

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Danks v. Middelveen*,  
2024 BCSC 174

Date: 20240202  
Docket: M207722  
Registry: Vancouver

Between:

**Amy Louise Danks**

Plaintiff

And

**Frederick Middelveen, Winnifred Middelveen,  
Ming Zhang and Dao Guang Zhang**

Defendants

And

**Insurance Corporation of British Columbia**

Third Party

Before: The Honourable Justice Kirchner

## Reasons for Judgment

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**Introduction**

[1] The plaintiff, Amy Danks, sues for damages for injuries she sustained as the passenger in a truck that was hit from behind in a three-car rear-end accident. Liability is disputed as between Frederick Middelveen who was driving the truck behind the Danks' truck and Ming Zhang who was driving the car that hit Mr. Middelveen's truck sending it into the Danks' truck. The Insurance Corporation of British Columbia is a third-party and took the lead role in defending the claim.

[2] Ms. Danks sustained soft-tissue injuries to her neck, shoulder, and back from the accident. She claims this pain has become chronic and is unlikely to improve. She says these injuries cause daily headaches, challenges with sleep, and significant anxiety and depression that make her less patient and more irritable. This has negatively impacted her social and family relationships. Once an accomplished and enthusiastic athlete, she is now unable to maintain the level of fitness and activity that once defined her life. She has also lost enthusiasm and energy for the very successful childcare business she and her close friend built together.

**Before the Accident****General**

[3] Ms. Danks lives in the Lynn Valley area of North Vancouver with her husband, Michael Danks, and their three daughters. She was 41 at the time of the accident and 46 at the time of trial. She and Mr. Danks met in high school and later married in 2005. At the time of trial their children were ages 17, 15, and 11.

[4] Ms. Danks grew up in North Vancouver and spent most of her summers at her family's cabin on Bowen Island. She remains very close to her family, especially her sister Brooke Miller who described Ms. Danks as an outgoing and spontaneous person before the accident who was vibrant in social situations. She was enthusiastic and motivated with a strong work ethic and a determination to succeed. She was very social and loved being around people and in the public enjoying herself. She was also the "glue that held the family together."

[5] Ms. Danks' friend and business partner, Samantha Johncox has seen Ms. Danks almost every day since 2008. She described Ms. Danks before the accident as an "incredibly outgoing person" with a "zest for life" and a "lively personality".

### **Childcare Business**

[6] After high school, Ms. Danks completed an Early Childhood Education program at Capilano University and then worked as a supervisor at a kids' day camp in West Vancouver. That job and her passion for working with children inspired her to return to school with a view to becoming a teacher and, in 2005, she completed the Professional Training Program at Simon Fraser University and qualified as a teacher.

[7] In 2006, while working as a teacher-on-call, Ms. Danks decided to start a childcare business. She obtained a licence to open a seven-child daycare space in the basement of the Danks' home, then on 15<sup>th</sup> Street in North Vancouver. She called it Sweet Peas Cottage and it was a huge success. She received great feedback from the parents and quickly generated a large waitlist.

[8] In the fall of 2007, Ms. Danks became pregnant with her second child. With a view to getting help running Sweet Peas Cottage and potentially expanding the business, she persuaded Ms. Johncox to become her business partner and together they incorporated Sweet Peas Cottages Ltd. In 2011, they relocated the business to a commercial space they designed and renovated themselves and expanded to take 14 children. In 2013, they opened a second location on Brooksbank Avenue in North Vancouver and in 2017 they opened a third location in Lynn Valley. They now employ some 30 people including managers, teachers and support workers. Before the accident, both were eager to continue expanding their business.

[9] In the early years of the business, Ms. Danks and Ms. Johncox did all the hands-on childcare duties which is highly physical work. Ms. Danks did this with no difficulty. As the business expanded they hired teachers for this work and settled into managerial roles, although from time-to-time they had to step on to the daycare floor

when a teacher was unexpectedly ill and a substitute could not be found. Most of their days, though, were (and are) filled with the tasks of managing a successful business and a staff. They work extraordinarily well together. They put in long days to build the business but both were enthusiastic and passionate about it and the service they were providing parents and kids.

### **Athletics**

[10] Ms. Danks is very athletic and has been throughout her life. Growing up, she played many different organized sports at school and in clubs or leagues, including soccer (at the Metro level), volleyball, and softball. She was named female athlete of the year for her high school. Much of her life revolved around sports and athletics, including her friend groups. Her sister, Ms. Miller, said Ms. Danks has always been a competitive athlete.

[11] After finishing high school, Ms. Danks continued with athletics. She regularly ran 5 or 10 km on her own and with Ms. Miller. She often hiked with Mr. Danks (himself a committed hiker and outdoors person) or with her mother or friends. She regularly went to the gym and did organized intensive workouts and boot camps with Ms. Johncox. She continued playing organized sports, particularly soccer, well into adulthood.

[12] Like Ms. Danks, Mr. Danks is very athletic and driven by fitness. Their shared passion for physical activity has always been a significant part of their relationship. All three of the Danks' children have inherited their parents' athleticism and play sports such as basketball and soccer and run cross-country. Ms. Danks coached and managed their sports teams when they were younger before they reached a more elite level.

[13] It is fair to say that sport and athletics have been a core part of Ms. Danks' life and identity since her youth.

### **Family and Relationships**

[14] Mr. Danks is the deputy fire chief with the North Vancouver District Fire Service and has worked in the fire service for the City and now District of North Vancouver since 2001. He also volunteers with North Shore Search and Rescue where he is the Team Leader. He started with there as a volunteer member-in-training in 1996 when he was just 19 and progressed through many different levels in the organization. In 2004 he took on the Team Leader position after his predecessor died unexpectedly. This position came with significant new responsibilities and, while it was not unexpected that he would eventually take on this role, it came earlier than anticipated. Though it is a volunteer position, it requires commitment, akin to a job. He is put in physically challenging and risky situations and can be called away a moment's notice to lead or participate in a rescue. Before the accident, Ms. Danks never worried when Mr. Danks was called out on a rescue and knew it was simply part of who he is.

[15] The Danks bought their present home in 2015 and built a large garden. Prior to the accident, Ms. Danks did all the gardening, often spending up to six hours on a nice weekend day doing so. She took a lot of pleasure in managing the garden and found it helpful to relieve stress. Mr. Danks said it was her time to "Zen out – where she found her peace". He said it was a passion for her and their garden was something she was very proud of.

[16] Around 2015, the Danks bought a five-acre recreational property on Gambier Island in Howe Sound. Though Gambier is close to Vancouver, it is relatively remote in the sense that it is boat access only with no ferry and no stores or services on the Island. Residents must bring in supplies by boat.

[17] Life at the Gambier property involves physical activity but, prior to the accident, Ms. Danks embraced that as a labour of love. They must carry their groceries and other supplies up the ramp from the dock and along the pier to their "old beater" of a car to bring them up to the cabin. They chop and stack firewood to heat the cabin and Ms. Danks kept a garden on the property and mowed the lawn.

## **Health**

[18] Before the accident, Ms. Danks was healthy, fit, and active. She had no significant health problems. She had suffered a knee injury while attending a fitness boot camp before the accident. She said it had healed after physio and other treatments, although it continued to bother her after especially intensive exercise, like hiking the Grouse Grind. She continued to run and knew not to exceed a limit past which the knee might bother her. Dr. David Koo, a physiatrist called by Ms. Danks, said his examination of her knee suggest relatively mild or low-grade tendinopathy/bursitis which, in his opinion, “would not have been disabling to her normal recreational, domestic and leisure activities, other than exceptionally strenuous activities, such as climbing the Grouse Grind.”

[19] At some point before the accident, Ms. Danks was prescribed an anti-depressant by her family doctor, although she could not recall this. Counsel for ICBC argues this indicates that Ms. Danks had some pre-existing depression before the accident but Dr. David Morgan, a psychiatrist called by Ms. Danks, testified in cross-examination that the prescribed dose is too low to treat depression. He inferred it must have been prescribed as a sleep aid.

[20] Ms. Danks also had high blood pressure and was taking medication for that before the accident.

## **The Accident**

### **How the Accident Happened**

[21] The accident happened on August 17, 2018. Since liability is in issue, I will discuss the accident in some detail.

[22] The family was driving back from Pitt Meadows where they had just picked up a new puppy. They were in a 2016 GMC Sierra Truck. A friend of one of their daughters was also with them. While travelling west on Lougheed Highway, they went into a left-turn lane to turn south on Harris Road, presumably to make a stop. As they sat in a line of traffic waiting for the left turn signal they were suddenly hit



from behind by a truck being driven by the defendant Frederick Middelveen. Ms. and Mr. Danks each testified that they were hit with significant force and their truck was jolted forward. The children in the back seat screamed out.

[23] Ms. Danks was wearing her seatbelt, as was everyone in the truck. She recalls being lurched forward and then backwards. She felt stressed and panicked immediately after the impact out of concern for the children in the truck. She recalls Mr. Danks, who was driving, was calm in the moment.

[24] Mr. Danks, however, had his own private moment of fear. He remembers the feeling of having his foot on the brake yet the truck was still moving forward. He recalls needing to calm himself before checking on the rest of the family and the friend to make sure they were okay. He recalls being very scared himself initially but knew he needed to calm down and put on a brave face for the family. He recalls that Ms. Danks also looked very scared.

[25] Mr. Middelveen testified that he was also sitting in the same line of traffic waiting to turn left. He was driving a Toyota Tacoma pick-up truck. He recalls there were many cars ahead of him but it was clear behind him when he last checked his mirror. Mr. Middelveen was looking ahead trying to calculate the number of cars that were getting through on the advanced left turn signal when he was hit from behind by a car driven by the defendant, Ming Zhang. He said the impact made the sound of a “tremendous crash” and it was hard enough to push him into the Danks’ truck with some force. He was not injured in the accident. He did not see Ms. Zhang’s vehicle approaching but by the force of the accident he inferred she was moving at a significant speed.

[26] Mr. Middelveen was an experienced driver. He was 85 at the time of the accident and there was no evidence that his driving skills had waned with age. There was a handicap parking decal on the car which he believes his wife applied for but he acknowledged it was for both of them. Despite that, he had no mobility limitations at the time.

[27] Ms. Zhang was driving a 2010 Ford Mustang that belonged to her husband. She was driving alone despite having only a class 7 Learner's Licence which required her to have a qualified supervising licenced driver with her in the car. Ms. Zhang had to run what she considered to be an urgent errand and did not want to disturb her husband who was napping so she took the car out on her own.

[28] Her account of the accident is substantially different than Mr. Middelveen's. She testified that she was stopped in the line of traffic behind Mr. Middelveen's truck waiting for the light to turn. She said the traffic ahead of her started moving so she moved as well and suddenly Mr. Middelveen applied his brakes and she could not stop in time and hit his truck. She felt the seatbelt hold her back forcefully and said it was very painful. She said she momentarily lost awareness and felt very dizzy, although on discovery she said she lost consciousness for approximately three minutes. She said the airbag deployed and there was smoke inside the car. Her forearm and neck were injured.

[29] Following the accident Mr. Danks called 911 and left his truck to check on the other drivers. He was surprised to see there was little or no apparent damage to the front of Mr. Middelveen's truck but then observed the ball of the trailer hitch on his truck was embedded within or underneath a seam in the front bumper of Mr. Middelveen's truck. On his observation, it appeared that the ball of the hitch had contacted the frame of the Middelveen truck which may explain the absence of visible damage.

[30] After talking with police and exchanging information, Mr. Danks and Mr. Middelveen separated their trucks and both drove off. Ms. Zhang recalls an ambulance attending and having her wounds treated with a simple dressing. She declined to go to the hospital. She was issued a ticket by the attending police officer for violating the terms of her Class 7 licence. The Mustang could not be driven (but was later repaired) so her husband picked her up and took her home.

### **Liability for the Accident**

[31] The Danks bear no liability for the accident. Ms. Zhang is clearly at fault in that she either failed to keep a safe distance from Mr. Middelveen's truck or she failed to stop at the line of traffic. The only issue for liability is whether Mr. Middelveen also bears any responsibility for the accident.

[32] Ms. Zhang's evidence of how the accident happened is not credible. It is inconsistent with Mr. Danks, Ms. Danks, and Mr. Middelveen's evidence that both their trucks were stopped waiting for the light to change when the impact happened. Further, the damage to the Mustang and the rear of Mr. Middelveen's truck as well as the impacts described by Ms. Zhang are inconsistent with a low-speed collision that happened while cars were slowly advancing at an intersection. I find as a fact that Ms. Zhang was travelling at a relatively high speed as she approached the line of cars, probably did not see that they were stopped, and collided into Mr. Middelveen's truck with a substantial impact. I accept Mr. Middelveen's evidence that the force of the impact is consistent with Ms. Zhang travelling at a much higher speed than would be expected of a car approaching a line of standing traffic at a stoplight.

[33] Ms. Danks argues that Mr. Middelveen is contributorily negligent for accident in that he failed to keep a safe distance between his truck and the Danks' truck while stopped at the light. When asked how much space there was between his truck and the Danks', Mr. Middelveen said he estimated "at least three feet" but emphasized he was unsure of the precise distance and he did not measure it. He said the Danks' truck did not appear to be close when he was stopped behind it. By his assessment, there was "enough space" between the two vehicles and he was at what he considered to be a safe distance.

[34] I am not persuaded that Mr. Middelveen's actions fell below the standard of care. As an experienced driver, his assessment of having "enough space" and at a safe distance is likely a better indication of the amount of space than his estimate of "at least three feet." Counsel has provided no authority indicating that a driver in

Mr. Middelveen's position is negligent and liable in the circumstances. It may well be that a driver who stops too close to the car in front puts the occupants of that car in danger but I am not persuaded that is what Mr. Middelveen did.

[35] If find that Ms. Zheng is 100% liable for the accident.

### **Ms. Danks Post-Accident**

#### **Immediate Aftermath of the Accident**

[36] When the Danks got home after the accident, Ms. Danks felt shock and exhaustion. Later that night she developed a "smashing sort of headache" and by bedtime her neck had become sore. She took Advil but had a bad sleep because she was in a lot of discomfort and could not stop thinking about the accident and how it might have affected the four children.

[37] The next day she still had a headache, her neck and back were sore, and she felt dizzy. She went to a walk-in medical clinic where she was diagnosed with whiplash and prescribed a muscle relaxant. She was told to rest and was referred to physiotherapy. She was also told to see her family doctor which she did, although it took a few weeks (until September 5) to get an appointment that fit with her own schedule.

[38] Mr. Danks felt fine the night of the accident but the next day he began to feel significant pain that became worse over time. He said he had not experienced back pain like that before and it "knocked him to the ground." He described himself as being in "survival mode by that point."

[39] In the days and weeks that followed the accident, Ms. Danks attended physiotherapy and was given home exercises and stretches to help with her neck and back which continued to be sore. Her left shoulder also became sore. She did the recommended exercises and stretches daily at home. She also used a massage gun. Her family doctor recommended she continue with the exercises and that she should talk to her personal trainer about modifying her workouts to accommodate

her condition. She also suggested that Ms. Danks might take a bit of time off from her workouts.

[40] Despite following the recommendations of doctors and physiotherapists, Ms. Danks' injuries persisted. While she found the exercises and treatments to be of some help, she continued to have significant pain in her neck and shoulder with headaches every day which often became severe towards the end of the day. Her back continued to be sore. She took muscle relaxants and used muscle and topical creams to try to ease her pain and discomfort. She also took over-the-counter Advil (two to four a day in the days and weeks after the accident).

[41] She had problems with her sleep in the weeks after the accident mostly because of her pain and discomfort but also because of a lingering stress recalling the accident and worrying about the kids. She took a sleep aid at night and used a heating pad throughout the night but continued to have sleep difficulties and would wake up groggy and tired.

### **Injuries and Condition**

[42] Ms. Danks continues to suffer from chronic neck and shoulder pain, headaches, and back pain. While she saw some measure of improvement in these conditions over the years, she continues to live with varying degrees of daily pain and discomfort, particularly in her neck, and the related headaches she experiences almost daily can be severe. She acknowledges that she had headaches from time-to-time before the accident but she does not consider those to have been any different than most people. She said her post-accident headaches are more intense and more frequent than what she experienced before.

[43] Ms. Danks continues to struggle with sleep. For the last year-and-a-half or so, she and Mr. Danks have been sleeping in separate rooms because her fragile sleep is easily disrupted by sharing a bed.

[44] Ms. Danks has found herself clenching and grinding her teeth at night and has experienced jaw pain. On her dentist's recommendation, she was fitted for a

night guard but found it uncomfortable making it hard to sleep so she has not used it, preferring instead to focus on a better sleep.

[45] Ms. Danks has also suffered from significant anxiety and depression since the accident. It developed in the year or two after the accident. She finds herself overwhelmed by her work and family responsibilities and she worries about them. She said these anxieties can lead to a sense of panic at times a feeling of not being safe or in control of the situation. When this happens she gets shaky, begins to sweat, and her thought process becomes blurred. Her anxieties fill her head at night and cloud her sleep. She also has considerable driving anxiety and struggles with being a passenger in the car because she is not in control. She was not able to help teach their eldest daughter to drive, a milestone she regrets having to miss.

[46] She has become uncharacteristically anxious about Mr. Danks' work with North Shore Search and Rescue and she has started to discourage him from going on rescues. At one point, when he had to leave the Gambier property to go on a rescue, she asked him to retire from the organization. North Shore Search and Rescue has been a material part of Mr. Danks' life and even his identity since he was a teenager. Ms. Danks knew this from the start of their relationship and welcomed it as part of who he is. Now, though, she finds her anxiety has overtaken her comfort with it and that has become a challenging aspect of their relationship.

[47] Ms. Danks experienced some anxiety before the accident but says it was nothing extraordinary for a parent running her own business. As she said, she had "spots of anxiety" "like people do" but she was in control of it and could manage it by talking with Mr. Danks, going for a run, or working in the garden. The anxiety she feels now is more intense, frequent, and uncontrollable.

[48] Ms. Danks' chronic pain and her anxiety and depression have changed her life, affected her family and social relationships, and have led to her becoming reclusive and easily irritated. She no longer likes to go out with friends and she finds social events challenging. She is less patient at work and with her family, and lacks the personal motivation she had before the accident. Ms. Miller says Ms. Danks

seems very withdrawn and, while she has never seen her snap, she has noticed that her patience runs thin.

[49] Ms. Danks says she has noticed a change in herself with her stressors, anxiety, and depression since the accident. She largely works at home now and becomes frustrated with their children making noise when she is trying to work. This has been a challenge for the family because they have always encouraged a vibrant home. She says she is short with her children, especially her youngest. Mr. Danks has also observed this and said before the accident she was a very involved parent who was tightly connected with the three children and their activities. Now she is more reclusive in the house and less attentive to the children's needs. Ms. Danks says she feels shame that she is letting her kids down.

[50] Ms. Johncox says Ms. Danks is now an "emotional wreck". I did not understand this to be pejorative or a criticism but rather of a descriptor how Ms. Danks' mood today compares with her pre-accident temperament. Ms. Johncox says Ms. Danks cries a lot and seems disconnected. She said before the accident Ms. Danks was always on the go and was the person initiating things but now she is more reclusive and less social. Ms. Johncox has found this very difficult because the two of them were constantly active together before the accident but now Ms. Johncox feels a part of herself is missing with Ms. Danks' reclusiveness.

[51] At one point, Ms. Danks began drinking wine more heavily than was usual for her. She says she did this to help cope with the pain and her anxieties. With the assistance of Mr. Danks and her mother, she recognized it had become a problem and she stopped drinking altogether. ICBC and, to a lesser extent, counsel for the Middelveens, suggest this episode of heavier drinking is a factor in Ms. Danks' depressed mood and overall reduced conditioning but I do not accept this. She began drinking more wine because of her accident-related condition. It was an unfortunate way to try to cope with her physical and mental challenges but she did this for only a brief period before stopping cold turkey. Apart from this evincing her

ongoing chronic pain and mood problems, I place no other significance on this temporary period of elevated alcohol consumption.

### **Fitness and Activity**

[52] While Ms. Danks has been able to keep herself active since the accident, the intensity of her physical activity has diminished substantially because she finds it aggravates the pain in her neck and back and contributes to her headaches.

[53] In the days and weeks after the accident, Ms. Danks stopped going to the gym with Ms. Johncox. However, their personal trainer designed a less intensive program that she could do alongside Ms. Johncox. Ms. Johncox continued with a more intense workout along the lines of what Ms. Danks used to do before the accident. Ms. Johncox has noticed that Ms. Danks takes it easy on elements of the workout – like cardio exercises – when Ms. Johncox goes hard. She said before the accident Ms. Danks worked as hard as Ms. Johncox on these.

[54] In January 2023, Ms. Danks started with another personal trainer on her own to focus on her own condition. She attends with this trainer once a week doing core-strengthening exercises. She also started doing Pilates to strengthen her core and she tries to go once a week but this is also dependent on her level of pain. She has also had massage therapy treatments and found these give her some relief for a day or two and help somewhat with her sleep. She also went to chiropractic treatments on her doctor's recommendation to help with her back pain but has found this to be of only limited help although there are times when it makes her feel better. Of course, all of this was interrupted in 2020 with the COVID pandemic but she continued with her home exercises during that time and has since returned to the gym and other treatments.

[55] Ms. Danks can go for walks with little difficulty and, after some time, she worked her way back to running again but can only go for about 15 or 20 minutes without triggering her pain or a headache. She is unable to do the hard long runs she did before the accident. She works at home-based exercises and stretches,



including those recommended by her physiotherapist, but she had to stop her involvement in organized sports.

[56] In 2022 Ms. Danks joined women's basketball program. It was not a competitive league and was open to all skill levels. Its focus was on learning and developing skills and doing some light fitness and conditioning. Unfortunately, she injured a gluteus muscle and had to stop playing. She attributes the injury to an exacerbation of her accident-related injury but that connection is not made in the medical evidence.

[57] At one point Ms. Danks tried skiing again when the family went to Whistler but she had an anxiety attack at the top of the mountain and was unable to continue. She has not tried to ski since. Skiing is a big part of Mr. Danks' physical activity and for their three children. While Ms. Danks did not identify it as an especially important activity for her, she did ski with some regularity before the accident. The family had a place at Whistler that they shared with another family. Now, however, only the kids and Mr. Danks ski.

[58] Ms. Danks' chronic pain has limited the physical activities, caused her to moderate the intensity of the physical activity that she can still do, and has reduced her overall fitness and conditioning that has been of huge importance to her throughout her life. This is a significant change in her life which I find is a material cause of her depression and has put a strain on her family relationships.

[59] The family still goes to the Gambier Island cabin but Ms. Danks finds this difficult. She has anxiety on the boat ride and it is painful to carry supplies up the dock. She cannot do all the upkeep work she did before the accident, such as chopping wood or mowing the grass. Mr. Danks will now often take the kids there without Ms. Danks.

[60] Ms. Danks is no longer able to garden as she used to as she finds it exacerbates her pain and brings on a headache. She still does some light gardening work but the Danks had to hire a gardener to keep up with the work.

[61] Before the accident, Ms. Danks has taken responsibility for most of the indoor housework. She did the majority of the laundry, cleaning, washing floors and all the meals, although they also had a housecleaner in once a month to do some of this. Since the accident, Ms. Danks has not been able to put in the same effort at housework and cannot do heavier work like washing floors and cleaning tubs. Mr. Danks and the children have stepped up to take on more housework and they have doubled the hours for their housecleaner who now comes twice a month.

[62] The Danks also hired a dogwalker for their golden doodle (the one they picked up on the day of the accident, who is now five). Before the accident, Ms. Danks regularly ran with their previous dog, a black lab, but now that typically falls to Mr. Danks. Ms. Danks walks the dog when she is able to but she cannot take her on the bigger walks or runs that she needs as an active and high-energy dog. It will not surprise parents in dog-owning families that the Danks' children do not walk the dog as much as Ms. and Mr. Danks feel they ought to.

[63] That said, Ms. Danks agreed in cross-examination that they schedule the dog walker for the morning because she is occupied with other aspects of life that time of day, including family and her business. I accept that Ms. Danks is unable to run the dog as she used to before the accident and some amount of assistance is required but I am not persuaded the full cost of the dog walker is reasonably attributable to her accident injuries.

### **At Work**

[64] Ms. Danks now works mostly at home. She finds she is working less efficiently because of her pain and the need to take breaks. She finds it more challenging to complete the tasks she did before the accident and has lost the passion she had for the business before the accident. She has become somewhat detached from staff and the daycares.

[65] Ms. Johncox said Ms. Danks is not as calm and even-keeled as she was before the accident. She said her written communications with parents are less focused and she described one incident where Ms. Danks, very uncharacteristically,

responded aggressively to a parent's complaint. I attribute this to Ms. Danks greater susceptibility to irritation due to her chronic pain and sleep challenges. Because of that and some other communications with parents, Ms. Johncox has taken over email communications with clients. She has also observed that Ms. Danks is less patient and more strict with staff than she was before the accident.

[66] Ms. Johncox said that overall, Ms. Danks is not performing at the same level at work that she did before the accident. She is doing less physical tasks and that has "definitely changed over time."

### **Relationships**

[67] Ms. Danks has lost her enthusiasm for socializing and going out with friends. She says she has become reclusive and she finds social events and even outings with close friends challenging. She finds it difficult to attend community events with Mr. Danks associated with North Shore Search and Rescue, which were routine before the accident.

[68] Ms. Johncox said before the accident, Ms. Danks was the one to arrange social events or outings with her or other friends but now Ms. Johncox finds she is the one trying to persuade Mr. Danks to go out, usually without success. She said on a recent trip to Chicago to attend their childrens' basketball tournament, Ms. Danks was reclusive and tended not to socialize with other parents as she would have before the accident. She also took cabs to places where Ms. Johncox would walk, which was not typical of Ms. Danks before the accident.

[69] Ms. Miller thought she and Ms. Danks were growing apart after the accident because Ms. Danks was not planning outings or engaging with her. She did not want to go for runs or walks. This was a big gap in Ms. Miller's life because Ms. Danks had been her "major running buddy" before the accident.

[70] Mr. and Ms. Danks' relationship has been strained by Ms. Danks' condition. Mr. Danks said Ms. Danks' struggle to become healthy and active again is frustrating for both of them. He said she often re-injures herself when trying to work out or

being active and this crushes her motivation and drives down her mood. Her mood, anxiety, and propensity to irritation is a tension in the household and is straining the marriage. Her injuries, her struggles with sleep, and her discomfort with body image due to her reduced conditioning have impacted Ms. and Mr. Danks' intimate relationship, particularly since they have started sleeping in separate rooms. With Ms. Danks' compromised ability for physical activity, she and Mr. Danks are not able to share in the physical activity they used to do together before the accident such as hiking or riding bikes.

[71] Ms. Danks said that Mr. Danks has tried to recommend that she get some emotional support, presumably through counselling or perhaps through a mental health professional, but Ms. Danks said she has declined to do so.

[72] ICBC argues the tensions in the marriage developed long after the accident and suggests the two are unrelated. It argues the marriage tensions are the major cause of Ms. Danks' anxiety and depression. I do not accept this. I am satisfied that the marriage and larger family tensions have developed over time as Ms. Danks' pain condition became chronic and her related anxiety, depression, and irritability worsened.

### **Credibility and Reliability**

[73] The foregoing summary is based substantially on the evidence of Ms. Danks, Mr. Danks, Ms. Miller, and Ms. Johoncox. I found all of four were credible and reliable witnesses. Apart from some relatively minor inconsistencies or inaccuracies that can reasonably be expected when trying to recall events from five years ago, these witnesses testified carefully and sincerely. None of their evidence was inconsistent with or contradicted by the evidence of others and Ms. Danks was not impeached on any of her evidence, save potentially for a point about whether she took time off work immediately after the accident. Even on that point, however, the evidence Ms. Danks gave at trial was less favourable to her own claim than was the discovery evidence counsel for ICBC sought to impeach her with so any

contradiction was inconsequential to her credibility. I accept the evidence of all four of these witnesses.

### **Expert Medical Evidence**

#### **Physical Medicine**

[74] Dr. David Koo is an expert in physical medicine and rehabilitation. Based on his examination and assessment of Ms. Danks and his review of her medical records, he opines she has suffered soft tissue injuries to the cervical, thoracic and lumbar spine, and periscapular region. He opines that her ongoing headaches are likely contiguous to her neck and upper back pain. He described her physical limitations as follows:

Ms. Danks' current level of disability is best characterized as moderate. She continues to have daily pain that is activity limiting, and interferes with her ability to lift heavier things, interferes with her sleep, ability to read, participate in active recreation and leisure pursuits that are higher impact or more physically demanding, and significantly limits her ability to do housework, gardening, and socialize with friends.

[75] Dr. Koo attributes these injuries to the accident, noting there is nothing in her medical history about these conditions before the accident and nothing to suggest another cause. Since these conditions have persisted more than four years post-accident he opines they are chronic and "maximal medical recovery has likely taken place". He opines Ms. Danks' current level of moderate disability is likely to be permanent. He explains how he anticipates these limitations will affect her in the future:

In my opinion, she is likely to experience ongoing future patterns of pain flare ups depending on her work and general activity levels; she is at heightened risk for reinjury and setback based on her underlying soft tissue vulnerabilities that have persisted from the accident.

...

In my opinion, Ms. Danks' chronic mechanical neck, upper back, periscapular pain and lower back pain will likely continue to restrict her abilities to tolerate prolonged sitting, lifting, bending, twisting, and carrying. She will likely have ongoing moderate levels of disability related to her work and non-work activities. She is likely restricted in terms of the total number of hours and the intensity with which she is able to work without undue symptom aggravation and she is likely to experience worsening of her pain levels, headaches,

mood and irritability if she is not provided the opportunity to pace, take breaks, stretch and to remove herself from noisy and distracting environments.

[76] Dr. Koo also opines that Ms. Danks is suffering from depressed mood and post-traumatic anxiety. While he defers to psychiatric or psychological experts on her mental health, he observes that anxiety and depression tend to inhibit improvement of chronic pain or make it worse. He attributes her anxiety and depressed mood to her chronic pain, recurring headaches, and her post-accident limitations on activities.

[77] Dr. Koo associates Ms. Danks' problems with sleep and her jaw pain with both her chronic pain and her anxiety symptoms and says these are common following a motor vehicle accident that has resulted in chronic muscular pain to the neck and upper back.

[78] Dr. Catherine Paramonoff is also a physical medicine specialist whose report was tendered by ICBC. Based on her physical exam of Ms. Danks and her medical records, Dr. Paramonoff opines that Ms. Danks suffered musculoligamentous injuries to her neck, myofascial injuries to her upper back, and "mood symptoms/psychological issues" which confound her overall symptom presentation. She opines these are related to the accident.

[79] Dr. Paramonoff substantially parts company with Dr. Koo (and Ms. Danks' own evidence) in opining that Ms. Danks' neck and back pain had "largely improved" with some "residual neck stiffness" by October 2019 and that her soft-tissue injuries have "largely resolved" with some mild residual symptoms associated with muscle imbalance or deconditioning. Dr. Paramonoff opines that the "onset of a greater extent of symptoms over time is likely largely unrelated to the MVA". She opines that Ms. Danks' ongoing headaches are unrelated to the accident, largely because of her opinion that the soft-tissue injuries are resolved and thus are not the cause of the headaches. She suggests that Ms. Danks' lower back and left shoulder pain are not related to the accident because she finds they are not documented in Ms. Danks' medical records.

[80] Dr. Paramonoff bases these opinions largely on what she perceives to be an absence of reference to the specific injuries in Ms. Danks' clinical records. She is largely dismissive of Ms. Danks' own report of her injuries and condition as reported when Dr. Paramonoff took a history from Ms. Danks. She suggests this history is subject to "recall bias" which she says is to be expected from a plaintiff during an independent medical exam. As a practice, Dr. Paramonoff does not ask a plaintiff if accident injuries persisted over time but instead relies on the plaintiff's medical records which she considers to be a more reliable. She also said "it would take far too long to go through each symptom" with a plaintiff on a medical exam.

[81] In my view, Dr. Paramonoff's approach is unduly dismissive of Ms. Danks' own report of her symptoms and ongoing condition. When a plaintiff reports a symptom or condition that is not recorded in their clinical records or is recorded only sporadically or recently, this may justify questioning the plaintiff's report. However, Dr. Paramonoff wholly (or substantially) dismissed Ms. Danks' report in favour of the medical record without exploring the reason for any apparent discrepancy. She assumed Ms. Danks' report was faulty or the product of "recall bias".

[82] There may be a good reason why something is not documented, or documented less frequently than one might expect, in a clinical record. As Justice N. Smith pointed out in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, clinical records have limitations as evidence:

[32] ...clinical records ... are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

...

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

...

[36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[Emphasis added]

[83] I accept that the absence or infrequency in the clinical records of a symptom Ms. Danks reported to Dr. Paramonoff may be worthy of further exploration. However, it is not a basis, on its own and without further inquiry, to disregard a plaintiff's reported history and conclude she does not have that symptom. This court has recognized that taking a complete and accurate medical history is essential for an expert to provide an accurate and complete assessment: *Preston v. Kontzamanis*, 2015 BCSC 2219; *Martin v. Steunenberger*, 2021 BCSC 1411 at para. 188. Implicit in this is that the plaintiff's stated medical history *matters*. This does not mean it should be accepted without scrutiny but nor should it be marginalized at the first hint of conflict with clinical records.

[84] In assessing a witness's credibility, a court typically starts from presumption that a witness is being truthful: *Hardychuk v Johnstone*, 2012 BCSC 1359 at para. 10. Their evidence, if controversial, is scrutinized for reliability, including the potential for unconsciously indulging in "the human tendency to reconstruct and distort history in a manner that favours a desired outcome": *Hardychuk* para. 10. However, the witness's evidence is not disregarded simply because, on first blush, it does not accord with a written record that might facially be perceived as more reliable. Some effort is made to understand a material inconsistency and the reason for it. It seems equally important that a medical professional should do at least the same in assessing a patient's report of their medical condition.

[85] Another concern with Dr. Paramonoff's approach is that she did not request additional medical records, even when she learned through Ms. Danks that she had received treatments for which Dr. Paramonoff did not have records. These include massage therapy and chiropractic records. She acknowledged in cross-examination that she learned Ms. Danks had seen a chiropractor but she did not request those



records, stating: “I base my report on the records I have. Whatever those records cover is what I have.” This strikes me as a risky approach for an expert who places so much importance on the medical records over the plaintiff’s own report.

[86] For these reasons, I prefer Dr. Koo’s report over Dr. Paramonoff’s where the two are inconsistent. I accept that Ms. Danks has suffered from the injuries Dr. Koo describes in his report and that her pain has become chronic. I also accept his opinion that her physical condition is now unlikely to improve and will likely impair her function at home, in her athletic activities, and at work in the future.

### **Psychiatry**

[87] Dr. David Morgan is a forensic psychiatrist called by Ms. Danks. He examined her in a 1.5 hour video interview and reviewed her medical records. He diagnosed her with moderate, persistent Somatic Symptom Disorder, moderate Major Depressive Disorder, Generalized Anxiety Disorder, and Panic Disorder. As I will discuss later, I have some hesitancy in accepting the full extent of these diagnoses, in part because not all the factual assumptions that underlie them were proven. However, courts are more concerned with the symptoms and effects of an injury, including a mental injury, than with the specific diagnosis that a psychiatrist might assign to those symptoms or effects: *Saadati v. Moorhead*, 2017 SCC 28 at paras. 31-32. I am satisfied Ms. Danks suffers from significant anxiety and depression and that the accident was a material cause of those conditions.

[88] Dr. Morgan opines that Ms. Danks’ psychiatric condition flows from the physical pain she has experienced and endured after the accident and the resulting limitations this has placed on her lifestyle. He suggests her anxiety and depression is “closely tied to her physical prognosis and there is probably a complex synergistic relationship between the physical symptoms she experiences and her psychiatric symptomology.” In other words, her physical pain and her psychiatric condition fuel one another. I accept this evidence.

[89] In response to Dr. Morgan, ICBC tendered the report of Dr. Premakanthie Laban, a psychiatrist. In her opinion, Ms. Danks’ symptoms and presentation as

described by Dr. Morgan in his report do not meet the diagnostic criteria for Somatic Symptom Disorder, Major Depressive Disorder, and Panic Disorder under the *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”) 5. Much of this opinion is based on her view that Ms. Danks’ appears (from Dr. Morgan’s report) to be functioning well at work and at home. She suggests a patient would be quite debilitated if suffering from Major Depressive Disorder or Somatic Symptom Disorder and Ms. Danks does not fit this profile.

[90] I have significant reservations about Dr. Laban’s opinion based not on her skills or qualifications but on the task she was given by ICBC and the resulting scope of her report. Dr. Laban’s instructions were to read and critique Dr. Morgan’s report. She was not given the opportunity to examine or speak with Ms. Danks. Nor was she given Ms. Danks’ medical file or any other documents to review.

[91] This court has stated on many occasions that expert evidence from a psychiatrist who has not examined the plaintiff and instead prepares a “critique” report is of little, if any, assistance to the court: *Dhaliwal v. Bassi*, 2007 BCSC 549 at paras. 2-3; *Rizzotti v. Doe*, 2012 BCSC 1330 at para. 35; *Donovan v. Parker*, 2014 BCSC 668 at para. 37; *Wong v. Campbell*, 2020 BCSC 243 at paras. 51-56; *Preston v. Kontzamanis*, 2015 BCSC 2219 at paras. 152-133; *Barsky v. Simons*, 2023 BCSC 1826 at para. 83. I agree with and adopt the reasoning in these cases. In my view, that is reason enough to give Dr. Laban’s report little or no weight but I would add the following observations.

[92] First, although Dr. Laban suggests she has not offered a diagnosis of Ms. Danks, she does opine on her condition and its causes by drawing inferences from what is reported in Dr. Morgan’s report. There is little difference between opining on her condition and offering a diagnosis. In my view, either one requires an examination of Ms. Danks.

[93] Second, the inferences Dr. Laban draws are not always supported by the evidence or are based on speculative reasoning. For example, Dr. Laban focuses on a statement in Dr. Morgan’s report that prior to the accident Ms. Danks found

gardening to be a stress release. She infers from this that Ms. Danks had anxiety symptoms and became “upset and irritable very quickly” before the accident. As I have said earlier, Ms. Danks, like most people, had stressors and anxieties of everyday life before the accident but was able to control them with things like exercise and gardening. As I have found earlier, the anxiety Ms. Danks has lived with since the accident is of a different nature and more severe than before the accident. Dr. Laban would likely have learned this through an examination.

[94] Dr. Laban also questions Dr. Morgan’s opinion that Ms. Danks’ anxiety and depression was caused by the accident by drawing on a single reference in Dr. Koo’s report to Ms. Danks likely experiencing stress when her father had double lung transplant surgery. That event undoubtedly caused Ms. Danks stress and anxiety (as she acknowledged) but it does not explain the severe anxiety and depression that has overtaken her since the accident. Having not met with or examined Ms. Danks, Dr. Laban was not in a position to comment on how severely her father’s illness might have contributed to her anxiety.

[95] Dr. Laban also opines that if Ms. Danks was suffering from severe anxiety or depression, her family doctor would have picked up on that and noted it in her medical records. In my view, that is speculative and not a basis to reject Dr. Morgan’s opinion or find that Ms. Danks’ anxiety and depression is not significant. As I have said earlier, clinical records have their limitations. I am not convinced the family doctor would necessarily have picked up on Ms. Danks’ mental health during brief visits. At a minimum, I should have heard from the family doctor on this point rather than be asked to speculate as to what she may or may not have perceived. It was open to ICBC to call the family doctor as a witness to test out this theory with evidence but it did not do so.

[96] Third, even if Dr. Laban had confined her opinion to whether Ms. Danks’ presentation as described by Dr. Morgan met the DSM-5 criteria for each diagnosis, I would still be disinclined to give it weight because her criticisms of Dr. Morgan’s diagnoses were not put to him in cross-examination. While the rule in *Brown v.*

*Dunne* (1893), 6 R. 67 (H.L.) does not strictly apply to expert opinion evidence (*Hide-Away Resort Ltd. v. Van Der Wal*, 1999 CanLII 5646 at para. 77 (BCSC); *Nash v Olsen*, [1984] BCJ No 1497 (BCCA)), Dr. Laban's opinion loses force when her critiques of Dr. Morgan were not put to him for a response.

[97] All of that said, even giving Dr. Laban's report little or no weight, it is still open to me to weigh Dr. Morgan's opinion in light of the totality of the evidence.

[98] I am not persuaded Ms. Danks' condition fully aligns with Dr. Morgan's diagnosis of Major Depressive Disorder. That diagnosis is based in part on a misunderstanding that Ms. Danks was unable to travel to oversee the three childcare locations which Dr. Morgan incorrectly believed to be scattered around the Province. While Dr. Morgan maintained in cross-examination that this error does not change his opinion, I am not fully persuaded of that since it is a primary reason he gave for his diagnosis of Major Depressive Disorder. Further, there is evidence that Ms. Danks has travelled (twice) to Hawaii and once to Chicago since the accident.

[99] Dr. Morgan also wrote that Ms. Danks is particularly worried about the health and safety of the children at the daycare but I did not hear evidence from Ms. Danks that this is a symptom of, or a contributing factor to, her anxiety. She and Ms. Johncox certainly prioritize the safety of the children attending their childcares and the evidence shows they have built a very safe and comfortable environment for the children in all three locations with a professional staff that is committed both to the children and to the Sweet Peas organization. With this firmly in place, I did not hear evidence that Ms. Danks needed to worry about the safety of the children as that is well in hand.

[100] However, I am satisfied that Ms. Danks has suffered significant anxiety and depression caused by the accident, be it directly or indirectly as a result of her chronic pain and related limitations. Her anxiety and depression are *significant*, but not *debilitating* to the point she is unable to perform at work or in other tasks. She finds work more challenging and there are some tasks, such as dealing with parents, that she has handed over to Ms. Johncox and others. She is also less engaged with

the manager and staff at the locations she is responsible for and she works at home more than she did before the accident which makes her less involved in the operational aspects of the daycares. However, there is no evidence that she is failing in or unable to do the necessary duties to keep the business running.

[101] Similarly, while her anxiety and depression have had a clear impact on her social and family relationships, particularly with Mr. Danks, it is not debilitating in the sense she is unable to function at home.

[102] If debilitation is required for a diagnosis of Major Depressive Disorder (as Dr. Laban suggests), I would be inclined to find that Ms. Danks' depression has not reached that level. Ultimately, however, I need not decide whether her symptoms meet that diagnostic criteria since my task is to focus on symptoms and effects (and their causes) rather than a specific diagnosis: *Saadati*, paras. 31-32. I am satisfied Ms. Danks is suffering from anxiety and depression as a result of the accident and this has affected her business, personal, and family life as I have described.

[103] With respect to Dr. Morgan's other diagnoses, I accept that Ms. Danks has suffered and continues to suffer from general anxiety since the accident which has caused panic attacks. The incident on Gambier Island when Mr. Danks was called away to a rescue is a good example. However, while I accept that Ms. Danks' anxiety has become relatively constant, I did not hear evidence that panic attacks happen with frequency, but I accept they do happen from time-to-time. I also accept Dr. Morgan's opinion that Ms. Danks' pain preoccupies her and dominates her thinking and causes her anxiety. I need not decide whether this is sufficiently severe to meet the diagnostic criteria for Somatic Symptom Disorder but I am satisfied that Ms. Danks experiences the symptoms that led Dr. Morgan to make that diagnosis. As I discuss below, those symptoms are also consistent with what was observed during her functional capacity evaluation.

[104] In summary, I accept that Ms. Danks has experienced and continues to experience ongoing and significant anxiety and depression that has impacted on her own life and her ability to perform at work and in social environments. It has also

impacted her social and family relationships, especially with Mr. Danks. While I have found it is not debilitating in the sense that Ms. Danks is still able to function, albeit at a compromised level, I nevertheless accept that it is significant and greatly impactful on her life and those close to her.

### **Occupational Therapy/Functional Capacity**

[105] Edgar Emnacen was qualified as an expert in Occupational Therapy, Functional Capacity Assessments, and Costs of Future Care Assessments. He conducted a full-day functional capacity assessment of Ms. Danks and provided a functional capacity evaluation and cost of future care report.

[106] I do not propose to review Mr. Emnacen's findings in any detail. It is sufficient to say that, on his assessment, Ms. Danks demonstrated limitations due to neck, shoulder, and back pain, fatigue, and headaches. It is noteworthy that Mr. Emnacen assessed her as having applied a reasonably high physical and cognitive effort during the assessment. Mr. Emnacen's findings of Ms. Danks' physical limitations are consistent with her own evidence and Dr. Koo's opinion.

[107] Also noteworthy is Mr. Emnacen's observations of Ms. Danks' mental and emotional response to the day of testing. He reported that she became overwhelmed, stressed, lost concentration, and became fatigued by the tasks that she was given. These tasks were a combination of physical and cognitive exercises designed to measure her overall functional capacity. He said she became emotional or close to tears on a couple of occasions and reported being overwhelmed. She also expressed pessimism about being able to finish tasks (which she was able to complete) and demonstrated a better level of functioning than her subjective symptom report suggested.

[108] In response to Mr. Emnacen's report, ICBC tendered a report of Janita La Roux, an occupational therapist. Ms. La Roux describes her report as a "critique" of Mr. Emnacen's report. Like Dr. Laban, Ms. La Roux did not examine or meet with Ms. Danks or review her clinical records (at least not before writing her report). She only read and critiqued Mr. Emnacen's report. For the reasons given earlier in

respect of Dr. Laban's report, this limits the utility of Ms. LaRoux's report, especially as it relates to assessing Ms. Danks' function.

[109] Much of Ms. La Roux's "critique" is speculative, pointing out things that were "unclear" to her in Dr. Emnacen's report. For example, she states: there is "little evidence" in the report that Mr. Emnacen considered the effect of pain may have on mood and cognitive function; the report "seems to create the impression" that Mr. Emnacen placed more reliance on some medical records over others; it is "unclear" if Mr. Emnacen considered how the presence of observed behavior influenced the test outcomes; and it is "unclear" if he inquired about pre-existing mental health issues. These are but few examples.

[110] She also raises discrete issues with Mr. Emnacen's testing, the specific tests he chose to administer (often stating it is "unclear" why he chose to use a particular test), some of his explanations of the test results, his use of a cognitive test as part of assessing effort, and inconsistencies she perceives in his conclusion.

[111] I have concluded that no weight should be given to Ms. La Roux's report (or at least her critique of Mr. Emnacen's functional capacity evaluation). On reflection, I ought to have exercised my "gatekeeping" function and not admitted that part of the report into evidence at all, despite the plaintiff's consent to its admission. The report reads, as Justice Adair said in *Turner v. Dionne*, 2017 BCSC 1924 at para. 17, like a "valuable tool in identifying areas for cross-examination but is otherwise argument and advocacy such that it was inconsistent with the expert's duty to the court". I adopt the same view here.

[112] I am satisfied that Mr. Emnacen properly conducted a professional evaluation of Ms. Danks' functional capacity and satisfactorily explained the matters that are the subject of Ms. La Roux's critique.

[113] Parts of Ms. La Roux's opinions relating to cost of future care stand on something of a different footing to the extent she accepts Mr. Emnacen's conclusions on Ms. Danks' function and impairments and comments on appropriate

care items or their cost. However, where her opinions rest on her own speculation of Ms. Danks' condition or needs, her opinion is given no weight.

### **Causation**

[114] I am satisfied that Ms. Danks' has proven that her chronic neck, shoulder, and back pain, headaches, sleep disruption, jaw pain, and anxiety and depression were caused by the accident.

[115] Causation is established where the plaintiff proves that defendants or one of them caused or contributed to her injuries. The negligence need not be the sole cause of the injuries so long as it is part of the cause beyond the minimalist range: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9; *Blackwater v. Plint*, 2005 SCC 58 at para. 78. The primary test for causation asks whether the plaintiff would have suffered the injuries but for the defendant's negligence. This test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[116] The evidence shows that before the accident Ms. Danks displayed none of the symptoms and conditions I have outlined, apart from the ordinary anxieties of life and running a business. It seems Ms. Danks may have had some trouble with sleep before the accident but her sleep difficulties after the accident are severe and flow from the pain she chronically experiences and the related anxiety. The medical evidence I have accepted supports the accident caused Ms. Danks' physical injuries and these in turn have become chronic and caused her problems with sleep, anxiety, and depression.

[117] ICBC argues that Ms. Danks has experienced a number of health and stress challenged unrelated to the accident that have caused or impacted on her physical and mental condition. These include a back injury she sustained while helping her father out of a car, a wrist injury she suffered when she fell backwards during a workout, stress and anxiety during her father's double lung transplant and his



subsequent treatment for rejection issues over the transplanted lungs, stress and anxiety arising from relationship challenges with Ms. Danks, and the COVID pandemic including Ms. Danks contacting COVID around New Year 2022.

[118] However, there is no medical or other evidence that I accept that supports a causal link between these matters and Ms. Danks' condition. The back injury was temporary and probably an agitation of her accident injury. The wrist was sore for a while after the fall but an x-ray and a bone scan showed no fracture. Further, ICBC's suggestion that this fall "no doubt" also affected her left side, left shoulder, and left side of the neck has no supporting medical evidence. As I have said, her father's the double-lung transplant and rejection treatments were a stressor but not a cause of Ms. Danks' serious anxiety and depression that followed in the year or two after the accident. The stressors in the Danks' relationship follows from Ms. Danks' mood and anxiety issues arising from the accident and not some independent source (which ICBC did not define). Finally, there is no evidence Ms. Danks was extraordinarily impacted by the COVID pandemic or her own COVID illness which was brief and unremarkable.

[119] ICBC even asked the Court to infer that family financial pressures have contributed to tension in the Danks' relationship and Ms. Danks' own anxiety and depression. The suggested inference rests solely on the fact that the Danks have a "larger home, ongoing landscaping improvements, three growing teenagers and the mounting cost of living between two properties in North Vancouver and Gambier Island". ICBC has led no evidence about the Danks' household financial circumstances, apart from Ms. Danks' own income and Sweet Peas' financial statements. There is simply no basis to suggest the Danks are living beyond their financial means or that this is a cause of anxiety or tension in the relationship.

[120] On the evidence, I am satisfied that Ms. Danks has proven that her injuries and condition as I have described it were caused by the accident.

**Non-Pecuniary Damages**

[121] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. A common but non-exhaustive list of factors typically considered include the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital, or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[122] The compensation should be fair to all parties. Fairness is measured against awards made in comparable cases, but these serve only as a rough guide since each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189. The assessment of non-pecuniary damages is necessarily influenced by each plaintiff's own experiences in dealing with the injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[123] I have described in some detail Ms. Danks' injuries and their effects on her enjoyment of life, her ability to function, her social and family relationships, and her marriage. I will not repeat that. I will simply note that before the accident, Ms. Danks was a very fit and high-functioning woman but now lives with chronic neck, shoulder, and back pain with associated headaches. The severity of this this pain varies at different times but it is always present at some level. Her injuries and conditions have had a significant negative impact on her social and family relations, her marriage, and her work.

[124] Ms. Danks is also a life-long athlete with a passion for outdoor and physical activity that is fundamental to her identity and well being. It is also a central feature of her marriage and other family relationships. It is clear that the loss of (or at least dramatic change to) that core part of her being has taken a significant toll on her mental state and is a major contributing factor to her anxiety and depression. It is not surprising that the significant diminution in her ability to carry on her physical activity at a high level has impacted her profoundly, especially when her husband, her sister,

and her closest friend – those with whom she has shared this passion for athleticism – are not similarly compromised.

[125] Ms. Danks submits that non-pecuniary damages in the range of \$190,000 to \$220,000 are appropriate. She cites *Tan v. Mintzler and Miller*, 2016 BCSC 1183 (\$210,000 or \$258,000 with inflation); *Sebaa v. Ricci*, 2015 BCSC 1492 (\$180,000 or \$225,000 with inflation); *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000 or \$221,000 with inflation); *Ali v. Padam*, 2017 BCSC 1849 (\$190,000 or \$229,000 with inflation); *Wang v. McNaught*, 2017 BCSC 454 (\$175,000 \$211,000 with inflation); *Gill v. Apeldoorn*, 2019 BCSC 798 (\$200,000 or \$230,000 with inflation); *Ranahan v. Ocegüera*, 2019 BCSC 228 (\$160,000 or \$184,000 with inflation); *Kempton v. Struke Estate*, 2020 BCSC 2094 (\$200,000 or \$227,000 with inflation); *Martin v. Steunenbergh*, 2021 BCSC 1411 (\$210,000 or \$234,000 with inflation); and *Knight v. Zenone*, 2022 BCSC 99 (\$200,000 or \$211,000 with inflation).

[126] In my view, *Wang* and *Ranahan* are most comparable to this case.

[127] In *Wang*, the plaintiff in his mid-40s suffered soft tissue injuries to his neck and back which became chronic. He developed depression and PTSD. Before the accident he was “physically vigorous and enjoyed many physically demanding activities” such as hiking the Grouse Grind, skiing and swimming but was unable to do these after the accident. The court awarded \$175,000 (\$211,000 with inflation) in non-pecuniary damages.

[128] In *Ranahan*, the plaintiff was a sports physiotherapist with passion for physical activity and athletics comparable to (and perhaps greater than) Ms. Danks. She suffered neck, shoulder, and back injuries and related headaches after a rear end collision. These became chronic. She developed anxiety and depression. Unlike Ms. Danks, she also suffered a concussion and developed cognitive problems including issues with memory and focus challenges. Her accident-related injuries had a very similar effect on her active lifestyle, her work, and her relationships as Ms. Danks has experienced. She was awarded \$160,000 (\$184,000 with inflation) in non-pecuniary damages exclusive of housekeeping.

[129] The injuries and impacts were more severe in *Tan* (where the plaintiff could no longer work and the ongoing effects of a mild traumatic brain injury featured prominently in the assessment); *Sebaa* (where the physical injuries are not especially comparable to Ms. Danks and were more severe); *Pololos* (where the physical injuries were similar but the plaintiff's anxiety and depression was especially severe such that he was angry, morose, and isolated, and his life had little content); *Ali* (where the plaintiff's chronic back pain extended into her leg making her unable to walk for more than 10 minutes at a time); *Gill* (where the plaintiff's depression was debilitating and he was unable to work and completely lost his pre-accident lifestyle); *Martin* (which has many similarities to this case but the anxiety and depression was more severe and forced the plaintiff to stop working); and *Knight* (where a back injury required surgery that was only partially successful and recovery was complicated by an opiate disorder that was also caused by the accident). *Kempton* is not comparable to this case.

[130] ICBC submits a non-pecuniary award of \$75,000 is appropriate. It did not cite any comparable authorities in its written argument but in oral submissions drew to my attention *Burnett v. Granneman*, 2023 BCSC 1425 and *Aujla v. Nijjar*, 2022 BCSC 1262.

[131] In *Burnett*, the 41-year-old plaintiff suffered neck, shoulder, and back injuries and related headaches after a rear end accident. The court found his claims of restricted function inconsistent with his extensive participation in many different active sports post-accident and concluded that the injuries did not limit his function to the extent claimed. There were no findings of anxiety or depression. The court awarded \$55,000 exclusive of housekeeping.

[132] In *Aujla* the 30-year-old plaintiff suffered neck, shoulder, back, jaw, and pelvic pain following two accidents. The court found she had ongoing "mild chronic soft tissue injuries" but her pain had a "relatively minor impact on her day-to-day activities". The court found she had mild to moderate depressive symptoms that

were treatable. It awarded \$125,000 (\$129,000 with inflation) in non-pecuniary damages including a “slight loss of housekeeping capacity”.

[133] ICBC’s submission is premised on its arguments that Ms. Danks’ physical injuries from the accident substantially resolved within a year or two, some of her complaints of pain and physical limitations are unrelated to the accident, and her anxiety, depression and its impacts on her life and relationship is unrelated to the accident. Since I have rejected these submissions, there is no premise for ICBC’s proposed \$75,000 award.

[134] Each case must turn on its own circumstances and I find the particular impact on Ms. Danks’ athletic lifestyle, which is really part of her identity, to be a significant factor. So too is the fact that Ms. Danks has lost the spark for the business that she lovingly and proudly grew with her good friend and business partner. I find an award of **\$190,000** is appropriate in this case, subject to my findings below on mitigation.

### **Loss of Earning Capacity**

[135] Ms. Danks seeks compensation for both past and future loss of earning capacity. In *Kallstrom v. Yip*, 2016 BCSC 829 at para. 388-390 Justice Kent summarized the general legal principles that apply, including that it is not the loss of earnings for which the plaintiff is compensated but the loss of capacity to earn income. He added:

[389] ... Generally speaking, the value of a particular plaintiff’s capacity to earn is equivalent to the value of the earnings that he or she would have received, whether in the past or in the future, had the tort not been committed. The essential task of the court is to compare what would have been the plaintiff’s past and future working life if the accident(s) had not happened with the plaintiff’s actual past and likely future working life after the accident(s). The difference between the two scenarios represents the plaintiff’s loss...

[390] Determining how a plaintiff’s life would have proceeded had the accident(s) not occurred is an exercise in the hypothetical. So too, of course, is any determination of how the plaintiff’s post-accident(s) future life will unfold following the trial.

[136] Hypothetical events, be they be in the past or the future, will be taken into consideration if they shown to be a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (per Goepel J.A., dissenting but not on this point). The court must then determine the measure of damages by weighing the relative likelihood of those hypothetical events.

### **Past Loss of Earning**

[137] Ms. Danks claims \$181,351 in past, after-tax loss of income. The amount, which was calculated by economist Darren Benning, is based on two assumptions: one is that Ms. Danks and Ms. Johncox hired replacement staff to cover work Ms. Danks was not able to do; and the other is a hypothetical scenario that, but for the accident, there is a real and substantial possibility that Ms. Danks and Ms. Johncox would have opened a fourth childcare location in 2021.

[138] As business partners in Sweet Peas Cottage Ltd., Ms. Danks and Ms. Johncox draw equally from the business. Each year they consider the company's financial position and they agree on a salary the business will pay them. Although Ms. Danks' has had challenges since the accident in carrying out her duties for the business, this has not directly affected her salary.

[139] I am not persuaded that Sweet Peas Cottage Ltd. has incurred an additional expense due to Ms. Danks' post-accident condition. Since at least the time the business was expanded to a third location, if not earlier, Ms. Danks and Ms. Johncox are rarely called upon to do the hands-on work of the teachers. They have hired staff for that and have teachers-on-call if a regular staff member is ill. They employ two managers to cover the operational aspects of the childcares and who can step on to the childcare floor if a teacher is ill. Having these managers has freed-up Ms. Johncox and Ms. Danks to manage and oversee the business. The evidence does not suggest the managers or any other staff were hired to provide added support for matters Ms. Danks could not deal with herself because of her accident injuries. Nor is there evidence either manager must put in additional time or overtime for this purpose.

[140] Nor am I persuaded that Ms. Danks' accident-related injuries prevented the business from expanding to a fourth location before the trial. I accept that before the accident, Ms. Danks and Ms. Johncox frequently discussed a further expansion of the business and were enthusiastic about it. As Ms. Johncox said, "We were young and gung ho." The previous expansions had all gone very smoothly so they felt they could do more.

[141] Since the accident, Ms. Danks says she has lost the energy and the passion for the business and this has affected her enthusiasm to expand. Ms. Johncox also said Ms. Danks does not have the same drive to expand that she had before the accident. She said when they opened the First Street location, she was, in her own words, "crazy nervous" about the plan and "freaked out" by the risk and it was Ms. Danks who pushed her to agree to the expansion. Now that spark is gone and, while Ms. Danks is still willing to explore expansion, Ms. Johncox is the eager one.

[142] Despite that, since the accident they have looked at a number of potential new locations including in Squamish, Horseshoe Bay, another location in West Vancouver, and elsewhere but found all these options unsuitable for various reasons unrelated to Ms. Danks' condition. Ms. Johncox said some other expansion opportunities arose but these felt more like "big box" facilities that do not fit with the business model and philosophy Ms. Danks and Ms. Johncox follow.

[143] Thus, while I accept that Ms. Danks' drive and interest for expansion has waned, I am not persuaded that it has prevented Sweet Peas from expanding before the trial, even as a real and substantial possibility. I therefore make no order for past loss of earning capacity.

### **Loss of Future Earning Capacity**

[144] Ms. Danks seek an award of \$2,102,100 for loss of future earning capacity, which is premised there being a real and substantial possibility that, without the accident, Sweet Peas would have expanded with a new location every five years starting in 2021 until 2041 (i.e. five new locations bringing the business to eight locations by 2041) but now will not do so because of Ms. Danks' injuries and

resulting condition. It also assumes that Ms. Danks will miss 12 days of work per year, she will reduce her work hours to part time starting at age 55, and she will retire no later than 60. It assumes that without the accident, Ms. Danks would have worked full time to 65 and part-time thereafter to age 70.

[145] The Court of Appeal recently restated the objective and basic approach to assessing an award for loss of future earning capacity in *McKee v. Hicks*, 2023 BCCA 109 at para. 76 as follows:

[76] ... The objective of an award for loss of future earning capacity is 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, 1996 CanLII 183 at para. 32; *T.W.N.A. v. Clarke*, 2003 BCCA 670 at paras. 24-28. This task involves a comparison of 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, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[146] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47 the Court of Appeal restated the analysis for future loss of earning capacity as a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras 93–95.

### **1. Potential Future Loss of Capacity**

[147] The first step in *Rab* is met in this case. Ms. Danks' pain is chronic with poor prospects for recovery. As a result of her condition, she is less interested in the business, is less tolerant of noise and environment at the childcares, takes time out of the day to rest or take treatments, works less efficiently and largely from home, is less engaged with the daycares, the staff and parents, and delegates tasks to Ms. Johncox or managers. She has also lost her drive to further expand the



business. I find there is some prospect for improvement in at least some of these areas if Ms. Danks seeks the psychological help recommended by Dr. Morgan but even with that possibility, Ms. Danks' capacity to continue working in the business and other jobs in a competitive labour market is certainly diminished.

## **2. Potential for a Pecuniary Loss**

[148] I am satisfied there is a real and substantial possibility that Ms. Danks will suffer a pecuniary loss because of her compromised capacity. There is a real and substantial possibility that Ms. Danks' hypothetical without-accident working life would have seen her and Ms. Johncox further expand their business to at least two or three additional locations and potentially more. Both had the drive to expand and Ms. Johncox continues to have that ambition. Childcare businesses in North Vancouver similar to theirs have expanded by many locations in the last 10 years and Sweet Peas now receives significant government funding to provide less expensive childcare which creates an even more secure environment for expansion.

[149] I also find the hypothetical without-accident scenario suggested by Ms. Danks' counsel that she would have worked full-time to age 65 and part-time to age 70 is reasonable given Ms. Danks' commitment to her own fitness and her pre-accident passion for the business. In her current condition and reduced passion for the business, an earlier retirement without expansion is a real and substantial possibility that would result in a pecuniary loss.

## **3. The Value of the Loss**

[150] The real challenge is attempting to assess the value of this loss and its relative likelihood having regard to positive and negative contingencies. It is here that courts must "gaze more deeply into the crystal ball": *Andrews et al. v. Grand & Toy Alberta Ltd. et al.*, [1978] 2 S.C.R. 229 at 251; *Rab*, para. 35,

[151] In my view, the hypothetical expansion to eight locations by 2041 suggested by Ms. Danks is more ambitious than the evidence suggests. Ms. Danks and Ms. Johncox have a clear philosophy on how childcare services are best delivered

and both testified that it is important to them that their business stay true to this philosophy. They believe in a model where the business is connected to the community and the families that it serves. They do not subscribe to what they call a “big box” model where childcare services are provided in a more institutional setting and delivered by staff with a high turnover rate. They pride themselves on their ability to retain their staff and deliver a very high quality of personalized care to the children and families they serve.

[152] This is not to say that Ms. Danks and Ms. Johncox could not maintain this philosophy with eight (or more) locations but rather it indicates that they take a more measured approach to expanding only when the space and the circumstances are clearly suitable. This is one of the reasons they had not expanded to a fourth location before trial in that they had not found a location that was suited to these standards.

[153] There is a very good opportunity for expansion in 2024. Ms. Johncox testified that a developer of a commercial/residential project in North Vancouver is trying to persuade Sweet Peas to establish a childcare in that new building. Mr. Johncox has been in active discussions with the proponent about this and is very interested in the opportunity but is concerned that Ms. Danks lacks the interest and motivation for this expansion. I find that, but for the accident, Ms. Danks would almost certainly have been enthusiastic about this opportunity.

[154] In my view, for the purpose of assessing the value of Ms. Danks’ loss and having regard to the pattern of past expansions and the climate for future expansions, a reasonable hypothetical without-accident scenario is that Sweet Peas would open new locations in 2024, 2030, and 2035. I consider a larger expansion is also a real and substantial possibility but so too is a smaller expansion. To some extent these cancel one another out but I would assess a larger expansion would have been more likely than a smaller expansion in a without accident scenario.

[155] In his report, Mr. Benning accounted for an expansion of Sweet Peas to a fourth location by multiplying Ms. Danks’ annual income by a ratio of 4/3. He

estimates the increase with a fifth location by multiplying her estimated four-location income by a ratio of 5/4, and so on with additional locations. This assumes that her income will increase proportionally in perfect correlation with each new location which, of course, is unlikely since the profits with additional locations will be affected by additional costs. As ICBC's expert economist, Mark Gossling, points out in his report, "[a]s the number of locations increase, the owners' time is spread over more locations and the percentage of work done by hired labour (versus the owners) increases." In his opinion, the increased labour costs would be less than proportional to the number of locations. I accept Mr. Gossling's opinion on this point but unfortunately no party has suggested how else to estimate the remunerative impact of additional locations. Thus, in assessing the value of the loss, I will follow Mr. Benning's approach but will keep in mind that it likely overstates the financial benefit of additional locations.

[156] On the other hand, I also weigh this against the positive contingency that a larger expansion is more likely than a smaller or no expansion in a without accident scenario. I also note that Sweet Peas' financial statements show that in most years the company had some amount of retained earnings that would otherwise be available to Ms. Danks and Ms. Johncox as shareholders. This suggests the business is more successful than Ms. Danks' salary might indicate.

[157] I also find that Mr. Benning's estimate of Ms. Danks' 2023 income at \$297,546 is too high. This is important because it is the base income from which he assesses her future without-accident earnings. I find there are three flaws in how he has calculated her 2023 income.

[158] First, he has used an average of her 2018-2022 income (after converting those to 2023 values) to arrive at a base amount (\$191,159). However, her 2020 income was atypically high because Sweet Peas' profits in that year were atypically high. This is likely due to additional government subsidies that childcare providers, including Sweet Peas, received during pandemic shut-downs. I therefore view the 2020 income as an outlier.

[159] Second, Mr. Benning has enhanced this base income by adding \$32,000 to account for an additional staff expense to cover for Ms. Danks' reduced capacity. However, as I have found earlier, Sweet Peas did not incur this expense because of Ms. Danks' accident injuries. I would add here that there is no evidence to explain how this figure of \$32,000 was arrived at. I accept that in the future there is a real and substantial possibility that Sweet Peas may need to incur an expense to cover some tasks that Ms. Danks would have done but for the accident and this, in turn, would affect Ms. Danks' (and potentially Ms. Johncox's) salary. However, the evidence does not support an annual \$32,000 loss in Ms. Danks' income. If the company had to pay someone to cover 12 (eight-hour) days of Ms. Danks' time each year and assuming a salary of \$75/hr, this would be an annual cost to the company of \$7,200 or a present value (up to Ms. Danks' retirement) of around \$75,000. How this cost to the *company* would translate into impacting Ms. Danks' income is not clear on the evidence but at present she and Ms. Johncox draw equally from the company. However, I consider this to be another factor that offsets the potential overstatement of the remunerative benefits of expansion in Mr. Benning's analysis.

[160] Third, because Mr. Benning was asked to assume that a fourth location had opened in 2021 (in a pre-trial without-accident hypothetical which I have not accepted), he has multiplied the enhanced base income by 4/3, ultimately arriving at \$297,546.

[161] In my view, Ms. Danks' 2023 income should be estimated without these three enhancements. Thus, after adjusting her annual income between 2018 and 2022 to 2023 values and taking the average of those years but excluding 2020, I estimate Ms. Danks' base income for the purposes of assessing future loss at \$170,000. Assuming the hypothetical expansions I have suggested and applying Mr. Benning's methodology, her income would increase with a fourth location in 2024 to \$226,666 ( $\$170,000 \times 4/3$ ), to \$283,333 in 2030 with a fifth location ( $\$226,666 \times 5/4$ ), and to \$340,000 in 2035 with a sixth location ( $\$283,333 \times 6/5$ ).

[162] Applying the future income multipliers in Mr. Benning's Table 5 and using the same assumptions about part-time work starting at 65 and retirement at 70, I calculate the present value of Ms. Danks' total income in a without-accident scenario to be \$3,663,437.

[163] The with-accident hypothetical scenario put forward by Ms. Danks assumes no expansion of the business and retirement at age 60. Using the base 2023 income of \$170,000, this generates a present-value hypothetical total income of \$2,164,753 and thus a loss, before contingencies (other than those in Mr. Benning's Table 5), of \$1,498,684 (about \$1.5 million).

[164] I note that Mr. Gossling proposes somewhat different future income multipliers based on his view that a different approach to measuring labour participation rates should be applied. As he points out, data needed for his approach is not available from Canadian sources so he has used data from a labour market transition forces study in the United States. Mr. Gossling may raise a fair point but Mr. Benning's approach has been widely accepted and used in this court. As the future income multipliers are used here as a starting point for an assessment rather than a scientific prediction of future income, I find Mr. Benning's Table 5 to be an adequate tool.

[165] With respect to the relative likelihood of a \$1.5 million loss, I consider there to be a strong possibility of an imminent expansion in the business and that Ms. Danks will share in the benefit of that until she retires. I believe there is a reasonable chance that Ms. Danks' spark for the business will be rekindled at least to some degree, especially if she follows Dr. Morgan's recommended treatments for her mental health.

[166] Further, I find it is very unlikely she will leave the business altogether. Her ability to work is impaired but she is not fully disabled. Dr. Koo opines that Ms. Danks is less capable of the full scope of work she did before the accident and is less likely to tolerate "busy, noisy environments, working directly with children, or dealing with the stressors of employee relations and concerned parents."

Importantly, though, he says her “current self-employment is ideal” (my emphasis) for the workplace accommodations she needs. Thus, it is unlikely that Ms. Danks would leave Sweet Peas because she will not find more accommodating employment elsewhere.

[167] Thus, I find there is a strong likelihood that Ms. Danks will benefit from an imminent expansion, but that expansion is not inevitable given Ms. Danks’ diminished capacity and enthusiasm for it. I find there is a smaller likelihood of expanding to a fifth or sixth location or of Ms. Danks benefiting from those remuneratively.

[168] I consider there to be a reasonable prospect for improvement in Ms. Danks’ mental health if she follows Dr. Morgan’s treatment recommendations. An improvement to her mental health is likely to have some benefits for her physical condition given the link between the two as described by Dr. Koo. This would increase the likelihood of Ms. Danks continuing to work past 60 in a with-accident scenario.

[169] On the other hand, I also consider as a real and substantial possibility that Ms. Danks’ condition could worsen with a fresh injury. Dr. Koo’s opinion is that Ms. Danks “remains at heightened vulnerability to reinjury or reputative strain by way of a fall, subsequent motor vehicle accident or resumption of inappropriate work, domestic or sport-aggravating activities that negatively affect her soft tissue injury regions.”

[170] Ms. Danks argues that considering the contingencies, a 50% deduction in the without-accident hypothetical put to Mr. Benning in his instructions is reasonable. However, that 50% deduction rests on a different scenario than what I have considered, including that Sweet Peas would expand with five additional locations rather than the three I have assumed. The proposed 50% reduction presumably incorporates a possibility of a smaller expansion, which is already factored in to my analysis. I also note that counsel offers no explanation for suggesting a 50%

deduction which seems somewhat arbitrary and, to use the language of *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 36, “plucked ... from the air”.

[171] ICBC argues there is no loss of future earning capacity but, in the alternative, says any loss should be assessed using the approach outlined in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 using two years of Ms. Danks’ average income from 2018 to 2022 (excluding 2020 and without adjusting for inflation) and applying a 25% deduction for failure to mitigate. Where, as here, the plaintiff is still working at the time of trial and has no past loss of earnings, the *Brown v. Golaiv* approach has attraction. However, it would not give effect to the real and substantial possibility that Sweet Peas Cottage would have expanded in the future but for the accident and now may not.

[172] Having regard to the positive and negative contingencies I have just discussed, and given the evidence of a potential imminent expansion, I consider there to be at least a 75% chance that Sweet Peas will expand by one location in 2024 despite Ms. Danks’ injuries (i.e. there is a 25% likelihood that her injuries will prevent expansion). Using Mr. Benning’s approach, the base 2023 income of \$170,000 would increase by \$56,666 with that expansion (from \$170,000 to \$226,666). 75% of that increase is \$42,500 which would bring Ms. Danks’ annual income for the purposes of this analysis up to \$212,500 starting in 2024. (This assigns to Ms. Danks 100% of the base \$170,000 salary and 75% of the \$56,666 increase with one new location from 2024 to retirement.)

[173] I consider there to be a 30% chance that Sweet Peas will expand with a second new location in 2030 despite Ms. Danks’ injuries (i.e. a 70% likelihood that her injuries will prevent a second expansion). The modified base income (without contingency) would increase with a fourth location by \$56,666 (from the hypothetical \$226,666 to \$283,333). 30% of that increase is \$17,000 which would bring Ms. Danks’ income with the contingency up to \$219,500 in 2030. (This assigns Ms. Danks 100% of the base \$170,000 income, 75% of the \$56,666 increase with one new location, and 30% of the \$56,666 increase with a second new location.)

[174] I consider there to be a 15% chance that Sweet Peas will expand with a third new location in 2035 despite Ms. Danks' injuries (i.e. an 85% likelihood that her injuries will prevent a third expansion). With that expansion, the modified base income (without contingency) of \$283,333 would increase by another \$56,666 (from the hypothetical \$283,333 to \$340,000). 15% of that difference is \$8,500 which would bring Ms. Danks' with-contingencies income up to \$238,000 starting in 2035.

[175] I consider there to be a 50% likelihood that Ms. Danks will retire at age 60 and thus apply a 50% deduction to the assessed income between age 60 and 65.

[176] Using these modified income figures with Mr. Benning's Table 5 multipliers, I assess Ms. Danks' income in this scenario to be \$2,617,767 which would generate a present-value loss of just over \$1 million (\$3,663,437 - \$2,617,767 = \$1,045,670).

[177] Based on this, and having regard to other positive and negative contingencies I have discussed and the possibility for improvement with some mental health treatment recommended by Dr. Morgan, I consider that **\$1,000,000** is a reasonable and fair assessment of Ms. Danks' loss of future earning capacity.

### **Cost of Future Care**

[178] A 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 to the extent that is possible. When full restoration cannot be achieved, such as in the case of chronic pain with no prognosis for improvement, 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 v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[179] The test for determining the appropriate award is objective, based on medical evidence. There must be a medical justification for each item claimed, and the claim



must be reasonable: *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63. Justification means the cost is both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not used a service in the past, it may be inappropriate to include it in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O’Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68–70.

[180] Mr. Emnacen has prepared a cost of future care assessment based on his functional capacity evaluation of Ms. Danks. I have considered Ms. La Roux’s responding report on these items but, as I have said, its weight is limited by her not having examined Ms. Danks. Where there is evidence of the actual costs of services that Ms. Danks incurred (such as housekeeping and gardening) I consider it appropriate to use those costs rather than Mr. Emnacen’s estimates.

[181] **Dental Assessment and Night Guard:** Ms. Danks claims \$750 for a dental consultation and a night guard based on Dr. Koo’s recommendation. However, she has already been fitted for a night guard but does not like to use it because she finds it uncomfortable. She has not claimed it as part of her special damages. I make no award for this.

[182] **Rehabilitation Services:** Dr. Koo recommended Ms. Danks continue with pain-relieving therapies such as physiotherapy, massage therapy, and chiropractic treatment on a contingent basis every two to four weeks for management of her chronic pain condition, interspersed with periods of increased frequency during flare-ups. He estimated 24 to 36 sessions per year distributed between the three modes of treatment, recurring annually. Mr. Emnacen opines the average cost of these per session is \$85 with a range of \$2,040 to \$3,060 per year. This generally accords with Ms. Danks’ actual cost for these therapies. I will award the mid-point of this at **\$2,550 annually**.

[183] **Active Rehabilitation:** Dr. Koo recommends that Ms. Danks engage in 24 to 36 kinesiology sessions over the next year for active rehabilitation focusing on flexibility, strength, endurance, and cardiovascular. Mr. Enmacen agrees with this and further recommends four additional sessions for follow-up which were not

specified by Dr. Koo. Mr. Emnacen estimates the cost of Dr. Koo's recommended treatment to be between \$2,280 and \$3,420 plus GST and another \$380 for the follow-up sessions that Mr. Emnacen recommends. Ms. Danks has been doing some of this already in connection with her regular gym workouts which have been modified to accommodate and manage her condition. However, she has not done this with a kinesiologist. Thus, I am persuaded that some but not necessarily the full recommended amount of active rehabilitation is reasonable. I therefore award \$2,280 plus GST (total **\$2,394**) which is the low end of Dr. Koo's recommendations.

[184] **Occupational Therapy:** Dr. Koo recommended an in-home consult with an occupational therapist to recommend house cleaning equipment and ergonomic strategies for domestic management. Mr. Emnacen suggests this home visit could also address active pain management and other strategies for managing home and leisure activities. He recommends up to 18 hours of Occupational Therapy consult time in six visits for this purpose for which he estimates a cost of \$2,300.

Ms. La Roux agrees with this this amount of support and the cost estimate.

Mr. Emnacen also recommends another \$650 for two hours of ergonomic assessment for Ms. Danks' home workplace. Interestingly, Ms. La Roux recommends more than this (five hours) but I accept Mr. Emnacen's recommendation. He also opines that home ergonomic equipment, including a sit-stand desk, an ergonomic chair, and other equipment is \$2,000 and Ms. La Roux agrees. I award **\$2,400** for occupational therapy and **\$2,000** for ergonomic equipment.

[185] **Psychological Counselling:** Dr. Morgan recommended at least 20 sessions of Cognitive Behavioral Therapy with a psychologist to address Ms. Danks' depressive thinking and anxiety. Given that Ms. Danks has declined to pursue mental health treatment to date, there is a real question as to whether she will actually incur this cost. On balance, though, I find that Ms. Danks has now started to accept that her anxiety and depression is a true health issue that should be treated and doing so is necessary for her own health and for her family relationships. I

award **\$4,700** which is Mr. Emnacen's estimate of the cost of the 20 sessions recommended by Dr. Morgan.

[186] **Massage Implements:** Dr. Koo suggested a massage therapy chair, massage seat overlay and/or handheld massage unit for day-to-day management of Ms. Danks' symptoms in between therapy sessions. Ms. Danks currently uses a Theragun (massage gun) and providing for a replacement cost of that is reasonable. Mr. Emnacen estimates that massage chairs can range from \$1,700 to \$4,000 and up to \$10,000. He estimates a Theragun to be in the range of \$525 replaceable every five years. Ms. La Roux opines that a massage chair is not in Ms. Danks' interest because she should be focusing on active treatments such as cognitive behavioural therapy. She also questions the utility of a massage gun, but Ms. Danks' evidence is she finds some temporary relief from its use. Counsel for Ms. Danks argues that a \$5,000 contingency for massage chair "should Ms. Danks choose to use one" is reasonable but there is no evidence of Ms. Danks showing an interest in massage chair. There is evidence she regularly uses a Theragun and, although she has already acquired one, that is nearing five years ago. I therefore allow \$525 plus GST/PST (total **\$588**) for a new Theragun plus replacement cost every five years.

[187] **Gym Pass:** Dr. Koo recommends Ms. Danks have a gym pass and access to an aquatic center to help facilitate participation in lower impact activities including walking, stretching, yoga, Pilates and swimming. Ms. Danks already regularly attends the gym and did so before the accident. Given her athletic lifestyle I find she would almost certainly have continued with this without the accident. While I accept a gym pass is medically reasonable and something Ms. Danks could use, it is a cost she would have incurred even without the accident so there is no loss.

[188] **Acoustic Ear Plugs:** Dr. Koo suggests Ms. Danks may find some benefit with using acoustic ear plugs to assist with her noise intolerance. I heard no evidence that Ms. Danks has used or intends to use ear plugs. I decline to make an order for this item.

[189] **Medications:** Ms. Danks has regularly used over-the-counter pain relievers and/or anti-inflammatory medication since the accident. Dr. Koo recommends its ongoing use to manage her pain. Mr. Emnacen estimates the annual cost of two-tablets a day, consistent with Ms. Danks' use, at **\$159 annually**. I make that award.

[190] **Housekeeping Services:** Ms. Danks seeks an award for housekeeping services to provide six hours of cleaning every two weeks. Before the accident, the Danks had housecleaning services once a month. Since the accident Ms. Danks has been unable to do larger cleaning work such as washing floors, windows, and bathtubs without encountering pain in her neck. She has stopped doing this work and the Danks increased the time for their professional housecleaner who now comes every two weeks. As Ms. Danks finds she is unable to do this cleaning work, I accept a pecuniary award is appropriate: see *McKee v. Hicks*, 2023 BCCA 109 at paras. 105-114. However, since she has increased existing housekeeping services from once a month (pre-accident) to bi-weekly (post-accident), it is appropriate to award only an amount for this increase in service brought about by the accident injuries. I also would order provision for these services up to age 70 recognizing that many people require assistance with housekeeping by that age. I would also make a deduction to account for the reasonable possibility that the Danks will move to a smaller home once their children are grown and have moved out. Ms. Danks' housecleaning service currently charges \$208 for a 6.5-hour cleaning of the house. The annual cost of that is \$5,408 plus GST. Half of this amount is \$2,704 (\$2,839 with GST) annually to age 70 which has a present value of \$54,232. With a contingency deduction to account for a potential move to a smaller home, I award a total of **\$45,000** for loss of housekeeping

[191] **Gardening Services:** Ms. Danks did substantially all the gardening work before the accident and now she is unable to do so. The Danks have hired a gardener to do the work Ms. Danks previously did and she seeks an award for these services in the future. I accept this is reasonable but the award should recognize that many people seek assistance with their gardens before age 70 and there is a reasonable likelihood that the Danks will downsize their home at some point:

*Pololos*, para. 150. The Danks' gardening service charges \$35 per hour and typically puts in three to four hours a month, sometimes less and infrequently more. I consider four hours a month to be reasonable for total of \$1,680 annually to age 70. I apply a 30% contingency discount to account for the possibility of moving to a smaller home without a garden.

[192] Using Mr. Benning's present value multipliers (Tables 6 and 7) the present value for all these items is as follows:

Item	Cost	Replacement	Present Value
Rehabilitation Services	\$2,500	Annually	\$67,183
Active rehabilitation	\$2,394	One Time	\$2,280
Occupational Therapy	\$2,400	One Time	\$2,374
Ergonomic Equipment	\$2,000	One Time	\$2,000
Psychological Counselling	\$4,700	One Time	\$4,648
Theragun	\$588	Every Five Years	\$3,398
Medications	\$159	Annually	\$4,267
Housekeeping Services	\$2,839	With GST annually to age 70 less contingency deduction	\$45,000
Gardening Services	\$1,680	Annually to age 70 (rounded w/ 30% contingency deduction)	\$22,500
<b>Total</b>			<b>\$153,650</b>

### **Mitigation**

[193] I have no hesitation in concluding that Ms. Danks has diligently pursued treatments for her *physical* injuries, including physiotherapy, chiropractic treatments, massage therapy, Pilates, and exercises. ICBC argues there appear to be gaps in her treatment regime but I am satisfied that she has actively followed the home exercises that have been recommended to her and tailored work-outs with her personal trainer aimed at managing her physical pain.

[194] However, Ms. Danks has not sought treatment or any help for the anxiety and depression that has materially affected her life, her functioning, and her relationships. Although she is acutely aware of the impact her anxiety and

depression are having on her life, she has not discussed it with her family doctor or sought counselling or other medical treatment for it. In fact, she said Mr. Danks has tried to recommend to her that she get emotional support for these challenges but she has declined to do so.

[195] The onus is on the defendants or ICBC as third party to prove Ms. Danks has failed mitigate her damages. They must show she refused a course of medical treatments recommended to her by doctors. Specifically, it must be shown that: (1) Ms. Danks acted unreasonably in eschewing the recommended treatments, and (2) the extent, if any, to which the damages would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. As Justice Dickson said in *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 201, the duty “includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing his or her injuries.”

[196] Ms. Danks had not refused treatment recommendations from medical professionals for counselling or psychiatric treatments, but nor has she sought any medical or counselling advice for the anxiety and depression despite being acutely aware of the problem. A strong case for failure to mitigate might exist if a person seeks *no* medical treatment or advice for a known injury if the evidence indicates treatment would likely improve the condition. I see no reason why that would not be the case for mental injury. Dr. Morgan opines that Ms. Danks “would probably benefit from antidepressant treatment and psychiatric treatment” (my emphasis). He adds that she would “probably benefit from psychological treatment” (my emphasis) and suggests this should be done by a registered psychologist rather than a counsellor. I take from his use of “probably” that, in his opinion, it is more likely than not that Ms. Danks would benefit from these treatments.

[197] Ms. Danks is well aware of her post-accident anxiety and depression but she is not comfortable seeking mental health treatment and thus has chosen not to. Embarrassment or discomfort about pursuing psychiatric help to alleviate a mental injury does not excuse a failure to mitigate: *Mullens v. Toor*, 2016 BCSC 1645 at

para. 116, aff'd 2017 BCCA 384. Moreover, Ms. Danks refused Mr. Danks' suggestion to seek professional assistance with her emotional difficulties. Though Mr. Danks is not a medical professional, his suggestion ought to have carried some weight given that a significant part of Ms. Danks' claim relates to impacts on her relationship with him.

[198] Ms. Danks points to *Chiu*, where the Court of Appeal overturned a finding that the plaintiff had failed to mitigate his damages by seeking psychological treatment. However, in that case the plaintiff was young (16 at the time of the accident) and "did not have a good grasp of what was wrong with him and why he needed medical attention from time to time" (para. 58). That is not true of Ms. Danks.

[199] I am satisfied that if Ms. Danks had sought out treatment for her anxiety and depression it is more likely than not that at least her mental health would have improved. Given the interaction between anxiety and chronic pain, it seems there is potential for her physical pain to improve as well, but there is no specific evidence addressing that. Dr. Koo recommended that Ms. Danks pursue psychological treatment for her anxiety and depressed mood yet he also opined that she has likely reached her maximal recovery for her physical injuries.

[200] I therefore find that Ms. Danks has failed to mitigate her losses but I confine this to her not seeking mental health treatment up to this point. The impact of her untreated anxiety and depression on her present condition and her relationships is substantial but I consider a relatively modest 10% deduction in the non-pecuniary damage award is appropriate. I would have made a higher deduction had Ms. Danks not made such considerable efforts to address her physical injuries with home and gym exercises as recommended by her doctor and other treatment professionals. I make no deduction to the loss of future earning capacity award because my analysis there already factors in a contingency that Ms. Danks' overall condition will improve with mental health treatments. Nor do I make a deduction for the cost of future care as her failure to mitigate to date does not affect that.

**Special Damages**

[201] Ms. Danks claims the following in special damages:

Item	Cost	Claim
Chiropractic Services	\$1,334	\$1,334
Massage Therapy	\$4,257	\$4,257
Physiotherapy	\$2,580	\$2,580
Pilates	\$6,023	\$6,023
Prescriptions/Medications	\$1,979	\$1,979
Dog Walker	\$12,895	\$6,448
Gardening	\$7,966	\$5,049
Housekeeping Services	\$13,433	\$6,716
Miscellaneous	\$2,218	\$2,218
Transportation/Mileage	\$871	\$871
<b>Total</b>		<b>\$37,475</b>

[202] Ms. Danks has reduced her claims for the dog-walking expense by 50% in recognition that there is a parallel family benefit to having that service. She claims half of the housekeeping costs based on the fact that the Danks used half of this amount of housecleaning before the accident. She has reduced the claim for gardening services to exclude the cost of plants and other materials on the invoices tendered. The miscellaneous items are hot/cold packs, muscle therapy creams, exercise/massage tools, over-the-counter medications, Theragun, and other items she spoke about in her direct examination.

[203] ICBC argues the only special damages Ms. Danks should be awarded are for one year of gardening services in the year post-accident and transportation to and from four physiotherapy treatments in that year. (Inexplicably, ICBC does not accept special damages for those four physiotherapy treatments but I gather this is an oversight in its argument.) ICBC rejects all other claims, presumably on its theory that Ms. Danks' accident-related injuries and condition are very limited.

[204] An injured plaintiff is entitled to recover their reasonable out-of-pocket expenses incurred as a result of the accident on the principle that such recovery is necessary to restore the plaintiff to the position they would have been in but for the accident. I accept Ms. Danks claims relate to accident-related treatments and the services she claims for are reasonable. Dr. Koo has endorsed all the forms of



treatments (including Pilates) as “reasonable endeavors to explore as therapeutic leisure activity pursuits”. I note some of the massage treatments were from a spa rather than a massage therapy professional and some were for her gluteus injury from basketball which I have found was not related to the accident. I would make a slight discount for those. I agree that only a portion of the dog-walking expense is accident related and the proposed reduction of 50% reasonably addresses this. In my view, **\$36,000** is reasonable for special damages.

### **In-Trust Claim**

[205] Ms. Danks makes a relatively modest “in-trust” claim of \$5,000 for the value of housekeeping service Mr. Danks provided in her place. The principles applicable to these claims were discussed in *Dykeman v. Porohowski*, 2010 BCCA 36 at paras. 28-29 and *Frankson v. Myer*, 2008 BCSC 795 at para. 74. In *Frankson*, Justice Newbury said such claims “must be carefully scrutinized” with a view to determining whether they were part of the “give and take” between family members or whether they truly go above and beyond that.

[206] Mr. Danks’ evidence about what housekeeping tasks he took over to assist Ms. Danks was very general. He said he and the Danks children have “worked to compensate for” Ms. Danks’ diminished ability to clean the house. He said he does his best to get the kids to help. While I have found Ms. Danks has not been able to do the same housework she did before the accident, I have found this is the reason they doubled the time for the housekeeper and I have awarded an amount for this under special damages. I am not persuaded by the generality of Mr. Danks’ evidence that his contribution has been particularized to support an in-trust claim or to suggest it is beyond the ordinary contributions of a family member.

### **Management Fee**

[207] Ms. Danks seeks an award of a management fee to assist her in managing the future care and future earning capacity award. An award for management fees recognizes that prudent investment of awards for future care and future income is necessary to ensure an income stream to meet the objectives of the award:

*Townsend v. Kroppmanns*, 2004 SCC 10 at paras. 5-6. As the court points out in that case:

[5] ... The dollar amount received for future costs is actually lower than projected costs because it is assumed that the amount paid will be invested and will earn income before being used for future needs.

[208] However, the court went on to say at para. 6 that a management fee is awarded where the plaintiff's ability to manage the fund "is impaired as a result of the tortious conduct" (my emphasis).

[209] In *Mandzuk v. I.C.B.C.*, [1988] 2 S.C.R. 650 at para. 2, the court suggested a management fee may also be awarded "where the plaintiff's level of intelligence is such that he is either unable to manage his affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return." The court added that the plaintiff must lead evidence to establish the need for financial management and the cost of such services.

[210] In *Lester v. Alley*, 2022 BCSC 121, Justice Basran reviewed the legal principles respecting management fees and found the plaintiff had not met the required standard. He noted that she had maintained a landscaping business for several years and in doing so made financial decisions that enabled her to maintain dozens of clients. He said at para. 28:

[28] ...the diverse range of daily decisions required to operate a business are more complex than directing investments in low risk, fixed income securities to achieve a relatively modest rate of return.

[211] Ms. Danks did not suffer an injury that impaired her ability to manage the funds. Further, while I accept that Ms. Danks, like most people, has no expertise making sophisticated investment decisions, she is certainly capable of directing investments to achieve a relatively modest rate of return. Like the plaintiff in *Lester*, she has continued to successfully run Sweet Peas Cottage for more than five years along with Ms. Johncox and she can make the necessary decisions to invest her award to achieve the targeted rate of return. I find she is not entitled to an award of a management fee.

**Tax Gross-up and Costs**

[212] Counsel requested the opportunity to make submissions on a tax gross-up following my judgment. They may seek an opportunity to do so through Supreme Court Scheduling. Subject to receiving any relevant settlement offers or submissions the parties wish to make, which can also be arranged through Supreme Court Scheduling, Ms. Danks will have her costs.

**Summary and Conclusion**

[213] In summary, I find that Ms. Zhang is 100% at fault for the accident and Ms. Danks is entitled to the following damages:

Item	Amount
Non-Pecuniary (\$190,000 minus 10%)	\$171,000
Past Loss of Earning Capacity	\$0
Future Loss of Earning Capacity	\$1,000,000
Cost of Future Care	\$153,650
Special Damages	\$36,000
In-Trust Claim	\$0
Tax Gross-up	TBD
Costs	TBD
<b>Total</b>	<b>\$1,360,650</b>

“Kirchner J.”