IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McWilliams v. Hardy,*
2023 BCSC 1259

Date: 20230724
Docket: M2010059
Registry: Vancouver

Between:

Morgan Danielle McWilliams

Plaintiff

And

Ronald Dean Hardy

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:	C. Dyson I. Bownick A. Zang, A/S
Counsel for the Defendant:	G. Griffith K. Wrolson, A/S
Place and Date of Trial:	Vancouver, B.C. January 30 & 31, February 1-3, 2023
Place and Date of Judgment:	Vancouver, B.C. July 24, 2023

Table of Contents

I. INTRODUCTION

[1] Morgan McWilliams was injured when the car she was driving was struck from behind by a vehicle driven by Ronald Hardy. Mr. Hardy admitted liability for the collision during the trial. At issue are the injuries Ms. Williams suffered and an assessment of the damages to which she is entitled for those injuries.

[2] Ms. McWilliams sustained various physical injuries in the collision. The normal recovery period for those injuries was about six months. It is now four and a half years since the collision. Ms. McWilliams' evidence is that the pain from her injuries continues to impair her quality of life and her ability to work and perform household chores. In addition, she says she suffers from depression and debilitating driving anxiety as a result of the collision.

[3] The experts generally agree that Ms. McWilliams suffers from chronic pain as a result of the collision. They also agree that there is an undeniable psychological component of her current condition.

[4] The defendant accepts that the collision caused various soft tissue injuries. He contests the nature, severity and duration of those injuries, as well as their consequences. The defendant disputes that the collision caused Ms. McWilliams' depression or anxiety. He argues that she has failed to mitigate her damages.

II. BACKGROUND

[5] The collision occurred on November 22, 2018. Ms. McWilliams was 26 years old at the time. She was living with her parents in Richmond, British Columbia, where she had grown up.

[6] Ms. McWilliams was driving her mother's car, with a friend in the passenger seat. She had just stopped for a car in front of her, when she was struck hard from behind. She was jolted forward and caught by her seatbelt. She immediately felt sore all over, with significant pain in her neck and head. She did not go to the hospital; instead, her friend drove her home. The next day, she noticed that her knee and wrist were also very sore.

[7] Ms. McWilliams was attending the University of British Columbia at the time of the collision. She missed several classes because she found it uncomfortable to sit and did not want to drive to the UBC campus. She persevered, however, and completed her degree on time and graduated with a Bachelor of Arts in History in May of 2019.

[8] Ms. McWilliams was working at Montana's Restaurant in Tsawwassen Mills at the time of the collision. She had worked in the restaurant industry since 2012, part-time during the school year and full-time during the summers. She had been employed by Montana's since 2015. She worked primarily as a server, but also as a bartender and a server supervisor.

[9] Ms. McWilliams missed two weekends of work at Montana's following the collision. When she returned to work, she struggled with the heavy slate platters on which some dishes are served at that restaurant. She also had difficulty changing beer kegs, which was part of her duties. As a result, she left Montana's less than a month after the collision.

[10] Ms. McWilliams quickly found work as a server at Boston Pizza. Her duties at Boston Pizza were less challenging physically, although she still avoided some work that she found difficult.

[11] From September to December 2019, Ms. McWilliams spent time abroad on a volunteer internship in Ghana. In February 2020, she returned to work at Boston Pizza. In March 2020, she was laid off with the initial Covid lockdowns.

[12] Ms. McWilliams applied for and was accepted into one or more Masters of Arts programs in Europe. She decided not to attend, however, because the programs went online during the Covid pandemic.

[13] Ms. McWilliams enrolled in the Bachelor of Education program at UBC. The classes were online at this time, so she was able to attend from home in Richmond.

[14] In December 2020, Ms. McWilliams started working one night a week at a restaurant called the Cheese Inn in Vancouver. The restaurant accommodated her injuries by limiting the tasks she found difficult.

[15] Between February and May 2021, Ms. McWilliams completed the practicum requirement for the Education degree in person, at a high school in White Rock.

[16] In March 2021, she applied for substitute teacher, or teacher-on-call ("TOC"), positions with three local school districts in the Greater Vancouver area: Delta, Surrey and Richmond. As Ms. McWilliams explained it, with a TOC position, there is no guarantee of working on a given day in a given district, but if a TOC is employed in multiple districts, the probability of full-time work is greatly increased. She testified that being employed in three districts "essentially guaranteed" full-time work. In 2021, a TOC working full-time hours could expect to earn a starting salary of approximately $60,000 per year.

[17] Ms. McWilliams completed her Bachelor of Education degree in July 2021. She received offers from all three of the school districts to which she applied for a TOC position. She did not accept the offers. Ms. McWilliams testified that this was because she began to experience significant anxiety around driving to a new location every day and not knowing how strenuous each day's work would be.

[18] Ms. McWilliams began looking for opportunities to teach abroad that would not require daily commuting. She accepted a teaching position with an all-female university in Somaliland that offered on-campus housing. The pay was just $325 USD per month, or approximately $5,000 CDN for a year.

[19] When the contract in Somaliland ended, Ms. McWilliams opted not to renew it. In August 2022, she started a new job with a private school in Bahrain. She was still teaching at the school in Bahrain on the date of trial. She teaches 27 grade 4 students using the BC Curriculum. The position pays approximately $55,000 CDN per year.

[20] Ms. McWilliams has received positive feedback on her work in Bahrain. She expects to be offered to have her contract extended.

III. ANALYSIS

A. Causation

[21] The basic rule of causation for negligence is that the plaintiff must demonstrate on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred: *Clements v. Clements*, 2012 SCC 32 at para. 13. Inherent in the "but for" test is a requirement that the defendant's negligence was necessary to bring about the injury - in other words, the injury would not have occurred without the defendant's negligence.

[22] It is not necessary for the plaintiff to demonstrate that the defendant's negligence was the sole cause of a subsequent medical condition. There may be other potential non-tortious causes, including pre-existing medical conditions. So long as there is a substantial connection between the defendant's negligence and the plaintiff's injury, the defendant is liable for the damages: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 44, 1996 CanLII 183; *Farrant v. Laktin,* 2011 BCCA 336 at paras. 9–11.

[23] In this case, the defendant accepts that his negligence caused soft tissue injuries to Ms. McWilliams' neck, back and shoulders which have developed into chronic pain.

[24] The defendant submits that Ms. McWilliams' wrist and knee injuries were pre-existing from years prior and ongoing at the time of the collision, and that, if there was any aggravation to those injuries, they have since resolved to their baseline level.

[25] Further, the defendant submits that Ms. McWilliams' depression was a pre-existing and ongoing condition at the time of the collision. He argues that, beyond the normal recovery time from the physical injuries, the collision did not cause a significant disruption to Ms. McWilliams' daily life.

B. Injuries

i. Credibility and Reliability

[26] I found Ms. McWilliams to be a credible and reliable witness. She appeared to be honest and forthright in giving her testimony. She acknowledged prior injuries and pre-existing conditions, including personal struggles with her mental health. She made appropriate admissions under cross-examination. The changes in her lifestyle and personality following the collision were corroborated by her mother and a friend.

[27] Ms. McWilliams made some errors in her evidence. However, I view these errors as minor and inconsequential. For example, in her direct testimony, she said she attended physiotherapy for a full year after the collision, whereas the documents show that the treatment was actually for about three months. Another example is that on her examination for discovery, she denied neck or back pain in the two years prior to the subject collision, failing to mention the pain in these areas she reported to her doctor following the May 2018 accident. She acknowledged these minor inconsistencies without evasion. They do not undermine the credibility or reliability of her evidence overall.

[28] The defendant observes that there is no record in the clinical notes that Ms. McWilliams reported her mental health concerns arising from the collision to her family doctor, despite a history of disclosing similar issues prior to the collision. However, it is clear from the evidence that she disclosed her struggles to her family and friends. She also sought treatment for the driving anxiety and, later, counselling for depression. The absence of a record in the notes of her family doctor is not evidence she did not suffer an injury: *Edmondson v. Payer,* 2011 BCSC 118, at para. 36.

[29] Ms. McWilliams' evidence of chronic pain was confirmed objectively on physical examinations by the physiatrists who gave expert evidence on behalf of both the plaintiff and the defendant. Her description of her depression and anxiety was accepted by an experienced psychiatrist who provided an expert report. No

expert suggested that she is embellishing or exaggerating her persistent pain. I will return to the expert evidence below.

ii. Health and Lifestyle Prior to the Collision

[30] Ms. McWilliams described herself as a social and outgoing person by nature. She enjoys travel, adventure, time with friends and family and physical activity. Prior to being injured in the collision, she particularly enjoyed hiking, running and walking her dogs. She also enjoyed family dinners and nights out with her friends.

[31] Ms. McWilliams acknowledged that she struggled with depression and obsessive-compulsive disorder prior to the collision. As a teenager, she experienced sadness and self doubt which evolved over time into negative thoughts and occasional suicidal ideation. Despite this, she says she led a full and rewarding life prior to the collision. She had a strong network of friends on whom she could lean during depressive periods. Social activities and active outings also helped to improve her mood.

[32] In 2017, Ms. McWilliams endured what she described as a “dark time”. In February, her family doctor diagnosed her with a major depressive disorder and prescribed Prozac. Her time in Ghana that summer gave rise to anxiety about her sexual health. In November, a person with whom she was romantically involved was diagnosed with HIV. She worried about her partner’s health as well as her own HIV status.

[33] However, Ms. McWilliams testified, she was feeling better by early 2018. In January 2018, she left the relationship, which she described as “toxic”, and discontinued the Prozac.

[34] Closer to the date of the collision, Ms. McWilliams experienced some further difficult life events, including the death of a close family friend and euthanizing a pet. On November 19, 2018, less than one week before the collision, she saw her family doctor, seeking a note in support of an academic concession from UBC. She told the doctor that she had “a really rough month” and “had not felt that bad in five years”.

[35] In redirect on this subject, Ms. McWilliams testified that the events and symptoms she described to her doctor in November 2018 occurred two months prior to the appointment. She testified that she was feeling better by the time she saw the doctor, but still needed a concession from the university to attend a funeral.

[36] Ms. McWilliams' explanation is consistent with her doctor's note: "overall improved now". I accept her explanation and her evidence that she was on an "upward trajectory" emotionally in the months prior to the collision.

[37] Ms. McWilliams also experienced some minor on-going physical ailments prior to the collision. As a teenager, she was diagnosed with patellofemoral syndrome, a common source of pain under the kneecap. In 2013, she fell and injured her wrist.

[38] On May 9, 2018, Ms. McWilliams was involved in a minor motor vehicle collision that aggravated her wrist and her right knee. She complained to her doctor of lower and upper back and neck pain, as well as headaches following this accident. However, she did not miss work as a server at Montana's.

[39] I accept Ms. McWilliams' evidence that, while she experienced some discomfort from these pre-existing conditions prior to the collision, she was able to manage the pain, for example by moderating her running or wearing a wrist brace at work.

iii. Injuries and Their Consequences Following the Collision

[40] Ms. McWilliams described the following injuries as she experienced them immediately following the collision: pain in her neck and shoulders that extended down into the middle of her upper back; lower back pain; pain in her right wrist and right knee; and intense, throbbing headaches, initially on a daily basis, decreasing to three or four times per week in the months following the collision.

[41] Ms. McWilliams also immediately felt anxious about driving. She became tense and nervous behind the wheel. Every time that she got in the car, she

experienced visions of how she would get hurt again. She changed jobs from Montana's to Boston Pizza in part because Boston Pizza was closer to where she lived. She did not drive into Vancouver unless she had to. She did not drive to activities like hiking or social events. When she did drive, she drove slowly and carefully.

[42] The collision and resulting physical injuries also contributed to a decline in her mental health. Ms. McWilliams testified that she began to have suicidal thoughts involving cars or driving, particularly when driving over bridges or in mountainous terrain, which she had not experienced before the collision. She also lost access to several significant coping mechanisms she had used in the past. She was no longer able to take long walks or do most physical exercise because of the physical pain. She could no longer take leisurely drives because of the driving anxiety. She stayed home and withdrew from friends and social activities.

[43] Six months following the collision - the normal recovery time for soft tissue injuries - she continued to experience pain in her neck, back, wrist and knee. She continued to find it difficult to lift objects with her right hand. Pain in her right knee continued to make it difficult to walk, stand or sit. The headaches continued, although their frequency decreased to two or three times per week. She was still anxious about driving. She remained less social and withdrawn from friends and activities. Her energy level was down. She was sleeping less. Her mood was lower.

[44] Ms. McWilliams testified that any improvement in her physical or mental condition plateaued in late 2020, about one year after the collision.

[45] Ms. McWilliams attended counselling with a firm specializing in MVA-related anxiety and depression. She attended approximately 30 sessions, until she was informed that, due to ICBC policy, her visits with her counsellor would no longer be covered. Rather than switching counsellors, she discontinued the therapy.

[46] Ms. McWilliams attended physiotherapy between January and March 2019, when she stopped attending. She testified that physiotherapy provided some short-term relief, but no long-term improvement.

[47] She began massage therapy in April 2021, which she testified provided some temporary relief. She also resumed physiotherapy in May 2021. She continues to receive massage therapy, and she does the stretches recommended by her physiotherapist on her own in Bahrain.

[48] At the time of trial - four and a half years after the collision - Ms. McWilliams' condition remained about the same as it was one year after the collision. She continued to experience headaches, now one or two times per week. Her neck and back were still tense and sore, and the pain continued to make it difficult for her to move in certain directions. She still experienced occasional flareups that caused shooting pain. Sitting, standing or walking for extended periods of time still caused her pain and discomfort. A common aggravating factor for her lower back pain was bending over, such as when she leans over a student desk at work as a teacher. She also had difficulty teaching physical education. She still noticed pain in her right wrist when it was put at an angle or she lifted heavy objects. Her headaches and low energy made lesson planning a challenge.

[49] As of the date of the trial, Ms. McWilliams continued to avoid physical activities that she had previously enjoyed, such as running and hiking. Her pain discouraged her from involvement in outdoor extracurricular programs at the schools in Somaliland and Bahrain. While at home in Richmond, she contributed less to chores around the house. Walking her dogs was less enjoyable and she could only walk one dog at a time because of the pain in her wrist.

[50] Driving anxiety also remained an issue for her. The anxiety only got worse in early 2021 when she drove to White Rock on a daily basis to complete the practicum for her education degree. It was a significant factor in her decision to turn down the TOC positions in the Lower Mainland and instead seek out a teaching job overseas. She continued to avoid driving when she could.

iv. Expert Evidence

[51] Two physiatrists, specialists the field of physical medicine and rehabilitation, gave evidence at trial. Ms. McWilliams tendered an expert report by Dr. Zeeshan Waseem. The defendant tendered an expert report by Dr. Hernish Acharya.

[52] The physiatrists reached similar conclusions on Ms. McWilliams' initial injury and the cause of her presenting symptoms. In essence, they agreed that she suffered soft tissue injuries in her neck and back that have developed into a chronic pain syndrome.

[53] Dr. Waseem wrote in his report that:

> Based on the history obtained and review of provided medical records, Ms. McWilliams appears to have initially sustained sprain/strain soft tissue injuries to the cervical, thoracic and lumbar spines, right wrist and right knee and developed headaches as a result of the subject motor vehicle accident.
>
> These injuries resulted in chronic myofascial pain of the cervical and thoracic spines, chronic mechanical lower back pain, post-traumatic headaches with tension and cerviogenic features, aggravated right wrist pain and generalized deconditioning.
>
> Initially increased knee pain has resolved to prior baseline levels.

[54] The defendant's expert, Dr. Acharya, wrote:

> …[I]t is my opinion that a Whiplash Associated Disorder in the November 22, 2018, accident that has subsequently developed into a chronic pain syndrome and that it is unlikely that a chronic pain syndrome would have developed had the November 22, 2018 accident not occurred.

[55] Dr. Waseem and Dr. Acharya differed somewhat in their findings on their physical examinations of Ms. McWilliams. Both found tenderness in her neck, back and shoulders. However, Dr. Waseem noted the presence of trigger points, which he explained are hyper-irritable nodules or knots in muscle fibers that can be a cause of pain, whereas Dr. Acharya did not find any "focal musculoskeletal or neurological causes" of the pain symptoms. Also, Dr. Waseem found an aggravation of Ms. McWilliams' right wrist and right knee pain, whereas Dr. Acharya made no specific mention of the wrist or the knee.

[56] They also differed in their assessment of the consequences of Ms. McWilliams' injuries. Dr. Acharya wrote:

> I did not find any medical evidence upon which to suggest the imposition of a medical restriction nor upon which I would necessarily expect a physiological capacity limitation.

[57] Dr. Acharya explained that a "medical restriction" is a restriction based on a medical risk, and a "physiological capacity limitation" is a physical limitation on a person's ability to participate in an activity (he gave as an example a quadriplegic cannot walk).

[58] Dr. Acharya continued:

> As such, the functional problems that Ms. McWilliams is describing are likely best characterized as functional intolerances.

[59] Dr. Acharya defined "functional intolerances" as limitations without a medical underpinning. In other words, in Dr. Acharya's opinion, Ms. McWilliams is not medically limited from engaging in activities. Rather, it is the pain symptoms which are impairing her ability to function more fully.

[60] In general, I prefer Dr. Acharya's opinion over that of Dr. Waseem. Under cross-examination, Dr. Waseem confirmed that he only examined Ms. McWilliams for about 15 minutes. He relied more heavily on a review of her medical records. Dr. Waseem also made some factual errors in his report. For example, he stated there was no reported or documented history of neck and back complaints or headaches pre-dating the subject collision. While these errors were minor, they illustrate a difference in approach, in which, in my view, Dr. Acharya took more time and care in preparing his report.

[61] That said, there is little material difference between the basic conclusions of these two experts. Specifically, they both found that Ms. McWilliams developed a chronic pain syndrome as a result of the collision. Given the nature of chronic pain

syndrome, I don't think anything material turns on the physiological source of the pain.

[62] Dr. Waseem defined chronic pain as pain that persists after clinical resolution of the injury. As Dr. Waseem explained it, chronic pain is a condition in which the pain itself becomes the underlying impairment. He testified that pain for many years can wear down a person's resilience and create problems with her self-esteem and participation in social and recreational activities. It can cause depression, which in turn leads to further physical symptoms. In other words, chronic pain creates a feedback loop which is a hindrance to full recovery.

[63] Dr. Acharya defined chronic pain as pain that persists more than six months beyond what would be expected for the physical injury to heal. Despite the fact that the physical injury has healed, he explained, the patient continues to experience pain along pathways that have become abnormal. In other words, the patient continues to experience pain in the absence of actual or impending tissue damage.

[64] Dr. Waseem opined that Ms. McWilliams physical condition would be considered chronic and unremitting and, therefore, permanent.

[65] Dr. Acharya was less pessimistic. In his opinion, while difficult to predict, Ms. McWilliams' functional intolerances may respond to "hurt versus harm" counselling. He explained:

> These [functional intolerances] should respond to hurt versus harm counselling wherein her primary health care providers can encourage her to engage in any activity of her choosing be at vocational, recreational, or household, at any time of her choosing.

[66] The goal of hurt versus harm counselling, according to Dr. Acharya, is to reduce pain symptoms by encouraging the patient to recognize that the pain is not caused by actual or impending tissue damage, and that activity is not going to harm them further.

[67] Dr. Acharya's opinion that hurt versus harm therapy can improve function has come in for some judicial criticism. In *Mak v Blackman*, 2022 BCSC 931, Justice Majawa wrote:

> [94] Dr. Acharya's opinion on the relationship between pain and limitations would lead to the conclusion that a person who has chronic pain syndrome must endure constant flare-ups of pain at a significant detriment to their quality of life simply because they are not further damaging their muscles and ligaments. With respect, this conclusion cannot be correct. While pain is undoubtedly subjective, it is real and the effect it has on people's lives cannot be ignored. It is reasonable to expect an injured person to engage in activities, even where they cause some pain. It is not reasonable to dismiss the impact that pain can have entirely.

[68] I do not take Dr. Acharya's evidence in this case to be that Ms. McWilliams should attempt to push herself through the pain. Instead, his opinion is that her pain symptoms may respond favourably to hurt versus harm therapy, and, assuming the recommended therapy is successful, her functional prognosis – the prospect she can return to normal activities – should be good.

[69] Under cross-examination, Dr. Acharya acknowledged that hurt versus harm therapy is not always successful and is "often not done well" by practitioners. He also acknowledged that, even when successful, the therapy almost never results in complete resolution of pain symptoms.

[70] I accept Dr. Acharya's opinion that Ms. McWilliams currently has functional intolerances rather than medical restrictions or physiological capacity limitations, as he explained those concepts. I also accept his opinion that Ms. McWilliams may respond favourably to hurt versus harm therapy. However, his evidence does not cast doubt on the existence of her current chronic pain condition. Moreover, it does not support a finding that Ms. McWilliams is more likely than not to recover from her chronic pain condition.

[71] The physiatrists both noted a psychological component of Ms. McWilliams' chronic pain condition. Dr. Waseem stated that Ms. McWilliams psychological symptoms have hampered her physical recovery. Dr. Acharya acknowledged that

recovery from chronic pain has a significant psychological or psychiatric component which is outside his area of expertise.

[72] The only report by an expert in the field of psychology or psychiatry was a report by Dr. Paul Devlin tendered by Ms. McWilliams. Dr. Devlin has written many expert reports on the subject of chronic pain and depression.

[73] Dr. Devlin opined that Ms. McWilliams suffers from major depression and a somatic symptom disorder ("SSD") secondary to the chronic pain directly caused by the collision on November 22, 2018.

[74] Dr. Devlin described chronic pain as a physical injury with psychiatric implications. Chronic pain is not a symptom, he explained, but rather a disease that is quite different from acute pain. With chronic pain, the nervous system becomes ingrained and incapable of resolving the pain. Dr. Devlin noted that chronic pain can affect mood, health and employment.

[75] In his report, Dr. Devlin wrote that:

> I believe that this lady's pain (although variable) is mostly of moderate intensity and can therefore be more sever on occasion, leading to considerable lack of capability to manage even basic things that she previously took for granted and leading to a significant impairment in her ability to plan activities including anything physical.

[76] Dr. Devlin found that Ms. McWilliams' depression has caused her to suffer from "learned helplessness" which he described as being "entrenched in depression with the realization that she may never have a reasonable career or be able to experience life as she would've expected to know it". He concluded that the prognosis for Ms. McWilliams to recover from her psychiatric injuries is poor.

[77] The defendant submits that Dr. Devlin's opinion should be given little or no weight because he was not given access to relevant information. The copy of the clinical records of her family doctor that Dr. Devlin reviewed prior to writing his report was redacted to remove references to Ms. McWilliams' sexual health. He also was not provided with Ms. McWilliams' counselling records.

[78] When presented with the unredacted clinical records under cross-examination, Dr. Devlin agreed that Ms. McWilliams was diagnosed with a major depressive disorder in March 2017. He agreed that she experienced significant anxiety around her sexual health following the research project in Africa. He also acknowledged that Ms. McWilliams appeared to be experiencing a depressive episode when she attended a visit with her family doctor in September 2017 and November 2018.

[79] These facts did not change Dr. Devlin's opinion. He was aware that Ms. McWilliams suffered a history of mood problems prior to the collision. In his opinion, her depressed mood prior to the collision was a normal response to tragic life events, whereas her depression following the collision was an abnormal reaction to physical pain.

[80] Dr. Devlin's opinion was also unchanged by the lack of reference in the clinical records to mood issues following the collision. He testified that, in his experience, patients often do not discuss mood issues with their family doctors. As stated, I accept Ms. McWilliams' evidence of her depression and anxiety following the collision, despite the lack of reference in the clinical notes.

[81] The defendant also argues that Ms. McWilliams does not meet the threshold for SSD. Dr. Devlin identified the following requirements for a diagnosis of SSD: (a) one or more somatic symptoms that are distressing or result in significant disruption of daily life; (b) excessive thoughts, feelings or behaviours related to somatic symptoms or related health concerns; and (c) the state of being symptomatic is persistent, typically lasting longer than six months.

[82] Dr. Devlin agreed during cross-examination that missed time from work is a factor that contributes to meeting the "significant disruption of daily life" threshold necessary for a diagnosis of SSD. He also agreed with the defendant's assertion that Ms. McWilliams has demonstrated an ability to work since the collision. However, he stuck to his diagnosis of SSD.

[83] I accept Dr. Devlin's expert opinion that Ms. McWilliams suffers from major depression and SSD secondary to chronic pain. However, I would not put any weight on the following statement in Dr. Devlin's report:

> It is highly doubtful that she will ever regain as successful a career as she might have expected. It is also doubtful that she will be able to sustain the rigours of working in a foreign country despite the fact she has a preference for a warmer climate.

[84] Dr. Devlin did not provide any analysis to support these conclusions. An opinion on Ms. McWilliams' vocational prospects, in Canada or abroad, is outside his area of expertise.

v. Findings on Causation

[85] Ms. McWilliams sustained soft tissue injuries to her neck, back and shoulders in the collision that have developed into chronic pain. These injuries remain symptomatic in the sense that Ms. McWilliams continues to experience pain resulting from the collision. Ms. McWilliams also suffered post-traumatic headaches as a result of the collision, which persist today although less frequently.

[86] In addition, Ms. McWilliams developed major depression and SSD secondary to the chronic pain caused by the collision. These phycological disorders have impaired her physical recovery and damaged her function and quality of life. She continues to struggle with driving anxiety and persistent distressing thoughts about her pain and limitations.

[87] The November 2018 collision also aggravated pre-existing wrist and knee injuries to an extent that the pain interfered with her work and activities, whereas it had previously been manageable. However, the aggravation of these injuries attributable to the collision appears to have passed. Dr. Acharya did not note wrist or knee pain in his report. Dr. Waseem found that the right knee pain had resolved to baseline levels. I am not persuaded that the continuing pain in her wrist and knee is caused by the collision.

[88] There is no evidence that the earlier collision on May 9, 2018, caused or contributed to Ms. McWilliam's injuries. While the earlier collision caused pain in the same anatomical areas, these relatively minor injuries resolved by the date of the second collision. No expert attributed the chronic pain, headaches, depression or SSD to the first collision.

[89] I reject the defendant's contention that the major depression diagnosed by Dr. Devlin is a pre-existing condition. While Ms. McWilliams suffered from depression and experienced a depressive episode as recently as two months before the collision, there is no evidence of a risk of a natural progression of her pre-existing depression to the post-collision phycological disorders diagnosed by Dr. Devlin in the absence of the collision: *Lo v. Vos,* 2021 BCCA 421*,* at paras. 71,75, 79.

[90] In short, the evidence establishes a substantial connection between the collision and Ms. McWilliams' injuries, both physical and psychological. On a balance of probabilities, I am satisfied that, but for the defendant's negligence, Ms. McWilliams would not have suffered from chronic pain in her neck, back and shoulders, aggravation of her knee and wrist, persistent headaches, or the major depression and SSD diagnosed by Dr. Devlin.

vi. Prognosis

[91] Ms. McWilliams pain condition is chronic. Drs. Waseem and Devlin say it is permanent. However, there is also some evidence it could improve. All three experts recommended medication as prescribed by a mental health professional, counselling and therapies to lessen her symptoms.

[92] Dr. Acharya specifically recommended the hurt versus harm therapy discussed above. As stated, his evidence does not support a finding that Ms. McWilliams is more likely than not to recover from her current chronic pain condition. However, it does give rise to a real possibility her function and quality of life could improve provided she is able to participate in the therapy he recommends or something similar.

[93] Dr. Devlin recommended cognitive behavioural therapy (“CBT”), which he said could be extremely useful in managing Ms. McWilliams chronic pain and depression. Dr. Devlin also testified that he has seen many individuals in Ms. McWilliams’ position benefit from attending multidisciplinary pain clinics.

[94] There was very little evidence at trial with which to assess the likelihood of success of these therapies in Ms. McWilliams’ case. If the therapies are going to show positive results, it will likely be incremental and over the long term. While there is a real and substantial possibility her level of functioning and quality of life could improve, the likelihood she will recover completely from the current chronic pain condition is low.

vii. Mitigation

[95] The defendant seeks a global reduction of damages of 20% because, he submits, Ms. McWilliams failed to mitigate her loss with continued treatment following the collision.

[96] Justice Verhoeven helpfully summarized the legal principles relating to a mitigation defence in *McNabb v. Rogerson*, 2022 BCSC 1514:

> [134] In summary:
>
> a) The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of the loss.
>
> b) In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to the plaintiff by doctors, the defendant must prove two things:
>
> > i. that the plaintiff acted unreasonably in deliberately avoiding the recommended treatment, and
> >
> > ii. the extent, if any, to which the plaintiff's damages would have been reduced had the plaintiff acted reasonably.
>
> c) In order to meet this second part of the test, the defendants must establish a real and substantial possibility that any part of the losses could have been avoided.
>
> d) If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.

[97] The defendant relies on the evidence that Ms. McWilliams discontinued physiotherapy in March 2019, and did not resume physiotherapy or try massage until 2021. He also notes that she has not been attending treatment clinics while she has been living abroad.

[98] Under cross-examination, Dr. Waseem acknowledged that physiotherapy and massage are typically more effective when they are done soon after a trauma. However, he did not agree with defence counsel that Ms. McWilliams would have had better results in this case if she continued physiotherapy. In giving this answer, Dr. Waseem assumed that Ms. McWilliams continued the exercises she was taught in physiotherapy.

[99] The defendant argues that Ms. McWilliams acknowledged on her examination for discovery that she stopped exercising altogether following the collision. In context, this characterization does not fairly reflect her evidence. Ms. McWilliams testified that she continued to do the stretches she was shown by her physiotherapist and attempted to remain active to the best of her ability.

[100] Moreover, Ms. McWilliams' primary impairment is chronic pain, not untreated physical injuries. As discussed, chronic pain is a condition in which the pain itself becomes the underlying impairment. Notably, Dr. Acharya testified that Ms. McWilliams would not benefit from further physiotherapy, massage therapy, chiropractic care or injection-based treatment. Instead, he recommended the hurt versus harm therapy discussed above.

[101] Given this evidence, I am not persuaded there is real and substantial possibility Ms. McWilliams could have avoided her current condition with more physiotherapy or massage.

[102] The defendant argues that Ms. McWilliams is unreasonably reluctant to take medication for her depression. He notes that Dr. Devlin opined the treatment for her depression has been "deficient" and she should reconsider medication for depression.

[103] The evidence does not establish that Ms. McWilliams unreasonably neglected her mental health following the collision. She attended 30 counselling sessions to address her driving-related anxiety, and testified that she is willing to attend further counselling. Although she did not seek out a further prescription for medication, she did what she could to improve her mood. There is no expert evidence that medication would have provided a measurable improvement. The primary therapies recommended by Dr. Acharya and Dr. Devlin going forward are talk-based.

[104] In short, I am not persuaded that Ms. McWilliams acted unreasonably in deliberately avoiding recommended treatment. Nor am I persuaded that there is a real and substantial possibility her condition would have improved with additional treatment. Accordingly, I find that the defendant has failed to meet his onus to establish that Ms. McWilliams failed to mitigate her loss with additional treatment.

C. Non-Pecuniary Damages

[105] Non-pecuniary damages (or damages for pain and suffering) are assessed based on a non-exhaustive list of factors set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. In *Stapley*, Justice Kirkpatrick described the factors as follows:

> [46] The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and

> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[106] More recently, in *Callow v. Van Hoek-Patterson,* 2023 BCCA 92, the Court of Appeal instructed that determining an appropriate range of non-pecuniary damages "entails ascertaining the upper and lower range for damage awards in the *same class of case*" (emphasis in original): at para. 19. Given no two cases are alike, defining the class is "a generalized exercise that takes place at a high level of abstraction": *Callow* at para. 19.

[107] In *Callow,* the Court described the plaintiff's situation as follows at para. 22:

> A person in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood for future improvement is poor. With caution, can continue to participate in previous activities while monitoring physical exertion for pain.

[108] Based on this description, the Court found that the range of non-pecuniary damages for a person in the situation of the plaintiff in that case was $50,000 to $60,000 (at para. 23).

[109] Ms. McWilliams' situation is more dire than that of the plaintiff in *Callow*. At the high level of abstraction recommended by the Court in *Callow*, Ms. McWilliam's situation can be described in the following terms:

> A person in their early 30s who sustained soft tissue injuries to their neck, back and shoulders which developed into chronic pain and remain symptomatic. Also suffered post-traumatic headaches which persist although not as frequent. Developed major depression and somatic symptom disorder marked by driving anxiety. No longer engages in recreational and social activities enjoyed before the collision. Withdrawn from friends and family. Some prospect of improvement with appropriate treatment.

[110] The parties provided numerous decisions in support of their positions on non-pecuniary damages in this case.

[111] *Leung v. Draper,* 2020 BCSC 219, in which Justice Tucker awarded $90,000 in non-pecuniary damages before reducing the award 10% for a failure to mitigate, provides an appropriate lower end of the range of comparable awards. In *Leung,* the 37-year-old plaintiff sustained back and neck injuries that developed into chronic pain. Her back and neck pain were likely permanent, although her symptoms could be lessened with appropriate treatment. She suffered mild SSD, as well as anxiety and depression. These conditions could also be improved with treatment. Driving made her anxious; however, she still drove. She could not engage in recreational and social activities the way she did before the collision; however, she continued to be socially engaged.

[112] *Lal v. Singh,* 2021 BCSC 2378, in which Justice Taylor awarded $165,000 in non-pecuniary damages, provides an appropriate upper end of the range. In *Lal*, the 39-year-old plaintiff suffered chronic neck and back pain, migraine headaches, fatigue, depression and mild SSD. The evidence established that she would have an ongoing disability in terms of headaches, mild cognitive and memory complaints and chronic myofascial pain. Although she continued to work, her condition affected her enjoyment of every other aspect of her life. Her injuries impaired her ability to participate in activities, relationships with family and friends and any interest in forming a romantic relationship or having a family of her own.

[113] In my view, the mid-point between these two awards would be fair to both parties in this case. I therefore assess Ms. McWilliams' non-pecuniary damages at $127,500.

[114] The defendant sought a deduction from the award of non-pecuniary damages for positive contingencies, by which I understand him to mean the possibility that Ms. McWilliams may respond favourably to the hurt versus harm therapy recommended by Dr. Acharya.

[115] In my view, Dr. Acharya's opinion does not provide a meaningful basis for a deduction in non-pecuniary damages. While an assessment of Ms. McWilliams' economic loss must necessarily be grounded in a consideration of the contingencies, both negative and positive, the award of non-pecuniary damages is better assessed at the high level of abstraction recommended by the Court of Appeal in *Callow.* The award I have made includes a general consideration of her prognosis.

D. Past Wage Loss

[116] The defendant concedes that Ms. McWilliams missed work at Montana's as a result of her injuries in the collision.

[117] Ms. McWilliams testified that she missed "one or two weekends" of work. She worked approximately 16 hours a week, typically in eight-hour shifts. She made minimum wage plus tips. Minimum wage for alcohol servers in British Columbia in 2018 was $11.40 per hour. Four days of work, at eight hours a day, at minimum wage, totals approximately $365. No adjustment for income taxes is necessary, as Ms. McWilliams income in 2018 and tuition tax credits would have kept her in a non-paying tax bracket.

[118] Ms. McWilliams mitigated any further wage loss as a server by acquiring a new position at Boston Pizza. She does not claim any further past wage loss prior to the completion of her education degree.

[119] Ms. McWilliams claims past wage loss as a teacher from the date of her qualification in British Columbia to the date of trial.

[120] According to a teacher salary grid tendered as evidence by Ms. McWilliams, a TOC in British Columbia with her qualifications working full-time hours could earn a starting annual gross salary of $58,707. Applying a tax rate of 20%, her likely net starting income as a TOC was $46,966.

[121] Ms. McWilliams turned down the TOC positions she was offered in the Lower Mainland, and instead took a teaching position in Somaliland, where she was paid approximately $4,950, a difference of approximately $42,016.

[122] Following the end of her one-year contract in Somaliland, Ms. McWilliams took a job at the private school in Bahrain, at which she worked for six months before trial and continues to work. The teaching position in Bahrain pays a salary of $55,000.

[123] Ms. McWilliams testified that, had she accepted the TOC positions in the Lower Mainland, her earnings would have moved up the pay scale. According to the salary grid, she would have earned approximately $61,860 in 2022. The difference in six months' income between the job in Bahrain and full-time hours as a TOC in British Columbia is $2,744 assuming a tax rate of 20%**.**

[124] The defendant argues that Ms. McWilliams' decision to move to Africa and subsequently to Bahrain was more likely a result of her love of travel and volunteerism, rather than her injuries.

[125] In substance, this is an argument that, by leaving British Columbia where she was qualified to be a teacher, Ms. McWilliams failed to mitigate her economic loss.

[126] I agree with the defendant that the evidence does not establish that Ms. McWilliams was prevented by her physical injuries from working as a teacher in British Columbia. Indeed, she testified that she has found some aspects of working in Somaliland and Bahrain difficult because of her physical limitations. She did not give evidence that working abroad, which involves long distance air travel and other rigours, is easier physically than working as a TOC in British Columbia. Instead, the reason she gave for her move to Africa and subsequently Bahrain was related to her driving anxiety, and to a lesser extent, headaches, which she finds less frequent in sunnier climates.

[127] Ms. McWilliams described her decision to turn down the TOC positions in the Lower Mainland and accept a position in Somaliland as follows. In May or June

2021, she was planning to pursue a career as a teacher in this province. As she got further into the practicum for her education degree, however, she found driving to White Rock more and more difficult. Therefore, she began to look abroad for options that would allow her to make use of her teaching degree, but live on a campus where she was not required to drive to work. In Somaliland, she was able to avoid driving almost altogether. In Bahrain, she can minimize her driving.

[128] She considered accepting a TOC position in the Richmond school district only. However, she decided against this option because she would still need to drive to work at different schools, and because working in just one school district would not guarantee full-time hours. She also testified that it is difficult to transfer her teacher qualifications to other jurisdictions in Canada where it might be possible to live closer to where she works.

[129] I agree with the defendant that Ms. McWilliams' decision to work abroad was based on more than driving anxiety. She clearly enjoys travel and adventure, as well as the opportunity to live and work with people of different cultures. Immediately after she graduated from UBC with a degree in history, she spent six months in Ghana. Before she entered teachers' school, she considered a Masters program in Europe. Her decisions to work in Somaliland and Bahrain were based at least in part on the opportunity to travel and try something new for a year or two.

[130] More importantly, her decision to accept a very low-paying job in Somaliland was not reasonably required by her driving anxiety. There were other reasonable alternatives, as evidenced by her subsequent position in Bahrain, that could have minimized her driving and paid her closer to what she would have earned in British Columbia.

[131] In my view, Ms. McWilliams failed to make reasonable efforts to find more remunerative work as a teacher that could accommodate her driving anxiety. I am not persuaded that living at home in Richmond, and driving to three school districts, or living on campus in Somaliland and being paid $5,000 a year, were the only reasonable alternatives open to her. There is no evidence that teaching positions in

British Columbia, or elsewhere, that would have paid a competitive salary, all necessarily involve extensive driving. There is no evidence, for example, that Ms. McWilliams considered relocating to a smaller community in British Columbia or somewhere other than Africa that would allow her to walk or take public transportation to work, but also earn a decent wage. Her evidence about transferring her qualifications to other jurisdictions in Canada was vague and unpersuasive.

[132] I do not fault Ms. McWilliams for taking a low-paying job in Africa. There are many good reasons to work in a disadvantaged part of the world at less than what one could earn in Canada. However, the defendant should not be required to make up the difference when the decision to earn less than her potential income was not reasonably related to Ms. McWilliams' physical or psychological injuries.

[133] In my view, there is a real and substantial possibility that Ms. McWilliams could have worked as a teacher within her limitations, in Canada or abroad, in 2021 at a salary approximating her salary in Bahrain in 2022.

[134] Accordingly, I would limit her past wage loss as a teacher to the difference between her salary in Bahrain and her potential salary as a TOC in three school districts in British Columbia. Based on the numbers provided by Ms. McWilliams, the after-tax difference is $2,744.

[135] Adding the lost wages as a server, I award $3,109 as past wage loss.

E. Damages for Loss of Earning Capacity

[136] Assessing damages for future loss of earning capacity involves the use of one of two approaches: the earnings approach or the capital asset approach. Generally, the earnings approach is appropriate where the with- and without-accident earnings trajectories can be assessed reliably and the loss measured by taking the difference between the two. The capital asset approach, which is based on a multiple of years of pre-accident earnings, is appropriate only when the evidence does not allow the court to reliably assess the future earning streams. See *Perren v. Lalari*, 2010 BCCA 140 at paras. 31–33; *Johal v Fazli*, 2021 BCSC 1896, at para. 225.

[137] In *Rab v. Prescott*, 2021 BCCA 345, at para. 47, Justice Grauer set out a three-step process for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial:

> …The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown Brown* [*v. Golaiy (1985), 26 B.C.L.R. (3d) 353* (S.C.)]).
>
> The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss.
>
> If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* [*v. Silva*, 2021 BCCA 228] at paras 93–95.
>
> [Spaces added for readability.]

[138] In my view, the earnings approach based on the three-step test in *Rab* is appropriate in this case. Ms. McWilliams' income loss was not clear at the time of trial. It is therefore necessary to assess the consequences of her injuries on her future income earning potential. This assessment requires a comparison between her future if the collision had not happened and her likely future after the collision. That assessment necessarily involves a consideration of hypothetical events, both negative and positive. The parties are not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is "a real and substantial possibility and not mere speculation". *Dornan v. Silva,* 2021 BCCA 228, at para. 156-157; *Rab*, at paras. 29 and 48; *Lo,* at para. 97-104.

[139] As a final step, the Court must be satisfied that the award is fair and reasonable to both parties: *Lo,* at para. 117.

i. Potential Future Event

[140] The evidence discloses a potential future event that could lead to a loss of capacity. If Ms. McWilliams' chronic pain, headaches and driving anxiety do not improve, she will be less capable overall of earning income in all types of

employment and less valuable to herself as a person capable of earning an income in the competitive labour market.

[141] Pain in her neck, back and shoulders will limit her physical capacity as a worker, including her ability to participate in extracurricular activities as a teacher. Headaches will limit her ability to concentrate and work on academic or administrative tasks. Driving anxiety will limit where she can work.

ii. Real and Substantial Possibilities

[142] There is a real and substantial possibility that Ms. McWilliams' chronic pain, headaches and driving anxiety will continue for some time. Her level of functioning may improve with appropriate treatment, including the hurt versus harm therapy recommended by Dr. Acharya; however, the likelihood she will fully return to her pre-accident level of function is low.

[143] There is a real and substantial possibility that Ms. McWilliams can continue to work as a teacher within her limitations at a salary approximating her salary in Bahrain. This includes the good likelihood that she can extend her current contract in Bahrain and remain there as long as she wants.

[144] However, a long-term career along the lines of her position in Bahrain will not yield the same lifetime earnings as Ms. McWilliams could have earned if she gained seniority as a TOC and went on to work as a fully-able classroom teacher in British Columbia.

[145] Ms. McWilliams testified that she plans to return to British Columbia in the next year or two, and hopes to remain in the education field. She testified that she plans to pursue a Maters in Education so that she can qualify to work on the curriculum or administrative side of teaching, where she can avoid the physical demands of classroom teaching.

[146] This is a positive contingency: by upgrading her qualifications, Ms. McWilliams may regain her place in the competitive labour market. She may

continue to suffer some headaches; however, given her academic successes since the collision, it is unlikely she will fail if she chooses this alternative career path. In my view, there is a real and substantial possibility Ms. McWilliams will eventually find a teaching job in this Province that accommodates her limitations.

iii. Value of the Potential Future Loss

[147] Considering all of the evidence and assessing the likelihood of the various possibilities occurring, I find that Ms. McWilliams has suffered a 10% loss of her earning capacity.

[148] I adopt Ms. McWilliams' estimate of her lifetime earning capacity without the injuries. She begins with her current earnings of $55,000. Assuming she will work until age 65, the appropriate multiplier in Appendix E of the Civil Jury Instructions is 27.056, based on a discount rate of 1.5% and 35 years of future earnings. Accordingly, her estimate of the present value of her expected lifetime earnings is $1,488,080.

[149] This estimate does not include benefits or promotions; however, Ms. McWilliams did not provide any evidence of expected benefits or promotions.

iv. Conclusion on Future Economic Loss

[150] My assessment that Ms. McWilliams has suffered a 10% loss in capacity yields an economic loss in the amount of $148,808.

[151] The defendant submits that there should be a 20% general contingency deduction to the future loss of earning capacity award given general labour market conditions.

[152] I decline to make a general contingency deduction. Recent appellate caselaw casts doubt on the proposition that a 20% adjustment for general labour market contingencies is required in every case as a general rule: *Gray v. Lanz,* 2022 BCSC 2218, at para. 92 – 93.

[153] In this case, the estimate of Ms. McWilliams' future income is already conservative and may underestimate what she could have earned as a teacher in this province but for her injuries. In my view, a general contingency deduction is not required in this case.

[154] I am satisfied that an award of $148,808 for loss of future income earning capacity is fair and reasonable to both parties.

F. Loss of Housekeeping Capacity

[155] Ms. McWilliams seeks an award of $50,000 for past and future loss of housekeeping ability as a separate award, in addition to non-pecuniary damages.

[156] In *Ali v. Stacey*, 2020 BCSC 465, Justice Gomery considered two decisions of the Court of Appeal addressing claims for loss of housekeeping capacity, *Kim v. Lin*, 2018 BCCA 77 at paras. 27–37, and *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96–103, and concluded:

> [67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:
>
> a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
>
> b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
>
> c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
>
> d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[157] Ms. McWilliams has had the benefit of housekeeping services in Somaliland and Bahrain. The cost of those services is currently deducted from her income in Bahrain as part of her rent payments. However, the services she receives through

her employer do not provide complete coverage of every household need. She manages to keep her residence clean and presentable, albeit with some difficulty.

[158] At home, where she has lived on and off since the collision (November 2018 to September 2019, December 2019 September 2021 and holidays to present), her mother and father perform some of the household tasks Ms. McWilliams handled prior to the collision. Ms. McWilliams estimates that her total contribution to the household work went from about 40% pre-collision to 15% post-collision.

[159] However, it must be observed that the decline in Ms. McWilliams share of the household work is in the context of a family home and support for Ms. McWilliams' rest and recovery. I am not persuaded that the work her mother and father have done while she is at home is analogous to the services that might be provided to Ms. McWilliams personally by a paid housekeeper.

[160] To the extent that housekeeping is more difficult or painful for Ms. McWilliams since the collision, the loss is non-pecuniary in nature. I have taken her pain and discomfort into consideration in determining the award of general damages.

[161] Accordingly, I decline to make a separate pecuniary award for loss of housekeeping capacity.

G. Cost of Future Care

[162] Future care cost awards are intended to compensate a plaintiff for expenses that are reasonably necessary for their future medical care. These expenses must be reasonable and they must be medically justified: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.).

[163] Dr. Waseem recommended that Ms. McWilliams participate in a three-month active rehabilitation course, two or three times per week. He further suggested that Ms. McWilliams obtain in-home exercise equipment such as a stability ball, exercise mat, weights and resistance bands. He recommended two or three educational

sessions by a health professional to guide her with a self-directed exercise program. He also recommended topical medications.

[164] The defendant concedes that in-home exercise equipment should be included in a cost of future care award. In my view, the full scope of Dr. Waseem's recommendations should be included, as Ms. McWilliams will benefit from coaching and guidance, as well as equipment. Unfortunately, Ms. McWilliams did not provide any evidence of the cost of Dr. Waseem's recommendations. In the absence of evidence, I estimate $1,000 for these recommendations.

[165] Dr. Devlin recommended that Ms. McWilliams receive treatment sessions with a kinesiologist to assist with her deconditioning. In my view, this recommendation is redundant with Dr. Waseem's recommendations.

[166] Dr. Devlin further recommended 20 to 30 sessions of CBT over the next two years, at a cost of $200 to $225 per hour. In my view, this recommendation is both reasonable and medically justified. I find there is a real and substantial possibility Ms. McWilliams would attend CBT. I award $6,000 for 30 sessions.

[167] Dr. Acharya recommended that Ms. McWilliams attend hurt versus harm therapy. He did not provide a cost estimate for this therapy. I think it is important, given the defendant's reliance on Dr. Archarya's opinion as a positive contingency, that Ms. McWilliams be able to benefit from the therapy he recommended. Hurt versus harm appears to be a specific therapy for chronic pain, distinct from the CBT recommended by Dr. Devlin. I find there is a real and substantial possibility Ms. McWilliams would attend if it was funded. I award an additional $6,000 for hurt versus harm therapy.

[168] Finally, Dr. Devlin opined that attendance at a private pain clinic would be beneficial to Ms. McWilliams. In oral evidence, Dr. Devlin indicated that the cost could be as much as $20,000. As I understand it, attendance at a multidisciplinary pain clinic would substitute for many of the other recommended treatments (exercise, CBT, hurt versus harm). I have not been provided with any evidence to

justify the additional cost of the clinic. Accordingly, I do not find it appropriate to award an additional amount for attendance at a private pain clinic.

[169] In sum, I award $13,000 for the cost of future care.

H. Special Damages

[170] The defendant agrees that Ms. McWilliams has incurred special damages totaling $1,158.64. I allow this claim in full.

IV. CONCLUSION

[171] I award Ms. McWilliams damages totalling $293,575.64 as follows:

a) $127,500 in non-pecuniary damages;

b) $3,109 as past wage loss;

c) $148,808 for loss of future income earning capacity;

d) $13,000 for the cost of future care; and

e) $1,158.64 in special damages.

[172] Unless there are matters that must be brought to my attention, Ms. McWilliams is entitled to costs. If the parties wish to make submissions on costs, they may do so in writing. Their submissions should not exceed five pages in length (excluding appendices) and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons.

"Elwood J."