IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bowes v. Leatherdale,*
2024 BCSC 165

Date: 20240201
Docket: M121562
Registry: Kelowna

Between:

Karen Bowes

Plaintiff

And

Stuart James Leatherdale

Defendant

Before: The Honourable Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:	M. Van Nostrand
Counsel for the Defendant:	R. Pici
Place and Dates of Trial/Hearing:	Kelowna, B.C. November 14-17, November 20-21, November 23-24, 2023
Place and Date of Judgment:	Kelowna, B.C. February 1, 2024

Table of Contents

Introduction

[1] The plaintiff seeks an award for damages for injuries received in a motor vehicle collision on August 16, 2018 (“MVC”). The defendant admits liability for the collision.

Background

[2] The plaintiff is 50 years of age. She has been married for approximately 12 years and has no children.

[3] She was one course short of graduating from high school.

[4] She worked at various jobs before completing a hairstyling and aesthetics course in approximately 1999. Beginning in 2003 she transitioned to working as a hairstylist.

[5] Since 2006 and at the time of the MVC, the plaintiff was a self-employed hairstylist working from her home in Rutland, British Columbia.

[6] Tax returns in evidence show her income in the years leading up to the MVC as follows:

2015	$6,977
2016	$4,492
2017	$5,350
2018	$5,209

[7] The plaintiff testified that she reported only a portion of her actual income on her tax returns and that her full revenues are recorded in a separate ledger. According to those documents her income for those years was as follows:

2013	$24,270
2014	$23,407
2015	$26,424

2016	$23,464
2017	$25,897
2018	$22,771

[8] The plaintiff's pre-motor vehicle collision health was complicated by long-standing struggles with anxiety and depression. Those began in her childhood and would appear to have arisen out of difficulties with her family relationships and circumstances of immediate family members. Her mental health was further complicated in her adult life by a physical assault that occurred at a workplace, as well as a second random assault in the downtown Kelowna area.

[9] In 2017 and early 2018 the plaintiff engaged with Interior Health’s mental health services. At points in time when obtaining those services she expressed suicidal ideations.

[10] She was prescribed various medications in an effort to deal with both her anxiety and depression.

[11] From a physical perspective, there is recorded history of neck, upper back and shoulder complaints. She had been attending chiropractic treatments regularly beginning in 2007. The pre-MVC records also reference sleep issues.

[12] Prior to the MVC the plaintiff was an avid gardener.

[13] The plaintiff travelled to Mexico annually with her mother and on some occasions those trips included her husband.

[14] She and her husband socialized with friends.

[15] The MVC occurred while the plaintiff was stopped at a traffic light. The defendant struck her vehicle from behind, causing significant damage to her small SUV. She was able to exit her vehicle unassisted and obtain the defendant’s relevant information. She described both herself and the defendant as being “in shock”.

[16] The plaintiff saw a doctor the following day. She was experiencing headaches and pain in her neck and left shoulder.

[17] Over the time since the MVC, the principal physical complaints of the plaintiff have been left-sided neck, shoulder, arm, upper back and chest pain. She describes these at the time of trial as being severely limiting.

[18] Since the MVC she has lost significant weight, dropping from 145 pounds to approximately 107 pounds. She describes very poor sleep. Her anxiety and depression are prominent problems that significantly impact her activities, presentation and outlook.

[19] Following the MVC the plaintiff continued to work, but her volume of work declined over time. She entered into evidence tax returns and personal records of income earned since the MVC show the following:

Tax Returns	
2019	$6,058
2020	$3,329
2021	$7,709
Personal Records	
2019	$18,565
2020	$14,100
2021	$6,230
2022	$0
2023	$0

[20] The plaintiff made the decision to cease work in or about 2021.

Medical Evidence and Expert Reports

[21] Each of the plaintiff and defendant obtained expert reports from a physiatrist and a psychiatrist. In addition, the plaintiff obtained the report of an occupational

therapist who conducted a functional capacity evaluation and cost of future care report. She also obtained the opinions of a vocational consultant and an economist.

[22] There is general consensus among the physiatrist and psychiatric experts that the defendant's condition meets the criteria for a somatic symptom disorder ("SSD") with predominant pain. This nomenclature replaces what was formerly referred to as chronic pain disorder.

[23] In Dr. Anderson's reports, the plaintiff's psychiatric expert, the condition is described in these terms:

> . . . Patients with SSD have physical symptoms that are distressing and/or result in significant disruption of daily life. Patients can have disproportionate and persistent thoughts about the seriousness of their symptoms, a persistently high level of anxiety about them and can spend excessive time and energy devoted to their symptoms/health concerns.

[24] Dr. Anderson summarizes his opinion on these terms:

> Ms. Karen Bowes is a 49-year-old woman who was injured in an MVA on August 16, 2018. Ms. Bowes had a pre-MVA history of anxiety symptoms but her emotional functioning worsened considerably following the MVA. Prior to the MVA occurring Ms. Bowes had intermittent physical symptoms but she was able to work full-time as a hairdresser. Ms. Bowes was unable to continue working as a hairdresser following the MVA because of pain, fatigue and emotional deterioration.
>
> Ms. Bowes presently has a number of psychiatric disorders. Ms. Bowes has a persistent somatic symptom disorder (SSD) with predominant pain, PTSD in partial remission, a major depressive disorder (MDD), a generalized anxiety disorder (GAD) and panic disorder with agoraphobia. Since the MVA occurred Ms. Bowes has also had chronic insomnia (largely secondary to pain), fatigue and cognitive difficulties.

[25] In the plaintiff's physiatrist report from Dr. Khan, he is careful to comment exclusively on the physical presentation of the plaintiff. His diagnosis is as follows:

> Diagnoses:
>
> - Cervical spine sprain/strain
> - Left trapezius/posterior shoulder girdle sprain/strain
> - Lumbar spine sprain/strain
> - Chronic myofascial pain in the aforementioned regions

> From a physical perspective, there were no relevant subsequent conditions identified. In addition, there were no conditions identified that were confidently exacerbated by the subject accident.

[26] The defence's physiatrist, Dr. Flaschner, confirms the nature of the physical injuries specifically attributed to the MVC in these terms:

> Based on the history, physical examination, and review of available documentation, the injuries secondary to the motor vehicle collision include:
>
> 1. Cervicothoracic musculoligamentous sprain/strain
> 2. Left chest contusion
> 3. Possible lumbar sprain/strain resolved
> 4. Chest wall sprain/strain
> 5. Headache, post whiplash/medication overuse
> 6. Jaw symptoms to be addressed by Ms. Bowes' dentist

[27] The defence's psychiatrist, Dr. Dahi, provides the following synopsis:

> The motor vehicle accident in 2018 triggered some of the old contextual emotional vulnerability and personality traits. She has developed somatization symptom disorder (unconscious translation of emotional pain to body pain). The contextual emotional issues and somatization tendency root to her very early experiences in family with an alcoholic father who had his own severe traumas from his childhood and a mother who was already victimized in a dysfunctional family dynamic by her father. The intergenerational issues affected the formation of Mrs. Bowes' character and her vulnerable self-esteem and self-confidence, as well as her somewhat fragile degree of resilience. From the information revealed during the interview it seems that Mrs. Bowes' sister has been impacted by the same dynamics of the original family. The emotional struggle within her marriage has made her emotionally more vulnerable. The accident triggered those emotional vulnerabilities and created a somatization symptom disorder.

[28] Those experts' descriptions of the plaintiff's current condition are generally consistent but offer different perspectives.

[29] As noted, the plaintiff's physiatrist, Dr. Khan, is careful to limit his opinion to the physical symptoms/conditions. He does not specifically quantify or attempt to quantify those conditions, instead suggesting further assessments of her physical capacity through vocational and functional capacity evaluations.

[30] He states that her accident-related injuries have impacted her housekeeping, work and recreational capacities.

[31] Dr. Anderson opines that the plaintiff is “not likely competitively employable due to the nature and extent of her ongoing MVA-related symptoms including pain, fatigue, functional limitations (e.g. limited sitting and standing tolerance and limited use of her left arm), fluctuating symptoms, cognitive difficulties (e.g. difficulty multitasking), depression, anxiety, irritability, emotional lability (e.g. frequent tearfulness) and reduced coping ability.” He concludes that she will likely have a permanent disability as a result of the motor vehicle collision.

[32] Dr. Flaschner, as was the case with Dr. Khan, limits his comments to the plaintiff’s physical condition. He opined that she is able to tolerate minimum sedentary to light employment on a full-time basis; that she is able to change her position and posture. He agrees that her ongoing anxiety and depression “may be causing or contributing to Ms. Bowes’ inability to work”, implying he agrees that she is currently unable to work.

[33] Dr. Dahi does not specifically express an opinion as to the plaintiff’s current level of function.

[34] A functional capacity evaluation was conducted and it concludes that the plaintiff is competitively unemployable. A similar conclusion was reached by the plaintiff’s vocational consultant.

[35] The experts disagree on the extent to which the plaintiff’s pre-existing conditions play a role in her current state and as to the prospects for improvement.

[36] All agree on the general nature of her pre-existing conditions.

[37] Dr. Khan notes no physical conditions were exacerbated by the MVC.

[38] His view is that her current pain experience “will likely continue to persist into the future”. His recommendations are to increase the plaintiff's physical activity through active rehabilitation.

[39] Dr. Anderson says that the best treatment for the plaintiff is a multidisciplinary pain clinic. He says the plaintiff was emotionally vulnerable prior to the MVC. While he makes a number of recommendations for care, he considers the long-term prognosis for the plaintiff to be poor. He concludes that she will have a permanent disability.

[40] Dr. Flaschner states the plaintiff received physical injuries and her "ongoing presentation likely represents residual soft tissue sprains/strains influenced by Ms. Bowes' mental health issues". He opines that there is a "reasonable probability that symptoms will improve if Ms. Bowes' mental health issues can be adequately addressed".

[41] Dr. Dahi provides the most optimistic prognosis. He states that the pre-MVC issues are the main contributors to her current presentation. He does not specifically address the prospect that she would have experienced the issues but for the MVC. His prognosis is:

> If Mrs. Bowes stops vaping CBD, considers a gradual return to work, follows a more regular and vigorous exercise program, attends to individual therapy sessions, and has couples therapy with her husband, the prognosis can be quite favourable.

[42] In addition to the expert opinions, both the plaintiff and defendant called medical witnesses who have been involved in the plaintiff's care. Theirs was not opinion evidence but rather evidence of the plaintiff's presenting complaints at various points in time.

[43] For the plaintiff these were Dr. Hawkins and Dr. Langedyk. Each dealt with the plaintiff before and after the MVC.

[44] Dr. Hawkins was the plaintiff's family doctor beginning in September 2017. Prior to the MVC, his notes record complaints in relation to sleep for which he prescribed medication. He did not note chronic pain complaints prior to the MVC. He made a referral to mental health in December 2017.

[45] His notes suggest he first saw her after the MVC on October 1, 2018. Post-MVC he provided prescriptions for pain and recorded the plaintiff's complaints to include headaches, neck pain, left arm pain and numbness.

[46] Dr. Langedyk was the plaintiff's chiropractor from 2007 to May 2018. For a period of time beginning prior to and after the MVC the plaintiff saw a different chiropractor before returning to Dr. Langedyk's care in approximately March 2019. In 2007 the plaintiff identified anxiety and depression as health issues that she had "in the last 10 years". In the years prior to the MVC the plaintiff typically presented with some mix of complaints of wrist, shoulder, neck and back pain as well as headaches.

[47] When he did resume seeing her post-MVC in 2019, Dr. Langedyk testified that the plaintiff's complaints were mainly left neck, shoulder, chest and arm. These were not typical of the presentation prior to the MVC.

[48] The defence called two counsellors with Interior Health mental health services who dealt with the plaintiff before the MVC only.

[49] Joanne Clements was a mental health therapist with Interior Health who saw the plaintiff between October 2017 and August 2, 2018.

[50] On October 19, 2017 the plaintiff reported she was dealing with anxiety in connection with her extended family, medical appointments and being in downtown Kelowna that was affecting travel or "doing new things". She also reported depression that impacted her sleep, energy levels, concentration and motivation.

[51] The plaintiff then saw Brittany Campbell, who was a practicum student with Interior Health mental health working with the "Short term Assessment and Treatment Team" who saw the plaintiff between November 29, 2017 and March 27, 2018.

[52] With Ms. Campbell, the plaintiff described struggling with lifelong anxiety amplified by the assault referred to above. She expressed thoughts of suicide.

[53] In February 2018, in the context of a stressful return to work after her trip in Mexico and “throwing her back out from overworking”, the plaintiff described “deep rooted thoughts/emotions around feeling useless”.

[54] In March the plaintiff presented as very emotional and Ms. Campbell noted, “These overwhelming feelings of frustration, anxiety, low self-worth/self-esteem, helplessness and ‘wanting the pain to stop’ have resulted in strong ideation, and fantasizing about suicide. Karen also expressed wanting to explore her childhood trauma further with a psychologist/someone trained specifically in trauma work.” Two weeks later her presentation was far more positive.

[55] Both Ms. Clements and Ms. Campbell’s notes record the plaintiff attributing the source of her issues being connected with close family relationships and circumstances.

Lay Witnesses

[56] The plaintiff called four friends and/or former clients as well as her husband, Michael Bowes. Each described significant changes in the plaintiff’s personality and mood after the MVC. Adjectives used included “diminished” with the general indication being that the plaintiff is more subdued, withdrawn and less engaging.

[57] Michael Bowes confirmed the plaintiff’s indication that they are no longer intimate and that their social interactions are significantly reduced.

Positions of the Parties

[58] There are two principal sources of disagreement between the parties that underly their positions as to the various heads of damage. The first is in characterizing the severity and trajectory of her pre-MVC mental and physical health conditions. The second is the prognosis for any future improvement in her physical and mental health.

[59] Referencing the so-called thin skull and crumbling skull doctrines described in *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*] at paras. 34 and 35, the plaintiff

argues that her pre-MVC mental health issues made her vulnerable to the effects of the MVC. She says her attendances for counselling had been productive and the conditions were not interfering with her work at the time of the MVC.

[60] She argues that she is now severely compromised in all aspects of her life including being competitively unemployable. Further she says there is no basis to conclude that there will be meaningful improvement in her physical or mental health.

[61] The defendant references *Athey* for its comments on causation. Those comments include the following:

> 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

[62] The defendant argues that the accident caused an exacerbation of pre-existing and active depression, anxiety, and neck, upper shoulders and lower back pain.

[63] The defence also stresses that the plaintiff's mental health deteriorated in 2021, almost three years after the MVC, which should support a conclusion that the plaintiff has not proved this was caused by the MVC.

[64] The defence also argues that there is a real prospect for some recovery that must be accounted for in assessing damages for future losses.

[65] On the strength of their respective arguments, the parties' positions as to the appropriate awards under the various heads of damage are as follows:

Head of Damage	Plaintiff	Defendant
Non-pecuniary damages	$175,000	$90,000 to $95,000
Past loss of earnings capacity	$60,000	$0 to $7,875
Future loss of earnings capacity	$380,000	$0 to $35,414 to age 65

Cost of future care	$150,000	$15,654 to $32,847
Special damages	$20,000	$13,000
Total	$790,000	$118,654 to $184,136

Analysis

[66] Before dealing with the specific claims under each head of damage, I will address the two principle sources of disagreement between the parties referenced above. Underlying each of those as well as the applicability of the thin skull or crumbling skull analogies, is the characterization of the plaintiff's pre-MVC or "original position". As noted by the Supreme Court in *Athey*:

> 35 . . . The defendant need not put the plaintiff in a position *better* than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway (emphasis in original).

[67] The plaintiff attended for chiropractic treatments consistently for years prior to the MVC. Various physical complaints are recorded over those years. Generally, they are unremarkable. They are consistent with the nature of her work as a hair stylist and with stereotypical "everyday" complaints.

[68] Dr. Flaschner initially stated that, "Based on the history, physical examination, and review of available documentation", her physical injuries were "secondary to the motor vehicle collision". After a review of the chiropractic chart of Dr. Erzoff, Dr. Flaschner provided the following as an amendment to his opinion:

> The discussion regarding the type of injuries sustained in the motor vehicle collision from my report is likely still relevant given the mechanism of injury. However, the diagnosis of persistent aggravation of pre-existing musculoskeletal issues as a result of injuries in the motor vehicle collision will be solely dependent on the history provided by Ms. Bowes, as there are no objective tools to distinguish her pre-existing complaints from her post MVA symptoms.

[69] With that proviso, all of the medical experts conclude that the plaintiff received soft tissue injuries in the MVC.

[70] There is no question that the plaintiff had longstanding issues with anxiety and depression prior to the MVC. To the extent the plaintiff suggests the problems had resolved as a result of treatment she had undertaken in late 2017 and early 2018, I would reject the proposition. The problems did eb and flow. In part a result of the plaintiff being a poor historian, the details of how her mental health had impacted her in the early years are unclear. On the evidence presented, in the period late 2017 to early 2018, her mental health conditions had been the most serious.

[71] There is no specific evidence or opinion as to how those conditions might have progressed in the future but, logically, the pattern would have remained as it had for the many years prior. The plaintiff herself argues that her pre-existing mental health made her vulnerable.

[72] The opinions are clear that the plaintiff's anxiety and depression did indeed leave her vulnerable. Dr. Flaschner's testimony described the interaction between the plaintiff's physical injuries and mental health. The following excerpt from that testimony is particularly informative:

> Dr. Flaschner: Yah, we see that as a bi-directional relationship, actually. So, like, for whiplash we know that a primary determinative outcome, after a whiplash inquiry, which we normally think of as being a physical injury, the six primary determinatives of outcome as to whether or not people get better after a whiplash injury are largely psychological factors. . . .
>
> So, academically it's interesting that what really defines how well someone will do after a physical whiplash injury is largely their psychological status. . . .
>
> We know that anxiety in particular tends to magnify pain perception, so it makes a lesser pain issue seem like it's more. But in turn we see physical complaints related solely to psychiatric issues and this is why the International Association for the Study of Pain, the IASP, their definition of pain does not require any physical injury. Psychological pain is a large part of that. And so we see in this particular file psychiatrists who are involved on the medical/legal side of things who both diagnosed somatic symptom disorder, somatic symptom disorder being a condition that manifests as physical pain because of emotional concern or emotional stressors. From my side of things as a physiatrist, where we deal with the physical side of it, it becomes very difficult to differentiate the psychiatric pain manifestations from the physical ones because the presentation is really very similar. Like, for depression alone, one of the most common presenting features of

> depression is low back. It's not that the depression caused an injury to the low back, it's just the way that people manifest that mood issue. And similarly, anxiety often results in a lot of muscle tension. We see people complain of muscle pain, or myofascial pain when they are very anxious. And so it becomes really very hard to differentiate visual physical things from the psychiatric manifestation.

[73] Based on the collective weight of the evidence including the expert opinions, there is no question that, as a result of the MVC injuries, the plaintiff has developed SSD. Each of the lay witnesses confirmed a significant change in the plaintiff after the MVC. Whatever other issues or challenges her mental health may have presented in her future or the extent of pre-existing physical issues, SSD is a product of the MVC. Dr. Dahi said it succinctly as quoted above, "The [MVC] triggered those emotional vulnerabilities and created a somatization symptom disorder".

[74] The prospects for the plaintiff improving are the subject of comment by each of the physiatrist and psychiatric opinions with Dr. Dahi being the most optimistic. His optimistic view is not unqualified however, as it is linked to significant change in rehabilitative direction, which includes a gradual return to work. With that change, he opines that "the prognosis can be quite favorable".

[75] Dr. Anderson's opinion is far more pessimistic, but again not entirely without qualification. He states the plaintiff has been compliant with her treatment but also recommends additional treatment. He concludes her long-term prognosis, from a psychiatric point of view, is poor. He states, in part:

> Ms. Bowes may have an improvement in her emotional functioning if the above recommendations are put into place but she will not likely return to her premorbid level of emotional function as a long as she has significant pain and functional imitations. Ms. Bowes will likely remain emotionally vulnerable and be at risk of deteriorating emotionally if her physical symptoms should worsen as she ages or if she is exposed to new psychosocial stressors. Ms. Bowes will also be at an increased risk of developing a worsening of her PTSD symptoms if she is involved in another traumatic event.

[76] Consistent with the comments of Dr. Flaschner above, Dr. Anderson references the inter-relationship between the physical and psychiatric conditions,

noting that the plaintiff is anxious about her pain causing it to worsen and that increased pain feeds her depression. He states generally patients with SSD lasting more than two years tend to remain symptomatic.

[77] I accept that the onset of the SSD has dramatically affected the plaintiff.

[78] The defendant argues that, because the plaintiff continued to work following the MVC until 2021 and because the anxiety and depression symptoms wax and wane, the plaintiff "has not established that the flare up of anxiety and depression and pain in 2021, was caused by the subject [MVC]."

[79] I do not agree with the defendant's arguments that her pre-existing mental health challenges or her physical complaints are the source or would have led to her current status even without the MVC.

[80] The evidence is clear that she received physical injuries in the MVC. The evidence of each of Dr. Flaschner, Dr. Anderson and Dr. Dahi explain the onset of SSD being connected to those injuries. No doubt she was vulnerable, no doubt her mental health issues were significant in late 2017 and early 2018, but the specific disorder, SSD, was caused by the MVC.

[81] She had carried on her work up to the MVC. It was not a flare up of her pre-existing anxiety and depression in 2021, but the persistent effect of the SSD and her physical injuries that rendered her competitively unemployable.

[82] The plaintiff's original position was that of a person who had those vulnerabilities and whose life would have continued to have been impacted by them. The task is to value her damages based on the imposition of the physical injuries and SSD on this plaintiff.

[83] I will conclude by addressing the additional psychological diagnoses referred to by Dr. Dahi and Dr. Anderson. Those include PTSD (post-traumatic stress disorder), major depressive disorder (MDD), a generalized anxiety disorder (GAD), panic disorder with agoraphobia and cannabis use disorder.

[84] The depression and anxiety are discussed throughout the decision. PTSD was not a focal point in argument and its presence, cause and prognosis, on the evidence before me, do not add anything more than context.

[85] Dr. Dahi concluded the plaintiff has a cannabis use disorder and that she needs to cease its use as part of his recommendations. The plaintiff described its use for symptom management. She did not, however, advance a claim for its costs as part of her claim. There is no medical evidence to support its use in her treatment. I draw no specific conclusions but do observe it is for the plaintiff to consider the recommendation and whether generally to endorse Dr. Dahi's recommendations.

Non-Pecuniary Damages

[86] The plaintiff was coping with real challenges prior to the MVC. As noted above the physical complaints were persistent but manageable. It would be wrong to dismiss them as inconsequential or irrelevant in understanding her original position but also wrong to overstate their impact.

[87] That she would have such complaints given the nature of her work is not unusual but the fact of them shows there were limits to her capacity for physical activities including work volumes.

[88] The plaintiff's testimony made it clear that she was highly driven by making her clients happy and presenting herself as upbeat and positive. That would influence how clients and others in her life saw her despite her challenges. Perhaps most telling of this is the evidence of her husband Michael. He denied any knowledge of her attendances at hospital for her mental health concerns in 2017 and 2018. She explained she did not want to burden him with her issues.

[89] Also, her own description of her life before the MVC focussed on the positive aspects. While perhaps understandable, that testimony showed her to not be a reliable historian and to tend to minimize her pre-MVC challenges.

[90] Her struggles with anxiety and depression were likely to have continued to eb and flow depending, at least in part, on life events and circumstances. Her description of her life before the MVC as “joyous” must be viewed with skepticism if it was intended by her as a general description. Photographs she referenced to support her testimony are literally and figuratively a snapshot in time.

[91] In cases dealing with contingency deductions where plaintiffs have pre-existing conditions, the courts assess whether there is “a real and substantial possibility, thereby giving rise to a measurable risk” that a future event would have aggravated the pre-existing condition (see *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*]). Here the question is whether there was a risk the plaintiff would suffer such an event resulting in the decline in the plaintiff’s condition.

[92] On the evidence here, I find that such a risk existed. She was emotionally fragile and the information regarding her difficulties flaring less than one year prior to the MVC to the point of suicidal ideation provides context as to its severity and the reality of that risk.

[93] None of that diminishes the fact that the plaintiff was functioning in all aspects of her life at a much higher, more rewarding and satisfying level before the MVC. I accept that she is significantly compromised and her overall quality of life much reduced.

[94] I also accept that there is a basis to conclude that further specific treatment may assist. The optimism expressed by Dr. Dahi, in my view, goes too far and a more guarded view is appropriate.

[95] The plaintiff does not advance a separate claim for loss of housekeeping capacity. She argues that “the effects of her reduced ability to work around the home should be taken into account as part of her non-pecuniary loss.”

[96] Both plaintiff and defence referenced authorities in support of their respective positions on non-pecuniary damages. While helpful, each case is of course unique.

In addition, pain is a subjective experience and describing or categorizing it is not easy. This makes comparisons with others' experiences difficult.

[97] Each counsel provided three cases. The plaintiff's authorities involved awards between $125,000 and $150,000 without deduction for pre-existing conditions.

[98] The defence cases involved awards between $90,000 and $150,000 before any deductions. In each of those cases the court did deduct a percentage between 25% and 40% in recognition of pre-existing conditions.

[99] I will comment on them briefly.

[100] *Safdari v. Buckland*, 2020 BCSC 769 involved more significant pre-existing conditions and less consequential injuries.

[101] *Grewel v. Sanghera*, 2021 BCSC 621 is closer to the facts before me, but I would make similar comments to the latter. There the pre- and post-non-MVC conditions were more significant (at paras. 27-130).

[102] *Girvan v. McGlue*, 2023 BCSC 902 is a reasonably similar case involving physical and psychological injuries. The Court awarded $90,000 after a reduction of 40% for the role of the pre-existing conditions.

[103] *Palani v.* Lin, 2021 BCSC 59 is another similar case where $150,000 was awarded but the Court found no basis for reduction for pre-existing conditions. The Court noted that the plaintiff did experience significant emotional disturbance and occasional violence at an early age and that there was "some evidence" that those "early experiences may have left her with pre-existing vulnerability to developing prolonged pain in response to more recent trauma".

[104] In *Cumpf v. Barbuta*, 2014 BCSC 1898 the Court concluded the medical condition significantly affects "[the plaintiff] emotionally and affects her family, marital and social relationships. At the time of trial, it was four and one-half years post-accident. While Ms. Cumpf had improved, she had plateaued and will not likely

improve further without significant further treatment." The Court awarded $150,000 in non-pecuniary damages.

[105] *Kam v. Van Keith*, 2015 BCSC 1519 at para. 26 again sets out a description of injuries that bears similarity to the plaintiff's injuries in this case. Cole J. awarded $125,000 without any pre-existing conditions.

[106] *Stapley v. Hejslet*, 2006 BCCA 34, provides a foundation for the assessment. It is also a basis for a more structured approach to considering the authorities presented. The oft-cited paragraph from that decision is:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
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> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[107] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[108] Having regard to the authorities and the evidence I conclude that an award of $140,000 reduced (~15%) to $120,000 is appropriate.

Loss of Earnings/Earnings Capacity

[109] The approach to the assessment of claims for future loss of earnings or earnings capacity has been addressed by the Court of Appeal with some frequency of late. A very recent summary of that approach is contained in *Davies v. Penner*, 2023 BCCA 300, as follows:

> [25] An award for loss of future earning capacity is intended to return the plaintiff to the position they would have been in, had they not been injured: *Athey v. Leonati*, [1996] 3 S.C.R. 458. The court must compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Rab* at para. 65. The three-part test set out in *Rab*, at para. 47, involves two inquiries and an assessment:
>
> a) Whether the evidence discloses a potential future event that could lead to a loss of capacity;
>
> b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and, if a real and substantial possibility exists;
>
> c) Assessing the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.
>
> [26] The first step is "evidentiary". Where the evidence indicates no loss of income at the time of trial, a number of considerations are relevant to the question of whether there is an impairment of capacity: *Rab* at para. 36, referring to *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.):
>
> 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.
>
> In *Rab*, Justice Grauer specifically recognized "chronic injury, future surgery or risk of arthritis" as circumstances that could give rise to a potential future event based on the considerations set out in *Brown*: at para. 47.
>
> [27] The second step requires a trial judge to consider whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. A real and substantial possibility is a higher bar than mere speculation, but does not require proof on a balance of probabilities: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34. A finding of diminished earning capacity at the first stage does not necessarily mean that there is a real and substantial possibility that the plaintiff's diminished

> capacity will lead to a pecuniary loss in their particular circumstances: *Rab* at para. 44; *Bains v. Cheema*, 2022 BCCA 430 at para. 22. The inquiry must be answered based on the whole of the relevant evidence.
>
> [28] The final step is assessing the value of the possible future loss. This must include assessing "the relative likelihood of the possibility occurring": *Rab* at para. 47. There are two ways to quantify a loss of future earning capacity; the earnings approach and the capital asset approach. Generally, cases where plaintiffs' injuries have exposed them to future loss of capacity but their income at trial is at or near their pre-accident level of earnings, lend themselves to the capital asset approach: *Rab* at para. 30; *Kringhaug v. Men*, 2022 BCCA 186 at para. 43. Depending on the particular circumstances, there are a number of methods by which the court can assess loss of future earning capacity based on the capital asset approach: *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.).

[110] The Court of Appeal in *Dornan* provides guidance on the concept of a "real and substantial possibility", including the following:

> [63] Such discussion, of course, of necessity concerns hypothetical events: what will or what would have happened in the future? As observed by Mr. Justice Goepel in *Grewal v Naumann*, 2017 BCCA 158 at para 48, and as I discuss further below, "a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation". A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable.
>
> [64] It follows that the process is one of determining whether, on the evidence, the contingency or risk is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood. This was explained succinctly by Justice Major in *Athey*:
>
> > 27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, *they are simply given weight according to their relative likelihood*: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. *A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation*: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
> >
> > [Emphasis added in *Dornan*.]

[111] The functional capacity evaluation, the vocational consultant and Dr. Andersen all conclude the plaintiff is competitively unemployable. Dr. Flaschner states:

> From a strictly physical perspective, Ms. Bowes would be expected to tolerate at minimum sedentary to light level employment on a full-time basis that allows for changes in position and posture throughout the day. There is a reasonable expectation that sustained shoulder flexion or abduction while cutting hair may exacerbate neck and shoulder soft tissue pain and it would be reasonable to expect the need for brief breaks between clients.

[112] Dr. Dahi does not specifically comment on her current ability to work but recommends a gradual return to work as part of her rehabilitation.

[113] The plaintiff is 50 years of age. She worked as a hair stylist for approximately 15 years. Despite her pre-existing physical and emotional conditions, she had worked steadily. As noted above she was vulnerable.

[114] The defendant argues the plaintiff's decision to quit was not a result of the MVC injuries, since she continued to work after the MVC until 2021. I do not agree. There is little to support the argument that her decision was a product of her pre-existing conditions. It is my conclusion on the whole of the evidence that she continued to work as long as she did despite the MVC injuries. The SSD developed as a result of the MVC and the prolonged compounding interactive effect of the pain and anxiety and depression led to her impaired capacity to work.

[115] In the alternative, the defence argues there should be deduction consistent with the deduction from non-pecuniary damages (while the defence argued 30%, I have found that to be ~15%) based on the pre-existing conditions.

[116] I agree that there was a real and substantial possibility that the plaintiff would have ended or reduced her work as a result of her pre-existing conditions. The approach taken to account for the pre-existing conditions in assessing non-pecuniary damages is not, however, appropriate. There, the goal is to compensate for the impact of the MVC injuries to her pain and suffering. That is a

linear type of analysis. In relation to the plaintiff's work, she has been rendered competitively unemployable as a result of the MVC injuries including the SSD.

[117] I must assess the risk that her earnings would have declined in the absence of those injuries. The real and substantial possibility includes that she may have only reduced her workload to some degree. When the range of possibilities is taken into account, it is my conclusion that only a 5% reduction is appropriate. This is applicable to both her past and future earnings loss claims.

[118] In addition, the defendant says there should be a further 10% reduction to reflect a residual earning capacity.

[119] The fact that she was able to continue to work following the MVC is relevant in assessing her residual earning capacity. While I accept the expert opinions that at the times of those assessments she was competitively unemployable, I also agree that there is a real and substantial possibility that she may be able to return to some earnings as a hair stylist working from her home if future treatments are successful.

[120] It is clear from the plaintiff's testimony that she loved her work. She has the ability to control her workload as a result of being self-employed and working from her own home. There is merit in her argument that her clients' needs require regularly scheduled appointments. Those clients will have a limited tolerance for uncertainty as to whether those appointments will be kept. The question, however, is whether there is a real and substantial possibility that she will earn some income. There is also the possibility that she may take some other form of employment, at least in a part-time capacity. Such future or hypothetical possibilities will be taken into consideration as long as it not mere speculation.

[121] With the benefit of a moderation of symptoms through treatment there is justification for some optimism that at least a modest return is possible and this should be included in the assessment of the plaintiff's loss of capacity. I also find merit in Dr. Dahi's opinion that a gradual return to work would serve be rehabilitative.

[122] If the plaintiff does return, it would not be to her pre-MVC earnings level. Similar to the prospect that she would have lost income as a result of her pre-existing condition, the likelihood that she will do some work in the future must recognize the likelihood that, if she does, it would be less than her pre-MVC earnings level.

[123] I find that a further 10% deduction is appropriate, limited of course to her future loss of earnings claim.

[124] I turn next to consideration of the level of earnings to be used in applying these conclusions.

[125] The plaintiff relies on her ledger records less the expense claimed in her tax returns as the best evidence of her income rather than her tax returns. She then argues that 15% should be added for undeclared and unrecorded gratuities.

[126] The defence referred to British Columbia cases that conclude a failure to declare income is not a bar but it creates a strong inference against the claimant.

[127] I accept that the plaintiff did not report all of her income in her tax returns and that her ledgers reflect her actual income.

[128] I find it a much more difficult proposition that she would maintain her detailed ledgers to record her actual income but not include in them any gratuities received. I note that the clients who testified said nothing of gratuities.

[129] The plaintiff chose to keep separate records of undeclared income. On the evidence here, the proposition that she kept detailed records of that undeclared income but then chose to exclude gratuities from that record is one that I cannot accept.

[130] I must now apply these conclusions to the facts as I have found them and determine the awards for past and future losses.

[131] In my assessment of her past loss I accept, as argued by the plaintiff, that her past loss should be based on a projection of what she would have earned based on her average pre-MVC earnings for the years 2013 to 2017. From that, her actual net earnings after the MVC to the date of trial must be subtracted. There are different approaches that might be taken to calculating those amounts but there is no error in that proposed by the plaintiff so I will adopt that generally.

[132] There are, however, some adjustments proposed by the plaintiff that I need to address. I have already provided my comments on the suggestion that there should be an upward adjustment for unreported and unrecorded gratuities.

[133] The plaintiff also proposes a modest ($700 to $1,281.40) decrease to the 2018 loss of earnings to reflect her mental health issues experienced in early 2018. That is a reasonable proposition but, in light of my 5% overall reduction, I will not include it in my calculation.

[134] Further, the plaintiff acknowledges the 2020 income was impacted by COVID and suggests the loss for that year should be reduced by one-half. Again, that is a reasonable position which I incorporate into my calculation.

[135] The plaintiff suggests a modest rounding up from her calculation of the past wage loss to account for possible rate increases for her services. The evidence provides some support for the fact that her rates did vary and increase, but there is nothing to indicate any organized or regimented approach by the plaintiff. Despite that, her gross revenue over the 2013 to 2017 period was very consistent, with a low of $23,464 and high of $26,464 with no trend line. I decline to adopt this proposition.

[136] The average pre-MVC earnings were $24,692.40. Subtracting her actual income yields the following annual gross losses, totalling $84,486.70:

2018	$1,981.40
2019	$6,123.40
2020	$10,592.40

2021	$18,462.40
2022	$24,692.40
2023	$22,634.70 (to December 1, 2023)

[137] After adjustments, the total loss of revenues is therefore $79,190.50.

[138] As argued by the plaintiff, her average annual expenses of $5,248.17 must be deducted for each year for 2013 to 2018, totalling $31,489.02, yielding a past loss of $47,701.48. Reduced by 5%, the past wage loss is $45,701.48.

[139] In respect of her future loss of opportunity, the plaintiff relies on the economist's report and the same average pre-MVC earnings. That report adjusts income for wage inflation, suggesting that 2018 income of $18,200 would equate to $29,319 in 2013. The latter is then used to project the future loss. As indicated in my discussion of the past loss, the plaintiff's historical earnings do not follow that statistical pattern. Accordingly, I use the amount of $24,692.40 less average expenses of $5,248.17.

[140] The multiplier from the report which was accepted by both the plaintiff and defendant to the plaintiff's age 65 is 12.648. That produces a result of $245,930. Reduced by 15% as discussed above, the award is $209,041.

Costs of Future Care

[141] The principles governing an award for costs of future care are set out in *Quigley v. Cymbalisty*, 2021 BCCA 33, as follows:

> [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: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
>
> [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: *Aberdeen* at para. 42; *Gao* at para. 69.

[142] The plaintiff created the following table setting out the care items she says are justified, including the present values based on multipliers from the economist's report. I have adapted that table by adding the defence position in relation to each item and inserting the amounts I award. My reasons explaining those awards follow.

Future Care Recommendation	One Time	Annual	Total	Defence Position	Court Award
Cognitive Behavioural Therapy (15-20 sessions)	$3,375-$4,500		$3,375-$4,500		$3,938
Psychologist (long-term recommended by both Anderson/Dahi)		$1,800-$2,700	$54,888	$12,654	$54,888
Marital Therapy (Dr. Dahi recommends 20 sessions)	$3,400		$1,700-$2,550		$2,207
Botox Injections	$1,250-$2,000	$2,500-$4,000	$41,249	$0	$0
ENT Treatments	$5,105		$5,105	$0	$0
TM Specialist (with ongoing oral appliance)	$500	$600	$5,777	$0	$0
Ketamine Injections	$7,394		$7,394	$0	$0
Active Rehab	$450		$450	$500	$450
Passive Modalities		$990-$1,176	$25,130.16-$29,851.58		$25,130.16
Occupational Therapist	$520		$520		$520
Injection-Based Therapies	$2,000		$2,000		$500
Prescription Medication		$244.75-$1,412.75	$7,371-$34,145	$2,500	$9,036
Supplies and Equipment	$1,676.98		$9,908	$0	$9,908
Cleaning Assistance		$1,400-$1,600; $875-$1,000	$20,920-$33,472	$0	$20,920

Future Care Recommendation	One Time	Annual	Total	Defence Position	Court Award
Total			$187,487.16-$232,659.58	$17,193	$127,497.16

[143] Each of the plaintiff and defendant have applied multipliers from the economist's report to arrive at the net-present values they present. One source of discrepancy is duration of the cost each argues should be awarded. Generally, the defence use the multiplier to age 65 whereas the plaintiff assumes a lifetime expense.

[144] Each party suggests some general rationalization for their positions.

[145] The plaintiff notes she has been spending money on various care items at a pace of approximately $6,000 per year which equates to a net present value of $15,2304. In addition the plaintiff acknowledges that some items claimed need to be "tempered". She argues that $150,000 would be the appropriate award.

[146] The defendant suggests the difficulty in separating out the role of the pre-existing conditions in the costs supports using age 65 as the basis for the multiplier.

[147] Care must be exercised in making a generalized assessment. The approach to be taken by a trial judge was set out in *Sunner v. Rana* 2015 BCCA 406 as follows:

> [45] In *Johal*, this Court stated:
>
> > [44] The difficulties posed by these reasons are three-fold:
> >
> > (1) The judge did not analyze each item of care to determine whether there was an evidentiary link between the caregiver's assessment of pain or disability and the recommended care;
> >
> > (2) it is not apparent that the judge had regard for the real and substantial possibility that the expense will be incurred or that he made an allowance for the contingency that the cost may not be incurred. It may be that he accepted Ms. Johal's submission as to the

appropriate negative contingency, but it is not apparent from the reasons; and

(3) the judge did not identify the specific amount awarded for each item claimed. Thus, as the appellants note, there cannot be a proper mandatory deduction pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 because one needs to first determine whether the item is a mandatory or discretionary benefit under s. 88 of Part 7 of the *Insurance (Vehicle Act) Regulation*, B.C. Reg. 447/83.

> [45] It may be, as Ms. Johal suggests, that the bulk of the claimed future care costs were supported by the evidence. For example, it may be possible to infer what amounts the judge specifically awarded for the Botox injections, and the seasonal cleaning and gardening assistance. The insurmountable difficulty in determining this issue on appeal lies in discerning from the reasons precisely which costs were allowed, in what amounts, and for what reason. In other words, the road map for the award was not developed in the reasons for judgment: there are individual items that were claimed by Ms. Johal that were neither accepted nor rejected by the judge. That being so, that part of the award must be set aside and a fresh determination made.
>
> [46] Thus, I would remit the matter to the judge for a fresh determination of the future care costs.

[46] In *Gregory*, this Court reiterated at para. 39 that "there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional". A physician need not testify to the medical need for each item of care that is claimed.

[47] In *Gignac*, this Court declined to remit the matter to the Supreme Court because the judge had retired, but stated:

> [32] The failure of the trial judge to perform an analysis of each item sought by the plaintiff with respect to whether there was "some evidentiary link between the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health professional" was a legal error.

. . .

[49] The appellants note that the judge reduced the award of non-pecuniary damages by $10,000 because the respondent did not follow medical advice to follow a focused exercise program. They assert that he may not undertake the proposed future care regime. The judge's reasons suggest that he was receptive to that concern.

[148] I will therefore proceed to address the specific items claimed by the plaintiff.

Psychological Counselling and Treatments

[149] Both Dr. Anderson and Dr. Dahi recommend some form of psychological treatment.

[150] Dr. Dahi says, “at least once a week psychotherapy (psychodynamic or psychanalysis-oriented psychotherapy) for the long term” is required. There is no evidence of the cost of this specific treatment.

[151] Dr. Anderson recommends another 15 to 20 sessions of cognitive behavioural therapy before reassessing the need for further treatment. He also suggests long-term supportive therapy of eight to 12 sessions per year as well as “several sessions” of marital therapy. Each of these is costed in the occupational therapist’s report.

[152] The plaintiff’s mental health is a major contributor to her overall condition and is central feature of the SSD diagnosis. Dr. Flaschner testified that the plaintiff’s ability to cope with her symptoms depends on the management of her mental health. I accept the recommendations.

[153] I have selected the mid-point costs where a range of treatment intensity is recommended.

Botox and other TMJ Treatments

[154] The plaintiff has had Botox injections to manage jaw pain. She could not recall who recommended it. Dr. Anderson suggests it is a possible treatment but recommends it be determined by an “appropriate specialist”. He suggested a referral to such a specialist for assessment and treatment recommendations. There is no evidence that has occurred. In the cost of care report, the occupational therapist provides costs on the assumption that Botox would be trialed and then continued. The report goes on to provide costs for other possible TMJ treatments including trigger point injections, oral appliance and physiotherapy.

[155] Dr. Flaschner stated that use of Botox is ill-advised for treatment of the plaintiff's jaw pain without the assessment of an appropriate dental/TMJ specialist. He noted that there are some negative possible consequences, including weakness and further pain issues.

[156] On the evidence I have, I reject the claim for the care item associated to the plaintiff's jaw pain. There is no finding of TMJ and no specific treatment recommendations.

ENT Treatment Plan

[157] Dr. Anderson also recommends a referral to an ENT specialist to assess tinnitus, noise sensitivity and episodes of dizziness. His suggestion is that the ENT may make treatment recommendations. There are, however, no such recommendations. Again, the occupational therapist has provided costs of treatments that she anticipates may be recommended.

[158] On the evidence before me, I reject the claim for these expenses as well.

Ketamine Injections

[159] Dr. Anderson notes in his conclusions that "If Ms. Bowes' depression worsens further then she will likely require psychiatric hospitalization and consideration of treatment with other modalities (e.g. electroconvulsive therapy (ECT) or intravenous ketamine)." The occupational therapist confirms ECT is covered by MSP. She notes the ketamine is a potential cost. In sum it would only be a consideration and only if her condition deteriorates.

[160] In my view this does not rise to the status of a recoverable cost of future care.

Active Rehabilitation

[161] The defendant agrees to the provision of $450 claimed by the plaintiff. This represents costs associated to having a kinesiologist design and oversee an exercise program. It is appropriate.

Passive Modalities

[162] Dr. Flaschner endorses active rehabilitation as the principle physical treatment but adds that "[m]annual therapies would not be expected to be curative but can be used for temporary symptomatic relief to allow Ms. Bowes to tolerate her vocational and avocational needs and participate in her exercise program."

[163] Dr. Kahn makes a similar recommendation. Specifically he states that, "[p]assive modalities . . . may be occasionally sought in cases of flare-up, but are not strictly required. The mainstay of her treatment will be active rehabilitation."

[164] From the latter the occupational therapist, based on her clinical experience, provided the average costs of ten to 12 sessions per year of chiropractic, massage, physiotherapy and acupuncture. That is the basis for the amount claimed.

[165] Taking the evidence collectively, I make an award based on ten sessions per year.

Occupational Therapist

[166] Dr. Kahn recommends two consultations with an occupational therapist to "optimize and enhance her housekeeping abilities". This is reasonable.

Prescription Medication

[167] The occupational therapist, in her cost of care report, looks at the various medications Dr. Kahn and Dr. Anderson suggest may be tried and appropriately notes that several of them have already been tried without positive results. The report then sets out the costs for a 90-day trial and long-term use of four of them. The occupational therapist notes that "[s]ome of the medications can be combined but not all. If deemed beneficial, costs for one or more of these medications may need to be considered on an ongoing basis so annual costs are also included."

[168] In the result it is impossible to identify which, if any, may be used on an ongoing basis. The plaintiff's table above shows the range of annual costs of the individual medications. The actual annual costs range extremes are $244.75,

$1,084.35, $317.75 and $1,412.75. It is reasonable to make some allowance for medication costs but doing so in any way is necessarily largely arbitrary. Recognizing the plaintiff's difficulties tolerating many medications to date and the possibility that, even if tolerated she does not continue their use, my award is based on annual costs of $300 with a net present value of $9,036.

Injection-Based Therapies

[169] Dr. Kahn includes a suggestion of consultation with a specialist for a trial of these therapies. Dr. Kahn noted "[t]he duration of this treatment is variable, as it will depend on the benefit attained, tolerance of medication side effects, magnitude of benefit, tolerance of procedures, convenience of continuing treatment, etc." The plaintiff testified that she has had two such injections with some relief and is willing to further this.

[170] The occupational therapist's report simply notes "[c]osts range according to the treatment". Some are covered by MSP. Individual injection costs are $75 for the others with one costing $200.

[171] The result is that I cannot know whether any injections she might try would have a cost to her or whether they would be taken on an ongoing basis. I will award $500.

Supplies and Equipment

[172] Dr. Kahn also suggests considering ergonomic modifications and adaptive equipment. From this the occupational therapist specifically recommends a combination automatic vacuum/mop and an adjustable handle for a mop with a duster attachment. With projected replacements, the value set out by the plaintiff in her table above is set out. This is reasonable.

Cleaning Assistance

[173] This recommendation comes from the occupational therapist's own assessment. As noted above the plaintiff does not advance a claim for loss of housekeeping capacity.

[174] The occupational therapist's rational is that, based on the plaintiff's level of function, allowing for 40 hours per year on as-needed basis. In anticipation the plaintiff may follow through on moving to a smaller home she notes this might be to 25 hours per year at some point. The plaintiff's table shows the range based on one option or the other.

[175] I agree that an allowance is justified and make it on the basis of 25 hours per year to age 80.

Special Damages

[176] An award of special damages should reflect out-of-pocket expenses reasonably incurred as a result of an accident. Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred for treatment aimed at promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[177] At trial the plaintiff presented a binder of expenses. The plaintiff conceded that a number of the expenses she incurred following the trial should be adjusted to reflect that she would have attended for some in any event. Specifically, she acknowledges that one half of the expenses she incurred for chiropractic and massage treatment should not be reimbursed.

[178] The defendant argues that the concessions of the plaintiff do not go far enough. Below is a table setting out the amounts claimed and the defendant's position together with the amount awarded. The reasons are set out in the paragraphs that follow.

Item	Plaintiff's Claim	Defence Submission	Court Award
Physioactive	$1,326 (total cost $2,064 but only 1/2 out-of-pocket to plaintiff)	$2,064	$1,326

Item	Plaintiff's Claim	Defence Submission	Court Award
Kelowna Family Chiropractic	$1,300	$0	$0
Langedyk Chiropractic	$2,149	$0	$0
Balance Point – RMT, Kinesiology, Acupuncture, Chinese Herbs	$4,653.35	$5,500	$4,653.35
Leslie Park Fitness – Kinesiology	$2,100	$2,100	$2,100
Kelowna Psychologists Group	$691	$691	$691
Kelowna Mental Health	$0	$0	$0
Cerulean Medical Institute	$1,000	$0	$0
Miscellaneous other Treators	$535.07	$0	$0
Prescription Medications	$208.19	$208.19	$208.19
Miscellaneous Expenses (La-Z Boy chair, pillows, heat pads and YMCA membership)	$792.59	$656 (YMCA membership)	$792.59
Travel	$4,576 ($6,156 less $280 for Langedyk and $1,300 for Balance Point)	$2,000	$3,720 ($4,576 less another $280 for Langedyk and $576 for Kelowna Family Chiropractic
Total	$19,331.20	$13,219.19	$13,491.13

[179] I will only address the expenses the plaintiff pursued in argument and where the defence disputed the amount claimed.

Kelowna Family Chiropractic

[180] As noted above, the plaintiff had been attending with Dr. Langedyk for several years prior to the MVC. She made the decision to change chiropractors in or about May 2018 and started attending Kelowna Family Chiropractic in June 2018. The treatment plan the new chiropractor instituted included treatments three sessions per week with no specified end date. Those had been continuing at the time of the MVC. She returned to Dr. Langedyk on March 29, 2019 and was continuing with him to the date of trial.

[181] There is no identified increase in the frequency or costs of treatment post-MVC. Although I have no clear evidence of it, I accept that the focus of the treatments may have been adjusted as a result of the MVC. On the evidence however I find no basis for awarding the costs of this ongoing treatment.

Langedyk Chiropractic

[182] The plaintiff suggests that one-half of these treatment costs should be recoverable as special damages. For similar reasons to the Kelowna Family Chiropractic costs, I reject this part of the claim.

Balance Point-RMT, Kinesiology and Acupuncture

[183] The plaintiff proposes that only one half of the attendances for massage be covered. When the associated travel is removed the amount claimed is reduced from $7,459.72 by $2,806.36 to $4,653.35. The defence position exceeds this therefore I award $4,653.35.

Cerulean Medical Institute

[184] The plaintiff obtained her Botox injections from this provider. As noted above, they were used to address her jaw pain. The plaintiff could not recall in her testimony who recommended this. As was described above in the sections dealing with cost of future care Botox has been suggested as a possible treatment for TMJ issues but only on the recommendation of a suitable specialist.

[185] I am unable to conclude this is a recoverable expense.

Miscellaneous other Treators

[186] The plaintiff seeks to recover the cost of treatments she has tried. There are three, each of which she attended once.

[187] One was aromatherapy for relaxation.

[188] The second was an attendance while she was travelling in Mexico. She testified it was due to a reaction she had to a medication. The receipt indicates it was “due to mental problems”. It is not clear what the medication was and there is no additional information.

[189] The third was for an assessment suggested by the plaintiff's massage therapist. She did not engage in the program offered, but purchased some glasses she was told could assist with her mood.

[190] In my view none of these is supported by sufficient or any evidence that establishes they are properly recoverable as a special damage.

Miscellaneous Expenses

[191] The only items in this category the defence challenges are the costs of two pillows ($85.59) and a heating pad ($49.99). In my view each of these are reasonable.

Mileage

[192] The plaintiff seeks recovery of a mileage allowance for the treatments she claims. That is proper and I have awarded the amount as I can determine it from the materials in evidence dealing with special damages.

Conclusions

[193] I have adapted the table set out earlier to include a column for the awards set out above to summarize my conclusions.

Head of Damage	Plaintiff	Defendant	Court Award
Non-pecuniary damages	$175,000	$90,000 to $95,000	$120,000
Past loss of earnings capacity	$60,000	$0 to $7,875	$45,701.48
Future loss of earnings capacity	$380,000	$0 to $35,414 to age 65	$209,041
Cost of future care	$150,000	$15,654 to $32,847	$127,497.16
Special damages	$20,000	$13,000	$13,491.13
Total	$790,000	$118,654 to $184,136	$515,730.77

Costs

[194] Absent knowledge of any information or circumstances that would suggest otherwise, the plaintiff is entitled to her costs. If, however, either party takes a different position they should advise Supreme Court Scheduling within 21 days of

the date of this decision so a hearing dealing with costs can be scheduled. The same deadline is imposed should there be any other issues that need to be addressed, arising from this decision.

"Betton J."