IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Porter v. Feizi,*
2023 BCSC 491

Date: 20230329
Docket: M208928
Registry: New Westminster

Between:

Lori Ellen Porter

Plaintiff

And

Irene Feizi

Defendant

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Plaintiff:	A.E. Harrison A. Attrell
Counsel for the Defendant:	D. Chadwick H. Sayed
Place and Dates of Trial:	New Westminster, B.C. September 26-29, 2022 October 3-7, 2022
Place and Date of Judgment:	New Westminster, B.C. March 29, 2023

Table of Contents

INTRODUCTION **3**
BACKGROUND **3**
THE ACCIDENT AND AFTERMATH **4**
FINDINGS REGARDING INJURIES **6**
Credibility and reliability 6
Expert evidence 7
Loss of earning capacity 14
PAST LOSS OF EARNING CAPACITY **14**
Pre-trial without-accident earning capacity 15
Pre-trial with-accident earning capacity 17
Conclusion regarding past loss of earning capacity 19
FUTURE LOSS OF EARNING CAPACITY **20**
Post-trial without-accident earning capacity 21
Post-trial with-accident earning capacity 22
Conclusion regarding future loss of earning capacity 24
FUTURE COSTS OF CARE **24**
SPECIAL DAMAGES **26**
NON-PECUNIARY LOSS **26**
CONCLUSION **28**

Introduction

[1] Lori Porter suffered injuries in a rear-end collision that occurred on January 26, 2017. The defendant is solely at fault for the accident. The only real issue at trial was the appropriate measure of damages.

[2] Unfortunately, Ms. Porter has not recovered from the accident-related soft tissue injuries she suffered to her neck, back and shoulders. In addition, she continues to suffer ongoing headaches, dizziness, and constant ringing in her ears. Ms. Porter has not returned to work or to many of her usual activities. She seeks damages for non-pecuniary loss, past and future loss of earning capacity, loss of housekeeping capacity, future cost of care and special damages.

[3] The defendant says the plaintiff's injuries do not limit her function to the extent she claims and that she failed to mitigate her losses by failing to return to sedentary employment as recommended by Dr. Paramanoff. The defendant suggests that I should draw an adverse inference because the plaintiff did not provide opinion evidence from any treating health care providers.

[4] After setting out a brief background, I will outline my findings regarding the circumstances of the accident, credibility and reliability, the plaintiff's injuries, and their impact on her function. I will then turn to the various heads of damage.

Background

[5] At the time of the accident, Ms. Porter was 45 years old. She lived in a large home in Maple Ridge with her husband and the younger of her two daughters. Her older daughter had moved out a few months before the accident but returned for a few months during the pandemic. Ms. Porter's husband, two daughters and mother gave evidence at trial. They largely confirmed her pre-accident condition, post-accident complaints and limited activities.

[6] In terms of employment, Ms. Porter started working as an inspector with the BC Ministry of Finance in 2004. In subsequent years, she completed various training and certifications that qualified her to work as a senior investigator in the

investigation unit at the BC Ministry of Finance, a position she held at the time of the accident. Ms. Porter enjoyed her work, which involved investigating contraventions of regulatory legislation. She found her job to be very exciting and very rewarding. Ms. Porter was proud to be one of the few women on the team. Five of Ms. Porter's former co-workers gave evidence at trial, including her former supervisor and an administrative person. The latter two described themselves as friends as well as co-workers of Ms. Porter.

[7] Prior to the accident, Ms. Porter was in good health. She had been involved in two prior motor vehicle accidents. Neither previous accident caused any ongoing injuries. Dr. Heran, neurosurgeon, opined and I accept that it was unlikely that a concussion she suffered in the 2008 accident created any predisposition to additional impairments if she had another accident.

[8] Before the accident, Ms. Porter enjoyed an active lifestyle that included regular workouts, training for a 100 km bike trek, boating, golf and other leisure activities. Ms. Porter was a meticulous housekeeper. She enjoyed repurposing furniture and helping with maintenance projects at a recreational property that she and her husband have near Harrison, BC. Pre-accident, Ms. Porter was high-functioning and energetic, and she cared about her appearance.

The accident and aftermath

[9] On January 26, 2017, Ms. Porter was travelling eastbound on Lougheed Highway in moderate to heavy traffic on a weekday afternoon. Her vehicle was stationary when it was rear-ended by a vehicle driven by the defendant. Ms. Porter felt her body move forward and backward at least once. Both vehicles had scrapes on the bumpers where they collided.

[10] Shortly after the accident, Ms. Porter developed an intense headache. She felt pain and tightness in her neck, pain across her shoulder blades and into her right shoulder, and pain in her back. She felt pressure in her right ear. Within a few hours, she felt dizzy and nauseous.

[11] The following day, her headache and neck pain intensified, causing Ms. Porter to consult her long-time family doctor, Dr. Martin. She reported headache, neck pain, back pain, pain across her shoulders, dizziness, inner ear pressure, and vision problems. A few days later, she saw her chiropractor and made similar complaints. She later developed hip and knee pain, both of which resolved. As of the trial date, Ms. Porter continued to complain of headaches, neck pain, back pain and some cognitive symptoms that she attributed to the accident.

[12] Ms. Porter continued to see Dr. Martin until he retired in December 2021. Dr. Bakker took over as Ms. Porter's family doctor in early 2022.

[13] Since the accident, Ms. Porter has had extensive therapy, including the following:

a) 228 chiropractic treatments between January 31, 2017 and September 26, 2022;

b) 151 sessions of active rehabilitation with a kinesiologist between July 6, 2017 and November 6, 2019;

c) 10 sessions of massage therapy between September 20, 2017 and April 11, 2018;

d) five Botox injections for headaches and neck pain; and

e) one counselling session.

[14] As of the trial date, Ms. Porter continued to see her chiropractor every second week, and she was receiving Botox injections every three months. She had recently started receiving weekly intramuscular stimulation ("IMS") treatments, and she had resumed active rehabilitation sessions twice per week. Ms. Porter regularly took Maxalt for headaches and migraines, Naproxen for pain, and Baclofen for muscle pain to help her sleep. Ms. Porter used self-treatment remedies such as a trigger point stick and a percussive muscle massager. She had recently joined a waitlist to see a psychologist.

[15] Ms. Porter did not return to her regular or any employment following the accident, other than two informal visits to the office in the spring of 2017.

Findings regarding injuries

[16] I find that Ms. Porter suffered soft tissue injuries in the accident that continue to cause her pain, headaches, and some "cognitive inefficiencies" as described by Dr. Greer (explained below). She was recently diagnosed with Somatic Symptom Disorder ("SSD"), which explains why she currently perceives her pain to be more disabling than her physical injuries would otherwise suggest. I accept that there is a possibility that Ms. Porter's physical, psychological, and cognitive symptoms will improve with further treatment, though she will likely continue to suffer from some degree of soft tissue pain. Due to her physical limitations, she is restricted to sedentary work and unable to do heavy seasonal cleaning; however, there is no contraindication to participation in her usual recreational activities, and she is able to do her usual housework provided she paces herself.

Credibility and reliability

[17] The defendant argues that this Court should approach Ms. Porter's evidence about her ongoing pain cautiously because her complaints are subjective in nature. The defendant says caution is appropriate "when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery": *Butler v. Blaylock* (7 October 1981), Vancouver B781505 (B.C.S.C.).

[18] The defendant argues that Ms. Porter's level of disability is not as great as she claims, which the defendant says undermines her credibility and the reliability of her complaints of pain. In support of this position, the defendant points to Dr. Paramanoff's 2019 recommendation that the plaintiff could start a gradual return to work and Dr. Heran's opinion that "the degree of disability appears to be out of keeping with what one would expect following the injuries she has had". However, I am satisfied that Ms. Porter's credibility and in turn the reliability of her complaints of pain are distinguishable from the issue of whether she has proven that her pain or

any other accident-related condition has impaired her earning capacity or her avocational capacity to the extent claimed.

[19] The defendant says that the plaintiff's recall and demeanour over two days of giving evidence at trial are inconsistent with her complaints of memory and other cognitive difficulties and her evidence that sitting aggravates her pain symptoms after 30 minutes. I agree that Ms. Porter appeared to have no difficulty with recall or word-finding when testifying. However, I am cautious about attaching too much weight to my own observations and have considered them in the context of the neuropsychological test results. My own observation that Ms. Porter did not appear to be limited in her sitting tolerance during her time in the witness stand is not inconsistent with the results of Dr. Watt's work capacity assessment, which found she had no restrictions on sitting tolerance.

[20] On balance, I accept that Ms. Porter is generally credible and that she did her best when giving evidence to be as objective and as factual as she could be. Her evidence did not change on cross-examination. There were no significant inconsistencies between her testimony regarding her limitations and the observations offered by her family members and friends. Her complaints have been consistent over time.

[21] That said, her evidence regarding her actual functional capacity is not reliable. The disparity between her perceived and actual functional limitations is explained by the recent SSD diagnosis. In other words, I accept that Ms. Porter has not intentionally exaggerated her limitations. My findings regarding Ms. Porter's degree of impairment rest on the expert evidence rather than on her perception of her degree of impairment.

Expert evidence

[22] Expert evidence also informs my findings regarding the injuries suffered and prognosis for further recovery. The plaintiff filed expert reports from Dr. Paramanoff (physiatrist), Dr. Greer (neuropsychologist), and Dr. Watt (occupational medicine

physician). The defendant filed reports from Dr. Heran (neurosurgeon), and Dr. Connell (radiologist).

[23] Neither party filed opinion evidence or clinical records from any of the plaintiff's treating health professionals. The plaintiff filed Dr. Martin's report to her long-term disability insurer and various notes documenting his view that she remained unfit for work; these documents were not admitted as opinion evidence but rather to prove that Dr. Martin told the plaintiff that she was not fit to return to work. These documents were not helpful in assessing the plaintiff's losses, especially her loss of earning capacity. In his report to the plaintiff's long-term disability insurer, Dr. Martin documented a diagnosis that is not supported by any of the expert evidence filed at trial. The various notes do not provide any justification for his advice that the plaintiff was unfit to return to work.

[24] The defendant asks the Court to draw an adverse inference from the fact that the plaintiff failed to tender a report from Dr. Martin. I decline to do so, as I am not satisfied that his evidence is critical to the fact-finding exercise in this case. There is little difference between the experts regarding the nature of the plaintiff's physical injuries. This is not a case in which there is an issue regarding causation of injury or any suggestion of a relevant pre-existing condition, circumstances in which evidence from the primary care provider might be critical. Dr. Martin's pre- and post-accident clinical records were disclosed as part of document disclosure in this litigation and provided to the experts who provided opinion evidence, and neither party sought to file these clinical records in evidence. As noted, Dr. Martin retired at the end of December 2021, and I am left to infer that this may have been part of the reason there was no report from Dr. Martin (though there was no direct evidence on this point). In summary, this is not a case where the plaintiff has failed to call a treating physician in respect of an important aspect of a matter in dispute: *Buksh v. Miles,* 2008 BCCA 318 at paras. 31–35.

[25] As noted, there is little dispute between the experts regarding the soft tissue nature of Ms. Porter's physical injuries. I accept that Ms. Porter suffered soft tissue

injuries to her neck, upper back, and across her shoulders as a result of the accident. Five-and-a-half years post-accident, Ms. Porter continues to have constant mild to moderate pain in these areas with increased pain with some activities. Some of her neck pain may be attributable to degenerative changes, asymptomatic pre-accident but rendered symptomatic by her injuries. In short, Ms. Porter's ongoing neck and upper back pain is caused by the accident.

[26] Ms. Porter had some pain in her mid and lower back subsequent to the accident, but these symptoms had resolved by the time she saw Dr. Paramanoff on September 25, 2018. By the time she returned to see Dr. Paramanoff on April 27, 2022, Ms. Porter was complaining of occasional pain down her whole back with increased activity. Dr. Paramanoff opined that post-accident muscle deconditioning and imbalance likely factored into her complaints of back pain in April 2022. I accept that Ms. Porter's current intermittent back pain is caused by the accident.

[27] There is still potential for mild improvement of Ms. Porter's soft tissue symptoms and for mild to moderate improvement in symptom management with proper exercise and training, though she is likely to have a residual baseline of symptoms due to her accident-related injuries. Dr. Paramanoff opines and I accept that there is no medical contraindication to Ms. Porter's participation in activities (including sedentary employment) as a result of her soft tissue injuries.

[28] Dr. Watt is less optimistic regarding the potential for symptom improvement; however, I prefer the opinion of Dr. Paramanoff, as she is more qualified based on her specialty in physical medicine and rehabilitation, and she justified her opinion.

[29] As a result of the accident, Ms. Porter developed headaches, including muscle-tension headaches and some with migrainous features. She continues to suffer headaches on a regular and often daily basis. Botox injections provided some relief, but they were discontinued until recently due to funding issues. Dr. Heran opined that it would be reasonable to resume Botox, though he noted that usually a patient will try other medication options before resorting to Botox.

[30] Dr. Heran also opined and I accept that Ms. Porter's current medication regime is not appropriate and may be causing rebound headaches. Dr. Paramanoff also warned that the plaintiff's use of analgesic and anti-inflammatory medication should ideally be limited to avoid contributing to analgesic-rebound headache. I infer from Dr. Heran's criticism of the plaintiff's current medication regime and recommendations for other options that he anticipates potential improvement with better headache management. Dr. Paramanoff offered a less optimistic prognosis for Ms. Porter's headaches based on the fact she had consulted a neurologist specializing in headaches; however, Dr. Heran is more qualified than is Dr. Paramanoff to provide an opinion regarding headaches, and he opined based on his own expertise rather than based on an inference about treatment provided by someone else.

[31] Ms. Porter complains of intermittent dizziness. I accept Dr. Heran's opinion that these complaints stem from neck movements, and no particular vestibular management is required at this time.

[32] Ms. Porter complains of tinnitus, i.e. a ringing in her ears. Although she says it is nearly constant and distracting, Ms. Porter has not been referred to an ear, nose and throat specialist (despite Dr. Paramanoff's deferring to such an expert with respect to these complaints in her initial report dated May 21, 2019). I accept that Ms. Porter experiences some degree of tinnitus, but I conclude it is not a significant factor in her current condition or level of function because she has taken no steps to seek treatment.

[33] Ms. Porter complains of some cognitive symptoms, including difficulties with simple arithmetic, word-finding, short-term memory and reading comprehension. In April 2022, Dr. Greer administered a battery of neuropsychological tests, which disclosed some cognitive deficits in the areas of attention and speed of information processing. Dr. Greer described these deficits as relatively mild, resulting in "cognitive inefficiencies" rather than "cognitive deficits" that may be more pronounced in a demanding work environment and that might be aggravated by an

increase in stress, anxiety, depression, pain or fatigue. Dr. Greer opined and I accept that these mild cognitive symptoms are attributable to pain, tinnitus, and SSD. I will return to the prognosis for cognitive symptoms after considering Dr. Greer's diagnosis of SSD.

[34] Dr. Greer recently offered a psychological diagnosis that may explain Ms. Porter's perception of her own limitations. In her report dated June 21, 2022, Dr. Greer diagnosed Ms. Porter with SSD, with predominant pain, persistent, mild-to-moderate severity. SSD is a clinical diagnosis based on criteria found in the *Diagnostic and Statistical Manual of Mental Disorders*, 5th edition. According to Dr. Greer, SSD encapsulates a level of significant distress associated with symptoms and applies when someone attaches a disproportionate amount of importance to symptoms. In the plaintiff's case, the operative symptom is pain. In other words, SSD reflects the plaintiff's abnormal level of distress in response to her pain. Dr. Greer's diagnosis relies on her finding that Ms. Porter is likely under-reporting her emotional symptoms, a finding that I accept, as it is reasonably grounded and justified in her report. Dr. Greer opines and I accept that Ms. Porter's "current experience of distress about pain is directly related to and [was] caused by the 2017 MVA and the resulting sequelae".

[35] Given the absence of psychological assessment or treatment prior to Dr. Greer's 2022 assessment, it is not clear when Ms. Porter first met the diagnostic criteria for SSD. Further, Dr. Greer declined to opine on whether Ms. Porter would have been able to return to work at an earlier date (specifically in May 2019 when Dr. Paramanoff recommended that she start a gradual return to work), because Ms. Porter's "cognitive deficits and psychological difficulties may have presented differently earlier in her recovery". This gap in the evidence is problematic for the assessment of the plaintiff's loss.

[36] Dr. Greer opined that the plaintiff "has likely reached her plateau regarding her neuropsychological, psychological and physical injuries". I do not accept Dr. Greer's negative prognosis for the following reasons:

a) Dr. Greer acknowledged in cross-examination that her opinion that the plaintiff has likely reached a plateau in the recovery from her physical injuries reflects “the standard literature”; Dr. Heran and Dr. Paramanoff are both more optimistic regarding the potential for further improvement of the plaintiff’s pain symptoms; and

b) the plaintiff has had no psychological treatment to date (aside from one counselling session with an unknown provider), and she is now prepared to seek such treatment.

[37] Instead, I find there is potential for improvement of the plaintiff’s psychological difficulties, which in turn, combined with the potential reduction in her pain, would likely result in a reduction in her cognitive complaints. In her report, Dr. Greer offered a number of positive and negative prognosticators for improvement of Ms. Porter’s cognitive and emotional symptoms. The plaintiff’s overall resiliency and determination, which I accept she has, are positive prognosticators. Dr. Greer acknowledged that improvement of Ms. Porter’s mental health is an important feature to her overall recovery. Ms. Porter’s reluctance to acknowledge a mental health component to her condition has been an impediment to her recovery; however, she is now willing to pursue the cognitive behavioural therapy recommended by Dr. Greer, which may be of benefit.

[38] The defendant argued that the plaintiff failed to mitigate her losses by failing to pursue psychological support as recommended in Dr. Paramanoff’s first report. However, I find that the defendant has failed to prove on a balance of probabilities that “the plaintiff’s injuries *would have* been reduced to some degree” if she had pursued psychological treatment at an earlier stage in her recovery: *Haug v. Funk*, 2023 BCCA 110 at para. 61.

[39] In terms of function, I accept the opinion of Dr. Paramanoff as follows:

a) Ms. Porter is capable of participating in activities (including regular homemaking activities, sedentary work, and recreational activities)

provided she paces herself, optimizes ergonomics, and optimizes mechanics of movement;

b) Ms. Porter is unlikely to return to the more demanding physical tasks of her previous employment (such as carrying out arrests);

c) Ms. Porter would be able to work at least part-time in light or sedentary employment and potentially more than part-time; and

d) Ms. Porter requires assistance with heavier seasonal cleaning.

[40] Dr. Paramanoff specifically deferred to psychology to comment on psychological stressors. In terms of additional functional impacts, I accept Dr. Greer's opinion that Ms. Porter may withdraw socially as a result of pain and its consequences; she may have difficulty with tasks requiring both speed and accuracy; and she may have difficulty handling occupation stress. Dr. Greer anticipates that Ms. Porter may have difficulty tolerating full days and full weeks of work (especially without accommodation), and she is at increased risk of medical time off work.

[41] Dr. Watt opined that it was possible but not probable that Ms. Porter could perform sedentary office duties on a limited part-time basis. To the extent his opinion is inconsistent with Dr. Paramanoff's opinion regarding work capacity, I prefer the opinion of Dr. Paramanoff, as she is more qualified to opine on function based on her specialty in physical medicine and rehabilitation. Further, Dr. Watt's opinion was based in part on his view that Ms. Porter would struggle with prolonged sitting: this comment was based on her self-report and was not confirmed on his own functional capacity testing. I have found Ms. Porter's view of her own functional limitations is not reliable, which means Dr. Watt's opinion is less reliable to the extent it is based on her self-report. I do not accept Dr. Watt's opinion to the extent he anticipates workplace challenges due to "ongoing cognitive difficulties", as he did not have access to Dr. Greer's neuropsychological test results and instead relied on Ms. Porter's perception of her cognitive difficulties.

[42] With these factual findings regarding her injuries, I will turn to the assessment of damages, as it remains the Court's task to translate her injuries to damages: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397, 1982 CanLII 36 (S.C.).

Loss of earning capacity

[43] I find as a fact that Ms. Porter has suffered a loss of earning capacity as a result of the injuries she suffered in the accident. Prior to the accident, she worked in a job that involved both desk work and field work. Due to her injuries, she is no longer able to carry out the physical aspects of the field work, and she is unlikely to regain the capacity to return to that physical type of work. However, the expert evidence she tendered stated that she was capable of returning to sedentary employment with some adaptations as of May 21, 2019 and that she remains capable of sedentary employment, at least on a part-time basis.

[44] The defendant characterizes Ms. Porter's failure to attempt to return to work as a failure to mitigate. In my view, it is more appropriate to assess her past loss of earning capacity based on the real and substantial possibilities established by the expert evidence, adjusted for contingencies. In assessing Ms. Porter's loss of capacity, I have applied a negative contingency to account for the possibility that Dr. Paramanoff's opinion is overly optimistic. The award for future loss of earning capacity needs to account for Ms. Porter's failure to attempt to return to work, as her prolonged absence from the workforce is a negative prognostic factor in assessing the likelihood that she will return to work.

[45] In order to assess Ms. Porter's loss of earning capacity as a result of the accident, it is necessary to assess both what her earning capacity would have been had the accident not happened and what impact the accident has had on her earning capacity.

Past loss of earning capacity

[46] In terms of past loss of earning capacity, Ms. Porter is entitled to be compensated based on what she would have earned but for the injuries sustained in

the accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. When assessing damages for past loss of earnings, I may consider hypothetical events that may have happened in the past provided there is a real and substantial possibility they would have occurred but for the injuries Ms. Porter suffered: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183.

[47] Section 98 of the *Insurance Vehicle Act,* R.S.B.C. 1996, c. 231 stipulates that only net income loss is recoverable.

Pre-trial without-accident earning capacity

[48] To assess her without-accident earning capacity, it is necessary to consider what Ms. Porter's earnings would have been absent the accident. I find as a fact that Ms. Porter likely would have continued working for the BC Ministry of Finance had the accident not happened. I accept that it is likely that she would have been bumped from grid 24 (her pay grade at the time of the accident) to grid 27 in November 2017. I find there was a real and substantial possibility (with a likelihood of 33%) that Ms. Porter would have been promoted to the team lead position in December 2020 with the commensurate pay increase. Based on the economic reports and these findings of fact, I assess Ms. Porter's pre-trial without-accident earning capacity at approximately $520,000. I will now briefly review the facts that underlie these conclusions.

[49] Prior to the accident, Ms. Porter worked full-time, 35 hours per week, as a senior investigator with the BC Ministry of Finance. Her job combined desk work with field work. She and her colleagues investigated violations of provincial regulatory legislation, such as the *Tobacco Tax Act*, R.S.B.C. 1996, c. 452 and the *Motor Fuel Tax Act*, R.S.B.C. 1996, c. 317. Desk work involved working on a computer, including writing surveillance logs, reports to Crown counsel, informations to obtain search reports and reports to the Minister. Ms. Porter had an interest and training in intelligence, and she was building a database of intelligence to assist with investigations. Ms. Porter was the exhibit custodian for her unit, which involved maintaining the exhibit database and the evidence locker. Field work often involved

extended hours and might include surveillance, searches and seizures of contraband cigarettes, or hours standing outside doing fuel tank dips. Mobile surveillance, which involved long days sitting in a vehicle, would happen up to four or five times per year. Approximately 20 – 30% of Ms. Porter's working hours were taken up with field work. Ms. Porter would regularly have to lift boxes that could weigh from 30 to 60 pounds when managing evidence or seizing contraband.

[50] Prior to the accident, Ms. Porter had no difficulty with the physical or intellectual aspects of her job. She received positive reviews from her supervisors, and she was respected and well-liked by her co-workers. Ms. Porter's position was unionized, and her earnings were prescribed by a collective agreement.

[51] After the accident on January 26, 2017, Ms. Porter called her department to say she had been in an accident and would not be coming in. Over the next number of months, she provided her employer with status updates.

[52] In March 2017, Ms. Porter went to work for approximately four hours to move documents to a shared computer drive for an investigation that a colleague had taken over as lead investigator in her place. This computer work aggravated Ms. Porter's headache and neck pain. The task took longer than expected because her pain was such a distraction that she was unable to focus as required.

[53] Ms. Porter went back to the office on one other occasion in 2017, but she does not recall the circumstances of that visit.

[54] While Ms. Porter was off work, three members of the investigation team were bumped from grid 24 to grid 27 in November 2017. Based on seniority within the unit, Ms. Porter likely would have been bumped to grid 27 if she had been working at the time.

[55] In 2018, a competition opened for the newly-created team lead position in the investigation unit. If Ms. Porter had been working at the time, then she likely would have applied for the team lead position. As part of the competition, each of the three grid 27 position holders in the unit did a six-month temporary assignment as team

lead, during which they were paid at a grid 30, step 5 rate. But for the accident, I find that Ms. Porter likely would have been temporarily assigned to the team lead position for six months as part of the competition.

[56] In December 2020, one of Ms. Porter's former colleagues was permanently appointed to the team lead position. This former colleague had more seniority than Ms. Porter in government, but Ms. Porter had more seniority within the unit. I accept that Ms. Porter was as qualified as the other candidates and that there was a real and substantial possibility that Ms. Porter would have been promoted to team lead had the accident not occurred. I assess the likelihood that she would have been promoted at 33%, recognizing that the actual successful candidate would have participated and had a good chance of succeeding even if Ms. Porter had been in the running.

[57] I accept that, but for the accident, Ms. Porter would have worked similar overtime hours to those actually worked by her former colleagues since January 2017. Based on the evidence of her former colleagues' hours and earnings, I find Ms. Porter's regular salary would have been augmented by 15% annually to account for overtime earnings.

[58] The plaintiff filed an expert report prepared by economist Sergiy Pivnenko to assist the Court with the assessment of her loss of capacity claims. Without factoring in overtime earnings, Mr. Pivnenko calculated that Ms. Porter's pre-trial earnings to the date of trial would have been $447,928 without promotion to team lead and $461,536 with promotion to team lead as of January 1, 2021. Based on my finding that her likelihood of promotion was 33% and that she would have earned an additional 15% annually for overtime, I find that her pre-trial without-accident earning capacity was approximately $520,000.

Pre-trial with-accident earning capacity

[59] Because she has not returned to work, the plaintiff says that her past loss of earning capacity matches her pre-trial without-accident earning capacity. The plaintiff relies on evidence that her family doctor has not cleared her to return to

work. However, without evidence regarding the opinion that informs his recommendation, the fact that Dr. Martin did not "clear" her to return to work is of little assistance in my assessment of her income earning *capacity*. As mentioned earlier in these reasons, there was no expert opinion evidence at trial from Dr. Martin.

[60] In assessing the plaintiff's pre-trial with-accident earning capacity, I have relied in particular on the expert opinion of Dr. Paramanoff, who first assessed the plaintiff at the request of her counsel on September 25, 2018 and prepared a report dated May 21, 2019. In her May 2019 report, Dr. Paramanoff opined that "Ms. Porter does not have a medical contraindication from participating in activities as a result of the soft tissue injuries sustained from the MVA". Dr. Paramanoff noted that Ms. Porter required adaptations including micro breaks to avoid prolonged static positioning, pacing of activities, and optimal ergonomics and mechanics. Dr. Paramanoff opined that it was reasonable for Ms. Porter not to have returned to physical work; however, she recommended "a very gradual return to sedentary work" combined with continued strengthening, further headache management and ergonomic optimization of the workplace. In her May 2019 report, Dr. Paramanoff noted that "[t]he extent to which Ms. Porter will tolerate building up work hours is yet to be determined".

[61] Ms. Porter did not follow Dr. Paramanoff's advice to begin a very gradual return to work. Instead, Ms. Porter listened to her family doctor and stayed off work. Ms. Porter confirmed that Dr. Paramanoff's report was provided to Dr. Martin, but she does not recall discussing Dr. Paramanoff's advice to return to work with Dr. Martin.

[62] Because Ms. Porter did not attempt to return to any work, the Court is left to assess her with-accident earning capacity based on hypothetical events where there is a real and substantial possibility that those events would have occurred. In this case, I am satisfied that there is a real and substantial possibility that Ms. Porter could have worked at a sedentary job as of May 21, 2019 based on

Dr. Paramanoff's opinion. Assessing the likelihood of the possibility of the plaintiff's working in a sedentary job and the earnings that she was capable of earning in such a position is more difficult based on the evidence.

[63] In my view, a reasonable assessment of Ms. Porter's with-accident earning capacity from June 1, 2019 (i.e. shortly after Dr. Paramanoff's report was prepared) to the date of trial is $80,000 based on the following factors:

a) I estimate that Ms. Porter could have earned $50,000 per year for a full-time sedentary position after a seven-month gradual return to work (considering her 2019 without-accident base salary was $72,462);

b) A 30% reduction is appropriate to reflect the real and substantial possibility that she would have only been able to work part-time;

c) A further 25% reduction is appropriate in recognition that Dr. Paramanoff may have been wrong when she opined that Ms. Porter was capable of returning to work, including the possibility that Ms. Porter had an undiagnosed psychological condition as of May 2019 that would have reduced the likelihood of a successful return to work.

[64] A with-accident capacity of $80,000 corresponds to a loss of approximately 70% of Ms. Porter's without-accident earning capacity for the same time frame, which strikes me as reasonable in all of the circumstances.

Conclusion regarding past loss of earning capacity

[65] I find that Ms. Porter suffered a net past loss of earnings of $330,000 based on the following:

a) Her pre-trial without-accident earning capacity was approximately $520,000;

b) Her with-accident earning capacity from June 1, 2019 to the date of trial was approximately $80,000;

c) She had actual pre-trial earnings of $38,347 (sick leave, etc.); and

d) an 18% deduction for income taxes and employment insurance premiums (as per Mr. Pivnenko), pursuant to s. 98 of the *Insurance (Vehicle) Act*.

[66] Ms. Porter claimed an additional $4000 for past loss of pension benefits, because she has accrued pensionable service at a lower rate than she otherwise would have but for the accident. However, I decline to award this or any amount for past loss of pension benefits based on Mr. Pivnenko's opinion that there is very little or no past loss of pension benefits because she has saved contributions she would have otherwise made while working.

Future loss of earning capacity

[67] I am satisfied on the evidence that Ms. Porter has suffered a future loss of earning capacity. As a result of her injuries, she is unlikely to return to the physical work that she was able to do prior to the accident, and there is a real risk that she will not return to full-time employment.

[68] Before an award can be made for loss of future earning capacity, a plaintiff must demonstrate "that there is a real and substantial possibility of a future event leading to an income loss": *Perren v. Lalari,* 2010 BCCA 140 at para. 32.

[69] I accept that Ms. Porter's injuries prevent her from carrying out the physical aspects of her previous job. I am satisfied that there is a real and substantial possibility that this limitation will lead to an income loss because she is no longer able to work as a senior investigator and potentially other jobs that require regular physical exertion. I accept that her potential earnings in a purely sedentary job are likely less than what she would have been able to earn as a senior investigator. Further, there is a real and substantial possibility that Ms. Porter will never regain the capacity to work full-time and that, at best, she will be restricted to part-time employment, which would obviously result in an income loss.

[70] That said, I am not satisfied that there is a real and substantial possibility that any cognitive symptoms will lead to any additional income loss. Dr. Greer described Ms. Porter's scores on neuropsychological testing as showing "cognitive inefficiencies" rather than "cognitive deficits". I am not satisfied that there is a real and substantial possibility that such cognitive inefficiencies, even if they persist, will lead to a loss of income beyond the loss attributable to her physical symptoms.

[71] Given these findings, the final step in assessing Ms. Porter's claim for future loss of earning capacity is to assess the value of her loss. This includes factoring in the relative likelihood of the real and substantial possibilities that affect her post-trial without-accident and with-accident earning capacity: *Rab v. Prescott*, 2021 BCCA 345 at para. 47; *Dornan v. Silva*, 2021 BCCA 228 at paras. 93-95.

Post-trial without-accident earning capacity

[72] But for the accident, I find that Ms. Porter's future earning capacity would have been $1,200,000 based on her anticipated earnings as a senior investigator or team lead to retirement at age 67.

[73] I find that Ms. Porter likely would have worked to age 67 if the accident had not happened. Ms. Porter had given little thought to her retirement plans prior to the accident, but she had discussed with her husband that she would work until she maximized her pension, i.e., to age 67 based on when she joined the public service. Ms. Porter loved her job, and it is not unusual for senior investigators to work past the age of 65.

[74] Based on my previous findings regarding likelihood of promotion, my assessment of the plaintiff's post-trial without-accident earning capacity assumes that the plaintiff would have earned an annual base salary of $85,638.

[75] I accept that Ms. Porter would likely have continued to earn overtime wages in addition to her base salary, though at an annual rate of 10% rather than 15%. I would anticipate that the plaintiff's overtime hours would have tapered off as she got older, consistent with the experience of one of her former co-workers,

Mr. Headridge. The plaintiff's historical earnings also reflect that overtime earnings were not consistently 15%, though I recognize that Ms. Porter at times took time off in lieu of pay for overtime hours.

[76] Mr. Pivnenko provided a present value multiplier to age 67, but I accept that his multiplier needs to be reduced to reflect labour market contingencies. I accept Mr. Pivnenko's evidence that risks of unemployment, part-time work and exit from paid employment before anticipated retirement age are below average among unionized public sector workers and generally relate to the onset of health conditions. Mr. Pivnenko was not able to estimate how much lower the unionized public sector rate is as compared to the average rate of 11.9%. I find that a labour market contingency of 8% is appropriate in this case.

[77] With these mathematical anchors, I estimate that Ms. Porter's post-trial without-accident earning capacity to be approximately $1,200,000.

[78] In assessing Ms. Porter's post-trial without-accident earning capacity, I find that the positive contingencies (including the possibility that she would have worked past the age of 67 because she loved her job) balance out the negative contingencies (including that she might have chosen to retire earlier).

Post-trial with-accident earning capacity

[79] My assessment of Ms. Porter's residual earning capacity rests on similar findings to those that apply to my assessment of the plaintiff's pre-trial with-accident earning capacity. Dr. Paramanoff remains of the view that Ms. Porter has the capacity to return to sedentary employment, at least on a part-time basis, provided she pursues a graduated return to work. I accept Dr. Paramanoff's opinion regarding Ms. Porter's residual earning capacity. Dr. Greer does not rule out a return to work but suggests that the likelihood of success depends on accommodations and supports.

[80] To assess Ms. Porter's future with-accident earning capacity, I rely on the following mathematical anchors and assumptions:

a) I estimate that Ms. Porter could earn $35,000 per year for part-time work;

b) Ms. Porter is likely to retire from part-time sedentary work at age 65;

c) Without necessarily having the job security of a unionized public service position, a labour market contingency of 11.9% applies;

d) A 15% reduction is appropriate in recognition that Dr. Paramanoff may be wrong when she opines that Ms. Porter is capable of returning to part-time sedentary work. This reduction is slightly less than the pre-trial with-accident assessment in recognition that her psychological condition has been diagnosed and treatment prescribed.

[81] Taking these factors into account results in an estimate of $325,000 in residual earning capacity.

[82] Dr. Greer identified a number of positive prognosticators for recovery, including Ms. Porter's willingness to pursue treatment and her support network. Dr. Heran identified Ms. Porter's lengthy absence from the workforce as a negative prognosticator for a successful return to work. In considering this negative contingency, I cannot ignore the real and substantial possibility that Ms. Porter's with-accident future earning capacity would have been higher if she had returned to sedentary work in June 2019 as recommended by Dr. Paramanoff, i.e., this negative contingency might have been eliminated if the plaintiff had to returned to work in 2019.

[83] In this case, accounting for contingencies, I would adjust the estimate of her residual earning capacity upward to $400,000. This estimate corresponds to a loss of approximately 66% of Ms. Porter's without-accident post-trial earning capacity, which strikes me as reasonable in all of the circumstances.

Conclusion regarding future loss of earning capacity

[84] Based on my estimate of Ms. Porter's with- and without-accident post-trial earning capacities, my assessment of her future loss of earning capacity is $800,000.

Future costs of care

[85] An award for future care costs is based on "what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff": *Milina v. Bartsch* (1990), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.).

[86] The following treatment costs and costs of care are justified based on the expert evidence at trial:

a) $5630 for 24 sessions at a rate of $235 per session for cognitive behavioural therapy with a psychologist, as recommended by Dr. Greer;

b) $400 for 4 sessions with a kinesiologist or physiotherapist to review her exercise program and advise regarding principles of hurt versus harm, as recommended by Dr. Paramanoff and Dr. Heran;

c) $2350 for 10 sessions with a vocational rehabilitation specialist and $1000 for 10 hours of occupational therapist services to help the plaintiff transition back to work, as recommended by Dr. Paramanoff; and

d) $5000 for heavier seasonal cleaning, based on 8 hours per year to age 70, as recommended by Dr. Paramanoff.

[87] I have estimated the cost for vocational rehabilitation and occupational therapy services based on evidence of the cost of comparable services.

[88] The plaintiff seeks an award of $114,756.20 for a lifetime of Botox injections ($1150 per session every three months). Dr. Heran opined that it was reasonable to continue with Botox for headache management if Ms. Porter is receiving significant benefit. He did not opine on whether Botox injections should continue indefinitely.

Further, Dr. Heran noted that other headache management options included calcium channel blockers, beta-blockers and Topamax, all of which were recommended by the plaintiff's treating neurologist but not trialed by the plaintiff for reasons not explained in evidence. I infer from Dr. Heran's evidence on cross-examination that the cost of these other medications is less than the cost of Botox, but that is far from clear. Doing the best I can with the available evidence, I am prepared to award the plaintiff $75,000 for Botox injections or replacement headache therapy (i.e. approximately two thirds of the estimated lifetime cost for Botox). I have reduced the amount claimed to account for reasonable lower cost replacements and for the potential for headache reduction through better pain management as a result of other prescribed therapies.

[89] The plaintiff also seeks an award of $107,771 for a lifetime of her current medications (Baclofen, Naproxen, and Rizatriptan). However, I accept Dr. Heran's opinion that her current medication regime is not the standard of care for management of headaches, which leads to the conclusion that it is not reasonable to fund the current medications. However, Dr. Heran also recommended that the plaintiff start a trial of standard neuromodulating medications, the cost of which is not in evidence. Again, doing the best I can with the limited evidence available, I award $35,000 for medications other than Botox or its replacement.

[90] Ms. Porter seeks an award of $11,974.56 for six adjunctive treatments per year for pain flare-ups. Dr. Paramanoff recommended that Ms. Porter avoid reliance on passive treatments, but she opined and I accept that it is reasonable for the plaintiff to have access to adjunctive treatments for symptom relief on a time-limited basis, up to six treatments per year. Dr. Paramanoff also opined and I accept that such pain flare-ups are expected to decrease over time. On that basis, I would award $6000 for adjunctive treatments based on $80 per treatment.

[91] Ms. Porter also seeks an award of $84,451.95 for 15 psychology sessions per year for life. Dr. Greer's report is somewhat unclear regarding her recommendation for future treatments beyond her recommendation for the initial set of 24 sessions.

Based on my reading of her report, Dr. Greer recommended “approximately 10 - 15 sessions on an as-needed basis” or perhaps more owing to the complexity of Ms. Porter’s presentation. I do not read Dr. Greer’s report to recommend 15 sessions per year. On that basis, I am prepared to award $4700 for psychological therapy sessions after the first year, i.e., the cost of 20 sessions.

[92] With respect to other treatment recommendations, I generally prefer the opinion of Dr. Paramanoff over that of Dr. Watt given her higher level of training and expertise as a physiatrist. On that basis, I decline to award the cost of a progressive exercise program, supervised yoga, a pain clinic, or any amount for IMS therapy. With respect to IMS, I note that the plaintiff has tried this therapy and found it of no benefit, and that Dr. Paramanoff specifically advised against passive therapies.

[93] Based on the foregoing, the award for future cost of care is $135,080.

Special damages

[94] The parties agreed that an award of $36,133.89 is appropriate to compensate Ms. Porter for out of pocket expenses incurred as a result of the accident. This award includes the cost of user fees for treatment, mileage related to treatment, and Botox.

Non-pecuniary loss

[95] I am satisfied that Ms. Porter’s injuries have caused her pain, reduced her function and adversely affected her enjoyment of life. An award of $150,000 is reasonable compensation for her non-pecuniary losses.

[96] An award for non-pecuniary loss is intended to compensate a plaintiff for her pain and suffering, her loss of enjoyment of life, and her loss of amenities, both to the date of trial and into the future. In assessing Ms. Porter’s loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal to SCC ref’d, 31373 (19 October 2006).

[97] Ms. Porter has had continuous pain in her neck and upper back for more than five and a half years. She is likely to have some residual pain even if her current pain symptoms abate or are better tolerated. Ms. Porter's recovery has been complicated by her recently diagnosed SSD.

[98] Ms. Porter's pain and her reaction to her pain have limited her recreational activities, her social interactions, and her housekeeping tasks. She is no longer the high-functioning, energetic person that she was before the accident.

[99] That said, Ms. Porter is capable of her regular homemaking activities and could resume many of her pre-accident leisure activities as long as she builds up her strength and tolerance for activities she has not done for a while.

[100] Ms. Porter has suffered significant loss, non-pecuniary as well as pecuniary, as a result of her inability to return to work as a senior investigator. Ms. Porter was justifiably proud of her role and her job performance, and she enjoyed very much being part of a team that carried out an important public function. In some ways, Ms. Porter has lost part of her identity.

[101] The plaintiff submits that an appropriate award for non-pecuniary loss would be $200,000. She relies on *Colgrove v. Sandberg*, 2022 BCSC 671; *Tompkins v. Meisters*, 2021 BCSC 2080; and *Jantzi v. Moore*, 2020 BCSC 1489. She also seeks an additional award of $50,000 for past and future loss of housekeeping capacity.

[102] The defendant submits that an appropriate award for non-pecuniary loss would be in the range of $80,000 to $110,000. The defendant relies on *Tait v. Soda*, 2020 BCSC 638; *Constantinescu v. Van Ryk*, 2021 BCSC 18; *Pang v. Burns*, 2020 BCSC 356; and *Purewal v. Uriarte*, 2020 BCSC 1798. The defendant argues that the plaintiff's loss of housekeeping capacity ought to be considered as part of the plaintiff's non-pecuniary award, as there was no evidence of actual expenditures on housekeeping services or evidence that family members undertook functions that would otherwise have to be paid for: *Riley v. Ritsco*, 2018 BCCA 366 at paras. 98, 101–102.

[103] An award of non-pecuniary damages must be fair and reasonable to both parties. Comparable cases may provide some guidance as to a reasonable non-pecuniary award, though each case turns on its facts. In my view, generally speaking, the plaintiffs in the cases cited by Ms. Porter have more significant impairments or more negative prognoses or both. On the other hand, the plaintiffs in the cases cited by the defendant are less seriously injured or affected by their injuries.

[104] I find that an award of $150,000 is appropriate in the circumstances of this case, after considering the *Stapley* factors and awards made in similar cases. This award reflects the difference between Ms. Porter's without-accident and with-accident conditions and factors in the potential for some improvement of her pain and her pain reaction.

[105] This award for non-pecuniary loss compensates Ms. Porter for any loss in respect of housekeeping. In my view, aside from an inability to carry out heavy housekeeping tasks (for which she has been compensated under the future care award), the plaintiff's loss in respect of housekeeping relates to increased pain and suffering rather than a loss of capacity: *Kim v. Lin*, 2018 BCCA 77 at para. 33.

Conclusion

[106] To summarize, the defendant is liable to pay the following damages to Ms. Porter:

Head of Damage	**Award**
a. Past Loss of Earning Capacity	$330,000.00
b. Future Loss of Earning Capacity	$800,000.00
c. Costs of Future Care	$135,080.00
d. Special Damages	$36,113.89
e. Non-Pecuniary Damages	$150,000.00
TOTAL	**$1,451,193.89**

[107] Ms. Porter is entitled to pre-judgment interest on the award of special damages. Ms. Porter is also entitled to her costs, subject to any offers or other matters that may require an adjustment to her entitlement to costs. If the parties wish to address costs or pre-judgment interest on special damages, they may arrange with court scheduling in the next 30 days to make submissions before me for this purpose.

"Lamb J."