IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lundgren v. Taylor,*
2023 BCSC 612

Date: 20230417
Docket: M189002
Registry: Vancouver

Between:

Natasha Jayne Lundgren

Plaintiff

And

Douglas Taylor

Defendant

\- and –

Docket: M193465
Registry: Vancouver

Between:

Natasha Jayne Lundgren

Plaintiff

And

Lynda Diane Eyra

Defendant

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiff: S.T. Cope

Counsel for the Defendants: M.F. O'Meara

Place and Date of Trial/Hearing: Vancouver, B.C.
February 6-10, 13-17 & 21-24, 2023

Place and Date of Judgment: Vancouver, B.C.
April 17, 2023

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Overview

[1] The plaintiff seeks damages for injuries from two motor vehicle accidents on August 25, 2016 (the "2016 Accident") and June 24, 2018 (the "2018 Accident"). Liability has been admitted for the 2016 Accident but not for the 2018 Accident.

[2] The plaintiff has a complex history of other health issues, including physical and mental health challenges. In addition, the plaintiff was involved in a motor vehicle accident on January 16, 2012 (the "2012 Accident"), the action for which was settled in 2017. Currently, the plaintiff has significant functional limitations, using a motorized wheelchair for outings and requiring the assistance of home care aides. The task for the Court is determining liability for the 2018 Accident, and causation and assessment of damages for the 2016 Accident and the 2018 Accident.

Background of the Plaintiff

[3] The plaintiff Natasha Lundgren is currently 47 years old and resides in Chilliwack, BC. Ms. Lundgren grew up in the Chilliwack area and graduated from secondary school in 1993. She was married in 2001, and moved to Hope. She graduated with a certificate in early childhood education from the University of the Fraser Valley in 2003. Around 2005, Ms. Lundgren converted her home's basement in Hope into a childcare centre with a capacity for up to eight children.

[4] The plaintiff then looked to expand her childcare business, and in 2009 opened a second location in Chilliwack in premises rented from the local school board. After approximately a year, the school board moved to end the rental and Ms. Lundgren looked to purchase a residence in Chilliwack to house her childcare centre. In 2010, Ms. Lundgren purchased a home on Reece Avenue with a $50,000 down payment. The home was renovated to be a childcare centre. Ms. Lundgren had plans to open up to four childcare centres.

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Medical History of the Plaintiff Before the 2012 Accident

Diagnosis of Schizophrenia

[5] Ms. Lundgren was diagnosed with schizophrenia when she was 19 years old. She first began noticing symptoms when she was about 14 years old. She testified that she has auditory hallucinations, where she hears voices in her head. Ms. Lundgren testified the voices are usually those of three men and one woman, and the voices sometimes urge her to harm herself. While in high school, she was so distressed by the voices that she attempted suicide. To get away from the voices, Ms. Lundgren would go for long walks outside. She testified that sometimes she called the crisis line for help, which led to the police tracing her by telephone to take her to the hospital. When the officers arrived at her location, she would often run away from them. During one of these encounters, her right shoulder was injured by an officer when her arm was twisted. She has a history of involuntary admissions to the Fraser Canyon Hospital in Hope due to mental health concerns. From January 2010 to January 2012, she agreed there were approximately 38 hospitalizations due to schizophrenia. The hospital records show continuing visits for mental health concerns through to 2016.

[6] Ms. Lundgren has been under the care of a psychiatrist since her early 20s, and placed on medications to control her hallucinations. It took time to find a medication that worked for her. She testified that it was approximately 1997 or 1998 when she found an effective medication. At a later point, that medication no longer worked and she changed to a different medication around 2005. Currently, the plaintiff receives an injection twice a month to keep her hallucinations under control.

Restrictions Placed on her Daycare Centres

[7] As a result of a complaint, an investigation was conducted by the local licensing authority into the plaintiff’s daycare centres in 2010. The complaint related to the plaintiff’s mental health issues. As a result of the investigation, restrictions were placed on the plaintiff in her childcare work, including the condition that the plaintiff would always work in the company of a qualified adult.

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The 2012 Accident

[8] On January 16, 2012, Ms. Lundgren was driving her 2004 Honda Civic westbound on Highway 1 from Hope to Chilliwack in a snowstorm with whiteout conditions. She was behind a truck and was followed by a Peterbilt semi-truck and trailer. She testified that when the truck in front of her suddenly stopped, she braked and aimed for the left ditch. Her vehicle was hit from behind by the semi-truck. Her vehicle spun around, and ended up against a snow bank. Ms. Lundgren's vehicle could not be driven, and she was taken to the hospital by ambulance.

[9] Ms. Lundgren suffered soft tissue injuries to her neck, shoulders, mid and low back, both knees and left ankle. She also had headaches, which she described as like a knife sticking into her head. She testified these headaches were different from migraine headaches she had previously. Ms. Lundgren testified these headaches were intense, and she was still having quite a few by 2014. Her back was aching badly, and it felt like the whole area was bruised. She testified that anything she tried to lift she would drop due to the shoulder pain. It was difficult to be on her feet due to the left ankle pain. Her back pain also made it difficult to sleep. After the 2012 Accident, the plaintiff also began having issues with her memory.

[10] The 2012 Accident caused her auditory hallucinations to flare up. While her hallucinations were previously mainly occurring during the night, she began having more daytime hallucinations after the 2012 Accident. As a result of this, Ms. Lundgren had more interactions with the police. She developed a relationship with some of the officers, and in 2013 made a training video for the RCMP on how to deal with persons with mental health issues.

[11] She testified that due to a combination of the hallucinations and physical pain, she was not able to work in her daycare centres after the 2012 Accident. Her Reece Avenue residence was foreclosed upon and she lost her down payment. Ms. Lundgren filed for personal bankruptcy in 2013.

[12] Ms. Lundgren received treatments from a chiropractor, massage therapists and a physiotherapist after the 2012 Accident. The plaintiff's friend, Coralee Lord, testified that the plaintiff started using a cane after the 2012 Accident.

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<u>Work at Childcare Centres after the 2012 Accident</u>

[13] Ms. Lundgren testified that she volunteered at childcare facilities in 2014. In the fall of 2014, she began paid employment with the Hope Preschool Daycare Centre. However, after a couple of weeks, Ms. Lundgren found she could not work full time and cut back her hours to part time, and then to casual. She also sought accommodations from her employer, such that she could sit in a chair instead of on the floor with children. She earned approximately $4,781 in 2014 and $601 in 2015 from the Hope Preschool Daycare Centre.

[14] Her employer, Loesje Angel, provided Ms. Lundgren a written offer of employment in 2015. However, the plaintiff did not accept the job at that time. Ms. Lundgren testified that Ms. Angel continued to offer her a job at the Hope Preschool Daycare Centre in 2016, and Ms. Lundgren also had a job offer from another childcare facility at the same time. Ms. Lundgren did not commit to either job, but testified that she was considering returning to work in October 2016.

[15] Sandra Swecera worked with the plaintiff at the Hope Preschool and Daycare Centre in 2014. Ms. Swecera testified about the plaintiff's difficulties at work in 2014, noting that the plaintiff appeared strained in her movements. The plaintiff had difficulty with stairs at the daycare, and she was wincing with discomfort.

[16] The plaintiff began receiving a disability pension from the Canada Pension Plan in 2013. She is currently still in receipt of that monthly pension.

<u>Medical Condition of the Plaintiff Before the 2016 Accident</u>

[17] Ms. Lundgren got a puppy in August 2015, and she testified that the puppy had a positive impact on her ability to deal with her hallucinations. She explained that as she did not want to be separated from her puppy by being admitted to the hospital, she had to learn new strategies to cope with her hallucinations.

[18] After the 2012 Accident, the plaintiff was receiving assistance with housekeeping from a friend. The plaintiff testified that she needed help with some tasks such as mopping the floors and scrubbing the toilet.

[19] Prior to the 2016 Accident, the plaintiff testified she was again able to walk outside for two hours or longer. She wore braces on her left knee and left ankle for support due to pain. She continued to have memory issues, and required lists as reminders. She was still experiencing headaches, shoulder pain and back pain, which worsened with activity. However, the plaintiff believed her level of pain was decreasing. She was feeling tired during the day. The plaintiff agreed that she had a discussion with her family doctor in 2015 about the plaintiff being unable to return to any form of work. She testified that she believed the 2012 Accident changed her life.

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<u>The 2016 Accident</u>

[20] On August 25, 2016, the plaintiff was with her mother, driving eastbound on Highway 1 near Langley, BC. The plaintiff testified that she was travelling at 70 to 80 km/h when she was rear ended by a motorcyclist. The plaintiff pulled over on to the shoulder of the highway. Her mother exited the car but the plaintiff did not get out. A police officer attended the scene and provided a motor vehicle incident statement for the plaintiff to complete at the scene. Under injuries, Ms. Lundgren wrote “tailbone pain, nausea and left ribs”.

[21] The plaintiff’s mother drove to the hospital in Chilliwack. Ms. Lundgren was examined by an emergency room physician. The clinical notes of the physician state the plaintiff advised the doctor that she had nausea, tailbone and left rib pain.

[22] The plaintiff received massage therapy, physiotherapy, chiropractor care, footcare and counselling after the 2016 Accident. The plaintiff testified she suffered the following injuries from the 2016 Accident:

- aggravation of her right shoulder pain;
- aggravation of her left ankle pain;

- aggravation of her headaches and neck pain;
- new hip pain, including low back pain and tailbone pain which wrapped around her hips;
- new left shoulder, left wrist and left ribs pain; and
- increased driving anxiety.

[23] After the 2016 Accident, the plaintiff testified that she needed more assistance with housekeeping and meal preparation than she had been receiving after the 2012 Accident. The plaintiff also started using a walker to help her stand up from a sitting position. She was also not able to walk for more than 15 minutes at a time, as her hips would be in pain.

[24] In 2017, the plaintiff and her husband moved to Chilliwack. The plan was for the plaintiff's mother to live with them, so the plaintiff could assist her mother who had health issues. The plaintiff and her husband purchased a house; renovations were carried out inside, as it was initially in rough shape. Currently, the plaintiff and her husband live in the upstairs portion of the house, and the plaintiff's mother lives downstairs.

The 2018 Accident

[25] On June 24, 2018, the plaintiff was driving on 1st Avenue in the curb lane near the intersection of Young Street in Chilliwack. A vehicle in the left lane switched into the curb lane and hit the plaintiff's vehicle. As the plaintiff was aware there were pedestrians on the sidewalk, she slammed on her brakes as she was afraid her vehicle would mount the sidewalk. The plaintiff testified that she brought her vehicle to a very sudden stop. She then pulled over, and got out of her vehicle to exchange information with the other driver.

[26] Ms. Lynda Eyra was the other driver in the left lane. She testified that she had signalled to turn left, though she moved her vehicle to the lane on her right. Ms. Eyra

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testified that there was very little damage to both vehicles, so she felt there was no need to exchange information.

[27] The plaintiff testified that she walked back to her vehicle to get her cell phone to take photos of the licence plate of the other vehicle. Ms. Lundgren then called the police and reported the collision. She then drove home. When she got out of her vehicle, she had difficulty and had to hold on to the car door to pull herself up. She testified that her hips and both ankles were in pain. She had difficulty going up the outside steps to her home. Her friend Coralee Lord came to drive her to the hospital.

[28] Ms. Lundgren was examined by an emergency room physician at the hospital. The clinical notes of the doctor state that the plaintiff was concerned about her right shoulder, right thumb pain, headache, left ankle sprain, left hip and left groin strain.

[29] The plaintiff testified she suffered the following injuries from the 2018 Accident:

- aggravation of her right shoulder pain, which produced swelling through the right arm at night;
- pain and swelling in both ankles, more the right ankle than the left;
- increased hip pain and back pain; and
- increased driving anxiety.

[30] The plaintiff received care from massage therapists, a chiropractor, an aquatic rehabilitation specialist, a physiotherapist, a registered psychologist and a kinesiologist.

[31] After the 2018 Accident, the plaintiff put in modifications in her home, such as grab bars near her bed and in the shower, and a stair lift for the outside. The plaintiff started using other equipment, such as an adjustable bed, a walker with wheels, and a motorized wheelchair.

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[32] Ms. Lord testified that after the 2018 Accident, the plaintiff rarely changed out of her pajamas, and always had a cane and a walker nearby. The plaintiff's home became more disorganized and cluttered.

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Other Medical Concerns

[33] The plaintiff has various other medical issues, including the following:

- In addition to schizophrenia, the plaintiff has been diagnosed with generalized depressive and anxiety disorder.
- The plaintiff was diagnosed with a small tear to the tendon on the right shoulder in 2014.
- The plaintiff was previously diagnosed with sleep apnea, and had throat surgery. She started using a continuous positive airway pressure (CPAP) machine in March 2016, which improved her sleep.
- The plaintiff had diverticulitis, and colon resection surgery was performed in January 2016. Further surgery was required in October 2016 when a hernia developed as a complication.
- The plaintiff was diagnosed with breast cancer in 2019, and had a double mastectomy.

The Medical Evidence

a) The Plaintiff's Medical Evidence

Dr. Ron Giesbrecht, Chiropractor

[34] Dr. Giesbrecht has been treating the plaintiff since 2009. He prepared a medical legal report in September 2020 and testified at trial. He was qualified to provide expert evidence as a chiropractor.

[35] The plaintiff was treated in her neck, right shoulder, mid back and left knee from 2009 to January 2012. Dr. Giesbrecht noted in his report that, in his opinion, these

areas resolved but could be symptomatic with use. He treated the plaintiff for short duration headaches, upper neck stiffness, right shoulder strain with pain, and left knee tenderness and instability.

[36] After the 2012 Accident, Dr. Giesbrecht treated the plaintiff for unremitting headaches, decreased range of motion in the neck, and pain in left ribs. The left knee became worse, and the low back, mid back and right shoulder continued to need more attention than before the 2012 Accident. Dr. Giesbrecht's opinion was that while the plaintiff made some progress after the 2012 Accident, she still required more than 30 treatments in 2015. Her mid-thoracic spine, right shoulder, left knee, and left foot were recurring concerns. He was of the view that the plaintiff had improved by 50% from the 2012 Accident to just before the 2016 Accident.

[37] After the 2016 Accident, Dr. Giesbrecht's opinion was that the plaintiff suffered from tailbone pain on the left side, left groin pain, left shoulder pain, and stomach pain from the seatbelt. The plaintiff had immediate nausea. Her right shoulder was aggravated and her left wrist jammed. Ms. Lundgren had decreased range of motion in her neck. Her left shoulder was restricted in movement, her left wrist was swollen, and muscles in her back and neck were affected. Dr. Giesbrecht's opinion is that Ms. Lundgren's injuries from the 2012 Accident and the 2016 Accident have become chronic. He did not provide an opinion on the 2018 Accident.

Dr. Lori Laughland, Family Physician

[38] Dr. Laughland was the plaintiff's family doctor from 2009 to 2018. She provided a medical legal report on June 30, 2018, which was admitted into evidence at trial. She was not called to testify.

[39] Dr. Laughland's opinion is that the plaintiff has chronic soft tissue pain on her left lumbar area and left rib pain. In Dr. Laughland's opinion, the 2016 Accident was at least 85% of the cause for Ms. Lundgren's symptoms. It must be noted that Dr. Laughland's report was prepared before the 2018 Accident. Dr. Laughland noted that the plaintiff has pre-existing physical and memory issues unrelated to the 2016 Accident, which are barriers to the plaintiff's ability to work.

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Dr. Chuck Jung, Psychologist

[40] Dr. Jung assessed the plaintiff on four occasions in September and October of 2019 for the purpose of preparing a medical legal report. In addition, Dr. Jung continued to treat the plaintiff from 2019 to 2022.

[41] Dr. Jung's report was entered in evidence, and he was called to testify at trial. He was qualified to provide expert evidence as a psychologist.

[42] Dr. Jung's opinion is that if not for the 2016 Accident and the 2018 Accident, the plaintiff would not have developed her driving and vehicle phobia, which in his opinion meets the DSM-5 criteria of a specific phobia, major depressive disorder. In his opinion, the plaintiff also has somatic symptom disorder, which is when a person focuses significantly on symptoms like pain, causing emotional distress.

Dr. Malgorzata M. Sudol, Physical Medicine and Rehabilitation

[43] Dr. Sudol assessed the plaintiff on September 12, 2022 and prepared a medical legal report. Her area of expertise is in the assessment, diagnosis and treatment of musculoskeletal injuries, including the spine, neck, back, shoulders, elbows, wrists, hips, knees, ankles and feet. She also has expertise in rehabilitation, which focuses on the evaluation of patients with brain injuries, spinal cord injuries, multi-trauma, orthopedic conditions, neuromuscular conditions, pain disorders and general deconditioning. Her report was entered as evidence and she was qualified to testify as an expert at trial.

[44] Dr. Sudol's opinion was that the plaintiff suffered soft tissue injuries in her neck and upper back as well as in the lumbar and pelvic areas in the 2016 Accident and the 2018 Accident. Dr. Sudol noted she could not identify the exact cause of the plaintiff's right ankle pain, as no significant pathology was identified by ultrasound or MRI imaging. In terms of the plaintiff's current level of functioning, Dr. Sudol's assessment is as follows:

> Since the 2016 and 2018 accidents, Ms. Lundgren has experienced a significant functional decline. Ms. Lundgren sustained multiple musculoligamentous injuries in the 2016 and 2018 accidents, which have

> contributed to persistent musculoskeletal symptoms; however, based on these injuries alone, I would not expect her to be as limited in ambulation and daily personal and household activities as she currently is. It appears that multiple factors have contributed to the reduction in her activity tolerance including chronic pain with a component of central sensitization, profound fatigue, and her mental health with anxiety on top of a complex psychiatric history.

[45] In Dr. Sudol's view, the prognosis for the plaintiff's improvement is guarded.

Dr. John Armstrong

[46] Dr. Armstrong is a physician with postgraduate training in neurology. He has practised for 30 years in the field of complex chronic pain, which is an interdisciplinary area of medicine. He prepared a medical legal report which was entered in evidence. As well, he testified and was qualified as an expert in this area.

[47] Dr. Armstrong assessed the plaintiff on October 12, 2022. His opinion was that the plaintiff has a chronic myofascial disorder, which was pre-existing since the 2012 Accident, and which became worse and more widespread in the lower body after the 2016 Accident and the 2018 Accident. He was also of the view that the plaintiff has chronic fatigue syndrome, chronic schizoaffective disorder, and anxiety disorder.

[48] In his view, the plaintiff's likelihood of further improvement is "very guarded".

(b) The Defendants' Medical Evidence

Dr. Robert Miller, Psychiatrist

[49] Dr. Miller was qualified at trial to give opinion evidence as a psychiatrist, in the diagnosis and treatment of psychiatric conditions. He assessed the plaintiff on September 29, 2022 and prepared a medical legal report.

[50] His opinion is that the plaintiff fits the criteria for a diagnosis of a somatic disorder with predominant pain. In his view, the plaintiff was a person of high vulnerability prior to the accidents, and the pain she experienced after the accidents exacerbated what was likely already a predisposition to a somatic symptom disorder with predominant pain.

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[51] Dr. Miller's view is that the plaintiff would probably have continued to experience exacerbations of her mental illness even without the 2016 Accident and the 2018 Accident. His opinion is that an individual with schizophrenia such as the plaintiff would decline in function with age, regardless of the accidents.

Dr. Suzanne Christie, Family Physician

[52] Dr. Christie was the plaintiff's primary care physician in Hope from 2010 to 2015.

[53] She prepared a medical legal report for the plaintiff on August 21, 2015, in relation to the 2012 Accident. She also testified at trial.

[54] In her August 2015 report, Dr. Christie summarized the approximately 77 visits she had with the plaintiff from January 2012 to August 2015. Dr. Christie's view was that the 2012 Accident was the primary trigger for the plaintiff's disability. Dr. Christie's view was that the 2012 Accident triggered an exacerbation of her schizophrenia, resulting in the plaintiff experiencing daytime hallucinations. The plaintiff also developed cognitive issues, requiring the creation of lists to remind her of daily tasks. The plaintiff developed chronic pain from her headaches and soft tissue injuries. Dr. Christie's view was that the plaintiff would likely not return to work in the future. In cross-examination by the plaintiff's counsel, Dr. Christie agreed that she was providing her opinion in 2015 as to the plaintiff's capacity for work in the near future.

Dr. Jonathan P. Hawkeswood, Physical Medicine and Rehabilitation

[55] Dr. Hawkeswood assessed the plaintiff on October 26, 2022, and prepared a medical legal report. He also testified at trial. He has the same general area of expertise as Dr. Sudol.

[56] In Dr. Hawkeswood's view, he could not identify any significant structural injury or lasting tissue damage from the 2016 Accident or the 2018 Accident. His opinion is that the plaintiff's mental health issues and deconditioning are the main contributors to her current pain symptoms. His opinion is that the plaintiff has probably developed a generalized pain disorder, with features of central sensitization. He believes the

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plaintiff would benefit from a more active rehabilitation plan with both aquatic and land-based exercise components. His view is that her functional limitations are significantly greater than would typically be expected, and that mental health issues are likely the cause of the limitations and not the accidents. In his view, from a physical medicine perspective, the plaintiff's prognosis is fair.

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Credibility and Reliability

[57] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013):

> 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. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[58] I generally found the plaintiff to be honest in describing her injuries and their effects on her. She provided the Court a full account of her lengthy medical history beginning with her diagnosis of schizophrenia, the motor vehicle accidents, to her current level of functioning. However, I note she has suffered from memory problems since the 2012 Accident, and with the passage of time and the successive accidents, there is a concern about the reliability of her recollections about which injuries happened with which accident. As such, where possible, I will look to the medical evidence such as clinical notes to determine the nature and timing of the injuries.

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Liability for the 2018 Accident

[59] The plaintiff argues that the defendant Ms. Eyra is wholly liable for the 2018 Accident. The evidence is the plaintiff was in the curb lane, and the defendant's vehicle changed into the curb lane and hit the plaintiff's vehicle. The defendant testified she signalled a left turn with her vehicle, when in fact she turned right into the curb lane. As the plaintiff was already established in the curb lane, Ms. Eyra is solely responsible for the collision: s. 151 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. I find the defendant Ms. Eyra liable for the 2018 Accident.

Causation

Causation and Pre-Existing Conditions

[60] The basic legal principles respecting causation are found in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [*Athey*]. The general test for causation is the "but for" test requiring the plaintiff to prove on a balance of probabilities that his injury and loss would not have occurred but for the negligence of the defendant. This causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense: see *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328, 1990 CanLII 70.

[61] It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable. The contribution to the cause of the injury must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

[62] The law regarding causation of damages and pre-existing conditions was summarized by Madam Justice Fisher in *Chappell v. Loyie*, 2016 BCSC 1722 as follows:

> Causation of damage and pre-existing conditions

> [10] As the court said in *Blackwater* [*v. Plint*, 2005 SCC 58], a plaintiff is only to be restored to his original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this is to be taken into account in reducing the overall award: *Athey,* at para. 35; *Moore v. Kyba*, 2012 BCCA 361 at para. 43. In addition, damages caused by other non-tortious causes that occur after the defendant's wrongful act must be taken into account: *Blackwater,* at para. 80. This is referred to as the "crumbling skull" doctrine. It is important to note that any reduction made to take these factors into account does not reduce the damages; it simply awards the damages which the law allows: see *Blackwater,* at para. 84.
>
> [11] In addition, a tortfeasor is liable for a plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. As the court said in *Athey,* at para. 34, the tortfeasor must take the victim as he finds him, and is liable even though the plaintiff's losses are more dramatic than they would be for the average person. This is known as the "thin skull rule".
>
> [12] There has been some confusion in the law with respect to these labels. In *A. (T.W.N.A.) v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, the court clarified this at para. 30 by stating that the "simple idea" expressed in *Athey,* was clear and direct and "both latent and active pre-existing conditions must be considered in assessing the plaintiff's original position." At para. 48:
>
>> …Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.
>
> [13] Hypothetical and future events – how the plaintiff's life would have gone without the tortious injury – need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, or the probability of their occurrence. A future or hypothetical possibility is to be taken into account "as long as it is a real and substantial possibility and not mere speculation": *Athey,* at para. 27.

[63] These principles were recently reiterated by our Court of Appeal in *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*]:

> [39] …the appellant fails to distinguish between the legal concepts of causation and compensation. This distinction was the focus of the excerpt the trial judge quoted at para 66 of his reasons from the judgment of then-Chief Justice McLachlin in *Blackwater v Plint*, 2005 SCC 58, which I repeat for convenience:

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> [78] … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. …
>
> [40] As the trial judge explained in para 67, referring to the discussion in *Athey …* at paras 32–35, tortfeasors must take their victims as they find them even if the injuries are more severe than would be expected for a normal person (the "thin skull" rule), but need not compensate the plaintiff for the consequences of a pre-existing condition that the plaintiff would have experienced anyway (the "crumbling skull" rule).
>
> [41] As this Court explained in *TWNA v Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para 22, in discussing *Athey*, a defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes. Once causation has been proven, the tortfeasor is fully liable for the damage caused by his or her wrongful conduct. But when it comes to the assessment of damages, different considerations apply, as the notion of the crumbling skull plaintiff illustrates.

[64] As I understand it, this Court must determine which injuries, if any, were materially caused or substantially contributed to by the 2016 Accident and the 2018 Accident. Even where there are other potential non-tortious causes of an injury, such as psychiatric illness, the defendant will still be found liable if the plaintiff can prove that the accident materially caused or substantially contributed to the injury. However, in assessing damages, the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.

[65] In assessment of damages, the Court must consider the plaintiff's pre-existing condition. Here, the Court must consider whether there was a measurable risk that the plaintiff's current symptoms would have manifested without the 2016 Accident and the 2018 Accident. This measurable risk is understood as a real and substantial possibility, and if the Court so finds, it must assess the relative likelihood of it occurring. This was explained in *Dornan*:

> [62] As I see it, it is not necessarily determinative to say that the cases where contingency deductions have been applied tend to involve degenerative conditions. We begin with the first question. Did the plaintiff suffer from a pre-

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existing condition? That he did is not seriously challenged. That is what predisposed him to more serious consequences from the concussion caused by the collision than others might have experienced. The question then becomes, as articulated in *Athey*: is there a "measurable risk" that this pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence?

[63] Such discussion, of course, of necessity concerns hypothetical events: what will or what would have happened in the future? As observed by Mr. Justice Goepel in *Grewal v Naumann*, 2017 BCCA 158 at para 48, and as I discuss further below, "a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation". A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable.

[64] It follows that the process is one of determining whether, on the evidence, the contingency or risk is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood. This was explained succinctly by Justice Major in *Athey*:

> 27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 1977 CanLII 1332 (ON CA), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).

[Emphasis added in *Dornan*.]

Indivisible and Divisible Injuries

[66] Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes: *Bradley v. Groves*, 2010 BCCA 361 at para. 20.

[67] As the plaintiff has been involved in three successive motor vehicle accidents, the Court must determine whether the injuries from the 2012 Accident, the 2016 Accident and the 2018 Accident were divisible or indivisible. For indivisible injury caused by multiple tortfeasors, the tortfeasors are jointly and severally liable: *Athey*.

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However, the rule against double recovery may come into play where one of these actions have resulted in a settlement: see *Ashcroft v. Dhaliwal*, 2008 BCCA 352.

[68] Whether injuries are divisible or indivisible is a finding of fact based on the evidence. Where there is evidence that shows a plaintiff's injuries have plateaued or become chronic, it is possible to find the injuries from an earlier accident to be divisible from injuries suffered in subsequent accidents: see *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630 at paras. 169–172 and *Uppal v. Judge*, 2016 BCSC 642 at paras. 84–87.

[69] In this case, the plaintiff argues that the injuries are indivisible from the three accidents. The defendants concede the injuries are indivisible between the 2016 Accident and the 2018 Accident; however, the defendants argue that the injuries from the 2012 Accident are separate and divisible.

[70] In this case, there is evidence which permits the Court to separate out the injuries from the 2016 Accident and 2018 Accident from the 2012 Accident. There is evidence of the medical condition of the plaintiff before the 2016 Accident, for example the report of Dr. Christie in 2015 prepared for use in the litigation of the 2012 Accident, as well as her clinical notes documenting the plaintiff's visits up to 2016. As well, there is evidence from other physicians who treated the plaintiff before the 2016 Accident, such as the chiropractor, Dr. Giesbrecht. I find the injuries from the 2016 Accident and the 2018 Accident to be divisible from the 2012 Accident. However, I find the injuries from the 2016 Accident to be indivisible from the 2018 Accident, due to the inter-related nature of many of the injuries. I will consider the plaintiff's injuries from the 2012 Accident, as well as her other medical history including schizophrenia, as a pre-existing condition.

Findings on Causation

[71] Based on the totality of the evidence, I make the following findings with respect to the plaintiff's condition and causation:

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1. The plaintiff has been diagnosed with a schizophrenia disorder with auditory hallucinations since her teenage years. She requires antipsychotic medication regularly to deal with these hallucinations.

2. Before any of the accidents, the plaintiff had been treated by a chiropractor in her right shoulder, mid back, neck and left knee. The right shoulder was likely injured in one of the plaintiff's altercations with the police.

3. As result of the 2012 Accident:

    - She suffered soft tissue injuries to her neck, shoulders, mid and low back, both knees and left ankle; the back pain and ankle pain made it difficult for her to stand and sleep.

    - She experienced a new type of headache, which she described as like a knife sticking into her head. These headaches were intense and she was still experiencing quite a few of them in 2014.

    - Her auditory hallucinations flared up and she began to experience them during the day, whereas she mainly experienced hallucinations at night prior to that point.

    - The plaintiff also began experiencing problems with her memory, requiring lists as reminders to complete ordinary tasks.

    - She required assistance with some household tasks, such as mopping the floor and reaching behind the toilet to clean.

    - She developed a degree of driving anxiety related to snowy conditions and big trucks.

4. Prior to the 2016 Accident, the plaintiff's medical condition was as follows:

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- The plaintiff got a dog in 2015, which helped her deal with her hallucinations, as she did not want to be hospitalized and separated from her puppy.
- She was back to being able to walk for up to two hours. She wore braces on her left knee and left ankle.
- While the plaintiff made some progress after the 2012 Accident, her back, right shoulder, left knee, and left foot were recurring concerns. The plaintiff had improved by 50% from the 2012 Accident to the 2016 Accident.
- The plaintiff's pain in her back, right shoulder and left ankle had become chronic.
- The plaintiff was not able to return to work due to physical pain and hallucinations. She last worked in 2015 for a few months.

5. I find the following injuries were caused by the 2016 Accident:

- aggravation of her right shoulder pain;
- aggravation of her left ankle pain;
- aggravation of her headaches and neck pain;
- new hip pain, including low back pain and tailbone pain which wrapped around her hips;
- new left shoulder, left wrist and left ribs pain; and
- increased driving anxiety.

6. I find the following injuries were caused by the 2018 Accident:

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- aggravation of her right shoulder pain, which produced swelling through the right arm at night;
- pain and swelling in both ankles, more the right ankle than the left;
- increased hip pain and back pain; and
- increased anxiety in a vehicle even as a passenger.

7. The plaintiff currently experiences the following:

- The plaintiff has a chronic myofascial pain disorder, which was pre-existing since the 2012 Accident, and which became worse and more widespread in the lower body after the 2016 Accident and the 2018 Accident.
- The plaintiff has fatigue. There is some disagreement among the medical experts whether the plaintiff suffers from chronic fatigue syndrome. However, in my view, it is not disputed on the evidence that the plaintiff complains of fatigue, which I find was caused by the 2016 Accident and the 2018 Accident.
- The plaintiff has mental health challenges including a schizoaffective disorder, depression and driving anxiety. However, only the driving anxiety is caused by the 2016 Accident and the 2018 Accident, as the schizoaffective disorder and depression were pre-existing conditions.
- The plaintiff currently uses a motorized wheelchair outside of her home; she also uses a walker and grab bars inside her home to assist in her mobility.
- As the physical medicine experts have not been able to find a physical cause for the plaintiff's decline in mobility and function, the plaintiff's limitations are most likely due to a combination of deconditioning, fatigue

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and complex mental health challenges. I accept that the 2016 Accident and the 2018 Accident materially contributed to this decline in mobility.

- While the plaintiff has functional limits on her ability to perform personal care and tasks of daily living, the prognosis is guarded that she may be able to improve in the future.

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Assessment of Damages

Non-Pecuniary Damages

[72] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*], leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

> The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (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, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[73] While the cases cited are helpful, as noted in *Stapley* at para. 45:

> Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this

topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal,* [[1981] 2 S.C.R. 629 at 637, 1981 CanLII 35] is a helpful reminder:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* [*v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 at 284,1978 CanLII 12]).

[Emphasis added in *Stapley*.]

[74] The plaintiff seeks $190,000 to $225,000. She relies on *Tompkins v. Meisters,* 2021 BCSC 2080 ($190,000); *MacKinnon v. Swanson*, 2022 BCSC 1821 ($225,000 reduced by a contingency reduction to $180,000); and *Meckic v. Chan*, 2022 BCSC 182 ($225,000 reduced to $190,000).

[75] The defendants submit that non-pecuniary damages should be between $110,000 to $115,000. The defendants rely on *Monga v. Smith*, 2021 BCSC 1430 ($105,000); *Pelley v. Frederickson*, 2021 BCSC 82 ($120,000); and *Walks v. Cody,* 2019 BCSC 1371 ($90,000).

[76] In my view, the cases cited by the plaintiff involve individuals who were healthy with no pre-existing psychiatric issues before the motor vehicle accidents. The quality of life for these plaintiffs was substantially impacted by the accidents. Without the accidents, the plaintiffs in those cases had every reason to believe they would continue working full time, be active and raise their families. In this case, the plaintiff had significant mental health issues which were limiting her ability to work and socialize, and she was already dealing with injuries from the 2012 Accident which had become chronic.

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[77] The defendants' cases do not capture Ms. Lundgren's position either. None of the defendants' cases involve a plaintiff in multiple accidents. Also, the plaintiffs in those cases had more positive outlooks for future improvement of symptoms.

[78] In this case, I note that the plaintiff has suffered from driving anxiety, which has increased with each accident. She is currently not driving except in emergencies. Her functioning has declined since the 2016 Accident and the 2018 Accident, and she now uses a motorized wheelchair. She is currently not able to take walks outside, needs assistance with daily personal tasks, and cannot cook meals for her family. She experiences chronic pain in her neck, shoulders and ankles. She feels fatigued after short periods of activity. Her mood is low. However, she has a complex history of mental health and physical challenges that also affect her quality of life. Unfortunately the plaintiff has had to contend with schizophrenia, hallucinations, depression, generalized anxiety, breast cancer, diverticulitis, hernia and sleep apnea. She has certainly had more than her share of difficulties.

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[79] On the basis of the evidence, I find an award of $130,000 for pain, suffering and loss of enjoyment of life to be fair and reasonable for the injuries caused by the 2016 Accident and the 2018 Accident.

Past Wage Loss

[80] The plaintiff seeks past wage loss from 2016 to the trial date. She argues that she was preparing to return to work in childcare in 2016 and would have earned income without the 2016 Accident and the 2018 Accident. The plaintiff relies on the report by economist Kevin Turnbull, and seeks an award of $204,000 for the time period from 2017 to the trial date.

[81] The plaintiff refers to evidence that she had two job offers at two different childcare centres by the summer of 2016, and that she was planning to return to work in October 2016. She argues that she had always planned to open and operate multiple childcare facilities, and had prepared a business plan with that goal in mind. Ms. Lundgren argues that while the 2012 Accident had set her back, she had

progressed substantially in her rehabilitation by the summer of 2016, and was ready mentally and physically to return to the work she loved.

[82] The defendants argue that the evidence falls short of proving the plaintiff was able to work in childcare in 2016. They argue the evidence shows the plaintiff had not been working consistently since the 2012 Accident. The opinion of Dr. Christie in 2015 was that the plaintiff was unlikely to return to work in the future; however, in cross-examination, Dr. Christie agreed she was referencing the near future.

[83] In my view, the evidence does not support an award for past income loss. The plaintiff has not shown that there was a real and substantial possibility that she would have earned income without the 2016 Accident and the 2018 Accident. The evidence is clear that the plaintiff has not worked consistently since the 2012 Accident. She tried to go back to childcare in 2014 and 2015; however, those attempts were short-lived. She worked full time for a few weeks, then had to cut back her hours to part time as she found the work physically difficult. Her employment income for 2014 and 2015 was small.

[84] Her co-worker at the time, Ms. Swecera, testified about the difficulties the plaintiff had doing childcare work. The plaintiff had trouble going up and down the stairs, and going outside to supervise the children playing. She was looking tired and exhausted by the afternoon. Ms. Lundgren had trouble sitting on the ground with the children, and asked to sit on a chair. Perhaps the most telling is that while she had a firm written offer of employment with Hope Preschool and Daycare Centre in 2015, she did not accept the offer. In my view, there is no evidence to support that in 2016 the plaintiff's condition had improved to the point where she could work.

[85] Ms. Angel, the owner of Hope Preschool and Daycare Centre, testified at trial that she was very interested in having Ms. Lundgren work at her daycare. She was the one who wrote the offer of employment letter to the plaintiff in 2015. It was unclear from the evidence whether the job was still available to the plaintiff in 2016, and if it would be full-time or on an as needed basis. However, I note that Ms. Angel was not aware that the plaintiff had restrictions placed on her by the local childcare licensing

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authority in 2010, until she was informed by counsel during her cross-examination. Those restrictions included not being able to work alone with children. Ms. Angel agreed that those restrictions may have influenced her hiring decision. In my view, the plaintiff had reasons other than the motor vehicle accidents which made it difficult for her to continue working in childcare.

[86] Further, there is no evidence that the plaintiff had concrete plans to work at any particular childcare facility in the fall of 2016. She was scheduled for a hernia operation in the fall of 2016, and she testified she was waiting for her recovery from that surgery. The plaintiff had applied for a disability pension after the 2012 Accident, and there is no evidence that she took any steps to end that pension to return to work. Further, while I acknowledge that Dr. Christie qualified her opinion when she was testifying, she wrote a medical legal report in 2015 that the plaintiff would be unlikely to return to work in the future. That opinion is based on her knowledge of the plaintiff's medical condition, learned through five years of being her primary care physician.

[87] The plaintiff has not proven any past loss of income.

Loss of Future Earning Capacity

[88] The plaintiff claims more than $2 million as her loss of future earning capacity. She argues that without the 2016 Accident and the 2018 Accident, she was on track to resume her childcare work and her dream to open multiple daycare centres. She relies on the report of Kevin Turnbull, which includes projections for future income in present day value. The defendants argue there is no basis on the evidence to make any award for loss of future earning capacity.

[89] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal recently restated the operative principles to determine loss of future earning capacity, which had previously been revisited in *Dornan*, in *Rab v. Prescott*, 2021 BCCA 345, and in *Lo v. Vos*, 2021 BCCA 421:

> [7] The assessment of an individual's loss of future 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; it is an

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> assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
>
> [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab …*, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
>
> [9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55–56.
>
> [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
>
>> [47] … The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown* [*v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[90] In my view, the evidence does not disclose any potential future event which could lead to a loss of earning capacity. For the same reasons as discussed under past loss of income, there is no evidence to support the plaintiff's claim that she would have returned to work and continued to work into the future, without the 2016 Accident and the 2018 Accident. There is no evidence to support that there is a real and substantial possibility that the plaintiff would have earned income in the future without the accidents. The plaintiff has not suffered a loss of earning capacity due to the 2016 Accident and the 2018 Accident, as she had not been working consistently since the 2012 Accident.

[91] The plaintiff has not proven any loss of future earning capacity.

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Cost of Future Care

[92] When determining a cost of future care award, the Court should try to restore the plaintiff, as best as possible with a monetary award, to the position he would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia,* 2012 BCCA 351 at paras. 29–30.

[93] The plaintiffs claim $2,826,561 as damages for cost of future care. The defendants argue the items claimed are excessive and out of proportion to the injuries caused by the 2016 Accident and the 2018 Accident.

[94] The plaintiff relies on a life care report prepared by Ms. Jacquelyn Abdel-Barr, an occupational therapist. The report was prepared after one in-home visit by Ms. Abdel-Barr on August 16, 2022 to perform an occupational therapy home assessment. At the end of the in-home visit, Ms. Abdel-Barr decided not to carry out a functional capacity evaluation the next day.

[95] The report is written to incorporate all the recommendations made in reports of other practitioners. Ms. Abdel-Barr states that it is not in her scope of expertise to choose one medical recommendation over another, so all recommendations and their associated costs have been included.

[96] Ms. Abdel-Barr states that many of the items will be required until the end of the plaintiff’s life expectancy. I note that, as an occupational therapist, she does not have the expertise to comment on the length of the plaintiff’s disability. For prognosis, I would defer to the physicians.

Medications

[97] Many of these medications appear to be medications the plaintiff was taking before the 2016 Accident and the 2018 Accident (Advil, Tylenol, Claritin, and Gravol). There has been little evidence about some of these medications and what injury they are for. I award a nominal amount of $5,000.

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Occupational Therapist

[98] In my view, it is reasonable to award care by an occupational therapist for two years at $25,000. The plaintiff has had the support of an occupational therapist for the past two years and a further two years is justified on the evidence to promote a strong rehabilitation plan.

[99] However, I find the services of a rehabilitation assistant is not justified. The plaintiff has had the support of rehabilitation assistants for a number of years already.

Chiropractor

[100] There is no evidence that chiropractor services are related to the subject accidents, as the plaintiff has been receiving chiropractor care since 2009.

Massage Therapy

[101] There is no evidence that massage therapy is needed due to the accidents, as the plaintiff has been receiving this care since at least the 2012 Accident.

Equipment and Supplies

[102] The items listed include a walker, cane, orthotics, power wheelchair, grab bars, adjustable bed and other items. Most of these items have already been purchased and installed. I will award a nominal amount of $5,000.

Physiotherapy/Gym Membership

[103] The plaintiff has already had access to a physiotherapist and a kinesiologist. She has been taught different exercises to do at home. In my view, there is no need to continue these sessions. As for a gym membership, no evidence has been provided that the plaintiff will use a gym.

Home Support/Personal Care

[104] This is the largest item for cost of future care. The plaintiff is claiming approximately $1.4 million for personal care support from now to age 85.

[105] I am prepared to accept that the plaintiff is currently in need of assistance for some personal care and home tasks. However, I do not see the evidentiary basis to conclude that she will need this assistance until age 85, or that this ongoing need is caused by the 2016 Accident and the 2018 Accident.

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[106] While Dr. Sudol's opinion is that the plaintiff will most likely require ongoing regular caregiver and housekeeping supports going forward, Dr. Sudol also stated that prognosis for improvement is guarded. Dr. Armstrong's opinion is that the plaintiff's prognosis for recovery of function is "very guarded". Dr. Hawkeswood's view is that with a more active rehabilitation plan, the plaintiff has a fair prognosis for improvement. There is no medical opinion in evidence that states the plaintiff's current physical limitations are permanent.

[107] Further, the plaintiff's need for homecare is not all related to the accidents. The evidence of Dr. Miller was that the plaintiff's schizophrenia will also cause decline in function.

[108] In my view, a fair award is homecare assistance for four hours a day at $58,400 for one year. After one year, this homecare should be reduced to two hours a day. I am prepared to award $180,000, which is sufficient for five years of homecare.

Respite Care

[109] In my view, respite care is not needed as the plaintiff's husband testified that he rarely travels.

Gardening and Yard Work

[110] There is no evidence that the plaintiff had done any gardening or yard work before the accidents such that her inability to do this work now ought to be compensated.

Vocational Counselling

[111] In my view, vocational counselling is not needed as the expert opinion of Derek Nordin, the vocational consultant, is that the plaintiff will not be returning to work.

Total Award for Cost of Future Care

[112] The total award for cost of future care is $215,000.

Special Damages

[113] The plaintiff claims $216,385.80 for out-of-pocket expenses incurred as a result of her injuries from the 2016 Accident and the 2018 Accident. She claims for prescriptions, bed, mattress, installation of a stairlift, massage therapy, rehabilitation expenses, house cleaning, driver anxiety counselling, bathroom renovations, home care support, wheelchair and a wheelchair van, among other items. Receipts have been produced.

[114] In my view, the expenses are reasonable and related to her injuries from the accidents, with one exception. I find that the cost of the installation of a pool in her backyard for $78,049.50 is not a reasonable expense. It was incumbent on the plaintiff to look into alternatives for aquatic rehabilitation if she found the facility she was attending to not be suitable due to distance. This was a large expense, and there was little evidence presented which justified a private therapy pool over other options. No evidence was presented that other options were not available or effective. For example, the plaintiff could have looked into the availability of another therapy pool that was closer to home.

[115] There will be an award of $138,336.30 for special damages.

Conclusion

[116] The Court awards the following:

Non-pecuniary damages:	$130,000.00
Past loss of income:	$ 0.00
Future loss of earning capacity:	$ 0.00

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Future Cost of Care	$215,000.00
Special Damages	$138,336.30
Total Award	**$483.336.30**

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[117] Unless there are matters the Court is not aware of, the plaintiff has been successful and is entitled to her costs at scale B. If the parties wish to make further submissions on costs, those submissions ought to be in writing, to be provided to the Court within 30 days of receipt of this ruling.

"Chan J."