IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bennett v. Lopez,*
2023 BCSC 1812

Date: 20231016
Docket: M1811678
Registry: Vancouver

Between:

Nina Ashley Bennett

Plaintiff

And

Jorge Flores Lopez and Corey Vogel

Defendants

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for the Plaintiff:	T.J. Delaney J. Chohan
Counsel for the Defendant Jorge Lopez:	D.M. Foster N. Baharian
Place and Dates of Trial:	Vancouver, B.C. November 14-18; 21-23, 2022 April 27, 28, 2023
Place and Date of Judgment:	Vancouver, B.C. October 16, 2023

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INTRODUCTION

[1] The plaintiff, Nina Ashley Bennett, makes a claim for damages arising out of a motor vehicle accident that took place on November 10, 2016, at or near the intersection of 152nd Street and 64th Avenue in Surrey, British Columbia (the "Accident").

[2] Ms. Bennett was a passenger in a 2007 Chevrolet Suburban being driven by the defendant Corey Vogel when it collided with a 2011 Nissan sedan driven by the defendant Jorge Flores Lopez.

[3] Mr. Lopez has admitted liability with respect to the Accident. The claim against Mr. Vogel was discontinued on November 7, 2022.

ISSUES

[4] The issues at trial were:

1. Whether Ms. Bennett's alleged injuries were caused by the Accident;
2. Whether Ms. Bennett is entitled to damages under the following categories:
    a. non-pecuniary damages;
    b. past income loss;
    c. future income loss;
    d. loss of housekeeping capacity;
    e. costs of future care; and
    f. special damages.

BACKGROUND

Ms. Bennett's Testimony

Pre-Accident History

[5] Ms. Bennett was born in British Columbia on September 28, 1987, and is currently 35 years old. She has two children, ages 13 and 15.

[6] In or about 2005, at the age of about 18 and after completing high school, Ms. Bennett commenced working for a division of HR Block Finance called Financial Stop, which was a cheque cashing business. She worked at Financial Stop for about five years.

[7] When Ms. Bennett was around 21 years old, she was diagnosed with depression. Ms. Bennett testified that she had first begun taking antidepressant medication without a diagnosis when she was approximately 13 years of age but had stopped because it was not helping at the time. After the diagnosis at the age of 21, Ms. Bennett resumed taking medication prescribed by her family doctor, which she took intermittently on an as-needed basis up to a few months prior to the date of the Accident.

[8] While in high school, Ms. Bennett was also diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and was prescribed medication for that condition. Prior to the Accident, Ms. Bennett did not miss work due to the depression and ADHD and was never hospitalized for these conditions.

[9] In or about 2008, Ms. Bennett started a common law relationship with an individual named Nick Poznekoff, who was a roofing contractor. They had a daughter together in 2009. This was Ms. Bennett’s second child, with her first being born with a different father in 2007.

[10] In or about late 2009 or early 2010, Ms. Bennett left the job at Financial Stop when the business closed down. She worked for about six months as a cleaner with Molly Maid and a further six months at a corner store before starting a new job with Insta Loans, which was another cheque cashing business.

[11] Ms. Bennett worked at Insta Loans for about six months in or about 2011, until one day she was robbed at gunpoint in her workplace. Due to trauma arising from the robbery, she went off work on a worker’s compensation (“WCB”) claim.

Ms. Bennett testified that she suffered post-traumatic stress disorder ("PTSD") as a result of the robbery and sought counselling for it, which helped to manage her symptoms. She testified that the PTSD still bothers her sometimes (for example, if she sees someone all covered in black it triggers her) but that it is a lot better now.

[12] While off work, Ms. Bennett undertook education relating to a diploma in office administration from MTI Community College, which included a practicum with a tax and accounting business. She obtained her diploma between July 2012 and March 2013. Ms. Bennett also testified that she provided daycare services to other families during this time, which she claimed supplemented her income by about $800 per month.

[13] About four years prior to the Accident, Ms. Bennett had a motor vehicle accident on December 12, 2012, involving a rear end at a pedestrian crossing (the "2012 MVA"). Ms. Bennett suffered injuries in the 2012 MVA and reported low back pain to her doctor. However, Ms. Bennett also testified that the 2012 MVA did not cause her to miss any school at the Community College and she graduated on time. In January 2015, Ms. Bennett incurred a further injury at work when she jumped into a recycling bin to free up more space for garbage. She testified that this made her back sore again.

[14] In addition, in or about 2013 Ms. Bennett was apparently thrown to the ground by Mr. Poznekoff in a dispute. The extent of her injuries from this incident, if any, were not clear on the evidence.

[15] Ms. Bennett did not receive employment income in 2013 and continued to collect WCB benefits after obtaining her diploma. In late 2013 she received a WCB payout of approximately $39,000.

[16] Following completion of her practicum, Ms. Bennett received a job offer from an accounting firm. However, Ms. Bennett testified that Mr. Poznekoff encouraged her to use the WCB funds to start a roofing business with him. Ms. Bennett testified that she invested the WCB funds in the business by purchasing an SUV, a trailer and roofing tools.

[17] On January 2, 2015, Ms. Bennett registered Diverse Roofing and Maintenance as a sole proprietorship (“Diverse Roofing”). In 2015 and 2016, Ms. Bennett claimed income from Diverse Roofing on her tax returns. In addition to work with Diverse Roofing, she testified that she was earning income during that period from providing child care services on a freelance basis, but this income was not declared on her tax returns.

[18] In 2016, a few months prior to the Accident, Diverse Roofing received a significant assessment from WCB due to a failure to make corporate remittances in time. At that time, Diverse Roofing owed a substantial amount of money to WCB and Ms. Bennett and Mr. Poznekoff made a decision to cease operations.

[19] Ms. Bennett testified that she was not willing to continue business with Diverse Roofing until the assessment was paid off and therefore was not working with or earning income from Diverse Roofing at the time of the Accident. She testified that, at the time of the Accident, her only income was from providing child care services.

[20] In the fall of 2016, about three weeks before the Accident, Ms. Bennett and Mr. Poznekoff ended their relationship. By all accounts at trial, the breakup was acrimonious and their relationship has been relatively tumultuous since that time.

The Accident

[21] The Accident occurred on November 10, 2016. Ms. Bennett testified that she hit her head during the Accident and believes she may have lost consciousness, although she was not sure. She also testified that she had difficulty breathing and had chest pain. Despite this, Ms. Bennett admitted that she was nonetheless able to get out of the vehicle without assistance after the Accident and to help the children who were in the back seat.

[22] Ms. Bennett testified that, after the Accident, her right leg swelled up and she experienced bruising and sensitivity. She also experienced pain in her neck and shoulders, and pain in her lower back, occasionally shooting down her right leg, and

tingling and numbness in her left hand and fingers. Further, she experienced headaches in the back of her head, radiating to the front. She testified that initially, after the Accident, she experienced the headaches daily, and that they were excruciating, causing her to feel hot and nauseous and also sensitive to light, often reducing her to tears. When the headaches would come on she would go to a dark room and use a cold cloth.

Post-Accident History

[23] She testified that she initially used a walker and cane to move around, and still walks with a limp. She stated that her tolerance for standing continues to be limited.

[24] Ms. Bennett testified that, as of the date of the trial commencing in 2022, she continues to experience pain. Ms. Bennett testified that the injury to her neck is the worst. She testified that she experiences a lot of pain in her neck, that her range of motion is restricted and that the pain sometimes radiates into her shoulders. She testified that her arms can go numb, particularly when she coughs. She also experiences bad headaches although their frequency has diminished to every three days and a couple of hours each time.

[25] Ms. Bennett testified that her back and leg continue to hurt and that she sometimes gets a sharp shooting pain down her leg. She also has issues in her right hip and the area between her hamstring and calf. She testified that the pain has seriously impacted her sleep, as it wakes her up at night. Previously, she noted, she had no such sleep issues.

[26] Ms. Bennett testified that the injuries have affected her mobility. While she testified that she previously lived an active life, she now cannot run, ride a bike or stand in one position for long. She cannot lift heavy objects such as the garbage, as this causes pain in her back and leg.

[27] Ms. Bennett testified that the emotional and psychological impacts of the injuries have been severe. She testified that, after the Accident, she had issues with

memory and concentration and her mood declined leading her into severe depression. She testified that she was unable to work, earn an income or care for her children and to participate in the hobbies she used to enjoy. She stated that this made her feel useless, worsening her depression, and resulting in suicidal ideation. She became almost destitute, borrowed money from friends and family and used the food bank, all of which she testified contributed to her lowered self-esteem.

[28] Ultimately, Ms. Bennett testified, she started cutting her wrists and made multiple suicide attempts. At one point, she testified that she was hospitalized in a psychiatric facility for over a month. While she was in the hospital, her children were cared for by Mr. Poznekoff.

[29] Ms. Bennett has not worked since the Accident, and testified that she relies principally on her mother to help with household chores and cleaning., although Ms. Bennett has the ability to do some of the lighter chores.

[30] Ms. Bennett testified that she has tried many treatments to address her pain and symptoms, including physiotherapy, kinesiology and yoga. She has also used many medications with little or no success, due to various side effects.

[31] Ms. Bennett testified that she was assaulted in 2019 by the defendant, Mr. Vogel, with whom she was in a relationship at the time. She described being kicked with steel toe boots in her head, arms and legs while she was on the ground, and later being taken to the hospital where x-rays were conducted to her head and neck to ensure no brain damage.

[32] In 2019, Ms. Bennett was also in a further motor vehicle accident, which involved the vehicle she was driving striking a tree. Ms. Bennett testified that her hip was sore as a result of the accident and that the soreness lasted a few weeks.

[33] In 2019 or 2020, Ms. Bennett was also assaulted by a group of people at her home where she was beaten. The extent of her injuries, if any, were not clear on the evidence.

The Expert Medical Evidence

Dr. Mary Ong

[34] Dr. Mary Ong was qualified without objection as a medical doctor and specialist in internal medicine, pain diagnosis and pain management. She is the co-founder of the Complex Pain Centre at St. Paul's Hospital.

[35] Dr. Ong first met with Ms. Bennett in September 2017 on the recommendation of Ms. Bennett's neurologist. Dr. Ong has been treating Ms. Bennett since 2017.

[36] Dr. Ong noted with respect to medical history that Ms. Bennett had migraine headaches as a teenager and also had generalized anxiety and ADHD, for which she was prescribed Biphentin.

[37] Dr. Ong opined that, following the Accident, Ms. Bennett has developed complex regional pain syndrome affecting her right leg (which appeared to be in remission as of 2022), and also has myofascial pain affecting her neck and lower back, associated with central sensitization syndrome, which she did not have prior to the Accident. She also opined that Ms. Bennett has chronic cervicogenic headaches arising from the upper posterior cervical spine.

[38] Dr. Ong opined that the "[Accident] is likely the sole cause of her cervicogenic headache and that the Accident had also re triggered her pre-existing migraine headache". Dr. Ong noted that Ms. Bennett had no prior history of chronic myofascial pain along her neck and shoulder girdles prior to the Accident and concluded on that basis that the myofascial pain is likely arising from the Accident. Dr. Ong also noted stenosis and compression of the right C5 and left C6 nerve roots. She observed that Ms. Bennett had no symptoms attributable to cervical spine pathology prior to the Accident and concluded that the cervical facet joint changes are likely arising from the Accident.

[39] In her first report dated February 22, 2022, Dr. Ong referenced the fact that she was requesting a nerve conduction study to confirm her diagnosis. In a follow up

report dated July 28, 2022, Dr. Ong referenced EMG/NCS findings dated April 13, 2022, by a radiologist at St. Paul's Hospital which showed findings of chronic bilateral C5 and C6 radiculopathy and stenosis.

[40] Dr. Ong concluded in her first report:

> Ms. Bennett's multiple spine pathology and cervicogenic headache contributed significantly to her inability to perform activity of daily living, eg. Cooking, house cleaning, repetitive lifting or reaching above with right arm, self care…
>
> Given the above physical limitation, it is unlikely that Ms. Bennett will be able to pursue a physically demanding occupation in future such as her previous occupation as a roofer. She needs to avoid sustained neck extension or flexion and repetitive weight lifting.

[41] With respect to future treatment, Dr. Ong opined that it was necessary to be "very cautious" about any surgical intervention due to the "high probability of poor treatment outcome".

[42] Dr. Ong recommended steroid injections for the numbness, nerve blocks for the cervicogenic headaches, trigger point injections for the myofascial pain and stated Ms. Bennett may be amenable to Botox injections for the chronic migraines. Dr. Ong noted that, due to Ms. Bennett's central sensitization syndrome, which is often refractory to conventional treatments such as physiotherapy and occupational therapy, and the major financial and psychosocial issues she has developed due to her inability to work, the clinical picture has been compounded, necessitating a coordinated treatment between psychiatrist, psychologist, social worker and kinesiologist following the target treatment of her structural issues.

[43] Dr. Ong concluded that Ms. Bennett's prognosis is "markedly guarded", given the severity of her symptoms with major disruption of her ability to function.

Dr. John Sun

[44] Dr. John Sun was qualified without objection as an expert in neurosurgery. Dr. Sun is presently a Staff Neurosurgeon with Victoria General Hospital and the Vancouver Island Health Authority.

[45] Dr. Sun conducted a physical examination of Ms. Bennett on July 25, 2022, and also reviewed her medical history and records.

[46] Dr. Sun noted that Ms. Bennett was involved in a motor vehicle accident on December 12, 2012, and had reported soft tissue injury and mechanical pain of her cervical, thoracic and lumbar spine and also complained of right buttock pain and headaches at the time. He further noted that these symptoms were aggravated by an assault in April 2013 and that, in March 2014, she developed radiation of pain in her right leg. He observed from her records that her low back pain and right leg pain was aggravated in January 2015 after she jumped in a recycling bin.

[47] While acknowledging that there was no medical documentation of pain from February 2015 until the November 2016 Accident, Dr. Sun opined that her prior reporting of low back problems "suggests she had not fully recovered from her back injury prior to the [Accident]."

[48] Subject to that caveat, Dr. Sun nonetheless opined that Ms. Bennett's complaint of low back pain "is consistent with soft tissue injury and mechanical pain of the lumbar spine", noting that "[i]t has a temporal relationship to the [Accident] and therefore it is causal." However, Dr. Sun cautioned that "this diagnosis is given based on subjective complaints with no objective way I can prove the diagnosis or its severity." He also noted that Ms. Bennett is more susceptible for the injury given her past injury of the same nature.

[49] Dr. Sun opined that he had no objective diagnosis for Ms. Bennett's right leg pain, noting that further testing was required to establish a diagnosis. He also opined there was no objective clinical evidence of a spinal cord injury.

[50] With respect to the neck pain, Dr. Sun diagnosed it as "soft tissue injury and mechanical pain of the cervical spine" and further opined that "[i]t has a temporal relationship to the [Accident] and therefore it is causal." He reached the same conclusion with respect to her headaches, albeit noting that there was no clinical evidence of a concussion. He again cautioned that these diagnoses were based on subjective complaints with no objective basis.

[51] Dr. Sun observed that Ms. Bennett was involved in two motor vehicle accidents in 2019 and was assaulted in the same year. He opined that these events "aggravated her symptoms".

[52] With respect to prognosis, Dr. Sun noted that Ms. Bennett has tried all the standard modes of treatment for the soft tissue injury and mechanical pain of the spine that he would have recommended, observing that most patients will improve over a three- to six-month period. As a result, Dr. Sun opined that Ms. Bennett's "prognosis for improvement is poor, given that she has tried all modes of standard treatment without improvement and she is well beyond 1 to 2 years of persisting symptoms."

[53] To prevent further worsening, Dr. Sun recommended general spinal care as a "lifelong measure". He also recommended that Ms. Bennett's cervicogenic headaches follow the same treatment and prognosis as her soft tissue injury and mechanical pain. Dr. Sun opined that the prognosis for her arm symptoms and right leg is "uncertain" and that further investigations are required.

[54] Dr. Sun opined that Ms. Bennett's arm symptoms have no temporal relationship to the Accident, noting that they were first reported in March 2018.

[55] Dr. Sun concluded:

> Ms. Bennett's limitations with respect to work are based on her subjective complaints of pain. She does not have any objective neurologic deficit that would limit or prevent her ability to do any type of work within reason; past, present, and in the future.

Dr. Shaila Misri

[56] Dr. Shaila Misri was qualified as an expert in psychiatry. Dr. Misri is a Professor Emerita with the Department of Psychiatry at the University of British Columbia.

[57] Dr. Misri conducted a clinical interview of Ms. Bennett on April 11, 2022 and reviewed her psychiatric and medical history.

[58] Dr. Misri opined as follows:

> In my opinion, it is more likely than not that the [Accident] caused the onset of the following psychiatric symptoms:
>
> 1. Neurocognitive Disorder (NCD), onset post MVA, presently mild in intensity, following a fluctuating course, multifactorial in origin.
> 2. Persistent Depressive Disorder, reactivated post MVA, chronic in its intensity, moderate to severe in its clinical presentation.
> 3. Generalized Anxiety Disorder (GAD), reactivated post MVA, following a complex course with off and on panic attacks.
> 4. Borderline Personality Disorder, onset post MVA, multifactorial in its etiology, moderate to severe in its intensity.

[59] With respect to the NCD, Dr. Misri opined that there is a probability that Ms. Bennett suffered a mild traumatic brain injury as a result of the impact from the Accident, noting that the description of the Accident points to a very brief post-traumatic amnesia.

[60] Dr. Misri opined with respect to the NCD: “Absent the accident, in my opinion Nina would not have incurred the neuro-cognitive deficits she is struggling with at present.” Dr. Misri also opined that “the improvement has not been significant”, that Ms. Bennett’s productivity has gone down quite considerably and that the functional impairment has caused her intense anxiety.

[61] With respect to the Persistent Depressive Disorder, Dr. Misri opined that Ms. Bennett’s score on the PHQ-9 test was 20, which denotes “severe depression”. While noting Ms. Bennett’s history of depression dating back to teenage years, Dr. Misri also found it significant that, at the time of the Accident, Ms. Bennett was working hard with the roofing company, was raising children and was functional.

[62] Dr. Misri opined that the Accident impacted Ms. Bennett’s life “in a major way”, observing that the combination of depression, anxiety chronic pain and neurocognitive difficulties made her feel worthless because of the degree of her incapacity, including being unable to look after her children.

[63] Dr. Misri noted that Ms. Bennett has trialled multiple antidepressant medications since the Accident which were unsuccessful due to severe side effects. Dr. Misri observed that Ms. Bennett has found therapy at a mental health centre to

be useful, but the treatment has not led to a complete resolution of her depressive symptoms as yet.

[64] With respect to the GAD, Dr. Misri opined that it is more likely than not that the Accident caused a reactivation of anxiety for Ms. Bennett (she had a previous history of anxiety dating back to her teenaged years), noting that panic attacks began right after the Accident. Dr. Misri opined as follows:

> Nina has had previous history of anxiety going back to her teenage years because of her traumatic childhood. She got help from the youth program for her anxiety. She was on escitalopram in her late 20s, and was doing fairly well. With medication and counselling the anxiety issues were manageable. She developed goals with regard to her career, and she enjoyed being a mother. She had hobbies, she was a horse rider and owned a couple of horses, and liked spending time outdoors.
>
> Absent the [A]ccident, in my opinion, the course of anxiety would have followed a different trajectory. The treatment of anxiety became challenging with relentless pain, depression and NCD related symptoms… The multiple complex comorbidities which resulted from the MVA has rendered her anxiety treatment resistant.

[65] Finally, with regard to the Borderline Personality Disorder, Dr. Misri opined that "it is more likely than not that the [Accident] result in the onset" of that condition. Dr. Misri noted that Ms. Bennett's history of depression, anxiety and trauma in the past has made her "vulnerable" to developing mental health issues and that the Accident "added another layer of complexity to her life, specifically to the course of mood and anxiety issues."

[66] Dr. Misri observed that Ms. Bennett developed cutting behaviours which resulted in hospitalization and that different medications she tried have not worked.

[67] With respect to the impact of the Accident on Ms. Bennett's functionality, Dr. Misri opined that there are physical, cognitive and psychological impairments that prevent Ms. Bennett from returning to the roofing business. In addition, Dr. Misri opined that, due to a "vicious cycle that has been formed between chronic pain, cognitive and psychiatric symptoms", Ms. Bennett "will continue to remain functionally impaired in the workforce in the foreseeable future."

[68] With respect to prognosis, Dr. Misri opined:

1. Complete recovery from NCD “may not likely happen” and prognosis is “guarded”;

2. Complete recovery from Persistent Depressive Disorder “is likely not possible” and “prognosis for complete recovery is poor”;

3. Prognosis for complete recovery from GAD is “guarded”; and

4. Prognosis for complete recovery from Borderline Personality Disorder is “poor” and “guarded”.

Dr. Eugene Okorie

[69] Dr. Eugene Okorie is a Faculty Member with the Department of Psychiatry at the University of British Colombia in Kelowna. He is also a Clinical Trials Investigator with OCT Research ULC.

[70] Dr. Okorie was qualified without objection as an expert in psychiatry.

[71] Dr. Okorie conducted an examination of Ms. Bennett on July 23, 2022, and reviewed her psychiatric and medical history.

[72] Dr. Okorie opined that Ms. Bennett did not sustain any traumatic brain injury in the Accident, noting that she had told ambulance and hospital staff who assessed her after the Accident that she did not lose consciousness. Dr. Okorie opined:

> In my opinion, her ongoing attentional and memory impairments are more likely than not related to her pain, ADHD, emotional distress, cannabis use, sleep disturbance, and medications including Zopiclone.

[73] Dr. Okorie identified Ms. Bennett’s longstanding difficulties with ADHD, persistent depressive disorder and borderline personality disorder, and other mood and anxiety-related difficulties, which he opined pre-dated the Accident. He stated:

> Ms. Bennett’s self-reported history and medical records show a pervasive pattern of abandonment fears, unstable/intense interpersonal relationships, impulsivity, affective instability, recurrent suicidal gestures, anger management challenges, and chronic low self-esteem diagnostic of borderline personality disorder (BPD).

[74] He further opined:

> These disorders, which pre-dated the subject MVA, were caused by her genetic inheritance, early life adversities, lifelong attachment challenges, and spousal abuses.
>
> Ms. Bennett's psychosocial situation started to deteriorate about a month prior to the subject MVA, when breaking up with her abusive boyfriend triggered a series of losses, including her roofing company, accommodation, routines, and sources of income. Subsequent stressors including loss of custody of her children, relationship problems, MVA-related pain and related disabilities, assault by her boyfriend, and other unrelated MVAs have further contributed to her difficulties.
>
> Even though her ADHD, BPD, and PDD would have continued and caused her functional issues in the future without appropriate treatments absent the subject MVA, above-noted stressors, cannabis use, and inadequate treatments have aggravated the disorders with resultant repeated hospital presentations for escalated suicidal, impulsive and dangerous behaviours.

[75] With respect to the impact of Ms. Bennett's condition on her functionality, Dr. Okorie opined as follows:

> Although Ms. Bennett's pain and physical difficulties may cause her functional limitations in physical jobs, and I would defer to other experts to expand on this, it is her psychiatric conditions particularly her BPD and ADHD that would undermine her capacity to attend work and effectively perform the duties of any jobs including sedentary jobs. In my opinion, her BPD and ADHD, unless adequately treated, would undermine her capacity to consistent attend work, effectively interact with coworkers, or meet her productivity targets.
>
> The complexity of Ms. Bennett's psychiatric condition demand care under a mental health and substance use service with inputs from psychiatry, social work, occupational therapy, and psychology. She would also benefit from regular medication reviews by a psychiatrist, individual counselling based on cognitive behavioural therapy and mindfulness training, and dialectical behaviour (group) therapy program.

[76] Dr. Okorie also opined that Ms. Bennett's specific circumstance is further challenged by her pain and related disabilities, although deferred to other experts for treatment recommendations for her pain and physical difficulties.

[77] In an addendum report dated September 26, 2022, Dr. Okorie opined as follows:

> Although the subject MVA and related pain and functional limitations aggravated Ms. Bennett's depression, anxiety, emotional dysregulation, and cognitive challenges, it is my opinion that other subject MVA-unrelated factors, including pre-MVA social problems, relationship spousal strife, child

> custody struggles, other MVAs, and poor treatment compliance, also contributed to her issues.
>
> I agree with Dr. Misri that absent her pain and physical issues Ms. Bennett's complex psychiatric issues significantly impact her function. As noted in my earlier report, Ms. Bennett would be unable to perform even sedentary jobs that accommodated her pain due to her psychiatric issues.

ANALYSIS

Causation

[78] Ms. Bennett alleges that, as a result of the Accident, she incurred a range of injuries (the "Alleged Injuries") including:

- injuries to her neck, head, shoulder and lower back, radiating to her right leg and numbness in her left hand and fingers;
- chronic cervicogenic headaches; and
- psychological injuries, including a neurocognitive disorder, severe depression, anxiety and borderline personality disorder ("BPD").

[79] The defence takes issue with the alleged causal link between the Accident and the Alleged Injuries, arguing that these arose either from unrelated pre-existing conditions or intervening events after the Accident.

Applicable Law

[80] The onus is on Ms. Bennett to prove on a balance of probabilities that (1) she did in fact suffer the Alleged Injuries; and (2) that the Accident caused the Alleged Injuries. To establish causation, Ms. Bennett must demonstrate that "but for" the Accident she would not have suffered the Alleged Injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8. Inherent in the "but for" test is a requirement that the Accident was necessary to bring about the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, 1996 CanLII 183; *Clements* at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[81] Ms. Bennett need only establish a "substantial connection between the injury and the defendant's conduct", beyond the *de minimis* range, in order to establish

causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327, 1990 CanLII 70; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11. The "but for" test must be applied in a "robust common sense fashion" with no requirement for scientific evidence of the precise contribution the defendant's negligence made to the injury: *Welder v. Lee,* 2019 BCSC 1328 at para. 76; *Clements* at para. 9.

[82] With regard to the law to be applied in relation to causation in cases involving a pre-existing condition or intervening later events, Justice Chan helpfully summarized the analysis in *Lundgren v. Taylor*, 2023 BCSC 612:

> [62] The law regarding causation of damages and pre-existing conditions was summarized by Madam Justice Fisher in *Chappell v. Loyie*, 2016 BCSC 1722 as follows:
>
> > Causation of damage and pre-existing conditions
> >
> > [10] As the court said in *Blackwater* [*v. Plint*, 2005 SCC 58], a plaintiff is only to be restored to his original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this is to be taken into account in reducing the overall award: *Athey*, at para. 35; *Moore v. Kyba*, 2012 BCCA 361 at para. 43. In addition, damages caused by other non-tortious causes that occur after the defendant's wrongful act must be taken into account: *Blackwater*, at para. 80. This is referred to as the "crumbling skull" doctrine. It is important to note that any reduction made to take these factors into account does not reduce the damages; it simply awards the damages which the law allows: see *Blackwater*, at para. 84.
> >
> > [11] In addition, a tortfeasor is liable for a plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. As the court said in *Athey*, at para. 34, the tortfeasor must take the victim as he finds him, and is liable even though the plaintiff's losses are more dramatic than they would be for the average person. This is known as the "thin skull rule".
> >
> > [12] There has been some confusion in the law with respect to these labels. In *A. (T.W.N.A.) v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, the court clarified this at para. 30 by stating that the "simple idea" expressed in *Athey*, was clear and direct and "both latent and active pre-existing conditions must be considered in assessing the plaintiff's original position." At para. 48:

> …Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

> [13] Hypothetical and future events – how the plaintiff's life would have gone without the tortious injury – need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, or the probability of their occurrence. A future or hypothetical possibility is to be taken into account "as long as it is a real and substantial possibility and not mere speculation": Athey, at para. 27.

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

> [39] …the appellant fails to distinguish between the legal concepts of causation and compensation. This distinction was the focus of the excerpt the trial judge quoted at para 66 of his reasons from the judgment of then-Chief Justice McLachlin in *Blackwater v Plint*, 2005 SCC 58, which I repeat for convenience:
>
> > [78] … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. …
>
> [40] As the trial judge explained in para 67, referring to the discussion in *Athey* … at paras 32–35, tortfeasors must take their victims as they find them even if the injuries are more severe than would be expected for a normal person (the "thin skull" rule), but need not compensate the plaintiff for the consequences of a pre-existing condition that the plaintiff would have experienced anyway (the "crumbling skull" rule).
>
> [41] As this Court explained in *TWNA v Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para 22, in discussing *Athey*, a defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes. Once causation has been proven, the tortfeasor is fully liable for the damage caused by

> his or her wrongful conduct. But when it comes to the assessment of damages, different considerations apply, as the notion of the crumbling skull plaintiff illustrates.
>
> [64] As I understand it, this Court must determine which injuries, if any, were materially caused or substantially contributed to by the 2016 Accident and the 2018 Accident. Even where there are other potential non-tortious causes of an injury, such as psychiatric illness, the defendant will still be found liable if the plaintiff can prove that the accident materially caused or substantially contributed to the injury. However, in assessing damages, the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.
>
> [65] In assessment of damages, the Court must consider the plaintiff's pre-existing condition. Here, the Court must consider whether there was a measurable risk that the plaintiff's current symptoms would have manifested without the 2016 Accident and the 2018 Accident. This measurable risk is understood as a real and substantial possibility, and if the Court so finds, it must assess the relative likelihood of it occurring.

[83] As noted in *Jandric v. Janzen*, 2023 BCSC 470, where a defendant argues that a plaintiff's damages are to be reduced to account for any measurable risk that the pre-existing condition would have detrimentally affected the plaintiff even absent the tortious event, the burden of proof lies with the defendant and "measurable risk" (para. 136) must rise above mere speculation and be based upon the accepted evidence.

The Evidence

[84] In my view the testimonial and expert medical evidence established a causal connection in this case between the Accident and some but not all of the Alleged Injuries. Specifically, I accept that the Accident caused Ms. Bennett's injuries to her right leg, neck, shoulder, lower back and the chronic cervicogenic headaches, and also caused the onset of the severe depression, the generalized anxiety and the BPD. I agree with the defence that the plaintiff failed to demonstrate that the Accident caused the ADHD, PTSD, the depression and anxiety as a baseline condition (as distinct from the Post- Accident severe depression which I find was causally connected to the Accident) or the neurocognitive disorder.

[85] In explaining my conclusion, I will first review the relevant medical and lay witness evidence and then address the issues raised by the defence with respect to the credibility and reliability of Ms. Bennett's testimony.

The neck and lower back pain and the headaches

[86] There was not a material disagreement between the medical experts about the causal connection between the Accident and Ms. Bennett's neck and lower back pain and headaches.

[87] Dr. Ong opined in her report that, following the Accident, Ms. Bennett has developed myofascial pain affecting her neck and lower back, associated with central sensitization syndrome, which she did not have prior to the Accident. Dr. Ong noted that Ms. Bennett had no prior history of chronic myofascial pain along her neck and shoulder girdles prior to the Accident and concluded on that basis that the myofascial pain is likely arising from the Accident. Dr. Ong also opined that the "[Accident] is likely the sole cause of her cervicogenic headache and that the Accident had also re triggered her pre-existing migraine headache".

[88] Dr. Sun did not disagree with Dr. Ong with respect to the back and neck pain and the headaches, opining that there was indeed a causal connection between these injuries and the Accident, although subject to the caveat that these diagnoses were based upon Ms. Bennett's subjective complaints. I will address this caveat in my credibility analysis below.

[89] Dr. Sun also opined that Ms. Bennett was "more susceptible for the [back] injury given her past injury of the same nature", as a result the 2012 MVA. As explained in *Lundgren* at paras. 62-64, Dr. Sun's opinion on this issue supports the conclusion that the Accident was therefore at minimum a contributing cause to Ms. Bennett's back injury to the extent that it materially worsened a pre-existing condition. Ms. Bennett was therefore in the position of a thin skull plaintiff with respect to her back, although I will address the possibility that her back condition could have manifested in the future even without the Accident (i.e. in the sense of a crumbling skull plaintiff) at the damages assessment stage of the analysis.

[90] The conclusions of the medical experts on these injuries are consistent with Ms. Bennett's testimony about the pain she suffered in the lower back and neck areas immediately after the Accident (which she had not experienced in the two years prior to the Accident), and the ongoing severe headaches (which she had never experienced before). There was no lay witness testimony which contradicted Ms. Bennett's evidence about the consistent and debilitating pain she has experienced in all these areas after the Accident (which she had not experienced in such a continuous manner even with respect to her back before the Accident).

[91] I therefore conclude that all these injuries were caused by the Accident.

Cervical spine injury

[92] Dr. Ong opined that Ms. Bennett had stenosis and compression of the right C5 and left C6 nerve roots attributable to the Accident and associated with the cervicogenic headaches. She observed that Ms. Bennett had no symptoms attributable to cervical spine pathology prior to the Accident and concluded that the cervical facet joint changes are likely arising from the Accident.

[93] In her first report dated February 22, 2022 (well before the 84-day expert report deadline), Dr. Ong referenced the fact that she was requesting a nerve conduction study to confirm her diagnosis. In a follow up report dated July 28, 2022, Dr. Ong referenced EMG/NCS findings dated April 13, 2022, by a radiologist at St. Paul's Hospital which showed findings of chronic bilateral C5 and C6 radiculopathy and stenosis. The defence questioned whether Dr. Ong's latest report was improper reply due to a reference to the radiology findings (i.e. as new evidence) but I find her reference in her earlier report to the fact that these findings had been requested made the inclusion of the study results proper and fair in the later report.

[94] Dr. Sun did not agree with Dr. Ong with respect to a cervical spine injury, as Dr. Sun was of the view that Ms. Bennett had mechanical pain of her cervical, thoracic and lumbar spine dating back to the 2012 Accident that had not fully resolved.

[95] Under all the circumstances I prefer the evidence of Dr. Ong on this issue. In her report, Dr. Ong explained how her conclusions about the causal connection between the Accident and the spinal injury were based upon the relevant radiology imaging and neurological exams and other relevant symptoms such as a sensory deficit in the left thumb, whereas Dr. Sun's did not reference any such data in support of his conclusion apart from Ms. Bennett's medical records prior to the Accident. Dr. Sun merely concluded that "further investigations are required" without taking the analysis further.

[96] Further, and more importantly, Dr. Ong's conclusion is more consistent with the medical records and the witness testimony which indicate that, by the time of the Accident, there was no evidence that Ms. Bennett had any active, pre-existing symptoms arising from the 2012 Accident that had not resolved or were not fully managed. With respect to the medical records I find the following facts to be significant:

- There are references in Ms. Bennett's medical records to back pain arising from the 2012 Accident up to 2014 but no such references in the two years prior to the Accident;

- On January 15, 2015, Ms. Bennett complained of back pain and pain in her right leg arising from a new injury resulting from jumping in a recycling bin. She testified that this occurred when she was at a roofing job site and was attempting to compress discarded materials to make room for more materials. On February 6, 2015, there was a reference in the medical records to her back still being sore and a note that she was awaiting an x-ray;

- However, in five more medical visits after February 15, 2015 and up until the date of the Accident (a period of approximately one year and nine months) there were no further complaints of back or leg pain. Given that Ms. Bennett had a track record of previously reporting issues with her back and leg to her doctor, the lack of further reporting strongly supports the inference that her prior back and leg complaints had either fully resolved by the time of the

Accident, or at a minimum were sufficiently resolved that they were not impacting her daily life and activities.

[97] With respect to the non-party witness testimony, I note that there was not a single witness (including defence witnesses) who testified that Ms. Bennett was restricted or disabled in any material way by back pain in the two years prior to the Accident. To the contrary, the witnesses all described Ms. Bennett as an active mother with a busy home and work life, which included participation in the running of Diverse Roofing. In particular:

- Karla Kruhne, a defence witness, was married to a roofing contractor who worked on site with Mr. Poznekoff. She testified that she became friends with Ms. Bennett in 2014 and 2015. She testified that she would spend two to three days a week with Ms. Bennett and sometimes weekend days as well in 2014 and 2015. They would hang out at the house together, walk their dogs, cook dinner, take the kids to school and go shopping. Sometimes, she recalled, they went camping with the kids. She also recalled that Ms. Bennett would periodically drive up to Whistler to assist with Diverse Roofing projects and deliver materials and that Ms. Bennett was active in managing the books for Diverse Roofing, which Ms. Kruhne assisted her with. Ms. Kruhne did not report any observations in her testimony that Ms. Bennett was suffering from any disability or back pain prior to the Accident, or that she was otherwise compromised in her ability to live a normal life.

- Cody Chapman, married to Ms. Kruhne, also testified for the defence. He recalled that Ms. Bennett was an active participant in the Diverse Roofing business. He recalled that Ms. Bennett was fairly healthy and fit and that her house was not in disarray. He recalled she was devoted to her kids and that he would often see her playing on the ground with them. As with Ms. Kruhne, Mr. Chapman did not identify any disability or back pain on the part of Ms. Bennett prior to the Accident.

- Ms. Benneteau, Ms. Bennett's mother, also testified that Ms. Bennett was an active person prior to the Accident and a "social butterfly". She recalled Ms. Bennett going on camping trips, lake trips, playing soccer, riding horses and climbing trees prior to the Accident. She testified extensively as to the drastic changes in Ms. Bennett's physical health after the Accident.

[98] I conclude that the Accident caused a spine injury to Ms. Bennett that was separate and distinct from any back injuries she had incurred prior to the Accident and was also associated with the cervicogenic headaches.

The right leg pain

[99] Dr. Ong opined that Ms. Bennett's complex regional pain syndrome affecting her right leg was likely caused by the Accident. Dr. Ong noted that, following the Accident, Ms. Bennett reported right leg pain. Ms. Bennett was examined and observations of her leg included discolouration, muscle twitching, heat and swelling and pain from mechanical touch or stimulus. She also reported difficulty climbing up stairs, walking up an incline, playing with her children and weight bearing.

[100] Dr. Sun did not diagnose the right leg injury in his report, noting that further testing was required to establish a diagnosis. He did not attempt to explain or reconcile the relevant symptoms reported by Ms. Bennett that were corroborated by medical professionals in the medical records.

[101] Given Dr. Sun's lack of analysis, and the medical records and witness testimony which did not identify right leg pain as an issue in the two years prior to the Accident, I prefer Dr. Ong's conclusion. I conclude that the Accident was a causal contributor to Ms. Bennett's right leg pain, although I note that Dr. Ong has observed that the right leg pain had largely resolved as of 2022.

Prognosis on Physical Injuries

[102] Dr. Ong opined that Ms. Bennett's injuries have "contributed significantly to her inability to perform activity of daily living, e.g. Cooking, house cleaning, repetitive lifting or reaching above with right arm, self care…" and also that "it is unlikely that

Ms. Bennett will be able to pursue a physically demanding occupation in future such as her previous occupation as a roofer."

[103] With respect to future treatment, Dr. Ong opined that it was necessary to be "very cautious" about any surgical intervention due to the "high probability of poor treatment outcome". Dr. Ong concluded that Ms. Bennett's prognosis is "markedly guarded", given the severity of her symptoms with major disruption of her ability to function.

[104] Similarly, Dr. Sun also opined in the body of his report that Ms. Bennett's "prognosis for improvement is poor, given that she has tried all modes of standard treatment without improvement and she is well beyond 1 to 2 years of persisting symptoms." Dr. Sun further recommended general spinal care as a "lifelong measure" to prevent further worsening.

[105] However, in the final paragraph of his report titled "Limitations", Dr. Sun appeared to depart completely from his earlier poor prognosis by concluding as follows:

> Ms. Bennett's limitations with respect to work are based on her subjective complaints of pain. She does not have any objective neurologic deficit that would limit or prevent her ability to do any type of work within reason; past, present, and in the future.

[106] In a comment on this paragraph in a reply report, Dr. Ong took issue with Dr. Sun's conclusion and observed as follows:

> I would strongly disagree with this statement given Ms. Bennett cervical spine injury suffered during MVA Nov. 10, 2016, resulted in cervicogenic headache and cervical radiculomyelopathy.
>
> In fact, I am baffled by Dr. Sun's contradictory statement to his own recommendations on long term preventative measures for cervical and lumbar spine care noted [earlier in Dr. Sun's report].
>
> [Emphasis added.]

[107] I share Dr. Ong's difficulty in trying to reconcile the final paragraph in Dr. Sun's report (which effectively indicates Ms. Bennett has no objective limitations or deficits) with his earlier conclusions in the same report about a poor prognosis,

the failure of standard treatments over a long period and the need for lifelong spinal care. This final paragraph, which is drafted in a sweeping manner (i.e. "past, present and in the future"), appears to amount to a statement to the effect of "it's all in her head and always was". However, if Ms. Bennett's condition is truly only attributable to subjective belief, as Dr. Sun implies, it is difficult to understand why Dr. Sun has also fully supported the "standard" spinal treatments that Ms. Bennett has already received and recommended lifelong spinal care (as opposed, for example, to merely psychological counselling).

[108] In closing argument, defence counsel sought to soften the apparent contradiction by focussing on Dr. Sun's use of the words "any type of work within reason". However, this does not help under the circumstances because Dr. Sun did not explain what "within reason" means in his report, nor is it apparent on the face of the words. For example, did he mean any type of work appropriate "for a person with a serious spinal injury and a poor prognosis" or any type of work appropriate "for a person with no objective injury at all but merely a subjective perception of pain"? Dr. Sun never explained this in the report with the result that the contradiction remains unexplained. Under cross-examination, Dr. Sun explained that the words "within reason" were intended to refer to refraining from heavy lifting but, again, this was difficult to reconcile with his conclusion in the report that Ms. Bennett's deficits are subjective not objective.

[109] Unfortunately, in light of these serious contradictions and the sweeping and unrestricted language in this last paragraph on "Limitations", it is difficult to resist the conclusion that Dr. Sun has put himself in the role of advocate on behalf of his client, the defendant, rather than limiting himself to his duty to advise the court by presenting a balanced weighing of all the evidence. For all these reasons, I have given this final paragraph, and the conclusion therein, little weight.

Post-Accident Events

[110] Dr. Sun stated the following in his report:

> On June 20, 2019 and July 27, 2019, [Ms. Bennett] was involved in MVAs and assaulted in January 2019. These events aggravated her symptoms. The degree of aggravation seemed temporary. She had a pre-existing susceptibility to injury because she had ongoing symptoms.

[111] The defence has sought to argue that these events in 2019 may have constituted intervening causal factors which worsened Ms. Bennett's condition and may have broken the causal connection between the injuries incurred as a result of the Accident and her symptoms as of the trial date. However, I note that Dr. Sun himself was of the view that the "degree of aggravation" from the subsequent events was "temporary". There was no other compelling medical evidence adduced at trial to support the conclusion that the subsequent motor vehicle accident and assaults had a significant long-term effect upon Ms. Bennett's health or in any material way altered or worsened the symptoms otherwise attributable to the Accident. The impact of these injuries were speculative and not measurable based upon the evidence adduced at trial.

[112] Accordingly, I conclude that these subsequent events did not break the causal chain between the Accident and the Alleged Injuries, or otherwise materially alter the long-term impact and trajectory of these injuries.

Psychological Injuries

[113] Dr. Misri opined that the Accident caused the onset of Ms. Bennett's NCD, the persistent depressive disorder, the GAD and the Borderline Personality Disorder. Dr. Okorie disagreed, opining that these were all pre-existing conditions.

[114] While there was significant disagreement between Dr. Misri and Dr. Okorie on many issues in their reports, I emphasize at the outset that Dr. Okorie in his second report did agree with Dr. Misri that Ms. Bennett's current psychiatric issues renders her currently unable to perform even sedentary jobs. Dr. Okorie stated:

> I agree with Dr. Misri that absent her pain and physical issues Ms. Bennett's complex psychiatric issues significantly impact her function. As noted in my earlier report, Ms. Bennett would be unable to perform even sedentary jobs that accommodated her pain due to her psychiatric issues.

[115] However, Dr. Okorie further opined that Ms. Bennett's psychiatric issues are attributable to prior psychological conditions and life events unrelated to the Accident. By contrast, Dr. Misri opined that it is more likely than not that the Accident caused the onset of the four psychiatric symptoms identified above.

[116] On balance I prefer the evidence of Dr. Misri (with the exception of the opinion relating to NCD which I explain below), which is more consistent with the medical reports and the witness testimony. I have reached this conclusion for four reasons. First, I note that Dr. Okorie admitted under cross-examination that he had failed to review the clinical medical records in the preparation of his report, whereas Dr. Misri had done so.

[117] Second, if Dr. Okorie had reviewed the medical records, he would have seen that while these records did indicate that Ms. Bennett had symptoms of depression, anxiety and ADHD dating back to her teenaged years, there was no evidence that these conditions had previously had a debilitating effect on her life in the manner that occurred immediately after the Accident. To the contrary, the medical reports indicated that these conditions had been controlled with medication. In 2014 and 2015 the reports contain repeated notes stating "mood steady", "coping well" and "nil acute". A note from January 2016 stated: "doing well with meds, mood stable". Under cross-examination, Dr. Okorie in fact admitted that a review of clinical records shows that her depression and ADHD were "well controlled" during the 2014–2016 time frame prior to the Accident.

[118] Third, Dr. Okorie also admitted under cross-examination that the following statement in his report about the issues with Ms. Bennett's history, which played a central role in Dr. Okorie's conclusion, was actually a reference to her history <u>after</u> the Accident and not before as he opined in his report:

> Ms. Bennett's self-reported history and medical records show a pervasive pattern of abandonment fears, unstable/intense interpersonal relationships, impulsivity, affective instability, recurrent suicidal gestures, anger management challenges, and chronic low self-esteem diagnostic of borderline personality disorder (BPD).

[119] In my view, this was a significant failing in Dr. Okorie's report, as it indicates that he was using data about her condition after the Accident to diagnose her condition prior to the Accident. As a result, his entire analysis with respect to the causal connection between the Accident and any resulting changes in her psychological condition is open to question.

[120] For example, Ms. Bennett testified that her suicide attempts, self-cutting, loss of sense of self-esteem, hopelessness and instability post-dated and did not pre-date the Accident. She also explained that her low-self esteem developed due to her feelings that, as a result of her injuries from the Accident, she was not able to work, be a good mother and otherwise be a productive person, which greatly exacerbated her condition. This evidence is significant because, as noted by Dr. Misri, these types of actions and patterns, experienced after the Accident, are DSM-5 criteria for BPD.

[121] Under cross-examination, Dr. Okorie admitted that there was nothing in the medical records which supported the conclusion that Ms. Bennett suffered from the conditions he identified in the above paragraph prior to the Accident. Thus, by his own admission, there was no evidence upon which he could have based a BPD diagnosis prior to the Accident.

[122] Fourth, there were certain key assumptions in Dr. Okorie's report which were not supported by the evidence. For example, the following passage in Dr. Okorie's report appears to set out Dr. Okorie's theory that Ms. Bennett's psychological condition was attributable to factors other than the Accident:

> Ms. Bennett's psychosocial situation started to deteriorate about a month prior to the subject MVA, when breaking up with her abusive boyfriend triggered a series of losses, including her roofing company, accommodation, routines, and sources of income. Subsequent stressors including loss of custody of her children, relationship problems, MVA-related pain and related disabilities, assault by her boyfriend, and other unrelated MVAs have further contributed to her difficulties.

[123] The evidence at trial did not support Dr. Okorie's assumptions. Specifically:

- There were no medical records to support a deterioration of her psychological situation a month prior to the Accident;

- Ms. Bennett testified that leaving Mr. Poznekoff was a relief for her and not a source of stress. She explained that it was a relief because he was abusive;

- Diverse Roofing had ceased active business about three months before the Accident and not one month before as Dr. Okorie posited. Ms. Bennett testified that, after Diverse Roofing ceased operations, she was looking at other opportunities, including sub-contracting pressure washing jobs. This type of proactive planning was not a sign of someone who was in a deteriorating psychosocial situation, as surmised by Dr. Okorie;

- Dr. Okorie did not account in his opinion for the fact that Ms. Bennett had changed jobs before without suffering a catastrophic psychological decline. Indeed, even following an incident where she was robbed at gunpoint and suffered from PTSD, she was subsequently able to resume a normal working and home life;

- Ms. Bennett did not lose her accommodation at the time of the Accident, as posited by Dr. Okorie, as she ultimately stayed in the family home and Mr. Poznekoff left. Dr. Okorie admitted under cross-examination that he did not know where Ms. Bennett was living at the time of the Accident, and merely assumed she had lost her accommodation;

- Dr. Okorie admitted under cross examination that the medical records supported the conclusion that Ms. Bennett's self-esteem was closely related to her accomplishments and that she was "prideful" about that before the Accident. He also admitted that the loss of her job would have been "critical" for her. He further admitted that, absent the Accident, Ms. Bennett may have found another job and that, without the Accident, she would not be as badly off as she is today; and

- None of the testimony from the lay witnesses supported the theory of Dr. Okorie that the cause of Ms. Bennett's psychological deterioration was unrelated to the Accident. To the contrary, Ms. Benneteau and Ms. Milligan, among other witnesses, testified that she was a happy and energetic person prior to the Accident.

[124] Taking into account the foregoing, I prefer the evidence of Dr. Misri over the evidence of Dr. Okorie, at least as it pertains to the persistent depressive disorder, the generalized anxiety disorder and the BPD. With respect to Dr. Misri's opinion, I have the following concerns:

- Dr. Misri's diagnosis of neurocognitive disorder appears to be based in significant part upon the assumption that Ms. Bennett had suffered a mild traumatic brain injury ("MTBI"), despite Ms. Bennett's uncertainty as to whether she had ever suffered a loss of consciousness during the Accident. Dr. Okorie took issue with her diagnosis in large part upon that basis. In my view, there was insufficient medical evidence adduced by the plaintiff at trial to establish that Ms. Bennett had indeed suffered a MTBI. While I acknowledge Dr. Misri's statement that the cause of the NCD was "multifactorial in its etiology" (and not solely based upon a MTBI), the significant role played by the alleged MTBI in her analysis leads me to doubt the diagnosis because the MTBI was not proved on a balance of probabilities;

- There is no question in my view that Ms. Bennett had suffered from depression and anxiety for a long time and it is also my view based upon the evidence that these are conditions she would have had to manage throughout her life even without the Accident. Dr. Misri's view was that these conditions were well managed prior to the Accident and that the effect of the Accident and its aftermath was to greatly magnify the severity and extent of these conditions. I find this opinion to be persuasive on the issue of causation but do note that there was compelling evidence that Ms. Bennett was inconsistent in her use of anxiety and depression

medication and likely would have faced challenges in life relating to the depression and anxiety even without the Accident. This does not affect the causation analysis but I will take this into account in my damages assessment.

Credibility and Reliability of Ms. Bennett's Testimony

[125] The defence argues correctly that the credibility and reliability of Ms. Bennett's evidence was an important issue in this case because the expert medical reports tendered rely significantly upon Ms. Bennett's self-report of physical and psychological symptoms. This was in particular a point made by Dr. Sun, as I have described above. Thus, I must carefully weigh the credibility and reliability of her testimony.

[126] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 87–93, Justice Mayer described the appropriate approach to credibility analysis as follows:

> [87] Before I proceed further with my reasons, I consider it appropriate to make some general comments with respect to credibility, which as I have already said is a central issue in this case. Credibility issues arose as a result of changes in witnesses' evidence before and during trial, the nature of responses to questioning at trial including the witnesses' demeanour, the overall plausibility or logic of the witnesses' testimony and the conflicts in evidence of both the party witnesses and the evidence of independent witnesses and the documentary evidence.
>
> [88] I am conscious of the principles set out in the leading authorities concerning how the court should deal with credibility and reliability questions. Those include *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C. C.A.), *R. v. H.C.*, 2009 ONCA 56, *Bradshaw v. Stenner*, 2010 BCSC 1398, *Pacheco v. Antunovich*, 2015 BCCA 100, and the cases referenced therein.
>
> [89] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.
>
> [90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the

witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.

[91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[92] Some additional factors which may impact credibility include the following:

a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony: see paras. 57-59, 86 of *F.H. v. McDougall*, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1.

b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: *Le v. Milburn*, 1987 CarswellBC 2936 (W.L.) at para. 1; *Jones v. Jones*, 2008 BCSC 1401 at paras. 31, 32 and 60; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 9.

c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: *Bradshaw* at para. 190;

d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: *Osayande v. Canada (Minister of Citizenship And Immigration)*, 2002 FCT 368 at paras. 19 and 21;

e) Credibility will be undermined when a witness (or party) has failed to produce documents: *Bradshaw* at para. 188; *Pacific West Systems Supply Ltd. v. Vossenaar*, 2012 BCSC 1610 at paras. 84 to 86;

f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: *R. v. Storey*, 2010 NBQB 86 at para. 78; *Wang v. Wang*, 2017 BCSC 2395 at paras. 45-46 and 89-90; and

g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: *Bradshaw* at paras. 191 to 192.

[127] Taking into account the foregoing principles, I found Ms. Bennett on balance to be a credible witness, in particular as her testimony pertained to her injuries and

the impact on her life. I found that her testimony held together as a narrative and her demeanour on the witness stand was consistent with what one would expect from someone who is managing significant pain and mental health issues. Ms. Bennett was not notably combative or evasive nor was her evidence on the major issues either internally inconsistent or in material conflict with evidence of the other lay witness testimony (apart from the issues raised by the defence below which I will address). That said, there were issues with her recollection of certain events and dates, which at times put the reliability of her testimony into question. I have taken this into account in my analysis.

[128] The defence took the position that Ms. Bennett was lacking in credibility or otherwise an unreliable witness at trial for the following reasons, among others:

- In the year 2020 Ms. Bennett received a total of $20,000 in Canada Emergency Response Benefits (“CERB”) even though she knew she did not meet the eligibility criteria. Ms. Bennett testified that she needed the money to feed her children but admitted that she was already receiving $22,923 in social assistance during that period and was not eligible;

- Ms. Bennett exaggerated in her testimony the amount of time she spent working at Diverse Roofing, testifying that she spent six to eight hours each day, five days a week. The defence argued this was not consistent with her testimony that she was taking care of four children during that period, including dropping them off and picking them up from school. It was also not consistent with Ms. Kruhne’s testimony that she would spend at least two to three days with Ms. Bennett each week engaging in various activities after Ms. Bennett dropped off the children at school;

- Ms. Bennett testified that Diverse Roofing was her business and that Mr. Poznekoff and Mr. Chapman were her employees at Diverse Roofing. However, this was denied by Mr. Poznekoff and Mr. Chapman;

- Ms. Bennett testified that she had to be “carried in and out” of the camp site when going on a couple of camping trips after the Accident but also admitted

> that in July 2019 she was in a vehicle accident on a camping trip while attempting to drive two other campers who were intoxicated up the road.

[129] The issues with the reliability of Ms. Bennett's testimony raised by the defence are in my view valid to an extent and justify approaching Ms. Bennett's testimony with appropriate caution. However, they do not provide a sufficient basis for rejecting her testimony as a whole. As noted by Justice Matthews in *Iampietro v. Leung*, 2019 BCSC 1750:

> [8] A plaintiff must lead convincing evidence on the matters on which he or she bears the burden of proof. In a personal injury case, it can be the plaintiff's own evidence, so long as the court scrutinizes it when there is no objective evidence available: *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 (C.A.) at para. 13. It is not necessary to accept the evidence of any witness in its entirety. It is reasonable for a trier of fact to accept parts of a witness' evidence and apply different weight to different parts of a witness' evidence: *R. v. R.(D.)*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291 at para. 93; and *R. v. Howe* (2005), 2005 CanLII 253 (ON CA), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

[130] I do not accept the defence proposition that Ms. Bennett's evidence should be wholly rejected for the following reasons:

- While the CERB claim does raise issues about Ms. Bennett's honesty at a high level, I note that this was not an instance of dishonesty as a witness or as a participant in the court process. Further, Ms. Bennett did testify that she was financially desperate at the time, needed to support her children, and was experiencing many emotional and psychological challenges;

- The defence has not alleged that any of Ms. Bennett's testimony was lacking credibility or reliability as it pertained to her description of her injuries and symptoms, nor have they alleged that any of her evidence in this regard was inconsistent with the other lay witness testimony (apart from certain statements made by Mr. Poznekoff, which I will address below);

- Ms. Bennett's testimony about the extent of her involvement at Diverse Roofing may reflect a level of exaggeration but does not in my view represent an example of dishonesty. Although Mr. Poznekoff testified that he was the

principal owner of the business, it was apparent from her testimony that Ms. Bennett strongly believed they were equal partners and had an honestly held recollection of participating heavily in the running of the business. Ms. Bennett's testimony was corroborated by the testimony of Mr. Chapman and Ms. Kruhne who both recalled Ms. Bennett being actively involved in the business;

- The events described in the 2019 accident were not described at trial with sufficient particularity to draw many material conclusions. Ms. Bennett described what appeared to be an urgent situation and admitted that she stepped into the driver's seat of a car to address the situation. This could have been a situation where the urgent nature of the circumstances led her to take steps despite her compromised health. I am not convinced that this single incident goes very far in terms of undermining Ms. Bennett's evidence as a whole (and that of the other lay witnesses) concerning her extensive injuries and psychological condition.

[131] Thus, I do not find that Ms. Bennett's evidence must be wholly or even substantially rejected as not credible or unreliable. Instead I have approached her evidence with appropriate caution where circumstances dictate.

[132] Mr. Poznekoff also gave certain testimony which the defence relied upon to attempt to undermine Ms. Bennett's case. In particular he testified that Ms. Bennett had been inconsistent prior to the Accident in taking her anxiety medication, questioned her claim that she had an active lifestyle prior to the Accident (for example questioning her claim that she rode horses) and minimized to a great extent her role in the Diverse Roofing business.

[133] As noted by counsel for the plaintiff, Mr. Poznekoff's testimony was subject to some serious credibility concerns. Ms. Benneteau testified with respect to a conversation she had shortly before trial with Mr. Poznekoff and Ms. Bennett (also recalled by Ms. Bennett) where he asked Ms. Bennett to pay an outstanding tax bill of his or he would "testify to sink her case". Thus Mr. Poznekoff had a motive not to

be truthful and, perhaps not coincidentally, his testimony was consistently antithetical to key elements of Ms. Bennett's case and yet inconsistent with the testimony of other lay witnesses. For example:

- Mr. Poznekoff's testimony that Ms. Bennett did not ride horses was contradicted by testimony of both Ms. Benneteau and Ms. Milligan;

- Mr. Poznekoff's testimony that Ms. Bennett had little or no involvement in Diverse Roofing was contradicted by testimony of Ms. Kruhne, Mr. Chapman (who was intimately involved with the business) and Ms. Benneteau;

- Mr. Poznekoff's testimony that Ms. Bennett never climbed ladders or involved herself in project cleanup was contradicted by Ms. Benneteau's testimony that Mr. Poznekoff proudly told her "my baby gets up on the roof" and Ms. Bennett's evidence that she injured herself tramping cardboard down in a disposal bin while on the job;

- Mr. Poznekoff's testimony that he did not recognize the trailer that Ms. Bennett brought to a campsite they had both attended on a weekend getaway (presented to him at trial in a photograph taken at the time) was difficult to believe. One would have expected at a minimum that, even if she did not own it, Mr. Poznekoff would have been curious about where Ms. Bennett had obtained a trailer that he had never seen before; and

- Mr. Poznekoff's testimony that Diverse Roofing did not supply tools on site was directly contradicted by Mr. Chapman who testified that Diverse Roofing in fact did supply tools, including a compressor, air guns, roof jack plank and nails.

[134] Accordingly, I have approached Mr. Poznekoff's testimony with significant caution, as there are material credibility issues with that testimony.

Conclusions on Causation

[135] In conclusion, I accept that the Accident caused Ms. Bennett's injuries to her right leg (which has largely resolved by the date of trial), neck, shoulder, lower back and the chronic cervicogenic headaches, and also caused the onset of the severe depression, the generalized anxiety and the BPD. I agree with the defence that the plaintiff failed to demonstrate that the Accident caused the ADHD, PTSD, the depression and anxiety as a baseline condition (as distinct from the Post- Accident severe depression which I find was causally connected to the Accident) or the neurocognitive disorder.

Non-Pecuniary Damages

[136] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities: *Welder* at para. 82. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal set out an inexhaustive list of factors to consider when assessing non-pecuniary damages:

> . . .
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> . . .
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff. . .
>
> [Citation omitted.]

[137] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[138] The amount of the non-pecuniary award should compensate for more than direct injuries. As explained by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260:

> [95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 129 D.L.R. (3d) 263; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, 263 D.L.R. (4th) 19, leave to appeal ref'd [2006] S.C.C.A. No. 100; *Lee v. Dawson*, 2006 BCCA 159 at paras. 76-79, 267 D.L.R. (4th) 138, leave to appeal ref'd [2006] S.C.C.A. No. 192. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".
>
> [Internal citations omitted]

[139] Ms. Bennett testified that, before the Accident, she was a devoted, hands-on mother and had a busy work life. She had a very active social life, close friends and enjoyed outdoor activities in particular. She testified that she loved to ride horses. She enjoyed camping in remote locations (which involved packing in to the site), 4x4 riding with friends and swimming. She testified that, after the Accident, she can no longer enjoy these activities and indeed has been confined to a large extent to her home. She is able to perform some housekeeping duties but is severely constrained in that regard and relies heavily on her mother for assistance. She has become very socially isolated and her former close friends now rarely see her. The decline in her psychological condition has also been sudden and dramatic, resulting in self-cutting and ultimately several suicide attempts.

[140] Ms. Bennett's testimony was supported by corroborating witnesses.

[141] Ashley Milligan testified that she is a long-time friend of Ms. Bennett and has known her since Grade 1. She stated that Ms. Bennett was like a sister to her. Ms. Milligan testified that, before the Accident, Ms. Bennett was a happy and active person who rarely sat down. She recalled going camping with Ms. Bennett, which involved hiking and carrying in supplies. She recalled play dates with their children involving jumping on the trampoline and rollerblading together.

[142] Ms. Milligan testified that she worked with Ms. Bennett at Financial Stop for a period. She recalled that, if work was slow, Ms. Bennett would encourage them to do exercises to keep busy.

[143] After the Accident, Ms. Milligan testified that she saw Ms. Bennett and felt that she was struggling. She observed that Ms. Bennett was hunched over, stayed mostly in her bedroom and the house was messy with garbage overflowing and dishes unwashed.

[144] Jodi Benneteau is Ms. Bennett's mother. She described Ms. Bennett before the Accident as bubbly and a social butterfly. She recalled camping with Ms. Bennett with her children and seeing Ms. Bennett climbing trees and jumping over rocks while playing with the children.

[145] Ms. Benneteau testified that, after the Accident, she recalled Ms. Bennett using a walker and cane for months. She observed that Ms. Bennett appeared to be in a lot of pain. She also observed that Ms. Bennett fell into a major depression and could not care for her children on her own.

[146] Ms. Benneteau testified that she does most of the household cleaning and chores for Ms. Bennett. She will also take the children on excursions to places like the beach and noted that, generally, Ms. Bennett will not join them.

[147] It is clear that, immediately after the Accident, Ms. Bennett's life circumstances declined immediately and catastrophically. Since the Accident, she has lived with consistent and constant pain, has lost her job, her children for periods, her active lifestyle and her sense of self worth. She has suffered severe and

prolonged depression. She has lived on social assistance since the Accident. Although she had previously been diagnosed with ADHD, depression and anxiety there was no evidence that these conditions had ever impacted her life in a manner even close to the manner that it was impacted after the Accident, as she had previously lived a productive work and family life.

[148] Ms. Bennett's medical prognosis is guarded but not hopeless. With adequate treatment, counselling and medication, it appears that although she will likely not return to her pre-Accident state, she does have prospects of resuming clerical or desk work at least on a part-time basis and perhaps some resulting improvement in her severe depression (which has been closely tied to her inability to work and live a productive life).

[149] Ms. Bennett relies upon the following authorities: *Shongu v. Jing*, 2016 BCSC 901 ($200,000 award); *Little v. Schlyecher*, 2020 BCCA 381 ($250,000); and *Steinlauf v. Deol*, 2021 BCSC 1118 ($225,000, after a 15% reduction for contributory negligence).

[150] The defence relies upon the following authorities: *Siddall v. Bencherif*, 2016 BCSC 1662 ($60,000, adjusted to $72,000 for inflation); *Miller v. Dent*, 2017 BCSC 1177 ($70,000, adjusted to $77,000 for inflation); *Sen-Laurenz v. Napoli*, 2019 BCSC 1379 ($90,000, adjusted to $93,000 for inflation); *Crozier v. Insurance Corporation of British Columbia*, 2019 BCSC 160 ($125,000, adjusted to $128,000 for inflation); *Achan v. Jin*, 2020 BCSC 1430 ($90,000, adjusted to $93,000 with inflation); *McHatten v. McRea*, 2021 BCSC 1471 ($100,000, adjusted to $101,000 with inflation); and *Lo v. Vos*, 2019 BCSC 1306.

[151] The defence also seeks a reduction of the award by 30% to 50% to account for intervening stressors (i.e. unrelated injuries after the Accident) and pre-existing conditions unrelated to the Accident. I have addressed the evidence that was adduced at trial in relation to these alleged pre-existing conditions and intervening stressors elsewhere in these reasons and will not repeat that analysis here. I have taken that evidence into account in considering, in the analysis that follows, the comparability of the authorities referenced by the parties.

[152] With respect to the plaintiff's authorities, there are significant parallels in my view between this case and *Shongu*, as both plaintiffs had comparable levels of pre-existing conditions. Prior to the accident in *Shongu*, the plaintiff was employed full-time and led an active life, which included jogging. He volunteered extensively with his church, was an active participant in providing child care for the family children and assisted with household chores when he was not at work. However, up to six years before the accident, the plaintiff had also been previously treated for PTSD and schizophrenia, which he had subsequently managed with medication (similar to Ms. Bennett). After the accident, the plaintiff experienced chronic debilitating pain in his neck and left arm, and severe headaches. The plaintiff also experienced a recurrence of PTSD symptoms, mild psychotic symptoms and agoraphobia. As a result of his injuries, he became unfit to work, could no longer provide any real assistance to his wife in child care or looking after the household, or participate in activities that gave him pleasure, and became fearful of leaving his home and suffered from hyper vigilance and agoraphobia. The Court found that his pre-accident psychological condition and the injuries he suffered in the accident were causes in fact (para. 164) of his present difficulties and his injuries were thus fully compensable, awarding $200,000.

[153] *Steinlauf* was less comparable as, prior to the accident, the plaintiff in that case, a police officer, was described as "outgoing, energetic, enthusiastic, high achieving, and ambitious with absolutely no physical, psychological or emotional restrictions" and "enjoyed a wide range of outdoor activities and sports" and "was social and had a good network of friends and a history of personal relationships" (para. 130). This can be contrasted with the demonstrated fact that Ms. Bennett was diagnosed with depression, ADHD and PTSD prior to the Accident. After the accident, the plaintiff in *Steinlauf* was diagnosed with mild traumatic brain injury, post concussive syndrome, chronic migraine, chronic pain, depression and anxiety and PTSD. The Court found that since the Accident, the plaintiff was "a shadow of his former self" and was "now permanently, partially disabled, with limited mobility, shattered confidence, serious psychological problems, persistent and worsening

pain, and an uncertain future" and a guarded prognosis (para. 138). In my view the diminution in health was greater in *Steinlauf* after the accident than in this case.

[154] The decision in *Little* is in my view also less persuasive than *Shongu* as it involved a reduction of a jury award above the upper limit to a lesser amount. The Court of Appeal in that case explained that the reduction to $250,000 from $447,000 was not based solely upon judge-alone awards in comparable cases but instead was the result of balancing the judge-alone guideline with deference to the jury's view of an appropriate award, which "respects the parties' original choice to have the damages assessed by a jury rather than a trial judge" (para. 19). The Court concluded merely that the award of $250,000 would not "shock the Court's conscience and sense of justice". For all these reasons I find *Little* less persuasive.

[155] With respect to the defence authorities, there are some parallels between this case and *Crozier*. In that case, the plaintiff had pain in the neck, back, shoulders, rib and chest; significant chronic pain in the thoracic spine, headache; dizziness and nausea; post-traumatic stress disorder, together with symptoms of depression and anxiety; fatigue and problems with concentration and memory, either as a result of a mild traumatic brain injury (not confirmed through neuropsychological testing), or a combination of the physical and psychological/psychiatric injuries. Five years after the accident, she continued to be significantly disabled from working fully in her chosen field of massage therapy, her physical activity was limited and she was only able to do light housework. However, a distinguishing factor in that case was the Court's finding of a real and substantial possibility of significant improvement in the plaintiff's condition in respect of her psychological condition and possibly her pain syndrome. There was no such evidence in this case.

[156] The facts in *Siddall* are distinguishable, as the Court found that, at the time of the accident, the plaintiff was subject to continuing risk of suffering pain associated with her various pre-existing disorders, including a history of anxiety, depression, self-abuse and other psychological issues since she was a teenager, two prior suicide attempts, and headaches, neck and shoulder pain. These pre-existing issues were much more serious and continuous in my view than those in this case. In

awarding $60,000, the Court found that “the plaintiff’s pre-existing condition, both physical and psychological, was part of her original condition” (para. 227), and further found that her pre-existing physical pain symptoms, which had reduced in frequency and intensity during the year of the accident, would have intensified the following years regardless of the two accidents. There was no such evidence in this case.

[157] The injuries and symptoms following the accident in *Miller* were considerably less serious than in this case. The plaintiff in *Miller* had pain in his neck, back and shoulders but these symptoms abated somewhat by about six months post-accident and, at the time of trial, were described by the Court as “relatively minor for the most part” and by the plaintiff as an “annoyance” and as “borderline pain” (para. 150). There was also evidence of a pre-existing degenerative condition in his neck and back which would have caused some of this pain, at times, in any event, pre-existing depression and substance abuse.

[158] In *Sen-Laurenz*, the plaintiff had experienced more improvement and better prospects for the future than Ms. Bennett. Although the plaintiff in that case continued to suffer from chronic pain, diffuse soft tissue injuries, headaches and persistent functional limitations, she had managed her pain with therapy and treatment and had returned to many of her pre-accident physical activities, with significant limitations. Despite the impact of these limitations on her quality of life, the plaintiff was gainfully employed at a medical limit, had a boyfriend, was completing her studies and had plans to attend medical school. Obviously, Ms. Bennett was nowhere near this level of recovery at the time of trial.

[159] In *McHatten*, the accident had caused soft tissue back injury morphing into chronic pain, fibromyalgia, anxiety and depression, resulting in a loss of employment and despair and several panic attacks. However, by mid-2018, the plaintiff’s pain symptoms had improved significantly and her recovery was sufficient for her family doctor to advise her that she was ready to return to work. This distinguishes *McHatten* from this case in my view. By 2017, she had been able to perform most, if not all, of her housekeeping duties, albeit by pacing herself. This again distinguished

the case from this one. The Court found that her chronic back pain was "likely to wax and wane into the foreseeable future" (para. 162) but also found it significant that, post-accident, she had a stroke which was "unquestionably an intervening event" and "disabled her for approximately one year" (para. 163). There was no comparable evidence of an intervening event in this case.

[160] After considering all the *Stapley* factors, the relevant authorities and the impact of inflation with respect to the quantum of prior comparable awards, I conclude that an appropriate award of non-pecuniary damages in this case is $215,000. This award also takes into account Ms. Bennett's loss of housekeeping capacity as discussed more fully below.

Past Income Loss

[161] Ms. Bennett seeks an award of $225,000 for past income loss.

[162] In *Singh v. Paquette*, 2022 BCSC 1579, Justice Walker helpfully summarized the legal analysis to be applied with respect to a past income loss claim:

> [162] Past income loss is a component of loss of earning capacity. The award is meant to compensate an injured plaintiff for the loss of the value of the work that the plaintiff would have performed but was unable to because of the injury caused by the tortfeasor's negligence: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at paras. 28–30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45; *X. v. Y.*, 2011 BCSC 944 at para. 185; *M.B. v. British Columbia*, 2003 SCC 53 at paras. 47, 49; *Wainwright* at para. 171. Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 130.
>
> [163] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2020 BCCA 398; *Wainwright* at para. 172.
>
> [164] While the standard of proof for proving a past event is on a balance of probabilities, any hypothetical events, past or future, will be taken into consideration as long as it is a real and substantial possibility and not mere speculation, and will be given weight according to its relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 27-28; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 27–29; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14, 27-28.
>
> [165] In *Falati*, Justice Saunders summarized the principles governing the assessment of pre-trial lost earning capacity caused by the tortfeasor:

[39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. “past loss of income” or “past wage loss”, it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity – *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative “real possibility” and “capital asset” approaches to assessment are reviewed and discussed.

[40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies – what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff’s prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: “The only difference is that knowledge of events occurring before trial takes the place of prediction” – Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable – Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

> “What would have happened in the past but for the injury is no more ‘knowable’ than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.”

[41] Those general principles involved in the process of assessment include the following:

- The task of a court is to assess damages, rather than to calculate them mathematically – *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;

- The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their

relative likelihood – *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;

- Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong – *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.);

- Any assessment is to be evaluated in view of its overall fairness and reasonableness – *Rosvold*, at para. 11.

[42] A trial decision of Finch J., as he then was, *Brown v. Golaiy*, 1985 CanLII 149, 26 B.C.L.R. (3d) 353, which has been frequently cited, sets out a list of further specific considerations which may be taken into account in making an assessment:

> "The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."

[43] Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the basis of the balance of probabilities – *Steenblok v. Funk*, [1990] 5 W.W.R. 365, 46 B.C.L.R. (2d) 133 (B.C.C.A.); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss or earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the

> potential value of each of these opportunities, adjusted for various contingencies, may be weighed in determining the value of the plaintiff's lost earnings capacity, both past and future.

[163] As stated above, I am satisfied on a balance of probabilities that the Accident caused the Alleged Injuries, with the exception of the ADHD, PTSD and the depression as a baseline condition (as distinct from the post-Accident severe depression) and also the neurocognitive disorder.

[164] I am also satisfied based on all the evidence that, as a result of the Alleged Injuries, all four of the *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) considerations were operative with respect to Ms. Bennett during the period between the Accident and the trial. In this respect, I note that Ms. Bennett was unable to return to work after the date of the Accident and still had not returned as of the date of the trial, instead relying solely on social assistance. She testified that she has been unable to return to employment as a result of her injuries, or to pursue other work and business opportunities such as pressure washing, child care or even clerical work, and this testimony was corroborated by the testimony of her family and other lay witnesses, and the expert evidence.

[165] The defence argued that the motor vehicle accident and assault she experienced in 2019 were intervening causal factors but, as discussed above, there was no compelling medical evidence that the impact of the injuries caused by these events was anything more than temporary. The evidence in my view does not establish a real and substantial possibility or measurable risk (see *Jandric*) that these events, taken alone, would have caused anything more than a short-term absence from work.

[166] Having found a loss of earning capacity, the next issue to be addressed is how the value of Ms. Bennett's loss prior to the date of trial should be assessed. In valuing the loss, I must next decide between an earnings-based and capital asset approach. In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court explained the difference as follows:

> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[167] In the context of this case I find that the capital asset approach is more appropriate. At the time of the Accident and for a few months prior to that time, Diverse Roofing had ceased business operations. The evidence did not support the conclusion that there was a real and substantial possibility that Ms. Bennett was going to continue in the roofing business, as her involvement with that business was tied closely to Mr. Poznekoff (who had the experience as a roofing tradesperson, which Ms. Bennett did not) and their relationship had ended. Indeed, Ms. Bennett herself testified that, at that time, she was thinking of pursuing other opportunities such as obtaining contracts to pressure wash buildings. Thus, although Ms. Bennett did have marketable skills and experience, she had no clear career trajectory at the time of the Accident.

[168] Since Ms. Bennett had no actual income stream at the time of the Accident, I must consider whether there was a real and substantial possibility that, absent the Accident, she would have found employment or income sources other than income from Diverse Roofing and up to the date of trial. In my view there was such a real and substantial possibility. I reach this conclusion for the following reasons:

- Ms. Bennett had a demonstrated prior long-term track record of employment and income earning prior to the Accident. After graduating from high school in 2005, Ms. Bennett worked continuously at Financial Stop for five years. When Financial Stop closed down, she worked two short-term jobs at Molly Maid and a corner store for a

period of about six months for each job. She then took a job at Insta Loans where she worked for six months until she was robbed at gunpoint in 2011. This event, which caused her to leave work, was outside her control;

- During the period when she was off work recovering from the trauma from the robbery, Ms. Bennett was not idle. Instead she completed a diploma in the office administration field at MTI Community College, including a practicum with a business called Prime Tax & Accounting. She also testified that during this time she supplemented her income with child care services;
- After receiving a WCB payout delating to Insta Loans, Ms. Bennett testified that she invested these funds in an entrepreneurial opportunity with Diverse Roofing by purchasing a trailer and tools;
- While at Diverse Roofing, the evidence was clear that Ms. Bennett was acquiring skills in running a business, including marketing, interacting with clients and engaging in administrative and bookkeeping tasks. Both Karla Kruhne and Cody Chapman testified that Ms. Bennett was actively working with Mr. Poznekoff at Diverse Roofing and Ms. Kruhne testified that she was helping Ms. Bennett by showing her how to do the books;
- As correctly argued by the defence, the evidence does not establish that Ms. Bennett was actually doing roofing work at Diverse Roofing in the sense of the manual labour; rather it demonstrates that she was involved principally with the administrative side of the business, which was consistent with her prior skill set and training.

[169] The foregoing evidence in my view establishes that Ms. Bennett's skills in the area of office administration and customer service were clearly a capital asset which would have enabled her to find alternate sources of income, and there has been an impairment of this capital asset as a result of the Accident. The next question is how to value that capital asset up to the date of trial.

[170] In 2015, Ms. Bennett reported income of $53,748 on her income tax return. Using this income as a baseline assumption, Kevin Turnbull, who was qualified without objection as an expert economist, estimated Ms. Bennett's past loss of earnings at $228,000 net of taxes.

[171] However, as correctly noted by the defence, Mr. Turnbull's conclusion was narrowly based upon one year of earnings and disregarded much lower income earning years in 2016 ($13,140) and 2014 ($17,635). Thomas Steigervald, an expert economist qualified without objection, opined that basing an income projection on a single year's income is a potentially unreliable methodology (and Mr. Turnbull agreed with this under cross-examination), and that opinion makes sense.

[172] As an alternative to Mr. Turnbull's calculations, Mr. Steigervald calculated average nominal income based upon 2014 and 2015, which resulted in an amount of $35,692 per year. The three-year average of Ms. Bennett's income from the years 2014-2016, as suggested by Mr. Steigervald, results in a nominal income of $28,174 per year. However, this is unreasonably low as a baseline in my view because the business did not operate for a full year in 2016, with the result that the 2016 revenue numbers artificially reduce the three-year average.

[173] As a further point of comparison, Ms. Bennett testified that her hourly wage at Financial Stop and Insta Loan was between $12 and $15 per hour, which was close to minimum wage, and it is reasonable to assume that Ms. Bennett would have earned at least that much up to trial. Assuming a minimum wage of $15.65/hour, a person would earn about $32,552 per annum, which would translate into gross earnings prior to trial in the amount of $192,559.34 (to be adjusted net of taxes).

[174] With respect to applicable contingencies, I note the following:

- While Ms. Bennett testified that she was looking at business opportunities in the area of pressure washing, there was no evidence that she had established that business as a going concern (as Diverse Roofing had been in 2015), nor did she have the advantage of having a partnership with a skilled tradesperson

with an existing client base like Mr. Poznekoff. I assess the likelihood that she would have continued to earn business income as high as at 2015 levels ($53,748) as very low, or less than 10%;

- In reaching this conclusion, I also must consider the reasonable likelihood that, in attempting to start a new pressure washing or other business, she would have likely had a year or two of much lower earnings (or even periods of no earnings) as she attempted to build the business, which might then have been followed by higher earnings;
- I must also consider the possibility that the new business would not have been successful;
- However, in the event new business was not successful, there was in my view a very high likelihood (greater than 50%), given her past experience and training, that Ms. Bennett would have been able to obtain and maintain gainful employment in the area of office administration or comparable jobs. As noted above, Ms. Bennett had a demonstrated record of continuous employment and a willingness to work hard. She also for many years had an income stream, on average, of at least minimum wage prior to the Accident;
- There was a possibility that Ms. Bennett's prior baseline depression, ADHD and PTSD may have impacted her future earnings potential. However, considering that she had managed all these conditions for years prior to the Accident while working full-time and being an active mother, I assess this risk as low, and certainly less than a real and substantial possibility. In addition, since I did not accept Dr. Okorie's conclusions in this regard, there was in my view no compelling medical evidence to support the conclusion that these pre-existing conditions would have had a future material disabling effect absent the Accident (i.e. that she was a crumbling skull plaintiff as opposed to a thin skull plaintiff).

- Ms. Bennett testified that she was also earning $800 monthly income from child care income. However, this alleged income was undocumented at trial and not reported on her tax return. I am not convinced based on the evidence that this income was proved and also assess the likelihood that she would have been able to earn this level of income in addition to a full-time job or running a business as very low and less than a real and substantial possibility.

[175] Taking into account the foregoing contingencies, a reasonable basis for calculating the value of the capital asset is in my view the two-year average nominal income from 2014 and 2015 of $35,692 per year (which is only slightly higher than the minimum wage for that period) resulting in an amount of $210,582.80, to be netted for tax. Although not in evidence, combined federal and provincial tax rates at Ms. Bennett's income level have generally been at or close to 20% in the relevant years. Applying this amount results in a net loss of $168,466.24.

[176] The defence correctly argues that social assistance payments are deductible from past and future income loss awards: *Sidhu v. Hiebert*, 2022 BCSC 1024 at paras. 761-763.

[177] The defence argues that Ms. Bennett received $147,118 in benefits between 2017 and 2023 which should be deducted, resulting in a loss of $21,348.24. However, this includes a $20,000 CERB benefit which I understand Ms. Bennett is obliged to return to the government. To the extent that Ms. Bennett has already repaid this amount to the government prior to this decision or has an imminent legal obligation to repay (which I assume here), this award should be adjusted upward accordingly to $41,348.24.

[178] To the extent that Ms. Bennett does not repay the $20,000 CERB amount to the government, the defendants shall have leave to apply to adjust the award downward accordingly.

Future Income Loss

[179] The plaintiff seeks damages for future income loss in a range between $1,000,000 and $1,503,000.

[180] In *Rattan v. Li*, 2022 BCSC 648, the Court helpfully set out the applicable analysis:

> [145] An award for future loss of earning capacity represents compensation for a pecuniary loss. While the award is an assessment of damages, not a calculation, the award nevertheless involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157 [*Dornan*].
>
> [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), 74 D.L.R. (4th) 1 (Ont. C.A.).
>
> [148] At para. 47 of *Rab*, Grauer J.A., writing for the Court, sets out a three-step process for considering claims for loss of future earning capacity:
>
> > (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?;
> >
> > (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?; and,

> (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?
>
> [149] As a final step in the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117 [*Lo*].
>
> [150] The relevant jurisprudence identifies two approaches to the assessment of damages for loss of earning capacity: an earnings approach and a capital asset approach. In cases using the earnings approach, valuation of the future loss—the third step of the process—typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Lo* at para. 109; *Dornan* at paras. 155–156. In cases using the capital asset approach, such as cases where the plaintiff continues to earn income at or near pre-accident levels, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 43; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[181] As noted in *Ploskon-Ciesla*, with respect to the first and second steps of the *Rab* test, there are broadly two types of cases:

> [11] …there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies.

[182] In my view, given the severity of the injuries and the fact that Ms. Bennett has not worked since the Accident, this case falls generally into the category of one of the more "straightforward cases" referenced in *Ploskon-Ciesla* where the plaintiff has "clearly lost capacity and income" and the first and second steps of the *Rab* analysis are therefore essentially a "foregone conclusion" (at para. 11).

[183] In this respect, the following evidence is pertinent:

- The fact that Ms. Bennett has experienced multiple physical and psychological deficits since the Accident and, as a result, since that time has

not been capable of earning income. It also does not appear that these deficits are likely to improve materially in the near future or even the foreseeable future;

- The opinion of Dr. Ong that Ms. Bennett's prognosis is "markedly guarded", given the severity of her symptoms with major disruption of her ability to function;

- Dr. Misri's opinion that, due to a "vicious cycle that has been formed between chronic pain, cognitive and psychiatric symptoms", Ms. Bennett "will continue to remain functionally impaired in the workforce in the foreseeable future."

[184] Thus the evidence clearly discloses a loss of capacity on the part of Ms. Bennett that will extend into the future and a real and substantial possibility that this loss of capacity will cause a pecuniary loss, thereby satisfying the first two steps of the *Rab* test.

[185] That said, the evidence also does not support the conclusion that Ms. Bennett is fully disabled or will never be able to rejoin the workforce again in some capacity. For example:

- with respect to prognosis for vocational pursuits, Dr. Ong opined that "it is unlikely that Ms. Bennett will be able to pursue a physically demanding occupation in future" such as a roofer, but Dr. Ong also did not exclude less physically demanding occupations such as administrative or clerical work;

- Rob Corcoran, in a functional capacity evaluation report dated August 17, 2022, opined that Ms. Bennett no longer had the capacity to participate in construction labour but also opined that she did demonstrate the capacity to work part-time for administrative occupations with sufficient supports and services. He explained that, by part time, he anticipated she would work 12 to 20 hours per week by way of three to five four-hour shifts. Under cross-examination Mr. Corcoran also testified that Ms. Bennett has demonstrated mental capacity to engage in competitive activity for four to 12 hours per

week and a demonstrated capacity to work longer hours provided she can move around and shift positions.

- Dr. Misri opined that there are physical, cognitive and psychological impairments that prevent Ms. Bennett from returning to the roofing business but did not exclude less physical occupations. Dr. Misri also referenced the fact that Ms. Bennett is "hopeful for the future, especially since getting therapy" and is also hopeful about an improvement in quality of life following surgical intervention.

[186] Turning to the third step of the *Rab* analysis, the valuation of the possible future loss, I must next decide between an earnings-based and capital asset approach. As I explained in my analysis on past income loss, a capital asset approach is more appropriate in this case because Ms. Bennett was not working at the start of trial and also had an unsettled career path even at the date of the Accident, as she was considering alternatives to the roofing business such as pressure washing or other opportunities. She also had experience in office administration, which was a field clearly open to her.

[187] In his expert report, Mr. Turnbull posited three scenarios of loss of future earnings based upon different assumptions and applied a multiplier of $24,831 to age 67 ($23,818 to age 65) to extrapolate total loss:

(1) But for the Accident, Ms. Bennett would have continued to earn an income like what she earned in 2015 ($60,529), resulting in a total loss of $1,503,000;

(2) But for the Accident, Ms. Bennett would have worked in an employment position earning the average full-time, full year earnings of a BC female high school graduate ($57,282), resulting in a total loss of $1,422,000; or

(3) But for the Accident, Ms. Bennett would have worked in an employment position earning the average full-time, full year earnings of

> BC females who were employed as an administrative assistant ($58,968) resulting in a loss of $1,464,000.

[188] Ms. Bennett further argued that, even if her income were about $45,000 per annum, Mr. Turnbull's multiplier would result in a future loss of about $1,117,395.

[189] In my view, as discussed earlier, the 2015 income amount is not a reliable baseline for projecting future income because Diverse Roofing ceased operations the following year and because that amount does not account for Ms. Bennett's materially lower income in 2014 and 2016. A more reliable baseline, given the uncertainty surrounding Ms. Bennett's career path at the time of the Accident, is the average full-time, full year earnings of a BC female high school graduate ($57,282), which takes into account her earning potential over the course of an entire working life rather than merely reflecting a snapshot in time.

[190] With respect to the appropriate multiplier, Mr. Steigervald correctly observed that Mr. Turnbull's multiplier does not account for labour market contingencies (e.g. going back to school, raising children, preferring leisure over work, illness or disability). Accounting for normal survival risks and labour market contingencies, Mr. Steigervald opined that an economic multiplier of $13,779 to 70 years old or $13,299 to 65 years old was more appropriate.

[191] However, in a reply report, Mr. Turnbull opined that the discounting in Mr. Steigervald's report of 45% was likely too high as it included Ms. Bennett in categories that were clearly not applicable to her (such as those who were disabled or not working at the time of the accident or women who had not yet had children). Mr. Turnbull opined that, if only strictly involuntary factors such as disability and risk of retirement past 60 were accounted for, the percentage discount would be between 10% and 15%, as opposed to 45%.

[192] While Mr. Turnbull's critiques of Mr. Steigervald's multiplier are fair under the circumstances of this case, I must also take into account the fact that Ms. Bennett did clearly have pre-existing conditions (in particular the longstanding ADHD, PTSD, depression and anxiety and the earlier back injury) which would have heightened her

risk of at least periodic non-participation in the workforce over the long term beyond the Canadian average. To account for these heightened risks I consider it appropriate to choose a multiplier at the midpoint between the two experts, which is $18,558 to age 65. Applying that multiplier results in a loss of $1,063,039, assuming that Ms. Bennett does not work for the rest of her life.

[193] With that calculated loss in mind, I must now consider applicable contingencies (apart from those already incorporated into the multiplier). With respect to positive contingencies, the most important in my view is the very real and substantial possibility that Ms. Bennett may be able to work at least part time in the future. While it is clear that Ms. Bennett has been substantially impaired to the point where she has been unable to work for six years, the evidence does not, as I have explained above, support the conclusion that Ms. Bennett is completely disabled or will be unable to work in any capacity for the rest of her life. Although Ms. Bennett is currently substantially impaired and non-competitive in the workplace, there is a very good prospect based on the evidence for some improvement with treatment and therapy, at least to the extent that Ms. Bennett may be able to work part time in a clerical position with accommodations. For these reasons, I assess the likelihood that Ms. Bennett will be able to work on a part-time (50%) basis in the future at 75%, which results in a reduction of the loss by 37.5%.

[194] With respect to negative contingencies, the most obvious is the possibility that Ms. Bennett's pre-existing conditions, including the ADHD, PTSD and depression could have manifested in the future independent of the Accident resulting in time off work and lost income. However, as I explained above, I have already accounted for this contingency in adjusting the multiplier and therefore make no further adjustment.

[195] Taking into account discounts for contingencies, this results in an award for future income loss of $664,399.

[196] Pursuant to s. 56(2)(a) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and s. 1(a) of the *Law and Equity Regulation*, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate used to calculate the present value of a future income loss is 1.5%. This discount rate was expressly incorporated into the

multipliers used in the economist reports and I therefore make no further adjustments.

Loss of Housekeeping Capacity

[197] The plaintiff submits that an award of $20,000 is appropriate for past and future diminished housekeeping capacity.

[198] The applicable analysis was set out in *McKee v. Hicks*, 2023 BCCA 109 at paras. 93–115, where the Court of Appeal reconciled two prior streams of authority:

> […]
>
> [106] The decisions in *Kim* and *Riley* have led to some confusion in the trial court, with at least one judgment describing the two decisions as "apparently inconsistent" (*St. Jules v. Cawley*, 2021 BCSC 1775 at para. 71). The Supreme Court has frequently referred to the judgment of Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 in attempting to describe the effect of *Kim* and *Riley*. At para. 67 of *Ali*, Gomery J. reconciled the practical operation of the Court's findings in *Kim* and *Riley* as follows:
>
> > a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
> >
> > b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
> >
> > c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
> >
> > d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.
>
> [107] Much of what is said in *Ali* accurately reflects the approach this Court countenanced in *Kim* and *Riley*, and it has served the trial court well. That said, there are some nuances of this Court's jurisprudence that are not completely reflected in *Ali*.
>
> [108] It is important to recognize that *Kim* and *Riley* dealt with somewhat different issues. *Kim* considered a situation of genuine incapacity – one where the injuries made it unreasonable to expect the plaintiff to perform some household tasks. *Kim* established that such claims are typically to be dealt with by awarding pecuniary damages. Further it states that such

> damages should generally be assessed with a view to the cost of obtaining replacement services on the open market.
>
> [109] *Kim* recognizes, however, that the preference for awarding pecuniary damages in such cases is not absolute. A judge retains discretion to assess damages as non-pecuniary, where it is considered appropriate to do so. The case also suggests (citing *McIntyre v. Docherty*, 2009 ONCA 448) that, in some cases, full compensation for the loss of housekeeping capacity may require an award of both pecuniary and non-pecuniary damages.
>
> [110] Especially in light of this Court's unanimous decision in *Riley*, I do not read *Kim* as suggesting that there is a discretion to award pecuniary damages in cases where the plaintiff remains capable of performing all household tasks but encounters some frustration or difficulty in doing them. Such cases are cases where the damages are non-pecuniary in nature.
>
> [111] *Riley* was such a case. The Court acknowledged that the plaintiff's difficulties had to be considered in assessing the amount of non-pecuniary damages but rejected the idea that a segregated non-pecuniary award was necessary. It also suggested that segregated non-pecuniary awards should not be made absent special circumstances.
>
> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.
>
> [113] In this case, the judge's finding that Mr. McKee would likely have difficulties with household tasks in the future was open to her. The finding did not amount to a finding that Mr. McKee would be incapable of performing household tasks in future. The trial judge did not suggest that Mr. McKee would have to engage others to perform household tasks for him.
>
> [114] In the result, Mr. McKee's damages were properly assessed as non-pecuniary damages, in accordance with *Riley*. The judge made no error in choosing to address Mr. McKee's diminished ability to perform housekeeping tasks by augmenting her award of non-pecuniary damages.

[199] The plaintiff argues that she has been rendered unable to participate in many housekeeping activities, as opined by Dr. Ong. In particular, the plaintiff relies upon the following evidence:

- Various lay witnesses noted her inability to maintain a clean and tidy house, unlike before the Accident;

- She is no longer able to perform heavier tasks or complete all household chores as she used to do;

- Ms. Bennett's mother testified that she helps Ms. Bennett 3–5 days a week with housekeeping and assists with cleaning, cooking, laundry, mopping, and cleaning bathrooms; and

- Ms. Bennett was billed by a friend who helped her clean her house on several occasions but was unable to pay the friend.

[200] The defence argued that there was no medical evidence that Ms. Bennett has been unable to perform all her pre-Accident housekeeping tasks. The defence further notes that the testimony was that Ms. Bennett is able to do some housekeeping tasks (such as dishes, mopping and sweeping), although she told Dr. Sun she is unable to do laundry and lawn mowing.

[201] In my view, taking into account all the evidence, this is not a case where Ms. Bennett is incapable of performing any housekeeping tasks, but rather one where she performs them with difficulty. Ms. Bennett testified that she does indeed perform household tasks but, due to discomfort, struggles with the heavier tasks which require repetitive bending. While Ms. Bennett's mother did testify that she assists Ms. Bennett regularly with household chores she does not do so all the time and, when she does not, Ms. Bennett apparently does them herself, albeit with difficulty.

[202] Accordingly, I do not make a separate award under this category but instead exercise my discretion to adjust the amount of the non-pecuniary award upward to account for the loss of enjoyment Ms. Bennett has suffered by being unable to take care of her household without pain and discomfort.

Costs of Future Care

[203] Ms. Bennett seeks an award for costs of future case in the amount of $90,000. The defence concedes that Ms. Bennett is entitled to some reasonable treatments but disputes some of the specific expense items claimed by the plaintiff.

[204] The courts have made it clear that an award for the cost of future care should have medical justification and should be reasonable. In *Chavez-Salinas v. Tower*, 2022 BCCA 43, Justice Abrioux set out the legal framework for future care awards:

> [83] The judge set out the applicable legal principles: Reasons at paras. 490–502. These were recently summarized by Justice Voith in *Pang v. Nowakowski,* 2021 BCCA 478:
>
> > [56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:
> >
> > > [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.
> > >
> > > [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable.
> >
> > [57] Several additional principles are relevant:
> >
> > > i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item;
> > >
> > > ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred;
> > >
> > > iii) The court must be satisfied that there is no significant overlap in the various care items being sought.
> >
> > [58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss.
> >
> > [Citations omitted.]

[205] While medical evidence for each item of care is not strictly required, the award must be based upon the medical evidence as a whole. In *Langille v. Nguyen*, 2013 BCSC 1460 at paras. 231–235, aff'd on appeal 2014 BCCA 430, Justice Fitzpatrick summarized the applicable approach:

> [231] 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* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.
>
> [232] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.
>
> [233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
>
> [234] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required: *Tsalamandris* at paras. 64-72. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.
>
> [235] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
>
> [Emphasis added.]

[206] Dr. Ong recommended the following care in her report:

a. imaging;

b. physical therapy;

c. occupational therapy;

d. psychiatry treatment;

e. nerve blocks;

f. steroid and trigger point injections;

g. Botox injections; and

h. ongoing use of medications.

[207] Dr. Misri also recommended the following:

a. cognitive behavioural therapy;

b. prescription medications; and

c. mindfulness therapy.

[208] Ms. Bennett testified that she would like to pursue the following, which are not covered by provincial health care:

- cognitive behavioural therapy;
- Botox injections; and
- physical therapy.

[209] In his report, Mr. Corcoran costed these treatments as follows:

- cognitive behavioural therapy at $18,720 for five years;
- Botox injections at $2,999 per year; and
- medications at $6,635 per year.

[210] On this basis, Ms. Bennett seeks the full five years of cognitive behavioural therapy, two years of Botox injections ($6,000), and half of the medication cost net of PharmaCare coverage ($2,000).

[211] In addition, with respect to physiotherapy, Ms. Bennett's costs for physiotherapy are $51.40 per 30-minute session. Assuming a session every two weeks, Ms. Bennett claims an annual cost of $1233.60. She seeks three years at $3,700.80.

[212] In his report, Mr. Turnbull provided a future cost of care multiplier of $31,147 to account for contingencies. Using his multiplier for medications, the lifetime care figure for Ms. Bennett is $62,294 plus $18,720 for cognitive behavioural therapy, $6,000 for Botox and $3,700.80 for physiotherapy resulting in a total of $90,714.80.

[213] The defence concedes that Ms. Bennett is entitled to some reasonable treatments but argues that the amount sought is too large.

[214] With respect to the cognitive behavioural therapy, the defence emphasizes, following *Chavez-Salinas v. Tower*, 2022 BCCA 43 at para. 83, that the Court must be satisfied that the plaintiff would in fact make use of the particular care items. The defence notes that the evidence is that Ms. Bennett has not attended counselling since September 2019 and therefore submits that it is highly unlikely she would attend cognitive behavioural therapy now. In the alternative, if the Court finds that the plaintiff will likely attend cognitive behavioural therapy, the defendant submits that costs of sessions for 2.5 years (approximately $5000-$8000) is more reasonable and fair.

[215] Ms. Bennett testified that cognitive behavioural therapy had not been recommended to her until recently and also testified she is very interested in doing it. Although the evidence is that she has done some therapy in the past, it was not cognitive behavioural therapy. Ms. Bennett in my view reasonably deserves an opportunity to try this new form of therapy, which was highly recommended medically. Dr. Misri recommended five years of this therapy but, in light of Ms. Bennett's past discontinuance of other psychological therapy, there is in my view a 25% chance that Ms. Bennett would not find this therapy effective and discontinue before the conclusion of a full five-year period. Accordingly I award the amount of 75% of the estimated cost which is $12,000 in round numbers.

[216] With respect to the Botox injections, the defence argued that Dr. Ong in her report opined merely that Ms. Bennett "may be" amenable to Botox injections for chronic migraines but noted that Botox was never suggested or tried by Dr. Ong even though she has been treating Ms. Bennett since 2017. The defence also noted that there is no evidence that such injections would alleviate Ms. Bennett's headaches. These objections are fair but the fact that success is uncertain does not justify a denial of the claim altogether. In my view a 50% reduction is appropriate to $3,000.

[217] With respect to medications, the defence submits that an amount of $10,000 (medications for ten years) is more appropriate than the $62,294 for lifetime medications sought by the plaintiff for this care item. In support of this argument, the defence notes that Mr. Corcoran lists not only the medication that the plaintiff took at the time she visited him, but also additional medications suggested by Dr. Misri. The defence submits that this results in duplication or an overclaim for the following reasons:

- no evidence was led as to whether or not the plaintiff has taken and would be taking any of these suggested medications;
- some of the medications suggested, e.g. SNRI, are for a "trial". Hence, they cannot be used for a "lifetime";
- no expert report is provided stating that the plaintiff can take all these medications at the same time without risking side effects or medication interactions; and
- lastly, there is no evidentiary support that the plaintiff, who is 35 years old, will need these medications for a lifetime.

[218] The defence objections are reasonable although they do not take into account the possibility that, if the trial medications (which are the most expensive) are successful, they may indeed be necessary for a lifetime. Taking into account the

defence objections, a reduction of the medication costs by about 30% to $40,000 is in my view fair and reasonable under the circumstances.

[219] With respect to physiotherapy, the plaintiff is seeking $1,233.60 per year for three years = $3,700.80. The defence notes that the last time the plaintiff attended physiotherapy, according to her Special Damages, was October 2018. She could have attended more sessions using “direction to pay”, the same method she used from April 2018 to October 2018, but she did not. In addition, I note that Ms. Bennett testified that she tried physiotherapy but chose to discontinue because her leg kept seizing up. I am not satisfied that, if awarded this amount, she would pursue the treatment in light of her prior bad experience. This claim is therefore denied.

[220] Taking into account the above deductions, the amount of cost of future care is therefore assessed at $65,000.

[221] With respect to the above calculation, pursuant to s. 56(2)(b) of the *Law and Equity Act* and s. 1(b) of the *Law and Equity Regulation*, the discount rate used to calculate the present value of future losses (other than income) is 2.0%. However, the multiplier in Mr. Turnbull’s economist report already expressly incorporates this discount rate so I make no further adjustment.

Special Damages

[222] Ms. Bennett claims $26,204.92 in special damages. Ms. Bennett provided receipts and invoices for the expenses.

[223] The defendant consented at trial to special damages in the amount of $19,098.57 but objected to a cost of $533.31 for a yoga retreat and $1,525.48 for a private MRI. The defendant submitted that there was no evidence that the yoga retreat was medically necessary, nor was there evidence that private MRI was necessary or urgent: *Dugas v. Kebede*, 2021 BCSC 2336 at para. 148.

[224] I agree with the defence argument and would therefore reduce the amount of special damages sought by the plaintiff by $2058.79 to $24,146.13.

ORDER

[225] I conclude that Ms. Bennett is entitled to the following award of damages against the defendant:

Head of Damage	**Award**
a. Non-pecuniary damages	$215,000
b. Damages for Loss of Past Income	$41,348.24 (assuming $20,000 is repaid to the government for CERB; otherwise $21,348.24)
c. Damages for Loss of Future Income	$664,399
d. Costs of Future Care	$65,000
e. Housekeeping Costs	$0 (included in non-pecuniary award)
SUBTOTAL	**$985,747.24**
f. Special Damages	$24,146.13
TOTAL	**$1,009,893.37**

[226] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

"M. Taylor J."