IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stillwell v. Richmond Cabs Ltd.,*
2023 BCSC 2270

Date: 20231227
Docket: M193774
Registry: Vancouver

Between:

Jane Stillwell

Plaintiff

And

**Richmond Cabs Ltd., Gurdeep Singh Sohi,
Jane Doe, John Doe and
Insurance Corporation of British Columbia**

Defendants

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff:	T.A. Hulley P. Cotterall, Articled Student
Counsel for the Defendants Richmond Cabs Ltd., Gurdeep Singh Sohi, and Insurance Corporation of British Columbia:	C.J. Hope D.M. Jeffrey
Place and Date of Trial/Hearing:	Vancouver, B.C. November 14-17, 2023 November 20-24, 2023
Place and Date of Judgment:	Vancouver, B.C. December 27, 2023

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INTRODUCTION

[1] On March 22, 2018, the plaintiff, Jane Stillwell, was injured when the taxi cab she was riding in (the "Taxi") made an abrupt and hard brake, ejecting her from her wheelchair at the rear of the Taxi and into the bench seat in front of her (the "Incident"). She sues the driver of the Taxi, Gurdeep Singh Sohi, and the owner of the Taxi, Richmond Cabs Ltd. She has also named the Insurance Corporation of British Columbia ("ICBC") as a nominal defendant in relation to a white vehicle that stopped in front of the Taxi, but whose owner and operator remain unknown, but she did not pursue that claim at trial.

[2] Liability has been denied.

[3] Ms. Stillwell's injuries were significant. In addition to a whiplash injury and bruising and lacerations, she suffered a broken nose, multiple fractures of her left leg above and below the knee, and her right leg bones in her ankle area. She spent approximately two weeks in the hospital. After she was discharged, she remained almost entirely non-weight-bearing due to the casts and braces that she then had to wear for another three to four months, leading to a loss of muscle strength and function. This was particularly devastating for Ms. Stillwell, as the maintenance of muscle strength and function has been a lifelong fight against the effects of muscular dystrophy. It is uncontroversial that the injuries she sustained accelerated her loss of strength and function beyond the ordinary course of her pre-existing condition.

[4] What remains at issue on this point is the extent to which this loss of strength and function was accelerated by the Incident. Ms. Stillwell says that she was living independently at the time of the Incident, with the exception of having assistance with laundry, house cleaning, and most meal preparation through her assisted living residence. She performed her key activities of daily living, including being able to get up and dress herself, and use the toilet throughout the day, without having to rely upon the presence and assistance of care, at least not on a regular basis. She argues that the injuries she suffered in the Incident accelerated her level of care to almost complete dependence on equipment and others for these latter activities.

She says that, but for the Incident, her function would not have been so reduced for another 10-15 years. The defendants argue that she would likely have reached her current level of function and need for care within two to three years as a result of her type of muscular dystrophy, regardless of her Incident-related injuries.

[5] More fundamentally, the defendants argue that Ms. Stillwell has not established that any of them is liable in negligence. While the defendants concede that Mr. Sohi owed a duty of care to Ms. Stillwell as his passenger, they argue that he did not breach any standard of care with respect to either his manner of driving or his abrupt braking that led to Ms. Stillwell's ejection from her wheelchair.

[6] Ms. Stillwell argues that Mr. Sohi's standard of care also included properly securing the specialized 3-point seatbelt provided for persons in wheelchairs in the Taxi (the "wheelchair seatbelt"), or at least asking whether Ms. Stillwell required assistance with securing that seatbelt. She argues that Richmond Cabs breached its standard of care in not properly training or supervising Mr. Sohi in this respect, and, in any event, that it is liable as the owner of the Taxi.

[7] The defendants argue that no standard of care to assist an adult with fastening their seatbelt has been recognized in our law, and should not be recognized in this case.

[8] Alternatively, they argue that Ms. Stillwell is contributorily negligent for failing to secure a belt attached to her own wheelchair, referred to as a "postural belt" by the defendants' experts. They say that the evidence establishes that, had Ms. Stillwell had the postural belt fastened, she would not have suffered the injuries that she did as a result of the abrupt-braking Incident.

[9] Finally, if I find that one or more of the defendants is negligent, I must assess Ms. Stillwell's claimed losses in terms of both non-pecuniary losses and costs of future care. Provided that liability is proven, and without prejudice as to Ms. Stillwell's other claims, the amount of special damages has been agreed at $10,422.64, which I round to $10,423.

FACTUAL FINDINGS

[10] An agreed statement of facts was entered. Neither Mr. Sohi nor a representative of Richmond Cabs testified, but portions of their examinations for discovery were read into evidence.

[11] In addition, neither Ms. Stillwell's credibility nor those of her friends or family was put in issue. It was conceded that Ms. Stillwell was credible and forthright. However, the defendants do raise issues with the reliability and accuracy of her evidence regarding the moments before the Incident, which I will address further below.

[12] Ms. Stillwell is currently 59 years old and has lived in Richmond, British Columbia, at all relevant times. On March 22, 2018, when she was 53 years old, she was injured in the Incident giving rise to this proceeding.

[13] Ms. Stillwell was diagnosed with muscular dystrophy, a degenerative neuromuscular disease, when she was nine or ten years old. As a result, she has slowly and progressively lost muscle strength, particularly in her hips, legs, shoulders, and arms. She obtained her driver's licence when she was 16 years old, and since her twenties, she has had a vehicle equipped with modifications that allow her to drive.

[14] Immediately after high school, Ms. Stillwell began working in various office jobs, and she began her career in the Department of Medicine at the University of British Columbia ("UBC") in her mid-twenties. Initially working in the Dean's Office, she later worked for many years in the Department of Obstetrics until 2002 when she was about 38 years old. She remained able to walk throughout this period, but she began to occasionally use a manual wheelchair for longer distances in her twenties and later began using a power chair in her mid-thirties. In 2002, she went on long-term disability, and she was largely using her power chair for mobility by the time she was in her forties. While she has been an active volunteer and board member with various non-profit organizations, Ms. Stillwell has not had paid employment since 2002, and she advances no claims for wage loss.

[15] In 2012, in her late forties, Ms. Stillwell moved into the Steveston Residence (the “Residence”), an apartment designed for wheelchair use, which provides assisted-living services as required. While she was not using the full range of support provided by the Residence at that time, she anticipated that she would need those services at some point in her lifetime due to the expected progression of her muscular dystrophy.

[16] At the time of the Incident, the evidence establishes that Ms. Stillwell was using her power chair and customized van for most of her mobility needs. She used the laundry, house cleaning and shared meal services at the Residence. She also required assistance with getting in and out of her custom shower chair and occasional assistance with transferring (e.g., from the toilet or into her bed) in the evenings if she was particularly tired or cold.

[17] However, other than the above, Ms. Stillwell was largely living independently. She got up and dressed herself when she was ready to. She could independently get out of bed and into her power chair, use the toilet, and perform her daily hygiene activities. She could go out as she pleased, and, provided that wherever she went had a wheelchair-accessible toilet, she was not limited in her ability to spend time away from home. For example, she regularly drove her mother around for appointments and went shopping and sightseeing, including visiting her friend in the Bellingham area. She could get ready for bed and go to bed on her own schedule.

The Incident

[18] On March 22, 2018, Ms. Stillwell was taken, with her wheelchair, to Richmond Hospital for severe abdominal pain and vomiting, which was determined to be caused by a large kidney stone. A few hours later, she was discharged and given pain and anti-nausea medication to see if the kidney stone would pass on its own.

[19] The hospital called a taxicab to pick her up and take her home. With the assistance of a nurse, Ms. Stillwell changed out of the hospital gown into her clothes, moved from the gurney to her power wheelchair, and exited the hospital.

[20] Mr. Sohi was already waiting for her outside the emergency ward doors with the Taxi, which was modified to take passengers in wheelchairs. The ramp extending out the back of the Taxi was already down, and the rear seats already pushed up to allow space for Ms. Stillwell's wheelchair. Ms. Stillwell drove her power chair up into the designated wheelchair space, and Mr. Sohi tied down the wheelchair with the four tie-down straps installed in the Taxi for this purpose.

[21] Mr. Sohi could remember very little about this interaction. I accept Ms. Stillwell's evidence that he did not say anything to her or ask her anything while securing the wheelchair, or before or during the ride.

[22] It is uncontroversial that Mr. Sohi did not affix the wheelchair seatbelt that would have secured Ms. Stillwell's body in place. It is also conceded, and I find on the evidence, that Ms. Stillwell would not have been able to secure the wheelchair seatbelt by herself due to its positioning in the Taxi.

[23] Ms. Stillwell did not latch the postural belt on her power chair. I accept her evidence that she almost always does so when she is operating her wheelchair and moving about. She has no explanation for why she did not do so that evening, other than that she did not think to do so when transitioning from the hospital gurney to the wheelchair, and in her rush to get to the Taxi that was already waiting.

[24] Mr. Sohi then proceeded to drive Ms. Stillwell from the hospital to the Residence. Mr. Sohi did not testify at trial. As such, the only direct evidence I have on the manner of Mr. Sohi's driving is Ms. Stillwell's evidence. She testified that Mr. Sohi was consistently exceeding the speed limit and following "closer than recommended" a white vehicle directly in front of the Taxi for most of the trip.

[25] Ms. Stillwell estimated the distance between the Taxi and the van to be 10-13 feet, and she remembered thinking that the Taxi was following the preceding white vehicle too closely throughout the trip. Her initial thought was that the vehicle in front must be going too slow, and that Mr. Sohi was trying to get it to go faster, but when she looked at the Taxi's speedometer, it indicated that the Taxi was already going

faster than 50 km/h. Although she could not see the precise speed, Ms. Stillwell recalled that the needle was just below the 60km/h mark, and that it was consistently at this speed throughout the entire trip – from leaving the hospital to the scene of the Incident.

[26] At trial, it was put to her that the Taxi was driving 50-55 km/h, based on a comment recorded in a clinical record made by a doctor at the hospital the following day. Ms. Stillwell did not recall saying this to the doctor, and she testified that she was sure about her sworn evidence that the Taxi's speed was closer to 60 km/h instead. On all the evidence at trial, I find that Mr. Sohi was more likely than not consistently exceeding the 50 km/h speed limit while transporting Ms. Stillwell.

[27] I also accept Ms. Stillwell's evidence that Mr. Sohi was following the white vehicle in front of the Taxi too closely. She recalls seeing an animal run across the path of the vehicle ahead of the Taxi, though she saw the animal on a different side of the road than was observed by a passing witness.

[28] I find that Mr. Sohi stopped the Taxi abruptly on Railway Avenue in Richmond, near the intersection at Williams Road. I find that the reason for the abrupt stop was that one or more racoons had run out onto the road, and the white vehicle in front of the Taxi had stopped to avoid them. Mr. Sohi then braked to avoid hitting the white vehicle. In doing so, I find that he braked abruptly and very hard.

[29] The defendants say that, even in the absence of evidence to the contrary, I should reject Ms. Stillwell's evidence that the Taxi was following too closely because it would have been physically impossible for the Taxi to stop without colliding with the vehicle in front if it was travelling at 50km/h or more with only a distance of 10-13 feet between the two vehicles. Although I have no expert evidence on the stopping distance of the preceding vehicle or the Taxi at this speed, the defendants have provided me with their own calculations showing that a vehicle travelling at 50 km/h travels 45.5 feet per second, and therefore a vehicle travelling at 50 km/h, 13 feet behind another vehicle, is driving less than 1/3 of a second behind the preceding vehicle and therefore would not have been able to avoid a collision at that speed and

at that distance. I note that this assumes that the drivers of the two vehicles did not apply their brakes at the same time in response to the racoon or racoons on the road.

[30] While I do not necessarily accept Ms. Stillwell's precise estimate of the distance between the Taxi and the preceding vehicle, I find that the evidence establishes that Mr. Sohi was travelling close enough that a very hard braking manoeuvre was required to avoid colliding with that vehicle when it came to a stop. Both vehicles were travelling at a similar speed and braked to a complete stop. They both would have been able to see the animal or animals on the road ahead, and they both braked. Mr. Sohi succeeded in bringing the Taxi to a stop approximately 3-6 feet from the preceding vehicle, and he only avoided a collision by performing a hard-braking manoeuvre.

[31] It was this hard and abrupt braking that caused Ms. Stillwell to be ejected from her wheelchair and onto the floor of the Taxi in the small space between her wheelchair and the bench seat in front of her, causing her injuries.

[32] Having successfully avoided hitting a racoon, the white vehicle continued on. Mr. Sohi and the Taxi, however, remained stopped because Ms. Stillwell was crying out in pain and bleeding profusely, likely from her broken nose. A passerby heard her and opened the side door to the Taxi. He called 911, and another passerby, with nursing experience, also called 911. With some assistance, Ms. Stillwell managed to call her brother, who then also attended the scene. Firefighters attended and managed to lift Ms. Stillwell to get her out of the Taxi.

Injuries

[33] Ms. Stillwell was then transported to the hospital in an ambulance. Mr. Sohi followed in the Taxi with Ms. Stillwell's brother and her wheelchair. She was admitted to the hospital. The medical experts are generally agreed that Ms. Stillwell suffered the following injuries as a direct result of the Incident:

a) Fracture to her nose, and associated facial bruising;

b) Fractures of her two lower right leg bones at the ankle with a displaced fragment;

c) A fracture to the bone at the top of her tibia and the bottom of her femur in the area of her left knee;

d) A further fracture of her left femur;

e) Bruising and abrasions on her body; and

f) Soft tissue injuries primarily to her right neck and shoulder, and to her left knee, which are now chronic and cause ongoing pain and discomfort.

[34] Ms. Stillwell remained in the hospital until she convinced staff to allow her to return home approximately two weeks later.

[35] Ms. Stillwell's right ankle was placed in a cast and her left leg was braced with a lockout device to prevent it from bending. Ms. Stillwell's left leg brace remained in full extension for approximately three months, and then was adjusted to allow some bend in the knee for another month. The right ankle cast was replaced after a month to address soreness, and then left on for several more weeks at least. Her right ankle remained swollen and tender for weeks after the cast removal.

[36] Shortly after the Incident, Ms. Stillwell began physiotherapy while she still had the brace and cast on, and she worked diligently in an attempt to restore her pre-Incident function. Since the Incident, she has successfully moved from requiring a two-person assist and mechanical lift every time she needed to transfer to or from her bed or wheelchair, and she managed a few independent transfers during a period of intense post-Incident therapy in the summer of 2018. However, she has remained almost entirely dependent on the assistance of at least one care aide for assistance with all of her transfers since the Incident. It is no longer considered a real possibility that she might regain the strength to independently transfer herself, including transferring to or from her bed, or to or from a toilet.

[37] I turn then to the issues in this case.

ISSUES

[38] I will address the issues raised in this trial in the following order:

a) Did Mr. Sohi's standard of care include ensuring that the wheelchair seatbelt was properly affixed before proceeding to transport Ms. Stillwell in the Taxi? In the alternative, did Mr. Sohi's standard of care require asking Ms. Stillwell if she required assistance with fastening the wheelchair seatbelt?

b) Regardless of whether such a standard of care applied, did Mr. Sohi breach his standard of care in the manner of his driving and abrupt stop?

c) If the defendants were negligent on one or more of the above grounds:

i. Was Ms. Stillwell contributorily negligent in failing to ask for assistance with the wheelchair seatbelt, or in failing to secure the postural belt on her wheelchair?

ii. At what point in time was Ms. Stillwell's muscular dystrophy likely to result in a similar loss of function regardless of the injuries she suffered in the Incident?

iii. What is an appropriate award of non-pecuniary damages in this case?

iv. What are Ms. Stillwell's costs of future care as a result of the Incident?

[39] I turn now to a discussion of the standard of care applicable to the defendants.

LIABILITY

A. Affixation of the Wheelchair Seatbelt

[40] The defendants have quite properly admitted that Mr. Sohi owed Ms. Stillwell a duty of care to take reasonable care with respect to foreseeable injury to her while

she was his passenger. They have also admitted that Richmond Cabs is liable as the owner of the Taxi for any liability ascribed to Mr. Sohi in this regard.

[41] The issue before me is whether this Court should recognize that the standard of care owed by a taxi driver to their passenger required Mr. Sohi to affix the specialized wheelchair seatbelt, or to at least ask Ms. Stillwell whether she needed assistance in that regard.

The Plaintiff's Position

[42] Ms. Stillwell says that those who transport people with disabilities, particularly commercial carriers, are held to a high standard of care that is specific to the needs of those persons. With respect to passengers that use a wheelchair specifically, she says that the duty is similar to that of a driver of public transit to drive with care to not only avoid sudden stops or jolts while driving but to also properly secure the passenger's wheelchair, including the specially designed wheelchair seatbelt. At the very least, Ms. Stillwell argues that Mr. Sohi was required to ask her if she required assistance with securing the wheelchair seatbelt.

[43] In this regard, Ms. Stillwell refers to s. 44.8 of the *Motor Vehicle Act Regulations*, B.C. Reg. 26/58 [*MVA Regulations*], which provides:

> **Division 44 — Mobility Aid Accessible Taxi Standards**
>
> **Part 1 — Accessible Taxis Manufactured or Converted Before September 16, 2019**
>
> **Mobility aid securement and occupant restraint**
>
> 44.8(1) Every accessible taxi must be equipped with mobility aid securement devices that conform with CSA standard Z605-95 at the time of manufacture or conversion and before the vehicle is first put into commercial service.
>
> (2) An operator of an accessible taxi must, before the vehicle is put in motion, secure every occupant of a mobility aid in a forward or rearward facing orientation by a securement system and procedure that meets the requirements of CSA standard Z605-95.
>
> [Emphasis added.]

[44] The CSA standard Z605 is defined in the *MVA Regulations*, and provided as as an authority in conjunction with the *MVA Regulations* without objection. My review

indicates that this standard has been substantively the same since 2018, and requires the attachment of all four tie-downs, as well as the proper attachment of the wheelchair seatbelt to restrain the occupant.

[45] Ms. Stillwell argues that this regulatory requirement is one that the common law should recognize as part of the standard of care of wheelchair taxi operators as a reasonable step to avoid objectively foreseeable harm to their passengers.

[46] She also relies on the decision of this Court in *Ranta v. Vancouver Taxi Ltd.*, [1990] B.C.J. No. 1620, 1990 CanLII 501 (S.C.). In *Ranta*, the plaintiff, a passenger in a wheelchair taxi, sustained various injuries when he was thrown from his wheelchair when his taxi driver stopped suddenly. In that case, the taxi driver was found negligent for failing to properly secure Mr. Ranta in the taxi, and the plaintiff was found not to be contributorily negligent. In finding that liability was established, Justice Harvey stated as follows (*Ranta* at 6):

> I find the evidence establishes that on this particular occasion the defendant Perran [taxi driver] failed to secure both sides of the plaintiff's wheelchair with the restraints provided for that purpose, and that this omission, coupled with the sudden deceleration of the vehicle for no apparent reason, constituted negligence which caused injury to the plaintiff sustained at that time.

The Defendants' Position

[47] The defendants say that Mr. Sohi did not have a duty to secure the wheelchair seatbelt while securing Ms. Stillwell's wheelchair into the Taxi, and that Ms. Stillwell's injuries could have been avoided in any event had she secured the postural belt on her wheelchair. The latter argument is one of contributory negligence if Mr. Sohi is found to have been negligent in this regard.

[48] With respect to whether Mr. Sohi's standard of care included securing the wheelchair seatbelt, the defendants say that there is no case to date that has imposed such a duty in relation to an adult passenger.

[49] The defendants seek to distinguish *Ranta* on the basis that negligence in that case was found on the basis of different factors, including that the taxi driver in that

case stopped suddenly “for no apparent reason”, and the driver had failed to properly secure all four of the tie-downs to the plaintiff’s wheelchair in the taxi. In that case, Mr. Ranta had specifically asked about a seatbelt for his body, but there was not one available in the cab, and he was also told by various taxi drivers during his trip to Vancouver that seatbelts were not necessary. In addition, the plaintiff specifically drew the taxi driver’s attention to the fact that only two out of four restraints were being used, but his query was dismissed. Further, Harvey J. in *Ranta* did not explicitly consider the standard of care issue, but rather found that Mr. Ranta was entitled to rely on “whatever method such a carrier used to secure him and his wheelchair in the vehicle”. The defendants therefore say that Mr. Ranta’s situation is completely dissimilar to Ms. Stillwell’s experience, and that that case is not a basis to impose liability in this case.

[50] More on point, the defendants say, is the case of *Stewart v. Douro-Dummer (Township)*, 2018 ONSC 4009 where the Ontario Superior Court of Justice declined to recognize a positive duty of care on a taxi driver to ensure that intoxicated or similarly vulnerable adult passengers are, or remain, buckled during a trip. In that case, the plaintiff was an intoxicated passenger of a taxicab who had unbuckled his seatbelt before an accident. An action was brought against the driver of the taxicab and the taxi company. The Court dismissed the action on the basis that there is no positive duty owed by the taxi driver to ensure that an intoxicated adult passenger was or remained buckled by a seatbelt.

[51] Furthermore, the Court in that case found that, even if a *prima facie* duty of care had been established, it would be negated by residual policy considerations, including that the legislature expressly chose not to make drivers responsible for ensuring that adult passengers buckle their seatbelts.

[52] The defendants concede, however, that the *MVA Regulations* in British Columbia do require that operators of taxis equipped to transport wheelchairs secure every occupant of a wheelchair with the required safety restraints, including the

occupant belt. The defendants also concede that policy considerations that apply to intoxicated adults do not have direct application to persons in a wheelchair.

[53] Nevertheless, the defendants argue that, for similar policy reasons noted in *Stewart*, this Court ought not to impose a duty of care on taxi drivers to ensure that adult passengers are wearing seatbelts, including adults with disabilities. In this case, they say that Mr. Sohi discharged his duty to Ms. Stillwell by securing her wheelchair in the Taxi with the 4 tie-downs, and driving reasonably safely. In the absence of a duty on the part of Mr. Sohi to take positive steps to ensure that Ms. Stillwell was wearing the wheelchair seatbelt, the defendants say that Mr. Sohi cannot be found negligent.

Determination

[54] In this case, the Taxi had been modified and equipped to transport wheelchairs, including the presence of four wheelchair tie-downs and the wheelchair seatbelt. It is also uncontroverted that Ms. Stillwell would not have been able to secure the wheelchair seatbelt herself, any more than she could have secured the four wheelchair tie-downs.

[55] I find that *Ranta* is on all fours with the liability issues in this case. It is not clear from *Ranta* whether, in 1986, wheelchair taxis in Vancouver were equipped with a specialized wheelchair occupant seatbelt to affix in addition to the four tie-downs. Regardless, I consider that that case establishes that the standard of care of taxi drivers is to ensure that a wheelchair passenger is effectively and properly secured, such that they will not be ejected from their wheelchair in the event of a hard stop, at which point it is foreseeable that personal injury will ensue. The fact that the driver in that case was unable to explain the reason for the hard stop (because he could not remember the incident at all) is not a distinguishing feature from this case.

[56] At the time of the Incident before me, I find that s. 44.8 of the *MVA Regulations* not only required the provision and tie-down of the wheelchair in all four corners (as was the case in *Ranta*), it also required the securement of the specially

modified 3-point occupant seatbelt by the driver. In my view, applying the standard of care imposed in *Ranta* would now clearly require the securement of this regulatorily mandated and available restraint.

[57] Even in the absence of the *MVA Regulations*, it is well-established that the law requires every passenger to be secured by a seatbelt. In *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, 1994 CanLII 128, the Supreme Court of Canada considered the implications of the requirement that passengers be belted in British Columbia, before there was a regulatory requirement for a driver to ensure that passengers under 16 years of age were wearing a seatbelt. The Court imposed a common law duty in this regard, even in the absence of such legislation. In doing so, the Court, at 685–688, noted:

> *The Duty Owed by a Driver to Ensure That Passengers Under 16 Wear Seat Belts*
>
> There is therefore a duty of care owed by an occupant of a car to wear a seat belt. This duty is based upon the sensible recognition of the safety provided by seat belts and the foreseeability of harm resulting from the failure to wear them. What then of children in a car? Children under 16, although they may contest it, do require guidance and direction from parents and older persons. This has always been recognized by society. That guidance and protection must extend to ensuring that those under 16 properly wear their seat belts. To the question of who should assume the duty, the answer must be that there may be two or more people who bear that responsibility. However, one of those responsible must always be the driver of the car.
>
> A driver taking children as passengers must accept some responsibility for the safety of those children. The driving of a motor vehicle is neither a God-given nor a constitutional right. It is a licensed activity that is subject to a number of conditions, including the demonstration of a minimum standard of skill and knowledge pertaining to driving. Obligations and responsibilities flow from the right to drive. Those responsibilities must include some regard for the safety of young passengers. Children, as a result of their immaturity, may be unable to properly consider and provide for their own safety. The driver must take reasonable steps to see that young passengers wear their seat belts. This is so since it is foreseeable that harm can result from the failure to wear a seat belt, and since frequently, a child will, for any number of reasons, fail to secure the seat belt.
>
> The driver of a car is in a position of control. The control may not be quite as great as that of the master of a vessel or the pilot of an aircraft. Nevertheless it exists. Coexistent with the right to drive and control a car is the responsibility of the driver to take reasonable steps to provide for the

safety of passengers. Those reasonable steps must include not only the duty to drive carefully but also to see that seat belts are worn by young passengers who may not be responsible for ensuring their own safety.

In my view, quite apart from any statutory provisions, drivers must accept the responsibility of taking all reasonable steps to ensure that passengers under sixteen years of age are in fact wearing their seat belts. The general public knowledge of the vital importance of seat belts as a safety factor requires a driver to ensure that young people make use of them. I would observe that this same conclusion was reached by Paris J. in *Da Costa v. Da Costa*, [1993] B.C.J. 1485. He too concluded that there is a duty owed by a driver to ensure that children are wearing their seat belts. The statutory provisions pertaining to seat belts must now be considered.

The Effect of the Motor Vehicle Act

Section 217(6) of *Motor Vehicle Act* reads as follows:

> 217…
>
> (6) A person shall not drive on a highway a motor vehicle in which there is a passenger who has attained age 6 but is under age 16 and who occupies a seating position for which a seat belt assembly is provided unless that passenger is wearing the complete seat belt assembly in a properly adjusted and securely fastened manner.

In *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, *supra*, the issue was whether a breach of the *Canada Grain Act*, S.C. 1970-71-72, c. 7, by delivery of infested grain out of a grain elevator conferred upon the Canadian Wheat Board a civil right of action against the Saskatchewan Wheat Pool for damages. No allegation of negligence at common law was put forward. The notion of a nominate tort of statutory breach giving rise to recovery simply on proof of breach of the statute was rejected. So too was the argument that an unexcused breach of a statute constituted negligence per se which would lead to an automatic finding of liability. The Court, in the clear and convincing reasons delivered by Dickson J. (as he then was), took the position that proof of a statutory breach which causes damages may be evidence of negligence. Further, it was held that the statutory formulation of the duty may, but not necessarily will, afford a specific or useful standard of reasonable conduct.

It follows that the statutory requirement pertaining to seat belts is subsumed in the general law of negligence. However, the statute can, I think, be taken as a public indication that the failure of a driver to ensure that children in the vehicle are wearing seat belts constitutes unreasonable conduct. Further, it may be taken as indicating that such a failure on the part of the driver demonstrates conduct which falls below the standard required by the community and is thus negligent. In this case, the legislation is simply another factor which can be taken into account by the Court in the course of determining whether the failure to ensure children in the car are wearing seat belts constituted negligent behaviour on the part of a driver.

[Emphasis added.]

[58] Adult persons in wheelchairs are in a different position than children, in that their inability to secure the required occupant seatbelt in a wheelchair taxi does not depend on their maturity but, in most cases, on their physical inability to do so. The diagrams in evidence of the location and affixation of the required wheelchair seatbelt, which must be secured onto the floor of the Taxi behind the wheelchair, convince me that only the most agile and flexible of adult persons, whether able-bodied or not, might be able to affix this restraint while sitting in a wheelchair.

[59] In my view, the observations of the Supreme Court of Canada in *Galaske* therefore apply with greater force to the obligations of a commercial taxi driver and their wheelchair passenger.

[60] I find that this would be the case, even in the absence of the *MVA Regulations* referenced above. As considered in *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 1983 CanLII 21, which was referenced in *Galaske*, (and many other cases) those regulations *may*, but not necessarily will, afford a specific or useful standard of reasonable conduct. I find that the requirements of s. 44(8) of the *MVA Regulations* that the driver of a wheelchair-equipped taxi secure all of the restraints, including the wheelchair occupant's seatbelt, reflects a standard that ought to be recognized by the common law as reasonably required to prevent the objectively foreseeable injury that may ensue from a failure to that seatbelt, even in the absence of the specific *MVA Regulations*.

[61] This standard of care is also reflected in the training materials for drivers of wheelchair taxis presented to the Court in this trial. While Mr. Sohi did not provide evidence of his own training, the discovery evidence of the representative of Richmond Cabs establishes that all of their drivers would have been trained on how to accommodate passengers with disabilities in accordance with the "Ask Listen Act" materials, which are in evidence before me. These materials also show that the proper securement of a wheelchair passenger involves the securement of all five restraining belts, including the four that hold down the wheelchair, and the fifth which is a 3-point seatbelt that secures the occupant.

[62] This standard is also supported by the evidence of the defendants' experts, 30 Forensic Engineering, who endorsed as authoritative the final report of a leading research institution on wheelchair occupant safety which stated that: "safe transportation and effective occupant crash protection depends on the ability to use and effectively secure crashworthy wheelchairs, and the ability to properly use complete belt-restraint systems consisting of both upper and lower torso belts…".

[63] The evidence of those experts and that report also conclusively confirm that the securing of the postural belt on Ms. Stillwell's wheelchair would have been inadequate to meet the standard of ensuring that an occupant in a moving vehicle is secured by a seatbelt. The report also notes that Ms. Stillwell's postural belt is expressly *not* intended to replace or act as a seatbelt in a vehicle. Therefore, whether Mr. Sohi believed the postural belt was fastened or not (and I find that he did not know or ask Ms. Stillwell about this), his possible belief that she had secured a postural belt on her seatbelt could not have met the requisite standard of care.

[64] I find that part of Mr. Sohi's standard of care as a driver of a wheelchair taxi was to know how to safely load and secure Ms. Stillwell's wheelchair in the Taxi, including securing the 3-point wheelchair seatbelt. He did not do so, and I find that he therefore breached the standard of care owed to Ms. Stillwell to properly secure her and her wheelchair.

[65] Having made this finding, it is not strictly necessary for me to consider whether Mr. Sohi also had a lesser standard of care to enquire as to whether Ms. Stillwell required assistance in securing the wheelchair seatbelt. In any event, I find that it was obvious that she would require this assistance.

B. Manner of Driving

The Parties' Positions

[66] Ms. Stillwell also says that, independent of any negligence in relation to the securing of her and her wheelchair, she has established that Mr. Sohi was speeding and following another vehicle too closely. She says that these actions are contrary to

Mr. Sohi's standard of care for two reasons: first, these actions are prohibited by the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*] and this should inform the applicable standard of care; and, second, they are not consistent with what a reasonable taxi driver, transporting a person with a known physical disability, would do to take reasonable care not to cause that passenger injury.

[67] In particular, Ms. Stillwell relies on the following *MVA* provisions:

> **Careless driving prohibited**
>
> **144** (1) A person must not drive a motor vehicle on a highway
>
> …
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
>
> **Following too closely**
>
> **162** (1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[68] With respect to s. 162(1), Ms. Stillwell relies on *Clark v. Hebb*, 2007 BCSC 883 [*Hebb*], for a review of the law with respect to a finding of negligence for following too closely or too fast for the conditions when an obstacle presents itself on the road: paras. 23–24. That review of cases tends to confirm that negligence may be found in such circumstances, even when the obstacle on the road, be it an animal or something else, appears suddenly. The law is neatly summarized at para. 29 of *Hebb* as follows:

> Courts of this province have had occasion to comment on the obligation of drivers to follow other vehicles at a safe distance. In *Pryndik v. Manju*, 2001 BCSC 502, Baker J. commented at para. 21:
>
> > The operator of a motor vehicle, following other vehicles, should keep his vehicle under sufficient control at all times to be able to deal with an emergency such as the sudden stopping of a vehicle in the line of vehicles ahead and the telescope effect that results, as each successive driver attempts to bring his or her vehicle to a halt.

[69] Although most of the cases reviewed in *Hebb* tend to confirm negligence, or contributory negligence, for following too closely when it results in a collision, Ms. Stillwell argues that, where it is determined that the driver has been driving negligently in the circumstances, a collision is not necessary for a finding of negligence.

[70] In this regard, Ms. Stillwell relies on a series of cases relating to the standard of care applicable to drivers of public transit, including *Prempeh v. Boisvert*, 2012 BCSC 304; and *Hutchinson v. Dyck*, 2015 BCSC 1039 where passengers fell and were injured while traveling on public transit. In those cases, braking hard and hitting a dip in the road too quickly were found to be breaches of a public transit bus driver's standard of care.

[71] A summary of the standard of care applicable to transit drivers relied upon by Ms. Stillwell can be found in *Clarkson v. Elding*, 2020 BCSC 72:

> [49] The standard of care owed by the operator of a transit bus to bus passengers was concisely summarized by Madam Justice Dardi in *Prempeh v. Boisvert*, 2012 BCSC 304 at paras. 15-16:
>
> > [15] The reasonable foreseeability test informs the analysis of liability. The standard of care owed to a plaintiff passenger by a defendant bus driver is the conduct or behaviour that would be expected of a reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver and anything the defendant driver knew or should have known: *Wang v. Horrod* (1998), 1998 CanLII 5428 (BC CA), 48 B.C.L.R. (3d) 199 at para. 39 (C.A.); *Patoma v. Clarke*, 2009 BCSC 1069 at para. 6.
> >
> > [16] It is well-settled on the authorities that the standard of care imposed on a public carrier is a high one. However the principle to be derived from the authorities is that the standard to be applied to the bus driver is not one of perfection nor is a defendant bus driver effectively to be an insurer for every fall or mishap that occurs on a bus: *Patoma* at para. 7.
>
> [50] In *Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15 at para. 17, our Court of Appeal confirmed that the mere fact that a passenger is injured while riding on a public carrier does not establish a *prima facie* case of negligence. The plaintiff bears the burden of proving on a balance of probabilities that the defendant breached the standard of care owed to the plaintiff.

> [51] It is not, in itself, a breach of the standard of care for a bus driver to stop abruptly, even where an abrupt stop causes injuries to passengers. As stated by Madam Justice Ballance in *Erickson v. Sibble*, 2012 BCSC 1880 at para. 57:
>
> > [57] Although each case turns on its own peculiar facts, the authorities inform the general principles at play. Taken together, the decisions indicate that it is not, of itself, a breach of the standard of care for a bus driver to stop abruptly, even where there is an indication that special precautions may be warranted with respect to an elderly, frail or physically compromised passenger. The issue of liability will depend not only on the manner of the stop, but the reason for its suddenness and the assessment of whether, in all the circumstances, the impugned driving conduct was substandard when measured against the standard expected of a reasonably prudent driver.
>
> [52] The standard of care analysis is informed both by the reasonableness of the parties' actions and the relevant rules of the road. The provisions of the *MVA* and other rules of the road are relevant to determining whether the standard of care has been breached, but they are not determinative: *Salaam v. Abramovic*, 2010 BCCA 212 [*Salaam*] at para. 21.

[72] Ms. Stillwell argues that the standards applicable to public transit drivers should also apply to taxi drivers, particularly those that transport persons in wheelchairs. In this regard, she relies on the discovery evidence of Richmond Cabs, as well as the evidence of Ms. Stillwell and other witnesses at trial, that confirmed that their wheelchair cabs are regularly used by HandyDART and Richmond Hospital to transport persons in wheelchairs. For example, the representative for Richmond Cabs confirmed that Richmond Hospital and the healthcare district are a significant client for them as part of a voucher system for the transportation of persons in wheelchairs. They also provide overflow services when HandyDART, the public transit option for persons in wheelchairs, is over capacity and unavailable. Accordingly, a person arranging for a HandyDART service may instead be presented with a wheelchair taxi from Richmond Cabs. Ms. Stillwell argues that the person so transported should not expect a lower level of care to be taken by the taxi driver in that instance.

[73] The plaintiff also says that there is generally a higher standard of care owed by commercial service providers to the public at large (as discussed in the context of

social host responsibility in *Childs v. Desormeaux*, 2006 SCC 18 at para. 37) that should apply to taxis, beyond what might be applied to a private driver of a vehicle.

[74] The defendants say that there are no cases (other than the public transit cases) where a defendant who made a hard brake and thus successfully avoided a collision has been found to have been negligent. Rather, they say that negligence has only been found where the driver is going so fast or following so closely that they cannot stop in time to avoid a collision.

[75] The defendants concede that hard braking was found to give rise to a finding of negligence with respect to public transit drivers, but they argue that the standard of care applicable to a public transit driver is different from those of other drivers. They say that this is partly because public transit drivers know that they are driving passengers who are not secured by seatbelts and are thus more susceptible to falls.

Determination

[76] The absence of liability in negligence when a driver successfully avoids a collision, does not necessarily mean that the driver's conduct did not fall below the required standard of care. Negligence requires proof of damage, and that will rarely be the case where there is no collision. The lapses of attention or failures to take due care that regularly give rise to negligence findings when they result in injury will not give rise to a cause of action when no accident or damage was caused. That is to say, the lack of a collision does not necessarily establish that there was no breach of a driver's standard of care.

[77] In this regard, I note the decision of Justice Wilkinson in *Blackburn v. Lattimore*, 2021 BCSC 1417 at paras. 14, 21–26, 41, 56 where a hard-braking incident led to findings of liability not only for the defendant bus driver and transit provider, but also for a private vehicle that cut the bus off. No collision occurred, yet both sets of defendants were found to have breached their standard of care (not just the public transit defendants).

[78] I also note that, although the cases relied upon by the plaintiff do not directly consider the situation of a taxi driver, other courts in Canada have found that taxi drivers are common carriers, and the standard of care applicable to them is higher than that of a private vehicle: *Gosse v. CBS Taxi Ltd. et al.*, 521 A.P.R. 285 at paras. 8–9, 1998 CanLII 18743 (Nfld. S.C.), var'd on other grounds 2000 NFCA 16; *Fraser v. U-Need-A Cab Ltd.; Great American Insurance Co., Third Party*, 43 O.R. (2d) 389 at p. 6, 1983 CanLII 1659 (S.C.), aff'd 50 O.R. (2d) 281, 1985 CanLII 2118 (C.A.). In *Fitzgerald v. Tin*, 2003 BCSC 151 at paras. 31–32, this court relied on the passages in *Fraser* that describe taxicabs as a common carrier, although that case related to the liability of a taxi company in relation to a hazard inside the cab itself.

[79] In this case, I do not consider it necessary to determine whether a higher standard of care, similar to that applied to public transit drivers, applies to taxi drivers in BC. As was stated by Justice Rowles in *Wang v. Horrod*, 48 B.C.L.R. (3d) 199 at para. 69, 1998 CanLII 5428 (C.A.):

> Much of the competent driving of a bus is the same as the competent driving of any other motor vehicle – the driver should obey the rules of the road as laid down in Part 3 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, keep a proper lookout, be aware of the conditions of the road, and so forth.

[80] I find that Mr. Sohi's actions of driving above the speed limit and following too closely together gave rise to an objectively foreseeable risk of injury to a passenger in his Taxi. This is particularly true in these circumstances, where Mr. Sohi knew that passengers with disabilities require more care to be taken, and that he knew that his passenger in this case was not properly restrained.

[81] In discovery, Mr. Sohi was asked whether, as part of his training in driving a wheelchair taxi, he had ever been told that passengers with disabilities may be more susceptible to injury from extreme driving movements than the average person. He responded that "this is always stated that for such customers, you have to be more careful."

[82] With respect to his knowledge that Ms. Stillwell was not properly restrained, there is no question that Mr. Sohi did not fasten the wheelchair seatbelt, and he

must have known that Ms. Stillwell could not and had not done so herself. Whether he believed that she might have done up her postural belt (which she had not) does not assist him.

[83] I find that Mr. Sohi's standard of care in transporting Ms. Stillwell required that he drive in such a way so as to avoid situations where he might have to come to an unnecessary abrupt and hard stop. Those situations include driving faster than the speed limit while following too closely. I find that he breached this standard in the circumstances.

[84] Finally, I note that finding a taxi driver liable for stopping suddenly with an unsecured wheelchair occupant is not without precedent: see *Ranta*.

CONTRIBUTORY NEGLIGENCE

The Parties' Positions

[85] The defendants argue that Ms. Stillwell was negligent and contributed to her injuries on two bases:

a) By failing to secure the postural belt on her wheelchair; and

b) By failing to ask for assistance with the wheelchair seatbelt in the Taxi.

[86] With respect to the first basis, the defendants rely on the expert evidence of 30 Forensic Engineering regarding the forces involved in a hard-braking event, materials failure, and biomechanics. The defendants say that this report establishes that Ms. Stillwell's postural belt, if it had been secured, would have prevented Ms. Stillwell from being ejected from her wheelchair and avoided the worst of her injuries. While a whiplash injury was still possible given Ms. Stillwell's greater susceptibility to such injuries, the experts' opinion is that ejection from her chair, which was the cause of the worst of her injuries and functional losses, could have been avoided with the latching of this postural belt.

[87] The defendants also rely on Ms. Stillwell's candid acknowledgement that she could have secured this postural belt before entering the Taxi, or before the Taxi

departed. She also agreed that she could likely have done so even after the Taxi was moving, though with more difficulty.

[88] In response, Ms. Stillwell argues that the expert evidence establishes that the postural belt could not be relied upon for accident protection. She notes that the comparator postural belt investigated by the 30 Forensic report authors actually cautions against its use for other purposes, which I take to mean purposes other than assisting the occupant to sit up properly in their wheelchair.

[89] Ms. Stillwell also argues that it was understandable why she had not secured the postural belt in the circumstances – she was leaving the hospital in a rush with an unpassed kidney stone.

[90] Ms. Stillwell also says that the 30 Forensic report does not establish that her actual postural belt (as opposed to the comparator belt considered) would have been adequate to prevent her injuries. In this respect, the 30 Forensic report authors acknowledge that they were unable to examine the actual wheelchair Ms. Stillwell was using at the time of the Incident (other than in a photo), and the best they can say is that a similar exemplar wheelchair was in good working order. In particular, Ms. Stillwell says that the authors were not aware of whether specific postural belt on Ms. Stillwell's previous wheelchair was in good condition. Instead, the comparison was made to a newer belt, affixed with a different system than was used on Ms. Stillwell's wheelchair at the time of the Incident.

[91] Overall, Ms. Stillwell says that the defendants have not made out contributory negligence.

Determination

[92] It is well-established that the burden of proving contributory negligence lies with the defendants. Where established, apportionment of damages is based on the degree to which each negligent party was at fault. The inquiry engages the question of relative blameworthiness, rather than the degree of causation: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 22. The court must determine whether Ms. Stillwell failed

to take reasonable care for her own safety and, if so, whether her failure was one of the causes of her injuries: *Bradley v. Bath*, 2010 BCCA 10 at paras. 24–27.

[93] Failure to wear a seatbelt is one basis upon which contributory negligence may be found. *Gilbert* provides a helpful summary in this regard:

> [24] A plaintiff may be found to have failed to take reasonable care for his or her own safety by not wearing an available seatbelt or by accepting a ride in a vehicle not equipped with seatbelts. If a seatbelt was available but not worn, the evidence must establish that it was operational and the plaintiff's injuries would have been reduced by usage to justify a finding of contributory negligence. Although there is no hard and fast rule as to apportionment in cases involving a successful seatbelt defence, the plaintiff is often held to be 10% to 25% contributorily negligent: *Harrison v. Brown*, 1985 CanLII 724 (BC SC), [1985] B.C.J. No. 2889 (S.C.); *Thon v. Podollan*, 2001 BCSC 194; *Ford v. Henderson*, 2005 BCSC 609.

[94] More recently, Justice Tucker summarized the law around the failure to wear a seatbelt in *Somers v. MacLellan*, 2023 BCSC 1449 at para. 200 as follows:

> **C. Failure to Wear a Seatbelt**
>
> The elements of contributory negligence as they relate to the failure to wear a seatbelt are as set out in *Gagnon v. Beaulieu*, [1977] 1 W.W.R. 702 at 707–708, 1976 CanLII 1565 (B.C.S.C.):
>
> (a) Failure, while travelling in a motor vehicle on a street or highway, to wear a seat belt or any part thereof as provided in a vehicle in accordance with the safety standards from time to time applicable is failure to take a step which a person knows or ought to know to be reasonably necessary for his own safety.
>
> (b) If in such circumstances he suffers injury as the result of the vehicle being involved in an accident, and if it appears from the evidence that if the seat belt had been worn the injuries would have been prevented or the severity thereof lessened, then the failure to wear a seat belt is negligence which has contributed to the nature and extent of those injuries.
>
> (c) In the case of this particular form of contributory negligence, the onus is on the defendant to satisfy the court, in accordance with the usual standard of proof, not only that the seat belt was not worn but also that the injuries would have been prevented or lessened if the seat belt had been worn. The court should not find the second of these facts merely by inference from the first, even if that has been established.
>
> [Emphasis added.]

[95] I find that the defendants have not met their burden to establish contributory negligence in this case.

[96] First, I agree with Ms. Stillwell that relying on a materials failure analysis for a comparator postural belt was fraught with difficulties. I accept that Dr. Eggum was able to identify from photographs that her postural belt at the time of the Incident was attached by a plastic triangle to Ms. Stillwell's previous wheelchair, and that this would likely have been the weakest aspect of the postural belt in terms of its ability to hold back the identified forces on Ms. Stillwell in the Incident. However, it is also clear from the report and those photographs that the manner of attachment of the postural belt to the frame of the comparator wheelchair was different, and the evidence is that the comparator materials reviewed by Dr. Eggum's associate in California were newer than those used in Ms. Stillwell's wheelchair.

[97] However, even if one were to assume that Ms. Stillwell's postural belt was in the same good condition and secured to the wheelchair in the most secure manner, the 30 Forensic report, and the testimony of its authors, establish without question that it was *not* designed to safely restrain the occupant of a wheelchair in a moving vehicle. Accepting the expert opinon that Ms. Stillwell's postural belt may have been sufficient to restrain her in a vehicle with ABS brakes (like the Taxi) in a hard-braking situation such as this Incident, that evidence also establishes that the postural belt (assuming it is in good condition and securely attached) is still entirely inadequate to deal with the forces of an impact or collision in a moving vehicle.

[98] Fundamentally, the defendants have to establish that the occupant of a vehicle has, at common law, a duty and standard related to their own care to make use of and affix a piece of equipment that is not a seatbelt, and that is not designed to be used as a seatbelt, and which is incapable of replacing the use of a seatbelt. In this respect, I have no evidence of how common these postural belts are on wheelchairs, or the frequency of their use. Their use is not required by regulation (and, indeed, the expert evidence is that they are not safety equipment). I have no

expert evidence capable of supporting the use of a postural belt as an objective standard of care that is required to be met by vehicle passengers in wheelchairs.

[99] The possibility, or even the fact, that the postural belt would have significantly lessened Ms. Stillwell's injuries in this particular Incident is not the same as proving that the standard of care, at common law, requires persons who use wheelchairs to affix a postural belt while in a vehicle (assuming that they have one).

[100] In my view, this Court should be slow to impose upon differently-abled persons a common law standard of care to use adaptive equipment that they have to make their daily lives work better. This is particularly true where that equipment is not safety equipment (such as the postural belt). It is even more true when there is already a universally applicable technology available in the form of a seatbelt, which has a corresponding standard of care to use it.

[101] Rather, what is required "in accordance with the safety standards from time to time applicable" is the securing of the 3-point seatbelt that all vehicles are required to provide: *Gagnon v. Beaulieu*, [1977] 1 W.W.R. 702 at 707, 1976 CanLII 1565 (B.C.S.C.). Modified wheelchair taxis must be equipped with a 3-point seatbelt that properly secures the occupant of a wheelchair. This is the only such belt that is required by regulation, and, in my view, it is the only belt that adequately meets the requirements of passenger safety and gives rise to a standard of care in negligence.

[102] Although *Ranta* did not concern the use of a postural belt, in my view, *Ranta* rejected a similar allegation that a passenger in a wheelchair taxi is required to apply some special knowledge of their own to avoid injury or contributory negligence:

> In the particular circumstances of this case, I find that notwithstanding the plaintiff's particular and unique knowledge of how his wheelchair and person should be secured when riding as a passenger in a motor vehicle, he was entitled when riding as a passenger in a commercial vehicle owned by a company whose business it was to transport disabled persons, to rely upon whatever method such a carrier used to secure him and his wheelchair in the vehicle. I find it too simplistic to say he had a choice and could have refused to ride in the vehicle. At the material time he drew to the attention of the defendant Perran that all four restraints were not being used, and says that he was told by Perran the use of the additional restraints was not necessary. I

> accept the evidence of the plaintiff on this point. In my view, it was not reasonable for him to have refused to ride as a passenger in the vehicle in such circumstances.
>
> For these reasons, I find the plaintiff was not guilty of contributory negligence.

[103] I find that the same observations are applicable to Ms. Stillwell's case in relation to the postural belt. She was entitled to rely on Mr. Sohi to comply with his obligation to properly secure her and her wheelchair in the Taxi using the legally required wheelchair seatbelt.

[104] Second, the defendants argue that *Ranta* is distinguishable because the plaintiff in that case specifically asked about the availability and securing of a seatbelt but was told it was not necessary. They argue that Ms. Stillwell was contributorily negligent for not making similar enquiries in this case.

[105] Nevertheless, the burden remains on the defendants to show that Ms. Stillwell owed herself a duty of care in this regard, and that the failure to ask that her seatbelt be secured was a breach of her standard of care.

[106] The defendants have not provided me with any case law that establishes such a standard of care on a passenger in a vehicle. There are many cases where passengers observe that the driver is driving above the speed limit, or not keeping a proper lookout, but the defendants have not provided me with any cases where a passenger was found to have been contributorily negligent for not reminding a driver to comply with the driver's own standard of care.

[107] In my view, the common law required nothing more of Ms. Stillwell in this case.

CAUSATION

[108] There is no dispute that Ms. Stillwell has proven that the immediate injuries she suffered were caused by the Incident. She has proven causation in this respect.

[109] Nor is there any issue that Ms. Stillwell had a pre-existing progressive condition – muscular dystrophy – at the time of the Incident.

[110] It is also established that Ms. Stillwell had some pre-existing muscle pain associated with her muscular dystrophy, for which she received monthly massage therapy, and this pain was worsened by the whiplash injury she suffered in the Incident.

[111] The issue of causation engaged in this case primarily relates to the question of what loss of function Ms. Stillwell was likely to suffer in any event (but for the Incident), as a result of her muscular dystrophy, acknowledging that the defendants are only obliged to compensate Ms. Stillwell for the injuries and losses that she suffered as a result of the Incident, and not from her "original position."

[112] *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 is instructive on this issue:

> 35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position <u>better</u> than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Underline emphasis in original.]

[113] Unlike proof of causation *per se*, which must be established on a balance of probabilities, establishing the plaintiff's future "original position" for the purposes of assessing damages caused by the Incident involves the consideration of a hypothetical future that is often not susceptible to proof on a balance of probabilities. In *Athey,* the Supreme Court of Canada describes the issue in this way:

> 27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 1977 CanLII 1332 (ON CA), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).
>
> [Emphasis added.]

[114] Our courts have generally applied this hypothetical future-gazing exercise to both losses caused by the negligence of a defendant, as well as to losses that might have been caused by a pre-existing condition. The facts to be considered in such a determination need not be established on a balance of probabilities, but rather as real and substantial possibilities, which are to be compensated in accordance with their relative likelihood. For example, in *Zacharias v. Leys*, 2005 BCCA 560, the Court of Appeal noted:

> [16] The crumbling skull rule is difficult to apply when there is a chance, but not a certainty, that the plaintiff would have suffered the harm but for the defendants' conduct. Major J. addressed this issue in *Athey* when he wrote, at paragraph 35, that damages should be adjusted only when there is a "measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence." Such a risk of harm need not be proved on a balance of probabilities, which is the appropriate standard for determining *past* events but not *future* ones. Future or hypothetical events should simply be given weight according to the probability of their occurrence. At paragraph 27, Major J. wrote that "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk." In the same paragraph, he went on to say that a future event should be taken into account as long as it is a "real and substantial possibility and not mere speculation."
>
> [Italic emphasis in original; underline emphasis added.]

[115] In *Rezaei v. Piedade*, 2012 BCSC 1782, this Court directly addressed the weighing of risks in relation to a plaintiff's pre-existing original position:

[43] The relevant case law does not address an explicit "burden" or "onus" for establishing that the crumbling skull rule applies. The general tenor of the decisions, however, is that the defendant must establish it to the requisite standard, likely because it will be the defendant who alleges it.

[44] An example of how this looks in practice is provided by *Penland*, where MacKenzie J., as she then was, said:

> [97] In this case, while find the medical evidence reflects that the Plaintiff suffers from osteoarthritis, there is no evidence before the court that this is a progressive, degenerative disease. I have already said that I cannot take judicial notice about the nature of the osteoarthritis. Therefore, I am left with the evidence that this disease did not impair her previous activities. The evidence simply reflects that pre-accident, the Plaintiff had a static condition that did not limit her activities in any way. There is no evidence before the court that this would have changed in the future. This disposes of the Defendant's argument that this is a "crumbling skull" case because there is no evidence before the court that osteoarthritis is a progressive and degenerative disease. I [cannot] find, in the absence of any medical evidence about the Plaintiff's prognosis, that there is a measurable risk that this pre-existing condition would have detrimentally affected the Plaintiff in the future. To do so would be to speculate as there is no evidence to support that assertion. Accordingly, I decline to reduce her damages.

[45] The absence of explicit language about the burden of proof is likely explained by the standard of proof that is required. Unlike causation, which the plaintiff must establish on the balance of probabilities, future hypothetical events, like a crumbling skull, are given weight according to their relative likelihood: *Athey* at paras. 26-28. There is, therefore, no clear threshold *per se*, just an accumulation of evidence.

[Emphasis added.]

[116] In *Amini v. Khania*, 2014 BCSC 1671, Justice Burnyeat stated:

> [44] The "crumbling skull doctrine" recognizes that an award should be reduced if there is a real possibility beyond mere speculation that a plaintiff would have suffered the losses or injuries regardless of an accident: *Athey*, *supra*, at para. 27. The November 2, 2009 x-rays show that Mr. Amini had degenerative disc disease of his cervical spine. The Defendants submit that the "significant, pre-existing degenerative disc disease would have become symptomatic regardless of the Accident, particularly when considering his age and how widespread and severe his degenerative disc disease was". In this regard, the Defendants rely on the decisions in *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762, and *Booth v. Gartner*, 2010 BCSC 471. The Defendants submit that there is "a strong likelihood" that the degenerative disc disease would have become symptomatic soon after the accident given the age of Mr. Amini, how widespread his degeneration was, and the severity and nature of his degenerative changes at C4-5.

> [45] In *T.W.N.A. v. Clarke* (2003), 2003 BCCA 670 (CanLII), 22 B.C.L.R. (4th) 1 (C.A.), Smith J.A. on behalf of the Court stated:
>
> > ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven by a certainty. Rather, it should be given weight according to its relative likelihood.
> >
> > (at para. 48)
>
> [Emphasis added.]

[117] Similarly, the causation issue before me is not concerned with whether causation or a pre-existing condition has been established. Rather, it requires me to consider the various real and substantial possibilities as to how long Ms. Stillwell might have maintained her strength and function—particularly with respect to her ability to transfer independently to and from her bed, and to and from the toilet, and what weight I should give to the relative likelihood of an earlier or later total dependence on a lift and assistance for these transfers.

The Plaintiff's Position

[118] Ms. Stillwell argues that there is a real and substantial possibility that it would have taken her 10 to 15 years to suffer the same functional losses, due to her muscular dystrophy, that she has suffered as a result of the Incident. She relies in this respect on the expert opinion of Dr. Caillier, a physiatrist called by Ms. Stillwell. Ms. Stillwell takes the position that damages should be awarded based on the midpoint of this estimate at 12.5 years post-Incident.

[119] Ms. Stillwell proffered two independent medical examinations in this regard: one prepared by Dr. Caillier, and a more recent report prepared by Dr. Alister Prout, a neurologist.

[120] The pertinent aspects of Dr. Caillier's opinion in this regard provide:

> In my opinion, in the absence of the MVI of March 22, 2018, the limb-girdle muscular dystrophy would likely have resulted in a slow progressive decline in function with increased care needs, but this likely would have occurred over 10 to 15 years.

> In my opinion, in the absence of the MVI of March 22, 2018, she would likely not be presenting how she currently is and has been since the time of the incident in question.
>
> In my opinion, the abrupt change in her function after the incident of March 22, 2018, is likely secondary to the injuries, physical deconditioning, and loss of technique for transfers/activities of daily living and immobility.
>
> Ms. Stillwell has LGMD and within my clinical experience with muscular dystrophy patients, once function has been lost, it is impossible to regain functional and strength capabilities as compared to someone without muscular dystrophy.
>
> The accident of March 22, 2018 is the major causative factor as to why Ms. Stillwell has been unable to regain her previous level of function secondary to the injuries, immobility and deconditioning that ensued.

[121] Dr. Prout opined that it "is impossible to predict" when Ms. Stillwell would have likely lost her ability to transfer without a sling lift, but he suggests that it would likely lie somewhere between the more "optimistic" estimate of Dr. Caillier's and the more "pessimistic" opinion of Dr. Mike Berger's, the defendants' medical expert:

> It is my opinion that Ms. Stillwell suffered a decline in functional abilities and that decline is hard to measure. Whether or not Ms. Stillwell would have declined to the degree to which she did post-accident over the next five, ten or 15 years is impossible to predict. It has been suggested by Dr. Caillier that it would have taken ten to 15 years for Ms. Stillwell to have reached her post-accident level of disability absent the accident although it is my opinion that this is probably an optimistic prediction given the slow decline that occurred in the decades prior to the accident and the degree to which she had major muscle weakness, both proximal and distal, pre-accident. It has been suggested by Dr. Berger that Ms. Stillwell would likely have required total care within two to three years absent the accident and it is my opinion that this, in turn is likely a pessimistic prognosis, given the degree to which Ms. Stillwell appeared to be fairly stable with respect to her functional abilities pre-accident as well as the fact that she has, in the more than five years post-accident, in fact been able to maintain many of her functional abilities at the new significantly lower level of functioning that has developed and which followed immediately upon the subject accident.

[122] Ms. Stillwell argues that Dr. Caillier's evidence is to be preferred over that of Dr. Prout in terms of the progression of her muscular dystrophy on the basis that Dr. Caillier is a physiatrist with a long-term clinical practice, who has the most experience with the longitudinal management and progression of muscular dystrophy. She notes that Dr. Prout concedes that he would defer to a physiatrist

with respect to the management of a patient with muscular dystrophy over time, as neurologists, such as himself, are primarily involved at the diagnostic stage.

[123] Ms. Stillwell also argues that Dr. Caillier's opinion is to be preferred over that proffered by the defendant's expert, Dr. Berger, because Dr. Berger has only been a medical doctor for approximately five years and therefore has insufficient clinical longitudinal experience with his patients to provide his opinion beyond that time frame. She submits that Dr. Berger took an overly academic approach to the question of prognosis, and that the much more extensive clinical experience of Dr. Caillier (and to a lesser extent Dr. Prout) in treating and following patients with neuromuscular disorders, is to be preferred.

The Defendants' Position

[124] By contrast, the defendants say that Dr. Berger's opinion should be preferred over those of Dr. Prout and Dr. Caillier. Relying on Dr. Berger's opinion, the defendants argue that after two to three years, Ms. Stillwell's function would have been no better even absent the Incident. They say that Dr. Caillier's opinion is not based on any clear rationale, and that Dr. Prout adds nothing by saying that the likely prognosis for her muscular dystrophy was somewhere in between the other two doctors' prognoses.

[125] While there is some uncertainty surrounding Ms. Stillwell's diagnoses, the evidence establishes that she has a serious, progressive, neuromuscular condition that is most likely limb-girdle muscular dystrophy. There is general agreement amongst the medical experts that the condition is characterized by a gradual deterioration which cannot be stopped or reversed.

[126] With respect to the time frame for this gradual deterioration, the defendants say that the two- to three-year time estimate provided by Dr. Berger is to be preferred over the prognosis of Dr. Caillier and Dr. Prout for a number of reasons.

[127] Firstly, the defendants argue that Dr. Berger's clinical practice, research and area of expertise are directly focused on care of individuals with complex

neuromuscular presentations, including muscular dystrophies, amyotrophic lateral sclerosis (ALS), and inflammatory neuromuscular conditions. On the other hand, Dr. Caillier's area of practice is more broadly focused.

[128] Secondly, the defendants say that Dr. Caillier "does not explain the rationale for her opinion whatsoever," including how she arrived at her opinion that the Incident accelerated Ms. Stillwell's decline in function by 10 to 15 years.

[129] The defendants argue that Dr. Berger, in contrast, provides a detailed analysis of his diagnosis and, while recognizing that it is impossible to predict how much the Incident accelerated functional decline, better explains his opinion that Ms. Stillwell would have needed total care for daily living activities within two to three years, or sooner. That explanation is as follows:

> Most patients with autosomal recessive sub-types of limb girdle muscular dystrophy experience profound functional deterioration in their 30s and 40s. Most patients become entirely dependent on ceiling lifts for transfers by their mid 40s-50s. It is documented in the pre-accident records that Ms. Stillwell was beginning to deteriorate functionally and having to rely on Hoyer lift before the subject accident. Given that her contemporary physical examination demonstrated marked proximal and distal weakness, Ms. Stillwell was on a trajectory to total care, whether the accident occurred or not.

[130] The defendants note that Dr. Berger's examination results of Ms. Stillwell from earlier in 2023 found that Ms. Stillwell has profound muscle weakness in the shoulder girdle, hip girdle, and around the ankles. Dr. Berger opined that "[t]here is no possibility that orthopaedic injuries have made her this weak," and that "[e]ven deconditioning would not result in such profound muscle weakness." Given this current muscle weakness, which is caused by her neuromuscular disease, Ms. Stillwell would not be expected to be able to perform any daily living activities independently, other than some basic feeding and grooming with set-up, and would not be able to transfer independently. Dr. Berger goes on to say that the period of immobility after the Incident alone would not be expected to result in "such dramatic strength deficits," and Ms. Stillwell likely would have experienced this weakness regardless.

[131] With respect to Dr. Prout's opinion, the defendants say that, while Dr. Prout's reasoning for thinking that Dr. Berger is too pessimistic is not as apparent. They say that Dr. Prout's opinion that Ms. Stillwell appeared to be "fairly stable" with respect to her functional abilities pre-Incident, and has been able to maintain many of her functional abilities at her new, significantly lower level of functioning, is not supported by the evidence. They say that Ms. Stillwell was not stable before the Incident, and that her function was, in fact, declining. The defendants note, in particular, indications in the clinical records that Ms. Stillwell was losing strength in her hands before the Incident and had obtained the Hoyer lift the previous year due to a loss of her ability to weight-bear in her legs and ankles.

[132] Accordingly, the defendants say that Dr. Berger's opinion ought to be preferred.

[133] In the alternative, as between the opinions of the two physiatrists, Dr. Berger and Dr. Caillier, the defendants argue that Dr. Prout's opinions regarding the extent to which Ms. Stillwell's muscular dystrophy was accelerated by the Incident ought to be preferred.

Determination

[134] As I noted above, the causation issue in this case is not whether the Incident caused Ms. Stillwell's injuries, or whether it accelerated her loss of function beyond the natural progression of her muscular dystrophy. Causation with respect to both of these questions has been established on a balance of probabilities by the expert medical evidence proffered by both parties.

[135] Generally, the burden is on the defendant to establish a pre-existing condition that would manifest itself in the future. That is also conceded and well-established on the evidence. I find that the natural progression of Ms. Stillwell's functional condition was to eventually lose her ability to transfer using her legs and arms to assist her, and that she would eventually have required a sling lift for all of her daily transfers.

[136] I must therefore consider the real and substantial possibilities regarding the progression of Ms. Stillwell's muscular dystrophy absent the Incident, including making findings regarding her pain and function at the time of the Incident, and the relative likelihoods regarding its manifestation in the future. Specifically, I have to consider how far into the future, absent the Incident, Ms. Stillwell would have likely experienced the same loss of function that she experienced immediately as a result of the Incident.

Factual Findings Regarding Causation

[137] Assumptions regarding Ms. Stillwell's level of function before the Incident are a key difference between the opinions of Dr. Berger on one hand, and Dr. Prout and Dr. Caillier on the other.

[138] While Dr. Berger's opinion relies more on Ms. Stillwell's diagnosis than on her medical history, he does rely on an April 2017 clinical notation made by Ms. Stillwell's family physician, Dr. R. Clarke, recommending the Hoyer lift on the basis that Ms. Stillwell was unable to weight-bear. Dr. Clarke testified about, and confirmed, this notation and his reasons for endorsing the purchase of the Hoyer lift for Ms. Stillwell. Although Dr. Berger relies on this assumed fact in his opinion at para. 134 above, and in his opinion generally, he does not assume that Ms. Stillwell had no ability to weight-bear at all before the Incident.

[139] Ms. Stillwell was cross-examined extensively on her pre-Incident ability to weight-bear, as well as on other clinical records and care notes pertaining to her function before the Incident. I also heard the evidence of Dr. Clarke, of Ms. Stillwell's friends, and of a Residence care aide regarding Ms. Stillwell's level of function and ability to transfer before the Incident.

[140] Ms. Stillwell gave her evidence before the Court with great equanimity and clarity, easily conceding the truth of many facts that might count against her. I found her credible and reliable, including when she contradicted the contents of what a doctor recorded in clinical notes put to her in cross-examination. The evidence of the other witnesses familiar with her care and daily routine also strongly supported

Ms. Stillwell's evidence with respect to her predominantly independent pre-Incident function.

[141] Based on all of the evidence, I find that Ms. Stillwell's function was slowly declining as a result of her muscular dystrophy before the Incident, but not anywhere near the rate predicted by Dr. Berger in his report. Assuming that Dr. Berger's opinion that persons with her type of muscular dystrophy are, on average, wholly dependent on ceiling lifts for their daily transfers sometime between their mid-forties and mid-fifties is accurate, Ms. Stillwell was clearly not the average person.

[142] With respect to the introduction of the Hoyer lift into Ms. Stillwell's daily routine in 2017, the evidence is clear that this lift replaced a previous sit-to-stand lift Ms. Stillwell had been using for the previous ten years or so, which was used almost entirely to transfer her into her shower chair. The sit-to-stand lift required her to stand upright while being transferred, whereas the Hoyer lift is a sling lift that carries the entire weight of her body in a type of hammock through the air. Both Ms. Stillwell and Dr. Clarke agreed that this new lift was prescribed in April 2017 primarily to address her limitations on weight-bearing with the sit-to-stand lift. However, the evidence establishes that Ms. Stillwell was still consistently able to weight-bear at the lesser level required for the purposes of her daily transfers in the months leading up to the Incident.

[143] In this regard, the evidence establishes that there are different gradations of weight-bearing ability, and that Ms. Stillwell was successfully adapting her routine as her muscles gradually grew weaker in this regard. She moved from being able to walk in her early forties to being able to stand upright into her early fifties. While she had lost some of the strength that had allowed her to hold herself standing upright for the duration required for the sit-to-stand lift, I find that before the Incident, Ms. Stillwell had clearly maintained the ability to weight-bear on her legs, ankles and feet for the purposes of shift and pivot transfers, without the assistance of a lift or a care aide.

[144] Further, the evidence establishes that there are many variations on the ability to transfer, with different levels of assistance that may be required from time to time. Strategies and equipment may have to change. Different levels of assistance may also be required, varying from complete independence, to requiring some assistance with weight-bearing from a care aide from time to time, to requiring such assistance more frequently, to complete dependence on both a care aide and a sling lift.

[145] On the evidence, I find that Ms. Stillwell's condition went from a level of weight-bearing primarily at the independent level to dependence on a care aide and a swing lift, as a result of her injuries caused by the Incident. This was a significant step down in function.

[146] Ms. Stillwell's injuries resulted in an immediate inability to weight-bear and maintain her transfer function in the months after the Incident because her right ankle and foot were in a cast, and because her left knee was held in full extension by a brace for several months. Ms. Stillwell's early attempts at transferring during this period, and the resulting injury to her wrists, do not establish a post-Incident return to her previous baseline, but rather represent the significance of her immediate losses as a result of the Incident.

[147] To the extent that the clinical records show a period of difficulty with independent shift and pivot transfers in late 2016 and early 2017, I am satisfied that this was an issue with a change in equipment that was resolved more than a year before the Incident. Similarly, periods of wrist weakness were not ongoing at the time of the Incident.

[148] Overall, I consider that the assumptions made by Dr. Prout and Dr. Caillier regarding Ms. Stillwell's clinical history are more supported by the evidence at trial than those made by Dr. Berger. In particular, I find that Ms. Stillwell was sufficiently able to weight-bear and transfer ten to 12 times per day on average in the year before the Incident, and this allowed her to be independent in this respect most days. While she was experiencing some decline in strength in this regard, the

decline was slow and gradual, and it was much more gradual than the averages expressed by Dr. Berger.

Findings Regarding Prognosis

[149] More significant than the differences in the assumptions made by the medical experts, however, is the differences in their approach to the question of prognosis. While Dr. Caillier and Dr. Prout consider Ms. Stillwell's past progression the best indicator of her future progression, Dr. Berger takes a different approach.

[150] Dr. Berger considers that the most important determinant of Ms. Stillwell's prognosis is a precise and accurate diagnosis. His opinion that Ms. Stillwell would likely be entirely dependent on ceiling lifts for transfers within two to three years in any event of the Incident is based on his opinion that persons with her assumed particular subtype of muscular dystrophy will generally be entirely dependent sometime between their mid-forties to fifties. Given that Ms. Stillwell was almost 54 years old at the time of the Incident, Dr. Berger predicts that she only had two to three years (or less) of independence left before she could only be transferred by ceiling lift. At the time of the Incident, Ms. Stillwell had already passed the age where he would have expected to see a complete loss of such function.

[151] The primary difficulty with Dr. Berger's diagnostic approach in this case is his opinion that Miss Stillwell's actual diagnosis is "unclear" and impossible to determine with the requisite precision in the absence of genetic testing, which he did not perform. He suggests that a diagnoses other than muscular dystrophy may in fact be more likely, including a much rarer form of spinal muscular atrophy, or a congenital myasthenic syndrome. No prognosis is provided for those potential diagnoses.

[152] Assuming that Ms. Stillwell has muscular dystrophy, Dr. Berger's view is that she could only have one particular subtype of 24 subtypes, in which case the diagnosis is still highly unusual in her genetic circumstances. Without genetic testing, and the lack of clarity regarding her diagnosis, his opinion is stated to be only "preliminary." In oral evidence, Dr. Berger further elucidated his doubts about this diagnosis. As a result, Dr. Berger's opinion regarding the average age by which

people are generally no longer able to function independently with this particular assumed diagnosis becomes much less useful to the Court.

[153] In addition, despite Dr. Berger's impressive knowledge and research, he provides no external support for his assertion that persons with this diagnosis lose all of their functional abilities to transfer and live without complete care beyond their mid-fifties. For example, he cites no studies to that effect, and the defendants concede that his opinion in this regard is based only on Dr. Berger's own experience in treating and following 150 to 200 people with various neuromuscular conditions, including ALS and various types of muscular dystrophy, as a medical doctor and researcher.

[154] Overall, given the necessity of a clear diagnosis for Dr. Berger's opinion, and the lack thereof, I prefer the approaches of Dr. Caillier and Dr. Prout. Instead of relying on a precise diagnosis of the specific subtype of Ms. Stillwell's muscular dystrophy, they rely more on the progression of her disease to date.

[155] When Dr. Prout was asked to review Dr. Berger's opinion, he stated the following about using the diagnostic approach as opposed to relying on the patient's history to best predict Ms. Stillwell's future:

> It has been suggested by Dr. Berger that gene sequencing to determine the actual subtype of limb-girdle muscular dystrophy (presuming that this is the correct diagnosis) may be helpful both with respect to determining the prognosis and with respect to possible involvement in clinical trials. It is my opinion that the best way to determine the prognosis of a patient with progressive neuromuscular symptoms is to analyze the progression and, over a period of five to ten years, assess the degree to which there has been progressive neuromuscular weakness. Although an accurate diagnosis may allow a somewhat more accurate prognosis, "the proof of the pudding is in the eating": In other words the track record of Ms. Stillwell as it pertains to her very slow progression in neuromuscular functioning is far more pertinent to making a prognostication of her future outcome. In this regard it is my opinion that an accurate genetic diagnosis will not affect significantly the ability to determine Ms. Stillwell's prognosis down the road.
>
> [Emphasis added.]

[156] I find Dr. Prout's methodology and reasoning most compelling in this case.

[157] Although he opined that Dr. Caillier's prognosis is likely optimistic, and Dr. Berger's prognosis is likely pessimistic, Dr. Prout also opined that it "is impossible to predict" when Ms. Stillwell would have likely lost her ability to transfer without a sling lift absent the Incident. He therefore defers to occupational therapists and physiatrists on the longitudinal management of these conditions.

[158] Both Dr. Berger and Dr. Caillier are physiatrists, but I have found that Dr. Berger's diagnosis-based opinion is not reliable for a prognosis in this case. I find that Dr. Caillier's report provides the most detailed and accurate consideration of Ms. Stillwell's history. Dr. Caillier also has a longer history than Dr. Berger in following, supporting, and managing the care of persons with neuromuscular conditions, some of whom she has followed for more than ten years.

[159] Overall, I find Dr. Caillier's prognosis of greater assistance in determining the real and substantial possibilities facing Ms. Stillwell's anticipated loss of function but for the Incident.

[160] I also find Dr. Caillier's opinion that Ms. Stillwell's inability to weight-bear and maintain her regular practice of independent transfers for several months after the Incident led to the loss of strength and function that were almost impossible to regain due to her condition. I do not accept Dr. Berger's conclusions, based on her hand and ankle weakness five years later, that her current weakness is solely attributable to the progression of her muscular dystrophy. This opinion seems to be rooted in Dr. Berger's diagnostic approach. As a result, I agree with the opinions of Dr. Prout and Dr. Caillier that Ms. Stillwell's current loss of strength and function has a great deal to do with her deconditioning after the Incident and her inability to regain full function post-Incident.

[161] Overall, although there are multiple real and substantial possibilities established on the evidence, I must give them weight based on their relative likelihood: *Athey* at para. 27; *Amini* at para. 45, citing *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48. I find that Ms. Stillwell has established that there is a real and substantial possibility that she would have

retained a level of function above her current post-Incident level of function for up to 15 years after the Incident. However, I have to balance that possibility with the other real and substantial possibilities that Ms. Stillwell would have reached her current level of function in a shorter time, including in ten years' time as Dr. Caillier suggests, or even less as Dr. Prout posits.

[162] I also have to consider that Ms. Stillwell's loss of function with muscular dystrophy was gradual and progressive, and that there are many incremental changes to her function that may have occurred before she completely lost her ability to transfer independently, including needing assistance more frequently in the evenings, and then more frequently throughout the day. Some of these changes would have allowed her greater freedom outside the Residence but required more assistance when she is at home. However, all of the above degrees of function would still have afforded Ms. Stillwell more independence than she has experienced post-Incident.

[163] Considering all of the real and substantial possibilities, and their relative likelihoods on the evidence before me, in light of Ms. Stillwell's relative stability pre-Incident and her ability to largely maintain and even slightly improve the function she was left with during the five years post-Incident, I find that a ten-year horizon post-Incident best reflects the real and substantial possibilities and their relative likelihoods for the purposes of assessing damages.

NON-PECUNIARY DAMAGES

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

[165] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> a) age of the plaintiff;
> b) nature of the injury;
> c) severity and duration of pain;
> d) disability;
> e) emotional suffering; and
> f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> g) impairment of family, marital and social relationships;
> h) impairment of physical and mental abilities;
> i) loss of lifestyle; and
> j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

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

The Plaintiff's Position

[167] Ms. Stillwell submits that the Incident has had profound consequences on her life. Although she was living with muscular dystrophy, she lived largely independently and was very involved in her community, primarily because she was able to manage most transfers on her own. Her ability to transfer meant that she was relatively unrestricted with respect to attending public activities, so long as accessible washrooms were available. Now that she is dependent on others for transfers, this aspect of her life is greatly diminished.

[168] Ms. Stillwell's testimony, which was supported by the evidence of staff at the Residence, family and friends, was that she was adventurous and "up for anything."

She travelled and volunteered, and she was not confined to her home or the availability of a specialized lift for the use of a bed or a toilet. The Incident changed all of that.

[169] As a result of her injuries and her loss of independence, Ms. Stillwell's friends and family say that she has lost her spark and now approaches life more cautiously. She is also now dependent on others for various functions including using a toilet and getting in and out of bed. For example, she must arrange a "bedtime" based on the schedules of the Residence care aides. For these reasons, she is essentially at the mercy of others' schedules and priorities.

[170] It is conceded that her slow deterioration of function would have led to a similar state of dependence at some point in the future. However, her natural loss of function happened slowly over the course of many years, giving her the opportunity to adjust to the reduced function, both in terms of making changes to the way she did things, but, most importantly, to psychologically come to terms with those changes and limitations. The dramatic and instant loss of function has affected her mood beyond what such loss would have occasioned had it occurred naturally.

[171] She also has new chronic pain associated with her whiplash injuries which she says is in addition to anything she might have expected in relation to the natural progression of her muscular dystrophy absent the Incident.

[172] Ms. Stillwell seeks $300,000 in non-pecuniary damages. She argues that the multiple fractures, lengthy hospital pain, and development of a new chronic pain condition would warrant an award of $200,000, even without the devastating effects on her function and independence. She says that when one factors in her loss of function and independence, however, the award should be significantly higher.

[173] In this regard, Ms. Stillwell relies on the following cases regarding her physical injuries and chronic pain:

a) *Farrugia v. Bailey*, 2023 BCSC 81: where $200,000 was awarded in relation to the development of chronic pain and the accelerated effects of arthritis;

b) *Borgford v. Ball*, 2022 BCSC 2026: where $250,000 was awarded to a plaintiff of a similar age who had pre-existing rheumatoid arthritis in relation to multiple orthopedic injuries. I note that that case also considered the effects of a traumatic brain injury and severe psychiatric injury; and

c) *Choi v. Ottahal*, 2022 BCSC 237: where $210,000 was awarded to a plaintiff of a similar age in relation to her chronic pain and post-accident development of somatic symptom disorder, and anxiety disorders leading to a loss of independence. While she did have pre-existing health issues, they had not significantly impaired her life before the accident.

[174] With respect to the acceleration of her disability and her loss of function, Ms. Stillwell refers to the following cases, which she says should augment her award:

a) *Agar v. Morgan*, 2005 BCCA 579: where $125,000 (approximately $183,000 adjusted for inflation) was awarded in relation to a three-year advancement of the plaintiff's anticipated loss of function due to his pre-existing cystic fibrosis (this amount was reduced from $175,000 by the Court of Appeal); and

b) *Boren v. Vancouver Resource Society for the Physically Disabled*, 2002 BCSC 1134: where $120,000 (approximately $188,000 adjusted for inflation) was awarded to a quadriplegic plaintiff who was more limited in his ability to transfer from his bed to his wheelchair (thus restricting his independence and mobility) as a result of injuries he sustained during improper transfers by the staff of the defendant.

[175] Ms. Stillwell also relies on *Miner v. Preissl*, [1989] B.C.W.L.D. 046, 12 A.C.W.S. (3d) 313. However, I note that in that case, an award of $125,000 in 1988 (or $275,000 adjusted for inflation) actually resulted in a much lower award of $18,750 because the plaintiff's muscular dystrophy was found to be 85% responsible for her post-accident condition. The method of assessing causation and damages in that case was also considerably different than the current approach at common law.

The Defendants' Position

[176] The defendants acknowledge that Ms. Stillwell sustained multiple fractures to her lower extremities, a broken nose, and some soft tissue injuries, and that she likely experienced significant pain and suffering and loss of enjoyment of life in the acute and healing phases of her recovery. However, they say that all of the injuries healed in due course. Furthermore, unlike many people who sustain lower extremity fractures, Ms. Stillwell was not otherwise disabled from walking, though her already limited function was affected. The defendants also acknowledge that she had issues with her mood which may be partly attributable to the Incident.

[177] The defendants argue that all of Ms. Stillwell's Incident-related injuries have resolved or substantially resolved: the fractures, bruises, and abrasions have healed. Although Ms. Stillwell still has neck and shoulder pain, she had chronic pain in those areas before the Incident which would have likely continued.

[178] The defendants say that the major factors in her mood problems consisted of being in the hospital for two weeks, and then being in lockdown during the COVID-19 pandemic. They note that Ms. Stillwell reported improvement in her mood upon being discharged from the hospital and when the pandemic isolation measures were relaxed. They also say that Ms. Stillwell has since resumed her recreational, social, and volunteer activities, albeit on a reduced basis.

[179] The defendants argue that Ms. Stillwell's life and function were atypical of most plaintiffs who have their injuries assessed by the courts. They say that an award in the range of $100,000 to $150,000 for non-pecuniary damages is appropriate, relying on the following cases:

a) *Goronzy v. McDonald*, 2020 BCSC 869: where $115,000 was awarded to a 49-year-old plaintiff who sustained multiple ankle fractures and required two surgeries. He also suffered soft tissue injuries to a knee and ankle and other injuries. He continued to have functional limitations and daily pain in his ankle, and it was expected that his condition would deteriorate;

b) *Scott v. Cheng*, 2019 BCSC 697: where $125,000 was awarded to a plaintiff who suffered multiple ankle and foot fractures; a fractured and dislocated thumb; soft tissue injuries; various bruises and lacerations; sleep disturbance and mood problems, and a loss of self-esteem. He had ongoing functional limitations and pain several years after the accident;

c) *Kirby v. Loubert*, 2018 BCSC 498: where $140,000 (approximately $166,000 adjusted for inflation) was awarded to a high-functioning incomplete quadriplegic plaintiff who was previously active in wheelchair rugby. His neck was more vulnerable to injury, and he had pre-existing chronic pain. His accident injuries included pressure sores; soft tissue injuries; exacerbation of his pre-existing chronic pain, and an increased risk of degenerative changes. In that case, the Court emphasized that these injuries were serious and had a far greater impact on the plaintiff given his disability, as compared to a person who did not have the same disability, and he had sustained a loss of function due to his injuries;

d) *Pfliger v. Letkeman*, 2014 BCSC 2690: where $130,000 (approximately $164,000 adjusted for inflation) was awarded to an 86-year-old plaintiff with a pre-existing history of degenerative arthritis. Her accident injuries included a severe fracture of her kneecap with ongoing chronic pain in the area and an inability to weight-bear on her right leg, requiring the assistance of a walker. Multiple surgeries on the knee were required, and pre-existing degenerative changes were accelerated. The plaintiff was unable to enjoy most of her pre-accident social and recreational activities

and live life in a fully independent manner. She was to move into an assisted living facility; and

e) *Monych v. Beacon Community Services Society*, 2009 BCSC 562: where $120,000 (approximately $166,000 adjusted for inflation) was awarded to a 42-year-old quadriplegic plaintiff who was relatively active before the accident. He sustained a fracture to his right femur and left tibia/fibula in a fall and developed ischial ulcers due to the hospital stay, during which time his mobility was severely limited. He spent almost a year in the hospital. He could no longer use his manual wheelchair and do independent transfers, drive an automobile, have a shower, or use the toilet after his injuries. He was confined to his bed or electric wheelchair at the time of trial.

Determination

[180] I find that Ms. Stillwell's loss of quality of life as a result of her injuries at the age of 53 were dramatic and resulted in a loss of independence during a time in her life that was particularly valuable to her, given her likely inability to sustain such a lifestyle for much more than ten additional years. Although she had faced various physical and functional losses to date, and relied on some care, she was largely independent when it came to going about her day, seeing her friends, and going on local road trips in the Pacific Northwest. She had weathered various physical and emotional challenges by the time of the Incident, but had always managed to maintain both her independence and positivity.

[181] The evidence establishes that Ms. Stillwell coped with the challenges of her muscular dystrophy with grace and patience. She contributed to her community and to the broader public as a volunteer with Muscular Dystrophy Canada, as a guest teacher at various post-secondary programs, and by working as a liaison at BC Children's Hospital with families of children who had had a recent diagnosis of muscular dystrophy.

[182] The Incident has resulted in a significant loss, particularly the loss of her ability to transfer independently. The loss of being able to control when one gets out of bed and gets back in, or when one may use the toilet, and the freedom and dignity that entails, is a very significant one, on top of her actual injuries and the aggravation of the chronic pain in her shoulders and neck caused by the Incident.

[183] The fact that Ms. Stillwell has previously lived with chronic pain and mobility limitations does not make the increased pain and further assaults to her independence and dignity any less significant. Indeed, it has been observed that independence and function is more precious, not less, to those for whom it is limited: *Bracey (Public Trustee of) v. Jahnke*, [1995] B.C.J. No. 1850 at para. 27, 1995 CanLII 2992 (S.C.), var'd on other grounds 34 B.C.L.R. (3d) 191, 1997 CanLII 2988 (C.A.)

[184] In reviewing the cases provided by the defendants, I find *Kirby*, *Pfliger*, and *Monych* most helpful. These cases tend to suggest a low end of $160,000 (adjusted for inflation). I find that the injuries in *Pfliger* are of similar significance, but I also note Ms. Stillwater's considerably younger age.

[185] *Agar* and *Boren* suggest an award in the range of $180,000 to $190,000 (adjusted for inflation) for the acceleration of an existing disability. However, in my view, those cases were more limited in the loss occasioned than has been suffered by Ms. Stillwell. A number of Ms. Stillwell's chronic pain cases are well above this figure, and I would consider that her losses significantly exceed those in *Choi* but are not as serious as those in *Borgford.*

[186] I also note the following cases that I consider of some assistance:

a) *Kim v Basi*, 2022 BCSC 1793: where $215,000 was awarded to a 72-year-old plaintiff with a pre-existing condition (arthritis in knees), the treatments prescribed were similar to those of Ms. Stillwell, and she required assistance with self care and an orthopedic back brace for a short period. I

note, however, that Ms. Kim suffered a concussion, while Ms. Stillwell did not.

b) *Cheng v. Mangal*, 2021 BCSC 954: where $225,000 was awarded to a 46-year-old plaintiff who had a pre-existing condition and suffered a dramatic change to her physical abilities, and her emotional state, personality and cognition following the accident.

[187] None of the above cases truly capture the nature of Ms. Stillwell's particular losses in this case. The exercise of assessing non-pecuniary damages is highly sensitive to the facts of each case.

[188] Overall, I award Ms. Stillwell $225,000 for her non-pecuniary losses.

COST OF FUTURE CARE

[189] As stated in *Milina v. Bartsch*, [1985] B.C.J. No. 2762 at para. 172, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99 (C.A.), the primary focus of the cost of future care inquiry is the provision of adequate future care. "The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff": *Milina* at para. 172. There must be some evidentiary link between the medical assessments and recommended treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[190] The extent, if any, to which a cost of future care costs award should be adjusted for contingencies depends on the facts: *Gilbert* at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. Rather, in assessing damages, the court does the best that it can based on the evidence before it.

The Parties' Positions

[191] Ms. Stillwell relies primarily on Dr. Caillier's opinion. With respect to managing Ms. Stillwell's chronic pain, Dr. Caillier recommends:

> Recommendations: Ms. Stillwell has limb-girdle muscular dystrophy; thus, the approach to management of her chronic pain is not what we would consider for those who have chronic pain without this diagnosis.
>
> One cannot expect Ms. Stillwell to progress her strengthening exercises to allow for improvement and improved management of her pain as this will likely result in more pain as well as overwork weakness; thus, a different approach needs to be taken.
>
> In my opinion, Ms. Stillwell would benefit from ongoing management strategies for her pain now and into the future. Such strategies are necessary not only for pain management but also to prevent further rapid deterioration in her function.
>
> I recommend that she have at least twice-monthly massage therapy treatments to assist with management of her chronic pain complaints.
>
> I also recommend physiotherapy at least twice monthly for IMS (intramuscular stimulation), stretching, assistive stretching, range of motion and exercise.
>
> In my opinion, she would also likely benefit from engagement in an ongoing exercise program with a kinesiologist or rehabilitation assistant in the pool at least one weekly and at home exercise program once weekly to assist with long term management of pain. She will need lifelong access to an adaptive pool.
>
> As her pain and reduced functional capabilities can result in her becoming more housebound, I also recommend that consideration be given for her to engage in the community that she has a rehabilitation assistant or companion meet with her once to twice weekly beyond going to the pool for her to be out and about in the community as well as engage in activities.
>
> Ms. Stillwell can take, as-needed Advil or Tylenol when experiencing a worsening of pain. Other considerations include topical anti-inflammatories such as Diclofenac 20% or Ketoprofen 10% which can be placed on areas of pain.

[192] In oral testimony, Dr. Caillier confirmed that "now and into the future" signified the remainder of Ms. Stillwell's life. Dr. Caillier's written report recommends lifelong access to an adaptive pool. Ms. Stillwell says that these items should be provided for the remainder of her lifetime because her increase in chronic pain is in addition to the accelerated functional losses she has experienced due to the Incident.

[193] With respect to Ms. Stillwell's loss of function related to the Incident, Dr. Caillier repeats many of the above recommendations, including: massages twice monthly; physiotherapy twice monthly; weekly kinesiology assistance at home (including at least once weekly at the pool; lifelong access to an adaptive pool; counselling; and companion care once or twice weekly for helping her at the pool and with her activities in the community.

[194] Dr. Caillier also notes the requirement for substantial equipment and care to address Ms. Stillwell's loss of function, many of which Ms. Stillwell already has access to, including her specialized bed and sling lift, and the availability of substantially increased levels of care at the Residence. No claim has been made with respect to any increased costs in relation to that care, or for the replacement life of any of that equipment. However, Ms. Stillwell does claim for the following additional items that were recommended by Dr. Caillier "to assist with preventing further rapid deterioration in her function":

a) A standing frame "to allow for stretching as well as weight-bearing through the lower extremities on an at least once weekly basis." Dr. Caillier recommends that consideration be given to Ms. Stillwell to have her own standing frame within the Residence if possible.

b) Having access to a driver or rehabilitation assistant. With respect to the concern that Ms. Stillwell's endurance for driving has been affected by her injuries, Dr. Caillier opined that she "may benefit from having a driver or assistance from a rehabilitation assistant."

c) Finally, having someone to assist her with transfer and care. Dr. Caillier notes that Ms. Stillwell will require such care if she seeks to go on vacations with friends or family.

[195] Ms. Stillwell relies on the report of Jodi Fischer, an occupational therapist with expertise in the costs of future care to determine the costs of these care items. Ms. Fischer also includes a modest sum for disposable briefs, something

Ms. Stillwell now needs for any outings because of her inability to access public toilets since the Incident. She relies on the present value tables provided by Darren Benning for the present value of this care.

[196] Ms. Stillwell argues that the recommended therapies for her chronic pain should be provided for her entire lifetime, while the therapies related only to her loss of function should be provided for the shorter period which has been established to have been caused by the Incident. For example, she seeks an award allocating two monthly massage sessions to her chronic pain management for her lifetime, and another single monthly massage session in relation to Dr. Caillier's recommendations to assist her in maintaining her function for a shorter period. She asks that the other therapies, including physiotherapy and kinesiology, be divided equally as between lifetime treatments for chronic pain and shorter-term treatments attributable to her loss of function.

[197] In the event that I find that Ms. Stillwell's current pain and loss of function are attributable to her Incident-related injuries, and not to the natural progression of her muscular dystrophy (as I have found), the defendants say that Ms. Stillwell has not proven that the recommended care was made necessary by the injury in question. Instead, they say that this care would have been required in any event, given that these therapies are of benefit to anyone with Ms. Stillwell's pre-existing degenerative condition.

[198] At this point, the defendants say that the goal of the recommended care items is only to maintain Ms. Stillwell's function, rather than to improve her function or rehabilitate her injuries. They thus argue that costs of future care are for rehabilitation purposes and are not medically justified, given the uncertainty of further improvement.

[199] If I nevertheless find that Ms. Stillwell will require future care beyond the trial date due to the Incident, the defendants submit that there should be a reduction of some of the recommended future care items referred to by Ms. Fischer and Mr. Benning. I will address these arguments further below.

Determination

[200] I agree with the defendants that the medical evidence suggests that Ms. Stillwell no longer has any hope of regaining her ability to transfer and the independence that comes with that. However, I disagree that this necessarily means that the recommendations endorsed by all three medical experts are not "reasonably necessary on the medical evidence to promote the mental and physical health" of Ms. Stillwell: *Milina* at para. 172.

[201] Dr. Prout expressed his opinion on this as follows:

> … Ms. Stillwell in my opinion suffered a significant step-like deterioration in her functioning directly as a result of the injuries sustained in the motor vehicle accident. She thereafter appeared to improve to a mild degree with ongoing rehabilitation strategies but has now likely plateaued with respect to further improvement and from here on will likely continue to slowly worsen due to her underlying progressive neuromuscular condition (presumed limb-girdle muscular dystrophy). The prognosis for further improvement is therefore poor although with ongoing active rehabilitation and attention to a variety of strategies to improve function, Ms. Stillwell may be able to maintain some of her functional abilities longer with rehabilitation therapies than without.
>
> [Emphasis added.]

[202] The medical evidence establishes that the Incident, and the injuries she suffered as a result, caused an abrupt and significant drop in Ms. Stillwell's strength and function. Since then, she has attended massage therapy three times per month and kinesiology in an adaptive pool twice per week. She was taken to G.F. Strong Rehabilitation Centre where her occupational therapists and physiotherapists would alternate working with her in a standing frame there every week until the pandemic began. They then continued working with her with another resident's standing frame at the Residence. She also regularly attends counselling.

[203] When ICBC stopped funding these therapies, Ms. Stillwell continued with the treatments that she could afford herself, including weekly pool therapy. The defendants have agreed, on a without prejudice basis as to liability and other heads of damages, to compensate Ms. Stillwell's special damages for these therapies to the trial date in the amount of $10,423.

[204] I am satisfied that these therapies are the reason that Ms. Stillwell has managed to maintain her strength and function at its current level since the Incident and to have had the slight improvements noted by Dr. Prout. Without those therapies, I find that the evidence establishes that Ms. Stillwell would have proceeded with the natural decline of her muscular dystrophy from her new, accelerated reference point post-Incident. Instead, she has made some improvements to her function and maintained them for the last five years, with hard work and the availability of the therapies she needs.

[205] Therefore, even though the prospect of further rehabilitation of her function is no longer realistic, the defendants remain liable for the costs of future care to the extent that they maintain Ms. Stillwell's condition to a level as close as possible to what it would have been but for their negligence.

[206] However, the defendants' obligations in this respect are only required to restore Ms. Stillwell to as close to her original position as possible. With respect to her function, I have found that the relative likelihood of the various real and substantial possibilities of those losses occurring gives rise to a 10 year limit horizon in relation to the loss of her strength and function caused by the Incident, which is five years after the trial for the purposes of assessing damages using the present value tables.

[207] I consider that her kinesiology, physiotherapy, occupational therapy, and counselling costs attributable to the Incident are appropriately confined to this ten-year time frame.

[208] With respect to her massage therapy, I consider that this therapy is primarily related to the aggravation of the chronic pain in Ms. Stillwell's shoulders and neck. The medical evidence suggests that this additional chronic pain is not expected to abate over time, and there is no evidence that it would have arisen in any event of her injuries. Some reasonable time frame for this therapy is therefore required, beyond Ms. Stillwell's functional losses. I make this award for a period of another ten years, or 15 years post-Incident.

[209] I turn now to a consideration of the defendants' arguments in relation to some of these specific claims for cost of future care.

Massage Therapy

[210] The defendants argue that Ms. Stillwell was already receiving monthly massage therapy for her neck and back pain, and that Dr. Caillier's recommendations for twice-monthly massage therapy is not clearly related to the Incident. Accordingly, the defendants say that any future care assessment for massage therapy should be reduced by 1/3 from that referred to by Ms. Fischer and calculated by Mr. Benning to reflect the actual recommendation by Dr. Caillier.

[211] I read Dr. Caillier's opinion differently from the defendants. Read as a whole, I find that Dr. Caillier opined that Ms. Stillwell's need for two additional massage therapy sessions per month beyond her pre-Incident use is attributable to the aggravation of her neck and shoulder pain caused by the Incident.

[212] Dr. Callier's opinion that the Incident caused Ms. Stillwell additional soft tissue pain beyond what she had or what she was expected to experience due to her muscular dystrophy is also supported by the opinions of Dr. Prout and Dr. Berger. Dr. Berger opined:

> … I agree with Dr. Caillier's synopsis that Ms. Stillwell likely experienced spinal soft tissue injuries as a result of the subject accident, and it would be very difficult for her to remediate these symptoms without ongoing massage therapy and physiotherapy. She would not be able to participate in traditional active rehabilitation to the point of being able to improve the strength of her postural and core muscles and, therefore, is at risk for persistent spinal pain for the foreseeable future. Passive modalities are really the only option available to her.

[213] I award Ms. Stillwell the costs of two massages per month for 15 years post-Incident, and 10 years post trial.

Counselling

[214] Dr. Caillier recommends that Ms. Stillwell continue to work with a psychologist or counselor to assist with the abrupt change in her function and loss of

independence, as well as the inability to regain pre-Incident function. She deferred to her colleagues in psychiatry or psychology to opine on the number of sessions now or into the future, however.

[215] As the defendants note, Ms. Fischer did not offer her own opinion on the frequency of required counselling but instead spoke to Ms. Stillwell's current clinical counselor, Ms. Banic, who recommended counselling twice per month, at a fee of $130 per session or $3,120 (plus GST) annually. The defendants say that the noted frequency of required counselling constitutes opinion evidence offered by a witness that did not testify. While hearsay referred to by Ms. Fischer may be admissible for the limited purpose of evaluating her opinion, it is not proof of its facts: *Mazur v. Lucas*, 2010 BCCA 473 at para. 44. Accordingly, the defendants say that the claimed costs of future care pertaining to recommended future counselling should be substantially reduced, if not eliminated entirely, given that there is no foundation for the required frequency of counselling.

[216] In my view, Dr. Caillier's expert opinion and the evidence at trial provide a clear foundation for an award to support ongoing counselling. Furthermore, the costs of counselling sessions are generally considered within the scope of an expert on the cost of future care, even if they have to research those amounts for the purposes of their report.

[217] The evidence is that, post-Incident, Ms. Stillwell was attending counselling every three weeks, and this is a service she had not used before the Incident. Allowing for some benefit to this service beyond that made necessary by the Incident, I would award Ms. Stillwell the costs of one counselling session per month.

Functional Driving Evaluation

[218] Ms. Fischer says that a $1,200 functional driving evaluation by an occupational therapist "may also be beneficial." The defendants say that such a recommendation is insufficient to establish a medical justification according to *Noh v. Verjee*, 2008 BCSC 1508, where the Court declined to award costs for future physiotherapy or kinesiology that "might be helpful": at para. 53.

[219] I agree with the defendants that Ms. Fischer's report provides no further justification for that specific recommendation. Furthermore, Ms. Stillwell did not identify this as something she would wish to pursue in her evidence. Rather, the evidence at trial provides a foundation for Ms. Stillwell to attend Alliance Mobility Solutions to address the viability of any potential modifications and associated costs for further adaptive aids. However, there is apparently no fee associated with such an assessment.

[220] I therefore do not make an award in relation to this claim.

Companion Services

[221] Ms. Fischer estimated the average cost of companion services for three hours per week at $33 per hour or $4,752 (plus GST) annually.

[222] The defendants say that the evidence at trial does not substantiate the medical justification or reasonableness required for such companion services, and that Ms. Stillwell is not lacking companionship or support amongst her friends and family.

[223] I find that the evidence establishes that, although she has been making do without support outside her home, Ms. Stillwell has also been measurably cutting back on time spent outside of the Residence because of her loss of function, including time spent with her friends, family, and on her volunteer work. The medical recommendations in this regard include substantially increased care assistance within her home (something Ms. Stillwell makes no claim for presumably because it is included in her housing costs) and companion care outside the home to assist Ms. Stillwell in returning to some of these other activities and pursuing her recommended therapies. If nothing else, this could give her assistance with peri-care necessitated by the lack of access to other toilet options, support in the changeroom for pool therapy, driving support for longer distances that she can no longer manage, and support on longer trips to the extent she might still manage them with support.

[224] Although Dr. Caillier recommends that Ms. Stillwell be provided this support once or twice a week, Ms. Fischer provided a reasonable estimate of three hours a week on average. I consider that this is warranted and reasonable on the evidence.

[225] I would therefore award Ms. Stillwell these costs for ten years post-Incident.

Standing Frame

[226] In her report, Dr. Caillier recommends that Ms. Stillwell would likely benefit from having a standing frame to allow stretching and weight-bearing at least once weekly. She recommends that consideration be given for Ms. Stillwell to have her own standing frame within the Residence. The total cost of this standing frame is $8,720.

[227] The defendants oppose this cost on the basis that Ms. Stillwell has unlimited access to a previously owned standing frame at the Residence. They say that the underlying facts or assumptions upon which Ms. Fischer based her recommendation for a new standing frame are not established in the evidence. Specifically, they argue that it is hearsay in Ms. Fischer's report that the existing frame is an older model with some broken or stripped parts and not enough lateral support. Accordingly, the defendants say that the medical justification and reasonableness of this recommended future cost have not been established.

[228] I note that Ms. Stillwell requires the increased use of many types of equipment, in addition to the standing frame, for which she makes no claim for their replacement cost, including her specialized bed, the full functions of which only became required as a result of the Incident, and her lift, which is now required to be used at a rate of approximately ten times its previous use. In this context, I consider Ms. Stillwell's claim for the replacement of one such piece of equipment, a second-hand standing frame, to be a reasonable one.

Remaining Recommendations

[229] Ms. Stillwell also seeks costs of future care for regular physiotherapy and kinesiology, including the continuation of the pool therapy she has been attending

multiple times per week since the Incident. She also seeks the cost of disposable briefs to (somewhat inadequately) address her inability to use the toilet independently, both at home and while outside her home. Other than the objections concerning whether these costs are properly Incident-related, the defendants raise no specific objections on the evidence, and I consider them warranted for the time frame I have found that causation has been made out.

[230] I make the following awards for cost of future care:

Item	Annual Cost ($)	Multiplier	Total ($)
Massage Therapy	2,520	8.858	22,323
Physiotherapy	5,100	4.712	24,032
Kinesiology	17,861	4.712	84,162
Pool Pass	252	4.712	1,188
Counselling	1,560	4.712	7,351
Companion Services	4,990	4.712	23,513
Disposable Briefs	134	4.712	632
Standing Frame (1x)	8,270	N/A	8,270
Total			**$171,471**

CONCLUSION

[231] The claim is dismissed as against ICBC as the nominal defendant in the place of the operator of the white vehicle. No negligence has been proven with respect to that vehicle.

[232] In conclusion, Ms. Stillwell is entitled to **$406,893** in damages from the defendants, jointly and severally, as follows:

Non-pecuniary Damages:	$225,000
Cost of Future Care:	$171,470
Special Damages	$ 10,423
Total:	**$406,893**

[233] Ms. Stillwell is also entitled to her costs as against Mr. Sohi and Richmond Cabs, subject to any offers or other matters that may require an adjustment to her

costs. ICBC filed a joint response to civil claim and was represented jointly with the other defendants, and I am not aware of any costs particular to that claim, which has been dismissed.

[234] If the parties wish to address costs, they may make arrangements with the Registry within 30 days of receipt of these Reasons to appear before me for this purpose.

"Marzari J."