

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Donaldson v. Grayson*,
2023 BCSC 1675

Date: 20230925
Docket: M179076
Registry: Vancouver

Between:

Michelle Donaldson

Plaintiff

And

Holly Marie Grayson

Defendant

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:

M-H. Wright

Counsel for the Defendant:

J.M. Shore
M. Iannicello
B. Folarin

Place and Dates of Trial:

Vancouver, B.C.
April 17-21, 24-28,
May 1-5, 8-9, 11-12, 2023

Place and Date of Judgment:

Vancouver, B.C.
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Overview

[1] On November 14, 2015, Michelle Donaldson was travelling north on Columbia Avenue, also known as Highway 22, in Castlegar. Holly Grayson pulled out of McDonald's drive-thru in an adjacent plaza and waited at the junction of the exit lane with Columbia Avenue for the opportunity to cross the northbound lanes of travel before turning left to travel south on Columbia Avenue towards Trail. Ms. Grayson pulled out, crossed the right northbound lane and as she entered the left northbound lane, Mrs. Donaldson's vehicle T-boned her vehicle. Mrs. Donaldson's airbag deployed causing her injuries.

[2] Mrs. Donaldson claims that Ms. Grayson's actions in crossing Columbia Avenue when it was not safe to do so caused her serious physical and psychological injuries including a mild traumatic brain injury with neurocognitive disorder, noise sensitivity, light sensitivity vision problems, post traumatic headaches, inner ear damage, tinnitus, vertigo, chronic pain in her neck, shoulder and back, depression, generalized anxiety disorder and somatoform disorder. She claims that her injuries preclude her from engaging in her pre-accident work as a co-owner and senior management for sporting goods stores that she and her husband own and preclude her from looking for better-paying work outside the family business.

[3] Ms. Grayson denies liability and asserts that Mrs. Donaldson contributed to the cause of the accident because she was speeding, and/or did not have her lights and/or could have taken evasive action. Ms. Grayson also disputes that she caused the injuries that Mrs. Donaldson complains of and that the injuries are as severe and long lasting as Mrs. Donaldson claims. Ms. Grayson asserts that Mrs. Donaldson is capable of returning to work in the family retail sporting goods business and given that the business has not had a reduction in profitability since the accident, Mrs. Donaldson has no claim for past or future loss of earning capacity.

[4] The issues are liability for the accident, the nature, prognoses, and cause of Mrs. Donaldson's injuries and the appropriate amount of compensation under each

head of damages claimed. Ms. Grayson also submits that there are significant issues pertaining to the reliability and veracity of Mrs. Donaldson's evidence.

[5] I conclude that the accident was caused by Ms. Grayson's negligence and that she has not proved that any liability should be apportioned to Mrs. Donaldson. I conclude that she suffered a traumatic brain injury with ongoing neurocognitive disorder, damage to her inner ear, problems with her vision, soft tissue injuries to her neck and shoulder, post traumatic headaches, noise sensitivity, light sensitivity and psychological injuries including depression, anxiety and somatoform disorder. I do not accept that the accident was the cause of her thyroid condition or the sole cause of the onset of menopause. I do accept that her injuries are life altering and significantly life limiting.

Credibility

[6] The defendants submit that there are significant issues with Mrs. Donaldson's evidence such that I should approach all of her evidence with caution and I should not accept what is not corroborated.

[7] A personal injury plaintiff bears the burden of proof on the balance of probabilities. The plaintiff may discharge the burden through the plaintiff's own evidence, so long as the court is careful to scrutinize the evidence when there is no objective evidence available: *Butler v. Blaylock*, [1983] B.C.J. 1490 para. (C.A.) at para. 13.

[8] The defendant submits that Mrs. Donaldson's evidence has credibility problems both in terms of its reliability (accuracy) and veracity (truthfulness).

[9] Evaluating credibility involves examining the witness's evidence for the ability and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, whether the witness changes evidence during direct examination and cross-examination, any motive to lie and demeanour. If the trier of fact accepts the witness's evidence as being

generally credible, then the trier of fact should compare it with the other evidence to determine whether it fits within the “preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”: *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff’d 2012 BCCA 296; *Jin v. Cheng*, 2018 BCSC 763 at para. 19.

[10] With regard to veracity, Ms. Grayson points to examples that she asserts are examples of Mrs. Donaldson not being truthful. One example was a resumé that Mrs. Donaldson prepared a few months before the accident. During Mrs. Donaldson’s cross examination, it was pointed out to her that her résumé showed that she had worked for Mallard’s Source for Sports, the family business, from 1987 to 2012, despite that Mrs. Donaldson was still working for that business in 2015 when she made the resumé. Mrs. Donaldson explained that it was a mistake, and pointed out that the resumé also said that she had worked for Mallard’s for 30 years, which would take her employment up to 2017, another mistake.

[11] Ms. Grayson submitted that Mrs. Donaldson concocted a story on the stand about nipple discharge contrary to a medical record around the same time which contained the note “no nipple discharge”. I did not observe what Ms. Grayson characterized as an obvious concoction on the stand. The evidence was that she had a medical appointment booked for a routine pap smear in December 2015, the month after the accident. Mrs. Donaldson testified that she suspected the appointment was booked before the accident but she was not sure. She described that before she attended the appointment, but after the accident, she started to have nipple discharge which was very concerning and which she had not experienced since her children were born. Her general physician’s note appears to state no nipple discharge. That could mean that there was none on the date in question or it could be a mistake in the notes. The general physician did not testify. It is trite law that a medical record is not evidence of the truth of what a doctor recorded or that what the doctor recorded is complete. The note is not evidence that Mrs. Donaldson was lying about having nipple discharge post-accident. On cross examination, Mrs. Donaldson stated that she could not testify about what was or was not recorded

in the doctor's notes but it is her body and she knows what was going on with it. That evidence does not call into question her veracity.

[12] Two parts of Mrs. Donaldson's evidence that Ms. Grayson also asserts were suspect in terms of veracity or lacking in reliability pertain to Mrs. Donaldson's arrangement with the family business post-accident, specifically an oral and then written subrogation agreement pertaining to salary continuation and an unfiled and unsigned record of employment. I will address these issues when addressing past loss of earning capacity. At this juncture, I observe that I do not consider the fact that Mrs. Donaldson and her husband, Dale Donaldson testified to having an oral agreement without being able to give details about the exact nature of the conversation, the date of the conversation, the terms of the agreement, etc., to be a matter that inherently draws their truthfulness into question. Mrs. Donaldson and Mr. Donaldson co-own a business that they work in and draw salaries from. It is consistent with the preponderance of probabilities that as co-owners, they had a discussion about Mrs. Donaldson's salary continuation but cannot remember the details of exactly what was said, when and where.

[13] I noted several instances where Mrs. Donaldson was careful when her case would have been assisted by her saying something different. She resisted the temptation to overstate evidence that would help her case. For example, on the issue of whether her headlights were on at the time of the collision, she testified that it was her usual practice to have them on and although she does not specifically remember turning them on, she would have noticed if they were not on because she had driven on an unlit stretch of highway from Trail to Castlegar. Another example is that when her counsel was taking her through a list of disputed out of pocket expenses, she pointed out a medication that she suspected was for her allergies. She testified that she had allergies before the accident, so she was not comfortable saying that the expenditure was accident related.

[14] To a certain extent, Mrs. Donaldson's evidence was hampered by the symptoms she claims were caused by the accident. She was tearful on more than

one occasion. She described that she becomes “flooded” and can no longer think clearly or express herself accurately. She was frustrated with questions, both from her counsel and defence counsel, asking her to explain things in more detail when she had already given answers but they were too vague to convey concrete evidence. She expressed difficulty in answering questions that related to dates or times when things occurred. She testified that these problems started after the accident and she associates them with her accident injuries.

[15] I agree with the submissions of Ms. Grayson that in some respects, Mrs. Donaldson’s frustration and lack of tolerance for the length of the examination in chief and cross examination caused her to become argumentative, especially where inconsistencies were pointed out to her. For the reasons that I will set out below regarding her injuries, I accept that this is related to her injuries.

[16] At other times, for example at the beginning of the court day or after the lunch break, Mrs. Donaldson was obviously making an effort to understand the questions and answer them accurately. For example, she was asked if she had ever had a concussion before the accident. She answered that she had fallen down before when doing sports, and thought she probably had but could not recall specifically. It was put to her that she had told the ambulance personnel, who saw her at the scene of the accident, that she had no history of concussion. She replied that she could not remember whether she told any of them that she might have had a previous concussion after falling down previously. For the purpose of assessing credibility, testing what Mrs. Donaldson told ambulance personnel about whether she had ever had a concussion when she was in the immediate aftermath of a traumatic collision is not of assistance to determine the veracity and reliability of her evidence at trial. However, the fact that at trial Mrs. Donaldson testified that she thought she might have suffered a concussion at some time prior to the accident in conjunction with a fall, but could not remember how, is an indication that she was trying to be honest and accurate with her evidence.

[17] Despite the explanation for why her evidence lacks details especially about times when certain things occurred and was not entirely internally consistent, these are nonetheless issues with the reliability of her evidence and a problem of how to find facts if the evidence is not detailed enough on an issue. However, to a large extent, other witnesses corroborated Mrs. Donaldson's evidence and provided more detail on matters that she did not.

[18] Mrs. Donaldson's husband and his evidence is corroborative of hers on some subjects, most notably her role in the family business, their future plans regarding that business and how she has changed since the accident.

[19] I was impressed with the evidence of Mr. Donaldson. He was fair and careful with his evidence and avoided overstating matters. For example, Mr. Donaldson attended the scene of the accident immediately after it occurred. He was asked if Mrs. Donaldson's headlights were on. He testified that her car has running lights which are on whenever the car is running. He testified her car was running when he got there, and he turned it off. Mr. Donaldson agreed that he could not say with certainty that her headlights were on, as opposed to her running lights, and that is a marker of his veracity and care in giving evidence.

[20] Other, less interested, witnesses corroborated the evidence of Mrs. Donaldson and Mr. Donaldson as to how Mrs. Donaldson is, to the observation of the witnesses, much more limited in her activities compared to before the accident, displays a much more subdued affect and engages less with those around her socially than she did prior to the accident. The evidence of these witnesses paint a picture of a person whose life has been dramatically diminished.

[21] Ms. Grayson also demonstrated that she came to testify candidly. At her examination for discovery, she testified that she could not remember whether Mrs. Donaldson's lights were on. The fact that they may not have been was a focal point of cross examination of Mrs. Donaldson and Mr. Donaldson. At trial, she testified that Mrs. Donaldson's headlights were on. She was not asked to explain the difference between these two pieces of evidence. Nevertheless, the trial evidence

demonstrates that she was prepared to testify in a manner that did not help her defence.

[22] Some of Ms. Grayson's evidence caused me to question how well she remembers the circumstances and details of the accident which took place almost seven and one of half years before the trial at which she testified.

[23] One example is the inconsistent evidence between her discovery evidence and trial evidence pertaining to whether Mrs. Donaldson's headlights were on.

[24] The other is also pivotal. Ms. Grayson testified that she moved out of a stationary position in the McDonald's drive-thru laneway onto Columbia Avenue. She testified that she did so as a black pick up truck, driving in the right northbound lane on Columbia Avenue, turned right into the plaza that she was exiting. As I will describe below, Michelle Postnikoff testified that she was driving a charcoal grey Subaru Legacy in the right northbound lane, turned right into the plaza, and as she did saw Ms. Grayson's vehicle pull out of the McDonald's drive-thru laneway and onto to Columbia Avenue. No one other than Ms. Grayson testified about a black pick up truck. Her evidence on this point is inconsistent with all of the other evidence including that of a disinterested witness. This calls into question the reliability of her evidence on the sequence of events immediately leading up to the accident.

[25] In these reasons, if evidence on a matter is disputed, I will state the dispute and state my finding. Where I stated a fact without doing so, it is because the evidence on it was not disputed or I have already found the fact after discussing the disputed evidence earlier in the reasons.

The Accident

[26] Ms. Grayson denied liability and through her counsel's questions of Mrs. Donaldson and other witnesses, attempted to prove that that Mrs. Donaldson was speeding and did not have her headlights on, despite that Ms. Grayson testified that Mrs. Donaldson had her headlights on and did not give any evidence that supported the suggestion that Mrs. Donaldson was speeding. There is no evidence

that suggests that the manner in which Mrs. Donaldson was driving up to the point that Ms. Grayson entered Mrs. Donaldson's lane of travel played a role in causing the vehicles to come into contact. By the close of the submissions, the defence theory was that Mrs. Donaldson was not paying close enough attention and could have avoided the collision. That seems to be an argument of apportionment of fault, as opposed to an argument that Ms. Grayson bears no fault. Nevertheless, given the denial of liability outright, I will first deal with the liability of Ms. Grayson.

[27] It is common ground that it was dark and rainy. It is common ground that traffic was heavy on Columbia Avenue, the main thoroughfare in Castlegar and the highway that connects Castlegar with Trail to the south.

[28] A left turning driver is considered the servient driver and the oncoming driver, going straight through the intersection, is considered the dominant driver. A dominant driver has the right of way; the servient driver has the obligation to yield the right of way: *Dawes v. Valadas et al.*, 2005 BCSC 1319 at paras. 33–34.

[29] The dominant driver is entitled to assume that a servient driver will obey the rules of the road: *Mills v. Siefred*, 2010 BCCA 404 at para. 26. A driver who is in the servient position who fails to yield the right of way to a driver in the dominant position has undertaken an unlawful act: *Walker v. Brownlee and Harmon*, [1952] 2 D.L.R. 450 (S.C.C.) at p. 460.

[30] Section 144 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 provides that a person must not drive a vehicle without due care and attention and without reasonable consideration for other persons using the highway. Section 174 of the *Motor Vehicle Act* provides that:

Yielding right of way on left turn

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[31] The burden of proving the absence of an immediate hazard at the moment the left turn begins is on the left turning driver: *Nerval v. Khehra*, 2012 BCCA 436 at paras. 28–29. In *Nerval*, Justice Harris explained that a “left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way” (at para. 33).

[32] An oncoming vehicle poses an immediate hazard precluding a lawful turn if the oncoming vehicle would have to take some sudden or violent action to avoid the threat of a collision: *Purvica v. Martin*, 2022 BCSC 181 at para. 60.

[33] Mrs. Donaldson had driven her mini van from Trail to Castlegar and was in the left northbound lane of Columbia Avenue. Ms. Grayson was driving a red Hyundai Elantra and was in an exit lane from the McDonald’s drive thru in a shopping plaza to the east of Columbia Avenue. Traffic was heavy.

[34] Ms. Postnikoff was travelling in the right northbound lane ahead of Mrs. Donaldson’s vehicle. Her evidence of the events leading up to the collision and of the collision is the most complete of all of the witnesses and has the advantage of being from someone who has no interest in the outcome.

[35] Ms. Postnikoff’s destination was the parking lot of the same plaza just south of where Ms. Grayson was stopped waiting to cross the northbound lanes of Columbia Avenue. Ms. Postnikoff testified that she believes she was travelling around 50 km per hour and slowed as she approached her right turn. Ms. Postnikoff testified that as she slowed to make her turn into the plaza, Mrs. Donaldson’s vehicle was in the lane to the left and behind her. Ms. Postnikoff testified that she could see Ms. Grayson’s vehicle with its left turn indicator on in the laneway from the plaza to Columbia Avenue. Ms. Postnikoff testified that as she slowed and turned on her indicator to turn right, Ms. Grayson pulled out at a “normal speed”. Ms. Postnikoff testified that as Ms. Grayson’s vehicle pulled out, she was in the course of her turn and Mrs. Donaldson’s vehicle was about a car-length back from the laneway. Ms. Grayson would have to cross Mrs. Donaldson’s lane of travel to turn left.

Ms. Postnikoff testified that as Ms. Grayson's car pulled out, she flinched, because she knew that Mrs. Donaldson's vehicle was in the left northbound lane and that a collision would occur. Ms. Postnikoff could not recall whether she turned her head and saw the impact or whether she was still looking in the direction she was turning and then turned her head half a second after the impact.

[36] Mrs. Donaldson did not have a specific recollection of her headlights being on, but she testified that she always drove with them on in the evening and she did not think it was possible that she could have driven all the way from Trail on a dark, unlit road, without them on. She testified that she was driving at a "normal" speed, by which I understand her to mean traffic speed. She testified that a car in front of her and in the lane to the right of her slowed down and turned into a shopping plaza. She saw Ms. Grayson's vehicle stopped at the McDonald's drive-thru exit onto Columbia Avenue. Mrs. Donaldson testified that she did not think anything of it but then it pulled out quickly in front of her. She has no recollection of the collision, but she recalls her airbag blasting her in the face.

[37] Ms. Grayson testified that she was waiting to cross the northbound lanes of Columbia Avenue for at least five to ten minutes. She testified that she had her left turn signal activated. She testified that a black pick up truck in the right northbound lane of Columbia Avenue turned into the plaza. That vehicle was on her left. Ms. Grayson testified that she looked in both directions, her mother told her she was good to go, and she disengaged her clutch, put her car into gear, and pulled out. She testified that was at most five seconds since she last looked left when she crossed into the left northbound lane and she first saw Mrs. Donaldson's vehicle which t-boned her vehicle a split second later.

[38] As I have already related, Ms. Grayson is the only one who testified about a black pick up truck. I conclude that Ms. Grayson's evidence is faulty on the details of the accident. I conclude that the vehicle that was turning into the plaza as Ms. Grayson started to pull out of the McDonald's exit lane was Ms. Postnikoff's

vehicle and there was no black pickup truck that turned immediately before the collision.

[39] Ms. Grayson testified that when she saw the black pick up truck turn into the plaza, she concluded she had a clear path to cross. If Ms. Postnikoff had to turn to make the right northbound lane clear for Ms. Grayson, then the position of Mrs. Donaldson's vehicle coming alongside Ms. Postnikoff, in the next lane over, was an obvious imminent hazard.

[40] There was evidence that the maneuver that Ms. Grayson was attempting to make was not unknown to persons who travel Columbia Avenue and had been made by others before, including Mrs. Donaldson. Nevertheless, it was dangerous, especially given the dark, rainy and busy traffic conditions in which she attempted to do it. It required her to cross the two northbound lanes and a centre two-way lane of travel before she reached the point where she could turn left and travel south on Columbia Avenue.

[41] Ms. Grayson was required to refrain from entering Columbia Avenue until it was safe to do so. According to the evidence of Ms. Postnikoff, as she slowed to turn, Mrs. Donaldson's vehicle was overtaking Ms. Postnikoff's vehicle such that the front of the mini van was about in line with her shoulder when Ms. Grayson pulled out. I conclude it was not safe for her to pull out when she did.

[42] For reasons that Ms. Grayson has not explained and for which there is no other explanatory evidence, she did not see Mrs. Donaldson's vehicle until she crossed into the lane in which Mrs. Donaldson was travelling. The lack of explanation is only consistent with Ms. Grayson not paying enough attention to whether that lane of travel was clear.

[43] I conclude Ms. Grayson was negligent.

[44] I turn to whether Mrs. Donaldson's actions were negligent in a manner that contributed to the accident, such that liability ought to be apportioned. Ms. Grayson's submission is that Mrs. Donaldson could have taken evasive action raises two

questions. The first is what a driver in Mrs. Donaldson's position could have done. The second is whether anything she could have done would have avoided the collision.

[45] Mrs. Donaldson saw Ms. Grayson's car stopped at the exit from McDonald's, at the junction with Columbia Avenue. She was entitled to assume that Ms. Grayson would not make an unlawful maneuver. There could be no sensible suggestion that the cautious driver would come to a stop on the busiest stretch of a highway in dark and raining conditions to allow a vehicle that was at a complete stop and did not have the right of way to traverse the highway.

[46] When asked how Mrs. Donaldson could have avoided the collision, counsel said Mrs. Donaldson could have swerved. The swerving options would be to swerve left, into oncoming traffic, or right, and potentially into other traffic in the same laneway.

[47] Counsel for Ms. Grayson submitted that because there was evidence that Ms. Postnikoff's vehicle gradually slowed and Mrs. Donaldson was about a car-length behind Ms. Postnikoff as Ms. Grayson commenced her left-hand turn, Mrs. Donaldson had plenty of time to see Ms. Grayson and avoid the accident. The problem with this submission is that the evidence about gradual slowing was Ms. Grayson's evidence that it was a large black pick up truck that gradually slowed and turned right before she pulled out. For the reasons I have already articulated, that evidence is unreliable and I do not accept it.

[48] In any event, the evidence of gradual slowing must be considered in the context of Ms. Grayson's evidence is that from the time she pulled out, which involved disengaging her clutch, putting her car into gear and accelerating, she had crossed the right northbound lane and was in Mrs. Donaldson's lane of travel in about two seconds. Ms. Grayson testified that there was a split second between when she saw Mrs. Donaldson's vehicle and that the impact.

[49] Keeping in mind that Mrs. Donaldson was entitled to assume that Ms. Grayson would not pull out when it was not safe to do so, even if Mrs. Donaldson noticed Ms. Grayson's vehicle moving the exact second she started to pull out, there is no evidence that Mrs. Donaldson could have done something in the two seconds she had before Ms. Grayson's vehicle was crossing into her lane of travel immediately in front of her. There is no evidence that there was a safe option for her to avoid the collision. While Ms. Grayson testified there was no traffic coming from her right (ie: southbound) when she pulled out, that does not mean that Mrs. Donaldson had the time to check that for herself and determine it was safe to swerve into the opposite lanes of travel. Nor is there any evidence that had she swerved, the collision would have been avoided.

[50] A key point to Ms. Grayson's argument is her assertion that Ms. Donaldson had a superior view of Ms. Grayson because Mrs. Donaldson saw Ms. Grayson stopped. However, there is no evidence that Mrs. Donaldson's view of Ms. Grayson was superior to the view that Ms. Grayson had of Mrs. Donaldson. Ms. Postnikoff was turning, so even if Ms. Postnikoff's vehicle was blocking Ms. Grayson's view of the left northbound lane, as Ms. Postnikoff turned Ms. Grayson had a clear view. There is no evidence that Ms. Grayson's view of Mrs. Donaldson was obscured and no explanation for why she did not see Mrs. Donaldson.

[51] I also note that when Ms. Grayson did see Mrs. Donaldson, she did not have time to brake or do anything else to avoid the accident. There is no evidence that Ms. Grayson's view of Mrs. Donaldson was obstructed and so if there was no time for Ms. Grayson to avoid the accident by the time she saw Mrs. Donaldson, then I fail to see how there was time for Mrs. Donaldson to avoid the accident after she saw Ms. Grayson moving.

[52] Taking into account that Ms. Grayson bears the onus to prove that Mrs. Donaldson could have taken steps to avoid the accident and that any doubt is resolved in favour of the dominant driver (*Dawes* at para. 32) and the fact that there was perhaps two seconds between when Mrs. Donaldson could have known that

Ms. Grayson was pulling out and when the accident occurred, I conclude that Ms. Grayson has not discharged her burden to prove any negligence on the part of Mrs. Donaldson.

[53] This case is different from *Purvica*, in which the dominant driver was held to be 40% at fault for not taking evasive action to avoid a collision when the servient driver turned left in an intersection. The servient left turning vehicle was behind another vehicle that also turned left. The dominant driver admitted to being distracted. The trial judge found that he failed to keep a proper lookout and that the distraction limited the evasive action he took. In this case, I have not found that Mrs. Donaldson failed to keep a proper lookout.

[54] I conclude that Ms. Grayson is 100% responsible for the accident.

Accident Injuries

[55] Mrs. Donaldson asserts she has suffered a traumatic brain injury with neurocognitive disorder, damage to her inner ear, vision problems, depression, anxiety, somatoform disorder, chronic pain due to soft tissue injury to her neck and shoulder, post-traumatic headaches, thyroid problems, and immediate onset of menopause.

[56] Ms. Grayson submits that several of Mrs. Donaldson’s physical complaints are not supported by admissible medical evidence, including her allegations that she suffered injuries to her neck, left shoulder, eyes, temporomandibular joint, hip, left foot or left toes.

[57] Ms. Grayson does not dispute that Mrs. Donaldson suffered a mild traumatic brain injury but she disputes that Ms. Grayson continues to have significant symptoms from it. Ms. Grayson submits that Mrs. Donaldson’s current health status is in part due to psychological symptoms that persist because she has failed to undergo appropriate treatment.

[58] Ms. Grayson also submits that Mrs. Donaldson’s fatigue is due to her thyroid condition which is not caused by the accident. Ms. Grayson submits that, similarly, the evidence does not support that Mrs. Donaldson’s menopause was triggered by the accident.

[59] There are three related questions to be asked to determine whether and to what extent Ms. Grayson is liable to compensate Mrs. Donaldson for the injuries she alleges. The first is whether she has the injury as alleged, including whether it is an injury, the severity of it and whether it is ongoing and to what degree. The second is whether it is caused, in whole or in part, by the accident. This is a question of liability which is referred to as cause in fact. If some or all of the injuries alleged were caused in part by the accident, the third question addresses whether a pre-existing injury or other cause is such that Ms. Grayson’s liability to compensate it is diminished. This third inquiry is a question of compensation and is referred to as cause in law.

Legal Principles

[60] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive compensation that places them in the same position as they would have been had the tort not been committed insofar as this can be achieved by a monetary award: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32.

Mrs. Donaldson bears the burden of proof on a balance of probabilities to prove what injuries she has suffered and to prove that they were caused by the accident.

[61] Ms. Grayson submits that the determination of what injuries were suffered and whether they were caused in whole or in part by the negligence of Ms. Grayson must be approached in an “exceedingly careful” manner because the evidence is dominated by the subjective complaints of Mrs. Donaldson, citing *Gordon v. Ahn*, 2016 BCSC 795 at paras. 65–67, which in turn cited the well-known decision of Chief Justice McEachern in *Price v. Kostryba*, (1982), 70 B.C.L.R. 397 (S.C.).

[62] In *Price*, Chief Justice McEachern relied on his prior decision in *Butler*, which was subsequently overturned on the point of whether the plaintiff’s evidence, which

is subjective by definition, is sufficient to prove injuries. While *Price* continues to be followed for the propositions that a plaintiff has the burden of proof and objective evidence is helpful to finding facts, there is no principle of law that the evidence of a plaintiff in a personal injury case should be received with a special form of scepticism or that there is a different standard for the burden of proof in a personal injury case: *Deol v. Sheikh*, 2016 BCSC 2404; and *Kallstrom v. Yip*, 2016 BCSC 829 at para. 335.

[63] The question to be determined with regard to cause in fact is whether it was necessary to have the accident for the post-accident health issues to occur. If so, then factual causation is proven, since the post-accident health issues would not have occurred but for the accident, even if pre-existing injuries play a role in the severity of symptoms Mrs. Donaldson experiences. The test is described as the “but-for test”.

[64] The question of whether the accident was a necessary cause of the plaintiff’s current symptoms must be determined on a balance of probabilities: *Clements v. Clements*, 2012 SCC 32 at para. 13. Factual causation is not established solely on the basis of a temporal link between the injuries and the accident: *Mudry v. Minhas*, 2010 BCSC 637 at paras. 44–45. Despite that a temporal connection alone is not sufficient to meet the balance of probabilities, the but for test demands a robust and common sense approach to the issue, not a painstaking scientific inquiry: *Clements* at para. 23.

[65] When determining factual causation, it is not important whether the injuries would have occurred in the future regardless of the accident. As long as the accident partially caused those injuries, the defendant is liable.

[66] Where cause in fact is established for a given health issue, it is necessary to assess cause in law. This is referred to as an assessment of damages issue, as opposed to an assessment of injury. Where the injury would have occurred to some extent without the accident such there are both tortious and non-tortious causes of an injury, the defendant is liable for the portion of the damages caused by the

defendant's tortious act and the defendant "need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway": *Blackwater v. Pint*, 2005 SCC 58, at paras. 74, 78 and 80 citing *Athey* at paras. 32–36.

Post Accident Events Related to Mrs. Donaldson's Injuries and Health

[67] Mrs. Donaldson testified she has no recollection of the actual accident. She testified that she recalled her airbag going off. She testified she recalled laughing, somewhat inappropriately, about a large marshmallow in her car. She was sufficiently oriented to call her husband using a sort of speed dial function on her mobile phone. He was only a few blocks away and was at the scene within minutes. He described Mrs. Donaldson as disoriented and confused. He testified that she expressed discomfort with the exploded airbag, so he assisted her to move to the back seat while they waiting for the ambulance.

[68] Mrs. Donaldson was attended to by ambulance personnel at the scene and then transported by ambulance to the hospital. She testified that she was dizzy and, felt like she was in shock. Mr. Donaldson testified that when she was at the hospital she was disoriented and unstable. They both testified that they were given written information about head injuries which they followed when they got home.

[69] Mrs. Donaldson testified that in the few days following the accident she felt nauseated and did not eat but drank ginger ale. She testified that she spent much of her time in bed. She described an occasion when she walked down a hallway in her home and had to steady herself by putting her hands out on the hallway walls. She experienced pain in her neck, back, face and behind her right eye. She described feeling bizarre, like she was in a giant bubble. Mrs. Donaldson testified that for about six weeks after the accident, she stayed at home except for medical appointments and she spent a lot of time in a dark room, in silence.

[70] On cross examination, Mrs. Donaldson agreed that the medical records indicate that she was reporting improvement in the weeks and months following the accident. She agreed with that and testified that she hoped that she was improving.

She testified that the improvement was relative to how bad she was and also, she believes, was in part due to staying home, being quiet and sometimes being in the dark. She testified that when she tried to become more active, she had problems.

[71] In February 2016, Mrs. Donaldson and Mr. Donaldson went on a cruise that Mr. Donaldson had given Mrs. Donaldson as a gift. Mrs. Donaldson testified that at the time, she thought she was getting better. She testified that while on the cruise she developed bad vertigo and experienced dizziness and nausea which persisted after the cruise.

[72] Mrs. Donaldson testified that in the year following the accident, she experienced problems with her hormones, including entering menopause immediately. Mrs. Donaldson testified that, associated with the change in her hormones, she suffered symptoms that significantly reduced her ability to enjoy sex.

[73] Mr. Donaldson testified that she has had, and continues to have, pain in her spine that radiates into the left side of her back and her shoulder. She testified that she has pain in her neck that makes it difficult to “pan” her neck.

[74] Mrs. Donaldson testified that, especially after the accident, she had significant pain in her right eye. She testified that she had pain in her cheek which has progressed to numbness. She testified that she has disabling headaches frequently. They persist to the present. Mrs. Donaldson takes over the counter medication for pain. Mrs. Donaldson testified that she has tinnitus in her right ear and vertigo that persists. She is very sensitive to noise and light.

[75] Mrs. Donaldson testified about what she calls “brain fog” and memory problems. She testified that she has problems with orderly and clear thinking. She struggles with finding words and following conversations, especially if there is background noise or more than one person speaking at a time. She testified that she is very forgetful.

[76] Mrs. Donaldson described her pre-accident mental state as “happy”. She explained that she liked to work and she liked to interact with people. She testified that since the accident, she has struggled with her mental health.

[77] Mrs. Donaldson testified that she has problems with the toes in her left foot, describing a sensation of her toes crossing even when they are not.

[78] Over the years since the accident, Mrs. Donaldson has attended for various kinds of treatment and investigations including psychological counselling, chiropractic, massage, acupuncture, physiotherapy, osteopathy, occupational therapy, ears nose and throat specialist assessment, kinesiology, brain SPECT imaging, vision therapy evaluation, a multi-disciplinary brain injury assessment, an ophthalmology assessment and acquired brain injury education and support sessions.

[79] Mrs. Donaldson testified about the frustrating process of assuming she would get better and then realizing in the spring of 2017, about a year and a half after the accident, that she was not getting better. She testified she went to her family doctor and insisted on investigations and recommendations that would improve her situation. She testified that her family doctor referred her to a multi-disciplinary brain injury clinic in Kelowna called Lifemark which she attended.

[80] After attending at Lifemark, but without the benefit of the Lifemark report, Mrs. Donaldson ceased participating in the return to work program set up through an occupational therapist, Megan Hughes, whom ICBC had assigned to her case. She testified she did so because the medical personnel at Lifemark had told her that by pushing herself, she was exceeding the limits that she could do with her head injury, and was making things worse. Mrs. Donaldson’s experience with Ms. Hughes was that Ms. Hughes developed an hour by hour schedule for Mrs. Donaldson to push her recovery. Mrs. Donaldson testified that she had been willing to do so up to that time, but was no longer willing to do so.

[81] After her experience at Lifemark, but again still not with the benefit of the reports, Mrs. Donaldson began demanding that her treatment be oriented around, and with, people with experience in acquired brain injury. She began attending the Kootenay Acquired Brain Injury group every second Tuesday in Castlegar, she went to special sessions in Trail and she underwent one on one counselling.

[82] Given the evidence as a whole, some of which I have addressed above and some of which I address below, I accept that what she reported as improvement early on was improvement compared to the immediate post-accident period, but she never improved to anything close to her pre-accident well-being and functionality.

Traumatic Brain Injury and Neurocognitive Disorder

[83] There is no contest that Mrs. Donaldson suffered a mild traumatic brain injury in the accident. The contest is about the severity of the injury, and whether Mrs. Donaldson recovered during the 18 months following the accident.

[84] Mrs. Donaldson asserts that as a result of her traumatic brain injury, she has persistent and permanent cognitive deficits including brain fog, memory problems, word finding problems, lack of confidence, lack of focus and decision-making difficulties. Ms. Grayson asserts that Mrs. Donaldson had largely recovered from her brain injury by April 2017 and does not have persistent cognitive deficits due to her brain injury. Rather, she asserts they are due to her psychological conditions.

[85] Mrs. Donaldson testified that she used to function without memory aids and now she uses them for everything. Her memory aids include a Google assistant, who reminds of her appointments and to turn off the oven or stove. Mr. Donaldson and Mrs. Donaldson have set out their Google system so that there are speakers in most rooms for the Google assistant to help Mrs. Donaldson. She also uses sticky notes as visual reminders. Mr. Donaldson testified that on most days, there are about 50 post it notes around their house.

[86] Mrs. Donaldson described becoming “flooded” as feeling like there was too much coming at her or going on around her for her to follow, understand, and

respond appropriately in interactions. She is more likely to feel flooded when she is tired. She described feeling flooded a few times during her testimony.

[87] Mr. Donaldson testified that prior to the accident, Mrs. Donaldson was organized, had a good memory and was a decisive person. He testified that after the accident they tried to maintain their usual division of decision-making and planning responsibilities around household and non-business financial and other matters. He described this as Mrs. Donaldson “soldiering on”. He testified that approach caused her to become angry and to have severe headaches, as a result of which they decided to minimize the decisions she has to make. He also testified that, based on his experience with her post-accident, she is simply not capable of making some decisions. Mr. Donaldson now manages their household finances, and except for Mrs. Donaldson’s medical appointments, makes their appointments and commitments.

[88] Mr. Donaldson also testified that Mrs. Donaldson sometimes says she cannot understand things or does not remember things and that sometimes she cannot keep up with him when he speaks at his usual pace. He testified that she asks him to slow down. He has tried to dial back his speech as a result. On the other side of the conversations, Mrs. Donaldson struggles with getting a full sentence out. On occasion, she will stop talking and then tell Mr. Donaldson that she cannot remember what she was going to say or she cannot verbalize what she wants to say. At other times, she stutters. He testified that she did not have any of these verbal problems prior to the accident.

[89] Mrs. Donaldson’s pre-accident intellectual abilities, as part of her “pre-morbid” cognitive baseline, discussed below, are relevant. She obtained a high school diploma. She testified that she did well. She later learned that she had a form of dyslexia. She and Mr. Donaldson testified that it was identified as a problem by a relative of Mr. Donaldson, Lani Donaldson, who works in that field as an educator. Mrs. Donaldson spent a week or so with Lani Donaldson about ten years ago working on the issue with success. Mrs. Donaldson testified that she took English 10

a few years before the accident and obtained an A-. At the time of the accident, she had just completed a creative writing course through UBC remote learning. Her grade was a B+.

[90] Two Mallard's employees who used to report to Mrs. Donaldson testified, Michael Ballance and Heather Kinicki. Both had significant experience working with Mrs. Donaldson. They have both interacted with her after the accident, most often when she has visited the Mallard's stores.

[91] Mr. Ballance described Mrs. Donaldson as a high energy boss who was intellectually capable and impressive. He was negatively blunt about how she comes across intellectually since the accident. He testified that during their brief conversations post-accident, she has sometimes walked away as she could no longer follow the conversation. He became emotional when discussing his post-accident interactions with her and explained that was because someone who had been his leader and mentor could no longer carry on a conversation with him.

[92] Ms. Kinicki testified that she considered Mrs. Donaldson to be very intelligent and capable prior to the accident. She testified that to her observation, Mrs. Donaldson now struggles intellectually although she thinks this has improved. She testified that Mrs. Donaldson speaks slowly and keeps conversations short.

[93] Mrs. Donaldson testified that in 2017, she had not regained her pre-accident health and she demanded that her doctor undertake the investigative measures so she could recover. As a result, in May 2017 she went to a brain injury multi-disciplinary assessment clinic called Lifemark in Kelowna. Mrs. Donaldson testified that she cleared the attendance to the clinic with her ICBC adjuster. She testified that she asked for a copy of the report of the assessment from her adjuster many times. She did not receive the report until her lawyer demanded a copy. She testified that it does not contain the results of all of the physicians and practitioners that she talked to and who assessed her. She questions whether it is complete.

[94] Mrs. Donaldson testified that during the Lifemark assessment, she came to understand that she had an acquired brain injury and that if she pushed herself too hard, she would regress. She testified that she realized that the program she was working on with the occupational therapist that ICBC had assigned, Ms. Hughes, was having that effect. She testified that Ms. Hughes encouraged her to push herself to her fatigue point so that she could extend that point by constantly pushing it. The next phase of the program was to be a return-to-work program. After attending Lifemark, Mrs. Donaldson told Ms. Hughes about her concerns regarding the rehabilitation program and withdrew from the care of Ms. Hughes.

[95] In 2017, Mrs. Donaldson also underwent to a consultation with the Kootenay Acquired Brain Injury Association. She began attending group therapy sessions which she has attended weekly or bi-weekly since. She testified that through those sessions, she has learned how to better cope with her brain injury.

[96] In 2018, Mrs. Donaldson began attending one on one counselling sessions with Lori Stolson, a psychological counsellor with the Kootenay Acquired Brain Injury Association. Mrs. Donaldson continued one on one counselling with Ms. Stolson until Ms. Stolson stopped providing counselling due to her own health problems in the summer of 2021. After she ceased providing regular counselling sessions, Ms. Stolson offered to provide telephone call sessions with Mrs. Donaldson on an as needed basis and Mrs. Donaldson has used that service from time to time.

[97] One of the authors of the Lifemark report, Dr. David Rhine, concluded and reported that Mrs. Donaldson sustained a minor traumatic brain injury with prolonged symptoms in the accident and recommended a referral to neuropsychology, visual rehabilitation and physiotherapy. Other authors recorded inconsistencies in cognitive screening which were attributed to Mrs. Donaldson “guarding” for fear of symptom exacerbation. The report also states that her balance issues were inconsistent with her reported vestibular findings. The report recommended a full neuropsychological assessment to determine validity and effort results. On the stand, Mrs. Donaldson asserted that she made every effort she could during her assessment at Lifemark.

She described that assessment as the only hope she had at that juncture to find out what was wrong with her and get better. I accept Mrs. Donaldson's evidence. It has not been contradicted and it is consistent with the preponderance of probabilities.

[98] Mrs. Donaldson also led the evidence of a neurologist, Dr. Cameron, who diagnosed a mild traumatic brain injury and opined that Mrs. Donaldson has symptoms of post-traumatic brain injury syndrome. Those symptoms include headaches, decreased memory, decreased concentration, decreased self-esteem, decreased self-confidence, decreased decision-making abilities, decreased multi-tasking abilities, decreased libido, decreased interest in socializing, photophobia, phonophobia, initial blurred vision, decrease in balance, and anxiety.

[99] I accept Mrs. Donaldson's evidence, largely corroborated by Mr. Donaldson, that she has these symptoms. Therefore, Dr. Cameron's opinion is based on facts proven in evidence.

[100] Dr Cameron also agreed with the opinion of the otolaryngologist, Dr. David, discussed below, that Mrs. Donaldson suffered an inner ear concussion associated with her mild traumatic brain injury.

[101] Ms. Grayson is critical of Dr. Cameron's explanation as to why the comments on the ambulance call report that Mrs. Donaldson clearly recalled the accident and did not have a loss of consciousness, were not accepted by him and why he concluded that Mrs. Donaldson did lose consciousness. That finding is part of his opinion that she suffered a mild traumatic brain injury. However, the ambulance call report, like any clinical record, is only evidence that the record maker made the observation and/or recorded the matter. If it records a statement by a party that is against interest, it may be admissible that the statement was made. In this case, the document does not allow the reader to determine whether Mrs. Donaldson stated that, or the maker of the clinical record concluded that, based on other statements. Mrs. Donaldson was asked whether she made the statement and she could not recall what words she said to the ambulance personnel. She testified that she recalled the events up to the collision but did not recall the collision. The person who

made the note was not called to testify why he or she made that note. Dr. Cameron preferred Mrs. Donaldson's statement to him that she remembered events leading up to the impact but not the impact, until she came to "after everything had stopped". In the circumstances, I have accepted that evidence and I do not fault Dr. Cameron for doing so also.

[102] In any event, as I have already stated, the fact that Mrs. Donaldson suffered a mild traumatic brain injury is accepted by Ms. Grayson and by Ms. Grayson's psychiatric expert, Dr. Brian Scarth, who came to that conclusion accepting that Mrs. Donaldson had a brief loss of memory prior to the impact and a period of altered level of consciousness. Accordingly, the emergency personnel record is not material except to generally undermine Dr. Cameron's opinion. I do not accept these critiques of his opinion.

[103] Ms. Grayson also challenges Dr. Cameron's opinions because he found that Mrs. Donaldson had a normal neurological examination. His examination of Mrs. Donaldson included a physical examination and some basic memory and cognitive testing such as recalling three objects (she recalled 0 and then recalled all three after some reinforcement), spelling backwards and subtraction. In the portion of his report, when he referred to normal neurological examination, he was addressing Mrs. Donaldson's complaints of sciatic joint pain which travels down her leg. His opinion is that the pain is soft tissue injury in origin, not neurologic in origin. His reference to normal neurological examination on this issue does not pertain to her cognitive function.

[104] I accept Dr. Cameron's opinion that Mrs. Donaldson has ongoing cognitive problems from her brain injury. Dr. Cameron also opined that her current cognitive symptoms are probably also due to her psychological diagnoses. He opined that while he does not expect improvement in the brain injury impact on her cognitive functioning, she might experience improvement in her psychological conditions and if she does, that might ameliorate but not eliminate, her cognitive problems.

[105] Mrs. Donaldson underwent a neuropsychological assessment with an independent medical expert retained by Mrs. Donaldson, Dr. Douglas Cohen. His report was in evidence and he testified. Ms. Grayson delivered a report of a neuropsychologist, Dr. Lysak, also from Lifemark but not part of the 2017 assessment. Dr. Lysak critiqued Dr. Cohen's report and opinions.

[106] Based on the neuropsychological testing, Dr. Cohen found that Mrs. Donaldson demonstrated lower intellectual ability than predicted by her pre-injury capacity. The scales which lowered her score were verbal comprehension and working memory and overall intellect. Dr. Cohen opined these results were consistent with Mrs. Donaldson's complaints of difficulties dealing with complex tasks and general memory since the accident. Dr. Cohen also reported that Mrs. Donaldson demonstrated impaired attention and concentration.

[107] Dr. Cohen also opined that her memory function is markedly impaired. She had good capacity in the area of executive output – sustaining visual sequencing and output – but poor performance on task switching measures and mildly weak conceptual reasoning. She demonstrated poor ability to regulate her attentional functioning with impaired divided attention, weak sustained attention, and uneven attention. Dr. Cohen opined that this is consistent with Mrs. Donaldson's report that she cannot multi-task.

[108] Dr. Cohen opined that Mrs. Donaldson's results are consistent with suffering a mild traumatic brain injury. He diagnosed ongoing neurocognitive disorder associated with her traumatic brain injury, ongoing pain, fatigue, sensory sensitivities (light and noise) and psychological complications of depression and anxiety.

[109] Dr. Lysak was critical of this opinion because of her view that Dr. Cohen should have ruled out mood disorders that mimic brain injury before coming to his final diagnosis. In my view, this critique is misplaced. As Dr. Lysak stated in her report, and Dr. Cohen confirmed in his evidence, a neuropsychologist does not diagnose brain injury. A neuropsychologist can interpret tests results as being

consistent with brain injury. That is what Dr. Cohen did. The fact of the brain injury is not contested.

[110] The question is whether the brain injury's effects on cognition are ongoing. Dr. Cohen opined that concussion effects can overlap with emotional reactions, pain and fatigue to diminish cognitive functioning. He opined that when concussion effects are combined with physical, emotional and psycho-social factors, the cognitive problems can be more persistent.

[111] Dr. Cohen opined that Mrs. Donaldson has depression, anxiety and somatic symptom disorder. He opined that the combination of a mild traumatic brain injury with these psychological disorders explains her persistent problems, worse cognitive performance and longer recovery. He opined that these conditions aggravate each other and their symptoms cannot be easily separated. He opined that it is not possible to attribute some symptoms to the brain injury and neurocognitive disorder, and others to the psychological disorders. The role of the ongoing symptoms from the physical injuries are also confounding and worsening her overall condition.

[112] Dr. Cohen opined that mild traumatic brain injury is associated with spontaneous recovery between one year and 18 months with smaller gains over the following one to two years. He opined that Mrs. Donaldson's recovery from her mild traumatic brain injury was likely maximized when he assessed her in December 2018 and improvements in her cognitive performance thereafter will be due to her learning coping mechanisms and reducing anxiety and reactivity.

[113] Dr. Lysak's opinion that Dr. Cohen should have ruled out that mood disorders may be mimicking a brain injury, is misplaced if she means that he disregarded psychological issues when diagnosing ongoing neurocognitive disorder.

[114] As discussed further below, Dr. Scarth opined that Mrs. Donaldson's cognitive function is impacted by her psychological issues and not by her brain injury, which resolved. I prefer the opinions of Dr. Cameron and Dr. Cohen that her brain injury and her psychological diagnoses are all contributing to her cognitive deficits. Those

opinions align more with Dr. Cohen's interpretation of the neuropsychological testing which I accept for the reasons I have expressed below. Also, as I address in more detail below, Dr. Scarth's conclusion that Mrs. Donaldson recovered from the brain injury is not based on admissible evidence and is not supported by the evidence.

[115] With regard to Dr. Lysak's criticism that Dr. Cohen over emphasized test results which are only a measure of what happened during that test, Dr. Cohen agreed that testing is a measure of performance on the day in question. But he also testified that some of the tests are quite stable and can be relied upon to determine a level of functioning that is not just reflective of the day of the test.

[116] During neuropsychological testing, Dr. Cohen concluded that the test of pre-morbid functioning was probably not reflective of her true pre-morbid functioning because she demonstrated difficulty decoding words. He described what he observed as dysphonetic dyslexia, which affects abilities to sound out words, but does not affect reading comprehension or cognition. Mrs. Donaldson testified that she understood she has dysphonic dyslexia. I understood her to simply be mispronouncing the word.

[117] Because of what he observed, Dr. Cohen did not use a portion of the pre-morbid function testing to estimate her pre-morbid capacity, but rather based it on demographic factors. Dr. Cohen is of the opinion that Mrs. Donaldson's historical work and functioning demonstrated that she was not significantly impaired by the dysphonetic dyslexia, including her work as a bank teller and in the family stores. Dr. Cohen also noted an association between dysphonetic dyslexia and attention deficit disorder, and opined that it was possible that Mrs. Donaldson had, pre-accident some mild form of attention deficit which might have been aggravated by the accident.

[118] Dr. Lysak was critical of Dr. Cohen disregarding the pre-morbid tests results. On cross examination, Dr. Cohen explained that he did not disregard the whole test, but the part of the test that measures performance. He did so because he observed her laboured reading, and because her score was at odds with what the

demographic indicators, a valid predictor of pre-morbid ability, indicated. He also explained that the part of the test he disregarded measures intelligence, and he was concerned that her dysphonetic dyslexia was affecting the results, but dyslexia is not an indicator of intelligence or lack thereof.

[119] When Dr. Lysak testified, she did not comment on the rationale that Dr. Cohen gave. Dr. Lysak did not opine that such an approach is not open to a neuropsychologist; her opinion was that she would not have used that approach in these circumstances. However, the decision Dr. Cohen made was informed by the whole assessment, including the interview of Mrs. Donaldson and the collateral interview. Dr. Lysak did not access to any information other than the test results. Dr. Lysak did not administer any tests and get results that would lead to a different conclusion. Her opinion, then, is that of a person who did not assess Mrs. Donaldson, did not hear her explain her dyslexic condition, did not see her laboured reading and did not administer the test. Dr. Lysak's opinions are too far removed from an understanding of Mrs. Donaldson and the collateral interview that Dr. Cohen for the Court to prefer her judgment as to whether the pre-morbid testing or the demographic predictors should be used.

[120] In *Sirna v. Smolinski*, 2007 BCSC 967, Justice Macaulay addressed the criticisms of a neuropsychologist who had not seen the plaintiff and the opinions of the neuropsychologist who had assessed the plaintiff. On a debate about how to interpret pre-morbid test results, Justice Macaulay preferred that of the expert who had seen the plaintiff and conducted the testing, in part because his opinion was more consistent with the evidence. At paragraph 98, he remarked that the critiquing expert's opinion could not explain how the plaintiff had managed to accomplish her post secondary education if her pre-morbid functioning was as low as that expert opined.

[121] That reasoning is apt in this case. The hypothesis that Dr. Lysak's opinion is intended to support, that Mrs. Donaldson's test results are all due to her pre-existing dysphonetic dyslexia, lacks a rational relationship to the evidence in this case.

Despite this lifelong condition, she did better than average in school. She attended and complete post secondary college education. Not long before the accident she took English 10 and then a university level creative writing course, doing well in both. She was a high functioning person before the accident including running a successful business, raising children, volunteering, hosting elaborate parties, and doing a lot of athletics very well. The uncontested evidence about the diminishment in her abilities across all realms, including being able to use her brain on a day by day basis, is inconsistent with her problems being due to a pre-existing learning disorder that had never really hampered her.

[122] Dr. Lysak's report includes her interpretation of the test results, which differ from that of Dr. Cohen in part because of the way she views Mrs. Donaldson's pre-existing learning disorder and the impact she believes it had on the test results. In addition, she points to some test results which were within normal ranges which she believes rule out ongoing neurocognitive disorder and support the thesis that psychological issues are causing her cognitive problems.

[123] There is nothing about Dr. Lysak's opinions, or the cross examination of Dr. Cohen, that allows me to determine whether she interpreted the test results more accurately than he did. However, Dr. Cohen examined Mrs. Donaldson, conducted a collateral interview of Mr. Donaldson, and did testing over two days. His interpretation of the tests results are based on a much more complete picture and understanding of Mrs. Donaldson than Dr. Lysak had.

[124] Ms. Grayson also asserts that Dr. Cohen should not have relied on four-year-old test results. He did a follow up report in January 2023 in which he reviewed several sets of clinical records and independent medical examination reports. He did not change his opinions. Ms. Grayson asserts that at that time, he should have re-tested Mrs. Donaldson to determine whether his 2018 testing was still valid. Dr. Cohen, on cross examination, agreed that after four years, retesting would be helpful.

[125] In submitting that Dr. Cohen should have done further testing, Ms. Grayson does not refer to any clinical or other evidence indicating that Mrs. Donaldson's cognitive functioning has changed in the four years. At trial, Mrs. Donaldson had trouble following questions especially when they required referring to points in time or passages of time. She was not able to remember some things that it would be normal to remember. She became fatigued and frustrated during testimony. She became emotional. She described being flooded and overwhelmed during her evidence. Mrs. Donaldson's evidence in this regard was similar to what other independent medical examiners observed, including Dr. Chow, Dr. Scarth, and Dr. Quee Newell.

[126] Mr. Donaldson's evidence demonstrates that despite hoping for and working for improvement, Mrs. Donaldson has not had much. Instead, they have made adjustments to accommodate her functioning.

[127] Based on the evidence that there has been no material change in the way Mrs. Donaldson functions in the interval, I conclude the evidence does not support the thesis that more testing would have demonstrated a material change in Mrs. Donaldson's cognitive status.

[128] I am of the view that Dr. Lysak's opinions do not undermine those of Dr. Cohen which I accept.

[129] Ms. Grayson also led the evidence of Dr. Brian Scarth, a psychiatrist. He met with Mrs. Donaldson over MS Teams. In his report, he noted that she was not initially able to recall specifics of her injuries, her most significant concerns or the treatments she had had. He noted that she became distressed by her inability to remember. After summarizing her responses to his questions, which included the shortcomings I have just described, Dr. Scarth also stated that Mrs. Donaldson provided "a well organized account of current social history, treatment providers and medication specifics as well as a detailed pre-accident history". Dr. Scarth did not explain how to reconcile these disparate observations about Mrs. Donaldson's ability to recall. Later in the report, he opined that Mrs. Donaldson did not show deficits in

attention, or consistent deficits in retrieval of recent or remote information. He then said Mrs. Donaldson's difficulty in providing information for the years following the accident was likely due to her anxiety and distress related to this period of time, rather than functional limitations in memory.

[130] Dr. Scarth opined that Mrs. Donaldson suffered a mild traumatic brain injury in the accident, developed anxiety including driving related anxiety and anxiety due to post concussion syndrome. He opined that she had continued high levels of anxiety and emotional distress associated with her perception of slow and incomplete recovery. Dr. Scarth reviewed the clinical records. He opined that there was substantial cognitive recovery in the initial months after the accident. This opinion is mostly based on Dr. Grantham's notes, the fact that Mrs. Donaldson went on a cruise in 2016 and on the Lifemark assessment.

[131] As I have indicated , the Lifemark assessment is not in evidence for the truth of its contents. Dr. Grantham does not comment on Mrs. Donaldson's cognitive wellness in her notes. That leaves the cruise as the basis for Dr. Scarth's conclusion that Mrs. Donaldson had substantial cognitive recovery. Dr. Scarth rules out neurocognitive disorder on the basis that there is no objective evidence of cognitive deficits since the spring of 2017. I note that the Lifemark report, that Dr. Scarth relied on in determining substantial cognitive improvement, contains a recommendation for neuropsychological testing which is difficult to reconcile with Dr. Scarth's conclusion.

[132] Dr. Scarth concludes that Mrs. Donaldson has anxiety, and because she has anxiety, and because he believes that she had substantial cognitive improvement, her anxiety is responsible for her difficulty in providing information about the years following the accident and it is not a problem with functional limitations in her memory. His reasoning is circular and is based on internally inconsistent statements regarding her ability to recount what had happened to her and her memory function generally.

[133] I conclude that Dr. Scarth's opinions on the cause of Mrs. Donaldson's current symptoms to be internally inconsistent and lacking in evidentiary foundation.

[134] I conclude that Mrs. Donaldson suffered a mild traumatic brain injury in the accident. There is no other contributing cause for the mild traumatic brain injury. She had developed mild neurocognitive disorder due to the confluence of the mild traumatic brain injury and the psychological disorders, as discussed below. I accept that the effects of the brain injury on her cognition is permanent. I conclude that there is no non-tortious cause for the neurocognitive disorder and that Ms. Grayson is entirely responsible for it.

Depression, Anxiety and Somatic Symptom Disorder

[135] There is no dispute that Mrs. Donaldson has psychological conditions including depression and anxiety. There is no dispute that they were caused by the accident. Ms. Grayson raised the question of whether there have been life events since the accident which are also playing a role.

[136] Mrs. Donaldson testified about feeling less confident, having trouble with sleep, not wanting to leave the house, and feeling less like socializing except with people very close to her. Mrs. Donaldson testified that her sleep has improved from being very limited since the accident to up to seven hours per night. She testified to the effect that in the months leading up the trial, the stress of the litigation made her anxious and interfered with her sleep.

[137] Mrs. Donaldson testified that her struggles with her mental health have included two occasions of suicidal thoughts. One was after an examination for discovery which she found overwhelming and considered jumping out of hotel window, and the other was when she was hiking and she had thoughts of jumping off a cliff. She testified that she forced herself to snap out of it.

[138] Mrs. Donaldson testified that she has trouble coping with life events as she did prior to the accident. For example, prior to the accident her mother-in-law, with whom she was very close, passed away. She testified that she made peace with the loss quickly. Since the accident, three people with whom she was close have died. In addition, her neighbour's dog was hit by a car while she was walking with it. She

testified that those deaths have caused her mood setbacks much worse than how she coped before the accident.

[139] Mrs. Donaldson testified that she has experienced anxiety, including driving anxiety, since the accident for which she took driving lessons. By about a year after the accident, she was able to drive herself around the West Kootenay areas that she knows well. Mrs. Donaldson will not drive on long trips, for example, Mr. Donaldson drove her to Kelowna when she attended Lifemark and to Vancouver for the trial. Mrs. Donaldson sometimes wears an eye mask in the car and/or lies down in the rear seat to remain calm.

[140] These symptoms presented after the accident, and except for the suicidal thoughts, have persisted.

[141] Mrs. Donaldson has had counselling since shortly after the accident with three different counsellors. She contacted emergency services when she felt suicidal after her examination for discovery and on an occasion when she was overwhelmed. She takes Citalopram regularly for depression and anti-anxiety medications on an as needed basis.

[142] Dr. Cohen opined that Mrs. Donaldson has generalized anxiety disorder. He opined that her difficulties with anxiety are likely causing further fatigue. Dr. Cohen opined that the suicidal thoughts, low mood, being easy to tears, poor sleep and fatigue are consistent with an ongoing major depressive disorder. Dr. Cohen also diagnosed somatic symptom disorder, which he described as a distressing condition involving excessive thoughts or preoccupations related to unresolved symptoms that result in significant disruption of daily life.

[143] Dr. Scarth opined that Mrs. Donaldson has an adjustment disorder including mixed anxiety and depressed mood. He opined that the onset was in late 2015 and has persisted to the present. Dr. Scarth opined that litigation anxiety was contributing to Mrs. Donaldson's anxiety.

[144] I find that Mrs. Donaldson has anxiety, depression and somatic symptom disorder and those conditions are playing a role in her cognitive problems.

[145] I also conclude that while the conclusion of the litigation may remove one source of anxiety and depression, there is no evidence that Mrs. Donaldson's psychological disorders can be expected to resolve completely or even significantly with the end of the litigation. She has had counselling with three different counsellors since 2016 and while she has developed skills to address her symptoms, she continues to have depression and anxiety. I accept the opinions that these conditions should be addressed with ongoing treatment which may offer some gains but not full recovery.

[146] While partial resolution of her mental health conditions may assist with her cognitive problems, she will not have complete resolution of her cognitive problems because the effects of her brain injury on her cognition is permanent.

Traumatic Ear Canal Injury, Hearing Sensitivity, Tinnitus, Balance and Stability

[147] Mrs. Donaldson testified that very shortly after the accident, she felt like everything was too loud. She developed tinnitus (ringing in her ears). In the days immediately following the accident, she felt unstable on her feet. She testified that one day she crawled from her bed into the kitchen of their home. She testified about another occasion when she walked down the corridor with her hands held out because she was afraid she would bounce off the walls due to instability on her feet. She claims that the accident, specifically the air bag deployment, caused injury to her inner ear that is responsible for these symptoms.

[148] Mrs. Donaldson spent several weeks after the accident at home with as little noise and light as possible. She testified that when she and Mr. Donaldson went on the cruise three months after the accident, her balance became worse and she could not take part in the activities that involved many people, crowds, noise and lights.

[149] The Donaldsons have made many adjustments to address Mrs. Donaldson's noise sensitivity and some to manage her balance issues. They purchased a sound bar for their TV so they can adjust the audio in a manner that does not aggravate Mrs. Donaldson. They have installed noise level reader Apps on their phones so they can assess the noise levels in public places before deciding whether Mrs. Donaldson can spend time there. Mrs. Donaldson, who frequently hosted and attended events with dozens of people and music, including live music, now asks hosts to turn off background music. She no longer attends music concerts, although she did attend a piano recital post-accident. She wears custom ear plugs that are hearing aids that moderate sounds instead of amplifying them. She has had railings and rubber mats installed to the entry of her house because some of the entry area can be come slick in the winter as a precaution.

[150] Ms. Grayson does not dispute that Mrs. Donaldson had these symptoms, but she says that given the timing of them, they were likely caused by a viral ear infection that Mrs. Donaldson contracted on the cruise.

[151] Mrs. Donaldson led the evidence of Dr. Eytan David, an otolaryngologist. Dr. David opined that Mrs. Donaldson suffered a traumatic injury to the inner ear as a result of the deployment of the airbag in the accident causing imbalance, tinnitus (an early form of hearing loss) and hyperacusis (sound sensitivity).

[152] With respect to damage to her inner ear, Dr. David opined that air bag deployment is an accepted cause of damage to the inner ear. He explained that his opinion that she suffered inner ear injury is based on the symptoms she reported, and the objective and clinical testing he did when assessing her.

[153] Dr. David testified that the pattern of the injury that he observed on testing Mrs. Donaldson was typical of inner ear trauma. He observed objective abnormalities of her right inner ear suggestive of gravity receptor dysfunction and of her left posterior semicircular canal. His testing demonstrated that Mrs. Donaldson had low ability to stabilize visual fixation in that part of her inner ear. Dr. David detected two signs of vestibular dysfunction: nystagmus and otolith dysfunction.

Dr. David also noted that Mrs. Donaldson's vertigo symptoms are typical in a posttraumatic inner ear balance injury. Dr. David opined that persistent sensation of movement following disembarkation from an ocean vessel is typical for inner ear balance dysfunction.

[154] Dr. David disagreed that the results of her testing could be consistent with a previous blow to the head unless that previous blow to the head involved acoustic trauma. Dr. David also disagreed that a viral inflammation could cause the bi-lateral inner ear trauma he detected, because a viral inflammation will only affect the side of the ear in which there was an infection, and would have a different pattern.

[155] Dr. David testified that Mrs. Donaldson told him that she had no history of prior head injury and that he did not see evidence of one in her medical records. As noted above, Mrs. Donaldson testified that she believed she likely had a concussion in the past. While I do not see this omission as a matter of veracity on the part of Mrs. Donaldson because there would be no reason for her to fail to tell Dr. David and then testify about it a trial if she was trying to conceal it, I agree that Dr. David should have had that information. However, there is no evidence that she had the problems that Dr. David opined about before the accident. I do not consider Dr. David's opinions to be undermined by the fact that they may have been a past undocumented head injury that had not caused any hearing or inner ear problem.

[156] Dr. David disagreed that Mrs. Donaldson's clinical status, immediately post-accident, ruled out an inner ear injury occurring in the accident. He agreed that traumatic injury to an inner ear typically has an immediate onset, but he stated that there is also significant variability in the timing of presentation of symptoms. Dr. David explained that if Mrs. Donaldson had prolonged bed rest after the accident, then the onset of dramatic balance symptoms may have been delayed. He also disagreed that Mrs. Donaldson's general physician records were devoid of notes that indicate dizziness or imbalance in the weeks after the accident because they note concussion syndrome. He testified that as a physician, when he reads

clinical notes with references to concussion he considers that to be a myriad of symptoms including imbalance, dizziness, tinnitus, and sensitivity to loudness.

[157] Dr. Lesperance, a physician who works in the same clinic as Mrs. Donaldson's general physician, saw Mrs. Donaldson at her first visit to the clinic after the accident and noted that Mrs. Donaldson complained of being "dizzy" and having "nausea" as well diagnosing concussion with grade 2 whiplash disorder.

[158] Mrs. Donaldson saw Dr. Grantham within a week of the accident. Dr. Grantham's work as a chiropractor includes concussion therapy. She asked Mrs. Donaldson to log her symptoms in several categories daily. Mrs. Donaldson completed those logs. On many of them, she recorded zero balance problems but on others she recorded balance problems including tripping and dropping things. She also reported dizziness, nausea, noise sensitivity and ringing in her ears.

[159] Dr. David reported that Mrs. Donaldson told him she had imbalance issues soon after the MVA. Ms. Grayson focusses on Mrs. Donaldson's evidence that she felt everything changed after the cruise and submits that Mrs. Donaldson's evidence is only consistent with balance issues developing after the cruise. I disagree. Mrs. Donaldson testified about stability issues while at home in the period immediately after the accident and then it worsening after the cruise.

[160] Mrs. Donaldson also told Dr. David that, at the time of the assessment, her balance is near normal except when she is fatigued or in busy visual environments. At trial, Mrs. Donaldson testified that she can walk for up to an hour and half at a time, but has to be careful on uneven ground. She testified that when she is tired, she is more unsteady.

[161] On cross examination, Dr. David explained that the fact that Mrs. Donaldson's balance has improved and she now experiences balance problems, mostly when she is fatigued, fits the natural history of an inner ear trauma injury. He testified that people learn to compensate with vision, their other inner ear, and their arms and legs. The ability to compensate is impacted by fatigue. Accordingly, the fact that he

did not observe Mrs. Donaldson having balance issues is not determinative of whether she had an inner ear injury. The same is true of some of the tests results that he conducted on balance that were normal.

[162] Mrs. Donaldson's evidence at trial about the trajectory of her balance and dizziness did not differ materially from what Dr. David relied on to form his opinions.

[163] With respect to hearing, Dr. David opined that Mrs. Donaldson's testing demonstrated abnormalities that manifest as loudness sensitivity and problems in hearing where there is a lot of background noise. A person with these problems would not have difficulty hearing in day to day speech in background silent environments but will have problems with hearing and with loudness sensitivity in loud environments or where there is background noise such as talking or music. Dr. David disagreed that Mrs. Donaldson's hearing was normal for a person of her age. He testified that if she had the same results in both ears, it would be considered normal, but excellent hearing in one ear and absence of hearing at some pitches in the other is abnormal.

[164] Dr. David explained that tinnitus is a manifestation of hearing loss. One of three features needs to be present to connect tinnitus to specific event: change in pre vs. post event hearing; acoustic trauma; and diagnosis of brain injury. He opined that Mrs. Donaldson meets all three requirements.

[165] Dr. David opined that Mrs. Donaldson has moderate to severe tinnitus that interferes with her ability to sleep. He agreed that 10-15% of the population have tinnitus and he agreed that some people with tinnitus function with it adequately by "shrugging it off". He agreed that this is the case for sporadic tinnitus, but his opinion is that Mrs. Donaldson has post traumatic tinnitus which is typical moderate to moderately severe and interferes with functioning. Dr. David disagreed that his categorization of her tinnitus of moderate to moderately severe is based only on her report of how it impacts her. He testified it was based on his objective testing results and Mrs. Donaldson's report of symptoms to him.

[166] With regard to the possibility of a viral infection, Dr. David testified that Mrs. Donaldson's results on hearing were inconsistent with a viral infection being the cause of her hearing loss because deficits will be in certain patterns across low, mid and high frequencies that are different from the results of Mrs. Donaldson's testing. Dr. David also disagreed that there might have been a very mild injury from the accident and a more serious injury from a viral infection on the cruise because a viral infection was inconsistent with the test results from Mrs. Donaldson's left ear.

[167] Dr. David's evidence was careful and measured. He gave rational and compelling responses to vigorous and extensive cross examination.

[168] The other evidence on this category of injuries includes Mrs. Donaldson's evidence of her hearing and balance problems, the changes that she and Mr. Donaldson have made to their home and activities to accommodate these problems, her use of noise reducing ear buds, and the evidence of witnesses who have observed her struggling to communicate in busy environments, avoiding loud and busy environments, and asking for background noise to be lessened or eliminated.

[169] Based on the lay and expert evidence pertaining to Mrs. Donaldson ear injuries and symptoms, I conclude she suffered traumatic injuries to both inner ears which are responsible for her tinnitus and noise sensitivity, and are in part responsible for the difficulty she has communicating and her balance. I conclude that the accident was the cause in fact of the injuries. I conclude that there is no other cause in fact of them that affects the extent to which Ms. Grayson is liable to compensate Mrs. Donaldson for these injuries.

Temporomandibular Joint Pain, Numbness in Left Cheek, Eye Pain, Face Twitching and Head Movement

[170] Mrs. Donaldson's amended notice of civil claim claims she sustained a soft tissue injury to her jaw and an injury to her face in the accident. In her closing submissions, Mrs. Donaldson did not list temporomandibular joint ("TMJ") pain or syndrome as an injury caused by the accident. She claims that as a result of the

accident, she had pain behind her right eye and in her right cheek shortly after the accident, and experiences ongoing numbness in her right cheek. She also claims have twitching in her face and an involuntary head movement when she is tired or under stress.

[171] Mrs. Donaldson agreed on cross examination that before the accident she had TMJ problems, had sought treatment for it and that she thought was associated with the fact that she grinds her teeth. Prior to the accident, she wore a night guard for her teeth grinding. She also agreed that occasionally, her teeth grinding causes headaches. She testified that she broke her night guard when grinding her teeth after the accident. Despite that this condition pre-existed the accident, she claims the expense of a new night guard. I presume this is based on an exacerbation of this condition, but she did not say that precisely. There is no medical evidence that this condition was exacerbated by the accident. I conclude that she has not proved that her TMJ was aggravated by the accident.

[172] In her closing submissions, Ms. Grayson treats these conditions as one and the same, submitting that Mrs. Donaldson gave evidence that her chronic TMJ caused her face pain. I disagree. On cross examination, Mrs. Donaldson, when asked if she had face pain from TMJ, replied that it was not like the face pain she has from the accident which she described as a numb, sagging face and pain behind her eye. Mr. Donaldson testified that he noticed that she started rubbing her face after the accident. In addition, Mrs. Donaldson testified about face twitching and a head movement that she experiences when she is under stress or tired. These symptoms were apparent while Mrs. Donaldson testified. Other witnesses also testified about seeing them and that she did not display them prior to the accident.

[173] Mrs. Donaldson's evidence is that the face pain, numbness twitching and head movement are all new since the accident. The evidence also is that the air bag went off in her face. Dr. David opined about significant forces of an air bag deployment.

[174] I conclude that the evidence of the force of the air bag explosion and Mrs. Donaldson's evidence of a pain behind her eye and in her face, followed by a numb face, and development of eye twitching and head movement proves on a balance of probabilities that these injuries were factually caused by the accident.

[175] There is no evidence that Mrs. Donaldson's face pain, eye pain, face numbness, twitching and head movement are related to her pre-existing TMJ and so there is no need to adjust her compensation on the basis that she would have suffered from those issues in any event of the accident.

Vision

[176] Mrs. Donaldson testified that after the accident, she had a lot of pain in her right eye which caused her to see an optometrist. She testified that bright, flickering lights bother her. She uses sun glasses (including indoors) and prism glasses with a blue tint to address light sensitivity. She testified that if she spends more than an hour on her computer at a time, her eyes feel strained and she can develop a headache. She also finds busy visual scenes, confusing and hard on her eyes.

[177] Mr. Donaldson testified that Mrs. Donaldson has complained of issues with light sensitivity since right after the accident. He testified that he installed dimmer switches and they keep the lights low. He finds this frustrating in terms of being able to see adequately, but he accepts that low light is the way it has to be.

[178] Ms. Grayson submits that Mrs. Donaldson's claims of photophobia and blurred vision are part of her symptoms in relation to her mild traumatic brain injury. Ms. Grayson also submits that because Mrs. Donaldson did not enter any expert evidence on vision issues, there is no medical evidence of an injury to her eyes. It is not clear whether Ms. Grayson's submission is that there is no evidence of vision issues that are attributable to an injury caused by the accident, whether that is the mild traumatic brain injury or a physical injury to her eyes or an eye.

[179] If Ms. Grayson's position is that there is no medical evidence linking Mrs. Donaldson's problems with her vision, including light sensitivity, intolerance for

busy visual fields and intolerance for computer screens to her accident injuries, I disagree. Dr. Cameron testified that Mrs. Donaldson's complaints, photophobia and initial blurred vision are symptoms of post traumatic brain injury syndrome. He explained that there is an ocular vestibular connection between the brain, eyes and ears and a high percentage of patients with a traumatic brain injury report blurred vision. Dr. Cohen opined that her visual problems and sensory sensitivity to her environment are consistent with the effects of a concussion.

[180] In the Lifemark report, one or more of the authors recommended that Mrs. Donaldson have a vision assessment and vision therapy.

[181] In July 2018, Mrs. Donaldson saw Dr. Daniel Walker, an optometrist who specializes in vision therapy and visual rehabilitation for vision testing. The purpose of the vision testing was eye tracking and teaming – i.e., to determine whether Mrs. Donaldson's eyes track appropriately and whether they work together appropriately. While Mrs. Donaldson's vision was normal on several tests, she had low scores on two. She has a mildly below average score on a "figure ground differentiation test" in which she was required to track and follow a visual maze in a busy visual scene. Mrs. Donaldson scored below average of depth perception, which is a way in which the eyes are supposed to be used together efficiently. Dr. Walker prescribed prism vision glasses – one for near vision and one for far vision. The prisms help the eyes converge. The glasses are also tinted blue to help with light sensitivity. Dr. Walker testified that the glasses are entitled to relieve symptoms but do not treat the underlying problem.

[182] Mrs. Donaldson testified that she did not have blurred vision, light sensitivity, decreased tolerance for busy visual environments or decreased tolerance for screens prior to the accident. In addition, several lay witnesses testified that since the accident, Mrs. Donaldson wears tinted glasses indoors including in restaurants and in the Mallard stores when she drops in. Mr. Ballance testified that he observed Mrs. Donaldson's intolerance for the fluorescent lighting in the Nelson store.

[183] While a temporal connection alone is not sufficient to prove causation, these witnesses' evidence support Mrs. Donaldson's evidence that she has ongoing visual problems that she did not have before the accident. The medical evidence of Dr. Cameron provides a causative link between the accident, Mrs. Donaldson's mild traumatic brain injury and her ongoing vision issues including light sensitivity and intolerance for busy visual environments. Based on the evidence as a whole, I conclude that Mrs. Donaldson's vision problems are due to the brain injury she sustained in the accident.

[184] With regard to cause in law, there is no evidence that Mrs. Donaldson had pre-existing vision problems that should be taken into account when assessing damages.

Neck, Back and Shoulders

[185] Mrs. Donaldson asserts that she suffered soft tissues injuries to her neck, upper back and shoulders which continue to cause her pain and which are easily triggered by moving her neck too much, such as when swimming or figure skating, or by heavy lifting. She also asserts that the pain has interfered with her sleep.

[186] Ms. Grayson asserts that Mrs. Donaldson's evidence lacked specificity and the court should not accept that these injuries have interfered with her functioning to the level she asserts. Ms. Grayson also asserts that due to the lack of expert evidence, I should not accept that these injuries persist as Mrs. Donaldson claims.

[187] I agree that when one considers Mrs. Donaldson's evidence specifically describing these injuries, she did not give a lot of detail compared to a lot of personal injury plaintiffs. It is typical, for example, for a plaintiff to describe the intensity of and frequency of pain from an injury in the immediate post-accident timeframe, six months out and then over time up to the trial. Often, the plaintiff's evidence will describe whether the pain has lessened and how the frequency has changed over time. Mrs. Donaldson did not testify that way. When asked those kinds of questions, she typically replied that she did not do well with questions that deal with time or time frames and that evidence of her injuries are all in the records.

[188] For the reasons I have given above, I do not consider this to be a matter of her veracity but it does affect whether the evidence she has led evidence that establishes that she suffers from the injuries she alleges.

[189] However, Mrs. Donaldson gave other evidence that assists. She described how the pain affects what she does now compared to what she did before the accident. She testified that she limits certain activities, for example certain types of swimming strokes to avoid triggering neck and shoulder pain. She testified that she swims with a mask and snorkel so that she does not have to turn her neck which will trigger an onset of neck pain. She testified that she positions her seat at the dinner table so she can see everyone else without having to turn her neck a lot. She also purchased an adjustable bed, and motorized recliner chairs so that she can be more comfortable. She testified that being in the hot tub helps her pain. Many of these modifications and adjustments were made at personal expense and inconvenience. None of this evidence was seriously challenged except on the broad-based submission that I should not rely on Mrs. Donaldson's evidence generally.

[190] In addition, Mrs. Donaldson attended for chiropractic, acupuncture and massage treatments, some of which were for pain relief in her neck, shoulders and back.

[191] With regard to these injuries, I did not permit the admission of the expert evidence tendered from her chiropractor, Dr. Grantham. However, Dr. Grantham testified as a treating practitioner. Dr. Grantham testified that she observed alterations in Mrs. Donaldson's posture and restricted range of motion in her cervical spine, thoracic spine and pelvis. She had swelling in her cervical spine and the tissues of her neck and upper back. Mrs. Donaldson had tension and excessive muscle tone from muscle contraction in her upper back. The swelling resolved over six weeks. Dr. Grantham has observed joint restriction in Mrs. Donaldson's cervical spine and thoracic spine up to the present. Dr. Grantham has observed her doing pain relieving motions such as rubbing her neck and trapezius.

[192] Dr. Grantham has not seen Mrs. Donaldson continuously. Mrs. Donaldson attended frequently for treatment after the accident up to late 2017, attended once in 2018 and then not again until 2022. Mrs. Donaldson explained that she pursued various forms of treatment over the years, trying to find something that would work. The evidence shows that in 2018, she increased her massage therapy treatments with various providers through 2018, 2019 and 2022.

[193] The gap in treatment does not affect how I view Dr. Grantham's evidence about the times she saw Mrs. Donaldson. While Dr. Grantham could not testify about any observations during the gap, her evidence was that Mrs. Donaldson was seeing her with complaints that corresponded to objective signs of injury in her neck, shoulder and upper back at various times between the accident and the trial.

[194] Ms. Grayson's submission that there is a complete lack of expert evidence on these injuries is incorrect. Dr. Cameron reported that when he examined Mrs. Donaldson, he observed spasm of her right trapezius muscles, her cervical paraspinal muscles and her right lumbar paraspinal muscles. While Mrs. Donaldson did not complain to him about headaches, he noted that her clinical records documented recurrent chronic headaches. He opined that Mrs. Donaldson's headaches are in part post traumatic musculoskeletal or cervicogenic headaches associated with her neck pain. He also opined that she has chronic pain as a result of soft tissue and skeletal issues that is completely disabling. He considered her to be a candidate for prophylactic pain and headache medication and for Botox injection therapy for headaches, neck pain and shoulder pain.

[195] These opinions were not challenged during cross examination of Dr. Cameron. Indeed, cross examination drew out of Dr. Cameron that he considered whether her whiplash disorder, and her symptoms pertaining to that, were a possible differential diagnosis for her cognitive impairment. While Dr. Cameron did not agree that whiplash disorder was causing her cognitive impairments, he did agree, as a result of the question put to him, that whiplash disorder is consistent with her neck pain, headaches, dizziness and tinnitus.

[196] The evidence was clear that despite the odd bout of neck or back pain prior to the accident, Mrs. Donaldson was a very active, busy, energetic and high functioning person up to the time of the accident. She did not have problems with her health, or chronic pain in these areas of her body which interfered with her functioning.

[197] Both Mrs. Donaldson and Mr. Donaldson testified that Mrs. Donaldson's pain has interfered with Mrs. Donaldson's sleep since the accident. They purchased a motorized bed so that she can get into a more comfortable position. As a result, Mr. Donaldson has to sleep in the position Mrs. Donaldson sets, which he does not always find comfortable. This evidence is compelling because common sense dictates that people do not undertake this type of expenditure and interference with the comfort of one of two people in a couple, in the crucial function of sleep if the pain is not ongoing and disruptive.

[198] The evidence is sufficient to prove on the balance of probabilities that Mrs. Donaldson suffered soft tissue injuries to her neck, shoulder and back in the accident that continue to cause her pain. I conclude that the accident was a necessary cause of these injuries.

[199] With regard to cause in law, there is no evidence that Mrs. Donaldson would have suffered chronic neck, back or shoulder pain that would limit her activities and interfere with her functioning had the accident not occurred. The evidence is that she had occasional problems that would resolve after a single chiropractor visit. Such problems are of a different category than the problems she has with chronic pain in those areas that she has to take care not to trigger. I conclude that there is no basis to adjust her damages on account of legal causation in relation to these injuries.

Headaches

[200] Mrs. Donaldson testified that her persistent headaches since the accident are extremely disruptive and difficult to manage. She described having headaches at a pain level of 3 or 4 out of ten frequently. She also described what she calls "hangover headaches". She says these headaches feel like a post heavy drinking

headache but she does not drink. She testified that they have a severity level of 7 or 8 out of ten and can last a few days at a time.

[201] Mrs. Donaldson takes Excedrin or Advil for these headaches. She testified that she finds that if she takes a lot of these drugs, she becomes constipated. With the bad headaches, she takes up to four Advil at a time.

[202] Mrs. Donaldson testified that prior to the accident, she had occasional headaches that were brief in duration.

[203] Ms. Grayson did not make a specific submission about headaches. She included them on the list of conditions that she does not agree that Mrs. Donaldson has suffered or continues to suffer from and about which I should not accept Mrs. Donaldson's evidence unless corroborated by an expert.

[204] I have not accepted that I should reject Mrs. Donaldson's evidence outright. I have indicated some issues with its reliability due to lack of specifics and lack of ability to testify about date and timing of events. However, those problems do not pertain to Mrs. Donaldson's evidence about headaches.

[205] Dr. Cameron opined that Mrs. Donaldson's headaches were post traumatic, in part related to the mild traumatic brain injury and in part associated with the neck pain as post traumatic musculoskeletal or cervicogenic headaches. Ms. Grayson did not lead evidence that challenged this opinion, nor did she undermine Mrs. Donaldson's evidence about the ongoing debilitating effects of her headaches.

[206] Mrs. Donaldson's evidence and that of Dr. Cameron passes the balance of probabilities threshold that Mrs. Donaldson has suffered post traumatic head injuries caused by her accident injuries.

[207] With regard to cause in law, the evidence is that Mrs. Donaldson had occasional headaches before the accident that did not interfere with her functioning. I conclude that there is no basis to adjust her damages on account of legal causation in relation to her post traumatic headaches.

Hips

[208] Mrs. Donaldson testified that after the accident, her right hip bothered her. Mr. Donaldson testified that she sometimes complains of pain in her hips when they are walking, but not very often.

[209] On December 16, 2014, approximately one year before the accident, Dr. Grantham made a note that Mrs. Donaldson had torqued her left hip/pelvis and had shooting pain. On December 18, 2014 she made a note that indicated the pain was decreased. I infer these notes are related because they are next to each other. On cross examination, Mrs. Donaldson testified that she had pain in her hips, more on the right side, prior to the accident.

[210] Dr. Grantham made a note in January 2016 that Mrs. Donaldson was complaining of left hip pain that day. Dr. Grantham testified that she observed joint restriction in Mrs. Donaldson's left sacroiliac joint.

[211] Ms. Chow, an occupational therapist who provided an expert report, examined Ms. Donaldson and noted tightness in both hips. However, she did not include that in her report and she agreed that Mrs. Donaldson had not complained of that to her.

[212] Ms. Grayson also asserts that Mrs. Donaldson has not provided any expert evidence with regard to whether the accident caused an injury to her hips. I do not accept that submission because Dr. Cameron observed that Mrs. Donaldson complained of pain radiating from her right lower extremity into her toes after the accident. He opined that the pain was probably sciatica-type pain from irritation of nerves in her lumbar region associated with soft tissue and musculoskeletal injuries to her lower back sustained at the time of the accident.

[213] Based on Mrs. Donaldson's evidence and the evidence of Dr. Cameron, I conclude that Mrs. Donaldson has injuries to the soft tissues in her lower back which are causing her pain to radiate down her right leg. I conclude that the accident was a

necessary cause of this injury based on the temporal connection, the lack of any problems in her right hip or leg prior to the accident.

[214] The evidence does not support the conclusion that she suffered an injury to her left hip due to the accident.

Feet and Toes

[215] Mrs. Donaldson testified that the toes of her left foot sporadically cramp or give her a sensation that they have spread apart or crossed. She also testified that she has discomfort from the nerves in her toes and pain in the bottom side of her foot. If she walks a distance in a heel, she has pain in her foot.

[216] Ms. Grayson refers to an entry in Dr. Grantham’s records, pre-accident, that refers to tingly left toes. On cross examination, Mrs. Donaldson agreed that she had problems with the toes on her left foot that started before the accident but not like after the accident. She explained that she could wear “pretty” shoes before the accident, but does not wear them after the accident.

[217] I pause to note that the pre-accident note pertaining to tingly toes comes under a note of decreased pain. The previous visit’s note is about shooting pain in her left hip and pelvis. It would appear, therefore, that note of left toes tingly relates to the note about decreased pain which relates to the shooting pain.

[218] I accept Mrs. Donaldson’s evidence of the problems she has with her left foot and toes including that it prevents her from wearing certain footwear. However, her evidence was very sparse, and there is no other evidence that assists the court with understanding this injury and connecting it to the accident on a factual basis. For that reason, it is not necessary to go on to determine the extent to which it is compensable and if, for example, the tingly toes she described to Dr. Grantham prior to the accident are part of the same condition and affect the extent of compensation.

[219] I conclude that Mrs. Donaldson has not proved that the problems she has with the left foot and toes are an injury caused in fact by the accident.

Thyroid

[220] Mrs. Donaldson testified that after the accident, she developed a problem with her thyroid gland. Shortly after the accident, Mrs. Donaldson went to the hospital with a sore throat and trouble breathing. An x-ray of her epiglottis revealed a nodule on her thyroid. Sometime after that, bloodwork demonstrated a thyroid problem. She was eventually prescribed Synthroid which she takes daily.

[221] In chief, Dr. Cameron was asked about the relationship between thyroid gland and brain injury. This topic was not addressed in his written report. I did not permit him to testify about it.

[222] There was no evidence connecting Mrs. Donaldson's thyroid condition with her accident injuries except a temporal connection. I conclude that this is insufficient to establish that the accident was a necessary cause of this condition.

[223] Dr. Cohen testified that Mrs. Donaldson's thyroid condition may contribute to her fatigue. This raises the question of whether there is a cause in law issue because she may have had problems with fatigue that would have been present regardless of the accident and for which Ms. Grayson should not be required to compensate her.

[224] I conclude that the evidence does not support a reduction in compensation on this issue. Dr. Cohen raised thyroid-induced fatigue as a possibility.

Mrs. Donaldson's evidence demonstrates how careful she must be to manage her activity to avoid fatigue. The medical evidence pertaining to her other medical conditions establishes a strong connection between them and fatigue. There is no evidence that Mrs. Donaldson would have developed debilitating fatigue from her thyroid condition if she did not have the accident injuries.

Menopause

[225] Mrs. Donaldson testified that she went into immediate menopause following the accident. She testified that her last period before the accident was in October or November, 2015 and she did not have another one until February 2016.

[226] On cross examination, Mrs. Donaldson agreed that she understands that peri-menopause is a time before menstruation ceases where a woman will have various hormonal symptoms, and menopause refers to the period a full year after menstruation stops. I understand that by immediate menopause Mrs. Donaldson meant that her period stopped suddenly and before she had any peri-menopausal symptoms. She testified that her symptoms included lack of libido and physical symptoms that significantly decreased her ability to have and enjoy sex. She became emotional when describing this, stating that she found it distressing to be speaking publicly about intimate relations she has with her husband.

[227] Ms. Grayson's counsel challenged Mrs. Donaldson's characterization of immediate menopause based on the definition in relation to a year long cessation of periods, which is a technically sound challenge. On the more substantive issue, of whether Mrs. Donaldson was plunged into this change without any peri menopausal transition, the issue is more nuanced.

[228] Ms. Grayson also challenged this more nuanced characterization on the basis that Dr. Andrews' clinical notes in December 2015 contained a reference to "sporadic menses". Ms. Grayson's counsel suggested to Mrs. Donaldson that she told Dr. Andrews that she was having sporadic periods in December 2015, which was inconsistent with a complete cessation of her periods after the accident. Mrs. Donaldson replied that she could not comment on Dr. Andrews' note, but that she probably told her that she had not had a period since October or November. Given that the appointment was in December, the timing is not inconsistent with Dr. Andrews' note of sporadic menses referring to a period 6-8 weeks prior.

[229] Mrs. Donaldson had a menstrual cycle on the cruise in February. There are clinical notes that indicated that she did not have menses for five months. This caused much counting to be done to determine if that meant that she had missed a period before the accident. Mrs. Donaldson maintained that she had a period in October or November and did not have one after the accident until the cruise.

[230] I have already addressed the evidence relating to nipple discharge. There was no evidence, expert or otherwise, connecting this symptom to menopause.

[231] Dr. Cameron testified that a significant number of women have a disruption in menstrual cycle or a change in their menstrual cycle following a traumatic brain injury due to disruptions of the connections between the pituitary gland and the hypothalamus deep in the brain. On cross examination, he testified that this connection was well understood and studied, especially because the same phenomena can cause a sudden decreased or elimination of libido in both men and women. He testified that it can be very disruptive to relationships if the couple does not know why one of them is suddenly disinterested in sexual intimacy.

[232] Dr. Cameron did not opine that Mrs. Donaldson was suddenly plunged into menopause. There is no expert evidence on that topic.

[233] Ms. Grayson also raises, understandably, that Mrs. Donaldson, at age 49, was at an age where menopause is expected. That fact raises cause in law issues.

[234] On the evidence, I conclude that the brain injury may have interrupted Mrs. Donaldson's cycle, but the evidence does not meet the balance of probabilities threshold that the accident caused Mrs. Donaldson to enter immediate menopause.

[235] The evidence does establish that the brain injury likely caused her to suffer a diminishment in libido. Although menopause was inevitable, and that symptom may have also accompanied menopause, there is no evidence that it would have done so permanently and so no evidence on which to base a reduction to her damages for this. In addition, this issue is relevant to her non-pecuniary damages only. The possibility that this one symptom is ongoing in part due to a non-tortious cause does not make a material difference to her non-pecuniary damages.

Failure to Mitigate

[236] A plaintiff in a personal injury action has a positive duty to mitigate. The defendant bears the burden of establishing: (1) that there were steps the claimant

could have taken to mitigate; (2) that those steps were reasonable; and (3) the extent, if any, to which the loss would have been avoided by taking those steps: *Stevens v. Creusot*, 2019 BCSC 1781 citing *Chiu v. Chiu*, 2002 BCCA 618 and other cases.

Failure to Seek Treatment and Follow Treatment Recommendations

[237] The duty to mitigate includes seeking treatment and following treatment recommendations: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144, at para. 56.

[238] Ms. Grayson submits that Ms. Donaldson failed to mitigate because she did not continue with the plan for rehabilitation developed by ICBC’s occupational therapist, Ms. Hughes. Ms. Grayson asserts that by withdrawing from Ms. Hughes’ rehabilitation plan, not working with a psychologist, and not seeking treatment for her headaches, Mrs. Donaldson has failed to mitigate.

[239] This theory of failing to mitigate raises a paradox because Mrs. Donaldson’s evidence is that the very thing that caused her to withdraw from Ms. Hughes plan, which she testified she thought was helpful, was the information she received when she sought out medical investigations and treatment because she did not perceive her condition to be improving. She went to Lifemark on the recommendation of her family doctor when she insisted on investigations into why she was not getting better. She testified that is where she learned she was likely pushing herself too hard through Ms. Hughes’ program and she decided to step back from it at least until she had the Lifemark report.

[240] The Lifemark records do not confirm or contradict Mrs. Donaldson’s evidence that she came to understand that the occupational therapy approach that she was undergoing with Ms. Hughes might be hampering her recovery. Ms. Grayson has not led any evidence that contradicts Mrs. Donaldson’s assertion about what advice she received while at Lifemark. Nor has she led any evidence to refute Mrs. Donaldson’s evidence that she asked ICBC for the Lifemark report and did not receive it for a lengthy period of time.

[241] The Lifemark report writers stated that Mrs. Donaldson would benefit from education on post-concussive syndrome and recovery. Mrs. Donaldson's evidence is that after her attendance at Lifemark, she began to insist that her treatment providers understand brain injury.

[242] Ms. Grayson also points to the reports of Ms. Hughes to ICBC (which are not sought to be admitted as expert reports) and the expert opinion of Ms. Grayson's psychiatric expert, Dr. Scarth.

[243] Ms. Grayson also points to Ms. Hughes records where she stated that unmanaged depression and anxiety were hampering Mrs. Donaldson's recovery. There is no evidence that was conveyed to Mrs. Donaldson. Mrs. Donaldson was attending counselling at that time and continued to seek it out. There is no evidence that Ms. Hughes or any other treating care provider or any one else advised Mrs. Donaldson to have psychological counselling different from what she was undergoing. Indeed, Dr. Scarth opined that based on his review of the clinical records, Mrs. Donaldson had two courses of psychotherapy that were appropriately focussed on management of anxiety.

[244] Despite having Ms. Hughes on the witness list, Ms. Grayson did not call her to testify. Accordingly, Ms. Hughes' recorded observations in her clinical notes and reporting, that Mrs. Donaldson had significantly improved and was ready for a return to work program, are not evidence for the correctness or truth of those observations.

[245] I have accepted that Mrs. Donaldson's cognitive issues are affected by her traumatic brain injury and her psychological injuries. There is no evidence that Ms. Hughes brought a brain-injury informed perspective to the rehabilitation plan.

[246] In addition, the evidence as a whole shows that Mrs. Donaldson has attended with many different health care providers, regularly attended her family doctor, followed her family doctor's advice, and sought additional forms of investigation. There is no evidence that she failed to follow advice or an avenue of investigation that would make her better.

[247] I conclude that Ms. Grayson has not proved that Mrs. Donaldson unreasonably failed to seek medical treatment or follow treatment advice.

Failure to Engage In Return to Work Rehabilitation

[248] The duty to mitigate includes taking reasonable steps to find employment at a level the plaintiff could have been expected to achieve in light of the injuries suffered as a result of the accident: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 282.

[249] With regard to the analysis of whether the plaintiff's actions have been reasonable, the analysis is not purely objective. The court should take into account the subjective knowledge of the plaintiff: *Gallina v. Honda Canada Finance Inc.*, 2014 BCSC 974 at para. 129. If the injuries the plaintiff has suffered, for example psychological injuries or a brain injury, are at the root of the alleged unreasonable behaviour, it will be inappropriate to make a deduction for failure to mitigate: *Mullens v. Toor*, 2016 BCSC 1645 at para. 123, aff'd 2017 BCCA 384; and *Litt v. Guo*, 2015 BCSC 2207 at paras. 415–16.

[250] Ms. Grayson asserts that by the spring of 2017, Mrs. Donaldson had recovered to the extent that she should have engaged in a return to work program that Ms. Hughes designed for her. Instead of doing so, Mrs. Donaldson entrenched herself in the idea that she has a permanent acquired brain injury and in doing so, failed to mitigate.

[251] Dr. Scarth opined that based on the 2017 occupational records showing that she had two to three hours of work tolerance per day, if she had intact physical capacity for the role, and if her employer supported a gradual resumption of work, it would have been appropriate for her to commence a return to work in 2017. Mrs. Donaldson was asked, in cross examination, about what Ms. Hughes recorded about her activity tolerance in 2017, and Mrs. Donaldson simply replied "those were her words". Mrs. Donaldson agreed that she wanted to work towards a graduated return to work program as suggested by Ms. Hughes and she was doing the best she could to do in that regard.

[252] The assumptions that underlie Dr. Scarth's opinion have not been proved. The statements in the occupational records that Mrs. Donaldson could work on her computer for two to three hours have not been proved. The evidence is that Mrs. Donaldson cannot do all of the physical work of her pre-accident roles, including that she limits her screen time to 20 minutes at a time, she cannot be in noisy environments or those with fluorescent lights, and she cannot bend and lift.

[253] Dr. Scarth also commented that the counselling records did not indicate that they were focussed on "recovery to the work role". He went on to opine that had Mrs. Donaldson stayed engaged in the occupational therapy process, he would have expected that she would have progressed to a supported return to work attempt in 2017. There is no evidence that any counsellor, or treating medical practitioner, suggested that Mrs. Donaldson have counselling focussed on return to work. There is no evidence that any treating medical practitioner recommended psychological counselling that Mrs. Donaldson refused or neglected to pursue.

[254] The Lifemark report authors state that based on 18 months post concussion, they would expect Mrs. Donaldson to have recovered. The report identified barriers of return to work to include lifting, carrying, repetitive squatting and balance issues. While shortcomings on some of the testing was identified, and thorough neuropsychological testing was recommended as a result, the report also concludes that there was no objective reason Mrs. Donaldson could not initiate a gradual return to "productive occupations such as re-initiating her home business".

[255] As I have noted, that report is not evidence that those statements are correct. There is no evidence that the opinion was conveyed to Mrs. Donaldson at the time. Contrary to the views expressed in the Lifemark report, I have concluded that Mrs. Donaldson had not recovered from her concussion at that time and still has not.

[256] Ms. Grayson has not led any evidence from Ms. Hughes that Mrs. Donaldson would have improved more or would have been able to return to work had she followed Ms. Hughes' program. Ms. Grayson points to the report of Dr. Quee Newell, Mrs. Donaldson's vocational consultant expert, who testified on cross examination

that with a supportive and empathetic employer, Mrs. Donaldson would gain confidence and her chances of returning to work would improve. Dr. Quee Newell qualified that by saying that if Mallard's was supportive, it could not solve Mrs. Donaldson's problems with lights and sound. She also opined that Mrs. Donaldson is not competitively employable. I do not consider evidence that Mrs. Donaldson is not competitively employable but might benefit in terms of confidence by returning to work at a family business to support a finding that Mrs. Donaldson has acted unreasonably in not insisting that her family business employ her regardless of whether she is capable of doing the work.

[257] Ms. Grayson has not met her burden to show that Mrs. Donaldson has been unreasonable in not continuing with Ms. Hughes' return to work program.

Assessment of Damages

[258] The fundamental principle of putting the plaintiff in the same position as she would have been had the accident not occurred is accomplished by awarding damages for pecuniary loss in the amount reasonably required to permit a standard of living and day to day functionality that, to the extent possible, approximates what the plaintiff would have experienced but for the wrong they were subjected to: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 167, citing *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940 at 962–63. Non-pecuniary damages are assessed to compensate for pain, suffering, and loss of enjoyment of life both prior to trial and into the future having ensured that the pecuniary losses are appropriately compensated and will not erode the non-pecuniary damages.

Non-pecuniary damages

[259] Mrs. Donaldson submits that an appropriate award of non-pecuniary damages is based on the broad range and duration of injuries addressed above. Mrs. Donaldson seeks \$325,000. She relies on cases that awarded between \$260,000 and \$350,000 (in 2023 dollars) for injuries to plaintiffs that she asserts are similar to the those she has suffered and whose circumstances are comparable.

[260] Ms. Grayson submits that the award for non-pecuniary damages should be based on a more limited set of injuries, particularly ongoing injuries, than asserted by Mrs. Donaldson. Ms. Grayson submits Mrs. Donaldson suffering a mild traumatic brain injury from which she largely recovered by 2017, an inner ear injury which caused mild symptoms post-accident but was aggravated during the February 2016 cruise, and then subsided leaving sensitivity to noise and tinnitus that can be addressed by hearing aids. Ms. Grayson also concedes that Mrs. Donaldson's ongoing psychological injuries were caused by the accident but they will improve with counselling. She submits an appropriate award is \$110,000 to \$140,000.

Legal Principles

[261] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing non-pecuniary damages. In some cases, it is appropriate to also consider loss of housekeeping capacity as part of this award: *Liu v. Bains*, 2016 BCCA 374 at paras. 25–29.

[262] It is typical for courts to consider cases in which the plaintiff has suffered injuries similar in nature and duration to those of the plaintiff in the case at bar. Such cases act as a guideline, but should not be used to develop a “tariff” for injuries of a certain type: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637. Similar injuries may not have similar consequences for the injured person.

The Stapley Factors

Age of the Plaintiff

[263] Mrs. Donaldson was 49 years old at the time of the accident. Fortunately, she was not at an age where the injuries have prevented her from enjoying big life challenges such as bearing children, raising children to adulthood and building a career. Her career was mid stride. On the other hand, she was young enough to have energy and successful enough to have the means to pursue many interests as described below as well as engaging in her family life including with her adult children and possibly future grandchildren. Her busy and rewarding life has been significantly disrupted.

Nature of the Injury, Severity of Pain and Impairment of Physical and Mental Abilities

[264] I have found that Mrs. Donaldson has proved that many, but not all, of the injuries addressed above were caused by the accident. My findings are broader than the limited set of injuries that Ms. Grayson urges.

[265] Mrs. Donaldson has chronic pain in her neck, back and shoulders and occasional pain and numbing in her face. Her face twitches and she stutters when she is under stress. She suffers from headaches, fatigue, sound sensitivity, light sensitivity, tinnitus and the multiple symptoms of her ongoing neurocognitive disorder. Her mental health has been significantly compromised due depression, anxiety and somatic symptom disorder.

[266] Mrs. Donaldson can exercise and recreate, but not at the level she did before the accident. She tries to avoid things that will trigger neck pain, shoulder pain and headaches through physical activity. She is hampered by fatigue.

[267] Mrs. Donaldson's mental capabilities are markedly diminished. Mr. Donaldson testified how she no longer participates in the decision-making for every day finances and other matters because she becomes too frustrated and angry, and because she simply cannot do it. The records and reports are replete with her frustration over her lack of ability to concentrate and focus. The Mallard's employees who testified, confirmed that their impression of her is that since the accident, she does not have the same intellectual abilities.

[268] Mrs. Donaldson described in her evidence, and this is repeated in clinical notes, expert reports, and the evidence of Mr. Donaldson, that she spent the first few years post accident wanting her old self back, trying many different things to get better, hounding her family doctor for investigations and treatment. She testified that she believed she could get better and wanted to get better. She testified that the people in her life have to put up with the "soup" that she now is. She explained that by "soup" she means the headaches, the fatigue, the inability to focus and the sound and light sensitivity.

[269] I infer from this evidence that Mrs. Donaldson has come to accept that she is not going to return to her “old self” and must learn to live life with her conditions. I conclude she is doing so with purpose. As I have described elsewhere in these reasons, she and Mr. Donaldson have made adjustments to just about every facet of their lives to accommodate her “new self”. She has not given up living life to the fullest, but her means to do so is much different than it was before.

[270] Mr. Donaldson testified that he believes that Mrs. Donaldson has happiness post-accident, but from his perspective, that is because they have learned to live with her limitations. He described her pre-accident happiness as deriving from her work, volunteering, parenting and family. In his straightforward low-key manner, he testified that her present form of happiness was that “it is different”.

[271] Despite that she is carrying on, Mrs. Donaldson is not always cheerfully carrying on. She has depression and anxiety. She is angry and frustrated by her circumstances and by her treatment by ICBC. She has found the court process anxiety-provoking to the point of feeling suicidal after an examination for discovery. One can hope that after these proceedings are over, she will be poised for improvement in her psychological well being from the removal of the litigation stressor. However, there is no evidence that the removal of this stressor will resolve her mental health challenges or even lead to significant improvement.

[272] I conclude that nature and breadth of her injuries, the severity and duration of the pain and symptoms, and their affect on her physical and mental functioning are such that an award at the higher end of scale of persons with similar injuries is warranted.

Family, Marital and Social

[273] Mrs. Donaldson and Mr. Donaldson have three children, a son aged 32, a daughter aged 29, and a foster son aged 29. At the time of the accident, they were in various stages of post secondary education and career development.

[274] Mrs. Donaldson and Mr. Donaldson testified that their home is a gathering place for their extended family in Castlegar and that prior to the accident they loved to plan and host large gatherings – barbeques for dozens of guests in the summer and gatherings of 12 or more family members for inside dinners. Since the accident, they limit the gatherings to six people. Mrs. Donaldson explained that when planning one of these smaller events, she and Mr. Donaldson sit down and make a list of every single thing that needs to be done, when it will be done, and by whom, including, for example, putting napkins on the table. That allows them to divide the work and ensure that every detail is attended to in a manner that does not overwhelm Mrs. Donaldson or trigger her pain and headaches. Mrs. Donaldson sort of chuckled ironically when giving this evidence. It is, indeed, a big change from what the evidence demonstrates went on before the accident.

[275] At such dinners, Mrs. Donaldson sits so that she can see everyone and does not have to turn her head. Mr. Donaldson testified that at around 8:30 pm, she gets up and leaves the gathering.

[276] Mr. Donaldson testified that he regards Mrs. Donaldson's relationships with friends and family to be based on her outgoing nature, her natural empathy and her kindness. He has noticed that since the accident, her circle of close friends is smaller. He perceives that she has continued her relationship with only those with whom she feels safe and who seem to understand her situation. He also has noticed that with family outside of their children, she is less inquisitive and involved in what is going on. He observes her to be more on the periphery of the goings on with their extended family than right in the middle, as she used to be.

[277] Bill Long is friends with Mrs. Donaldson and Mr. Donaldson. He has known them for about 30 years. He testified that he and his wife used to see the Donaldsons socially about one a month. The couples have travelled together. Since the accident, they have not had as much contact, although that is in part due to the fact that in 2017, the Longs moved and now live further away from the Donaldsons.

[278] Mr. Long described Mrs. Donaldson pre and post accident as like “night and day”. He testified that before the accident she was always right in the middle of whatever was going on, including hosting parties with music going late into the night. The Donaldsons came to the Longs home for dinner after the accident and Mrs. Donaldson asked Mr. Long to turn off background music. At a party to celebrate the Longs’ 30th wedding anniversary, an outdoor event with a musical performance, Mr. Long became aware that Mrs. Donaldson had gone into a sleeping cabin to get away from the stimulation.

[279] Mr. Long testified that the couples went camping together in their travel trailers in 2021. Mr. Long testified that he believes that is a good activity for her because it is quiet and not stimulating. Although Mrs. Donaldson goes to bed earlier than she used to, she otherwise participated.

[280] Lynn Burch is Mr. Donaldson’s sister. Ms. Burch and her husband live in the West Kootenays also and have a summer cottage on Christina Lake. She testified that they and the Donaldsons are close and saw each other regularly. Ms. Burch testified that the nature of their social interactions has changed since the accident. She testified that prior to the accident, the Donaldsons hosted many large gatherings at their home in Castlegar. She testified that they were lively and noisy affairs in the Donaldson’s large and beautiful yard with a barbeque that could feed dozens of people. Mrs. Donaldson and Mr. Donaldson prepared the food. Mrs. Donaldson decorated the yard beautifully, and they put up and took down the tables and chairs for the gatherings. Ms. Burch recalled one with a live band.

[281] Ms. Burch also testified that Mrs. Donaldson was in the thick of all of the social activity at Christina Lake and helped with any entertaining that Ms. Burch was doing. She gave an example of a wedding that they hosted at the lake, and how Mrs. Donaldson was instrumental in helping with putting it on, including setting up and taking down the various implements they used to host the wedding and putting out the food that a catering company supplied.

[282] Ms. Burch described Mrs. Donaldson as having more energy than a great deal of people. Ms. Burch testified that she never saw Mrs. Donaldson leave a social event early prior to the accident but after the accident, the Donaldsons are the last to arrive and the first to leave.

[283] The evidence is that while Mrs. Donaldson's relationships have been affected and she does not socialize with as wide a circle of people, she still has close relations with those she was and is close to. She testified that those who are close to her have to take all of her "soup". Based on the evidence, I conclude that those who are close to her continue to value their relationship with her and all of her "soup".

[284] Notwithstanding the maintenance of her close relationships, Mrs. Donaldson and Mr. Donaldson have significantly changed the way they socialize with friends and family, with whom they socialize and the frequency of socialization due to Mrs. Donaldson's accident injuries. This factor favours an award in the middle of the range for people with similar injuries.

Lifestyle

[285] In addition to working for Mallard's, Mrs. Donaldson did volunteer work including parent advisory committees while their children were in school. She was a library board member. She volunteered with the art gallery and for Castlegar Parks & Trails. She was involved in a vision group that business people in the area were working on with the Columbia Basin Trust. Some of this work had positive spillover to the Mallard's sporting goods stores. For example, creating more trails and parks caused more people to shop for hiking apparel, and that was good for business.

[286] Mrs. Donaldson was a competitive figure skater as a child, and later became a coach and a judge. She continued to skate as an adult. She testified that she has not skated since the accident because she is scared that skating would be moving her body fast and would involve turning and twisting her neck, and could cause her to fall. She testified that she misses figure skating.

[287] As a child, she was involved in swim club. She used swimming to train for her competitive figure skating. Again, she continued to swim as an adult. Since the accident, she takes aqua fit classes to keep up her cardio conditioning and strength. She resumed swimming laps sometime prior to the Covid-19 pandemic. She uses a face mask with a snorkel so that she does not have to turn her head to get air. She no longer does the butterfly stroke and she limits the breast stroke due to concerns that she will set off neck or shoulder pain.

[288] Mrs. Donaldson kayaked before the accident. She and Mr. Donaldson continue to do so, although they both testified it is for much shorter durations.

[289] Mrs. Donaldson testified that prior to the accident, she and Mr. Donaldson hiked during the summers, and would build up to a six to eight-hour hike on the Kokanee Glacier. She testified that since the accident, she has built her way up to walks on relatively even ground that last up to one and one-half hours in duration. She testified that sometimes her foot bothers her and sometimes she gets dizzy and tired, but she makes herself go for exercise and to get out of the house.

[290] Mrs. Donaldson testified that prior to the accident, she downhill skied regularly in the winter, including black diamond runs. She had tried downhill skiing once since the accident, and will not ski again because she did not feel confident while doing it. Mrs. Donaldson now cross-country skis instead.

[291] Mrs. Donaldson also testified that prior to the accident, she tried golfing on a few occasions. She has not returned to it out of concern that she will not be able to avoid triggering neck, back and shoulder pain when swinging a golf club.

[292] Prior to the accident, the Donaldsons spent many weekends each summer at the Burchs' Christina Lake property. They slept in a tent that they pitched. Since the accident, they have purchased a trailer that they sleep in so that Mrs. Donaldson can sleep on a mattress with support. Mrs. Donaldson spends more time at Christina Lake since the accident as she finds it quieter there. Ms. Burch confirmed that prior

to the accident, Mr. Donaldson and Mrs. Donaldson regularly stayed on their property, sleeping in a tent and that they now stay in a trailer.

[293] Mr. Donaldson testified that he and Mrs. Donaldson loved to travel and did as much as their work schedules would allow including cruises, trips to Europe and Central America. He had hoped that as they grew older they would work less and travel more.

[294] After the accident, the first trip they went on was the February 2016 cruise. Mr. Donaldson testified that that they were much less active on that cruise than they had been on others. They did not attend functions where there was a lot of noise or music.

[295] Mr. Donaldson testified that the journey to and from travel destinations can be hard on Mrs. Donaldson. For example, they travelled to Rarotonga and the flight was long. Mrs. Donaldson had a hard time recovering from it. Mr. Donaldson described that trip as one that “did not go well”. Mr. Donaldson testified that they planned the trip to Jamaica better by breaking up the travel legs and spending nights in hotels between legs. They flew business class using points.

[296] I pause to comment on this aspect of Mr. Donaldson’s evidence. It struck me as demonstrating that he came to trial to tell the court how the accident has affected them and their family without overstating matters. He did not embellish or use hyperbole when describing the trip to Rarotonga “did not go well”. Nevertheless, for people living through the day to day challenges of dealing with chronic pain and neurocognitive problems, planning a trip to an exotic destination to get away from it all, and then have it “not go well” would be extremely disappointing. Mr. Donaldson did not dwell on that in his evidence but described how they regrouped after Rarotonga and planned the next trip to avoid the problems they had experienced.

[297] This type of matter of fact acceptance of the reality and the care that they need to take to accommodate Mrs. Donaldson’s conditions and avoid triggering pain, headaches and noise sensitivity was a theme of his evidence. Another example is

that when they eat out, they go early in the evening, around five pm, because the restaurants are less likely to be busy. Mr. Donaldson goes into restaurants before they dine and scouts the noise, lighting and crowd factors.

[298] In summary, Mrs. Donaldson is able to do things that other people with her injuries would not be able to manage in part because she is significantly supported by a spouse and family members who have wrapped their heads and their attitudes around what needs to be done so that they can continue to interact as family members. This was manifestly clear through Mr. Donaldson's evidence. In addition, through her regular attendance at the Acquired Brain Injury group and courses, she has learned skills. Finally, she and Mr. Donaldson have the financial means to afford some of the accommodations that allow them to compensate for her limitations.

[299] Mr. Donaldson and Mrs. Donaldson have worked together to rebuild what they can of their pre-accident life. Despite that they are finding ways to ensure that Mrs. Donaldson has fulfilling experiences, can recreate, travel and spend time with family and friends, I conclude that her losses are significant on all these fronts and warrant an award that reflects the depths of the loss.

Comparator Cases

[300] Mrs. Donaldson relies on *Tan v. Mintzler and Miller*, 2016 BCSC 1183 (\$210,000); *Sirna* (\$200,000); *Yick v. Johnson*, 2012 BCSC 1485 (\$250,000); and *Grabovac v. Fazio*, 2021 BCSC 2362 (\$350,000).

[301] I consider *Tan* and *Sirna* to provide helpful comparators comparable in terms of injuries suffered and their permanence. In *Sirna*, the plaintiff was age 25 and in general, younger plaintiffs who have life altering injuries, all other things being equal, are entitled greater damages. I do not consider *Yick* to be provide a helpful comparator. The traumatic brain injury in that case was severe, the plaintiff had several other life threatening or extreme physical injuries including hemorrhage, pneumothoraces, cranial nerve palsy, and fractures to ribs, pelvis, spine, pubis and sacrum. I do not find *Grabovec* to be helpful as that case was about two motor vehicles accidents involving a young child, age 4 at the time of the first accident,

who had deeply entrenched psychological problems and who by the time of trial had been involved in six accidents.

[302] Ms. Grayson relies on *Dai v. Grose*, 2023 BCSC 717 (\$110,000); *Millar v. Wasden*, 2020 BCSC 1210 (\$125,000); and *Holdershaw v. Summers*, 2020 BCSC 1317 (\$120,000 dollars).

[303] Of these cases, the plaintiffs had comparable categories of injuries and ongoing categories of symptoms, but at much lower levels than Mrs. Donaldson. All were continuing to work at their pre-accident employment, although with some diminished confidence due to their diminished performance. In *Dai* the plaintiff did not have significant psychological problems.

[304] In my view, considering the comparator cases and the equivalent damages if awarded in 2023 dollars, the range of damages would be \$200,000 to \$275,000 for the injuries that Mrs. Donaldson has suffered.

Loss of Housekeeping Capacity

[305] When considering whether to compensate loss of housekeeping as an aspect of pain, suffering and loss of enjoyment of life or assess it as pecuniary award, it is appropriate to consider whether the plaintiff has suffered a true loss of housekeeping capacity or whether the loss is “more in keeping with loss of amenities, or increased pain and suffering”: *Kim v. Lin*, 2018 BCCA 77 at para. 33. In the latter case, assessing it as part of general damages is appropriate. Either way, it is appropriate to recognize, the work that other family members have gratuitously assisted with, after the accident, as compensable: *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67–68.

[306] Mrs. Donaldson and Mr. Donaldson testified that prior to the accident, Mrs. Donaldson did almost all of the grocery shopping and they shared cooking and cleaning up although Mrs. Donaldson did more. Mrs. Donaldson did a lot of the food planning and preparing when they entertained. She also did all of the planning for the parties and the decorating.

[307] Post accident, Mr. Donaldson does most of the grocery shopping. Mr. Donaldson estimated that Mrs. Donaldson still does more cooking, but he does more than he used to. In particular, he testified that he helps her with timing and finishing meals because her “timing is off”.

[308] With regard to housecleaning, since the accident they have purchased a robot vacuum that they use for routine cleaning. They share the bathroom cleaning. They both agree that they have settled for having a house that is less clean than it used to be. They have tried to hire cleaners but they are thin on the ground in Castlegar. If they could find one who would commit to regular cleaning, they would pay to have the house professionally cleaned.

[309] Mrs. Donaldson still does most of the gardening, but she does it a little at a time and asks for help from Mr. Donaldson. Mrs. Donaldson testified that she limits what she does to avoid triggering pain.

[310] Mrs. Donaldson used to do interior tasks such as painting and washing windows but she can no longer do those things because she cannot do anything that she has to look up to do. Mr. Donaldson has done some interior painting. Mr. Donaldson testified that he would do more, but he does not have the time to do the other chores he has taken on and continue with his full-time work, so they hire someone to wash windows, mow the lawn and do line trimming from time to time.

[311] I conclude that this case falls into a category where the loss is best reflected as a part of non-pecuniary damages because for most of the tasks, the Donaldsons have made adjustments and are living with a lower standard. For those where they have paid out of pocket, I will allow the special expense. The cost of care claim also includes an amount for home maintenance which I have allowed.

Assessment

[312] Considering the *Stapley* factors, loss of housekeeping and the comparator cases, I consider that Mrs. Donaldson is appropriately compensated by an award in the upper end of the range demonstrated by the comparator cases to address the

vast breadth of the impact of these injuries on her, including loss of housekeeping. I award \$250,000 in non-pecuniary damages.

Loss of Earning Capacity

[313] Mrs. Donaldson claims that she has not been able to work in gainful employment since the accident, and that she will remain competitively unemployable. She seeks past income loss on the basis that she would have continued to earn her Mallard's salary from the date of the accident for a further six months while she continued her search for a new position that paid more and had better benefits, including a pension. Mrs. Donaldson claims that by about six months after the accident she would have been earning about \$100,000 per year. She claims past income loss based on that income until trial. She claims future loss of earning capacity based on a similar income from the date of trial until her age 70.

[314] Ms. Grayson's position is that Mrs. Donaldson has no compensable earning capacity loss for two interrelated reasons.

[315] First, as one of two owners of the family business, paid a salary and entitled to one half of the profits of the business, she has no loss unless the business suffered a loss attributable to her absence. There is no evidence that the business has suffered a loss or will suffer a loss in the future.

[316] Second, with regard to past loss of earning capacity, Mallard's has continued to pay her salary since the accident, except for a few months in 2017. Ms. Grayson asserts that Mrs. Donaldson has not proved that she and Mallard's had an oral agreement by which Mrs. Donaldson is to repay her salary continuation if she is compensated for loss of earnings in this proceeding. Ms. Grayson submits that since there is no agreement, there is no compensable loss. Alternatively, if Mrs. Donaldson does prove a compensable past loss, her salary continuation must be deducted.

[317] Ms. Grayson also submits that if loss of earning capacity is appropriate, it should be based on her Mallard's earnings, and not what she could have earned at

another position because the chances of her finding another position are too speculative to be the basis of an assessment of damages.

Evidence Relating to Loss of Earning Capacity

[318] After high school, Mrs. Donaldson attended Selkirk College and obtained a diploma in business administration. She worked for two banks. Around the time that she and Mr. Donaldson were married, she began working for Mallard's, which Mr. Donaldson had already started.

[319] Over the years, the Donaldsons have had interests in three Mallard's stores: one in Trail, one in Castlegar and one in Nelson. At the time of the accident, and to the time of the trial, Mrs. Donaldson and Mr. Donaldson were the sole shareholders of the companies that owned the Mallard's store in Castlegar and in Nelson. They also were the sole shareholders of the company that owned a building in Nelson which housed the Mallard's store and leased business premises to others.

[320] At the time of the accident, Mrs. Donaldson had a variety of supervisory and managerial roles in the areas of buying, merchandizing, branding, staffing and financial matters for the Nelson and Castlegar stores.

[321] In the years leading up to the accident, Mrs. Donaldson had also been responsible for buying the soft apparel for the stores. This involved being familiar with the soft goods lines of many suppliers, staying on top of trends in sporting apparel, and buying the apparel that could sell at a profitable margin for the customers in Nelson and in Castlegar. In order to anticipate trends and have the right products in the stores, Mrs. Donaldson became and remained familiar with the product lines of suppliers, attended trade shows and met with wholesalers in person. She also took steps independent of the suppliers, including staying on top of social trends, watching popular movies and television shows and reading magazines.

[322] A few years prior to the accident, Mrs. Donaldson started training some of the senior staff on buying. She testified that she wanted to bring them along in this aspect of the business and free up her time for more supervisory roles.

[323] Mrs. Donaldson was also responsible for the merchandizing of the stores, including determining how the merchandise would be displayed, what would be put on sale, and when. She would direct a rotation or spin of each store periodically. This involved completely reorganizing where everything was displayed and how it was displayed in order to keep the shopping experience fresh for regular customers.

[324] The evidence was that merchandizing generally, and spinning a store in particular, was physical work involving boxes of merchandise that could be heavy or awkward, as well as climbing ladders, and taking down and setting up display racks and stands. Mrs. Donaldson could and did delegate the heaviest work and the ladder work to others, however her evidence and the evidence of other Mallard's employees was that regardless, this was a process that involved tiring physical labour from all involved, including Mrs. Donaldson. The current manager of the Nelson store, who reported to Mrs. Donaldson prior to the accident, described that when she came to Nelson to rotate the store, it was a high energy and exhausting day for the staff. Mrs. Donaldson also testified that she sometimes worked in the evenings after the stores were closed to bring the displays up to her standards. She would also sometimes rotate product from one store to the other, and on occasions would transfer the product between the stores in her van.

[325] I find that a portion of her work in the stores involved tiring physical labour.

[326] Mrs. Donaldson's responsibility for the stores included their "branding" which involved signage, colours, logos and the overall message that everything about the stores physical presence gave to customers. In the months leading up to the accident, Mrs. Donaldson was working on rebranding the stores with designers.

[327] Mrs. Donaldson also had roles in human resources for the business, including payroll, hiring practices and organizational manuals. In the year prior to the accident, she rewrote the organization's procedural manuals. While she did not deal with day to day staffing issues, she became involved when there was a significant problem with a staff member. She testified that fortunately, they had few of those.

[328] Mr. Donaldson testified that prior to the accident, Mrs. Donaldson interacted with their accountant on business matters but he has taken over that.

[329] The time that Mrs. Donaldson devoted to Mallard's pre-accident was a source of debate on the evidence. She testified that she averaged about 40 hours per week, but that it was not a steady 40 hours every week. Some weeks were less busy than others, depending on what was going on that week and there were certain times, during the year, where the stock rotations were very busy.

[330] Mr. Donaldson testified that Mrs. Donaldson probably worked about 40 hours per week but he agreed that she was not on the clock and could do other things, including her volunteer work, and her own business, Organize Happily, during a typical work day.

[331] Ms. Grayson disputes that Mrs. Donaldson was working 40 hours per week for Mallard's. She asserts that the evidence, when considered as a whole, cannot support that conclusion. She points to passages of Mr. Donaldson's evidence where he was asked about what responsibilities Mrs. Donaldson had before the accident. Mr. Donaldson described that some of the responsibilities were things that she did and which the store managers also did. The evidence that her responsibilities overlapped with those of the store managers does not undermine the evidence of both Mrs. Donaldson and Mr. Donaldson that she had a full time role with Mallard's.

[332] I conclude that Mrs. Donaldson's position was full time in the sense that her obligation to do the work she did precluded her from working regularly for anyone else. I include the volunteer work she did as a member of the business community, in considering that her commitment to Mallard's was a full time commitment. I accept her evidence and that of Mr. Donaldson that she undertook the work in part to further the interests of Mallard's.

[333] The amount of time that Mrs. Donaldson spent in the stores working was also disputed. Mrs. Donaldson had a hard time articulating what the split was between her time working out of her home office and the time in the stores. She worked from

home on some aspects of her Mallard's work such as buying, drafting manuals and anticipating trends. For other aspects, such as merchandizing and rebranding, she worked in the stores. She did not have an office in the stores. At the time of the accident, she estimated that except when she was in the stores working, she spent about five hours per day on the computer.

[334] Mr. Donaldson testified that approximately that 70% of Mrs. Donaldson's work for Mallard's was done from home and about 30% was in the stores.

[335] Ms. Grayson submits that the evidence demonstrates that Mrs. Donaldson spent 80% working from home.

[336] Mrs. Donaldson has not returned to work for Mallard's after the accident. Nor has she had any other gainful employment. Mrs. Donaldson testified that at present, she can work on the computer for about 20 minutes at a time. She sets a timer so that she does not get a headache. She testified that she likes to read magazines, but she will suffer symptoms if she does so for too long. Mrs. Donaldson testified that one of the coping mechanisms she has used to avoid triggering neck, back and shoulder pain or headaches is to avoid picking up heavy things or lift repetitively.

[337] Mr. Donaldson testified about the steps that have been taken to cover off Mrs. Donaldson's responsibilities for Mallard's. Some of them were assigned to senior staff. Some Mr. Donaldson took over, such as training staff and responsibility for soft goods buying. Their older son, Alex Donaldson, started working for the business in 2017 when it became clear that Mrs. Donaldson was not going to be able to continue. Mr. Donaldson testified that Alex Donaldson had talked about joining the family business, but Mr. Donaldson and Mrs. Donaldson wanted him to get experience outside the family business before he joined, if he ultimately decided to join. That did not happen, because as soon as he finished his university business studies, they needed him to come and help Mr. Donaldson with his duties so that Mr. Donaldson could take over some of Mrs. Donaldson's roles.

[338] Mr. Ballance works out of the Nelson store and is currently the General Manager for the operation that oversees both stores. At the time of the accident, he managed the Nelson store. Mr. Ballance described Mrs. Donaldson as an energetic and confident boss, who could be a little fierce. When rotations of the Nelson store were planned, he knew the day would require extra energy and focus from his staff and he prepared them for her arrival and awarded them after the work was done. He testified that Mrs. Donaldson trained him how to buy soft goods. He said she was excellent at it and a good mentor to him.

[339] Mr. Ballance testified that he initially took over some Mrs. Donaldson's tasks with the understanding that she would be coming back but that never happened. He testified that as he improved at the tasks he has taken on, he has been able to negotiate a higher salary. He also testified that part of the impetus for him to negotiate a higher salary is a change in the way he sees things and his own determination to ask for the salary he thinks he deserves to be paid.

[340] Mr. Ballance testified that from his current perspective as a general manager, he can see that she made the stores look great and had the ability to bring in products that were sellable.

[341] Ms. Kinicki was initially hired as a part time sales associate. She worked her way up to assistant manager and then manager of the Castlegar store. Ms. Kinicki described Mrs. Donaldson as a great mentor and trainer of staff. Ms. Kinicki admired her capabilities. She testified that Mrs. Donaldson was a go to person for any staffing issues or other emergencies. Regardless of the day of the week and the time of the day, Mrs. Donaldson could be reached and would respond right away.

[342] Ms. Kinicki and another Castlegar employee, Stacey Heaven, took on some of Mrs. Donaldson's tasks in relation to the Castlegar store. Ms. Kinicki also now does soft goods buying for both stores. Ms. Kinicki is now the go-to person for staffing issues at the Castlegar store. She finds that to be a demanding role.

[343] Mr. Donaldson testified that Mrs. Donaldson was excellent at her Mallard's roles. There is an obvious bias to his evidence. However, his characterization of her abilities was confirmed by Heather Kinicki and Michael Ballance.

[344] I found their evidence compelling. Neither Mr. Ballance nor Ms. Kinicki gave evidence in a manner or content that was consistent with painting a picture of a business that ran like clockwork when Mrs. Donaldson was involved and has fallen apart since. They both testified about their duties, some of which were taken over from Mrs. Donaldson, and how they learned to do them in somewhat hectic, not planned circumstances. The bottom line of their evidence was that they valued her mentorship on the tasks she taught them before the accident and they learned how good she was at some of her other tasks when they tried to do those tasks themselves without her guidance. Their evidence was consistent that the reassignment of Mrs. Donaldson's tasks took place over time and shifted over time.

[345] A few years prior to the accident, Mrs. Donaldson started her own business, called Organize Happily. She did this on her own time when she was not working for Mallard's. Her goal was to help others organize their personal or professional lives. She developed a website. The business had not become successful by the time of the accident. After the accident, Mrs. Donaldson tried to revamp the website. She could not do it so she took it down.

[346] Mrs. Donaldson testified that prior to the accident, she formed the view that a job with a pension would be beneficial. In addition, she testified that she wanted independence and to try something new as she had been working for Mallard's for a long time. She considered the sport goods industry to becoming increasingly competitive due to online retailing, and she thought some family income diversity would be a good idea. She started looking for opportunities that would allow her to equal or exceed her pay and participate in a pension plan while working in an area for which she had the skills. She testified that she intended to continue to work for Mallard's unless and until she found a suitable position. A few weeks before the accident, she saw a posting for an executive management position with the

Columbia Basin Trust. She made a résumé, which she admitted was not accurate about what years she worked for Mallard's, and applied for the job. Nothing came of it. She did not apply for any other positions prior to the accident.

[347] Mrs. Donaldson testified that she had not given much thought to retirement before the accident but she thought she would work until she was about 70. She liked being busy, liked working full time, and was a few years younger than her husband so she thought she would work longer than him.

[348] Mr. Donaldson testified that he has not made any specific plans about when to retire. He testified that he has mentors who work well into their 80s and in his observation, it has helped to keep them sharp. He testified that he doubts he would work full time or on a daily basis in his 80s, but given that his son is now involved in the Mallard's business, he plans to stay involved.

[349] Mrs. Donaldson and Mr. Donaldson were the sole shareholders of the companies through which the stores were ran and which owned the building that housed the Nelson store. They were entitled to all the profits. Mrs. Donaldson continues to be entitled to half of the profits. They also paid themselves salaries. After discussions with their accountant, they decided to pay themselves salaries based on Canada Pension Plan maximum earnings in order to maximize their Canada Pension Plan benefits when the time came. Mrs. Donaldson's T4 earnings were \$53,760 in 2015. Mr. Donaldson and Mrs. Donaldson also took profits from Mallard's through dividends.

[350] Mr. Donaldson testified that Mallard's is a mature business and was able to maintain profitability and grow the business despite Mrs. Donaldson's absence. In particular, to his surprise, the COVID-19 pandemic ended up being good for the business. Mr. Donaldson attributes that to the fact that people who live in the Kootenays stayed home for their recreation, did more outdoor recreation, and shopped locally. The online business also increased.

[351] Mr. Ballance's current responsibilities include hiring staff, most of whom work on the floors of the Nelson store. He has trained his staff to pre-screen people who inquire about positions. If the person passes the pre-screening criteria he has set, he has directed his staff to provide the person with an application to fill out and he will consider whether to interview the person. Based on his interactions with Ms. Donaldson since the accident, if Mrs. Donaldson was looking for a job at Mallard's now, she would not pass the pre-screening criteria he has established for her to be given the opportunity to apply. He referred to his observations that she speaks slowly, has trouble keeping up with his pace of speech and has walked away before he thinks the conversation has ended as matters that would prevent her from being permitted to make an application.

[352] Ms. Kinicki is one of the people who hires staff for the Castlegar store. Subsequent to the accident, Ms. Kinicki has had a few interactions with Mrs. Donaldson. She testified that Mrs. Donaldson wears sunglasses inside, custom ear plugs and a hat, no matter what the weather. Ms. Kinicki testified that Mrs. Donaldson speaks slowly and keeps the conversations short. She testified that based on the post-accident interactions she has had with Mrs. Donaldson, Ms. Kinicki would not hire her as she would not be able to function in a store environment.

[353] In considering this evidence, I am mindful that Ms. Kinicki and Mr. Ballance are still employed by Mallard's and still report to Mr. Donaldson. However, the content of their testimony persuaded me that they did not testify in a certain way to please him. For example, Mr. Ballance testified over video and so could only see some of the people in the courtroom, and when he was asked about his current views of Mrs. Donaldson compared to how she was before the accident, he asked if Mrs. Donaldson was present. He did not ask if Mr. Donaldson was present. When he was told that Mrs. Donaldson was not present, he replied negatively using language that one would not use to please the boss who is also Mrs. Donaldson's spouse.

[354] Mr. Donaldson testified that over the years, he has been involved in hiring for Mallard's. He testified that he would not hire Mrs. Donaldson as she functions post-accident, because she is not reliable and might not be able to come to work on a regular basis. He has concerns about how she would interact with customers and staff. He has concerns about her returning to work because she is easily confused. He stated, "it would not happen". On cross examination, the issue of the 2017 graduated return to work planning was addressed with Mr. Donaldson. He testified that he did not recall being involved in that planning. Ms. Hughes' records do not indicate that the return to work program was planned with anyone at Mallard's.

[355] On cross examination, counsel for Ms. Grayson put to Mr. Donaldson that there was no reason why Mallard's would not accommodate Mrs. Donaldson needs on a return to work, without specifying what accommodations would be appropriate. He replied that there would be no reason to not accommodate her returning to work if it made sense. When it was put to him that most of her work was done from home, which might make a return to work possible, he replied that it might be possible but she would still need to interact with staff and he did not think she could sustain that.

[356] Dr. Cameron also opined that due to Mrs. Donaldson's brain injury, induced cognitive problems and her chronic pain, Mrs. Donaldson is completely disabled and not competitively employable. Dr. Cameron's report and testimony demonstrated that he had a partially wrong understanding of Mrs. Donaldson's pre-accident employment. For that reason, I place little weight on his opinion as it relates to her work for Mallard's.

[357] Dr. Cohen opined that Mrs. Donaldson has a poor prognosis for returning to her pre-accident vocational level. His opinion is partially based on Mrs. Donaldson having a failed attempt, post accident, to get Organize Happily back up and running. I do not regard that as a failed attempt to return to work generally or Mallard's specifically. Nevertheless, Dr. Cohen's opinion is that her cognitive problems, combined with her mental health issues, sensory sensitivities and physical limitations are such that she would not be able to cope with even limited part-time

competitive employment. He opined that she is not capable of competitive employment. He allowed for the possibility that if her family business was flexible and supportive, she may be able to make limited contributions from time to time. Other than that, he suggested that “limited sheltered employment” or avocational pursuits (by which I understood him to mean unpaid) might be possible if it is facilitated by a rehabilitation plan that she can understand. Dr. Cohen opined that the prior return to work rehabilitation was presented at level that was above Mrs. Donaldson’s comprehension. He opined that problem, and Mrs. Donaldson’s low insight and irritability, caused it to fail.

[358] Dr. Quee Newell testified that during the interview portion of her vocational assessment of Mrs. Donaldson, Mrs. Donaldson did not display any pain behaviours that appeared to affect her ability or focus. However, Dr. Quee Newell testified that Mrs. Donaldson became extremely emotional at the beginning of the interview and again during the part of the interview when speaking about her cognitive challenges. Dr. Quee Newell testified that Mrs. Donaldson had difficulty understanding questions and would ask for clarification or would answer questions in a way that did not make sense given the question posed. Dr. Quee Newell testified that her test administrator reported to her that Mrs. Donaldson had difficulty with the test instructions and required clarification.

[359] On the basis of the medical information in the records and her limitations, the neuropsychological testing, Mrs. Donaldson’s presentation in the interview, and Mrs. Donaldson’s difficulty with the testing, Dr. Quee Newell opined that Mrs. Donaldson was not capable of competitive employment. She recommended psychological intervention and opined that if Mrs. Donaldson was able to increase her tolerance for productive activities, she would benefit from engagement in productive activity at Mallard’s. Dr. Quee Newell opined that this would not be considered competitive employment and that she could not opine whether Mrs. Donaldson would ultimately become capable of competitive employment. In December 2022, after review of further medical records and with the passing of a further three years of no employment, Dr. Quee Newell opined that Mrs. Donaldson

remained incapable of competitive employment. Dr. Quee Newell further opined that the lack of employment since late 2015 was a negative prognostic factor with respect to competitive employment in the future.

[360] Ms. Grayson led the evidence of Samantha Gallagher, a vocational consultant who critiqued Dr. Quee Newell's report. Ms. Gallagher did not meet with Mrs. Donaldson or perform vocational testing on her. Ms. Gallagher was critical of Dr. Quee Newell's approach and testing, including that she used a test administrator instead of administering the tests herself. This is particularly so because Dr. Quee Newell's opinion that Mrs. Donaldson is not competitively employable is based in part on the observations made by the test administrator as to Mrs. Donaldson's lack of ability to complete the vocational testing.

[361] On the point of lack of personal observation, I am not persuaded by this critique. I accept Dr. Quee Newell's evidence that what the test administrator, Ms. Wong, reported to Dr. Quee Newell was consistent with what Dr. Quee Newell observed during the interview. The problems took on added significance when they occurred again in a less emotionally evocative context. Dr. Quee Newell also explained that she has a different person administer the tests because that provides an added assessment of the subject's behaviour and abilities. In this case, Ms. Wong's observations were consistent with what Dr. Quee Newell observed.

[362] From the cross examination of Dr. Quee Newell and the evidence of Ms. Gallagher, I gather that the use of a test administrator is a matter of professional debate. I do not need to resolve it. In this case, the evidence that comes indirectly from the test administrator does not offend the hearsay rule because experts routinely rely on inputs from other sources. Qualified experts are permitted to rely on hearsay from sources that persons of their training and experience typically rely on. In neuropsychological assessments, the testing is routinely administered by someone other than the psychologist who conducts an interview, receives input from the test administrator as to any observations that pertain to the neuropsychological assessments, and interprets the test results.

[363] In this case, the critique coming from Ms. Gallagher does not assist because she did not meet Mrs. Donaldson and so has no evidence as to whether Dr. Quee Newell's conclusions based on the interview and the vocational testing correspond to the preponderance of evidence. That is especially so since Dr. Quee Newell's observations of Mrs. Donaldson, and the observations of the test administrator, are entirely consistent with the evidence of Mrs. Donaldson's abilities and presentation as I observed during her evidence and as other witnesses testified about.

[364] Under the heading failure to mitigate, I have addressed Dr. Scarth's opinion that Mrs. Donaldson would have progressed to a return to work "attempt" in 2017 had she remained engaged in the process. As I explained above, his opinion is based on assumptions including that Mrs. Donaldson had no physical limitations for her pre-accident employment, she had a supportive employer, she had recovered from her mild traumatic brain injury and on what Ms. Hughes' recorded in her occupational therapy reports. While she has a supportive employer, none of the other assumptions have been proved

[365] Dr. Scarth also testified that had Mrs. Donaldson engaged in a graduated return to work program, he would expect that she would have been able to tolerate a gradual return to a resumption of work hours. Dr. Scarth's opinion in this regard is based on his view that by 2017, Mrs. Donaldson had only minimal cognitive impairments caused by her anxiety. I have rejected that opinion and I have found that Mrs. Donaldson has ongoing neurocognitive disorder as well as psychological conditions that are acting together to markedly impair her function.

[366] Dr. Scarth examined Mrs. Donaldson for slightly over two hours using a video format. Although Dr. Scarth asserted that Mrs. Donaldson became emotional when he broached topics that he would expect to be emotional, such as the accident, he agreed that when he asked her who her family doctor was, she stated that she was blanking and displayed anxiety. When Dr. Scarth asked her about the accident, Mrs. Donaldson became overwhelmed and asked for a break. Mrs. Donaldson was rocking back and forth, was stuttering, and started to cry.

[367] The evidence from various experts that Mrs. Donaldson had instances of extreme emotional reactivity and limited tolerance was corroborated by what I witnessed at trial. Mrs. Donaldson, due to scheduling issues, was on and off the stand over a period of several days. Despite that there were long breaks between some portions of her evidence, her attendance at trial over those periods appeared to be taxing on her. As I have relayed, she would attempt to focus on the questions at the beginning of a session of her evidence but her ability to focus quickly diminished and would be depleted before the normal times for breaks. On more than one occasion she became emotional and she had to take a break. While this is to be expected when a person is testifying about traumatic events, these emotional moments happened, for example, when Mrs. Donaldson was asked where she lives near the beginning of her evidence and when she was asked about her son joining the family business. Overall, my impression of her on the stand, which was over several days, was similar to what Dr. Quee Newell and other witnesses who have assessed her expressed about her tendency to become emotional, about her inability to understand questions and difficulty expressing herself.

[368] Whether it is mostly due to psychological problems, mostly cognitive problems, or a mix of both, it is evidence that her emotional tolerance is limited and can result in very limited functioning.

[369] Ms. Grayson submits that the expert evidence that Mrs. Donaldson could return to work in a supportive environment means that she could continue working for Mallard's because her family business will support her. Ms. Grayson submits that given that the majority of her work was done from home, Mallard's can easily accommodate her light and hearing sensitivities by eliminating or deleting the small portion of her work that was done in the stores, which is also the physical work.

[370] I accept that for the purpose of considering this argument, there is probably not a material difference between whether Mrs. Donaldson's work for Mallard's was done 70% in the home or 80% from home. However, the evidence demonstrates that work from home was intricately connected with the appearance and

presentation of the goods for sale in the stores. She was responsible for how the stores looked and presentation of the inventory from the store fixtures and hardware, to the branding including interior design and logos, to what was on sale, and what inventory went where. Even though she was transitioning from implementation to supervising others on some tasks such as buying and merchandizing, it is impossible to conceive how she could discharge her responsibilities without attending at the stores. The end product was the stores and how the product was presented in the stores. There was no suggestion put to Mr. Donaldson or anyone else from Mallard's that such an accommodation could be made. Mr. Donaldson testified that Mallard's would accommodate Mrs. Donaldson if it made sense. This type of accommodation, on the evidence, does not make sense.

[371] In addition, the evidence as a whole supports the opinion evidence that Mrs. Donaldson is not competitively employable due to the combination of her physical, cognitive and emotional limitations. Two people who used to report to her and now hire Mallard's employees testified that, based on their interactions post accident, she is not hireable. Mr. Donaldson, who has had a day in day out experience with Mrs. Donaldson's post accident coping skills, testified that he did not see how she could interact with the staff as she would need to do, even if most of her work was done from home.

[372] Based on the evidence which was not undermined by cross examination, I find that in addition to her neurocognitive problems, Mrs. Donaldson cannot do all of the physical work of her pre-accident roles, including that she limits her screen time to 20 minutes at a time, she struggles to make decisions, she struggles to understand and articulate on matters such as time-related concepts, she cannot be in environments that are busy, noisy or have fluorescent lighting, and she cannot bend and lift.

[373] The suggestion that with psychotherapy and rehabilitation she can regain employability is not supported by the evidence. I accept that further psychotherapy may assist her, including her cognitive issues. However, even if she does have

some improvement cognitively and emotionally, her neurocognitive problems are permanent. If she improves, she will continue to have some level of cognitive and emotional problems and she will still have physical limitations, headaches and chronic pain. She may be able to engage in some volunteer or unpaid work of short duration time commitments, i.e., hours, not days. I conclude that Mrs. Donaldson is and will remain competitively unemployable due to her accident injuries.

[374] Dr. Quee Newell opined that given Mrs. Donaldson's lengthy experience with Mallard's in retail management, she would have been able to compete for a variety of occupations had the accident not occurred. Those include in the management and supervisory positions with retailers, retail buying, purchasing clerk, inventory clerk, financial services clerk and insurance agent. Based on data, she identified hundreds of job openings in the Kootenays in 2019. The wages were stated in hourly amounts that equate to about \$29,000 per year to \$100,000 per year. The median is \$65,000. However, there were very few positions that had range that went as high as \$100,000. The median of the medians is about \$52,483 in 2023 dollars.

[375] Ms. Grayson pointed out that during the vocational testing, Mrs. Donaldson demonstrated a lack of interest in the areas that in which many of these positions would be found. Dr. Quee Newell agreed with that. She explained that since the vocational testing was done post accident, and Mrs. Donaldson was not able to work in her former position, it was not surprising that she did not express interest in this type of position. Had she not been injured, and a job that met her skill set and her pay and pension aspirations were available, she might have taken it. Mrs. Donaldson testified that before the accident, she was looking for a position that fit her skills and experience with Mallard's, so long as it was not with a competitor.

[376] The evidence assists with assessing and valuing Mrs. Donaldson's pre-accident earning capacity. In that regard, positions that are consistent with her skills and experience are relevant. Mrs. Donaldson's evidence does not rule out her interest in such positions pre-injury.

[377] However, it is not clear how many positions that Dr. Quee Newell identified would be unsuitable because they are with a competitor or did not equal or exceed her Mallard's annual salary and/or did not have a pension. Dr. Quee Newell testified that she would expect that pensions would be associated with union or government positions and while she could not say how many of those positions would have pensions associated with them, there are some large employers in the Kootenays, such as Teck and hospitals that employ people with buying and inventory skills.

The Alter Ego Doctrine - Whether Mrs. Donaldson's Loss of Earning Capacity Must Be Based on the Post-Accident Performance of Mallard's

[378] Mrs. Donaldson does not base her claim on what the Mallard's business could have earned had the accident not occurred. Her claim is based on what she could have continued to earn as a salary at Mallard's or at other employment in roles for which she had experience and training.

[379] Ms. Grayson asserts that Mrs. Donaldson must base her loss of earning capacity through Mallard's gain or loss of profitability because Mrs. Donaldson's pre-accident salary was one way that Mallard's was distributing profit to her. As a co-owner, she was and is entitled to half the profits of Mallard's. She remains entitled to half of those profits. Whether half of those profits are distributed to her as dividends and employment income, she is still entitled to them.

[380] Mallard's continued to be profitable after Mrs. Donaldson's accident and had very good years, profit-wise, in the wake of the Covid-19 pandemic.

[381] Ms. Grayson tendered a forensic accounting report authored by Anthony Volpe. Mr. Volpe concluded that, even taking into account salary paid to Alex Donaldson, and increases in salaries or wages paid to the other Mallard's employees who have taken over Mrs. Donaldson's responsibilities, the wage burden to Mallard's has not increased compared to the pre-accident period. Accordingly, Mrs. Donaldson's entitlement to half of the profits has not been impacted by the accident. Based on this, Ms. Grayson asserts she has no loss of earning capacity.

[382] As a co-owner of the business, the alter ego doctrine permits Mrs. Donaldson to pierce the corporate veil and claim a loss of profitability of Mallard's if she chooses to do so: *Hart v. Hansma*, 2014 BCSC 518; and *Everett v. King* (1981), 34 B.C.L.R. 27 (S.C.). The question is whether she is required to pursue a claim for loss of earning capacity based on the alter ego doctrine where there is no demonstrable loss to the business.

[383] The position that Mrs. Donaldson must pursue her claim through the alter ego doctrine fails to recognize that what the court is called upon to assess is loss of earning capacity, not loss of income: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 20–21. The loss of income is evidence of loss of earning capacity and that explains why the plaintiff is able to use the alter ego doctrine for the evidence that is a measure of loss of the plaintiff's earning capacity. The converse is not correct; the evidence of no loss of income in the family business is not necessarily evidence that the plaintiff has no loss of earning capacity.

[384] This approach has been followed in several cases. For example, in *Hall v. Miller* (1989), 41 B.C.L.R. (2d) 46 (S.C.), a plaintiff and his wife worked together in various positions as a team. After the accident, they acquired a contract to jointly manage a motel. The plaintiff's capacity to work after the accident was significantly impaired. The plaintiff's wife carried 75% of the work load managing the motel. Without this uneven effort, the plaintiff and his wife would likely not have been able to take the contract. The Court of Appeal held that although the plaintiff had no specific economic loss and continued to receive wages, he could still be compensated based on "lost earning power": *Hall* at para. 20. The Court of Appeal noted that the extra work performed by the plaintiff's wife was compensable loss just as if an outside employee had been hired to do it.

[385] In *Burtwell v. McCaffrey*, 2013 BCSC 886, the plaintiff performed some clerical tasks for a family printing business in addition to working elsewhere. The plaintiff stopped working shortly after the accident but continued receiving income from the family business. The evidence was merely that the husband "took up the

slack” for the plaintiff, but this was sufficient to establish that the husband had performed the tasks normally done by the plaintiff: at paras. 83–93. Justice Fisher gave an award for past loss relating to the husband’s extra efforts.

[386] Although some of these cases came before *Rowe*, they use the concept of loss of earning capacity described in *Rowe* at para. 30, which is “a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury”.

[387] In some cases, including *Burtwell; Loik v. Hannah*, 2009 BCSC 1196; and *Krell v. Saari*, 2003 BCSC 699, the family business continued to pay a salary to the plaintiff. The salary continuation did not preclude making an award for loss of earning capacity. In *Burtwell*, Justice Fisher, then of this court, described the salary continuation as “income splitting for tax purposes” that did not bar the plaintiff from being compensated for lost capacity: at paras. 88–89.

[388] I conclude that Mrs. Donaldson is not required to measure her loss against the profitability of her co-owned company and is not precluded from advancing a loss despite her salary continuation. The salary continuation does raise the issue of a collateral benefit, which I will discuss below.

Assessment of Past Loss of Earning Capacity

[389] As with all personal injury compensatory damages, past loss of earning capacity is intended to restore the plaintiff the position he or she would have been in but for the defendant’s negligence. For past loss, the question is what the plaintiff would have earned based on real and substantial possibility: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175 citing *Rowe*; *M.B. v. British Columbia*, 2003 SCC 53; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.

[390] The burden of proof regarding actual past events is the balance of probabilities. However, some of the facts pertaining to past loss of earning capacity may be hypothetical. For example, what the plaintiff actually earned between the

accident and trial is an actual fact subject to proof on the balance of probabilities. What the plaintiff would have earned absent the accident is a hypothetical fact and even though it is a past hypothetical fact, it can be established based on demonstrating real and substantial probability: *Hardychuk* at para. 177, citing *Athey*; *Falati v. Smith*, 2010 BCSC 465; aff'd 2011 BCCA 45.

[391] Various evidentiary methods can be used to establish and value the loss of capacity to a plaintiff who is employed in a family business that carries on without the plaintiff, depending on the circumstances of the case. The court assesses damages for past loss of capacity and does not calculate them mathematically. Allowances for contingencies should be made and the award must be fair and reasonable taking into account all of the circumstances: *Falati*.

[392] In the year of the accident, Mrs. Donaldson's salary was \$53,720. In each year since the accident, she has been paid a salary except for portions of 2017 and 2018 when it was discontinued on the basis that Mrs. Donaldson would receive ICBC disability benefits and resumed when the benefits were not paid. In 2021, it was \$57,400. In 2022 it was \$64,902.

[393] I pause to note that Ms. Grayson asserts that there is no evidence that ICBC promised to pay Mrs. Donaldson disability benefits and takes umbrage at the suggestion that ICBC did not follow through on its obligations in that regard or should have called evidence to explain it.

[394] I accept Mrs. Donaldson's evidence that the reason that Mallard's prepared (although did not sign or file) a record of employment for her in 2017 and discontinued her salary was because Mrs. Donaldson was seeking disability benefits and attempting to comply with ICBC's requirements, including that there be a record of employment issued. ICBC did not pay disability benefits. Mallard's then recommenced Mrs. Donaldson's salary. There is no evidence as to why.

[395] Mrs. Donaldson's pre-accident employment earnings from Mallard's is proof that she was competitively employable. Her annual salary is a measure of the value

of her earning capacity, but it must be considered whether it is an accurate measure of earning capacity given that it was set in reference to Canada Pension Plan maximum insurable earnings.

[396] There is evidence that supports that Mrs. Donaldson's pre-accident salary, and the salary continuation paid to her using the same CPP-driven basis, was nevertheless in a range, although slightly less, of what it would have been if they were set for non-owner employees. Since the accident, two Mallard's employees have become salaried: Mr. Ballance and Alex Donaldson. Ms. Kinicki is one of the managers at the Castlegar store and she has some of Mrs. Donaldson's pre-accident roles including soft goods buying for both stores and being the go-to person for the staffing issues at the Castlegar store. In 2022, those three employees' salaries and wages ranged between \$53,000 and \$73,000.

[397] Mr. Volpe opines that Mrs. Donaldson was a self-employed individual. Accordingly, she could choose to pay herself through salaries, wages, dividends or other means. Based on his forensic review of Mallard's in the pre and post accident periods, the average income available to the shareholders increased in the post accident period compared to the pre-accident period. Based on this, Ms. Grayson submits that the salary paid to Ms. Donaldson was purely profit distribution, and not compensation for valuable services. Accordingly, Ms. Grayson submits that her work had no value and therefore cannot be the basis for a claim of loss of earning capacity.

[398] I reject this submission. The evidence I have accepted from Mrs. Donaldson, Mr. Donaldson, Mr. Balance and Ms. Kinicki persuades me that Mrs. Donaldson was providing valuable and valued services. A full time employee (Alex Donaldson) was brought on to relieve Mr. Donaldson of some of his work so that he could take on some of Mrs. Donaldson's. The fact that some of Mrs. Donaldson's work was reassigned to the person with the most experience (Mr. Donaldson) is evidence of its value. The fact that other employees with significant experience (Mr. Ballance and Ms. Kinicki) were assigned some of her tasks and Mr. Ballance is now being paid

more than Mrs. Donaldson, is evidence that she was providing valuable services to Mallard's and is evidence of her loss of capacity.

[399] Mr. Volpe also opined that he looked at non-shareholder wages for each of the companies that comprise Mallard's for the pre and post accident periods. He averaged them over 5 years. He found non-owner payroll increase in the post accident period of about \$25,500 per year. Ms. Grayson argues that because non-owner payroll did not increase by the same amounts as Mrs. Donaldson's salary, Mallard's did not suffer a loss and so neither did Mrs. Donaldson.

[400] The fact that non-owner salaries did not increase, on a five-year average, by the same salary as was paid to Mrs. Donaldson does not mean that her work was not replaced by others. I accept the evidence that Alex Donaldson joined Mallard's in 2017. Between the accident and then, Mr. Donaldson had taken on some of Mrs. Donaldson's work in addition to his own and there was no additional salary burden for that. In addition, Mrs. Donaldson's roles were reassigned to existing employees over time, but not with a linear increase in wages to those employees. Based on the evidence, I am not persuaded that Mr. Volpe's analysis assists in demonstrating or valuing Mrs. Donaldson's loss of earning capacity.

[401] Mrs. Donaldson asserts that the best measure of her earning capacity is Dr. Quee Newell's evidence as to what Mrs. Donaldson could have made had she obtained work outside of Mallard's within six months of the accident. Mrs. Donaldson's position is that given her long experience and responsibilities at Mallard's, the high end of the range of earnings identified by Dr. Quee Newell, i.e., \$100,006, is appropriate. Assuming she continued to earn \$52,720 for six months post accident, and then \$100,006 per annum after that, her gross past loss of earning capacity is \$734,825.

[402] I am not persuaded that Mrs. Donaldson's loss of earning capacity should be based on a scenario that she would have left Mallard's and obtained higher paying work. Despite the large number of openings identified by Dr. Quee Newell, there is no evidence as to what portion of them would be equal or higher pay than

Mrs. Donaldson's Mallard's employment income and have a pension. It is not clear how many of the large employers, those likely to offer pensions, were located in Castlegar or within daily commuting distance from Castlegar. The single job she applied for, at Columbia Basin Trust, was located in Castlegar. Nothing came of that application. This evidence is too tenuous to support even a real and substantial possibility. It is appropriate to take it into account as a contingency.

[403] I conclude that Mrs. Donaldson would have continued to work at Mallard's and earned her salary set in relation to CPP maximum pensionable earnings. Although the comparison to the statistics for senior management in the retail sector and the currently salary earned by the other senior staff are evidence that she was undercompensating herself, her salary was in a range that non-owner employees with senior responsibilities are paid. Given that it was the salary that Mrs. Donaldson and Mr. Donaldson chose to pay themselves it is the best evidence of the annual income her capacity would have generated during the pre-trial period.

[404] For 2017 and 2018 I do not have evidence of Mrs. Donaldson's full salary for, nor any evidence of the CPP maximum pensionable earnings for those years. For those years, I have used the most recent year income level. I assess her yearly pre-trial gross losses as:

- a) 2015 - \$53,720 full year salary equates to \$4,477 per month; the period of loss is November 15, 2015 – December 31, 2015 or 1.5 months; and so the loss is \$6,715.
- b) 2016 – the loss is \$53,760 full year salary.
- c) 2017 – her salary was interrupted by the disability benefits issue described above. I have used \$53,760.
- d) 2018 – her salary was interrupted by the disability benefits issue described above. I have used \$53,760.
- e) 2019 – the loss is \$57,400 full year salary.

- f) 2020 – the loss is \$57,400 full year salary.
- g) 2021 – the loss is \$57,400 full year salary.
- h) 2022 – the loss is \$64,902 full year salary.
- i) 2023 – the loss is based on 2022 salary of \$64,902 which equates to \$5,409 per month; January 1, 2023 to April 17, 2023 is 4.5 months; the loss is \$24,338.

[405] These pre-trial gross losses total \$429,445.

[406] With regard to contingencies, it is appropriate to consider that Mrs. Donaldson may have found work outside of Mallard’s that met her requirements of equal or greater pay and a pension. Pensions can significantly increase the value of annual compensation. However, I have not been provided with any evidence of what that would be. I am of the view that the chance of this happening is quite low – less than 25%. Given the low chance, the lack of information as to value the pension might add, and that the high end of the range of jobs for which Mrs. Donaldson had skills and experience is \$100,000, I would increase the award by 5% for this contingency.

[407] Other contingencies would be non-participation in the work force due to non-accident health related issues. Mrs. Donaldson did not have a history of illness. She did not have any underlying conditions. She was fit and active. She has had a thyroid condition and menopause post-accident, but there is no evidence of any incapacitating illness post accident other than her accident injuries. I would not reduce her past loss of earning capacity for non participation in the workforce.

[408] I assess gross past loss of earning capacity at \$450,000. I expect the parties will be able to agree on the appropriate deductions.

Deductibility of Past Wage Loss Continuation

[409] It is common ground that Mrs. Donaldson continued to receive her pre-accident salary from Mallard’s after the accident except for the period when it was

interrupted when Mrs. Donaldson understood that ICBC would start making disability payments to her.

[410] Mrs. Donaldson’s position is that her salary continuation payments are not deductible from a past loss of earning capacity award because they were made pursuant to an oral agreement that she would repay it from the proceeds of this claim. The oral agreement was memorialized in a written acknowledgement made after Mrs. Donaldson retained counsel.

[411] Ms. Grayson submits that Mrs. Donaldson has not proved an agreement to repay her salary continuation from her damages in this claim because the evidence about the oral agreement is not specific enough and does not include evidence of offer, acceptance, consideration and certainty of terms.

[412] These arguments concerns the compensatory principles prohibiting double recovery. The rule against double recovery has it roots in the basic compensatory principle that the plaintiff should be placed in the same position he or she would have been in had the accident not occurred, insofar as a monetary award can provide. The plaintiff must demonstrate a loss, and may only be compensated to the extent of that loss. “It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account”: *Ratych* at 981.

[413] Double recovery and concerns of over-compensation may arise in situations where the plaintiff received a “compensating advantage” from another source that lessened their actual loss. A “compensating advantage” is also know as a “collateral benefit”, a “gain or advantage that flows to the plaintiff and is connected to the defendant’s breach”: *IBM Canada Limited v. Waterman*, 2013 SCC 70 at para. 15.

[414] There are three situations where a compensating advantage will not offend the rule against double recovery and will not be deductible from an award for damages. First is the “insurance exception,”; second is the existence of a

subrogation agreement to repay the compensating advantage; and third is where the compensating advantage is of a charitable or gratuitous nature provided by a third party: *Ratych* at 982–983; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Kask v. Tam*, [1996] 7 W.W.R. 494, (B.C.C.A.); and *Waterman*.

[415] The Supreme Court of Canada described the role of subrogation in wage benefit situations in *Ratych* at 982–983 as an exception that is applied where the court is satisfied that the employer has a valid claim to have them repaid out of any damages awarded. In *Cunningham* at 415, Justice Cory for the majority noted that if a subrogation agreement exists, then generally that agreement will be determinative of whether the wages or benefits received are deductible from an award, whether or not the employer intends to act on the agreement.

[416] Payment of wages when a plaintiff is off work might also be provided voluntarily by the employer. Voluntary or gratuitous payments represent the third category of non-deductibility. The purpose of the non-deductibility of voluntary payments was discussed in *Waterman* at para. 39 as stemming from the rule that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages because “the springs of private charity would be found to be largely, if not entirely, dried up” and because it rarely makes sense to spend the time and effort required to take these sorts of gifts into account.

[417] The Court of Appeal for British Columbia has more recently stated that there is “no difference in principle’ between a charitable gift from a relation and one from an employer”: *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2021 BCCA 164 at para. 71. Justice Abrioux also noted a charitable gift could also be termed a voluntary payment and describing them that way may help “to recognize the various societal considerations that may inform a particular payment or series of payments”: *Provost* at para. 92.

[418] In *Provost*, Abrioux J. noted that the right of subrogation that arises in the context of benefits paid through insurance or an employer exists through the common law of contracts: *Provost* at paras. 37–68. I read this as meaning that

normally a contract would have to be established to provide for an enforceable right of subrogation, which would require some element of consideration.

[419] In this case, Mrs. Donaldson asserts that the agreement for repayment was made orally, and then acknowledged by Mrs. Donaldson in writing. Ms. Grayson relies on *Chiu v. Lam*, 2016 BCSC 299 at para. 39, citing *Clifford v. Fores*, 2004 BCSC 358 at paras. 39–40, for the proposition that Mrs. Donaldson bears the onus to prove offer, acceptance and certainty of terms. Those cases were decided in the context of alleged oral agreements regarding loans, where one party asserted that there was a contract and the other party to the contract disputed that there was a contract. In this case, both parties to the alleged contract assert there was a contract, it is Ms. Grayson, a non-contracting party, who disputes the contract.

[420] In *Stewart v. Collins*, 2022 ABQB 258, Justice Devlin reviewed the law since *Ratyck*, including *Cunningham*, *Waterman* and our Court of Appeal's decisions in *Provost* and *Kask*. At para. 36, Devlin J. observed that the law on the deductibility of collateral benefits is more contextual than black-line categorical. I agree with that observation. There is no doubt that when the plaintiff asserts there is a subrogation agreement, some evidence of that agreement must be led; a bare assertion that one exists is not sufficient: *Provost* at para. 88. Beyond that, the cases involving salary continuation by an employer that has the appearance of gratuity focus on whether the evidence demonstrates a moral obligation to repay. If there is, in the context of a voluntary continuation of salary, that is sufficient, even if consideration has not been proven.

[421] In *Stewart*, the employer of a deceased employee continued making his wage payments to the employee's widow. The employee had died in a workplace accident but the employer did not have any workers compensation insurance or benefits in place. For a period of time, the wage continuation payments were made without any agreement in place. Subsequently, the widow and the employer agreed that the payments were in lieu of a workers compensation agreement and the widow released the employer for any liability for failing to have workers compensation

coverage or insurance. Justice Devlin concluded that none of the payments were deductible because at first they were fully charitable, and subsequently, they had both a charitable aspect and were made in exchange for consideration of not being sued for failing to have insurance.

[422] Turning to the evidence in this case, Mrs. Donaldson testified that she was paid by Mallard's after the accident because of an agreement. She was asked about a document entitled "Subrogation Agreement" made June 13, 2017. It is only signed by Mrs. Donaldson, and it says as follows:

This is to confirm my oral agreement with my employer Mallard's Ski and Sport Ltd. In consideration of Mallard's Ski and Sport Ltd. paying me for days or portions of days that I miss as a result of injuries I sustained in a motor vehicle accident that occurred on or about November 14, 2015, I agree to advance and pursue a claim for my pay for those days and portions of days against all parties who may be liable for them including ICBC and the driver/owner of the vehicle that struck me, and to repay Mallard's Ski and Sport Ltd. the total of those amounts from the monies I receive for my claims.

[423] Mrs. Donaldson testified that she intends to abide to what she agreed to do as recorded in that document.

[424] I pause to note that this document is not an agreement in and of itself – it states that it confirms the oral agreement she has with Mallard's. Nevertheless, it describes a form of consideration in the oral agreement, namely that in exchange for salary continuation, Ms. Donaldson agreed to seek compensation for her loss of earning capacity and to repay Mallard's out of that compensation.

[425] On cross examination, Mrs. Donaldson was asked to give details about the oral agreement – when it was made, why it was made, what were the terms of it. She was unable to be more precise than that they agreed that Mallard's would continue to pay her and she would repay Mallard's out of a settlement or judgment. I do not consider that to be surprising in the circumstances. The business was their business. So long as they trusted each other, there was no need to reduce such agreement to paper as one would with an arms length employer or employee. There would be no need to be more detailed about it than what Mrs. Donaldson testified to.

The fact that she could not remember the details of the discussion is also not surprising in the circumstances.

[426] In direct evidence, Mr. Donaldson testified that he and Mrs. Donaldson had a discussed that she would continue to receive her salary and at the conclusion of the case, the money would be repaid to Mallard's. Mr. Donaldson was also asked why Mallard's continued to pay Mrs. Donaldson. He testified that she had a need to contribute, and that payment would be good for her self esteem. He said that the company was able to do it, and it felt like the right thing to do. He testified that they had the agreement that the money would be repaid.

[427] Ms. Grayson submits that this evidence is internally inconsistent. I see no inconsistency.

[428] Ms. Grayson submits that since Mr. Donaldson and Mrs. Donaldson are both paid a salary and are entitled to equal shares of the profits, the subrogation agreement is essentially a sham because Mrs. Donaldson was not paid based on how much she worked or what she did. Her salary was just a method of distributing her share of the profits to her and she was entitled to the share of the profits whether she worked or not.

[429] This submission is connected with the alter ego theory that Mrs. Donaldson has no loss of earning capacity, which I have rejected above. I also reject it as the basis for an assertion that the subrogation agreement was a sham. It ignores the evidence that Mrs. Donaldson, prior to the accident, did valuable work and earned a salary for that work.

[430] *Kask* is very similar to this case. the plaintiff was one of two brothers who owned a business. When he was injured in an accident, his usual wages were continued. He and his brother testified that they had an oral agreement that the wages were a loan to be repaid. The agreement was not documented in any way. The trial judge found that there was no legal obligation to repay and the plaintiff would not be called upon to repay. The existence of the contract was not challenged.

On appeal, the Court of Appeal held that the payments were gratuitous and given the plaintiff's testimony that he felt morally obligated to repay, the defendant should not be permitted to take advantage of the payments made by the employer (at paras. 24 and 27). The Court of Appeal did not assess the evidence about the contract in terms of offer, acceptance and consideration. The evidence of the company's gratuitous continuation of wage combined with the moral obligation to repay was sufficient.

[431] I accept the evidence of Mrs. Donaldson and Mr. Donaldson that they discussed and agreed that Mallard's would continue paying her salary which she would repay if she was compensated through her claim against Ms. Grayson. The objective evidence of Mallard's ceasing to do so when Mrs. Donaldson thought ICBC would begin paying disability benefits to her, and then Mallard's recommending payments when ICBC did not, supports the evidence of the oral arrangement. The lack of detail about the agreement makes sense.

[432] In the absence of any evidence to the contrary or internal contradictory evidence, I have no reason to reject their evidence as simply "manufactured" as suggested by Ms. Grayson. While this is an issue that will financially benefit Mrs. Donaldson, and by extension Mr. Donaldson, having observed them both testify at length, I do not conclude that they came to court to lie about this.

[433] I conclude that the payments were made pursuant to an oral agreement by which Mallard's and Mrs. Donaldson agreed that Mallard's would continue paying her salary and she would repay Mallard's out the compensation she received in this proceeding. In addition, Mallard's was motivated to do the right thing by Mrs. Donaldson and support her during her post accident travails. The payments made by Mallard's for salary continuation since the accident to trial are not deductible.

Assessment of Future Loss of Earning Capacity

[434] Mrs. Donaldson claims loss of future earning capacity at the level of \$100,000 per annum until age 70.

[435] Ms. Grayson's asserts there is no future loss because of the alter ego doctrine. I have rejected those arguments. She also takes issue with Mrs. Donaldson's economic evidence and her proposed retirement age of 70.

[436] Assessing an award for loss of future earning capacity 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: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32. The assessment requires a very fact-intensive, case-specific inquiry: *Gregory*, at paras. 32–33.

[437] In *Rab v. Prescott*, 2021 BCCA 345 at paras. 47–48 the Court of Appeal articulated a three-step process to assessing loss of earning capacity:

- a) The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity giving rise to the sort of considerations discussed in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 ;
- b) 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;
- c) If 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.

Steps 1 and 2: Evidence of potential loss of capacity and whether there is a real and substantial possibility of a pecuniary loss.

[438] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, Justice Harris, citing *Rab* at paras. 29–30, explained that the application of these steps is different depending on which of two broad categories of cases the case falls into: “... (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the

accident.” (at para. 11). Harris J.A. further explained that in category one cases the first and second step of the three-step analysis “may well be foregone conclusions”.

[439] This case falls into the straightforward category because of my findings that Mrs. Donaldson’s accident injuries have rendered her incapable of competitive employment since the accident and permanently. I have concluded that her injuries have precluded her from utilizing her earning capacity to make an annual salary. I have concluded that her Mallard’s salary is an appropriate measure of the pecuniary loss she has suffered and will suffer. I have rejected the argument that there is no real pecuniary loss due to her position as a co-owner and ongoing right to share in the profits of Mallard’s. The evidence therefore establishes an existing and ongoing loss of capacity and a real and substantial probability of a pecuniary loss.

Step 3: Assessing the Value of the Future Loss

[440] There are two widely used approaches to quantify loss of future earning capacity, the earnings approach and the capital asset approach. The earnings approach is often used where the plaintiff had an established earnings pattern or career trajectory prior to the accident, and after the accident the plaintiff continued to work in the same position with either reduced hours or modified duties, or took early retirement from that position as a result of accident-related injuries. See, for example, *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 25.

[441] The capital asset approach is used where there is a level of uncertainty making it difficult to measure the loss in a pecuniary way: *Riding-Brown* at para. 26.

[442] Usually, the defining distinction between the earnings approach and the capital asset approach is the extent to which the loss is measurable. For example, if there is little or no evidence of what the plaintiff’s post-accident earnings will be, the earnings approach may not be appropriate.

[443] In this case, my rejection of the alternate employment scenario as a real and substantial possibility applies to this issue. Had I accepted it, there would have been an argument that the capital asset approach was appropriate given that the evidence

of what earnings Mrs. Donaldson would have had at a different position would be uncertain. My conclusion that her loss of earnings capacity is appropriately measured by her Mallard's employment income, which was stable and remains stable, makes the earnings approach appropriate.

[444] Ms. Grayson submits that even if I accept that Mrs. Donaldson has persuaded me to proceed to step 3, I should use the capital asset approach and measure the loss based on the loss opportunity to engage in a "side gig" artistic endeavour earning \$20,000 per year for three years. I reject this as entirely unsupported by any evidence and disconnected from the facts I have found. While there is evidence that Mrs. Donaldson engaged in painting and other artistic endeavours as hobbies, there is no evidence that she is planning to stop working full time and engage in an artistic endeavour to earn income.

[445] Ms. Grayson makes some other arguments that are line with the capital asset approach but are also relevant to the earnings approach. She asserts that I should reject the suggestion that Mrs. Donaldson was working full time or would continue to work full time. With regard to the former, I have found she was working full time. With regard to the latter, Mrs. Donaldson had worked full time for many years, including raising three children. She managed to combine many varied interests with full time work up to the time of the accident. She had recently taken a university level creative writing course on the weekends. She had recently applied for a new full time job. There is no reason to doubt her testimony that she liked being busy, was always looking for a new challenge, and like to work full time. I conclude she would have continued to work full time.

[446] With regard to retirement age, the evidence was thin as it often is. Like many plaintiffs who are not on the verge of retirement, Mrs. Donaldson had not given much thought to it. Indeed, on the evidence, the thought she had given to it was that she would like a job with a pension. Based on that, I infer she was prepared to work the many years it can take for a pension to vest and she was thinking about the financial consequences of retiring. Her evidence that she would work to age 70 is supported

by Mr. Donaldson's evidence that he sees the value of keeping his hand in the family business, both personally and for his son's sake, and can see doing so into his 80s although perhaps not full time when he is 80 or older. He is four and a half years older than Mrs. Donaldson. By her age 70, he will be almost age 75.

[447] On the evidence, I accept that retirement at age 70 is appropriate for the assessment of future loss of earning capacity.

[448] Mrs. Donaldson entered expert opinion evidence from an economist, Mark Szekely, pertaining to past and future income loss multipliers. Ms. Grayson asserts that I should not accept this evidence because Mr. Szekely did not append his many pages of excel spreadsheets that contain the formulae he used and underlie the multipliers in his report. Ms. Grayson asserts that without the formulae, Mr. Szekely's opinions cannot be understood and tested and so violate the rules of expert evidence reports. Mr. Szekely disagreed that they could not be understood and tested. He explained that an economist with the appropriate training to offer these sorts of opinions would be able to read his report, see his tables, and understand and test what formulae he used. He explained that it would be impractical to attach the reams of excel spreadsheets for each calculation in the report.

[449] I agree with Mr. Szekely. I have no trouble accepting his opinion without reams of excel spreadsheets setting out each of his calculations.

[450] Mr. Szekely was asked to calculate future income loss based on the medians for the categories of workers like Ms. Quee Newell. As I have found that it is not a real and substantial possibility that Mrs. Donaldson would have obtained employment outside Mallard's, I will use this only for contingency purposes. For the starting point of the assessment, I will use Mr. Szekely's multipliers.

[451] Applying the evidence of the most recent CPP maximum contribution earnings, Mrs. Donaldson's future income loss is \$64,900 per year until her age 70. Using Mr. Szekely's multipliers, the loss to Mrs. Donaldson's age 70 is \$741,418.

[452] I turn to contingencies. In keeping with my past loss of earning capacity assessment, I consider that the chance of Mrs. Donaldson taking a position outside Mallard's was slim and it would be slimmer as time past for several reasons. First, the COVID-19 pandemic was good for the business and Mallard's performance may have alleviated Mrs. Donaldson's concerns about competition from online marketing. Her ability to find a position with a pension that would vest before retirement would diminish with each year that passed. However, consistent with my past loss adjustment, some adjustment upward is warranted because if the alternative employment had materialized, it would have resulted in increased income in the post trial period. I consider a 5% adjustment appropriate. While that seems *de minimus*, when applied to the large future loss of capacity, it is \$37,000, which is material.

[453] On the negative side, especially with an age 70 retirement age, absenteeism from the paid work force must be taken into account. In addition, Mrs. Donaldson may have decided to retire before age 70, another, more permanent form of non-participation. I consider it appropriate to reduce the starting point by 15% for the chance of non-participation in the paid workforce between now and age 70.

[454] I assess future loss of earning capacity at \$665,000.

Cost of Future Care

[455] Mrs. Donaldson has provided an expert report of an occupational therapist, Nazeen Chow. Ms. Chow undertook an assessment of Mrs. Donaldson. Based on that assessment, and the recommendations of Mrs. Donaldson's experts, she has recommended and costed items of future care.

[456] In addition, outside of Ms. Chow's report, Mrs. Donaldson has provided evidence with regard to a hot tub that is the subject of a recommendation by Dr. Grantham.

[457] Ms. Grayson objects to some of the cost of future care items, including the hot tub. The objections are one or more of the following: the costs are one that Mrs. Donaldson would have incurred in any event; the costs are unlikely to be

incurred by Mrs. Donaldson, and/or the costs are not supported by medical evidence.

[458] As a preliminary matter, Ms. Grayson submits that I should find some of the recommendations will not be utilized by Mrs. Donaldson because she has not utilized them recently. As part of this position, Ms. Grayson submits that I should reject the suggestion that affordability of various treatments played a role in that. Ms. Grayson submits that the evidence overall is that Mrs. Donaldson and Mr. Donaldson are financially fairly well off. In addition, she points to expenses that Mrs. Donaldson has incurred since the accident

[459] I do not accept these arguments. In making them, Ms. Grayson does not dispute that ICBC refused to fund many of these expenses, at least in the period six months after the accident. While Mrs. Donaldson appears to be comfortable financially, there was no evidence that she has an unlimited budget for these treatments. Leaving aside those recommended on a lower frequency than annual, the annual cost of the recommendations is over \$10,000. Evidence that Mrs. Donaldson is “fairly well off” does not equate to evidence that she could absorb annual costs of \$10,000 plus other costs less frequently.

[460] Ms. Grayson does not dispute all of the items. Accordingly, after setting out the legal principles, I will address the specific items she disputes and subtract those that I do not approve from the costing provided by Ms. Chow and valued in present day dollars by Mr. Szekely.

Legal Principles

[461] Awards of cost of future care must be objectively supported by medical evidence, the claims must be reasonable, and if the plaintiff will not use the services, the awards ought not be made: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; and *Golkar - Karimabadi v. Bush*, 2021 BCSC 990 at para. 107. The medical evidence can come from a health care provider who is not a physician. Like other awards for expenses that may occur in the future, they are subject to adjustments for contingences.

[462] The supporting medical evidence must demonstrate that the expense is reasonably necessary to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation*, 2012 BCCA 351 at para. 30. Because health and happiness are intertwined, reasonably necessary is a lesser requirement than medically necessary: *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993 at para. 82, aff'd *Aberdeen v. Zanatta*, 2008 BCCA 420.

Dental / TMJ

[463] Ms. Chow recommends follow up for Mrs. Donaldson's TMJ. Given that I have found that she TMJ was not caused by the accident, I conclude that this potential expense is not causally related to the accident. I do not allow it.

Occupational Therapy

[464] Dr. Cohen recommended occupational therapy that is centred on coping strategies for cognitive impairments, support for finding avocational / volunteer pursuits and support for pain and symptom management.

[465] Ms. Grayson objects to this as not likely to be undertaken by Mrs. Donaldson given that she withdrew from Ms. Hughes's occupational therapy.

[466] During her examination in chief, Mrs. Donaldson testified that she discussed the various recommendations that Ms. Chow made and that she would make use of the services and items recommended. When asked about occupational therapy specifically, she said she would make use of it.

[467] Dr. Cohen noted that Mrs. Donaldson's rehabilitation efforts with the occupational therapist, Ms. Hughes, had failed. He opined that that was likely because of Mrs. Donaldson having low insight into the rehabilitation plans and the rehabilitation plans being set a level that was not appropriate. He thought it was important that she be persuaded to engage in rehabilitation and he recommended that a psychotherapist have input into what the rehabilitation should be.

[468] The rehabilitation that Dr. Cohen recommends is different, with different objectives from that provided by Ms. Hughes. However, Dr. Cohen's recommendation is premised on the basis that Mrs. Donaldson will be resistant and will have to be persuaded. While Mrs. Donaldson was asked if she would use occupational therapy, she was not asked to explain why she would do that now when she had discontinued it in the past. Given her previous withdrawal from it, and the mistrust she exhibited of some of her caregivers over the years, I cannot conclude that she would engage in this therapy without evidence establishing that her resistance to it has been overcome.

[469] I conclude that occupational therapy is not supported by evidence that Mrs. Donaldson will undergo it.

Physiotherapy and Vestibular Therapy

[470] Ms. Chow recommends physiotherapy assessments every three years and a few treatments each year. Her recommendation includes an allowance for vestibular physiotherapy.

[471] Mrs. Donaldson has had physiotherapy in the past and testified that she would undergo it in the future if it is funded. Mrs. Donaldson testified that she has used various modalities from time to time based on what kind of therapy is available in the West Kootenay area and what she feels is working at the time.

[472] Ms. Grayson asserts that since Mrs. Donaldson's last physiotherapy was in July 2018, I should conclude she will not use it.

[473] Mrs. Donaldson testified that she underwent vestibular physiotherapy in Nelson shortly after the accident at the recommendation of her doctor. The Lifemark report states recommendations for vestibular exercises which Mrs. Donaldson has done and continues to do. Mrs. Donaldson could not recall whether she had any vestibular physiotherapy after Dr. David recommended it in 2018. Dr. David testified that the availability of physiotherapists with training in vestibular therapy was very limited when he made the recommendation in 2018 but there are more now.

[474] I conclude that Mrs. Donaldson will use vestibular physiotherapy if it is available to her, and that Ms. Chow's inclusion of it in the physiotherapy allowance is reasonable and medically supported.

[475] I conclude that Ms. Chow's allowance for physiotherapy is reasonable. Even if Mrs. Donaldson does not undergo it in exactly the same frequency because of logistics or need, the three year assessments and the quantity of the annual treatments will approximate what Mrs. Donaldson will use. I allow the claim for physiotherapy.

Kinesiology

[476] Mrs. Donaldson has used a personal trainer since the accident to assist her with developing an exercise program that is suitable for her injuries. Mrs. Donaldson has a home gym and goes to the local pool.

[477] Ms. Chow recommends 12 sessions per year to facilitate Mrs. Donaldson's maintenance of her home-based exercise program.

[478] Ms. Grayson submits that since Mrs. Donaldson has not seen a kinesiologist since 2017, I should conclude she will not use this service.

[479] Based on her past use of this service and her evidence that demonstrates a commitment to regular exercise to maintain her strength, I conclude that Mrs. Donaldson would use a kinesiologist. However, I do not conclude monthly kinesiology is reasonable. I conclude that three times a year is appropriate and award one quarter of the costs sought for kinesiology. I award the allowance for kinesiology tape as there was evidence that Mrs. Donaldson uses that to support the areas where she has chronic pain, for example on her back while kayaking.

Chiropractic or Massage Therapy

[480] Ms. Chow costed 12 treatments per year for chiropractic or massage therapy.

[481] Mrs. Donaldson has had chiropractic treatment and massage therapy from time to time since the accident. Ms. Grayson submits that she has not had massage

therapy since 2019 and only returned to chiropractic treatment in 2022 after a five year absence. She submits that an allowance for these treatments will not be used by Mrs. Donaldson for these treatments.

[482] I disagree. In the seven and one of half years since the accident, with the exception of 2020 and 2021, Mrs. Donaldson had some form of pain-related therapy including chiropractic, acupuncture, and massage therapy.

[483] I allow this aspect of cost of future care.

Recumbent Bike

[484] Ms. Chow recommends a recumbent bike for Mrs. Donaldson's home gym for cardiovascular exercise.

[485] Mrs. Donaldson testified that she has an upright stationary bike in her home gym. She testified that she has not used it. Ms. Chow did not identify advantages that a recumbent bike has over a stationary bike. Mrs. Donaldson did not testify that she would use a recumbent bike.

[486] The evidence is that Mrs. Donaldson undertakes activities that provide cardiovascular conditioning such as walking for up to one hour and a half at a time, swimming and cross-country skiing.

[487] I conclude the expense of a recumbent bike is not supported by the evidence.

Hot Tub

[488] Mrs. Donaldson testified that a family member loaned her an inflatable hot tub which she used. She wishes to purchase a permanent one. She testified that she floats in the hot tub and it eases her pain and provides her with a sense of calmness. She testified that she pushes herself hard with exercise because she knows that if she overdoes it, she can relieve the pain in the hot tub. Dr. Grantham recommended the plaintiff have a hot tub.

[489] Ms. Grayson opposes the hot tub cost although characterizes it as a special expense because it was not included in Ms. Chow's report. I consider it to be properly characterized as part of the cost of future care claim.

[490] Ms. Grayson submits that Dr. Grantham's recommendation is not evidence of support from a medical professional because Mrs. Donaldson went to see Dr. Grantham in late 2022 at the urging of her lawyer.

[491] I do not regard the timing of the visit as undermining the recommendation. On the evidence, it is possible to infer that Mrs. Donaldson's lawyer advised her that if she were to claim a hot tub, it had to be supported by a medical professional and so Mrs. Donaldson asked Dr. Grantham if she would recommend a hot tub. However, inferring that does not mean that Dr. Grantham's recommendation is not *bona fide*. Dr. Grantham is a professional health care provider. I have no basis to conclude that she would recommend something that she did not consider to be appropriate for the symptoms she was treating.

[492] Mrs. Donaldson has done a remarkable job at staying active with modified or different activities despite her physical and psychological injuries. She testified that she goes for walks, and has undertaken other activities such as craft courses, to force herself out of the house. She does strength training because she wants to stay strong. For these reasons, I accept her evidence that she feels she can push herself because she knows she can recover in the hot tub.

[493] I consider this to be the exceptional case where an expense such as this meets the test for an award.

[494] Mr. Donaldson obtained a quote for a hot tub based on the smallest model that a local hot tub provider supplies. The quote is just under \$19,000. The costs of installing the electrical to support is \$2300. I allow these costs.

Adjustable Bed

[495] Mrs. Donaldson testified that after the accident, she had a hard time sleeping more than short periods at a time. Mr. Donaldson and Mrs. Donaldson purchased an adjustable bed so that Mrs. Donaldson can find a comfortable position to sleep in. Mrs. Donaldson testified that gradually she has been able to build up her sleep to six or seven hours. She clearly attributed the stress of the trial to her more recent sleeping difficulties.

[496] Dr. Grantham recommended an adjustable bed as means to address Mrs. Donaldson's pain in her neck, upper back and shoulders.

[497] The adjustable bed is a one-way adjustable bed which requires Mrs. Donaldson and Mr. Donaldson to sleep in the same adjusted position. Mr. Donaldson is not comfortable in the positions that allow Mrs. Donaldson to sleep. Mrs. Donaldson seeks an award for a two-way adjustable bed as part of her claim for cost of future care and the costs of the one-way adjustable bed purchased as part of her special damages claim.

[498] Ms. Grayson submits that neither costs are recoverable because Mrs. Donaldson has not proved she has ongoing physical injuries. I have made findings contrary to that position.

[499] I conclude that the one-way adjustable bed was a reasonable special expense and a two-way adjustable one is also reasonable based on Mr. Donaldson's evidence that he has trouble sleeping if the position works for Mrs. Donaldson. However, I do not consider that Ms. Grayson should have to pay for both beds. I will allow the expense of the fully adjustable bed, \$4,485. I will deduct the expense of the previous adjustable bed from special damages.

Assessment of Cost of Future Care

[500] Mr. Szekely valued the cost of future care based on the low end and high end of the cost estimates. Mrs. Donaldson seeks the median of those totals. I did not

hear any submissions on why anything higher than the low end is appropriate. Given that, I will base my assessment on the low end.

[501] The total of the low end of the items that Ms. Chow recommended, less the items I have not permitted, is \$251,688. With the hot tub and two-way adjustable bed, the total is \$277,741.

[502] With regard to contingencies, despite my findings that the individual items claimed are ones that Mrs. Donaldson will use, the number of therapies and items of care recommended, when viewed in total, gives rise to a concern that reasonable time and effort will not permit Mrs. Donaldson to pursue all of them. I conclude that it is reasonable to reduce the cost by 25% for that contingency.

[503] I assess cost of future care at \$208,000.

Special Damages

[504] Mrs. Donaldson has submitted a list of special damages, some of which have already been reimbursed by ICBC. Mrs. Donaldson's counsel has identified those that she understands to be in dispute.

[505] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* at 78.

[506] I disallow the following as expenses that are related to Mrs. Donaldson's thyroid condition, TMJ, left foot, menopause or not otherwise associated with an accident injury:

- a) Bloodwork for thyroid;
- b) Safeway Pharmacy – thyroid medication, hormones;
- c) Pharmacy expenses for Synthroid and/or Levothyroxine;

- d) Isis Essentials – lubricant;
- e) Pharmasave – thermometer and iron supplements; and
- f) Dr. Dana Alumbaugh, podiatrist.

[507] I consider the following expenses to not have been the subject of evidence that sufficiently connects them to accident injuries or that establishes that they were reasonable expenditures:

- a) Fitbit;
- b) Obus neck massager;
- c) Canadian Tire Seat cushion;
- d) Isis Essentials – essential oils for headaches;
- e) Amen clinic; and
- f) Safeway pharmacy prescriptions but no description as to what the prescriptions were for.

[508] There are several entries for Santosha Spa. Mrs. Donaldson testified that she went there when she could not find a registered massage therapist. I conclude that these expenses are not adequately supported by the evidence.

[509] Mrs. Donaldson claims for ear protection, ear cancelling headphones, cable for her headphones, a handrail for the front stairs of her home and the Google Home System that Mrs. Donaldson uses to help her with memory problems and to keep her focussed on the tasks she is completing. Although there are no specific recommendations for these items, they are all supported by the evidence as being reasonable given Mrs. Donaldson’s accident injuries and I allow them.

[510] There are claims for power recliner chairs. Mrs. Donaldson claimed that she purchased two power recliner chairs so she can get into a comfortable position when

watching TV in the two rooms in which they have televisions. I consider reimbursement for one of the two chairs to be reasonable.

[511] Mrs. Donaldson also claims for a new TV and sound bar that they purchased because she found their existing TV flickered which bothered her eyes and the noise could not be adjusted to a level that she can tolerate. I observe that TVs and audio equipment have to be replaced approximately every 10 years. There was no evidence as to how old the flickering TV was but eventually the Donaldsons would have had to replace it. I do not allow the TV and sound bar.

[512] Mrs. Donaldson claims accommodation and food expenses for three days of testing at Lifemark. The assessment was recommended by Mrs. Donaldson's doctor and approved by ICBC. Mrs. Donaldson travelled from Castlegar to Kelowna to attend the three-day assessment. I allow these costs.

[513] Mrs. Donaldson also attended for vision therapy as recommended by Lifemark. Ms. Grayson is agreeable to the travel expenses for that therapy but not the accommodation. Given the distance between Castlegar and Kelowna, I am of the view that overnight accommodation was reasonable. I allow these costs.

[514] Mrs. Donaldson claims the costs of a consultation for Botox therapy. Dr. Cameron opined that she is a candidate for Botox therapy for her chronic pain. I allow this expense.

[515] Mrs. Donaldson claims the costs of "Weedman", a lawn mowing service and for the Window Guy for window cleaning. She also claims the cost of a robot vacuum that she purchased using points and has used instead of vacuuming herself. For the reasons given above pertaining to loss of housekeeping capacity, I allow these expenses. I do not allow the cost of their non-robot vacuum, a Dyson. While I accept Mr. Donaldson's evidence that the robot vacuum cannot get into all spaces that require vacuuming, the Donaldsons would require a vacuum had the accident not occurred. It is not reasonable to require Ms. Grayson to pay for the Dyson vacuum.

[516] Mrs. Donaldson claims the cost of a hotel room for her examination for discovery. I am of the view that this is not a special damage. It is a litigation expense for which there are other potential avenues to seek reimbursement. The same is true of the expenses for supplies for tracking special expenses.

[517] Ms. Grayson also objects to paying for a hotel room for Mrs. Donaldson to attend her video independent medical examination with Dr. Scarth. Mrs. Donaldson testified that because of her experience after the first examination for discovery when she felt suicidal, her doctor recommended that she have future discoveries in a neutral location. There is no evidence that her doctor recommended that independent medical examinations be in a neutral location. There is evidence that she attended independent medical examination at the premises of the examiners. I conclude the explanation is not sufficient. I do not allow this expense.

[518] Mrs. Donaldson claims a special toilet seat that she uses to assist with relieving herself when she is constipated due to pain relief medication. This is reasonable and I allow it.

[519] Mrs. Donaldson claimed for expenses to be repaid to her subrogated benefits provider, Manulife. Mrs. Donaldson's evidence on this topic was vague. Some of the subrogated claim relates to TMJ treatments which is not allowable. Apart from that, I have not heard evidence and received submissions on which of those items to which Manulife is subrogated fall into the categories that Ms. Grayson is not responsible for. I do not allow this amount.

[520] Subtracting the amounts that I have not allowed from the total of the list, and subtracting the amount that has being reimbursed by ICBC, I award special damages in the amount of \$24,774.57.

Summary of Damages and Costs

[521] In summary, I award the following:

Non-pecuniary damages:	\$250,000.00
Past loss of earning capacity:	\$450,000.00 (gross)
Future loss of earning capacity:	\$665,000.00
Cost of future care:	\$208,000.00
Special damages:	\$ 24,774.57

[522] The parties shall address appropriate deductions from past loss of earning capacity.

[523] Subject to matters of which I am not aware, I award Mrs. Donaldson costs at Scale B.

[524] If the parties wish to address deductions from past loss of earning capacity, costs or any other matters about which I am not aware, within 30 days of these reasons they shall arrange for a date. They shall deliver written submissions to each other within 45 days of these reasons, and a week prior to the hearing before me deliver the submissions with a joint brief of authorities.

“Matthews J.”