried to focus on things that would improve her condition so she could return to work.

[85] Ms. Paleshnuik's symptoms did not improve from 2018 to 2020. She developed some coping mechanisms that included driving to a park and sitting by herself in the parking lot to cry so that her husband and son would not see her upset. By this time, she was further frustrated that her condition was not improving. She provided a poignant example of this when she described watching Jeopardy with her family. She could not get the answers out quickly enough because of her cognitive and speech difficulties so she could no longer participate in what had previously been an enjoyable activity with her family.

[86] Ms. Paleshnuik gained weight in 2020 and recalls being at approximately 180 to 190 pounds. This was higher than ever before. Her current weight is 145 to 150 pounds.

[87] In 2021, she began Botox treatment. After this treatment, she noticed that she no longer had constant pressure on the side of her head. This treatment also reduced the severity of her headaches and decreased the pain symptoms in her neck, top of shoulder, head, and ear. She could think and speak more clearly. She was hopeful that finally she had found something that was working. She took this treatment approximately every three months and each treatment consisted of approximately 50 injections.

[88] As well in 2021, she began attending counselling sessions to help deal with the emotions of her ongoing condition. One of the effects of her improved pain symptoms due to Botox treatment was that she became aware of all the things she had missed and she grieved over them. She was trying to find a way to accept her current condition. Nevertheless, she did not want to tell people what had happened to her and the effects. Instead, she chose to try to find ways not to be with family and friends.

[89] The Accident put a strain on all of her relationships, including with Mr. Paleshnuik. She wants to be a better partner but she struggles to do this.

[90] After the Accident, Ms. Arneson noticed several significant changes in Ms. Paleshnuik. Ms. Arneson says that she did not regularly attend Cole's baseball games and when she did, she often arrived late and left early. She usually sat by herself and was no longer involved in conversations with other parents.

[91] When Ms. Arneson spoke with her, she noted that Ms. Paleshnuik often lost her train of thought and said things that were off-topic. Her speech became halting and careful. She used to be quick witted, energetic, and a strong conversationalist. She is now quiet, cautious, and somewhat scattered in her conversations.

[92] Ms. Paleshnuik is also much less reliable when it comes to attending social occasions. She sometimes does not show up at all or arrives late and leaves early. She prefers quiet locations for social get-togethers so Ms. Arneson and their friends either request quieter locations within restaurants or simply meet at one of their homes, because they are aware that noisy locations are difficult for Ms. Paleshnuik to manage. She specifically recalls that on several occasions they have asked that music be turned down in restaurants because it bothered Ms. Paleshnuik. Ms. Arneson also observed that Ms. Paleshnuik prefers socializing with just one or two other people in a quiet location. She simply is not as social as she used to be.

[93] In terms of her mood, Ms. Arneson noticed that Ms. Paleshnuik is irritable and sometimes snaps at others. She did not do this prior to the Accident. She also no longer has the same hearty laugh. Her tone is more serious and sombre. Ms. Arneson and her other friends moderate the tone of their conversations because Ms. Paleshnuik is less expressive, frequently off-topic, and it takes her longer to get her words out. Ms. Arneson described Ms. Paleshnuik as no longer being "in the game" and that she is simply not the same person that she was prior to the Accident.

[94] Ms. Paleshnuik tries to discuss politics, religion, and current events but not to the same extent or depth that she did before the Accident. Her tone and mood is sarcastic instead of quick witted. This creates awkward circumstances during discussions with other friends and conversations do not flow as they did prior to the Accident.

[95] In summary, Mr. Arneson recounted significant changes in her friend after the Accident. She is far less engaged, more sombre, short-tempered, sarcastic, and sometimes confused. This is a marked departure from her pre-Accident experiences with Ms. Paleshnuik in which she recalled that she was positive, energetic, and outgoing.

[96] Similarly, Ms. Wojtun noticed several significant changes after the Accident. Ms. Paleshnuik spoke much slower, laughed infrequently, and seemed to have difficulty processing information. For example, when they had coffee together, Ms. Paleshnuik had to process her thoughts carefully whereas she used to rattle things off quickly. She described Ms. Paleshnuik as a deer in the headlights and her outlook has become solemn and deflated.

[97] Throughout the five days over which Ms. Paleshnuik testified, I observed that her speech slowed, her stuttering noticeably increased, and she periodically had difficulty finding the words to express herself. She was unable to focus her vision, became dizzy, and tired.

[98] Under cross-examination, Ms. Paleshnuik's speech further slowed and became halting. She lost her train of thought and struggled at times by giving vague and slow answers. She was visibly trying to answer the questions to the best of her ability but having difficulty processing the questions and providing clear answers. At one point during this examination, she was asked to read a passage from one of the documents and it took her an inordinately long time to do so.

[99] Ms. Paleshnuik's current and ongoing symptoms are fatigue, dizziness, a hard time focusing and thinking, ear pressure, upper back pain, arm tingling that radiates to her right hand, and related grip weakness.

### **Medical Expert Evidence**

#### **Dr. Manu Mehdiratta – Neurologist**

[100] Dr. Mehdiratta is a neurologist. He assessed Ms. Paleshnuik on September 14, 2018 and July 12, 2022 and prepared expert reports dated September 14, 2018

and August 26, 2022. His first assessment of Ms. Paleshnuik was conducted in person and the second assessment was conducted virtually.

[101] Dr. Mehdiratta provided a neurological diagnosis consisting of a head injury with post-concussion syndrome, chronic migraines with medication overuse, exacerbation of pre-existing right TOS, post-traumatic vision syndrome, post-traumatic vestibulopathy, and cribriform plate injury. He found that all of these diagnoses were caused by the Accident.

[102] Dr. Mehdiratta opined that from a neurological perspective, as a result of the Accident and her neurological impairment, Ms. Paleshnuik is substantially disabled from returning to her vocational activities due to the various neurological conditions that he diagnosed and he expects that this disability will persist into the future. Her neurological impairments will affect her ability to earn an income and they prevent her from returning to her pre-Accident social and recreational activities as well as household cooking and cleaning. All of these impairments are expected to be indefinite in duration.

[103] Dr. Mehdiratta recommends a trial of amitriptyline and Botox injections. He recommends that Botox should be administered once every 12 weeks for a one-year trial. He also recommends an ophthalmological and otolaryngology assessments. He further recommends an MRI of the cervical spine.

[104] His prognosis is that Ms. Paleshnuik's Accident-related injuries of exacerbation of right TOS and cribriform plate injury are permanent. He deferred his prognosis on post-traumatic vision syndrome and post-traumatic vestibulopathy to other assessors. With respect to chronic migraines, he expects that her symptoms will improve with the recommended treatments.

[105] In his second report, after a virtual assessment of Ms. Paleshnuik, Dr. Mehdiratta maintained his opinion that Ms. Paleshnuik suffered a mild traumatic brain injury ("MTBI") and cerebral concussion as a result of the Accident.

[106] His specific neurological diagnoses as a result of the Accident are:



- a) traumatic brain injury;
- b) post-concussive syndrome;
- c) exacerbation of pre-existing migraines into chronic migraines;
- d) post-traumatic vestibulopathy;
- e) worsening of right-hand numbness and chronic neck pain with radicular symptoms;
- f) reduced sense of smell and taste;
- g) post-traumatic vision syndrome; and
- h) chronic back pain.

[107] His recommendations are:

- a) neuropsychiatric assessment;
- b) sleep study;
- c) occupational therapy assessment;
- d) ongoing treatment with Botox injections for chronic migraines;
- e) concussion rehabilitation consisting of vestibular, oculomotor and cervicogenic headaches treatments, as well as the Buffalo Concussion Treadmill Test (12 to 24 sessions);
- f) Ear, nose, and throat (“ENT”) evaluation;
- g) vision therapy;
- h) trial of Aimovig in addition to Botox for chronic migraines;
- i) neuromuscular consults and follow-up; and
- j) chronic pain evaluation.

[108] From a neurological perspective, Dr. Mehdiratta found that Ms. Paleshnuik’s difficulties impact her capacity as they relate to working in an administrative position. This is because the job demands of this role involve a variety of cognitive and physical demands that he believes are outside of her overall capacity at this time given her neurological problems. He does not believe that she is competitively

employable. Her difficulties arise out of her problems with headaches, neck pain, low back pain, dizziness, ringing in the ears, and cognitive issues.

[109] Dr. Mehdiratta notes that Ms. Paleshnuik continues to experience severe ongoing symptoms, including headaches, neck and back pain, memory conservation problems, dizziness, ringing in the right ear, decreased smell and taste, as well as mood and sleep disturbances. These symptoms are likely to worsen over time with age and in his experience, this often leads to early retirement for most patients with similar injuries.

[110] He also noted that she has been unable to resume completing her regular housekeeping and home maintenance tasks. The exertion demands of these tasks are outside of her current capacities and would lead to further exacerbation of her symptomology. He therefore concluded that Ms. Paleshnuik is partially disabled as it relates to home maintenance, as a direct result of the neurological injury she sustained in the Accident.

[111] Ms. Paleshnuik is also limited in participating in her pre-Accident recreational and social activities and partially disabled from doing them as a result of the injuries sustained in the Accident. Dr. Mehdiratta is satisfied that the neurological conditions that he diagnosed were caused by the Accident.

[112] Dr. Mehdiratta's prognosis for Ms. Paleshnuik's recovery is poor, given the severity of symptoms and the duration of them, particularly because it has been over six years since the Accident. He noted that patients that have symptoms for more than one and a half years are more likely than not to have permanent post-concussion symptoms after a MTBI.

**Dr. Frank Kemble – Neurologist**

[113] Dr. Kemble assessed Ms. Paleshnuik on May 12, 2022 and produced an expert report dated May 17, 2022. He has been a neurologist since 1971.

[114] Dr. Kemble noted that Ms. Paleshnuik presented with “remarkably hesitant speech”. He somehow concluded as follows:

The speech hesitancy which Ms. Paleshnuik exhibits is, in my opinion, not due to any difficulty in word finding but is a functional disorder similar to stuttering and does not have an underlying organic base.

[115] This is a puzzling comment because Dr. Kemble seems to accept that Ms. Paleshnuik has a problem with her speech and does not suggest that it existed prior to the Accident. The precise medical explanation for this problem is largely irrelevant. What matters is that she experiences this problem and there is no indication that it was caused by anything other than the Accident.

[116] Dr. Kemble observed that Ms. Paleshnuik could not hear the rustle of his fingers three inches away from her right ear. However, in his report, he opines that “the marked amount of deafness described on the right side by Ms. Paleshnuik is incompatible with the audio graphic testing as well as my testing”. He provided no explanation for this seeming contradiction.

[117] Dr. Kemble observed that Ms. Paleshnuik had reduced visual acuity on the right side and a concentric diminution of her right visual field during his testing.

[118] Dr. Kemble agrees with Dr. Mehdiratta that Ms. Paleshnuik sustained a MTBI caused by the Accident.

[119] However, Dr. Kemble does not believe that Ms. Paleshnuik is suffering from any cognitive impairment due to brain cell damage but, instead, attributes her symptoms to the “distracting effect of her various symptoms including chronic pain and headaches”. He does agree that she has recurrent cognitive impairment but he thinks that it will resolve with the resolution or reduction of her underlying chronic headaches and cervical pain. This is an odd finding given that by definition, chronic symptoms are highly unlikely to resolve.

[120] Dr. Kemble finds that the “combination of Ms. Paleshnuik’s impaired right hearing, right vision and speech hesitancy all suggest a non-organic neurological

basis”. There does not seem to be any dispute among the experts that Ms. Paleshnuik suffers from these symptoms and that they were caused by the Accident. The evidence is clear that she is suffering from these symptoms and they are affecting her function. The fact that an organic basis cannot be identified for them is largely irrelevant.

[121] Dr. Kemble further opines that “it is probable that Ms. Paleshnuik has a somatic symptom disorder open form (somatoform disorder). She also has significant anxiety although she denies any definite depression”. However, Dr. Kemble acknowledges that he is not qualified to make this diagnosis because he recommends that she be assessed and managed by clinical practising psychiatrist.

[122] He finds that she has a background history of migraine headaches dating back to when she was 15 years old. On this basis, he concludes that her current headaches are multifactorial “arising from her underlying emotional distress, previous history of migraine headaches and, to some degree, effect of her cervicogenic pain resulting from the automobile accident in 2016”. He finds that any significant reduction in her headaches will depend mainly on management of her underlying emotional dysfunction. He is not qualified to make this diagnosis so this finding is not much more than speculation.

[123] Oddly, Dr. Kemble describes the dizziness experienced by Ms. Paleshnuik as “multifactorial, partially being associated with her underlying emotional dysfunction and her visual impairment”. For some reason, he does not mention the Accident as the cause of this symptom notwithstanding the clear evidence that she did not have this problem prior to it. He believes that her dizziness is due to a combination of physical and emotional disability, with the major factor being her emotional dysfunction. Again, he is not qualified to make this diagnosis.

[124] Dr. Kemble recommends that Ms. Paleshnuik be assessed by a clinical practising psychiatrist, have management from a specialist in physical medicine and rehabilitation, and that she see a neuro-ophthalmologist. He also recommends an assessment by a neuro-psychiatrist for potential somatic symptom disorder.

[125] In his opinion, Ms. Paleshnuik does not have any definite organic neurological dysfunction other than her headaches which in turn are multifactorial. Her activities are limited primarily by her dizziness and noise sensitivity which he attributes to her emotional dysfunction. He also believes that her pain is mechanical and not neurologically based.

[126] In his opinion, Ms. Paleshnuik has not been fully investigated by clinical practising psychiatrist and a neuro-ophthalmologist. On this basis, he somehow concludes that from a neurological perspective, her prognosis is good.

[127] Aside from his concurrence with Dr. Mehdiratta that Ms. Paleshnuik suffered a MTBI, Dr. Kemble's expert report is generally unhelpful. Although he made this specific diagnosis, he seemingly discounts it by ascribing Ms. Paleshnuik's cognitive, dizziness, speech, vision, hearing, and headache symptoms to other diagnoses that he is admittedly not qualified to make. I prefer the clear and consistent analysis conducted by Dr. Mehdiratta to the confusing, contradictory, and unsupported opinions provided by Dr. Kemble.

**Dr. Lawrence Kei – Psychiatrist**

[128] Dr. Kei is a qualified physiatrist. He assessed Ms. Paleshnuik in person on August 22, 2022 and provided an expert report dated August 26, 2022.

[129] On physical examination, he noted that Ms. Paleshnuik had difficulty with visual tracking due to dizziness. In particular, he found that she had difficulty moving her right eye and it caused a pulling sensation. He also noted that she had slow verbal output and frequently had word-finding issues.

[130] Dr. Kei made the following diagnoses:

- a) persistent post-concussion syndrome with ongoing headaches, cognitive impairment, mood, visual, and vestibular symptoms;
- b) post-traumatic cervical sprain - strain injury consistent with chronic whiplash; and
- c) exacerbation of pre-existing right TOS.

[131] Dr. Kei found that it is more likely than not that the Accident caused these injuries. In particular, he notes that Ms. Paleshnuik reported memory loss during the events surrounding the Accident, felt confused, and had difficulty with verbal output on the day of the Accident. When he examined her, she continued to have difficulty with balance as well as dizziness. Taken together, it is Dr. Kei's view that the Accident caused a concussion resulting in debilitating headaches, cognitive impairment, visual and vestibular symptoms. He also finds that the Accident caused a whiplash injury.

[132] Dr. Kei explained that TOS describes a condition where the nerves and blood vessels are irritated causing symptoms in the arm usually provoked with arm elevation. Dr. Kei was aware that Ms. Paleshnuik had a TOS flare-up in 2015 but that she was able to return to full-time work. After the Accident, Ms. Paleshnuik reported a worsening of the symptoms and he notes in his opinion that the threshold to exacerbate her TOS was "significantly low" given how sensitive it previously was and that the Accident exacerbated her TOS symptoms.

[133] Dr. Kei concludes that Ms. Paleshnuik's injuries have rendered her disabled from working because she has difficulty with headaches and dizziness that are easily exacerbated with head movements. Furthermore, she has not experienced significant improvement in her concussion symptoms despite seeing multiple specialists and attending vestibular and visual therapy. It is his view that her impairment will persist into the future.

[134] Dr. Kei opines that Ms. Paleshnuik is unlikely to return to work at her pre-Accident capacity due to the symptoms of her concussion. The Accident caused symptoms of concussion which have affected her ability to participate in daily tasks and these impairments will persist into the future.

[135] Dr. Kei's prognosis is guarded because a complete recovery is unlikely given that it has been over six years since the Accident and Ms. Paleshnuik has not seen significant improvement with multiple therapies. Therefore, he expects that her

injuries, vocational limitations, and general disability will persist in the future. She is unlikely to regain her pre-Accident condition.

**Dr. Vance Tsai – Otolaryngologist**

[136] Dr. Tsai is an ear, nose, and throat/head and neck surgeon. He examined Ms. Paleshnuik on July 14, 2022 and produced an expert report dated August 15, 2022.

[137] From his perspective, Ms. Paleshnuik's dominant symptoms of persistent concern involve her imbalance and right-sided hearing concerns. She reported new-onset of hearing and imbalance issues immediately after the Accident.

[138] Dr. Tsai concludes that it is more likely than not that the Accident caused her imbalance and he does not anticipate substantial improvement because the Accident was more than six years ago and very little improvement occurs after 18 to 24 months from the time of injury.

[139] He opined that patients in Ms. Paleshnuik's predicament have a proclivity to take early retirement or may be less likely to take on new roles and responsibility. Her inability return to her prior long-term office job is consistent with these concerns.

[140] Dr. Tsai also concluded that Ms. Paleshnuik's hearing and tinnitus symptoms were caused by the Accident. Tinnitus concerns often affect sleep onset and quality. This condition is consistent with Ms. Paleshnuik's inability to return to her prior long-term office job. It often also results in the reduction of social contacts.

[141] Dr. Tsai noted that the onset of dizziness was validated in Ms. Paleshnuik's medical records in sequence, date, and time with different assessors, thereby, demonstrating consistency. This is strong evidence that she was experiencing this symptom because it was recorded in the weeks and months after the Accident.

[142] The mild right side hearing loss as diagnosed by Dr. Tsai is consistent with the evidence of Ms. Arneson who testified that Ms. Paleshnuik had difficulty following conversations in noisy locations such as restaurants and coffee shops.

[143] Dr. Tsai did not notice anything anomalous regarding Ms. Paleshnuik's speech, but, unlike her friends and family members, he does not know what her pattern of speech was before the Accident.

[144] Dr. Tsai cannot identify physiological explanation for Ms. Paleshnuik's dizziness. However, he accepts that her dizziness is real and in the absence of a specific diagnosis, the diagnostic term, Persistent Postural-Perceptual Dizziness ("PPPD") applies. This is a relatively new diagnostic term that applies to clear examples of patients experiencing dizziness where it is not based on a psychiatric or physiological diagnosis. It applies where there is not another explanation for this symptom. The important consideration is that he does not doubt that Ms. Paleshnuik is suffering from dizziness.

**Dr. Eyton David – Otolaryngologist**

[145] Dr. David is also an otolaryngologist. He did not examine Ms. Paleshnuik but performed a medical records review of other physicians and treatment providers regarding Ms. Paleshnuik and provided an expert report dated August 25, 2022.

[146] Dr. David opined that the medical documentation does not provide evidence of a post-traumatic inner ear hearing or balance injury. However, he acknowledged that the concussion diagnosis made by Drs. Mehdiratta and Kemble explains Ms. Paleshnuik's dizziness, imbalance, tinnitus, and sound and light sensitivity. Some of these symptoms could cause an inner ear problem and, in this case, he defers to neurologists for the concussion diagnosis and acknowledges that a concussion is a neurological explanation for the aforementioned symptoms.

[147] Although Dr. David points to some atypical and inconsistent responses in his review of the medical records, he does not deny that Ms. Paleshnuik suffers from dizziness that could also be associated with her concussion diagnosis.

**Dr. Krista Schultz – Psychologist**

[148] Dr. Schultz is a registered psychologist. She assessed Ms. Paleshnuik on July 18, 20, 21, and 22, 2022. This assessment ordinarily takes three days but



Ms. Paleshnuik required four days to complete this process because she proceeded slower than expected. Dr. Schultz produced an expert report dated August 25, 2022.

[149] Dr. Schultz noted that Ms. Paleshnuik has fragmented memory of the Accident because she recalls some of the relevant events but not all of them. For example, after the Accident, Ms. Paleshnuik recalls various papers flying around in her car but she has no memory of putting the car into park mode.

[150] Dr. Schultz described Ms. Paleshnuik's presentation during the assessment in respect of her neuropsychological and psychological functioning as well as her behavioural observations. These include significant cognitive impairment, speech difficulties, symptoms of depression, anxiety, insomnia, widespread chronic pain with somatic preoccupation in distress, and fatigue. These difficulties were comorbid with a range of medical issues including hearing loss, tinnitus, light and sound sensitivity, vision problems, dizziness, and balance and coordination difficulties.

[151] Ms. Paleshnuik presented with slow and inarticulate speech that included stammering, stuttering, and frequent pauses. She had word-finding and expressive difficulties. She maintained a flat mood and lacked social reciprocity.

[152] Dr. Schultz found that Ms. Paleshnuik's performance showed adequate effort such that the neuropsychological and psychological assessment was valid for the purposes of a medical legal determination.

[153] Dr. Schultz also found that Ms. Paleshnuik presented with a significant decline in her cognitive functioning as compared to her pre-Accident status, her perceptual reasoning is low-average, and working memory and processing speed are borderline. Ms. Paleshnuik presented with a widespread cognitive decline ranging from borderline to severe and very severe. Her overall neurocognitive impairment is in the moderate major category, more major than moderate.

[154] Dr. Schultz further opined that Ms. Paleshnuik's neuropsychological findings in conjunction with a substantial functional decline, decreased independence, and

ongoing distress meet the diagnostic criteria for DSM-5-TR Major Neurocognitive Disorder, without behavioural disturbance, but with comorbid mood, anxiety, trauma and stress related, and somatic mental disorders.

[155] Turning next to emotional impairment, Ms. Paleshnuik demonstrated complex and severe psychopathology with persistent depressive disorder and apathy along with partial features of post-traumatic stress disorder with dissociative symptoms, generalized anxiety disorder, insomnia, somatic symptom disorder with pain and bodily preoccupations, and a significant loss of self-esteem.

[156] Dr. Schultz found that Ms. Paleshnuik meets the diagnostic criteria for persistent depressive disorder with intermittent major depressive episodes. She also found that Ms. Paleshnuik meets the diagnostic criteria for generalized anxiety disorder (severe), and somatic symptom disorder with predominant pain (severe).

[157] According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition – Text Revision (DSM – 5 TR), Ms. Paleshnuik’s clinical diagnosis is as follows:

- a) Major neurocognitive disorder due to multiple etiologies, without behavioural disturbance;
- b) Adult onset fluency disorder (stuttering);
- c) Persistent depressive disorder with intermittent major depressive episodes, with current episode, with anxious distress, moderate;
- d) Specified trauma and other stressor-related disorder, including partial post-traumatic stress disorder with dissociative symptoms;
- e) Generalized anxiety disorder; and
- f) Somatic symptom disorder with predominant pain (persistent, severe).

[158] Dr. Schultz concluded that these diagnoses were caused by the Accident based on her findings that there is no evidence of diagnosed mental health disorders before the Accident and Ms. Paleshnuik did not exhibit these symptoms prior to it.

[159] Dr. Schultz further opined that the clinical prognosis for Mr. Paleshnuik's neuropsychological recovery is poor. From a brain injury perspective, over six years have passed since the Accident and she is at the plateau stage so only minimal clinical recovery can be anticipated. Furthermore, the clinical prognosis for her comorbid mental disorders and psychological impairments is guarded.

**Analysis of Non-Pecuniary Damages**

[160] Ms. Paleshnuik was 46 years old at the time of the Accident and 53 at trial. Prior to the Accident, she had good mental and emotional health and was extroverted, vivacious, and engaged in a range of social and vocational activities. She worked full-time, volunteered in the community, and demonstrated devotion and commitment to her family.

[161] The Accident completely derailed Ms. Paleshnuik's life. It caused a series of cognitive, mental health, speech, vision, and hearing problems that have negatively impacted every aspect of her life. She is no longer able to work, socialize, and engage with her loved ones as she did prior to the Accident.

[162] Ms. Paleshnuik used to be outgoing, engaging, and optimistic. She is now reserved, melancholy, and irritable. The Accident has damaged all of her close relationships, most notably with her son, husband, and close friends, such as Ms. Arneson and Ms. Wojtun, who all testified to remarkably similar changes in Ms. Paleshnuik since the Accident.

[163] Prior to the Accident, Ms. Paleshnuik enthusiastically supported Cole by attending, and assisting as needed, at his various club and school activities, including baseball, basketball, soccer and volleyball. As a result of the Accident, she missed connecting with and watching Cole play sports during his formative years. She is not as close to him as she was prior to the Accident and this is a significant loss to her. She is also no longer able to converse effectively and exchange views and ideas with her husband. She is not the partner that she used to be.

[164] Ms. Paleshnuik has gained weight since the Accident, her eating habits have deteriorated, and her condition has not improved despite the many therapeutic treatments she has undertaken. Her confidence has diminished, as has her level of independence and sense of self-worth.

[165] The defendant's assertion that Ms. Paleshnuik does not have memory or cognitive complaints is utterly unsupported by the evidence. Her memory of the circumstances immediately after the Accident suggest that she only recalls some of the details of the Accident, her subsequent discussion with the defendant, how she got to work, and then the hospital. Her memory of the Accident is clearly fragmented and contains gaps. Unsurprisingly, both neurologists, diagnosed her with a MTBI/concussion.

[166] Ms. Paleshnuik acknowledged that in August 2012, she was being followed by a neurologist in respect of migraines, ongoing neck and upper back pain, and pain in the right side of her ribs. This was several years before the Accident but importantly, these symptoms did not in any meaningful manner affect her vocational, social, and recreational activities. Her ability to do these things did not substantially change until after the Accident.

[167] Ms. Paleshnuik had TOS at the time of the Accident. This condition was symptomatic from 1996 onwards and was presumably caused by the 1996 Accident. Notwithstanding this condition, Ms. Paleshnuik worked full-time, in a sedentary position with accommodations, from 1999 to August 2015 without any significant disruption caused by this condition.

[168] The August 2015 TOS flare-up prevented Ms. Paleshnuik from working for approximately three-and-a-half months. She was still suffering from some increased symptoms from this condition at the time of the Accident. However, I accept Ms. Paleshnuik's evidence that prior to the Accident, she was back at work full-time and she was able to do virtually all of the things required of her both vocationally and in respect of her other activities. In my view, her functioning was not impaired by TOS prior to the Accident.

[169] There is no evidence that Ms. Paleshnuik's TOS symptoms were worsening or degenerative such that they would deteriorate over time. On the contrary, the evidence is that her symptoms were relatively stable aside from the August 2015 TOS flare-up that occurred approximately 19 years after the 1996 Accident that precipitated this condition.

[170] Dr. Kei described Ms. Paleshnuik's TOS condition as vulnerable to injury. I accept his evidence that Ms. Paleshnuik may have suffered subsequent TOS flare-ups but it is likely that they would not have affected her overall functioning or prevented her from working for anything other than a short period of a few months. I also accept his evidence that the Accident exacerbated her pre-existing TOS. In my view, this is akin to a thin skull, not a crumbling skull because of the aforementioned lack of evidence that her TOS symptoms were worsening or degenerative. Dr. Kei and Dr. Mehdiratta both opined that the Accident exacerbated Ms. Paleshnuik's TOS symptoms.

[171] Prior to the Accident, Ms. Paleshnuik had no significant pre-existing issues with her balance, memory, ability to focus, vision, or hearing.

[172] Dr. Kei, Dr. Mehdiratta, and Dr. Kemble provided an opinion on whether Ms. Paleshnuik sustained a MTBI. All three doctors agree that she sustained this injury. I accept the other diagnoses made by Dr. Mehdiratta and Dr. Kei as described earlier.

[173] Dr. Kemble acknowledged that the plaintiff did not fully recover from her MTBI. While he opines that she is no longer experiencing symptoms from damaged brain cells, a finding that on its face is vague and speculative, he does not deny she experiences the symptoms that she describes nor does he deny that she experiences these symptoms as a result of the Accident.

[174] Dr. David noted that tinnitus can be linked to a traumatic event if there is a diagnosis of a MTBI. Given that a neurologist made this diagnosis, he opined that it could have caused the tinnitus symptoms described by Ms. Paleshnuik.

[175] Dr. David also explained that a MTBI diagnosis explains symptoms like dizziness and sensitivity to light and sound.

[176] Dr. Tsai stated that, on a balance of probabilities, Ms. Paleshnuik likely has some hearing loss in her right ear given the multiple tests that showed similar results. Ms. Paleshnuik and Ms. Arneson corroborated this finding.

[177] Both Dr. Tsai and Dr. Kemble's reports suggest the plaintiff has PPPD. Dr. Tsai completed an actual examination of Ms. Paleshnuik, whereas Dr. David did not.

[178] Dr. Mehdiratta explained that a blow to the head can disrupt the cribriform plate and cause altered smell, another symptom described by Ms. Paleshnuik in respect of her altered sense of taste.

[179] Dr. Schultz diagnosed the plaintiff with neurocognitive disorder arising from the diagnosed MTBI. I also accept the other, aforementioned, diagnoses made by Dr. Schultz.

[180] Dr. Kemble also diagnosed Ms. Paleshnuik with somatic symptom disorder. I note however that he described this diagnosis as outside his area of expertise and he would defer to a psychiatrist and to a lesser extent a psychologist for this diagnosis.

[181] Aside from Ms. Paleshnuik's hip pain, for which there is not specific medical evidence, there is a diagnosis from a doctor or psychologist for each of the symptoms described by Ms. Paleshnuik.

[182] Some of the diagnoses are non-specific like PPPD, which does not specify the physiological mechanism of the symptom but, virtually, all of Ms. Paleshnuik's symptoms have been independently diagnosed. To the extent there is disagreement between the experts—aside from the hearing loss where Dr. David said there is none—the dispute is really about the physiological mechanism of Ms. Paleshnuik's

symptoms, not whether she is actually experiencing these symptoms or whether they were caused by the Accident.

[183] Dr. Schultz opines that Ms. Paleshnuik’s prognosis for recovery from her neurocognitive disorder is poor, and the prognosis for recovery from her psychological diagnoses is guarded. Similarly, Dr. Mehdiratta opines that Ms. Paleshnuik’s prognosis is poor and Dr. Kei opines that her prognosis is guarded. Dr. David does not provide a prognosis. Dr. Kemble provides a prognosis of “good” but he only addressed the question of cellular damage in the brain, which he somehow concludes has already fully recovered. He did not address the prognosis of her symptoms, of which he defers to physiatry, psychiatry/psychology and otolaryngology. In summary, the prognoses for Ms. Paleshnuik’s range of symptoms are either guarded or poor.

[184] Since the Accident, Ms. Paleshnuik experiences sadness, frustration and anger. She used to be extroverted with a full and exciting life that included many family members and friends. Now, she is dependent on others and has difficulty maintaining the relationships that are most important to her.

[185] Ms. Paleshnuik was proud of the work she did because it helped others. She feels a profound sense of loss with not being able to work.

[186] Ms. Paleshnuik used to have the grit and strength to be able to overcome things and not let them get her down but she no longer has this capacity. She is less patient, understanding, and empathetic than she used to be.

[187] Until she began Botox treatment she did not realize how much she had changed from her former self. Her family and friends recall that Ms. Paleshnuik used to have an expressive and loud laugh and she used to draw people towards her. She enjoyed discussions about politics and other issues. She no longer trusts her own knowledge to involve herself in those conversations because it is difficult for her to convey her thoughts. Her entire demeanour and personality have changed since the Accident.

[188] Notwithstanding the defendant's repeated efforts to impeach her with the testimony she provided at the examination for discovery on January 22, 2019, these attempts largely failed. The answers she gave at this examination are substantially similar to the evidence she provided at trial. To the extent that there are some minor discrepancies, I attribute this to the passage of time since the Accident as well as the cognitive and speech difficulties that Ms. Paleshnuik suffers from as a result of it.

[189] Ms. Paleshnuik agreed that she may have misspoke or otherwise avoided labelling her speech impediment when she denied that she stuttered during her examination for discovery. The exact characterization of her speech impediment is unimportant. I am more than satisfied, based on my observations of her speech combined with the evidence of her family, friends, and most of the experts, that she has a speech impediment and that it was caused by the Accident. She frequently had difficulty finding words, spoke slowly, and some of her words occasionally trailed off or slurred.

[190] Turning next to the cases relied on by Ms. Paleshnuik, *Grabovac* is factually distinct from the other cases, because in that case the court compensated the plaintiff for the loss of no longer being able to have children in addition to ordering damages for a range of otherwise similar injuries to those at bar. The other cases relied upon by the plaintiffs are a useful guide for assessing the quantum of damages.

[191] In *Plett*, the plaintiff suffered a MTBI, but had residual earning capacity, including the capacity to work part-time for 16 to 24 hours per week with an accommodating employer. She was 55 at the time of trial. The court awarded \$210,000.

[192] In *Choi*, the plaintiff was awarded \$210,000 in non-pecuniary damages for chronic pain, headaches, light sensitivity, hearing problems, cognitive issues, and a fundamental loss of her sense of self. The plaintiff was 63 years old at the time of trial, and had lost all of her earning capacity as a result of the accident. The evidence did not establish that she had sustained a MTBI.



[193] *Mellesmoen* is factually similar to the case at bar. It involved a plaintiff who was 51 years old at the time of the accident and 57 at trial. The plaintiff's injuries included an ongoing MTBI, myofascial injuries to her neck and upper back causing chronic and significant pain, a corresponding reduction in her activity level and resulting deconditioning, significant emotional suffering, mental impairment, and difficulty with low energy levels, communicating and making decisions. The court awarded non-pecuniary damages of \$220,000.

[194] The plaintiffs in *Kim* and *Wright* did not suffer diagnosed MTBIs but did experience chronic pain, mental health issues, sleep disturbance, cognitive difficulties, and in the latter case, debilitating headaches. The courts in these two respective decisions awarded \$215,000 and \$200,000 in non-pecuniary damages.

[195] As a result of the Accident, Ms. Paleshnuik is a completely different person physically, mentally, cognitively, and socially. Having considered all of the relevant cases and taking into account Ms. Paleshnuik's circumstances and prognosis, I conclude that she is entitled to \$210,000 in damages for pain and suffering caused by the Accident.

### **Loss of Income-Earning Capacity**

#### **Factual Findings**

[196] Ms. Paleshnuik did not attend college or university after high school. In 1988, she began her full-time working career as a healthcare worker employed by the provincial government at Woodlands Hospital in New Westminster. She has been a member of the British Columbia General Employees' Union since 1989.

[197] Ms. Paleshnuik was unable to continue working as a healthcare worker at Woodlands Hospital because she experienced right arm weakness caused by the 1996 Accident. She underwent retraining and completed a business administration program at the end of 1998 or beginning of 1999. Ms. Paleshnuik was limited to sedentary jobs because she could not do the physical work required of healthcare workers. She went back to full-time work in 1999 in the staffing department at

Riverview Hospital. Her job duties included scheduling and staffing of all nurses and healthcare workers at Riverview Hospital.

[198] After the 1996 Accident, Ms. Paleshnuik experienced ongoing symptoms of TOS including weakness in her right arm that prevented her from overusing it and she had to pace yourself and stretch to keep it strong. She was provided with a special chair, keyboard, and mouse to accommodate her right arm weakness.

[199] The TOS symptoms did not affect her work at Riverview Hospital and she was able to do the required tasks. Similarly, TOS did not affect how many hours she worked at Riverview Hospital. She missed very little time from work because of TOS and she worked full-time, approximately 37.5 hours per week and overtime as required.

[200] In 2012, Ms. Paleshnuik changed jobs to a client service worker position with the Social Services and Poverty Reduction Department in Surrey. This was a level 9, full-time job. She moved from a higher level down to a level 9 job because she wanted to avoid shiftwork and work on weekends, and she wanted a job that was closer to home. Many of the level 11 jobs were in Vancouver. She and her family were living in Langley at the time. Ms. Paleshnuik's TOS symptoms occasionally affected her work but she managed them as best she could and she was accommodated similarly to her previous position. In this new role, she continued to miss very little time from work because of TOS symptoms.

[201] Although Ms. Paleshnuik suffered from TOS, she worked full-time and her co-workers were not aware of her condition because it did not affect her ability to do her job.

[202] Ms. Paleshnuik asserts that her plan was to go back to school while working full-time because the government had programs that would pay for further education. She also wanted to work at a higher level and had an interview scheduled for a few weeks after the Accident that she was unable to attend. This was for a level 15 position.

[203] Ms. Paleshnuik testified that she had looked at several post-secondary programs but did not apply to any of them. She did not pursue any further post-secondary education prior to the Accident because her life was busy. She thinks she might have had more time to pursue further education in the future.

[204] Ms. Paleshnuik was working full-time at the time of the Accident but she has been unable to work since then. She received \$15,903 in short term injury insurance payments for the period from May 12, 2022 to November 11, 2016. This amount is subject to a subrogated claim. She received employment income, long term disability payments, and Canadian Pension Plan disability benefits for 2016 to 2022 as follows:

2016	\$40,734
2017	\$29,981
2018	\$30,239
2019	\$31,116
2020	\$31,294
2021	\$31,838
2022	*\$28,330

\* The 2022 amount is estimated using the 2021 amount and calculated to the first day of trial.

[205] Ms. Paleshnuik is aware that there are several barriers to her returning to work. These include her not remembering how to do her job, how to set up and work on computers, and how to do the required paperwork and follow the necessary procedures. She does not think she will be able to manage the reading and writing required or remember the necessary tasks. She also thinks that it would be hard for her to focus and that the loud environment and other noise would be difficult for her to manage, as would dealing with other people. She is no longer sure of herself, lacks confidence, and does not believe that she will be able to cope with the demands of working.

[206] Ms. Paleshnuik testified that she planned to work until she was at least 65 and that she was motivated to increase her salary level. Had she continued working, she would have been eligible for a full pension at the age of 57.

[207] Peter Sheldon, a qualified economist, provided an expert report in which he based his calculations on “risk only” contingencies because Ms. Paleshnuik had a strong attachment to work. He assumed that she probably would have continued working but for the Accident.

### **Functional Capacity Evaluation**

[208] Russell McNeil is an occupational therapist. He assessed Ms. Paleshnuik on August 7, 2022 and produced a functional capacity evaluation and cost of future care report on August 25, 2022.

[209] Mr. McNeil was unable to comment on typical measures of physical effort because Ms. Paleshnuik exhibited severely restricted physical and cognitive capacity resulting in her only being able to do limited testing. She attempted to persist with testing and tried to pace herself to manage her increased pain and fatigue.

[210] Mr. McNeil concluded that Ms. Paleshnuik does not have the physical or functional cognitive capacity to be competitively employable. She is capable of short periods of sedentary activity but she is not capable of working in occupations that fall within the sedentary physical demand characteristics. Even with accommodations, she would be unable to maintain a competitively employable work pace. In Mr. McNeil’s opinion, she will not be able to compete for work in the open job market. Mr. McNeil understandably reached the same conclusions in respect of light work, medium work and heavy work. In conclusion he found that she is not capable of either part-time or full-time work.

[211] Specifically, Ms. Paleshnuik did not demonstrate the capacity to perform her work as a client services worker on a full- or part-time basis at a competitively

employable work pace. She does not have the stamina to perform the requirements of this work.

### **Past Loss of Income-Earning Capacity**

#### **Relevant Legal Principles**

[212] The principles applicable to the assessment for past loss of income-earning capacity are:

- a) An assessment of a loss of income involves a consideration of hypothetical events.
- b) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- c) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- d) Once a hypothetical possibility is established, the Court must consider the likelihood of the event occurring in determining the measure of damages.
- e) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- f) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[213] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the Court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the Court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[214] This three-step process applies to both past and future income-earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163.

**The Parties’ Positions on Past Loss of Income-Earning Capacity**

[215] Ms. Paleshnuik sets out three different scenarios in respect of her claim for past loss of income earning capacity. The first scenario is based on her continuing to work full-time in her existing position; the second scenario assumes that she would have received a promotion to a higher paying position and worked in that capacity from the date of the Accident to the present; and the third scenario considers the possibility that she may have taken time off work due to her pre-existing health concerns.

[216] Mr. Sheldon, a qualified economist as noted, compared Ms. Paleshnuik’s 2016 to 2022 income with what it would have been under the first scenario and calculated that Ms. Paleshnuik’s net past wage loss to be \$276,050. This amount excludes her sick pay earnings of \$15,903, because it is subject to a subrogated claim. Similarly, Mr. Sheldon concluded that Ms. Paleshnuik’s net past wage loss under the second scenario is \$308,651.

[217] Ms. Paleshnuik asserts that the third scenario does not meet the test of a real and substantial possibility because TOS flare-ups cannot be predicted. She submits that she is entitled to \$292,351 in net past wage loss based on a 50% probability of each of the first two scenarios occurring.

[218] The defendant denies that Ms. Paleshnuik is entitled to an award for past loss of income-earning capacity. Alternatively, he suggests that she is entitled to no more than \$100,000 in respect of all of her pecuniary and non-pecuniary damages.

**Analysis of Past Loss of Income-Earning Capacity**

[219] With respect to Ms. Paleshnuik’s pre-existing TOS condition, it is important to note that when she returned to work on or around Christmas Day 2015, there were no restrictions on her duties and she was performing all aspects of her job. Before the August 2015 TOS flare-up, she was doing a series of job tasks that were in

addition to her full-time duties. As of January 2016, when she had returned to work, she was able to do all of the expected duties of her job but she was not doing additional duties.

[220] I accept that as a result of the Accident and since that date, Ms. Paleshnuik does not have the physical or functional cognitive capacity to be competitively employable. Specifically, I accept the clear and unequivocal expert evidence of Mr. McNeil and Dr. Mehdiratta that Ms. Paleshnuik is unable to work because of the physical, neurological and, particularly, the cognitive effects of the Accident.

[221] Ms. Paleshnuik has lost the capacity to work. There is undeniably a real and substantial possibility that this loss caused a pecuniary loss. This is because prior to the Accident, she had a strong attachment to work.

[222] Ms. Paleshnuik began her career as a public sector employee in 1988 and she worked full-time until the 1996 Accident. After a period of recovery and retraining, she resumed her career in 1999 and worked full-time in an administrative role until the Accident. The only career interruptions she encountered during this period were a one-year maternity leave and the August 2015 TOS flare-up. After several months of recuperation, she returned to work in November 2015 and she resumed all of her full-time responsibilities by December 25, 2015.

[223] The value of Ms. Paleshnuik's past loss of income earning capacity must be assessed by comparing what her working life would likely have been but for the Accident. I am satisfied that she would have continued working full-time throughout this period at level 9.

[224] During her testimony, Ms. Paleshnuik alluded to an upcoming interview she had for a more senior position at level 15. She also spoke of her interest in upgrading her educational qualifications and suggested that she had made some preliminary inquiries about taking some courses.

[225] I do not accept her submission that she was on the cusp of moving into a more senior role. Aside from the retraining she undertook after the 1996 Accident,

she had not undertaken any further course of studies intended to upgrade her skills in the previous 17 years. Furthermore, she moved down from a level 11 position to a level 9 position in order to work closer to her home and to avoid working on weekends. This was an entirely understandable decision given that she was Cole's primary caregiver and Mr. Paleshnuik travelled frequently for work.

[226] There is very little in Ms. Paleshnuik's educational or work history that supports the contention that she would have moved to a more senior role. I am, however, satisfied that she would have continued working in her current role but for the Accident.

[227] I accept Mr. Sheldon's calculation of Ms. Paleshnuik's past loss of employment income from the date of the Accident to the start of trial in the amount of \$322,251 based on her continued employment in a clerical position. Ms. Paleshnuik received employment income, disability benefits, and Canadian Pension Plan disability benefits of \$223,532 during this period. This amount includes \$15,903 in short-term injury insurance payments that is subject to a subrogated claim. I am satisfied that this amount should not be included in her income because she will probably have to repay it to the payor insurance company. Deducting this amount from the income she received yields a gross income loss \$114,622. I accept Mr. Sheldon's calculation that this amount should be reduced by 20.5% to account for taxes and EI premiums. Ms. Paleshnuik is therefore entitled to \$91,120 in respect of her past loss of income-earning capacity.

### **Future Loss of Income-Earning Capacity**

#### **Relevant Legal Principles**

[228] The Court's assessment of a plaintiff's future loss of income-earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise. The Court engages in an assessment that depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence



provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[229] As noted earlier in these Reasons, in *Rab* at para. 47, the Court of Appeal set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the Court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[230] The third step may involve either the “earnings approach” or the “capital asset approach”. The earnings approach is appropriate where there is an identifiable loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset rather than a loss of earning capacity: *Ploskon-Ciesla* at paras. 16–17.

[231] In *Dornan*, Justice Grauer stated that in undertaking the analysis of positive and negative contingencies, courts are required to assess what happened to the plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to a plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities: *Dornan* at para. 94.

### **The Parties’ Positions on Future Loss of Income-Earning Capacity**

[232] Ms. Paleshnuik posits several possibilities that might have occurred but for the Accident. Mr. Sheldon provided calculations for several scenarios applying “risk only” contingencies. The first scenario is that she would have worked full-time until age 65 in the position she held at the time of the Accident, resulting in a loss of \$452,200.

[233] The second scenario assumes that Ms. Paleshnuik would have worked until age 65 in a higher position at a level 15 pay scale giving rise to a loss of \$555,700.

[234] The third scenario assumes that Ms. Paleshnuik would have retired at age 57.1, the age at which she was entitled to a full pension, and worked part-time until age 65. Depending on her rate of pay, this possibility would lead to a loss of between \$306,400 and \$342,400.

[235] Ms. Paleshnuik submits that there is a 40% likelihood of the first scenario, a 40% likelihood of the second scenario, and a 20% likelihood of the third scenario. Taking into account a 10% contingency for the possibility that she may need to take further time off work due to her pre-existing condition, she asserts that she is entitled to \$421,272 for her future loss of income earning capacity.

[236] Ms. Paleshnuik also seeks \$140,480 in respect of the loss of pension earnings based on the value of her pension if she would have retired at 57.1 as compared to retiring at age 65. This amount presumes a 50% chance that she would have retired in her existing level 9 position and a 40% probability that she her best five years would be at a level 15 salary.

[237] The defendant submits that Ms. Paleshnuik worked out of financial necessity and that she did not have a strong attachment to the workforce nor a demonstrated drive to move beyond a level 9 position. He therefore suggests that she would have retired at age 57.1 and not worked thereafter.

[238] The defendant also submits that by not trying to work in any capacity, Ms. Paleshnuik failed to mitigate her damages. This is based on his position that she has some residual capacity to work. The defendant submits that she has not established that she is unable to work so she is not entitled to an award under this head of damage. Alternatively, the defendant submits that Ms. Paleshnuik had some residual capacity to work and should be compensated accordingly with a contingency discount for the unspecified percentage likelihood that she would have become disabled at some point absent the Accident.

**Analysis of Future Loss of Income-Earning Capacity**

[239] As previously discussed, I accept Mr. McNeil's and Dr. Mehdiratta's conclusions that Ms. Paleshnuik does not have the physical or functional capacity to be competitively employable as a result of the Accident.

[240] The prognoses for her various conditions are guarded or poor, so there is virtually no prospect of her circumstances improving such that she will be able to return to the workforce. Even if there is some marginal improvement in some of her symptoms, it is unlikely to improve her general ability to function.

[241] The defendant's assertion that Ms. Paleshnuik has some residual capacity to work is not supported by the evidence adduced at trial. It is nothing more than conjecture and speculation. Similarly, the submission that, absent the Accident, she would have become disabled at some point lacks an evidentiary foundation.

[242] I am satisfied that absent the Accident, Ms. Paleshnuik would have continued working full-time in her current position until she was eligible to retire at age 57. For the reasons previously described, I do not accept that Ms. Paleshnuik would have moved to a more senior, higher paying position.

[243] At the time of the Accident, she had been employed in the public service for over 25 years and there was virtually no history of her applying for, let alone moving to, progressively more senior positions. Aside from some required training in the wake of her 1996 Accident, she did not upgrade her educational qualifications during this period.

[244] At age 57, Ms. Paleshnuik would have been entitled to a full public service pension. I am satisfied that applying the risk only contingency is appropriate because of Ms. Paleshnuik's attachment to work and reputation for being a good worker, as described by Ms. Wojtun.

[245] Based on Mr. Sheldon's calculations and by applying her salary of \$49,400, a multiplier of 3.588 from November 21, 2022 to August 7, 2026, the date when

Ms. Paleshnuik would have become eligible for a full pension, as well as a 11.3% risk only contingency, and a 20% reduction for income taxes, she is entitled to an amount of \$125,775 for future loss of income-earning capacity in respect of her anticipated employment earnings as a public service worker.

[246] Based on Ms. Paleshnuik's attachment to working, I am satisfied that there is a 50% chance that she would have continued working part-time to age 65, but not in the public service. Ms. Paleshnuik suggested that she may have continued working in the public service past the date when she was eligible for a full pension, in order to maximize her pension earnings with higher salaries in the last five years. I think that is unlikely based on her work history and I am instead assuming that she would have retired from the public service and sought employment elsewhere on a part-time basis at a similar salary.

[247] I am assuming that Ms. Paleshnuik would have earned a part-time salary roughly equivalent to one-half of her current salary, \$25,000 per year. I am applying a multiplier of 6.875, using Mr. Sheldon's calculations: 10.643 is the multiplier from November 21, 2022 to June 24, 2034 and 3.588 is the multiplier from the same start date to August 7, 2026, her anticipated retirement date with a full pension.

[248] Taking into account a deduction for 15% for income taxes, Ms. Paleshnuik is entitled to \$73,047 in respect of her future loss of income-earning capacity for the period from when she would have retired from the public service to age 65.

[249] In doing his calculations, Mr. Sheldon did not take into account that Ms. Paleshnuik accumulates pensionable time while she is on long-term disability. I am assuming that she will continue to receive long term disability benefits until she retires on the date when she becomes eligible for a full pension so she is not entitled to a further amount for pension loss.

[250] Based on the foregoing, I assess Ms. Paleshnuik's entitlement in respect of her future loss of income earning capacity to be \$200,000.

## **Loss of Housekeeping Capacity**

### **Relevant Legal Principles**

[251] The principles applicable to the loss of housekeeping capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of housekeeping capacity is provided by the work being performed by others, even if done gratuitously.
- Evidence of a plaintiff's incapacity resulting in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for, supports a separate award of pecuniary damages.

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at paras. 28–34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 98.

### **The Parties' Positions on Loss of Housekeeping Capacity**

[252] Ms. Paleshnuik submits that some housework does not get done in her household because she is unable to do some of these tasks. She seeks \$80,000 for past and future loss of housekeeping capacity.

[253] The defendant did not articulate a specific position in respect of this loss. I assume that he denies that she is entitled to damages for this alleged loss.

**Factual Findings and Analysis on Loss of Housekeeping Capacity**

[254] Immediately after the Accident, Ms. Paleshnuik did not do much housework. Her husband, parents, and friends assisted with meals and household cleaning.

[255] Gradually, Ms. Paleshnuik was able to do some laundry, shopping, cleaning, and dusting, as long as she paced herself. She estimated that she currently does approximately 25% of the housework.

[256] Cole recalled that his mother continued to do some housekeeping after the Accident, but appeared to have difficulty and it took her longer to complete tasks.

[257] Mr. Paleshnuik recounted that prior to the Accident, Ms. Paleshnuik did approximately 75% of the housework and he did 25% of it. After the Accident, he estimates that he does 50% of this work, she does 25%, and 25% does not get done. Mr. Paleshnuik would like to bring in people to assist with housework but they cannot afford it.

[258] Mr. McNeil assessed Ms. Paleshnuik's need for housekeeping assistance at \$3,588 per year for weekly housework, based on two hours per week for heavier cleaning tasks. He also estimated an annual cost of \$552 for heavier seasonal housecleaning. Using the relevant multiplier, the present value of this cost for Ms. Paleshnuik to age 80 is \$85,726.

[259] I am satisfied that Ms. Paleshnuik is not capable of doing heavy housecleaning tasks. She is entitled to a pecuniary award for housecleaning because she can only do light housekeeping and many of the necessary tasks are simply not being done. This is a marked departure from the circumstances prior to the Accident when Ms. Paleshnuik did 75% of the housecleaning tasks.

[260] Prior to the Accident, Mr. and Ms. Paleshnuik both worked full-time and shared the home they lived in. Accordingly, it is reasonable that they share the responsibility for cleaning their home equally.

[261] Ms. Paleshnuik is only capable of doing approximately 25% of household cleaning so she should receive a pecuniary award for the 25% of the tasks that she cannot do. Mr. McNeil’s recommendation that Ms. Paleshnuik required two hours of weekly housecleaning and semi-annual heavy housecleaning assistance is somewhat excessive in relation to the 25% of housekeeping that she is incapable of doing. In my view, half of the recommended level of assistance will ensure that Ms. Paleshnuik is properly compensated for her inability to perform heavier housekeeping tasks. I am therefore satisfied that Ms. Paleshnuik is entitled to \$40,000 for past and future loss of housekeeping capacity.

**Cost of Future Care**

**Relevant Legal Principles**

[262] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.
- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.
- f) “Medical justification” is broader than “medically necessary”.
- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149.

### The Parties' Positions

[263] Using Mr. McNeil's cost of future care estimates and the relevant multiplier, Ms. Paleshnuik seeks \$148,264 for the items and treatments specified in the following table:

Item	Cost	Replacement Frequency	Yearly Cost	Total Cost (multiplier 20.7069)
Body Pillow	\$50	Every two years	\$25	\$517
Heat Pad	\$70	Every three years	\$23	\$476
Transcutaneous electrical nerve stimulation	\$50	Every five years	\$10	\$207
Electric Floor Scrubber	\$188	Every five years	\$38	\$786
Cordless Scrubber	\$70	Every five years	\$14	\$290
Exercise Equipment	\$159	Every three years	\$53	\$1,097
Kinesiologist	\$2,016	24 sessions	N/A	\$2,016
Massage Therapy	\$110	12 sessions per year	\$1,320	\$27,333
Physiotherapy	\$120	12 sessions per year	\$1,440	\$29,817
Chiropractic Treatment	\$70	12 sessions per year	\$840	\$17,393
Psychologist	\$220	Per session		Not Costed
Botox	\$3,300		\$3,300	<u>68,332</u>
Total				\$148,264

[264] In addition, Ms. Paleshnuik seeks funding for counselling and vision therapy sessions. She also claims \$10,000 for future mileage.

[265] The defendant did not clearly articulate its position on the cost of future care. I assume he denies that Ms. Paleshnuik is entitled to an amount in respect of this head of damage.

### Factual Findings

[266] Ms. Paleshnuik is currently undergoing several treatments including weekly physiotherapy, Botox injections every four months, counselling, vision therapy, and occupational therapy. She testified that she is also planning to start massage therapy.



[267] Ms. Paleshnuik takes the following medications as needed: Trintellix, tramadol, naproxen, as well as some over-the-counter medications.

[268] Since the Accident, Ms. Paleshnuik has attended 187 treatment sessions consisting of:

- a) 105 physiotherapy sessions;
- b) 6 Botox injection sessions;
- c) 15 counselling sessions;
- d) 23 vision therapy sessions; and
- e) 38 occupational therapy sessions.

[269] Ms. Paleshnuik has incurred \$4,338 in mileage expenses since the Accident.

[270] Her current treatments include Botox, physiotherapy, vision therapy, occupational therapy, speech therapy, and counselling. She intends to continue with all of these therapies as well as massage therapy in the future.

[271] In his cost of future care report, Mr. McNeil recommended items for pain management and homemaking assistive devices. He also provided recommendations for homemaking assistance, rehabilitation and health-related costs, medication, and pain relieving substances.

[272] Dr. Schultz recommended the following treatments:

- ongoing, long-term, psychiatric treatment;
- psychological treatment;
- marital counselling (ten sessions, then as needed);
- occupational therapy with monitoring and follow-up for two years and at critical life junctures;
- housekeeping on at least a weekly basis;
- assistance with finances and budgeting;

- speech and language assessment and therapy;
- audiology service;
- neuro-ophthalmology evaluation;
- multi-disciplinary chronic pain programming;
- functional hand assessment;
- balance reassessment by an ear, nose, and throat specialist;
- neurology or neuroradiology referral;
- driving assessment;
- access to transportation assistance;
- physical exercise program with personal fitness instruction by a kinesiologist;
- ergonomic arrangements and safety protections against falls;
- case coordination; and
- neuropsychological re-evaluation in two years to provide new treatment and rehabilitation input.

[273] Dr. Kei recommended that Ms. Paleshnuik continues to attend vestibular and visual therapy and to receive Botox injections and trigger point injections. As well, massage therapy would be helpful.

[274] Dr. Tsai also recommend balance/vestibular physiotherapy sessions if Ms. Paleshnuik finds them helpful.

### **Analysis**

[275] I am satisfied that the amounts claimed for pain management equipment (body pillow, heat pad, and transcutaneous electrical nerve stimulation, totalling \$1,200), home making assistive devices (electric floor scrubber and cordless scrubber, totalling \$1,076), exercise equipment (\$1,097), and 24 sessions with a

kinesiologist (\$2,016) are both medically justified and reasonable. Ms. Paleshnuik is entitled to a total of \$5,389 for these items and treatments.

[276] In my view, the claims for 12 sessions for each of massage therapy, physiotherapy, and chiropractic treatments are excessive and unreasonable. Ms. Paleshnuik has not received any massage therapy or chiropractic treatments to date and she attended approximately 16 physiotherapy treatments per year since the Accident.

[277] Ms. Paleshnuik may well need more of these types of treatments in the future, therefore, it is reasonable that she receive funding for 18 treatment sessions per year, of her choosing, at an average cost of \$100 per session. Accordingly, after applying the relevant multiplier, I am satisfied that she is entitled to \$37,272 ( $\$100 \text{ per session} \times 18 \text{ sessions} \times 20.7069 = \$37,272.42$ , rounded down to \$37,272) in respect of the treatments she chooses, instead of the amounts individually claimed for massage therapy, physiotherapy, and chiropractic treatments.

[278] Dr. Schultz recommended that Ms. Paleshnuik receive ongoing and long-term psychological treatment and ten sessions of marital counselling. In my view, access to six of these sessions per year at a cost of \$220 per session is both medically justified and reasonable because it accounts for the possible variability in her need for these sessions over the long-term. I am therefore satisfied that Ms. Paleshnuik is entitled to \$27,300 ( $\$220 \text{ per session} \times \text{six sessions} \times 20.7069 = \$27,333.11$ , rounded down to \$27,300) for psychological and marital counselling.

[279] Ms. Paleshnuik began receiving Botox injections in 2021 and continued this treatment in 2022. In each year, she received three rounds of Botox injections. Ms. Paleshnuik reported that she finds Botox treatment beneficial because it improved her pain symptoms in her neck and head, and reduced the pressure in her ear. This treatment also led to some improved cognition and speech.

[280] Mr. McNeil estimated the cost at \$550 to \$1,100 for each session consisting of the cost of the medication and injection.

[281] I am satisfied that \$41,000 ( $\$3,300/\text{year} \times 20.7069 \times .6 = \$41,122.62$ , rounded down to \$41,000) for Botox treatments is medically justified based on the benefits Ms. Paleshnuik receives from this treatment. This amount is reasonable taking into account a 40% contingency that she may not continue receiving this treatment three times a year to age 80.

[282] I am also satisfied that she is entitled to \$10,000 for mileage expenses she will incur in the future to obtain the treatments and counselling she requires.

[283] Based on the foregoing, Ms. Paleshnuik is entitled to \$121,000 ( $\$5,389 + \$37,272 + \$27,300 + \$41,000 + \$10,000 = \$120,961$ , rounded up to \$121,000) for her cost of future care.

**Special Damages**

[284] The parties agree that Ms. Paleshnuik is entitled to \$1,150 for special damages.

**Conclusion**

[285] Ms. Paleshnuik is entitled to a damages award of \$663,270 consisting of:

a) Non-pecuniary damages:	\$210,000
b) Past loss of income-earning capacity:	\$91,120
c) Future loss of income-earning capacity:	\$200,000
d) Loss of housekeeping capacity:	\$40,000
e) Cost of future care:	\$121,000
f) Special damages:	\$1,150
<b>Total:</b>	<b><u>\$663,270</u></b>

**Costs**

[286] If the parties wish to address costs, they are to file their respective written submissions within 30 days of the date of these Reasons. The written submissions are not to be more than ten pages, double-spaced.

[287] After both parties have filed their written submissions, they are to arrange a 9:00 a.m. hearing before me of no more than one hour through Supreme Court Scheduling.

[288] If no written submissions are received, Ms. Paleshnuik will have her costs, to be assessed at Scale B.

“Basran J.”