IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pidwerbesky v. Brunetti,*
2023 BCSC 556

Date: 20230411
Docket: M126296
Registry: Kelowna

Between:

Sara Pidwerbesky

Plaintiff

And:

Tara Brunetti and Grizzly Sports Pub & Grill Ltd.

Defendants

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:	P. L. Mitchell, K.C. B. Fitzpatrick
Counsel for the Defendants:	D.G. Soiseth E. Wood
Place and Dates of Trial:	Kelowna, B.C. September 20-23 and 26-29, 2022
Place and Date of Judgment:	Kelowna, B.C. April 11, 2023

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Introduction

[1] The plaintiff, Sara Pidwerbesky, claims damages for injuries she suffered in a car accident that occurred on December 18, 2018, in the intersection of Lawrence Avenue and Richter Street in Kelowna, British Columbia (the "Accident"). Liability has been admitted.

[2] Ms. Pidwerbesky alleges that the Accident caused injuries to her left knee, shoulders, ribs, and back. She has recovered from the knee, shoulder, and rib injuries. However, she continues to suffer from severe low back pain and symptoms in her left hip, leg, and foot which she says stem from a herniated disc at L5-S1 that was caused by the Accident. She has undergone two surgeries intended to repair the herniated disc. She says neither surgery was successful. She says the back injury has left her with constant severe pain and neurological symptoms, and has completely and permanently disabled her from working in any capacity. She claims non-pecuniary damages, past income loss, damages for loss of future earning capacity including loss of pension, damages for cost of future care, and special damages. She also advances an in-trust claim for assistance provided to her by her mother, Sharon Pidwerbesky. In total, she quantifies her claim at $2,819,689.83, of which about $2.4 million is for loss of future earning capacity.

[3] The defendants concede that Ms. Pidwerbesky sustained soft tissue injuries to her back, as well as minor injuries to her shoulders and knee in the Accident , but they dispute that the herniated disc was caused by the Accident. They say it is difficult to assess how long the soft tissue injuries to Ms. Pidwerbesky's back would have persisted, given the unrelated herniated disc, and that the non-pecuniary damages award should account for the possibility that the soft tissue injuries could still be symptomatic. The defence position is that the bulk of the claim is warranted only if the Accident caused the disc herniation, and that Ms. Pidwerbesky has not established causation with respect to that injury. The defence says she has established a claim for non-pecuniary damages of about $75,000 and special damages. Alternatively, if I find that the disc herniation was caused by the Accident, the defence quantifies the claim at between about $550,000 and $660,000 in total.

Summary of the Evidence

The Plaintiff's Background and Pre-Accident History

[4] Ms. Pidwerbesky was 32 years old at the time of the Accident and 36 years old at the time of the trial. She resides with her spouse, Ryan McCulloch, in Salmon Arm. She has a son from a previous relationship. Mr. McCulloch has two children from a previous relationship.

[5] Ms. Pidwerbesky graduated from high school in 2004. She was interested in pursuing a career in the medical field, but initially worked in a restaurant and in her parents' trucking business.

[6] In 2009, Ms. Pidwerbesky completed a ten-month medical office assistant diploma program at Vancouver Career College. She then worked in medical walk-in clinics doing administrative work.

[7] Between 2009 and 2013, Ms. Pidwerbesky lived what she described as a negative lifestyle that included drug abuse. She had an on-and-off relationship with someone who she said was "not a positive influence". She stopped using drugs when she became pregnant in 2012. Her son Jayden was born in late 2012. Soon after that she ended her relationship with Jayden's father.

[8] In 2013, Ms. Pidwerbesky started working in an administrative position for the Interior Health Authority ("IHA"). She continued to work for the IHA in administrative roles until 2016.

[9] In 2016, Ms. Pidwerbesky started working at Kelowna General Hospital ("KGH") as a senior leadership team assistant. She provided support to the surgical director. She enjoyed working at the hospital and was fascinated by surgery. She decided to become a licensed practical nurse ("LPN"), with the intention of eventually qualifying as a registered nurse ("RN") and working as an operating room nurse.

[10] In the fall of 2018, Ms. Pidwerbesky commenced the LPN Program at Sprott Shaw College in Kelowna. This is an 18-month program. She also worked as a porter at KGH, which was a casual position. She testified that her intention was to attain her LPN qualification, work for a few years, and then return to school in the fall of 2022 to pursue a Bachelor of Science in Nursing Degree and qualify as an RN. She explained that her decision to start with the LPN program was motivated by a concern about making the four year commitment to become an RN, which would have required her to incur significant student loan debt. She hoped to save some money while working as an LPN, which would reduce her need for student loans, and she planned to work as much as possible while also pursing the four-year nursing degree.

[11] Ms. Pidwerbesky enjoyed the first few months of the LPN program. She developed friendships with Leighton Smith and Jenna Ballantine, who were classmates.

[12] Ms. Pidwerbesky testified that before the Accident, she was in good physical heath and had no physical limitations.

[13] Ms. Pidwerbesky testified that before the Accident, she was happy and led an active and social life. She played soccer for many years. She enjoyed snow boarding, rollerblading, bike riding, and playing with Jayden. She testified that her mental health was good, noting that after a rough start in the years before Jayden's birth she was pursuing her career goal and developing friendships at school and work. As she put it, "the stars were aligning".

[14] Ms. Pidwerbesky's testimony about her pre-Accident lifestyle was corroborated by her mother, Sharon Pidwerbesky. She characterized her daughter as strong and active before the Accident. She said Ms. Pidwerbesky enjoyed playing soccer, rollerblading, hiking, and biking. She said before the Accident, Ms. Pidwerbesky was happy, bubbly and organized, and filled a leadership role in their family.

The Accident

[15] As noted, the Accident occurred on December 18, 2018, in the intersection of Lawrence Avenue and Richter Street in Kelowna. Ms. Pidwerbesky was on her way to school. Her vehicle collided with the front passenger door of a vehicle owned by the defendant, Grizzly Sports Pub & Grill Ltd., and driven by the defendant, Tara Brunetti, in a "T-bone" style collision, at significant speed, after Ms. Brunetti's vehicle ran a red light. The impact of the collision was substantial and caused Ms. Brunetti's vehicle to roll over on its side. Ms. Pidwerbesky testified that she was unable to brace before the impact.

[16] Ms. Pidwerbesky was able to get herself out of her vehicle. She testified she was panicky and in shock. She phoned her mother. The police, fire department, and ambulance attended at the scene. Her classmates Ms. Smith and Ms. Ballantine drove by on their way to school and stopped to check on her wellbeing.

[17] Ms. Pidwerbesky testified that she felt she had to go to class, as attendance was essentially mandatory. Her mother drove her to school.

Post-Accident Condition

[18] Ms. Pidwerbesky testified that as the shock of the collision wore off, she began to feel pain in her knees, low back, ribs, and shoulders. Over the next couple of hours, the pain intensified and she eventually left class. Her mother drove her to a walk-in clinic, where she was prescribed Tylenol 3 for pain.

[19] Ms. Pidwerbesky testified that over the next few days she was in a lot of pain. She took the rest of the week off school and then she had two weeks off for the Christmas break. Over the Christmas period she continued to experience excruciating pain, particularly in her low back and radiating down her left leg. She said within days of the Accident, she also began feeling "jolts or shocks" from the left side of her low back, running down her left leg and into her toes.

[20] Ms. Pidwerbesky recalled that on Christmas Day, she was unable to sit on the floor to play Lego with Jayden. On Boxing Day, she did not participate in a family

outing because of the pain. On December 29, 2018, she went to bingo with her grandmother, but was unable to play her own cards because she had to walk around to alleviate the pain. She recalled that she was experiencing frequent jolts down her left leg while at bingo. On New Year's eve, she attended an outdoor family event but was in a lot of pain.

[21] Ms. Pidwerbesky testified that she was not able to get an appointment with her family doctor, Dr. Kristie Kolkind, over the Christmas period. She attended Dr. Kolkind's clinic on January 2, 2019, where she saw another doctor, Dr. Tereposky. On that day, she completed a form titled "Motor Vehicle Accident (MVA) Patient Statement". Among other things, she identified pain in the "lower back & upper back immediate and still which radiates into my hips". She testified that when she wrote "radiates" she meant that the pain was starting in one place and going to another place, which she identified as her hip, left leg, and left foot. On a pain diagram, she indicated pain in her lower back with the most pain in the area just above the left buttock and in her upper back around the right shoulder blade. She did not specifically indicate jolts or radiating pain on the diagram. In cross-examination she said she tried to follow the instructions on the form and believes she indicated the symptoms she was feeling at the moment. She testified that at this time the pain was constant while the jolts happened every day but were intermittent.

[22] Ms. Pidwerbesky testified that when she met with Dr. Tereposky on January 2, 2019, she was experiencing pain in her left knee, low back radiating down her left leg, and in her upper back, right side. Dr. Tereposky prescribed a muscle relaxant, Tylenol, and ibuprofen, recommended treating the affected areas with ice, and provided a referral for physiotherapy and massage. Dr. Tereposky's clinical record for this visit describes Ms. Pidwerbesky's subjective complaints as including low back pain that "radiates down to buttock". There is no note of a complaint of pain radiating down into the leg. The notes also indicates "no paresthesia or weakness in arms or legs".

[23] Right after seeing Dr. Tereposky on January 2, 2019, Ms. Pidwerbesky attended physiotherapy at Sun City Physiotherapy. She returned to physiotherapy on January 4, 2019. The physiotherapist's clinical notes indicate that on that day she said that the left "SI" was the "main issue", with pain that "sent 'jolts' down leg into foot".

[24] Also on January 4, 2019, Ms. Pidwerbesky attended massage therapy. On a pain diagram on the intake form, she indicated pain in her lower back and right upper back, and drew arrows pointing down from the left hip area. The form instructed her to draw arrows to indicate "shooting" symptoms. She testified that when she drew the arrows she intended to convey shooting pain down her left buttock and into her left leg. She said this was the same symptom that she earlier described as jolts.

[25] The LPN program resumed on January 7, 2019, following the Christmas Break. Ms. Pidwerbesky was required to participate in a three-week clinical practicum at a long-term care facility. Her pain interfered with her ability to perform some tasks. She testified that her instructor allowed her to get help with those tasks from a colleague. Ms. Pidwerbesky then returned to the classroom. Initially, she was able to attend classes with adaptations such as changing positions frequently, sitting on a yoga ball, using the elevator, and lying down on breaks. She testified that by this time, the most prominent symptoms were the low back pain and the radiating pain and jolts down the left leg. She was using pain medication to try to keep up at school.

[26] Ms. Pidwerbesky continued to attend physiotherapy and massage therapy throughout January and February 2019. She saw Dr. Kolkind regularly for follow-up visits. She testified that throughout the spring of 2019, she continued to use pain medication to keep up with school and to work occasional shifts at the hospital.

[27] Ms. Pidwerbesky testified that by about the spring of 2019, she had developed more pronounced neurological symptoms such as pins and needles, tingling, and burning in her leg and foot. On June 20, 2019, she woke up in

excruciating, uncontrollable pain. She went to the emergency department at KGH. She was sent home with pain medication, but her condition did not improve. She returned to the emergency department. By this time, she said she could place almost no weight on her left leg. She was admitted to KGH, where she remained for 15 days. The pain was so severe she could not get herself to the bathroom. She described the symptoms as including radiating pain down her left leg into her toes, pins, needles, burning, and prickly sensations.

[28] At KGH, Ms. Pidwerbesky was referred to a neurosurgeon. A pain block was administered but it was not successful. An MRI revealed a left side disc protrusion at L5-S1. On July 3, 2019, a neurosurgeon, Dr. Yavin, performed a discectomy at L5-S1. Ms. Pidwerbesky testified that she understood the disc between L5 and S1 was protruding to the left, hitting the nerves, and that part of the disc was removed. Ms. Pidwerbesky was in a lot of pain following the surgery. She was discharged from hospital on July 8, 2019, with pain medication, a walker, and a raised toilet seat.

[29] While Ms. Pidwerbesky was in the hospital, she decided she had to withdraw from the LPN program because she had missed too much class and clinical time.

[30] The recovery from the surgery was difficult. Ms. Pidwerbesky's mobility was restricted. She could not bend. She was not able to walk. She had housekeeping assistance at home. Ms. Pidwerbesky's mother helped with errands such as picking up groceries and prescriptions, and she looked after Jayden.

[31] Ms. Pidwerbesky returned to physiotherapy in August 2019, working on range of motion, mobilizing, and building strength. She testified that her condition improved for a period, but did not resolve and eventually deteriorated.

[32] By the fall of 2019, Ms. Pidwerbesky could walk, but she still had low back pain and pain radiating down her left leg, as well as neurological symptoms in her left foot. She testified she was struggling emotionally due to the lack of income and the ongoing pain.

[33] In January 2020, Ms. Pidwerbesky returned to the LPN program. She found it very difficult to meet the physical demands of the program. She testified she hid her condition and tried to push through.

[34] In the spring of 2020, Ms. Pidwerbesky transitioned from the classroom to a clinical setting at the hospital, doing 12-hour shifts. Her supervisor was understanding of her condition and allowed her some accommodations. She broke up the physical work, took regular breaks, and asked for help with heavier tasks. She took pain medication to manage the pain at work.

[35] In the summer of 2020, Ms. Pidwerbesky completed her preceptorship in the vascular surgery unit at KGH. This involved working 12-hour shifts under the supervision of an RN or another LPN. She found the work very difficult. She was in a lot of pain. Again, she broke up the physical work and took regular breaks but, by the end of a shift, she was exhausted and often crying. She continued to take pain medication to get through.

[36] Ms. Pidwerbesky completed the LPN program in September 2020. She then worked as a porter at KGH, on a casual basis. She was able to work half shifts and flexible hours. She was not able to work full time because of the pain and the other symptoms in her leg. In November 2020, she took her LPN licencing exam and passed.

[37] In December 2020, Ms. Pidwerbesky started working in a casual position as an LPN on the surgical unit at KGH. She was hoping this would be less physical than working as a porter, and the casual nature of the position provided some flexibility. Nevertheless, she struggled to meet the physical demands of the job due to her pain. She took pain medication to get through her shifts and tried to hide her symptoms from her co-workers.

[38] In March 2021, Ms. Pidwerbesky transitioned from the surgical unit to a COVID vaccine team. This position was less physically demanding and the shifts were shorter (eight hours rather than 12 hours). She worked in this position until the

summer of 2021, when she returned to the surgical unit. She testified that, as a new nurse, she thought it was important to use her skills, which she was not doing on the vaccine team, and this prompted her return to the surgical unit.

[39] Ms. Pidwerbesky continued to find it difficult to meet the physical demands of the surgical unit. She testified she was taking up to eight tramadol a day for pain, but still she struggled. She was exhausted after every shift. Her mother was continuing to help by looking after Jayden and picking up groceries.

[40] By December 2021, Ms. Pidwerbesky had reduced her hours to casual. She testified she was continuing to struggle to perform at work and had to take a lot of pain medication to get through her shifts. She continued to suffer from low back pain and radiating pain down her left leg and into her foot. In addition, she started suffering from burning in her heel. She eventually took some time off expecting to return to work, but the pain did not settle.

[41] In late December 2021, Ms. Pidwerbesky suffered a serious pain flare up. She went to an urgent care centre in Kelowna, where she was given a Toradol injection. This alleviated some of the pain, but only temporarily. On January 1, 2022, she attended the emergency department at KGH. She said the pain was excruciating. She was given another Toradol injection plus hydromorphone, and referred back to Dr. Yavin. She took a medical leave from work.

[42] In February 2022, Ms. Pidwerbesky had an MRI, which showed that the same L5-S1 disc was herniated again. Dr. Yavin told her she needed a repeat surgery, which was scheduled for May 20, 2022.

[43] Between February and April 2022, Ms. Pidwerbesky continued to suffer in severe pain. She attended the emergency department at KGH on several occasions. On May 1, 2022, she went to the emergency department in a pain crisis, which she described as excruciating, and causing her to cry and vomit. She was having spasms. She was admitted. Her surgery date was moved up and Dr. Yavin

performed a second discectomy on May 6, 2022. She was discharged from hospital on May 8, 2022.

[44] The recovery from the second surgery was difficult. Ms. Pidwerbesky testified that she continued to have a lot of pain. She said Dr. Yavin told her to give it time, but the symptoms have not improved.

[45] Ms. Pidwerbesky testified that she spent the summer of 2022 just trying to get through each day. In July 2022, she moved to Salmon Arm with Mr. McCulloch. She had an occupational therapy assessment performed on their new home. They made some adaptations to the house and she started using aids such as a long-handled razor to shave her legs. She tries to stay on the main floor of the house because it is difficult to get up and down the stairs. She does no yard work, and only light, surface housework such as wiping counters. She has a housekeeper in once a month to do the heavier tasks such as vacuuming, washing floors, and cleaning the bathrooms. She testified this is not enough, but it is what they can afford.

[46] Ms. Pidwerbesky testified the second surgery did not result in any material improvement in her symptoms. She continues to suffer from intense low back pain and radiating pain down her left leg, as well as pins, needles, and burning sensations. Her sleep is affected by the pain. She has gained weight. Since the second surgery, she has attended at the emergency department of the Shuswap Lake General Hospital in Salmon Arm several times, due to pain flareups. The severity of the pain during flareups has caused her to scream and vomit. She continues to take pain medication – she said she takes tramadol constantly and hydromorphone occasionally. She recently started taking Baclofen, which helps with her spasms. She now takes duloxetine for depression and anxiety, and trazadone for sleep.

[47] Ms. Pidwerbesky has not returned to work. She testified that she does not intend to return to nursing. She said she cannot meet the physical demands. She testified that becoming a nurse was her passion and that the loss of her ability to work as a nurse has caused her very considerable emotional pain and suffering.

[48] Ms. Pidwerbesky has continued to see Dr. Kolkind for assessment and treatment of the injuries she sustained in the Accident. She attended the Okanagan Interventional Pain Clinic on occasion between April 2019 and October 2021. She consulted a psychologist in February 2020, but found that reliving her experience was upsetting so she did not return. She has started physiotherapy in Salmon Arm. She recently purchased a recumbent stationary bike, which she hopes will help her improve her overall fitness. She can no longer participate in physical activities such as playing soccer or rollerblading. She recently started taking short walks to the mailbox and back, but found that a day of walking in a mall was too much for her and resulted in a flareup of pain.

[49] Ms. Pidwerbesky testified that her social life since the Accident has been "pretty non-existent". She spends time with Mr. McCulloch, their children, and her mother. She said she occasionally has dinner with friends. She testified that her condition has had an impact on her relationship with Mr. McCulloch. Although he is understanding, she feels she is a burden to him. She testified that she is often miserable and irritable. Her pain interferes with their intimate relationship. There are times when he wants to go out for dinner or to socialize, and she has to decline.

[50] Ms. Pidwerbesky's testimony about her symptoms and the affect they have had on her lifestyle was corroborated by her lay witnesses.

[51] Michelle Eisen, a co-worker at KGH, noticed a difference in Ms. Pidwerbesky soon after the Accident when Ms. Pidwerbesky was covering some vacation shifts. She noticed Ms. Pidwerbesky moving around, adjusting her position, and twitching. She said she could tell Ms. Pidwerbesky was in pain.

[52] Michelle Scranton, a nurse who also works as an instructor at the University of British Columbia Okanagan Campus' school of nursing, worked with Ms. Pidwerbesky between April 2021 and December 2021. She described Ms. Pidwerbesky as a hard worker who displayed initiative. She said Ms. Pidwerbesky took on more of the administrative work because she found some of the physical tasks difficult.

[53] Mr. McCulloch did not meet Ms. Pidwerbesky until after the Accident, so he could not speak to her pre-Accident abilities. He did testify that Ms. Pidwerbesky's physical abilities are now limited. He noted that she performs only light housework, orders groceries online to avoid walking in a store, and avoids long car rides. He said her sleep is disturbed and that he has taken her to the hospital several times during extreme pain flare-ups.

[54] Leighton Smith, a classmate of Ms. Pidwerbesky's in the LPN program, testified that before the Accident, Ms. Pidwerbesky was bubbly, positive, and level-headed. When Ms. Pidwerbesky returned to the program after the Accident, Ms. Smith noted that she had difficulty with the stairs and took the elevator instead. She carried Ms. Pidwerbesky's bags for her. She saw Ms. Pidwerbesky shifting position during class and sitting on a yoga ball. She said that Ms. Pidwerbesky had difficulty during labs when she was required to move or dress a patient. She said after the Accident, Ms. Pidwerbesky cried often and got flustered. Jenna Ballantine, another classmate, gave similar evidence.

[55] Sharon Pidwerbesky testified that Ms. Pidwerbesky appeared to be in a lot of pain during the Christmas period immediately following the Accident. She said Ms. Pidwerbesky could not stay in one position for long, she slept most of Christmas Day, and she did not participate in all the family activities. She said in the days following the Accident, Ms. Pidwerbesky complained about jolts going down her leg, as well as severe pain. She said she specifically recalls the complaints of jolting pain down the leg because that symptom caused her considerable concern. She said Ms. Pidwerbesky seemed to get worse over time. She said that Ms. Pidwerbesky's personality has changed – she is now tearful, frustrated, and angry.

[56] Sharon Pidwerbesky testified that she spent a lot of time over the years looking after Jayden and helping her daughter with other tasks such as cleaning the house and shopping. She testified that she did all the packing for Ms. Pidwerbesky's recent move to Salmon Arm.

Expert Medical Evidence

[57] Ms. Pidwerbesky relied on the expert medical evidence of:

a) Dr. Donald Cameron, a neurologist, who conducted an independent medical examination on March 8, 2022, and authored three reports, the first dated March 9, 2022, the second dated July 6, 2022 following a review of updated medical records, and the third dated August 16, 2022, commenting on a defence report of Dr. Prenesh Govender dated August 10, 2022; and

b) Dr. Tony Giantomaso, a physiatrist, who conducted an independent medical examination on April 9, 2021 and a reassessment on March 10, 2022, and authored two reports, the first dated April 26, 2021 and the second dated March 14, 2022.

[58] The defence relied on the expert medical evidence of Dr. Govender, a neurosurgeon, who conducted an independent medical examination on July 8, 2022 and authored a report dated August 10, 2022.

[59] At the time of Dr. Cameron's initial assessment of Ms. Pidwerbesky, she had undergone the first surgery but not the second. In his first report, Dr. Cameron expressed the opinion that Ms. Pidwerbesky suffered soft tissue and musculoskeletal injuries involving her neck, back, and hip in the Accident, and that she also suffered "an acute herniated disk at lumbar L5 and S1 level on the left side" in the Accident, that resulted in a compression of the S1 nerve root. He noted the February 2022 MRI showed a "recurrent large left L5-S1 disk protrusion". He expressed the opinion that the herniation was caused by the Accident, recurred in the summer of 2019, and again in December 2021. He expressed the view that Ms. Pidwerbesky required repeat surgical treatment, which is what in fact transpired. He suggested that she may benefit from specific medications for neuritic pain. In his first report, Dr. Cameron also expressed the opinion that Ms. Pidwerbesky developed a chronic pain condition as a result of the injuries she sustained in the Accident.

[60] As noted, Dr. Cameron's second report is dated July 6, 2022, following his review of updated medical records and after Ms. Pidwerbesky's second surgery. In his second report, Dr. Cameron expressed the opinion that Ms. Pidwerbesky's back pain and pain radiating down her leg would probably improve for up to two years post-operatively and that she would then require a follow-up assessment to provide a more accurate long-term prognosis. He opined that as at the date of his second report, Ms. Pidwerbesky was completely disabled from nursing and also not able to work in any job. He expressed the view that it was probable that Ms. Pidwerbesky would remain "permanently significantly disabled due to her chronic pain", and that she would probably not be able to return to working as an LPN or in any position with similar physical requirements.

[61] In his third report, Dr. Cameron commented on Dr. Govender's report. Dr. Govender wrote that the symptoms suggestive of a herniated disc first occurred months after the Accident and therefore it was his opinion that the herniated disc was not caused by the Accident. Dr. Cameron disagreed, noting that the clinical records indicate that Ms. Pidwerbesky complained of low back pain and pain radiating into her buttocks and leg very shortly after the Accident. He noted a consistency in her reporting of "radicular-type pain and associated lower back pain" since very shortly after the Accident.

[62] Much of the cross-examination of Dr. Cameron focussed on the nature of symptoms of "radiculopathy" indicating S1 nerve impingement. He agreed that paresthesia (pins and needles) can be a symptom. He said other symptoms are jolting or shooting pain into the buttock or down the leg, part way down or down as far as the foot, and sometimes associated muscle weakness. He disagreed that to establish radiculopathy, symptoms must be evident in all areas innervated by the S1 nerve root. He said radicular pain is pain radiating down in the distribution of the S1 nerve root, but the symptoms are not necessary felt all the way down. He said some people with S1 nerve impingement will have symptoms only in the buttock, but most describe pain travelling down the leg. He did not agree that most patients will describe symptoms below the knee – he said most describe pain down the leg that

may or may not travel below the knee. He disagreed that intermittent symptoms are not sufficient to diagnose radiculopathy, and said some patients have transient symptoms that come on with certain activities or postures. He agreed that to link the herniated disk to the Accident there would have to be symptoms of radiculopathy within a couple weeks of the Accident.

[63] In cross-examination, Dr. Cameron maintained that Dr. Tereposky's clinical record for January 2, 2019 recording a complaint of pain that "radiates down to buttocks" is a "flag" for radiculopathy and that the January 4, 2019 physiotherapy record showing Ms. Pidwerbesky complained of jolts down the left leg was indicative of radiculopathy.

[64] At the time of Dr. Giantomaso's initial assessment of Ms. Pidwerbesky, she had undergone the first surgery but not the second. In his first report, Dr. Giantomaso expressed the opinion that Ms. Pidwerbesky likely sustained a lumbar injury in the Accident "causing progressive disc herniation", eventually requiring surgery, as well as "ongoing permanent sensory and motor loss, gait and balance dysfunction and neuropathic pain". He expressed the opinion that the mechanism of action of the Accident could reasonably be associated with these injuries. He wrote that "it is beyond doubt in my mind that she experienced a severe post-traumatic left S1 radiculopathy that eventually required surgery and that she has been left with permanent motor and sensory loss and likely permanent neuropathic pain". He recommended interventional pain management such as a transforaminal epidural block, and additional joint rhizotomies. He expressed the opinion that Ms. Pidwerbesky was no longer competitively employable as an LPN full time and was unlikely to be competitively employable full time in the future. He suggested it might be best for her to upgrade to an RN or find a job in home care or other types of nursing that do not require heavy lifting or repetitive bending. He suggested a trial of THC oil and CBD oil for pain, active rehabilitation focussed on core strengthening, passive therapies for occasional management of flare-ups, and psychological counselling.

[65] Dr. Giantomaso reassessed Ms. Pidwerbesky on March 10, 2022, prior to the second surgery but after the MRI showing a recurrence of the herniated disc. The only material change to his opinion was the observation that she had experienced a recurrence of a left-side disc protrusion and that she was, at the time, wholly impaired from most life activity as a result.

[66] In cross-examination, Dr. Giantomaso testified that his practice is targeted at patients experiencing pain generated in the spine, as opposed to generalized chronic pain. He agreed that sacroiliac joint pain almost never radiates below the knee, whereas S1 nerve root pain eventually does radiate below the knee and into the foot. He explained that in some cases radiculopathy progresses slowly, as more and more nerve fibres become affected. In such cases, the pain starts in the back and buttock and progresses down the back of the leg, eventually affecting the entire leg and foot. He expressed the opinion that if a herniated disk is caused by a traumatic event, he would expect this progression to occur within about six to eight weeks of the event. He agreed that at the time of the trial it was still “early days” following the second surgery and he said he was hopeful that Ms. Pidwerbesky would experience some improvement in her symptoms and function.

[67] Dr. Govender assessed Ms. Pidwerbesky after the second surgery. His report outlined a history that included Ms. Pidwerbesky initially complaining of persisting lower back pain and hip pain but not having “any radicular type of pain down the lower limbs”, and that the first record of complaints of radicular type pain down the left lower limb was “three months later”, at the end of February and early March 2019. He expressed the opinion that Ms. Pidwerbesky sustained a lower back strain in the Accident that resulted in the “mechanical and soft tissue symptoms in her lower back and hip”, but that it is unlikely the herniated disc and associated radicular symptoms were caused by the Accident because the symptoms did not occur until “many months after” the Accident. He wrote that a lumbar herniated disc would be expected to result in radicular pain down the lower limb “along the neural distribution” within a few days to one or two weeks after a causation event. He also expressed the view that Ms. Pidwerbesky “likely will have some chronic sensory S1

left-sided dysfunction which is unlikely to be severely disabling to prevent independent functioning", although he also wrote that her functional capabilities are best assessed through a physiatrist and with a functional and physical capabilities assessment.

[68] In cross-examination, Dr. Govender described radicular symptoms as neurological symptoms of pain, tingling, numbness, or weakness in the distribution of a particular nerve. He said these can be associated with decreased sensation, reflexes, and strength. He agreed that pain can be a symptom of S1 nerve impingement, noting that it is the distribution of the pain that is significant. He said it is unusual, although not impossible, for a patient with an S1 nerve impingement to have pain without numbness or tingling. He agreed that patients with S1 nerve impingement have symptoms of varying severity. In cross-examination, he said that the first documented symptom of radicular pain was a February 28, 2019 clinical note indicating a complaint of lower limb pain. This is a note of Dr. Kolkind's that reads "pain radiating down left leg". It appeared that he considered it significant, if not essential, for there to be a complaint of pain below the knee to diagnose an S1 nerve impingement. When shown the January 4, 2019 physiotherapy record noting a complaint of jolts down the leg into the foot, he said he did not necessarily agree this was a radicular symptom in the absence of numbness. Later, he agreed that a complaint of pain radiating down into the foot would have to be considered, but said that if it was caused by an S1 nerve impingement the symptoms should persist.

Other Expert Evidence

[69] In addition to the medical evidence, Ms. Pidwerbesky relied on the evidence of Erin Webber, an occupational therapist; Philip Whitford, a vocational rehabilitation consultant; and Christiane Clark, an economist.

[70] Ms. Webber initially interviewed Ms. Pidwerbesky on June 2, 2021, after the first surgery but before the second. She also subjected Ms. Pidwerbesky to a battery of physical tests over the course of several hours. The conclusions expressed in her first report dated July 9, 2021, include the following:

- Ms. Pidwerbesky was able to perform jobs requiring reaching, handling, fingering and/or feeling, upper limb coordination, and activities requiring basic balance and ascending and descending stairs, provided she was able to maintain neutral back postures;

- Ms. Pidwerbesky had limitations for non-neutral postures and would not tolerate jobs requiring prolonged or repetitive stooping or prolonged crouching and kneeling;

- Ms. Pidwerbesky was best suited to one hour intervals of standing and walking, and would be able to perform most flexible sedentary jobs provided she had the opportunity to take postural breaks; and

- Ms. Pidwerbesky was able to perform full-time work in jobs that reflect the above abilities and limitations.

[71] In her first report, Ms. Webber expressed the opinion that Ms. Pidwerbesky did not meet all the essential physical demands associated with the full scope of LPN roles, and would have to avoid roles with a high degree of patient handling and sustained/prolonged non-neutral back postures. She opined that a casual work schedule of a maximum of two consecutive 12-hour hospital shifts represented the upper end of her tolerance and she was best suited to lighter LPN jobs such as in assisted living facilities or clinical environments involving eight hour shifts.

[72] Ms. Webber assessed Ms. Pidwerbesky again on June 17, 2022, about six weeks following the second surgery. Her opinion following this assessment was far less positive. In her second report dated June 23, 2022, she expressed the view that Ms. Pidwerbesky no longer met the minimum functional capacity or basic positional tolerances required for any LPN job in a full or part-time capacity. Further, she opined that Ms. Pidwerbesky did not demonstrate the tolerance for sitting and standing to work in any competitive occupation in a full or part-time capacity, including sedentary work.

[73] Mr. Whitford interviewed Ms. Pidwerbesky on March 22, 2022 and March 28, 2022, shortly before the second surgery. He also administered a battery of vocational tests. The tests demonstrated that Ms. Pidwerbesky has average or high-average academic skills. The opinions expressed in Mr. Whitford's report include the following:

- Ms. Pidwerbesky is not competitively employable as a full-time LPN or member of a hospital nursing staff;
- Ms. Pidwerbesky is likely not competitively employable in a full-time administrative position due to pain flare-ups, among other things;
- there are few alternatives available to her with additional education and training due to her age and the cost of education;
- her limitations prevent her from full-time work, attaining supervisory or management status, and returning to administrative work, except in minor or casual roles;
- Ms. Pidwerbesky would likely be able to obtain and maintain casual short-term administrative employment; and
- Ms. Pidwerbesky's ability to become an RN is severely compromised.

[74] Ms. Clark provided estimates relevant to the assessment of Ms. Pidwerbesky's past and future loss of earnings, non-wage benefits, and pension benefits, and authored two reports, the first dated April 14, 2022 and the second dated June 23, 2022. Among other things, she estimated Ms. Pidwerbesky's past loss of earnings, as well as her lost future earnings and pension benefits in two assumed scenarios: Ms. Pidwerbesky working full-time as an LPN from the trial to age 65, and Ms. Pidwerbesky working 12 hours a week as an LPN from the trial to April 2026 and thereafter as a full-time RN to age 65.

[75] The defence relied on the evidence of Sheila Branscombe, an occupational therapist who conducted a functional capacity evaluation of Ms. Pidwerbesky on January 15 and 16, 2022; several months before the second surgery. She authored a report dated May 23, 2022.

[76] Ms. Branscombe's report includes the following opinions:

- Ms. Pidwerbesky is capable of working in an administrative capacity, such as in a unit clerk position, which is considered a sedentary occupation; and
- Ms. Pidwerbesky is capable of working as an LPN "as evidenced by her self-report of doing so", but would not meet the strength or cardiovascular demands greater than "light".

[77] Ms. Branscombe recommended that Ms. Pidwerbesky participate in a progressive goal attainment program (a program focusing on pain management), active rehabilitation, and occupational therapy, and that she obtain orthotics and other supportive devices such as a body pillow and an ergonomic task chair, among other things.

Discussion

Credibility

[78] As in most cases involving pain and other subjective symptoms, the plaintiff's credibility is vitally important. The Court must be very careful when assessing a plaintiff's credibility "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": *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) at 399.

[79] In this case, there is clear objective evidence of the herniated disc but the defence disputes that the Accident was the cause of that injury, and the resolution of that issue turns on the timing of the onset of certain subjective symptoms. Accordingly, to a large extent, Ms. Pidwerbesky's case hinges on the credibility and reliability of her testimony.

[80] The defence argued that there are serious difficulties with Ms. Pidwerbesky's credibility, particularly regarding the timing of the onset of certain symptoms. The defence submitted that the account she gave in her testimony was inconsistent with what she told her treating physicians at the time, as reflected in the clinical records, and, in one respect concerning the onset of foot pain, was inconsistent with the evidence she gave during an examination for discovery. I do not agree.

[81] In my view, the weight the defence gives to the clinical records is misplaced. As explained in the oft-cited decision of Justice N. Smith in *Edmondson v. Payer*, 2011 BCSC 118 at paras. 36, the absence of reference to a symptom in a doctor's clinical record cannot be the sole basis for any inference about the existence or non-existence of that symptom. It is not possible for me to conclude that the clinical records the defence points to accurately capture every single thing Ms. Pidwerbesky said during the consult visits in question.

[82] Ms. Pidwerbesky's testimony was not inconsistent with the clinical records. On the Motor Vehicle Accident (MVA) Patient Statement Ms. Pidwerbesky filled out on January 2, 2019, she noted pain radiating into her hips. She testified that although she had been having jolts down her leg, that symptom was not constant. On the same document she indicated the location of her pain by shading on a diagram. She shaded the low back and indicated the most pain was in the left hip and right upper back. Just above the diagram on the form, the patient is asked about the pain they have "today". The doctor's note of the January 2, 2019 visit includes a complaint of low back pain that "radiates down to buttock". None of this in inconsistent with Ms. Pidwerbesky's testimony. In her testimony she explained that at the time she did not appreciate the significance of describing different types of pain and she speculated that when she filled out the form she noted how she was feeling at that very moment. That is reasonable and consistent with the form she filled out two days later where she indicated "shooting" pain emanating from the left low back/hip in response to an express prompt on the form to distinguish between various types of pain including "shooting". It is also possible that she mentioned jolts down the leg to the doctor on January 2, 2019, but this was not noted in the record.

Of course, the physiotherapy notes taken on January 4, 2019, make clear that on that day Ms. Pidwerbesky did complain about jolts down her leg and into her foot.

[83] Ms. Pidwerbesky's testimony was not shown to have been materially inconsistent with her discovery evidence. In discovery she said she first had left foot pain in the summer of 2019. At trial, she said she had jolts running down her leg into her foot within days of the Accident, and that she later developed pain and other symptoms centered in the foot. She said that at the discovery she was referring to the onset of paresthesia in the foot. As noted by McEachern C.J.S.C., as he then was, in *Diack v. Bardsley* (1983), 46 B.C.L.R. 240 (S.C.) at 247, aff'd (1984), 31 C.C.L.T. 308 (C.A.), minor variations between a party's discovery and her evidence at trial are rarely helpful in assessing credibility because witnesses seldom speak with much precision at discovery. Further, as just noted, the complaint of jolts down the leg and into the foot was recorded by the physiotherapist on January 4, 2019.

[84] In short, I found Ms. Pidwerbesky to be credible. She was reasonable and internally consistent in her testimony. Her testimony was not shown to be inconsistent with objective evidence. Importantly, her account of the onset of symptoms suggesting a herniated disc was corroborated by objective evidence, specifically the January 4, 2019 note of the physiotherapist. I have no difficulty accepting her account of the nature and progression of her symptoms and the impact they have had on her life.

Findings on the Plaintiff's Condition and Causation

[85] As already noted, the defence concedes that Ms. Pidwerbesky sustained soft tissue injuries to her back and more minor injuries to her shoulder and knee in the Accident. However, the defence disputes that the herniated disc was caused by the Accident and says that most of Ms. Pidwerbesky's ongoing pain and all or virtually all of her functional limitations are attributable to the herniated disc.

[86] As already noted, I found Ms. Pidwerbesky to be a credible witness and I accept her account of the nature, severity, and progression of her symptoms. From

her account, that of her lay witnesses, and the clinical records I have already referred to, I find that:

- Ms. Pidwerbesky sustained injuries to her left knee, shoulders, ribs, and back in the Accident.
- The injuries to her left knee, shoulders, and ribs caused her pain in the affected areas, but these injuries fully resolved within a few weeks.
- The injuries to her back included soft tissue injuries that caused pain in her low back and the right side of her upper back. The upper back symptoms gradually resolved, but the low back symptoms persist.
- Within days of the Accident, Ms. Pidwerbesky was experiencing pain radiating from her low back into her left buttock, left hip, and down her left leg, as well as jolting sensations down her left leg into her foot. The pain was constant. The jolting sensations occurred daily but they were intermittent.
- By about the spring of 2019, Ms. Pidwerbesky was experiencing more pronounced neurological symptoms, including pins and needles, tingling, and burning.
- A herniated disc at L5-S1 was diagnosed following an MRI on June 23, 2019.
- On July 3, 2019, Ms. Pidwerbesky underwent a discectomy at L5-S1.
- Following discharge from the hospital on July 8, 2019, Ms. Pidwerbesky suffered from intense pain and was, for a period, wholly impaired in her ability to perform activities of daily living. Her condition gradually improved and, by late 2019, she was able to resume some activities of daily living. By early 2020, she was able to return to school, although the pain in her low back and left leg never resolved.
- Over the next two years, Ms. Pidwerbesky continued to suffer from ongoing pain in her low back and left leg that waxed and waned to some extent. She

was able to work, although she did so in pain and by taking a lot of pain medication.

- In late 2021, Ms. Pidwerbesky suffered a serious pain flare up. She took a medical leave from work. In February 2022, an MRI showed that the L5-S1 disc was herniated again.

- During the first few months of 2022, Ms. Pidwerbesky suffered extreme pain associated with the herniated disc, to the extent that she attended the emergency department on several occasions.

- On May 6, 2022, Ms. Pidwerbesky underwent a second discectomy. She was discharged from hospital on May 8, 2022.

- Since then, Ms. Pidwerbesky has continued to suffer from very significant and disabling low back and left leg pain. At best, there has been a marginal improvement in her symptoms since the second surgery.

[87] I turn now to the central question. Has Ms. Pidwerbesky established, on a balance of probabilities, that the herniated disc was caused by the Accident?

[88] In *Borgfjord v. Boizard*, 2016 BCCA 317, Justice Savage summarized the law on causation at paras. 54-57:

> [54] Causation is a two-step consideration. First, the plaintiff must establish the damage was caused *in fact* by the conduct of the defendant: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54. The test for factual causation was restated by the Supreme Court in *Ediger*:
>
> > [28] This Court recently summarized the legal test for causation in *Clements v. Clement*s, 2012 SCC 32, [2012] 2 S.C.R. 181. Causation is assessed using the "but for" test (*Clements*, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). That is, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred (*Clements*, at para. 8). "Inherent in the phrase 'but for' is the requirement that the defendant's negligence was necessary to bring about the injury -- in other words that the injury would not have occurred without the defendant's negligence" (para. 8 (emphasis deleted)).

> [55] Scientific proof of causation is not required; common sense inferences from the facts may suffice: *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 at paras. 38, 46. However, inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75 at paras. 58–62; *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at 279-80, 305.
>
> [56] Second, the plaintiff must establish causation *in law*. This has been described as proving the defendant was a proximate cause of the loss, the damage was not too remote from the factual cause, or the damage suffered was reasonably foreseeable: *Hussack* at para. 54. Overall the inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 11 and 12.
>
> [57] It is not necessary for the plaintiff to show the precise injury or the full extent of the injury was reasonably foreseeable, only that the type or kind of injury was reasonably foreseeable: *Hussack*, at para. 71.

[89] The question at this stage is one of factual causation.

[90] Dr. Cameron and Dr. Govender were both of the view that the presence of some radicular symptoms within about two weeks of the Accident was required to causally link the herniated disc to the Accident. Dr. Giantomaso said he would expect symptoms to present within about six to eight weeks of a causative event. The defence argued that the evidence of Dr. Cameron and Dr. Govender should be preferred over that of Dr. Giantomaso because as a neurologist and neurosurgeon, respectively, they are better qualified than a physiatrist to opine on the cause of a herniated disc. I do not agree. I am satisfied that all three of the doctors were well qualified to express the opinions they expressed. In any event, this difference in the expert medical evidence is not material because, for the reasons expressed below, I am satisfied that Ms. Pidwerbesky was experiencing radicular symptoms, or symptoms suggestive of a herniated disc, within two weeks of the Accident.

[91] I pause to address the defence submission that Dr. Cameron's evidence should be rejected because he demonstrated bias. This submission was based on what the defence characterized as a misleading statement in Dr. Cameron's third report and on the manner in which he testified, which the defence says was evasive and argumentative. Although Dr. Cameron did appear to get frustrated at times during cross-examination, I did not consider him to be concerningly evasive or

argumentative. In his third report he wrote that there is “well-documented neurological and neurosurgical literature that patients may initially develop relatively mild radicular-type symptoms associated with back pain following the original injury” and then “suffer an extension of the already protruded disk which originally developed at the time of the injury”, resulting in “radicular-type symptoms in delayed fashion, often several weeks or even a few months following the original injury”. In cross-examination, he agreed that this did not apply to Ms. Pidwerbesky. The defence says this demonstrates an intention to mislead. I do not view it that way. He was responding to, and disagreeing with, Dr. Govender’s report which Dr. Cameron read as expressing the view that a more progressive presentation was never a possibility.

[92] The defence argued that the symptoms Ms. Pidwerbesky complained of during the first couple of weeks following the Accident were not radicular symptoms. I disagree.

[93] I have found that within days of the Accident Ms. Pidwerbesky was experiencing low back pain; pain radiating from her low back into her left buttock, hip, and leg; and jolting sensations down her left leg into her foot. Clearly, these symptoms, particularly when viewed in the context of the subsequent more pronounced neurological symptoms, satisfied Dr. Cameron and Dr. Giantomaso that the herniated disc was caused by the Accident. I accept their evidence. Dr. Govender’s evidence is not inconsistent with their conclusions.

[94] Dr. Govender’s causation opinion, as expressed in his report, was premised on radicular symptoms not occurring until “many months after” the Accident. Earlier in his report he said such symptoms did not present until about three months after the Accident. In his testimony at trial, he agreed that the first documented symptom of radicular pain was a February 28, 2019 clinical note indicating a complaint of lower limb pain. This is a note of Dr. Kolkind’s that reads “pain radiating down left leg”. This was actually about two-and-a-half months after the Accident. In any event,

I have found that Ms. Pidwerbesky was experiencing pain radiating down the left leg within days, and certainly within two weeks, of the Accident.

[95] In addition, I have found that within days of the Accident Ms. Pidwerbesky was experiencing jolts down her left leg. The defence argued that Dr. Govender did not consider jolts to be a radicular symptom and that, in his view, it was essential that Ms. Pidwerbesky have numbness, paresthesia, or radicular-type pain within the two week window in order to link the herniated disc to the Accident. I do not think this is an accurate characterization of his evidence. Dr. Govender agreed that jolts down the leg could be a symptom of a herniated disc. He said jolts could also be caused by a muscle injury, but there is no doubt that he conceded that a herniated disc was a possible cause of jolts. He said that if jolts down the leg were caused by a nerve impingement, they would usually be accompanied by numbness, but he also said that impingement cannot be ruled out by the absence of tingling and numbness.

[96] In short, Dr. Govender's evidence is not inconsistent with the conclusion that the herniated disc was caused by the Accident because I have found the presence of both radicular pain (pain radiating down the leg) and jolts down the leg and into the foot within two weeks of the Accident. I have also found that by the spring of 2019 (about three months after the Accident), Ms. Pidwerbesky was experiencing more pronounced neurological symptoms, including pins and needles, tingling, and burning. I accept Dr. Giantomaso's evidence that the mechanism of action of the Accident could reasonably be associated with the herniated disc. I accept the opinions of Dr. Cameron and Dr. Giantomaso on the cause of the herniated disc. Given the factual findings I have made, Dr. Govender's evidence is not inconsistent with the conclusion that the herniated disc was caused by the Accident. All of these factors taken together satisfy me, on a balance of probabilities, that Ms. Pidwerbesky's herniated disc was caused by the Accident.

[97] In his second report, Dr. Cameron expressed the opinion that Ms. Pidwerbesky's back pain and pain radiating down her leg would probably improve for up to two years post-operatively and that she would then require a follow-up

assessment to provide a more accurate long-term prognosis. Dr. Giantomaso agreed that at the time of the trial, Ms. Pidwerbesky was still in the early days of recovery from the second surgery, and there was some prospect for improvement with active rehabilitation and exercise generally. On the basis of their evidence, I find that there is a real and substantial possibility that Ms. Pidwerbesky will experience some improvement in her condition by about May 2024, which will be two years after the second surgery.

Non-Pecuniary Damages

[98] An award of non-pecuniary damages is intended to compensate for pain, suffering, and loss of enjoyment of life prior to the trial and into the future. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle. I have taken these factors into consideration.

[99] Awards of non-pecuniary damages in other cases provide a useful guide, however, the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by a specific individual.

[100] Before the Accident, Ms. Pidwerbesky’s life was on the upswing. She had defeated a drug addiction and been drug free for more than six years. She had advanced in her career through a combination of post-secondary education and work experience. She was a highly regarded employee at KGH. She had commenced the LPN program, the first step in her plan to eventually become an RN. She was doing well in the program and had developed friendships with classmates and co-workers. She had no physical limitations. She was an active and involved

mother. She was a bubbly, positive, organized person, who filled a leadership role in her family.

[101] As a result of the Accident, Ms. Pidwerbesky has endured intense pain for more than four years. Her symptoms in the six months after the Accident were very severe. She tried, valiantly, to continue with the LPN program but did so with pain that took the enjoyment out of the pursuit of her dream. The first surgery itself was very painful and resulted in a difficult recovery period during which she had to use a walker and raised toilet seat. She was forced to put a hold on her education. Over the next two years her condition improved somewhat, but she continued to live in constant or near constant pain, using pain medication to get by. To her credit, she persevered and completed the LPN program, but struggled with the physical demands of a typical LPN role. She then suffered the re-herniation of the disc and endured a lengthy wait for another surgery. When Ms. Pidwerbesky was re-assessed by Dr. Giantomaso in March 2022, while waiting for the second surgery, he considered her wholly impaired from most life activity. She then underwent the second surgery in May 2022, and endured another difficult recovery, which was ongoing at the time of the trial about four months later. She continues to experience constant or near constant baseline pain and debilitating flare-ups that have resulted in her attending the emergency department several times since the second surgery.

[102] I am satisfied that there is some prospect of Ms. Pidwerbesky's condition improving to some extent. As mentioned, Dr. Cameron expressed the opinion that the pain will probably improve for up to two years post-operatively. Dr. Giantomaso agreed that at the time of the trial it was still "early days" following the second surgery and he was hopeful that Ms. Pidwerbesky would experience some improvement. However, from the expert evidence as a whole it is clear that there is little if any prospect of a full recovery and Ms. Pidwerbesky almost certainly faces many years of ongoing daily pain. She will likely be dependent on pain medication for the rest of her life.

[103] The Accident-related injuries have had a significant impact on Ms. Pidwerbesky's career, and this has caused her considerable emotional pain. It was important to her to advance in her career and she had demonstrated that her goal of becoming a nurse, and eventually an RN working in the operating room, was a realistic one. For reasons I will discuss in more detail later, I am not persuaded that the achievement of that goal was a certainty but for the Accident, but it was nevertheless a realistic goal when assessed from the perspective of her academic skills and capabilities. For reasons I will discuss in more detail later, I am satisfied that becoming an RN is no longer a real and substantial possibility for Ms. Pidwerbesky and that she is unlikely to ever work again as an LPN. Put simply, her career aspirations have been ruined by the Accident and this has caused her immense grief.

[104] The Accident-related injuries have deprived Ms. Pidwerbesky of the ability to be an active parent to Jayden. The injuries have also impacted her relationship with Mr. McCulloch, and diminished her social life.

[105] Although Ms. Pidwerbesky was not an unusually active person before the Accident, she is now extremely limited in her ability to engage in physical activity. While I am satisfied that she can do more than she has been doing in terms of active rehabilitation and exercise, her limitations are significant. She is unlikely to ever be able to rollerblade, bike ride, or hike pain-free. She has been, and continues to be, limited to very light housekeeping. While her function in this respect may improve somewhat, I am satisfied she will never be able to engage in heavy housework.

[106] Ms. Pidwerbesky seeks an award of $250,000 for non-pecuniary damages, which includes compensation for loss of housekeeping capacity. I considered the following cases cited by her counsel: *Bhatti v. Jones*, 2020 BCSC 1935 ($190,000 awarded in non-pecuniary damages); *Best v. Thomas*, 2014 BCSC 1033 ($225,000 awarded in non-pecuniary damages, or about $260,000 when adjusted for inflation); and *Khashei v. Pirro*, 2020 BCSC 1048 ($200,000 awarded in non-pecuniary damages).

[107] The defence submits that if the disc herniation was caused by the Accident, a non-pecuniary damages award of $140,000 is appropriate, citing the following cases: *Anderson v. Steffen*, 2021 BCSC 2248 ($130,000 awarded in non-pecuniary damages); *McCullagh v. Rozinbaum*, 2020 BCSC 429 ($175,000 awarded in non-pecuniary damages); *Sawires v. Paris*, 2021 BCSC 240 ($110,000 awarded in non-pecuniary damages); and *Knight v. Zenone*, 2022 BCSC 99 ($200,000 awarded in non-pecuniary damages).

[108] All the cases cited by counsel concern plaintiffs who, in general terms, sustained physical injuries similar to those sustained by Ms. Pidwerbesky. However, most of the cases relied on by the defence concern plaintiffs with ongoing symptoms and impacts that were significantly less severe than those of Ms. Pidwerbesky. For example, in *Anderson* it appears that the ongoing symptoms were attributable primary to the soft tissue injuries rather than the disc herniation and the plaintiff had not undergone surgery; in *McCullagh*, the plaintiff had not had surgery – surgery was recommended but the prognosis was positive; and in *Sawires*, the plaintiff had not had surgery and no surgery was contemplated at the time of trial, although it was a future possibility. With one exception, the cases relied on by Ms. Pidwerbesky are more analogous to this case. The exception is *Best*, which concerned a plaintiff whose injuries were even more debilitating than are Ms. Pidwerbesky's. For example, the disc injury suffered by the plaintiff in *Best* affected both his legs and his left arm and he was unable to walk more than ten feet without a cane.

[109] The cases I found most helpful as comparators were *Khashei* and *Knight*.

[110] The most significant factors in this case are Ms. Pidwerbesky's relatively young age, the severity and constancy of her ongoing pain, the two surgeries she has endured, the near certainty that she will permanently live with a residual baseline of pain and occasional excruciating flare-ups, and the substantial emotional suffering caused by the loss of her career aspirations. Having considered all the authorities, I assess Ms. Pidwerbesky non-pecuniary damages of $220,000, which

reflects the awards in *Khashei* and *Knight* with some adjustment for inflation, and includes compensation for the impairment to her housekeeping capacity.

Past Loss of Income

[111] A claim for past loss of income or income earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[112] Ms. Pidwerbesky's past loss of income claim is not controversial.

[113] At the time of the Accident, Ms. Pidwerbesky was working on a casual basis as a porter at KGH, earning $21.62 per hour. As an employee at KGH, she was a member of the Municipal Pension Plan ("MPP"). If the Accident had not occurred, I am satisfied that it is a near certainty that she would have continued to work casually as a porter until she completed the LPN program in late 2019, and thereafter she would have worked full-time as an LPN. Instead, as a result of the injuries she sustained in the Accident, she was unable to work at various times in the pre-trial period. Specifically, she continued to work casually as a porter for the first few months after the Accident but she was forced to stop working in June 2019 with the flareup that ultimately resulted in the first surgery. She returned to paid employment in 2020 working initially as a porter and then, in December 2020, as an LPN. She worked as an LPN until December 2021, albeit on a casual basis at times, until the flareup that ultimately resulted in the second surgery.

[114] Ms. Pidwerbesky calculates her past income loss, on a net basis, at $90,301.68. This amount comprises two components:

1. $7,869.68 for the seven months between June and December 2019. This is based on the assumption that during each of those months Ms. Pidwerbesky would have worked 65 hours at $21.62 per hour (for a total of $9,837.10 gross). The 65 hours per month is based on the average number of hours she

actually worked during the months of February, March, and April 2019. The claim of $7,869.68 reflects a 20 percent reduction to account for income tax.

2. $82,432 for the period from January 2020 to the trial. This is based on Ms. Clark's estimate of Ms. Pidwerbesky's loss of net earnings and loss of employer contributions to the MPP during that period, on the assumption that but for the Accident Ms. Pidwerbesky would have started working as an LPN in January 2020.

[115] The defence did not take issue with Ms. Clark's method of estimating Ms. Pidwerbesky's past loss of income. I am satisfied that Ms. Pidwerbesky's approach is an appropriate method of assessing her damages under this head. I assess her past income loss at $90,301.68.

Future Loss of Income Earning Capacity

[116] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 7 – 10, the Court of Appeal re-stated the operative principles which had previously been revisited in the trilogy of *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *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 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 v. Prescott*, 2021 BCCA 345, 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*). 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.

[117] In *Kringhaug v. Men*, 2022 BCCA 186, the Court reiterated that loss of earning capacity claims are assessed using either an earnings approach or a capital asset approach, with the former typically used where there is an identifiable loss of income such as where the plaintiff has an established work history, and the latter typically used in other cases such as with a young person whose career path is uncertain.

[118] In this case, it is beyond dispute that Ms. Pidwerbesky has established a potential future event that could lead to a loss of capacity. The evidence overwhelmingly demonstrates that the injuries she sustained in the Accident have limited her functional capacity and that the limitations are likely permanent.

[119] Both Ms. Webber and Ms. Branscombe identified functional limitations which I accept stem from the Accident-caused injuries. Ms. Branscombe's view of Ms. Pidwerbesky's functional capacity is more positive than Ms. Webber's view. I prefer Ms. Webber's evidence for three reasons. First, unlike Ms. Webber, Ms. Branscombe did not reassess Ms. Pidwerbesky after the second surgery. Second, Ms. Branscombe assessed Ms. Pidwerbesky in January 2022 but by March 2022 Dr. Giantomaso considered Ms. Pidwerbesky to be wholly impaired from most life activity. Third, Ms. Branscombe's conclusion that Ms. Pidwerbesky is capable of working as an LPN "as evidenced by her self-report of doing so" is inconsistent with the fact that Ms. Pidwerbesky stopped working as an LPN in December 2021 because of her injuries, and questionable given Ms. Branscombe's own assessment

which demonstrated that Ms. Pidwerbesky did not meet all the strength demands of an LPN (i.e., those beyond “light”).

[120] As a result of the functional limitations, Ms. Pidwerbesky has become less valuable to herself as a person capable of earning income in a competitive labour market; she is less marketable or attractive as an employee to potential employers. There has been an impairment of the capital asset: see *Rab* at paras. 36 and 60.

[121] It is also clear that there is a real and substantial possibility (indeed a certainty) that this loss of capacity will cause a pecuniary loss. The impairments identified by Ms. Webber will leave Ms. Pidwerbesky less able to compete in the marketplace, with economic consequences. It is a near certainty that she will continue to suffer from pain with associated limitations in functional capacity, even if she follows all treatment recommendations. I accept her evidence about her pre-Accident career intentions and aspirations. There is no doubt that those intentions and aspirations are no longer realistic for her. Among other things, she is unlikely to ever work full time, which she would have done had the Accident not occurred. She has established a real and substantial possibility of a pecuniary loss.

[122] The difficultly, in this case, presents at the third step - assessing the value of that loss, which must include assessing the relative likelihood of future events or contingencies.

[123] In *Steinlauf v. Deol*, 2022 BCCA 96, Grauer J. A. for the Court discussed the third step as follows:

> [55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:
>
> > ... An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff’s likely future after the accident has happened: *Rosvold v. Dunlop,* 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8....
>
> [56] Accordingly, as discussed in *Dornan* at para 156, it became necessary to assess the respondent’s without-accident earning potential, and what the

> respondent was likely to earn as a result of the accident. At the same time, as discussed in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[124] In *Dornan*, Grauer J.A. discussed the role of contingencies in the analysis in these terms:

> [92] In approaching this part of the appeal, it is useful to remember that we are dealing with specific contingencies, not general contingencies. The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):
>
> > 46 …[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
> >
> > 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.
>
> [93] The process, then, as discussed above at paras 63–64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.

[125] Thus, the application of a specific contingency, whether positive or negative, engages the "real and substantial possibility" analysis, and not merely the "relative likelihood" analysis that follows. If the contingency is a real and substantial possibility, the process becomes one of assessing its relative likelihood.

[126] Ms. Pidwerbesky's position on the quantification of her loss of future earning capacity is grounded in the following submissions:

- At the time of the Accident, she had embarked on a definite career path such that the earnings approach should be used to assess her damages for loss of future earning capacity.

- But for the Accident, she would have completed her LPN diploma by late 2019 and started working full time as an LPN in January 2020; she would have worked full time as an LPN for two years and then she would have commenced the four year Bachelor of Science in Nursing degree program to become an RN; during that four year period she would have worked 12 hours a week as an LPN while attending school; and commencing May 2026 she would have worked full time as an RN to age 65.

- But for the Accident, each year she would also have earned about 10 percent in overtime pay and another 10 percent in other premium pay, as she did in 2021.

- But for the Accident, she would have remained a member of the MPP and would have continued to make contributions on all her eligible earnings.

- In assessing her without-Accident earning capacity, it is appropriate to apply what Ms. Clark referred to as "risk only" contingencies, which account for the probability that a BC female will be forced into unemployment or part-time work, and not also "choice contingencies" which account for a person choosing not to participate in the workforce. She says choice contingencies should not be applied because she was committed to her career, she continued to work after having Jayden, and she continued to work after the Accident despite her severe pain, all of which demonstrate that but for the Accident there is very little chance that she would have voluntarily left the workforce before age 65.

- She has been left competitively unemployable in any capacity as a nurse and in any other capacity, including sedentary work. In other words, she has no residual earning capacity.

[127] On this foundation, Ms. Pidwerbesky quantifies her loss of future earing capacity at $2,434,613, which is the sum of:

a) Ms. Clark's estimate of her without-Accident future earnings (base pay) with risk-only contingency deductions in the RN to age 65 scenario ($1,609,501);

b) an additional 20 percent of that amount ($320,000) to account for 10 percent in overtime pay and another 10 percent in other premium pay;

c) Ms. Clark's estimate of the net present value of the loss of employer contributions to the MPP ($422,000); and

d) Ms. Clark's estimate of the net present value of the loss of CPP benefits ($83,112).

[128] Assuming I find that the Accident caused the disc herniation (which I have found), the defence concedes that Ms. Pidwerbesky has established an entitlement to an award under this head of damages. However, the defence quantifies the loss at between $327,500 and $433,000. This is based on the following submissions:

- Even absent the Accident, Ms. Pidwerbesky would not have pursued a Bachelor of Science in Nursing degree and become an RN given she was 32 years old when she started the LPN program. The defence says she would not have returned to school at age 36 to complete a four-year program.

- Even if Ms. Pidwerbesky would have attempted to gain admission to a degree program, there is no evidence to assess the likelihood that she would have secured admission.

- Ms. Pidwerbesky's without-Accident earning capacity should be assessed by deducting both risk and choice contingencies from Ms. Clark's estimates of

the without-Accident earnings of an LPN and associated MPP and CPP losses. The defence calculates this to be $1.31 million.

- Ms. Pidwerbesky has significant residual earning capacity (between 66 percent and 75 percent of her without-Accident capacity). In this regard, the defence submits that she has demonstrated a good work ethic and motivation, she has significant administrative experience and skills, no expert has expressed the opinion she will never work again, Mr. Whitford acknowledged that accommodations are routinely available for workers in the health sector, she is capable of working in a sedentary job with accommodations, and there is evidence that the administrative jobs she has had in the past in the health sector have paid about 75 percent of an LPN position.

[129] Thus, the defence submits that Ms. Pidwerbesky's damages for loss of earning capacity should be assessed at between 25 percent and 33 percent of the $1.31 million without-Accident capacity, which is between $327,500 and $433,000.

[130] There are flaws in the position of each party. Ms. Pidwerbesky has overstated her without-Accident capacity and understated her with-Accident capacity. In my view, there is a real and substantial possibility that she would not have pursued an RN degree even if the Accident had not happened, and I am not persuaded that she has no residual capacity. The defence has understated Ms. Pidwerbesky's without-Accident capacity and overstated her with-Accident capacity. In my view, there is a real and substantial possibility that she would have pursued an RN degree and, while I am persuaded that she has some residual earing capacity, the defence analysis does not adequately reflect the impact of her functional limitations and guarded prognosis.

[131] I agree that the earnings approach should be used to assess Ms. Pidwerbesky's damages for loss of future earning capacity because, at the time of the Accident, she had embarked on a definite career path and that career is no longer open to her.

[132] I will start my analysis by assessing Ms. Pidwerbesky's likely without-Accident future earnings.

[133] In my view, there is a real and substantial possibility that Ms. Pidwerbesky would have achieved an RN degree in accordance with the timeline posited by her counsel, but the likelihood she would have done so is far from certain. I accept that she is a hard-working, motivated, and determined person, and that she has the intellectual capacity required to complete a nursing degree. However, she is also realistic and practical, as reflected in her decision to start with an LPN diploma because of a concern about making the four year commitment to become an RN, which would have required her to incur significant student loan debt.

[134] I am doubtful that Ms. Pidwerbesky could have worked more than the odd shift as an LPN while also completing the degree. Ms. Scranton, who is a clinical instructor of nursing degree students, testified that it would be very challenging to work part-time as an LPN and also complete the degree requirements. It is very likely that Ms. Pidwerbesky would have had to incur significant student loan debt to complete the degree and, given her age, there is a real and substantial possibility she would have decided against doing that. This conclusion is also supported by the evidence of Mr. Whitford who identified Ms. Pidwerbesky's age and the cost of education as barriers to her retraining.

[135] There is no evidence in the record on which to assess the likelihood of Ms. Pidwerbesky getting into a degree program, but it is reasonable to infer that gaining admission is not a certainty. Accordingly, even if she was prepared to incur the cost, there is a real and substantial possibility that she would not have gained admission.

[136] In all the circumstances, I assess the likelihood that Ms. Pidwerbesky would have completed a degree in nursing and become an RN had the Accident not occurred, at 25 percent. I am satisfied that absent the Accident there is a near certainty that Ms. Pidwerbesky would have completed the LPN program by late 2019 and started working full time as an LPN in January 2020.

[137] I am satisfied that it is a near certainty that but for the Accident, Ms. Pidwerbesky would have chosen to work full time to age 65, would have taken advantage of some overtime opportunities and opportunities to earn premium pay, and would have remained a member of the MPP. I accept her evidence about her commitment to work in general, and in the health care sector in particular. She has proven herself to be a committed and hard-working person, who valued her career. There is very little chance she would have voluntarily pursued a different type of work or left the workforce. In all the circumstances, I am satisfied that when assessing her without-Accident capacity it is necessary to apply risk-only contingencies. In my view, it would not be appropriate to also apply negative-choice contingencies unless positive contingencies associated with future promotions are also applied. I am also satisfied that it is necessary to include an additional amount of earnings for overtime and other premium pay, but it is not reasonable to quantify this at 20 percent each year solely on the basis that this is the amount she earned in 2021.

[138] Ms. Clark's methodology was not challenged by the defence. Given the findings outlined above, it is appropriate to assess Ms. Pidwerbesky's without-Accident earning capacity by starting with Ms. Clark's estimates for the LPN to age 65 scenario, adjusted for risk-only contingencies but adding only a total of 10 percent for overtime and premium pay, and then grossing that up by 25 percent of the difference between that amount and the estimates for the RN scenario, but including only 10 percent for overtime and premium pay, to reflect the 25 percent likelihood that Ms. Pidwerbesky would have become an RN.

[139] Ms. Clark's estimate of without-accident future earnings (base pay) with risk-only contingency deductions in the LPN scenario is $1,330,405. I add 10 percent, or $133,041, to reflect the overtime and premium pay; Ms. Clark's estimate of the net present value of the loss of MPP benefits in the LPN scenario adjusted for risks only which I calculate at $222,887 ($267,805 - $44,918); and Ms. Clark's estimate of the net present value of the loss of CPP benefits in the LPN scenario adjusted for risks only which is $64,189. The sum of these amounts is $1,750,522. To that I add

$131,260, which is 25 percent of the difference between that amount and Ms. Clark's RN scenario but with only 10 percent for overtime and premium pay (($2,275,563 - $1,750,522) X .25), to reflect the 25 percent likelihood that Ms. Pidwerbesky would have become an RN. On this basis, I assess Ms. Pidwerbesky's without-Accident capacity at $1,881,782.

[140] I turn now to Ms. Pidwerbesky's with-Accident, or residual, capacity.

[141] As I have said, I accept Ms. Pidwerbesky's evidence about her commitment to work in general, and in the health care sector in particular. She is a dedicated and hard-working person with initiative, who places a high value on a career. I am satisfied that she will be motivated to work, even with some ongoing pain. From the evidence of Ms. Eisen and Ms. Scranton it is apparent that she is highly regarded by her colleagues. Mr. Whitford acknowledged that accommodations are routinely available for workers in the health sector. It is apparent from Ms. Pidwerbesky's evidence that casual and part-time positions are available in the health sector. In the circumstances, I am satisfied that opportunities to work will be available to Ms. Pidwerbesky if she is physically capable of working.

[142] The expert evidence overwhelmingly supports the conclusion that Ms. Pidwerbesky was not capable of working, in any capacity and to any degree, at the time of the trial. Dr. Cameron opined that as at the date of his second report (July 6, 2022, two months after the second surgery), she was completely disabled from nursing and also not able to work in any job. After the first surgery but before the second, Dr. Giantomaso expressed the opinion that Ms. Pidwerbesky was no longer competitively employable as an LPN full time and was unlikely to be competitively employable full time in the future. At that time, he suggested it might be best for her to upgrade to an RN or find a job in home care or other types of nursing that do not require heavy lifting or repetitive bending. However, when he reassessed Ms. Pidwerbesky two months before the second surgery but after the MRI showing a recurrence of the herniated disc, he considered her wholly impaired from most life activity. Ms. Webber's opinion, expressed following a reassessment about six weeks

after the second surgery, was that Ms. Pidwerbesky no longer met the minimum functional capacity to work in any competitive occupation in a full or part-time capacity, including sedentary work.

[143] The more difficult question is whether there is a real and substantial possibility that Ms. Pidwerbesky's condition will improve enough to allow her to work to some extent. I have found that there is a real and substantial possibility that she will experience some improvement in her condition by about May 2024. No expert expressed the view that she is unlikely to ever be able to work again. She returned to the LPN program about six months after the first surgery. It is clear she was not able to meet all the physical demands of nursing on a sustainable basis at that time, but she was able to work to some extent. In June 2021, Ms. Webber's view was that she could manage full-time work in a flexible, sedentary job. In March 2022, Mr. Whitford's view was that she would likely be able to obtain and maintain casual short-term administrative employment. In July 2022, after the second surgery, Dr. Cameron's view was that she probably would remain "permanently significantly disabled due to her chronic pain" and not able to return to working as an LPN or in any position with similar physical requirements, but he did not rule out sedentary work. This evidence satisfies me that there is a real and substantial possibility that her condition will improve enough to allow her to work in a flexible sedentary job on a part-time basis.

[144] Determining the likelihood of that outcome is very difficult. However, because of Ms. Pidwerbesky's motivated nature, I assess the likelihood to be relatively high. In all the circumstances, I find that there is a 75 percent chance that by about May of 2024, Ms. Pidwerbesky will be capable of half-time, flexible, sedentary work.

[145] I turn now to quantifying that residual capacity in dollar terms. As mentioned, there is evidence that the administrative jobs Ms. Pidwerbesky had in the past in the health sector paid about 75 percent of an LPN position. Ms. Clark estimated the future earnings of an LPN, including pension benefits, but excluding overtime and premium pay, at $1,617,481. From this, I conclude that a full-time, sedentary,

administrative position in the health sector would generate future earnings (including pension benefits) of about $1,213,110 (75 percent of $1,617,481). If Ms. Pidwerbesky worked half time, that would generate future earnings of about $606,555. I have found that there is a 75 percent chance that Ms. Pidwerbesky will be capable of earning at this level by about May of 2024. In all the circumstances, I assess her with-Accident earning capacity at 70 percent of $606,555, or $424,589, to reflect the 75 percent likelihood that she will return to this capacity, the delay in her getting there (to about May 2024), and the likelihood that she will have future periods of unemployment due to pain flare-ups.

[146] A comparison of Ms. Pidwerbesky's likely without-Accident future earning capacity ($1,881,782) and her likely with-Accident earning capacity ($424,589) leads me to assess her damages for loss of future earning capacity at $1,457,193.

Cost of Future Care

[147] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore them to their pre-accident condition, insofar as that is possible, and to preserve and promote their mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[148] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be reasonable and medically justified, not medically necessary, to be recoverable: *Milina* at para. 212. While evidence from various health care professionals can establish what is necessary in terms of future care, an evidentiary link between a "physician's" assessment of pain, disability, and recommended treatment and the care recommendations of a qualified health care professional is required: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 38-39.

[149] Ms. Pidwerbesky claims $32,000 for the cost of future care. This is based on Dr. Giantomaso's recommendations for active rehabilitation and occupational therapy, plus passive therapy such as physiotherapy, chiropractic therapy, massage therapy, and acupuncture during flare-ups. Using the ICBC Fee Guide amount of $145 per session as reflective of the cost of these treatments, she seeks between $1,740 and $3,480 for 12 to 24 sessions of active rehabilitation/occupational therapy, plus $1,000 a year to age 65 for passive treatments (at $145 per session, that amounts to almost seven sessions of passive therapy a year).

[150] The defence concedes that the claim for active rehabilitation/occupational therapy is reasonable at the midpoint of the range ($2,610), but submits that $1,000 each year to age 65 for passive therapy is excessive.

[151] I agree with the defence. While the items claimed are medically justified, $1,000 every year to age 65 for passive therapy is not reasonable. I assess Ms. Pidwerbesky's damages for the cost of future care at $17,110 ($2,610 for active rehabilitation/occupational therapy, plus $14,500 for passive therapy which is half the amount she claimed).

Special Damages

[152] Ms. Pidwerbesky claims special damages of $5,567.15. The defence agrees with most of the items claimed. The only items of dispute are $1,720.36 for a mattress and $283 for mowing and weeding.

[153] I agree with the defence. The evidence is insufficient to justify the claim for a new mattress. No details were provided with respect to the age or kind of mattress that was replaced or the basis upon which a new one was selected. The evidence is also insufficient to justify the claim for mowing and weeding. Although I am satisfied that Ms. Pidwerbesky was not capable of mowing or weeding, I am not satisfied that she would have performed these tasks if she was physically able to do so.

[154] I award special damages of $3,563.79.

In-Trust Claim

[155] In *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124, Justice D. Smith (as she then was) summarized the relevant principles to be applied in assessing an "in trust" claim as follows, at para. 180:

> [180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:
>
> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[156] Ms. Pidwerbesky seeks an award of $17,208 as compensation for the housekeeping, shopping, and babysitting services that her mother provided as a result of the Accident. She submits that the care provided by her mother went above and beyond that which would ordinarily be provided by family members. The amount claimed under this head reflects ten hours of assistance per week, each week from the Accident to the trial, valued at minimum wage of $11.95 per hour.

[157] While I am satisfied that Ms. Pidwerbesky's mother provided assistance to her, at least until she moved to Salmon Arm, with one exception the evidence is not sufficient for me to quantify the time spent, even in a rough way. It would be entirely speculative to base an award on ten hours per week, each week. However, it was established that Ms. Pidwerbesky's mother looked after Jayden during Ms.

Pidwerbesky's 2019 hospital admission (15 days). This certainly went above and beyond that which would ordinarily be expected of a family member. Valued at minimum wage, this time is worth $4,302 ($11.95 X 24 X15).

[158] Recognizing that Ms. Pidwerbesky's mother did provide additional services, I award $5,000 for the in-trust claim.

Conclusion

[159] In summary, the damages awarded to Ms. Pidwerbesky are:

Non-pecuniary damages	$220,000.00
Past loss of income	$90,301.68
Future loss of income earning capacity	$1,457,193.00
Cost of future care	$17,110.00
Special damages	$3,563.79
In-Trust Claim	$5,000.00
Total	**$1,793,168.47**

[160] Subject to further submissions, Ms. Pidwerbesky is entitled to her costs at Scale B. If the parties cannot agree or if there are circumstances of which I am unaware, they may make arrangements to speak to that issue.

"Warren J."