

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Barsky v. Simons*,
2023 BCSC 1826

Date: 20231018
Docket: M187542
Registry: Vancouver

Between:

Kathleen Alexandra Barsky

Plaintiff

And

Jeremy Thomas Simons and Alberto Arias

Defendants

Before: The Honourable Justice Majawa

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.
May 1-4, 8-12, and 15-19, 2023

Place and Date of Judgment:

Vancouver, B.C.
October 18, 2023

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INTRODUCTION

[1] The plaintiff, Kathleen Barsky, was involved in a T-bone type motor vehicle accident on March 8, 2018, (“Accident”). Ms. Barsky was the passenger in a vehicle driven by her friend, Jeremy Simons, who is a defendant in this case. The other vehicle involved in the Accident was driven by the other defendant, Alberto Arias. Liability between the two defendants is at issue. The quantum of Ms. Barsky’s damages is also at issue.

[2] Ms. Barsky claims that, as a result of the Accident, she has suffered multiple injuries to her shoulders, neck, and back that that have caused chronic pain. She also alleges that she has developed debilitating headaches arising from the injuries suffered in the Accident. Ms. Barsky also claims that she has suffered a mild traumatic brain injury and persistent symptomatic complaints including cognitive dysfunction. The plaintiff also alleges that the Accident caused a serious psychological injury. She seeks damages for pain and suffering, loss of earning capacity (both past and future), special damages, and the cost of future care.

[3] While the defendants do not agree with the quantum of damages sought by Ms. Barsky, they did not seriously challenge her credibility or reliability with respect to the extent of her injuries. Nor did they seriously challenge the credibility of the many lay witnesses called on her behalf. I have no trouble in finding that Ms. Barsky is a credible and reliable witness when it comes to the assessment of damages. In my view, Ms. Barsky accurately described her circumstances and symptoms before and after the Accident without embellishment, and I find her testimony in this respect was “consistent with the probabilities affecting the case, both as a whole and in existence at the time”: *Faryna v. Chorny*, [1952] 2 D.L.R. at 356, 1951 CanLII 252 (B.C.C.A.). I accept her testimony with respect to the extent and nature of her injuries having regard to the factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff’d 2012 BCCA 296. As will be discussed later, I have come to a different conclusion with respect to her reliability in respect of the circumstances of the Accident itself.

[4] I have determined that Mr. Simons is 90% at fault for the Accident and that Mr. Arias is 10% at fault. I have quantified Ms. Barsky's damages as being \$988,965. The following reasons detail my determination of liability and the quantum of damages in this personal injury action.

FACTS AND SUMMARY OF EVIDENCE

The Plaintiff, the Accident, and the Injuries

[5] Ms. Barsky was 45 years old at the time of trial. She was born in Vancouver, British Columbia.

[6] At the time of trial, Ms. Barsky was single and living on her own. In or around 2002, Ms. Barsky was diagnosed with a rare congenital heart disorder which required a significant amount of medication for a period of time. As I understand it, her heart condition was managed without the need for medication between 2007 and the Accident. Ms. Barsky testified that there is no known prognosis for her condition.

[7] Ms. Barsky reports having suffered from some symptoms of depression in or around the time she gave birth to her son and was diagnosed with the heart condition in 2002. At that time, she received some medication treatment for the depression but did not receive any counselling.

[8] Ms. Barsky also has a congenital defect such that she is visually impaired in her right eye. She described the condition as being related to her optic nerve not receiving or sending messages to and from her brain appropriately. In the time leading up to the Accident, she had managed this visual impairment well.

[9] The Accident occurred on March 8, 2018, at approximately 4:00 a.m. Ms. Barsky was the seat belted passenger in a Chevy S-10 pickup truck that was being driven by her friend, the defendant, Mr. Simons. Ms. Barsky and Mr. Simons were returning from Mr. Simons' blacksmith shop to the apartment building they both lived in.

[10] The Accident occurred when Mr. Simons attempted to make a left-hand turn. Liability for the Accident is at issue between the defendants, Mr. Simons and Mr. Arias.

[11] Ms. Barsky's recollection of the accident itself is blurry. After the collision, Ms. Barsky remembers hanging from her seatbelt, the truck being on its side, getting out with some difficulty, and eventually being in the back of an ambulance. But she and Mr. Simons eventually walked the relatively short distance home.

[12] When Ms. Barsky arrived home, she was not feeling well. She began to experience back and neck pain and felt very nauseous. She realized that she was seeing triple vision and had a blinding headache. She was also sick to her stomach. Mr. Simons' girlfriend called paramedics, and Ms. Barsky was taken to Vancouver General Hospital via ambulance. She does not recall how long she was at the hospital or what treatment she received. She went home that same day and attended her family doctor a few days later. Ms. Barsky's doctor told her that she had concussion-like symptoms.

[13] In the weeks after the Accident, Ms. Barsky experienced constant shoulder and back pain and a severe headache. She also had hip pain. She felt muddled and confused and was very sensitive to light and sound. The vision issues that she experienced the night of the Accident continued. Shortly after the shock of the Accident wore off, Ms. Barsky's mental state declined: she realized she was not going to be able to return to work anytime soon nor complete her on-the-job training. She was very irritable and volatile in the weeks following the Accident.

[14] In the months after the Accident, Ms. Barsky experienced headaches on a daily basis. On bad days, these headaches were blinding. And combined with nausea and light sensitivity, Ms. Barsky could not function. On good days, the headaches were continuous but less severe. Ms. Barsky also continued to experience significant and constant pain in her neck which also manifested as numbness in her arms. She also experienced low back pain which would come and go. Ms. Barsky's sleep was significantly affected following the Accident. Ms. Barsky

was struggling cognitively after the Accident such that she would repeat herself, lose her train of thought, and often have to search for words in the middle of conversations.

[15] By the end of 2018, Ms. Barsky's hip pain had almost entirely resolved but she was still frequently experiencing headaches. She continued to suffer from poor sleep and significant disturbances in her mood.

[16] Ms. Barsky's alcohol consumption increased significantly throughout 2019. At this time, she began to drink alone during the day. She reports that she was self-medicating with alcohol to deal with the effects the Accident had on her mental health and, in particular, her inability to return to work.

[17] By early 2020, Ms. Barsky reports that she had improved somewhat. Her cognitive symptoms improved and she was no longer embarrassed by them. At this time, she was making plans to return to work which assisted with her mood and outlook on life. She planned a graduated return to work ("GRTW") program that required her to be partnered with a colleague 100% of the time until she was able to work independently. She was ramping up for this return to work when the COVID-19 pandemic began in March 2020.

[18] Ms. Barsky did not cope well with the onset of the pandemic. The progress that Ms. Barsky struggled to build leading up to her expected return to work disappeared. Her treatments were suspended due to pandemic restrictions. She describes having given up all hope. Being single meant that the Covid-19 restrictions resulted in a significant period of solitude; Ms. Barsky was socially isolated and experiencing financial difficulties in relation to not working after the Accident. In addition, Ms. Barsky's two dogs died shortly after the onset of the pandemic.

[19] In the period from March 2020 until the end of June 2020, Ms. Barsky's mood and mental health deteriorated significantly. She still had daily severe headaches and a strong sense of hopelessness and resignation that her symptoms would not improve. Her drinking habit increased significantly during this time and friends

became concerned for her personal safety. Ms. Barsky's cognitive symptoms also continued to deteriorate during this period. She described herself as having very little patience and being frustrated frequently.

[20] As the lockdown restrictions lessened in the summer of 2020, Ms. Barsky began to return to her previous therapeutic routines. She also got a new dog which forced her to get out of bed, clean the house, and take care of herself.

[21] In the fall of 2021, Ms. Barsky returned to full-time employment. Ms. Barsky gave every bit of energy she had to her work and had little life outside work. She avoided parts of her job because she was unable to handle them. Her self-esteem crumbled, given that the pride she took in her work was diminishing. Oftentimes, she would find herself in bed at 7:30 or 8:00 p.m., sometimes after drinking an entire bottle of wine. Her speech issues worsened, as did her sleep and other mood issues.

[22] Ms. Barsky explains that worrying about her job and finances causes her depression symptoms to worsen, negatively impacting her physical conditions and cognition. Since taking on a new role in the fall of 2022, Ms. Barsky testified that her physical and mental health symptoms have worsened. At the time of trial, she only slept two to three hours per night and was not eating well. She reports that her neck and shoulder pain is consistent, particularly because she has not been seeing a registered massage therapist. Ms. Barsky has continued to have difficulty with her vision, and that contributes to her headaches. She states that she has significant or severe headaches four to five times per week and that she almost always has a constant baseline headache.

[23] Ms. Barsky's alcohol consumption and pattern of drinking increased since the Accident. Prior to the Accident, she would drink socially but since the Accident, she often drinks alone and uses alcohol to self medicate and assist with sleep. While she is not content with her level of alcohol consumption, Ms. Barsky feels she can manage her alcohol use.

Employment

[24] Following completion of her high school equivalency when she was about 18 years of age, Ms. Barsky worked in a number of service related positions.

Ms. Barsky was out of the workforce for a period of time following the birth of her son and the diagnosis of her heart condition. She re-entered the workforce at around age 27 when she returned to waitressing and bartending. Around that time, she attended a one-year college program focused on delivering social services and assisting those with mental health issues and addictions. She completed that program when she was approximately 28 years old in 2006 or 2007 and was awarded a diploma as a Community Support Worker.

[25] In or around 2007, Ms. Barsky moved to Vancouver to find a job in social services. She found employment immediately and proceeded to hold a number of full-time positions, mainly on Vancouver's Downtown East Side ("DTES"). In these positions, Ms. Barsky assisted those with substance use disorders and worked as a youth support worker. In 2010, Ms. Barsky obtained a full-time position as an employment assistance worker with the provincial Ministry of Social Development. In this role, she determined eligibility for benefits, managed cases, and interacted with clients on a personal level.

[26] In 2012, Ms. Barsky began an acting supervisor role where she supervised 30 client service workers and 20 employment assistance workers across the Lower Mainland. In this role she was responsible for payroll, performance appraisals, resolving community complaints, and exercising discretion as a supervisor. In 2015, Ms. Barsky's role was eliminated following a reorganization in the provincial government. She again found herself working in the DTES, now in a social assistance office where she took intake applications for pre-release inmates from various correctional facilities.

[27] In 2016, Ms. Barsky applied to be a Carrier Safety Inspector ("CSI") with the Commercial Vehicle Safety and Enforcement ("CVSE") branch of the provincial Ministry of Transportation and Infrastructure ("MOTI"). Ms. Barsky was hired and

began her role as a CSI trainee in September 2016. The formal process of training to become a fully qualified CSI is two years and includes courses offered through the Justice Institute of British Columbia. A CSI is responsible for monitoring trucking companies or carriers that must adhere to national safety standards. CSIs, amongst other things, carry out complex and lengthy audits of carriers to ensure that the companies are complying with their national safety code certificates. Robert Delisle, who spent more than 20 years with CVSE in numerous roles – including as its Director – describes being a CSI as the most challenging and demanding role within the organization.

[28] The audits conducted by CSIs are detailed and forensic in nature. Such audits include the review of maintenance records, pre-trip inspection reports, and driver's records. CSIs examine these records to ensure that a driver's hours of service and logbooks are accurate. The logbooks are compared with receipts and other third-party documentation to determine accuracy. CSI audits are reviewed by other CSI peers to ensure accuracy given the significant consequences of a finding of noncompliance on a carrier or trucking company's ability to operate. There is no doubt that this work requires a high level of concentration and attention to detail.

[29] Sandra Goes was Ms. Barsky's supervisor when she began as a CSI. Ms. Goes has been with the CVSE since 2009 and is currently one of two Deputy Regional Managers. She described Ms. Barsky's performance conducting audits as a CSI as being extraordinary. Ms. Barsky demonstrated an ability to condense very large amounts of information and identify linkages easily and quickly. Ms. Goes testified that Ms. Barsky's aptitude was something she has not seen before or since.

[30] CSIs also conduct roadside inspections which involve ensuring that certain national and international safety standards are met by the various trucks on the roads in British Columbia. This includes physical inspection of trucks' brakes, steering, and other safety components as well as ensuring that its cargo is secure. To maintain certification as a CSI, inspectors are required to complete at least 32 inspections annually. At the time of the Accident, Ms. Barsky was two courses shy of

completing the two-year long training program and she still needed to complete the inspection course and a mobile enforcement course.

[31] Ms. Barsky was recognized as a future leader by her management. In the training period between 2016 and 2018, Ms. Barsky was given projects by her supervisors and managers that would assist in preparing her for supervisory openings in the future. Ms. Goes said that Ms. Barsky was “by far” one of the best auditors she ever worked with, both in her time as an auditor and as a supervisor. Mr. Delisle described Ms. Barsky as being “very sharp” and a quick learner. He emphasized that she had the right mix of confidence, integrity, communications skills, and demeanour to make her an excellent CSI and future leader in the organization. At the time Ms. Barsky began as a CSI, Mr. Delisle managed 96 employees. Ms. Barsky was one of a handful of employees that Mr. Delisle had identified as a candidate for promotion.

[32] Ms. Barsky did not return to work for approximately one month after the Accident. She attempted to return to work in or around April 18, 2018. She was very motivated to return to work to complete the two remaining courses for her certification which had to be completed within the first two years of her employment. Ms. Barsky completed the in-class and testing components of those two remaining courses. Ms. Barsky pushed through physical discomfort and a fluctuating mood.

[33] Following completion of the required course work, she was also required to complete a physical evaluation as well as a number of inspections. She was unable to pass those evaluations. When she returned to work in April 2018, Ms. Barsky was very irritable and lacked stamina. She found that her organizational and time management skills had significantly deteriorated. She was taking much longer to go through the documents required in an audit and was easily distracted by interruptions. She missed a number of shifts. Having flexible hours was the only reason Ms. Barsky was able to complete or continue with her employment, at all.

[34] Ms. Barsky’s reports of her diminished function are corroborated by Mr. Delisle and Ms. Goes. Mr. Delisle testified that after her return, Ms. Barsky was

irritable with both teammates and clients and would become frustrated easily. This was inconsistent with her pre-Accident demeanour. Ms. Barsky also made mistakes in her work that she had not made before the Accident. Ms. Goes observed “sticky” notes all over Ms. Barsky’s workspace after she returned to work after the Accident. Ms. Barsky used those notes as reminders in respect of the progress she was making in her audit work and where she had left off. This was particularly striking to Ms. Goes because before the Accident, Ms. Barsky was able to conduct her audits and make the necessary linkages without these reminders. Ms. Goes realized that Ms. Barsky was unable to remember where in an audit she had left off from the previous day and would have to start all over again at the beginning. Given the nature and complexity of the work, Mr. Delisle and Ms. Goes determined that Ms. Barsky was no longer able to perform the duties of her employment.

[35] In or around September 2018, Ms. Barsky’s managers told her that they had observed a dramatic change in the quality of her work since the Accident. Given that a large component of her job as a CSI was to ensure the safety of the public, Ms. Barsky was told that she would not be able to return to work until she was in a position to do her job safely. While she describes her managers as being very understanding and kind when conveying this information, Ms. Barsky described this as “the worst day of her life.” I have no trouble concluding that Ms. Barsky’s self worth is largely related to her performance as an employee and the contribution she believes she makes to society in that role.

[36] After leaving work in September 2018, Ms. Barsky was placed on long-term disability. Her mental health deteriorated significantly during this time. She fell behind financially and, being single, had no one else to rely on. She withdrew socially, was not active physically, and her mood deteriorated.

[37] By the end of 2020, Ms. Barsky was slowly starting to rebuild her stamina and regain some time management skills. She began discussing a return to work with her general practitioner and occupational therapist. In late 2020 and early 2021,

Ms. Barsky's general practitioner submitted forms to Ms. Barsky's employer in respect of a proposed GRTW, but her employer rejected these proposals.

[38] By this time, Ms. Barsky was very anxious to return to work. Her employer and long-term disability insurance provider sent her to vocational training and assessment. Ultimately, Ms. Barsky was unhappy with the alternative employment proposed by the vocational assessment. She hired a lawyer to assist her with a return to work in light of her employer's resistance. The issue was resolved after she attended a neurological assessment. She returned to work in May 2021 with a GRTW plan.

[39] The GRTW was designed to have Ms. Barsky eventually return to full-time work. As I understand it, returning part-time to CVSE was not an option. In other words, once she completed the GRTW, Ms. Barsky could *only* return to CVSE full-time. When Ms. Barsky began the GRTW, her physical symptoms had improved somewhat and she was in better shape than in 2019. However, she was nowhere near her pre-Accident physical condition

[40] Throughout the GRTW, Ms. Barsky's mood, depression, and anxiety still affected her; however, she tried to ignore these symptoms and convinced herself that they would improve as she returned to permanent work. Ms. Barsky pushed very hard to return to her full duties at work, but this deteriorated her mental health. Her headaches began to increase in frequency and severity. By the time Ms. Barsky completed the six-week long GRTW in June 2021, she was exhausted but remained determined.

[41] Ms. Barsky returned to full-time work duties in June 2021. She was able to complete the two courses that she was previously unable to complete by July 2021 and completed the necessary number of inspections over the summer to become fully certified as a CSI by October 2021. During the time period between June 2021 and October 2021, Ms. Barsky's work duties were somewhat limited compared to before the Accident as she was permitted to prioritize her course work over work responsibilities.

[42] However, once she completed those courses, she was expected to return to her full auditing duties and conduct the occasional investigation. Ms. Barsky now found auditing to be very difficult: she struggled to multitask and organize paperwork. It took her nearly twice the amount of time to go through driver logbooks compared to before the Accident. She made mistakes which her peers noted in the CVSE peer reviews, something that had not happened before the Accident.

[43] At the end of 2021, Ms. Barsky's employment duties changed for a period of time following the significant floods in British Columbia. Ms. Barsky's job became more sedentary and less mentally intense: she ensured that vehicles did not access roads that were closed by the flooding. But when she returned to her usual duties in January or February 2022, she began to struggle significantly. She felt pressure to complete a number of outstanding audits. And, given her capability, she was taking much longer than expected to complete them.

[44] Ms. Barsky was once again able to modify her job duties due to the series of incidents that occurred on British Columbia highways where a number of overpasses were struck by commercial vehicles. She was assigned to investigate the reasons for these incidents, and this was less mentally intensive than audit work.

[45] In August 2022, Ms. Barsky applied for a position as a commercial transport enforcement officer ("CTEO") supervisor. She was successful and was appointed to this position in September 2022. Unlike CSI, this role did not require mentally intensive audits and complex paperwork. Ms. Barsky felt that this would be a better match for her post-Accident capabilities and she would be able to use the skills she had acquired as a supervisor with her previous employment. Her appointment as a CTEO supervisor came with an approximately \$10,000 per year increase in pay. Her duties as a CTEO supervisor involve a significant amount of human resources duties which takes a considerable amount of her time. There is also a significant amount of monthly and biweekly reporting as well as scheduling and payroll duties. The role is somewhat flexible in terms of hours, and she finds this helpful for managing her various limitations.

[46] Ms. Barsky was surprised to find this new role somewhat overwhelming. As a result, she began to delegate work to a co-worker, Tom Cirello, so that she could focus on the HR and performance management aspects of her role. Ms. Barsky testified that her management would not likely approve of the amount of work she has delegated to Mr. Cirello given that he is not qualified for that position. However, she thinks she would not be able to continue in the job if Mr. Cirello was not assisting her.

[47] Ms. Barsky testified that although she was originally very excited about her position as a CTEO supervisor, that excitement has waned as she has become more overwhelmed with the job. She testifies that her physical and cognitive symptoms have been gradually increasing since taking on this role and she is certain that she cannot sustain this level of employment. Ms. Barsky testifies that she is constantly stressed out and that her anxiety is worse than it has been for many years. She says she cannot focus and her depression is starting to return. Her thoughts are consumed with the possibility of her life coming crashing down around her, and she feels that she is close to the edge.

[48] Before the Accident, Ms. Barsky testified that – given her pension entitlement from her work with the provincial public service – she would have likely retired at 61. Currently, Ms. Barsky does not believe that her present career is sustainable. She believes that something has to change in the next few years. In particular, she believes she requires more flexibility or a part-time position. Ms. Barsky stressed that it is important for her to work, that she takes a great deal of pride from her work, and that her self-esteem is rooted in her contributions as an employee. She hopes to find a position that will fulfil her desire to help others and her need for purpose. Above all, she seeks a job that will allow her to have balance between life and work. This balance is currently missing because she is physically and mentally exhausted from her work. Given her experience with government bureaucracy, she thinks that part-time advocacy work would be a good fit. Or maybe work as a hospice care provider.

[49] In addition to her work as a CSI and as a social worker in the DTES, Ms. Barsky testified that she worked in a security role at a live music venue in Vancouver beginning in or about 2013 until the Accident. Ms. Barsky described herself as an avid music lover. This role allowed her to see musical acts while getting paid. Between 2016 to 2018, the frequency of this employment varied, but she says that she would usually work one to two shows per weekend. In this role, Ms. Barsky would work five to six-hour shifts beginning at approximately 7:00 p.m. She would check identification, manage the backstage area from a security perspective, and do general crowd maintenance. She says was paid \$25 per hour in cash and estimates that she made approximately \$800 to \$1,000 per month or approximately \$10,000 per year from this employment; however, she did not formally track the amount she earned from this work. Ms. Barsky did not report this cash income on her income tax return. She denied that this was intentional; rather she said that it just did not occur to her to do so. I find this difficult to accept, considering her attention to detail and the significance of this income relative to her T4 income. She has not returned to this work since the Accident.

Recreational Activities

[50] Despite her congenital heart and eye condition, Ms. Barsky describes her health in the five years leading up to the Accident as being very good. In those years, Ms. Barsky made a concerted effort to get into the best shape of her life and frequently attended the gym. Ms. Barsky found the gym to be a good stress reliever and attended between five and seven nights per week. She enjoyed “strong person” competitions and assisted with organization and coaching of athletes for these events. She also competed in Femsport: a strength and agility competition for those who identify as women. Ms. Barsky explained that leading up to her 40th birthday, she had committed to become more physically fit, had lost a considerable amount of weight, and was in the best shape of her life. Since the Accident, Ms. Barsky’s attends the gym sporadically, at best.

[51] Ms. Barsky’s social life before the Accident was active. She engaged with friends three to four nights per week. She would attend two to three live music

events per week. She spent approximately two hours per day training her dogs. This also kept her in shape. Furthermore, she was an avid sport shooter and actively engaged in target practice. Following the Accident, Ms. Barsky withdrew socially and only maintained relationships with a few friends.

[52] As Ms. Barsky attempted to return to work in the spring of 2021, she also tried to reengage socially. She attended a few football games and some activities with other dog owners. She also started to play slow pitch softball again. Ms. Barsky did a significant amount of volunteer work and event planning for hospital foundations before the Accident but has not done so since.

Housekeeping

[53] Ms. Barsky has lived in the same one-bedroom apartment since 2017. As Ms. Barsky lived alone, and does so today, she was entirely responsible for her home's upkeep. Prior to the Accident, Ms. Barsky maintained a tidy and clean house. She washed dishes right after they were used and would clean the floor immediately if something was spilled or her dogs had an accident. She did laundry frequently. She did heavier chores like dusting and deeper cleaning on the weekends. Ryan Wylie, a close friend of Ms. Barsky, observed her residence before the Accident and testified that it was spotless: no dishes were in the sink and the nothing was out of place.

[54] Following the Accident, Ms. Barsky became almost entirely incapable of carrying out the duties of maintaining her household. She described her house as being a "disaster" with piles of laundry, dirty dishes, and mess everywhere. As I understand it, her incapacity related more to her suffering mental health than her physical limitations post-Accident, although physical limitations played some role. Mr. Wylie described a dramatic change in the cleanliness of Ms. Barsky's residence following the Accident. He described her residence as being dirty: she would not take out the garbage, clothes were everywhere, and there was no food in the fridge.

[55] At the time of trial, Ms. Barsky's apartment is in much better shape than it was before. However, she attributes this to assistance from a professional organizer and cleaner – services she began receiving in early 2023.

Treatments

[56] Ms. Barsky has undergone a number of treatments since the Accident, including physiotherapy, vestibular physiotherapy, psychological counselling, massage therapy, kinesiology, occupational therapy, rehabilitation assistance, and speech language pathology.

[57] In the early months following the Accident, Ms. Barsky saw a physiotherapist and psychologist regularly. She saw her psychologist, Dr. Owen James, twice a month. At that time, her mood was volatile and she described herself as being angry all the time. She had not been bathing or eating properly. She recognized she needed care for her mental health. She found, and continues to find, psychological counselling very helpful.

[58] Ms. Barsky received treatment from an occupational therapist because the cognitive symptoms have caused her difficulty organizing and managing herself. Her occupational therapist assisted Ms. Barsky with goal setting and planning in an effort to assist her eventual return to work. He recommended that she see a speech therapist because she was repeating herself a lot, would often speak in the wrong tense, and was frequently unable to find the words to express herself. As a result, she was embarrassed and stopped communicating with friends for a period of time.

[59] Ms. Barsky also saw an ophthalmologist around this time. She says that the Accident reignited the congenital condition that causes vision impairment in her right eye. As she explained it, the Accident caused her to have significant depth perception issues, resulting in extreme fatigue and headaches.

[60] Massage therapy gave Ms. Barsky some temporary relief from the physical pain in her back, neck, and shoulders. Around this time, Ms. Barsky began seeing a

vestibular physiotherapist to address her consistent dizziness and ringing in her ears.

[61] Ms. Barsky testified to being terrified of prescription medications following her lengthy experience with such drugs when they were used to treat her heart condition. She experienced significant side effects from prescription medications. She has also had a number of allergic reactions to various medications. From my understanding, the only medication that Ms. Barsky was taking to treat her physical conditions was over-the-counter anti-inflammatories.

[62] At the time of trial, Ms. Barsky continues to see her psychologist on a regular basis and finds this very helpful. Although she has not gone to massage therapy for some time, she would like to attend when it works with her schedule because it gives her some temporary relief. She continues to work with her occupational therapist in order to assist with her executive functioning and organizing her home. She has completed the vestibular physiotherapy program and has not attended other physiotherapy for some time. She is no longer seeing the kinesiologist because of scheduling conflicts but testified that she would like to return to it.

EXPERT MEDICAL AND CAPACITY EVIDENCE

Psychiatrists

[63] Dr. Shaohua Lu is a psychiatrist and was qualified as an expert witness to give opinion evidence. Dr. Lu examined Ms. Barsky on June 29, 2022, and prepared an independent medical report on behalf of the plaintiff dated July 14, 2022. Dr. Lu testified at trial. In my view, Dr. Lu's opinion was not undermined during cross-examination. I have given his opinion considerable weight.

[64] Dr. Lu opines that the Accident played a direct role in the significant deterioration of Ms. Barsky's mental health. He comes to this conclusion after acknowledging that her psychiatric and medical history has made Ms. Barsky vulnerable to psychological injuries. Nonetheless, in Dr. Lu's opinion there was no

medical or clinical indication that, in the absence of the Accident, Ms. Barsky would have relapsed to any of her prior psychiatric symptoms.

[65] Dr. Lu diagnosed Ms. Barsky with a mild traumatic brain injury (“MTBI”). In his opinion, Ms. Barsky demonstrates what he calls the “classic triad” of cognitive, physical, and psychological features indicative of a MTBI. In particular, he notes that Ms. Barsky suffered from common MTBI symptoms: fatigue, memory and concentration difficulties, reduced sustained mental focus, dizziness, light and sound sensitivity, persistent headaches, visual changes, reduced mental stamina, mood changes, irritability, anxiety, and sleep pattern changes.

[66] In Dr. Lu’s opinion, Ms. Barsky has not made a full functional recovery since the Accident and she continues to have many of the symptoms associated with a MTBI. Dr. Lu explained that individuals with a MTBI are able to learn new things and retain their intelligence; however, their ability to meet demands is impaired. He refers to this as diminished peak performance. Dr. Lu explained that individuals with a MTBI can often do well with familiar tasks or in situations with little distraction and a quiet environment. However, MTBI leads to diminished efficiency when demands are higher. These individuals may be able to complete their required tasks at any given time but their reserve is diminished such that after doing so they “crash”.

[67] Dr. Lu explains that a MTBI can cause long-term persistent symptoms across an individual’s cognitive, physical, and emotional domains. Individuals with a MTBI often demonstrate a decreased frustration tolerance, a loss of self-confidence, and reduced emotional control. The symptoms are interrelated with pain and mood changes. In Dr. Lu’s opinion, Ms. Barsky’s clinical symptoms are typical of a MTBI and of the partial recovery of a MTBI in light of some of the improvements she has made compared to the initial onset following the Accident. However, her ability to sustain mental focus and mental attention remains reduced as well as her ability to balance competing demands.

[68] Dr. Lu opines that Ms. Barsky’s prognosis for recovery is poor; in his view, no further functional recovery is expected given that it has been over four years since

the Accident. In Dr. Lu's opinion, Ms. Barsky will continue to have her current symptoms and suffer from her relative decrease in functional ability. Dr. Lu opines that Ms. Barsky's MTBI has a direct relationship to her ability to function in her work environment.

[69] In my view, the evidence supports the facts upon which Dr. Lu based his opinion. I accept that Ms. Barsky has a reduced reserve to meet her pre-Accident ability to balance work, personal, and family demands. While she can learn and acquire new skills, such as a musical instrument, the ability to utilize the skills in a meaningful way has been negatively affected by the MTBI, and she has not regained her baseline functional capacity. I accept that she continues to experience difficulties consistent with the diagnosis of a MTBI. The fact that she scored relatively high on the Montréal cognitive assessment in 2023 does not change my view on this. Dr. Lu testified that assessment is "useless" for assessing a MTBI. Rather, its proper use is a screening tool for individuals with dementia; it is nowhere near detailed enough to assess the severity or presence of a MTBI.

[70] Dr. Lu opines that Ms. Barsky's chronic pain and cognitive symptoms negatively affect her psychological function and have caused other psychiatric symptoms which have resulted in further reduction in mental and physical stamina, sleep disturbance, and fatigue. When Ms. Barsky's pain endures and affects her ability to work, her mood and ability to cope correspondingly worsen. This is part of the interrelationship between pain and psychological conditions. Dr. Lu explains that once reactivated, Ms. Barsky's cognitive and psychiatric symptoms and chronic pain are intermingled; the chronic cognitive symptoms and pain reinforce her anxiety and mood symptoms and the frustration and demoralization associated with the functional changes and physical deterioration are major factors in the continued deterioration of her psychiatric symptoms. This is particularly acute for someone who places a great deal of importance on work for their self worth as Ms. Barsky does.

[71] Dr. Lu opines that at the time of his assessment, Ms. Barsky demonstrated a problematic use of alcohol. However, in Dr. Lu's opinion, Ms. Barsky's pre-Accident

alcohol use did not meet his criteria for misuse. Dr. Lu explained that determining whether someone misuses alcohol is a complex task. He explained that in general, someone who misuses alcohol has a functional impairment in their work, interpersonal, and social lives; however, he acknowledges that some individuals can display no significant functional impairment in those three areas but still have a misuse of alcohol. In Dr. Lu's opinion, because Ms. Barsky was able to work full time before the Accident, took on extra employment in addition to her full-time work, engaged in social activities, and there were no indications of interpersonal functional impairment, her pre-Accident use of alcohol was not particularly problematic. Nonetheless he did acknowledge that her pattern of binge drinking before the Accident was not healthy. I agree with Dr. Lu's opinion with regard to Ms. Barsky's pre-Accident use of alcohol.

[72] Dr. Lu attributes Ms. Barsky's increase in alcohol use to the interrelationship between the Accident and the subsequent MTBI, chronic pain, and the functional impairments she experienced at work. Dr. Lu believes there is a major risk that Ms. Barsky's symptoms will rapidly deteriorate if her current alcohol misuse progresses. Unfortunately, Dr. Lu's believes that given her continued chronic cognitive, physical, and psychological symptoms, Ms. Barsky is at a high risk of developing worse alcohol misuse. However, Dr. Lu is somewhat hopeful because Ms. Barsky has demonstrated some insight and recognition of the negative impacts of her alcohol misuse.

[73] Dr. Lu opines that Ms. Barsky suffered a relapse of a major depressive disorder which he attributes to the interrelationship between the chronic pain and cognitive impairments experienced by Ms. Barsky following the Accident.

[74] In coming to his diagnosis of major depression, Dr. Lu considered the various and significant losses that Ms. Barsky suffered in the years since the Accident including the death of loved ones. Dr. Lu acknowledged that symptoms of acute grief following the death of a loved one can be identical to the symptoms of major depression. However, when looking at Ms. Barsky's overall clinical progression,

Dr. Lu concluded that her symptoms were indicative of a relapse of major depressive disorder as opposed to the temporal grief one experiences after the loss of a loved one.

[75] In Dr. Lu's opinion, at the time of the assessment, Ms. Barsky was at a crucial stage of recovery in respect of her psychological symptoms. In his view, if Ms. Barsky continues her alcohol misuse, her residual mood, cognitive, physical, and psychological symptoms combined may limit the longevity of her current work routine. He recommends that Ms. Barsky undergo a trial of antidepressant medication and sleep medication. In Dr. Lu's opinion, Ms. Barsky would need to undergo such a trial for at least two years and medication dosages may need to be adjusted.

[76] Dr. Lu succinctly summarizes Ms. Barsky's rather negative prognosis as follows:

Ms. Barsky has a guarded prognosis. On a positive note, she had dealt with severe personal difficulties in the past. But she has a combination of overlapping conditions: MTBI, chronic pain, major depression, and alcohol misuse. There are secondary losses and uncertainties regarding her physical capacity and her ability to return to her usual capacity. More likely than not, she will not be able to regain her former capacity. A complete resolution of her physical, cognitive, and psychological symptoms is unlikely. She is expected to have ongoing fluctuation in her pain with corresponding limitations. Equally, her risk associated with her alcohol misuse remains. The 2018 MVA has substantially worsened her lifelong psychiatric trajectory.

[77] Dr. Paul Milanese is a psychiatrist and was also qualified to give expert opinion evidence. Dr. Milanese prepared a rebuttal opinion dated March 15, 2023, on behalf of the defendant Mr. Simons, in response to Dr. Lu's report. Dr. Milanese did not meet, speak with, or personally assess Ms. Barsky. Rather, his report is based upon the review of a number of documents including clinical records relating to Ms. Barsky.

[78] Dr. Milanese takes issue with a number of Dr. Lu's diagnoses. In particular, while Dr. Milanese agrees that Ms. Barsky developed symptoms of a major depressive disorder shortly after the Accident, he does not agree that Ms. Barsky

continued to have these symptoms at the time Dr. Lu assessed her on June 29, 2022.

[79] In cross-examination, Dr. Milanese acknowledged that in order to make a diagnosis of a psychiatric condition, the fifth edition of the Diagnostic and Statistical Manual requires that the mental health professional conduct a structured interview process with the patient. Dr. Milanese acknowledged that the structured interview process is a key tool in making a diagnosis, in part because it permits the assessor to make further inquiries about issues as they arise.

[80] In his report, Dr. Milanese references a number of clinical records in coming to his conclusion that Dr. Lu was incorrect in diagnosing Ms. Barsky with the continuing major depressive episode. In the clinical records referenced by Dr. Milanese, various treatment providers reference improvements in Ms. Barsky's mood or increases in her activity levels at particular times. In Dr. Milanese's opinion, these observations are not consistent with an individual who is suffering from a continued major depressive episode. Dr. Milanese opines that Ms. Barsky's depression has been in remission since the beginning of February 2020.

[81] I give little weight to Dr. Milanese's opinion in respect of Ms. Barsky's depression being in remission. As stated earlier, Dr. Milanese was not in a position to make such a diagnosis given that he did not meet or interview and conduct a structured interview with Ms. Barsky. Furthermore, Dr. Milanese acknowledged, during cross-examination, that there were a number of entries in the clinical records in which various treatment providers referenced Ms. Barsky as having symptoms consistent with depression during the same time period in which Dr. Milanese relied on clinical records referencing improvements being made. However, the clinical entries in which ongoing symptoms are discussed are not referenced in Dr. Milanese's report.

[82] Dr. Milanese's reason for not including such records appears to be a result of his interpretation of those clinical records. For example, in a clinical entry by Ms. Barsky's general practitioner dated February 7, 2020, the general practitioner

listed a number of symptoms of depression under the heading “complaints on presentation.” Dr. Milanese explained that he interpreted this entry to be referring to symptoms that Ms. Barsky had some time before because there was an entry in the same clinical note saying that “condition has improved.” Ultimately Dr. Milanese acknowledged that the availability of multiple interpretations of a clinical record is illustrative of the limits of their use. Had Dr. Milanese interviewed Ms. Barsky, he could have asked her questions about these clinical records.

[83] I find Dr. Milanese’s report to be of limited utility and I give the opinions expressed therein very little weight. I adopt this Court’s previous view on the limited utility of these “critique” style reports: for example, see *Wong v. Campbell*, 2020 BCSC 243 at paras. 51-56 and the authorities cited therein, and *Donovan v. Parker*, 2014 BCSC 668 at para. 37.

Physiatrist

[84] Dr. Lisa Caillier is a physiatrist and was qualified as an expert witness to give opinion evidence on the diagnosis, treatment, and prognosis regarding headaches, chronic pain, MTBIs, cognitive dysfunction, musculoskeletal injuries, and sleep issues. She was also qualified to provide her opinion on the impact that these conditions have on an individual’s vocation, recreation, and function. Dr. Caillier examined Ms. Barsky on January 6, 2023, and prepared an independent medical report on behalf of the plaintiff dated that same day. Dr. Caillier testified at trial. In my view, Dr. Caillier’s opinion was not undermined on cross-examination. Dr. Caillier was aware of Ms. Barsky’s pre-existing issues with mental health, her level of alcohol use, and sleep disturbances when she made her diagnoses. I have given her opinion considerable weight.

[85] Dr. Caillier made the following diagnoses in respect of Ms. Barsky:

- a) Chronic pain in her neck, upper back, and shoulder girdle; all being soft tissue in nature.

- b) Chronic post-traumatic headaches. In Dr. Caillier's opinion, the origin of Ms. Barsky's headaches is soft tissue injuries to her neck. Ms. Barsky's MTBI, poor sleep, and mental health also play a role in her headaches.
- c) Emotional and psychological symptoms, namely depression, frustration irritability, anger, anxiety, social isolation, change in personality, increased alcohol use, and decreased motivation. Dr. Caillier defers to experts in psychiatry and/or psychology in respect of this diagnoses but recommends that Ms. Barsky continue working with a psychologist to assist her in reaching a pre-Accident level of function.
- d) MTBI and persistent symptoms in the form of altered attention, concentration, recall, organization skills, reduced multitasking as well as emotional and psychological symptoms. Related physiological symptoms include fatigue, headaches, dizziness, noise sensitivity, light sensitivity, altered sleep, and balance. In Dr. Caillier's opinion, these symptoms are multifactorial in nature as there are a number of contributing factors.
- e) Cognitive dysfunction. In Dr. Caillier's opinion, Ms. Barsky's cognitive dysfunction is multifactorial in nature and is not solely related to the MTBI. Rather, her cognitive dysfunction is likely secondary to her chronic pain, headache, fatigue, lack of rest, and her mental health symptoms.
- f) Deconditioning. In Dr. Caillier's opinion, Ms. Barsky's physical deconditioning exacerbates her ongoing pain complaints. This deconditioning also increases her susceptibility and vulnerability for worsening her pain when she engages in activities that she has not engaged in for some time or when she is engaged in activities that are repetitive, sustained, or heavier in nature.

[86] Dr. Caillier concluded that all of the above noted diagnoses are caused by the Accident.

[87] Dr. Caillier's prognosis for Ms. Barsky's conditions is rather guarded. In her opinion, Ms. Barsky's headaches are unlikely to resolve and she is likely to have headaches now and into the future. These headaches, in Dr. Caillier's opinion, will likely have a negative impact on Ms. Barsky cognitive capabilities and will reduce her ability to focus and retain and share information.

[88] Dr. Caillier opines that Ms. Barsky's chronic pain is also unlikely to resolve. In her opinion, Ms. Barsky is likely to experience pain on a daily basis for the rest of her life; however, she notes that there are opportunities for Ms. Barsky to better manage her pain.

[89] The MTBI symptoms are interrelated with Ms. Barsky's headache, pain, fatigue, sleep, and mental health issues. These ailments operate cyclically, negatively impacting her functioning. In Dr. Caillier's opinion, Ms. Barsky will likely have ongoing persistent cognitive deficits, emotional and psychological symptoms, and physiological symptoms attributed to the MTBI now and in the future. In her opinion, Ms. Barsky is at risk of worsening her cognitive, emotional, and psychological and physiological symptoms if she was to sustain a brain injury in the future.

[90] Dr. Caillier opines that Ms. Barsky is unlikely to return to her pre-Accident level of functioning at home, work, or recreationally.

[91] Given the interrelated, and multifactorial nature, of Ms. Barsky's diagnoses, Dr. Caillier believes Ms. Barsky has opportunities to improve her pain management and functional ability if she follows a number of recommendations made in her report. Those recommendations will be discussed under cost of future care.

Neurologist

[92] Dr. Donald Cameron is a neurologist and was qualified as an expert witness to provide the Court with his opinion on the diagnosis, assessment, and treatment of individuals with MTBI, headaches, posttraumatic brain injury syndrome ("PTBIS") and chronic pain. Dr. Cameron examined Ms. Barsky on January 24, 2023, and

prepared an independent medical report on behalf of the defendant, Mr. Simons, dated January 29, 2023. Dr. Cameron testified at trial.

[93] Dr. Cameron explained that the majority of individuals who suffer a MTBI do not go on to develop PTBIS. The majority of those who do develop PTBIS have resolution of their symptoms within a few weeks. However, approximately 10 to 25% of those with PTBIS have symptoms that persist. Symptoms of PTBIS include headaches, dizziness, blurred vision, difficulty with multitasking and making decisions, a decrease in self-confidence and self-esteem, increased irritability and mood swings, exhaustion, overall decrease in physical and mental stamina, becoming overwhelmed with crowds, and a decreased ability to socialize. To be diagnosed with PTBIS, an individual must have a majority of the symptoms; two to three symptoms is not sufficient to warrant a diagnosis.

[94] In Dr. Cameron's opinion, Ms. Barsky suffered a MTBI at the time of the Accident. In Dr. Cameron's opinion it is "possible" that Ms. Barsky has developed symptoms of PTBIS. However, in his view the symptoms of PTBIS that she reported are "probably significantly contributed" by other factors. For example, the cognitive problems that Ms. Barsky has complained of are, in Dr. Cameron's opinion, probably significantly contributed to by her chronic pain and posttraumatic headaches that developed following the Accident. In his view, the anxiety and depression that Ms. Barsky complained of are also a likely contributor to her cognitive complaints. In his opinion, the headaches that Ms. Barsky complains of currently experiencing are likely musculoskeletal or cervicogenic in origin.

[95] Dr. Cameron opines that Ms. Barsky has been rendered partially disabled due to the problems she has developed as a result of the physical injuries that she sustained at the time of the Accident. He states the following:

It is my opinion that ongoing cognitive problems are multifactorial in etiology, and probably predominantly due to chronic pain and discomfort, post-traumatic headaches, psychological problems, and possibly still residual to the mild traumatic brain injury that she sustained at the time of the [Accident]...

[96] Dr. Cameron states that Ms. Barsky will likely remain permanently partially disabled given that over four years have elapsed since the Accident and adult patients in her age group typically improve up to approximately two years following a physical injury.

[97] Dr. Cameron is somewhat equivocal on the reasons why Ms. Barsky has developed symptoms consistent with PTBIS. However, at the end of the day, it is her symptoms and the effect they have had and will likely continue to have on her function, and not the formal diagnosis, that is relevant for the purposes of assessing the plaintiff's damages. Dr. Cameron's opinion does not undermine the symptoms reported by Ms. Barsky in any substantial manner.

[98] In his examination in chief, Dr. Cameron clarified that Ms. Barsky reported that her headaches have reduced to once or twice a week in frequency from the daily headaches she was experiencing following the Accident. At one point in his report, he states that Ms. Barsky "complains of headaches behind her ears on a daily basis since the Accident." And, at another point in his report, Dr. Cameron states that "the ongoing headaches which she reports still occurring about once or twice a week...." Dr. Cameron was taken to the notes he made during his assessment of Ms. Barsky, and it is not clear to me from those notes that his reference to her having daily headaches was only in reference to the period immediately following the Accident. Given this, I find that Dr. Cameron's report does not undermine Ms. Barsky's testimony that she continues to experience headaches on a daily basis.

Occupational Therapists

[99] Jacquelyn Abdel-Barr is an occupational therapist and was qualified to give opinion evidence in the area of life care planning, functional capacity evaluation, and the assessment of the effect that individuals' physical, cognitive, emotional, and social impairments have on their daily lives. Ms. Abdel-Barr assessed Ms. Barsky in her home on January 17, 2023. She prepared a cost of future care report on behalf of the plaintiff dated January 26, 2023.

[100] Gerald Kerr is also an occupational therapist and was qualified to give opinion evidence in essentially the same areas as Ms. Abdel-Barr. Mr. Kerr prepared a rebuttal opinion on behalf of the defendant, Mr. Simons, in response to Ms. Abdel-Barr's report. Mr. Kerr did not meet, speak with, or personally assess Ms. Barsky. As stated earlier, I find that there is limited utility in an occupational therapist's opinion on the cost of a plaintiff's future care needs in circumstances where the occupational therapist does not meet or assess the plaintiff themselves. As Mr. Kerr acknowledged, when assessing an individual's care needs, it is important to speak with, observe, assess and evaluate an individual in order to provide their opinion. I repeat my earlier comments on the limited utility of these "critique" style reports.

LIABILITY

The Law

[101] In determining liability, this Court's task is to assess the defendants' blameworthiness. As stated by our Court of Appeal in *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at para. 46: "Fault or blameworthiness evaluates the parties' conduct in the circumstances and the extent or degree to which it may be said to depart from the standard of reasonable care." If the court is unable to determine the degrees of fault, liability must be apportioned equally: *Negligence Act*, R.S.B.C. 1996, c. 333 s. 1(2).

[102] The Accident occurred on March 8, 2018, at approximately 4:00 a.m. when the defendant, Mr. Simons, attempted to make a left hand turn across the double yellow center line dividing the roadway and collided with the vehicle driven by Mr. Arias who was travelling in the opposite direction on the other side of the roadway. As the left turn was made at a place other than an intersection, the applicable provision of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA], is s. 166. The relevant portion of s. 166 provides that the left turning vehicle must ascertain that the turn can be made safely:

166 A driver of a vehicle must not turn the vehicle to the left from a highway at a place other than an intersection unless

...

(c) the driver has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway.

[103] As Ms. Simons was turning left across a double-yellow line, s. 156 of the *MVA* is also relevant. As explained by Affleck J. in *Banic-Govc v. Timm*, 2018 BCSC 1073 at para. 19, s. 156 provides that a driver intending to turn across a double solid line in order to leave a highway must first determine if it was safe to do so.

[104] Having the right of way, which Mr. Arias had as the dominant vehicle, does not insulate a driver from an assessment of whether that driver (with the right of way) exercised reasonable care in all the circumstances. This is reflected in s. 144(1) of the *MVA*, which provides that all drivers on a roadway are required to drive with due care and attention, with reasonable consideration for others, and at a speed that is not excessive relative to the road, traffic, visibility and weather conditions. As explained by Harris J.A. in *Nerval v. Khehra*, 2012 BCCA 436 at paras. 37-38; even if a left-turning driver can be said to be at fault for starting a turn when there is an immediate hazard, it does not follow that the through driver, as the dominant driver, cannot also be found to have been negligent. Groberman J.A. succinctly summarized the law in this way in *Salaam v. Abramovic*, 2010 BCCA 212:

[21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the *Motor Vehicle Act* and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

Discussion

[105] The Court heard testimony from Mr. Arias, the driver of the dominant vehicle, and Ms. Barsky, the plaintiff and passenger in the vehicle driven by Mr. Simons. Mr. Simons did not testify. A member of the Vancouver Police Department and a

member of the Vancouver Fire Department also provided evidence of their observations after arriving at the scene of the Accident; however, neither of them witnessed the Accident.

[106] Mr. Arias submits that Mr. Simons is entirely responsible for the Accident. He argues that Mr. Simons turned left when it was not safe to do so. He further submits that Mr. Simons was intoxicated, sleep deprived, and physically exhausted at the time of the Accident.

[107] Mr. Simons submits that Mr. Arias is liable for the Accident because he did not exercise reasonable care with respect to his speed and his attentiveness to the roadway and that he did not comply with the signal control light at the intersection that preceded the location where the Accident occurred. Should he be found to be liable as the servient driver, Mr. Simons submits that liability should be apportioned equally between the two defendants.

[108] There is no allegation that Ms. Barsky bears any responsibility for the Accident. Ms. Barsky takes the position that, as the servient driver, Mr. Simons is liable for the Accident. She submits that Mr. Arias may be contributorily negligent due to the speed he was travelling and that the fact that it can be inferred that he was not paying appropriate attention. However, Ms. Barsky suggests that any negligence on the part of Mr. Arias should be proportionally small.

[109] In assessing the evidence in respect of liability, the credibility and reliability of the witnesses who testified is important. The assessment of reliability and credibility involve different concepts. Justice E. McDonald succinctly summarized the approach in *Liu v. Keurdian*, 2022 BCSC 1334:

[8] ... As explained in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (Ont. C.A.) at 526 [*Morrissey*], credibility refers to the veracity of a witness's testimony, while reliability is concerned with the accuracy of the testimony based on the ability of the witness to observe, recall and recount the events. A witness who is not credible cannot give reliable evidence on the same point. Further, credibility does not equate to reliability which means that a credible witness may give unreliable evidence: *R. v. H.C.*, 2009 ONCA 56 (Ont. C.A.) at para. 41, citing *Morrissey*, at 526.

[110] I have considered the often-cited factors summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187 [*Bradshaw*], aff'd 2012 BCCA 296, in assessing the credibility of Ms. Barsky and Mr. Arias. This assessment of credibility determines whether I will accept all, some, or none of their evidence: *Currie v. Taylor*, 2014 BCCA 51 at para. 33. The factors at para. 186 of *Bradshaw* include:

...the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [citations omitted]. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time [citation omitted].

[111] The Accident occurred when Mr. Simons attempted to make a left-hand turn off of Hastings street near Lakewood Drive. According to Ms. Barsky, Mr. Simons came to a complete stop before beginning his left-hand turn across the double yellow line into the A&W parking lot. Ms. Barsky said she observed that the oncoming road was clear until the Lakewood Drive intersection and that the traffic light at Lakewood Drive was yellow at the time. She said that when Mr. Simons began his left turn it collided with Mr. Arias' vehicle.

[112] According to Ms. Barsky, she did not see any oncoming vehicles when Mr. Simons began to make the left turn and it was safe to make the turn. However, shortly after Mr. Simons began to make the turn, Ms. Barsky saw headlights coming at them quickly and a vehicle travelling in the opposite direction, driven by Mr. Arias, collided with Mr. Simons' vehicle, causing it to flip on its side and to come into contact with a light pole.

[113] While I do not take issue with Ms. Barsky's credibility in respect of her version of the Accident, I do not find her evidence to be reliable. Ms. Barsky admitted that her memory of the Accident itself, and the immediate aftermath, is poor. This is not surprising considering the MTBI that she suffered during the Accident. Furthermore,

according to Ms. Barsky, she had approximately four to five alcoholic drinks during the ten to twelve hours preceding the Accident. This occurred while she was spending time with Mr. Simons at his workshop while he completed the fabrication of a product. Ms. Barsky also consumed two beers after she and Mr. Simons walked home following the Accident. While she denies being intoxicated at the time of the Accident, she states that she had consumed enough alcohol that she would not have driven a vehicle. When she attended the hospital later that morning, her blood alcohol content was found to be nearly three times the legal limit to operate a motor vehicle. I find that Ms. Barsky's memory of the Accident is impaired by her alcohol consumption and the MTBI she suffered during the Accident. Therefore, I have given very little weight to her evidence about the circumstances of the Accident and the immediate aftermath.

[114] Mr. Arias' testimony is also problematic on a number of fronts.

[115] Mr. Arias steadfastly maintained that the Accident did not occur until 4:45 a.m. The evidence of the Vancouver Police and Fire Department is that the Accident occurred at approximately 4:00 a.m. and the emergency services were on the scene relatively shortly thereafter. These times are recorded in numerous records made by the first responders, and there is no reason for me to doubt their accuracy. At the time of the Accident, Mr. Arias was on his way to begin his work shift at 5:00 a.m. The drive to work from his home at that time of the day, which he had done numerous times before, routinely took 20-25 minutes. When confronted with the evidence of the first responders that the Accident occurred at 4:00 a.m., Mr. Arias maintained that the Accident occurred at 4:45 a.m. and denied that he was coming from somewhere other than his home or was on his way to somewhere other than work when the Accident occurred. This simply does not make sense considering that the Accident undoubtedly occurred at 4:00 a.m. and it only takes 20-25 minutes for Mr. Arias to get to work. It remains unexplained as to why Mr. Arias was on the roadway at the time of the Accident.

[116] Mr. Arias testified that Mr. Simons vehicle was six meters away when he saw it enter his side of the roadway and that it took three seconds between the time he saw the vehicle and the time of impact. He testified that when he saw the vehicle he applied the brakes and swerved to the right to try and avoid the collision. Mr. Arias denies that he was driving in excess of the speed limit at the time of the Accident.

[117] If I am to accept Mr. Arias' evidence regarding the speed he was travelling at and his distance from Mr. Simons vehicle when he first saw it, the Accident would have occurred in less than half a second from the time he saw Mr. Simons vehicle, not the three seconds that Mr. Arias testified to. Mr. Arias maintained his position with respect to time and distance despite being given numerous opportunities to clarify it. I agree with counsel for Mr. Simons that Mr. Arias' evidence is internally inconsistent. Moreover, if it is to be accepted, then it is unlikely that Mr. Arias would have had the time to apply the brakes and swerve to the right as he testified to having done.

[118] Furthermore, Mr. Arias' testimony on his speed, and how he was so certain of his speed, changed over the course of his testimony. I find this testimony to be entirely unreliable. Consistent with his discovery evidence, Mr. Arias first testified that he knows he was going 45-50 km/h because that is the speed limit and he always travels at that speed. He did not mention a specific recollection of looking at his speedometer at or around the time of the Accident. However, when pressed on cross-examination, he testified that he did in fact look at his speedometer shortly before the Accident because he was approaching downhill portion of the roadway. Moments later he testified that he slowed down because he saw Mr. Simons vehicle waiting to make the left turn. Then he testified that he reduced his speed to approximately 30-35 km/h immediately before the collision. Beyond the obvious concerns that arise with the evolution of Mr. Arias' testimony, his testimony that he slowed to 30-35 km/h after noticing Mr. Simons' vehicle is inconsistent with his testimony that the two were only six meters apart when he first saw Mr. Simons vehicle. It would be impossible for Mr. Simons to slow from 45 or 50 km/h to 30 or 35

km/h and note the reduction in speed by looking at the speedometer in the less than half a second between noticing Mr. Simons' vehicle and the impact.

[119] Given Mr. Arias' changing evidence with respect to the speed at which he was travelling, and the internal inconsistencies that I have discussed, I find that I am unable to rely upon his evidence. The inconsistencies lead me to infer that Mr. Arias was in fact driving in excess of the speed limit at the time of the Accident. Furthermore, if Mr. Arias' testimony is accepted with respect to him not seeing Mr. Simons' vehicle until their vehicles were six meters apart, it is reasonable to conclude that he was not driving with the requisite due care and attention demanded by the circumstances. Had he been doing so, he would have noticed Mr. Simons' pickup truck about to make a left turn much sooner than when the vehicles were only six meters apart. Particularly considering that there was not likely much other traffic on the road at 4:00 a.m. Despite neither party tendering expert evidence as to Mr. Arias' speed, the totality of available evidence, including the inconsistencies in Mr. Arias' evidence and the fact that the collision involving Mr. Arias' much smaller vehicle resulted in Mr. Simons' pick-up truck rolling on its side, suggests that Mr. Arias was travelling above the speed limit: *Raber v Romero*, 2022 BCSC 748 at para. 92; *LeSavage v. Lee*, 1999 CanLII 6124 (B.C.S.C.), 1999 CarswellBC 1066 (B.C.S.C.) at para. 16.

[120] However, I agree that it is rather unusual for a party to a motor vehicle accident to not provide evidence in chief despite the fact that liability is at issue and there are no other witnesses to the Accident other than the parties. Mr. Arias urges me to make an adverse inference from Mr. Simon's decision not to testify. According to the trial brief, Mr. Simons was expected to testify. It appears that the other parties were not notified that Mr. Simons would not testify until after Ms. Barsky's testimony concluded.

[121] In *Solberg v. Carriere*, 2014 BCSC 1668 [*Solberg*], Johnston J. considered whether to draw an adverse inference from the defendant's failure to testify. At

para. 38, he cited the following from *Halsbury's Laws of Canada* which was cited in *McIlvenna v. Viebig*, 2012 BCSC 218, at para. 70:

It is highly unusual for a party not to testify in a civil trial. The court may draw an adverse inference from the fact that a party fails to testify, provided that it is reasonable in the circumstances to do so. In order for an adverse inference to be drawn, there must be a dispute as to those facts concerning which the party would be competent to testify. Furthermore, if the plaintiff has failed to establish a *prima facie* case against the defendant, no adverse inference will be drawn should the defendant not testify.

[122] In *Solberg*, Johnson J. drew an adverse inference from the defendant's failure to testify despite the fact that the defendant was present for the course of the trial and that he was available to be called as an adverse witness by the plaintiff pursuant to R. 12-5(22)(a) of the *Supreme Court Civil Rules*.

[123] Upon consideration of the factors in *Singh v. Reddy*, 2019 BCCA 79 at para. 10, and the totality of the circumstances in this case, it is appropriate to draw an adverse inference from Mr. Simons' failure to testify for the following reasons:

- a) No explanation has been provided for Mr. Simons' failure to testify.
- b) I do not find that Mr. Simons was equally available to both defendants because it was reasonable for Mr. Arias to rely on the indication in the trial brief that Mr. Simons would be called to testify. Mr. Arias was effectively taken by surprise that Mr. Simons did not testify. Furthermore, Mr. Simons was not present in court for any of the proceedings before me, and therefore, R. 12-5(22)(a) was not available to Mr. Arias.
- c) As the other driver, Mr. Simons was uniquely situated to provide key evidence on the circumstances of the Accident itself, his and the plaintiff's consumption of alcohol leading up to the accident, and his level of exhaustion – given that he had been working for 14 hours preceding the Accident and that the Accident occurred at 4:00 a.m.

[124] I draw the inference that had Mr. Simons been called, his evidence would not have tended to establish that he, as the servient driver making the left-hand turn, did

not comply with his duty to ensure the roadway was clear prior to beginning that turn. I also draw the inference that his evidence would not have assisted his case in respect of whether he was intoxicated at the time of the Accident.

[125] While I am prepared to infer that Mr. Simons evidence would not have assisted his case, I am not willing to find that Mr. Simons was in fact intoxicated at the time of the Accident. Despite the fact that Mr. Simons and Ms. Barsky likely left the scene of the Accident without being told to do so by any of the first responders, the evidence is not sufficient to find that Mr. Simons was intoxicated. Ms. Barsky does not recall Mr. Simons drinking alcohol while she was with him at the workshop. Nor is there independent evidence to support such a finding. The police officer's suspicion that Mr. Simons left the scene of the Accident because he was intoxicated (and therefore did not want to speak with authorities) is not sufficient evidence upon which I would come to such a finding.

[126] While I have significant concerns in respect of Mr. Arias' testimony, it remains the fact that under the law, Mr. Simons was the servient vehicle. In *Pacheco (Guardian of) v. Robinson*, 1993 CarswellBC 12, 1993 CanLII 383 (B.C.C.A.), a decision involving a left turning vehicle at an intersection, the Court of Appeal discussed when it would be appropriate to find fault on the dominant (i.e. the non-left turning driver).

[18] In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstances any doubt should be resolved in favour of the dominant driver.

[127] In my view, these comments are equally applicable to the situation at hand, where the left-turn was not made at an intersection.

[128] As discussed above, I have inferred that Mr. Arias was not exercising reasonable care because he was likely driving in excess of the speed limit and not

paying the requisite amount of due care and attention at the time of the Accident. In my opinion, there is no doubt that Mr. Arias bears some responsibility for the Accident. However, given the adverse inference I have drawn from Mr. Simons' failure to testify, any doubt I have with respect to the extent of Mr. Arias' liability should be resolved in favour of Mr. Arias as the dominant driver. Consequently, I am only willing to find that Mr. Arias bears 10% of the liability for the Accident. Mr. Simons bears the remaining 90% of responsibility.

CAUSATION

[129] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury before damages are assessed. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimis*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, 1996 CanLII 183 (S.C.C.) [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[130] The expert evidence, including the evidence tendered by the defendants, all support the conclusion that the Accident has caused various soft-tissue injuries, chronic pain, major depressive disorder, related alcohol misuse, a MTBI, and symptoms consistent with PTBIS. Ms. Barsky was in good physical shape before the Accident and had no limitations. I find that Ms. Barsky has met the burden upon her of proving that the Accident caused her present-day physical symptoms.

[131] Although Ms. Barsky has experienced mental health challenges in the past and she may have been more vulnerable to psychological injuries as a result, I find that the Accident caused Ms. Barsky's major depression and associated symptoms. There is simply no evidence that Ms. Barsky would have experienced the psychological symptoms that she has but for the Accident.

DAMAGES

Non-Pecuniary Damages

[132] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, are only a rough guide as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[133] The factors that should be considered in making an award of non-pecuniary damages are well established and were set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*]. They include the plaintiff's age, nature of the injury, severity and duration of the pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of mental and physical abilities, loss of lifestyle, and the plaintiff's stoicism.

[134] The defendants do not deny that Ms. Barsky suffered injuries from the Accident. However, they argue that she has recovered from the majority of those injuries. I disagree.

[135] I do not find that Ms. Barsky has recovered from her injuries such that she was minimally affected by them at the time of trial. Improvements reported to some treatment providers reflect the ebb and flow nature of some of her symptoms; they are not indicative of a full recovery. While she returned to the gym as part of her kinesiology program, she clearly does not have the same level of physical function that she had before the Accident.

[136] I do not agree with the defendants that Ms. Barsky's depression has been in remission since February 2020, that her mood issues since then are related solely to grief, nor that she has not developed major depressive episodes since then. I have already explained why I prefer Dr. Lu's opinion over that of Dr. Milanese earlier in these Reasons. In my view, Dr. Lu's opinion that Ms. Barsky continues to suffer from

major depressive episodes is consistent with Mr. Barsky's evidence. The way in which Ms. Barsky previously dealt with grief is markedly different than the way in which she has responded to life's challenges since the Accident. Ms. Barsky's decision to adopt new puppies and plan for a GRTW are not inconsistent with an individual experiencing ongoing symptoms of major depressive disorder when considered in light of her other symptoms. Moreover, as referenced earlier, Dr. Milanese's conclusion that she had recovered did not consider a number of clinical records that indicated ongoing reports of depressed mood.

[137] The defendants concede that Ms. Barsky suffered a MTBI in the Accident. But they argue that her current cognitive complaints are more likely a result of her chronic pain and mental health issues, unrelated to the MTBI or PTBIS. However, it is the symptoms and their effect that are relevant for the purposes of assessing non-pecuniary damages. As discussed, Ms. Barsky's cognitive issues and their effect on her are significant. They were caused by the Accident regardless of whether they are related to the MTBI or other injuries.

[138] I have already thoroughly discussed the effects of the Accident on Ms. Barsky earlier in these Reasons. For present purposes, I will highlight the following: Ms. Barsky suffers from frequent severe headaches, neck pain, back pain, shoulder pain, depressed mood, anxiety driving, visual disturbances, poor sleep, alcohol misuse, social withdrawal, lack of motivation, feelings of hopelessness, low self-esteem, a short-temper, poor memory, difficulty finding words, light sensitivity, and tinnitus. I find that the Accident and her related injuries have had a profound effect on Ms. Barsky's life. It has significantly impacted nearly every aspect of her life and, in particular, her ability to work, which formed a significant part of Ms. Barsky's self-worth and identity.

[139] Before the Accident, Ms. Barsky worked two jobs, exercised regularly, frequently worked out at the gym and was physically fit. She helped organize and competed in various competitions related to physical fitness. She organized fundraising events for hospitals, had an active social life that included regularly going

to sporting and music events, and volunteered at dog shows. Since the Accident, Ms. Barsky has had limited social interactions, struggled to work one job, her exercise has been sporadic, she has had limited involvement in volunteer activities including dog shows and fitness events, she has gained between 50-60 pounds, and is deconditioned.

[140] Importantly, Ms. Barsky's work, which I accept used to be her outlet for stress, is now a significant source of her stress. Work aggravates all of her physical, emotional and cognitive symptoms. When Ms. Barsky returns home from work, she is exhausted and unable to do anything else. While she may have used alcohol in excess on occasion before the Accident, the Accident and her related symptoms have significantly increased her alcohol use.

[141] The witnesses called on behalf of the plaintiff to testify about her pre-and-post-Accident presentation were supportive of the significant effect the Accident has had on Ms. Barsky. Despite some improvements, I accept the observations of these witnesses that Ms. Barsky is an entirely different person than she was before the Accident, both physically and emotionally.

[142] I accept the expert's opinions that Ms. Barsky's prognosis for a full recovery is poor.

[143] Ms. Barsky cites the following cases in support of an award for non-pecuniary damages in the amount of \$230,000:

- *Fletcher v. Biu*, 2020 BCSC 1304 [*Fletcher*], where the Court assessed non-pecuniary damages in the amount of \$200,000, which counsel submits is approximately \$230,508 when adjusted for inflation.
- *Gill v. Apeldorn*, 2019 BCSC 798 [*Gill*], where the Court assessed non-pecuniary damages in the amount of \$200,000, which counsel submits is approximately \$230,000 when adjusted for inflation.

- *Moges v. Sanderson*, 2020 BCSC 1511, where the Court assessed non-pecuniary damages in the amount of \$200,000, which counsel submits is approximately \$230,508 when adjusted for inflation.

[144] The defendant submits that an award of \$110,000 to \$140,000 is appropriate and cites the following cases as being comparable to the case at hand:

- *Ricketts v. Tatla*, 2023 BCSC 314 [*Ricketts*], where the Court assessed non-pecuniary damages in the amount of \$130,000.
- *Woloschuk v. Neuman*, 2021 BCSC 940, where the Court assessed non-pecuniary damages in the amount of \$125,000 which counsel submits is approximately \$139,300 when adjusted for inflation.
- *Dhudwal v. Davis*, 2021 BCSC 374 [*Dhudwal*], where the Court assessed non-pecuniary damages in the amount of \$100,000 which counsel submits is approximately \$111,475 when adjusted for inflation.

[145] The cases relied upon by the defendants involve plaintiffs with less severe injuries than I have found to be suffered by Ms. Barsky. While the plaintiff in *Ricketts* suffered impacts similar to Ms. Barsky, he was significantly older than Ms. Barsky at the time of the Accident. The plaintiff in *Dhudwal* did not have a brain injury. While the cases relied upon by the plaintiff are more similar to the facts of this case, they involve plaintiffs with more severe injuries or impacts than that experienced by Ms. Barsky. For example, the plaintiff in *Fletcher* was no longer involved in sports at all, whereas Ms. Barsky has continued some involvement, albeit at a reduced capacity. While I find that Ms. Barsky's psychological injuries are significant, the plaintiff in *Gill* suffered more severe psychological impacts including a suicide attempt.

[146] I have considered the principles and factors set out in *Stapley* – and in the authorities provided by counsel – and Ms. Barsky's circumstances and prognosis. In particular I note that Ms. Barsky's career progression, an aspect of her life from

which she derived much of her self worth, has been undermined by the injuries she suffered in the Accident. I conclude that a fair and reasonable award is \$200,000.

Loss of Earning Capacity

[147] An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[148] The proper analysis for past and future diminished earning capacity was summarized in *Grewal v. Naumann*, 2017 BCCA 158. Justice Goepel was writing in dissent, however, the majority agreed with the following analysis:

[48] ... If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[Emphasis added.]

Loss of Past Income Earning Capacity

[149] Compensation for loss of past earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30:

[30] Thus, in my view, a claim for what is often described as “past loss of income” is actually a claim for loss of earning capacity; that 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.

[Emphasis added.]

[150] Ms. Barsky submits that her gross loss of past earning capacity is \$135,634. She submits that a discount of 20% is appropriate to convert this gross loss into a net loss. Consequently, the plaintiff submits that an appropriate net award for loss of past income earning capacity is \$108,507.

[151] The defendants agree that Ms. Barsky's gross loss of income award under this head is \$135,634 and that her net award should be \$108,507. However, they do not agree on the basis upon which the award is founded. However, the defendants have not provided an alternate foundation for the award.

[152] I accept the basis put forward by Ms. Barsky as the foundation for the award under this head. I agree that the evidence supports a finding that there is a real and substantial possibility that, but for the Accident, Ms. Barsky was on the path to move from her position as a CSI to a role as a manager, or at a minimum a role as a supervisor, at some point between the Accident and this trial. Sean Kelly is the deputy regional manager of the south coast region of the CVSE and is Ms. Barsky's current manager. He provided evidence of his salary. Mr. Kelly and Mr. Delisle both testified that Ms. Barsky's high performance and aptitudes before the Accident placed her on a career trajectory towards upper management. I have already discussed Ms. Goes' very positive views of Ms. Barsky's aptitude before the Accident.

[153] Immediately before the Accident, Ms. Barsky was earning \$58,169 per year. Once her sick pay had been exhausted, her employment earning significantly decreased until she returned to full time employment and received a promotion in 2022. Her total earnings between 2018 and 2021 was \$124,131.

[154] John Lawless is a vocational expert tendered by the plaintiff and was qualified to give expert opinion evidence in this matter. I accept his opinion with respect to the applicable collective agreement and wage increases. I further accept Gary Sidhu's evidence with respect to annual increases in the 2018 to 2021 period. Mr. Sidhu is currently the Acting Regional Manager for the CVSE South Coast Region. He was hired by MOTI in 2015, the year before Ms. Barsky started. I accept that his career

trajectory is reflective of what Ms. Barsky's career trajectory would likely have been, but for the Accident.

[155] Upon this evidence, I accept that, but for the Accident, Ms. Barsky would have earned \$248,765 from her employment with the CVSE, had she continued in the position she held when the Accident occurred. This equates to a past loss of earning capacity in the amount of \$124,634 (\$248,765 less \$124,131). On the evidence before me, I accept that there is a real and substantial possibility that Ms. Barsky would have had significant acting supervisory opportunities and would have obtained a supervisory or management position during the period between the Accident and trial. In my view, an additional \$10,000 or 8% of her past lost income is appropriate for a total award of \$135,634. This is equivalent to Ms. Barsky having spent 1/4 of this period of time in an acting supervisory position and 1/4 of her time in a management position. Given her pre-Accident performance and aptitudes, and Mr. Sidhu's career path, this may be conservative.

[156] The defendants oppose an award for loss of income in respect of Ms. Barsky's part-time employment at the music venue. They point to the fact that there is no corroboration in respect of the cash income she says she earned.

[157] I accept that the plaintiff worked one to two shifts per week at the music venue leading up to the Accident. I also accept that Ms. Barsky would have continued to do so but for the injuries she sustained in the Accident. However, in my view, the evidence as to her earnings at this job is not sufficient and does not form a basis upon which I could make an award. The only evidence I have of Ms. Barsky's pre-Accident earnings at this job is her estimate of \$800 to \$1,000 per month based upon \$25 per hour in cash. She did not report this income on her income tax returns, no documents were provided in support of this amount, and no one else with knowledge of her employment testified to the amount she earned. Consequently, I decline to make an award for lost income in respect of her work at the music venue.

[158] Upon consideration of all of the evidence, I find that Ms. Barsky's gross loss of past earning capacity is \$135,634. Consistent with the parties' positions, I find that

a 20% reduction is appropriate, and therefore, the net award for loss of past income earning capacity is \$108,507.

Loss of Future Income Earning Capacity

[159] The Court must answer two questions to determine a plaintiff's claim for loss of future earning capacity: 1) has the plaintiff's earning capacity been impaired by their injuries; and, if so, 2) what is an appropriate award to compensate for the loss: *Pett v. Pett*, 2009 BCCA 232 at para. 8. As with past income loss, while it is somewhat attractive to apply a mathematical calculation, the assessment of the loss is a matter of judgment and must be based on the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18 [*Rosvold*]. The way in which the assessment is carried out will vary from case to case: *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (B.C.S.C.) [*Brown*]; *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (B.C.C.A.).

[160] There are two possible approaches when assessing loss of future earning capacity: the "earnings approach" from *Steenblok v. Funk*, [1990] B.C.W.L.D. 1417, 1990 CanLII 3812 (B.C.C.A.), and the "capital asset approach" from *Brown*. Both approaches are correct. The earnings approach will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*]. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: *Perren* at para. 12.

[161] Even where the capital asset approach is appropriate, the court should "ground itself as much as possible in factual and mathematical anchors": *Knapp v. O'Neill*, 2017 YKCA 10 at paras. 17–19.

[162] In *Rab v. Prescott*, 2021 BCCA 345 [*Rab*], the Court of Appeal provided guidance in respect of the analysis of damages for loss of future income earning capacity. Justice Grauer held that once it is proven that there is a real and substantial possibility of a future loss of income, the court must then assess the likelihood of that loss materializing using the test for assessing whether a future hypothetical event will occur. The three-step process is described in *Rab* at para. 47:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring. [citation omitted].

[Emphasis added.]

[163] The approach in *Rab* was very recently reaffirmed and further explained in *Steinlauf v. Deol*, 2022 BCCA 96 [*Steinlauf*] and *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217.

[164] The Court must then review the overall fairness and reasonableness of the award: *Gregg v. Ralen*, 2018 BCSC 171 at para. 153.

[165] Ms. Barsky submits that an appropriate award under this head is \$640,000. In her submission, this award would recognize the promotions that she did not obtain because of the Accident and the likelihood that she will not be able to work at her current position until her originally planned retirement date.

[166] The defendants wisely concede that the evidence supports an award for loss of future income earning capacity; however, they dispute the quantum of the award. In their submission, Ms. Barsky's loss of future income earning capacity would be properly compensated by an award representing between one and two years of her current salary which equates to an award between \$84,000 and \$168,000.

[167] Given the defendants reasonable concession, I will only touch briefly upon the first two steps of the approach set out in *Rab*. I agree with the parties that Ms. Barsky has established that there is a potential future event that could lead to a loss of capacity. That is, she suffers from chronic soft tissue injuries and pain, headaches, psychological injuries, and cognitive deficiencies including poor memory. I find that there is a real and substantial possibility that these injuries will

impair Ms. Barsky's ability to earn income in the future (as they have in the past). As stated earlier, I accept that those injuries have persisted and that Ms. Barsky will likely experience symptoms, to some degree, for the rest of her life, as the experts have opined.

[168] Consistent with the parties' positions, after considering the factors in *Brown* at para. 8, I find that Ms. Barsky's capital asset (i.e. her income earning capacity) has been impaired as a result of the injuries she suffered in the Accident. In particular, those injuries have rendered her overall less capable of earning income from all types of employment and she is less marketable as an employee to potential employers. As will be discussed further, of particular relevance to this case is that Ms. Barsky has lost the opportunity to take advantage of all the job opportunities that would otherwise have been open to her if she had not been injured in the Accident.

[169] I accept that prior to the Accident, a significant part of Ms. Barsky's self-esteem and self-worth were derived from her work, and she placed great value upon her performance at work. Given the importance that work has for Ms. Barsky, there is no doubt that she views herself as less valuable as a person capable of earning income in a competitive labour market.

[170] The third step set out in *Rab* is to assess the value of Ms. Barsky's possible future loss. As has often been said, this analysis will always entail an element of crystal ball gazing. In assessing the loss, the court is not to engage in a mathematical calculation: *Rosvold* at para. 18.

[171] As stated in *Rab*, the quantification of the loss must include an assessment of the relative likelihood of the loss occurring. In *Steinlauf* at paras. 55-56, the Court reinforced the need to assess the plaintiff's without-accident earning potential in comparison with what the plaintiff is likely to earn as a result of the accident.

[172] Positive and negative contingencies may play a role in the assessment of damages under this head. There must be a real and substantial possibility, on the evidence, of a particular contingency arising; if there is, then the court is to assess

the relative likelihood of that contingency or risk arising: *Dornan v. Silva*, 2021 BCCA 228 at para. 64 and *Steinlauf* at para. 89. The burden of establishing that a particular contingency or risk should apply lies with the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39. In *Rattan v. Li*, 2022 BCSC 648 at paras. 146-147, Horsman J. (as she then was) summarized the role that contingencies play in the assessment exercise:

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).

[Emphasis Added.]

[173] The court should be wary of undercompensating a plaintiff through over-reliance on negative contingencies: *Keizer v. Hanna*, [1978] 2 S.C.R. 342 at 351-352, 1978 CanLII 28 (S.C.C.); *Morrison v. Moore*, 2009 BCSC 1656 at paras. 27-28. A trial judge has the discretion to adjust an award for general contingencies, and adjustments based solely on such general contingencies should be modest: *Graham v. Rourke*, [1990] O.J. No. 2314, 1990 CanLII 7005 (ON CA) at para. 14.

[174] As discussed earlier, I accept that Ms. Barsky was a high performer in her role with the CVSE. The uncontroverted evidence of the many witnesses who

testified on behalf of the plaintiff is that, prior to the Accident, Ms. Barsky was an exemplary employee with an exceptional ability to multi-task, handle stress, manage large volumes of documentation, difficult people, and a large and complex workload. Ms. Goes, Mr. Kelly, Mr. Delisle and Mr. Sidhu were all promoted to management positions since the Accident. Mr. Sidhu's career trajectory is particularly comparable given that he started with the CVSE within a year of Ms. Barsky.

[175] It is true that none of these witnesses testified specifically to the fact that Ms. Barsky was being groomed for an early promotion or that she had lost out on particular opportunity for an earlier promotion. It is equally true that Ms. Barsky would be required to compete with several other qualified candidates for such promotions. Nonetheless, because of the very positive views of Ms. Barsky's pre-Accident performance by those who hold, or have held, senior management positions within the CVSE and the numerous management positions that have come available since the Accident, I am persuaded that there is a real and substantial likelihood that Ms. Barsky would have been in a management position at the time of trial but for the Accident.

[176] I accept that had Ms. Barsky been promoted to a management position, she would now be earning between \$92,000 per year as a Deputy Regional Manager and \$104,000 per year as a Regional Manager, instead of the \$84,000 per year she earns as a CTEO supervisor.

[177] I accept that Ms. Barsky is struggling in her current role as a CTEO supervisor. I accept that this role is causing her significant stress, which results in an ongoing fluctuation of her physical, emotional and cognitive symptoms. I have no trouble in concluding that Ms. Barsky is at or near her breaking point and would not be able to handle the stresses of a management position. Dr. Caillier opines that Ms. Barsky may need to reduce her current work to four days per week if treatments do not help her. Dr. Lu opines that if her mood, cognitive, and psychological symptoms persist, which is likely, she may not be able to maintain her current work

routine. Dr. Cameron, the expert neurologist tendered by the defendants, is also of the view that Ms. Barsky is partially disabled.

[178] I agree with the defendants that it is appropriate to weigh the relative likelihood of Ms. Barsky obtaining a management position in my assessment under this head. Consequently, I have considered the fact that Mr. Sidhu pursued further education and training at a post-secondary institution before obtaining his management position and that Ms. Barsky had no such training. I have also considered the relative likelihood of management positions becoming available in light of the fact that such positions generally require the current occupant to vacate. Weighing all these considerations, I find that, but for the Accident, Ms. Barsky would likely be earning \$98,000 per year instead of the \$84,000 per year she is currently earning. Applying the multipliers of Darren Benning, an economist, the present value of an income loss of \$14,000 per year to the age of 61 is \$206,976.

[179] I decline to make any further adjustments for general labour market contingencies. Ms. Barsky has established a strong attachment to the workforce with a stable employer. She worked with the provincial public service from 2010 up to the date of the Accident. She was in a unionized position and had significant job security. This is not a situation where I am assessing loss for a disabled plaintiff with no education or work history. In those cases, general negative labour market contingencies may be a useful guide in the absence of reliable facts concerning the plaintiff's future earnings. Given the plaintiff's circumstances, the only further contingencies I will apply are the actuarial contingencies (survival probability and the discount rate prescribed by law) that are incorporated into Mr. Benning's multipliers.

[180] In my view, Ms. Barsky should not be compensated for future loss of income in respect of her work at the music venue. I have already discussed the evidentiary deficiency with respect to the quantum of her earnings in this job. Furthermore, Ms. Barsky testified that one of the reasons that she engaged in this extra employment was her need for extra spending money. At that time, Ms. Barsky was earning considerably less. Given the extra demands that a managerial position

would place on her time, and the extra salary she would have earned in such a position, I find it unlikely that she would have continued with this part-time work had she obtained a management position.

[181] Despite her very strong attachment to the workforce, I find that Ms. Barsky would likely retire at age 61. This is consistent with her testimony about her pre-Accident retirement plans. Those plans depended on her taking her government pension at the earliest vesting date. Given the extra remuneration that she would earn in a management position, it is likely that she would have continued with this plan and retired at 61 with a significant pension but for the Accident.

[182] I agree with the plaintiff that, given Ms. Barsky's injuries and prognosis, there is a real and substantial possibility that Ms. Barsky will be required to reduce her current hours or work in another field. I accept that part-time work is not available in her current position. She would therefore be required to look for work elsewhere in the public or private sector should she need to reduce her hours.

[183] Ms. Barsky submits that if she was required to work part-time, she would find another career as a hospice-aid or death doula. She submits that the median pay for a part-time nurse aid in British Columbia is \$29,000. Thus, she argues that her annual income loss would be in excess of \$60,000 per year compared to the salary she would make as a manager with CVSE (i.e. the without-Accident scenario).

[184] While I accept that work as a death doula or hospice aid is consistent with Ms. Barsky's aptitudes and preferences, I find it unlikely that she would take a position in the private sector given the importance she places on her public sector pension given her retirement plans. I am also not persuaded that Ms. Barsky will only be able to work half the time.

[185] In my view, and consistent with Dr. Caillier's opinion, there is, however, a real and substantial possibility that Ms. Barsky will not be able to sustain her current position and will need to reduce her work to four days per week at some point in the relatively near future. Given that her current position cannot accommodate this, it is

likely that should this need arise, Ms. Barsky will seek part-time employment within the public service in a role equivalent to her current role for similar remuneration, but pro-rated for part-time employment.

[186] In my view, it is appropriate to account for a reduction to part-time work as a contingency in the assessment of damages when considering Ms. Barsky's with-Accident earning scenario. A reduction of one day per week equates to \$16,800 per year based on her current salary. Using Mr. Benning's multipliers to age 61, this would result in current value of \$248,371. Given that Ms. Barsky may continue to work in her current position for a number of years before she is required to reduce her hours, an appropriate amount to account for the potential that Ms. Barsky will at some point leave her position to work part-time is \$200,000.

[187] Consequently, I find that the appropriate award for Ms. Barsky's loss of future income earning capacity is \$406,976 which accounts for both the lost promotional opportunities (assessed as \$206,976) and the likelihood that she will have to reduce her current hours to part-time in the future (assessed as \$200,000). In considering the reasonableness of this award, I note that it represents approximately five years of her current salary, which, in my view, is reasonable, considering the significant impact the injuries have had on her income earning capacity.

Cost of Future Care

[188] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (B.C.S.C.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55 and the authorities cited therein; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[189] It is not necessary that a physician testify to the medical necessity of each item claimed; however, there must be some basis in the evidence whereupon the trier of fact can draw a link between the professional's assessment of pain and disability with the recommended treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[190] In *Sharma v. Chui*, 2019 BCSC 2115, the Court said the following about adjustments to be made and contingencies to be applied to the assessment of damages for the cost of future care:

[120] Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.

[121] However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 234.

[191] An assessment of damages for cost of future care is also not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[192] Ms. Barsky seeks \$429,000 for the cost of future care. Her claim is mainly based upon Mr. Benning's calculations, which in turn is based upon Ms. Abdel-Barr's recommendations and cost of future care report and Dr. Caillier's recommendations. Ms. Abdel-Barr is an occupational therapist with many years of experience writing cost of future care reports. She assessed Ms. Barsky in her home and authored a report.

[193] The defendants argue that an award between \$32,155 and \$44,674 would be appropriate.

Homemaking Assistance

[194] Ms. Barsky seeks \$75,000 for assistance with homemaking tasks. This amount is made up of \$60,000 for weekly housecleaning assistance, \$10,000 in respect of meal preparation assistance, and \$5,000 towards seasonal exterior cleaning. The defendants submit that no award should be made in respect of these items. Should an award be made, the defendants argue that the amount awarded should be decreased to allow for the possibility of an increase in her functional tolerance.

[195] I do not agree with the defendant that Ms. Barsky has been able to manage her housekeeping chores since the Accident. On the evidence before me, Ms. Barsky has demonstrated that she has generally been incapable of completing all her housekeeping chores without assistance. Ms. Abdel-Barr observed Ms. Barsky demonstrate portions of several homemaking tasks during her assessment. I accept that engaging in these tasks exacerbates her physical symptoms. However, it is not clear to me that these physical effects alone go beyond a loss of amenities or increased pain while completing the tasks such that these tasks could not be completed over a longer period of time. An award for this type of loss is more properly considered as part of the award of non-pecuniary damages: *Kim v. Lin*, 2018 BCCA 77 at para. 33, *Haug v. Funk*, 2023 BCCA 110 at paras. 98-100.

[196] However, as discussed, the evidence demonstrates that Ms. Barsky's Accident caused psychological injuries. These psychological injuries – combined with the physical symptoms and the cyclical nature of these symptoms – have resulted in Ms. Barsky losing the capacity to complete certain housekeeping tasks. This is not, in my view, uncommon for those who suffer with periods of major depression as Ms. Barsky does. Witnesses called on behalf of Ms. Barsky were unequivocal in their evidence with respect to the state of Ms. Barsky's home pre and

post-Accident. Before the Accident, Ms. Barsky's house was very clean, neat, and tidy. After the Accident, Ms. Barsky's house was described as being "gross" and piled high with garbage, dirty laundry and other items. Ms. Barsky has had to engage friends to assist with just getting her residence into a presentable state over a dozen times since the Accident. Ms. Barsky has recently engaged the assistance of a housekeeper and organizer, and the witnesses who testified have noted a marked improvement in the condition of her home.

[197] In my view, Ms. Barsky's loss of housekeeping capacity is best dealt with as pecuniary award under the cost of future care. The evidence demonstrates that she has suffered a true loss of capacity to maintain her house. This loss will result in actual expenditures to keep her residence in a presentable state, much less the spotless state it was in before the Accident. Moreover, the assistance is recommended by Ms. Abdel-Barr, an occupational therapist, who is qualified to make such a recommendation. Assistance with housekeeping tasks will permit Ms. Barsky to improve her functionality to a level more commensurate to what it was before the Accident.

[198] Ms. Abdel-Barr recommended that, in order to manage her household tasks and maintain her home as she did prior to the Accident, Ms. Barsky will require assistance with an initial deep clean and organization totaling 26 hours. She also opines that Ms. Barsky will need weekly and seasonal cleaning assistance for 120 hours per year. Dr. Caillier also recommends weekly assistance. Ms. Abdel-Barr's recommendation accounts for Ms. Barsky's participation in some of the cleaning activities. Ms. Abdel-Barr also recommends that Ms. Barsky have assistance with meal preparation and grocery planning for two hours per week. Finally, Ms. Abdel-Barr recommends 12 hours per year for assistance with seasonal cleaning of her outdoor patio space. I accept that Ms. Barsky would likely utilize all of these services if they were awarded.

[199] Mr. Benning costed the present value of these recommendations in his report. His costing is based upon the recommended assistance to age 75 and then a

reduction of 25% from age 75-80. In my view, the costing of these items is inflated. As discussed, I have found that Ms. Barsky will likely retire at age 61. Considering that her lack of housekeeping capacity is highly correlated to the interrelation of her physical and mental health injuries – which are in turn significantly related to her employment, consideration must be given to the possibility of improvement when she retires from the workforce. Similarly, if Ms. Barsky is to leave her current employment for part-time employment that is less stressful, her functionality may improve.

[200] Accepting that the annual cost of weekly housekeeping services is \$4,442, and applying the considerations I have identified above, I find that an appropriate award for weekly housekeeping assistance is \$45,000. Upon the same considerations, and in light of the relatively small outdoor space that Ms. Barsky has, an award of \$5,000 over her lifetime is appropriate. It appears that Ms. Barsky has already availed herself of the services of an organizer and a housekeeper for an initial deep cleaning; I find this to be reasonably necessary for the reasons given above.

[201] In my opinion, Ms. Barsky has not met the onus of proving that meal preparation assistance is reasonably necessary. It seems to me that if Ms. Barsky avails herself of the assistance that has been provided for and if she reduces her work, as I expect she will, she will be capable of planning her meals successfully as she was before the Accident.

[202] In summary, I award \$50,000 for the cost of future care related to housekeeping assistance.

Botox and Amovig/Emgality

[203] Ms. Barsky seeks \$90,000 for the cost of Botox and Amovig or Emgality injections or tablets. The defendants submit that no award should be made for these medications.

[204] Dr. Caillier recommended that Ms. Barsky receive Botox injections to assist with her severe headaches. Dr. Caillier explained that Ms. Barsky's headaches are multifactorial and that it would be beneficial for her to have a trial of injections in an effort to determine the particular muscles that should be targeted to maximize the benefit. A further trial of either Amovig or Emgality is recommended if there is only a partial benefit from the Botox injections. Dr. Caillier testified Amovig and Emgality were designed to treat migraine headaches but have been used successfully to treat patients with headaches arising from MTBIs and neck and shoulder issues. If the Botox injections are successful, Dr. Caillier stated that they would be needed every three to four months indefinitely.

[205] Ms. Barsky has not tried Botox injections because she cannot afford them and she has not been provided with any insurance coverage to do so. She indicated a willingness to try these injections if they were not cost prohibitive. It is uncontroverted that Ms. Barsky has an aversion to taking prescription oral medications. Although she testified that she would consider using medications such as Amovig, I am not persuaded that Ms. Barsky would take this or Emgality in pill form. Furthermore, Amovig and Emgality would only be attempted if Botox injections are not successful, and there is no evidence before me as to the likelihood of success in such circumstances. In my view, it is speculative to say that the use of Amovig and Emgality is reasonably necessary. I decline to make an award for their use.

[206] The defendants argue that there is no evidence that Botox will be of any benefit to Ms. Barsky because she has not yet tried it. However, Dr. Caillier, who has had extensive experience treating headaches with Botox, explained that Ms. Barsky fits the patient profile of many of her patients who have been treated successfully with Botox. In her opinion, approximately 60% of patients who have severe headaches arising from a brain injury or from soft-tissue injuries in the neck and shoulders, benefit from the Botox injections: the Botox reduces the severity and/or frequency of their headaches. While headaches that arise from emotional issues will not likely be effectively treated by Botox, the evidence before me, including that of

Dr. Cameron, is that the origin of Ms. Barsky's headaches are likely from her soft-tissue injuries.

[207] In my view, Ms. Barsky has established that the use of Botox is reasonably necessary to preserve and promote her mental and physical health. Ms. Barsky should not be denied Botox because she was unable to afford it before trial and, therefore, is unable to conclusively say that it will be effective.

[208] Mr. Benning concluded that the present value of the cost of the recommended trial of Botox injections is \$1,987. The annual cost of the recommended injections is \$3,515 and Mr. Benning states that the present value of this indefinite cost is \$94,197. In my view, it is appropriate to reduce this amount to reflect the approximate likelihood of its success. Consequently, I award \$60,000 for the future cost of Botox treatments.

Physiotherapy and Massage

[209] Ms. Barsky seeks \$50,000 for the cost of physiotherapy and massage therapy. Dr. Caillier recommended one to two sessions of physiotherapy or massage therapy per month, not both. Although she agreed that the goal is to have patients move away from passive treatments, Dr. Caillier has found them to be beneficial for the managing pain and temporary flareups. This, in turn, helps her patients to work and better engage in life. I am satisfied that physiotherapy or massage therapy is reasonably necessary.

[210] The annual cost of one to two sessions per month of massage therapy is \$1,050 to \$2,100. According to Mr. Benning's multipliers, the present value of that cost is between \$28,745 and \$56,950. The annual cost of one to two sessions per month of physiotherapy is between \$780 and \$1,560. According to Mr. Benning's multipliers, the present value of that cost is between \$21,354 and \$42,708. Ms. Barsky has found some relief from massage therapy in the past and has indicated a willingness to engage in physiotherapy.

[211] In my view, it is appropriate to consider the likelihood that Ms. Barsky's symptoms will improve if she reduces or modifies her work or if she obtains relief from other treatments. However, I do not accept the defendants' position that an award for these treatments should be limited for one to two years; there is simply no evidentiary foundation for this submission. I find that an award of \$40,000 is appropriate for one to two session per month of massage or physiotherapy.

Kinesiology and Fitness Memberships

[212] Ms. Barsky seeks \$48,000 in respect of the future cost of a kinesiology program and a fitness pass with access to a pool and gym. The defendants accept that the recommendation that Ms. Barsky participate in a regular exercise program is a key component of her future care. However, the defendants submit that, at the most, Ms. Barsky should be provided with \$600 for the cost of six kinesiology sessions and no amount for a gym membership because she would have incurred this expense if the Accident had not occurred.

[213] While I agree that a fitness membership would be beneficial for Ms. Barsky, it is clear to me that given her pre-Accident engagement in exercise programs, including Femsport competitions, she would have incurred the costs for a gym membership if she had not been injured in the Accident. Consequently, I decline to make an award for this.

[214] Dr. Caillier recommended that Ms. Barsky have an additional 14-16 sessions with a kinesiologist to establish an exercise program that will assist with her long-term pain management and reduce her fatigue. She also recommends that Ms. Barsky be provided with an additional four to six sessions per year for the next three years to update and modify the exercise program and one to two sessions per year thereafter. Dr. Caillier is aware that Ms. Barsky has had previous sessions with a kinesiologist and explained that fatigue and lack of motivation may be preventing her from re-engaging with her exercise program. Ms. Barsky testified that although she knows how to use the gym and the equipment, she feels that, due to her state of deconditioning and injuries, she will require a modified program.

[215] In my view, it is reasonable that Ms. Barsky receive a refresher of sorts with respect to her exercise program under the guidance of a kinesiologist. It would also be beneficial for her to have some ongoing sessions, but I am not persuaded that the recommended frequency and duration is appropriate. Ms. Barsky has significant experience with exercise programs and lifting weights and is not likely to need as much instruction as the average person. Moreover, I am not persuaded that Ms. Barsky would need to use these services indefinitely.

[216] The present value of the cost of the initial sessions recommended by Dr. Caillier is \$2,727. In my view, this is appropriate. The annual cost of Dr. Caillier's recommended follow up sessions is \$1,103 and according to Mr. Benning's multipliers, the present value of this lifetime award is \$29,637. Given the considerations I have identified above, an award of \$10,000 for the follow up kinesiology sessions would be appropriate. Consequently, I award \$12,727 for the future cost of kinesiology.

Ergonomic Equipment and Assistance

[217] The defendants agree that the one-time costs of sought by Ms. Barsky for ergonomic equipment are reasonable.

[218] I agree with the defendants that an award for the cost of custom-made earplugs is not appropriate in the circumstances. Dr. Caillier stated that Ms. Barsky may get some benefit from the use of custom ear plugs to assist with sensitivity to noise that is related to the residual symptoms from her MTBI. In my view, this statement falls short of proving that the use of custom ear-plugs is reasonably necessary for Ms. Barsky's health. I decline to make an award for them.

[219] In light of the defendants' concession, I award \$5,709 for the future cost of ergonomic equipment.

Psychological Counselling

[220] The parties agree that psychological counselling is reasonably necessary for Ms. Barsky's mental health. However, the parties disagree on the quantum: the

plaintiff seeks \$67,000 and the defendants submit that an award of between \$10,500 and \$12,600 is appropriate.

[221] I agree with the parties that an award for counselling should be made. Ms. Barsky has benefited significantly from the counselling she received and I accept that she will continue to avail herself of this treatment. She is currently seeing her psychologist once per month but has seen him as frequently as once every two weeks since the Accident. Dr. Lu recommended that she receive psychological counselling for at least five years. While Dr. Caillier defers to the mental health experts in respect of frequency and duration, she also recommends that Ms. Barsky continue with counselling.

[222] The plaintiff's submission is based upon Ms. Barsky seeing her psychologist every two weeks for the next two years, and following that, eight to 12 counselling sessions per year on an ongoing basis. Given Ms. Barsky's current mental health state, the undeniable importance of this counselling to her functionality, and her experience with relapses of depression in the past, I accept that the award sought by the plaintiff is reasonably necessary. Consequently, I award \$67,000 for psychological counselling.

Occupational Therapy

[223] Ms. Barsky seeks \$90,000 for the future cost of occupational therapy. This submission is based on Dr. Caillier's recommendation that Ms. Barsky continue with occupational therapy to allow her to better manage her symptoms and help provide her with compensatory strategies and techniques for the cognitive impairments that have affected her organizational skills. Ms. Abdel-Barr has also recommended the use of an occupational therapist. Ms. Barsky has been working with an occupational therapist and has found that it has helped her with goal setting, planning, remembering, and organizing.

[224] The defendants concede that some award should be made for an occupational therapist but submit that it should be much less than what is sought by the plaintiff. In the defendants' view, an award of \$14,777 to \$22,166 would be

appropriate. According to the defendants, this amount represents eight to 12 sessions annually for five years.

[225] I agree with the parties that the services of an occupational therapist are reasonably necessary. I agree with the defendants that some consideration must be given to the likelihood that Ms. Barsky's condition will improve over time if she is to participate in a structured exercise program, reduce her work, and continue with her counselling as Dr. Caillier opined. In my view, two hours per month for approximately 10 years would be an appropriate award. According to Ms. Abdel-Barr, the annual cost of these sessions would be \$3,120. According to Mr. Benning's multipliers, the present value of an award of this amount for ten years is approximately \$28,000. In my view, given the extent to which Ms. Barsky has already participated in occupational therapy, this frequency of treatment would also include a cognitive program component. Consequently, Ms. Barsky is entitled to \$28,000 for the future cost of occupational therapy.

Dietician

[226] I am not persuaded that a dietician is reasonably necessary. The difficulties Ms. Barsky reports having with respect to meal planning and grocery shopping can likely be addressed by planning strategies provided by the occupational therapist.

Over-the-Counter Medications

[227] Ms. Barsky seeks \$8,500 for the future cost of over-the-counter medication. Ms. Barsky testified that she regularly takes Advil and Robaxacet to manage her pain and headaches. However, I am not clear on the amount or frequency she takes these medications. Nonetheless, given that she will not take any other oral prescription medication, I agree that an award for the future cost of these over the counter medications is appropriate.

[228] If the Botox treatments are successful, and she experiences other improvements as she reduces her work and continues with her exercise routine, the amount that she uses will likely be reduced. Given that the frequency and dose is

not clear on the evidence, I deem it appropriate to reduce the award to the minimum amount identified by Ms. Abdel-Barr in her cost of future care report. Consequently, I award \$4,000 for the future cost of over-the-counter medications.

Summary of Cost of Future Care Award

[229] In sum, I award the following cost of future care items:

Homemaking Assistance	\$50,000
Botox	\$60,000
Physiotherapy and Massage Therapy	\$40,000
Kinesiology	\$12,727
Ergonomic Equipment	\$5,709
Psychological Counselling	\$67,000
Occupational Therapy	\$28,000
Dietician	NIL
Over-the-Counter Medication	\$4,000
Total	\$267,436

Special Damages

[230] The parties agree on all of the special damages claimed by the plaintiff except for \$1,022 incurred in respect of housekeeping assistance she received in 2023 prior to the trial and \$1,785 in respect of housekeeping/organizing cost also incurred in January 2023. For the reasons given above with respect to the award for the future cost of homemaking assistance, I find these expenses to have been reasonable and necessary in the circumstances. Consequently, Ms. Barsky is entitled to a total of \$6,046 in respect of special damages.

CONCLUSION

[231] Ms. Barsky’s claim for damages is allowed. The defendants are liable for the damages awarded in proportion to their responsibility for the Accident: 90% Mr. Simons and 10% Mr. Arias. In summary, I award the following:

Non-Pecuniary Damages	\$200,000
Past Loss of Income	\$108,507
Future Loss of Earning Capacity	\$406,976
Cost of Future Care	\$267,436
Special Damages	\$6,046
Total	\$988,965

COSTS

[232] Subject to circumstances of which I am unaware, the plaintiff is entitled to her costs of the action at Scale B. Should the parties wish to make submissions on costs, they may arrange to do so with Supreme Court Scheduling. Any such arrangements to speak to the matter of costs must be made within 30 days of the date of these Reasons for Judgement.

“Majawa J.”