IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Michael v. Bergeron,*
2024 BCSC 715

Date: 20240430
Docket: M194356
Registry: Vancouver

Between:

Carrie Lynne Michael

Plaintiff

And

Conrad Joseph Bergeron

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:	R.D. Nairne A.M. Wood
Counsel for the Defendant:	E. Haupt J. Moise
Place and Dates of Trial:	Vancouver, B.C. February 5-9, and 12-16, 2024
Place and Date of Judgment:	Vancouver, B.C. April 30, 2024

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Introduction

[1] On May 26, 2018, the plaintiff, Carrie Michael, suffered major and lasting physical and psychological injuries when she was hit in a head-on collision while riding her motorcycle on Highway 3 just east of Osoyoos. She was on her way home to Penticton riding down the switch-back highway towards Osoyoos when the car driven by the defendant crossed the centre line and collided with her motorcycle. She suffered significant physical injuries that required three surgeries and left her which chronic pain and limited mobility. She has developed a severe mental illness because of the accident and ultimately had to give up a life she loved in Penticton to move to Victoria where she is more accessible to medical providers and family. She sues for damages arising from the accident.

[2] The defendant admits liability and substantially admits Ms. Michael's physical and psychological injuries. The main differences in the parties' positions are in the prospects for Ms. Michael's improvement, particularly with her psychological injuries. This in turn founds a disagreement on whether she could potentially return to some kind of work in the future. There are also significant differences as to the amount and cost of future care that Ms. Michael will need and the appropriate award of non-pecuniary damages.

Background

[3] Ms. Michael was 48 at the time of the accident and almost 54 at the time of trial. She grew up in Victoria, B.C. where she graduated from high school in 1988. She attended the University of Victoria for two years and transferred to a veterinary technician program at the University College of the Cariboo, now Thompson Rivers University, in Kamloops. She completed that program in 1993 and worked for a brief period in a veterinarian clinic in Victoria. Soon after, she married and moved to Calgary. She found work as a locum in various vet clinics before landing full-time work at Bowmount Animal Hospital. She completed her Veterinary Technician National Examination in 2009 and worked full-time in that field until the accident. She

described the role of a veterinary technician as akin to being a nurse but in a veterinary setting.

[4] Ms. Michael was perfectly suited to this work. She has a life-long passion for animals and a love of dogs in particular. In Calgary, she lived on an 80-acre property outside the city where she kept dogs and four horses. She rode the horses and ran the dogs alongside. She trained the dogs competitively and did “field trials” with her dogs, a practice where she would follow her dogs on horseback and test their ability to find game.

[5] While in Calgary Ms. Michael put on weight and developed type-2 diabetes, high blood pressure, and high cholesterol for which she began taking mediation. She also experienced frequent headaches that could be severe. She became unhappy and frustrated with her condition so she joined Weight Watchers and started running five or six days a week. She lost over 100 lbs and built up her conditioning so that she ran several half marathons and one full marathon. Her diabetes and high blood pressure subsided and she was eased off her mediations. Her headaches waned to one every two or three months.

[6] In 2014, following a split from her husband, Ms. Michael moved to Penticton with two of her dogs: Irish Setters named Journey and Spiral. She bought a two-level townhouse and quickly found full-time work at Lindsey Veterinary Hospital where she worked until the accident in 2018. The Penticton clinic was busier than the one in Calgary and she found the greater diversity of work and challenges more invigorating and rewarding than her previous jobs. She was happy with her work and her employer was happy with her. She expected to continue in that job until she had enough savings to retire.

[7] Ms. Michael was popular at work and had friends outside of work, particularly Susan Russell who shared her love of dogs. The two of them hiked the hills around Penticton on the weekend with their dogs. Ms. Michael continued horseback riding and doing field trials with her dogs or she would take them on a run. She enjoyed cooking, baking, and quilting before the accident. She also took up motorcycle

riding. Socially, she said she was “never the life of the party” but she enjoyed her time with friends, going out for dinner or drinks or having them over to her place to cook them a meal. She was also an independent person who took pride in looking after herself. She had a very happy life in Penticton, fulfilled by her work, her friends, her dogs, and her activities.

[8] Ms. Michael suffered a bit of a setback in 2016 with a repetitive knee injury and had to take a break from running but this did not affect her ability to work and she continued to walk and hike with her dogs. By 2018, she had resumed a light training schedule for running and was working towards another half marathon.

The Accident

[9] Ms. Michael’s accident injuries are significant. She suffered a dislocation and multiple fractures to her hip. This required immediate surgery following the accident and later required a hip replacement. She sustained a large laceration on her thigh that required ongoing care in the weeks after the accident, a fracture to the kneecap and tears to the anterior and posterior ligament around the knee that later required surgery. Her sciatic nerve was permanently damaged and this, along with other damages muscles in the leg, caused a permanent drop in her left foot as well as chronic pain and discomfort in that foot. Her injuries have substantially and permanently limited her mobility and she has chronic pain, particularly in her hip and to a lesser extent in her left foot and back. In the months following the accident she developed post-traumatic stress disorder and a major depressive disorder, both of which she continues to experience today with severity. She has not worked since the accident and will never be able to return to being a vet technician.

[10] After the accident, Ms. Michael was taken by ambulance to South Okanagan General Hospital for immediate treatment and then flown that same day to Vancouver where she was admitted to Vancouver General Hospital. The following day she had surgery to repair the multiple hip fractures. While the surgery was well-performed by all accounts, her hip would continue to give her constant pain, including after a hip replacement in 2023.

[11] Ms. Michael's sister, Michele Hetherington, immediately flew to Vancouver from her home in Portland, Oregon to help out.

[12] Ms. Michael recovered in hospital for three weeks. She was discharged on June 19, 2018 and had to use a wheelchair for several weeks thereafter. Ms. Hetherington took Ms. Michael to Victoria where she could stay in their father's house to recover. Her father lived in a rancher which is mostly one level except for a sunken living room and some stairs to ascend to the house. Apart from these challenges, Ms. Michael could navigate the wheelchair about the house. She used a walker or crutches when moving from the wheelchair to her bed or another chair. With the assistance of an occupational therapist, the house was equipped with wheelchair ramp so she could negotiate the few stairs.

[13] Ms. Hetherington stayed to care for Ms. Michael at their father's house for several months after the accident and Ms. Michael needed that help. She could not dress herself or use the washroom without assistance. Ms. Heatherington helped her brush her teeth, shower, and wash her hair. Ms. Michael could not negotiate the shower in her father's home so once she became more ambulatory, Ms. Heatherington took her to the community centre where she could use the disabled shower stall. A nurse came in twice a week to tend to Ms. Michael's thigh wound and Ms. Hetherington learned how to change the dressing. Ms. Hetherington drove Ms. Michael to her medical appointments, took notes during the appointments, and provided emotional support. She did the cooking, cleaning and laundry and attended to all Ms. Michael's needs. There is no question that Ms. Hetherington's help was indispensable in the months following the accident.

[14] Ms. Michael gradually became more mobile and, with the help of an occupational therapist, she worked her way out of the wheelchair and started using a walker. She later graduated to crutches, and then to one crutch, before ultimately being able to walk just using a cane which she still uses.

[15] In November 2018, some six months after the accident, Ms. Hetherington took Ms. Michael back home to Penticton. A friend moved her bed from the second-

floor to the main floor so she would not have to manage stairs. She used a powder room on the main floor as a bathroom and went to the community centre to use the disabled shower.

[16] By this time Ms. Michael was still feeling a deep constant throbbing pain in her hip, a grading “bone-on-bone” pain in her knee, and pain in her foot that was agitated with even a light touch. She said there had been some modest improvement by the time she returned to Penticton in that she was not “super miserable” but the pain still limited everything she did. By then she was able to dress herself, prepare light meals, do small loads of laundry, and manage her own basic needs. Friends came in to help her clean bathrooms and vacuum but around mid 2019 she engaged professional cleaners.

[17] Her older dog, Journey, came back to live with her after being, boarded along with Twist, by Ms. Russell. Journey, was an older dog who was less energetic than Twist so Ms. Michael was able to manage her for short walks. Friends also helped by taking Journey for longer walks. Journey provided Ms. Michael with important companionship during this time – a “warm presence” in her life, as she put it – that gave her reason to get out for a walk. However, Twist was younger and still needed considerable exercise which Ms. Michael could not provide. She had to give up Twist to a new home which devastated her.

[18] When Ms. Michael moved back to Penticton she was still feeling confident she would recover from her injuries. She regularly went to physiotherapy and saw a kinesiologist. She did regular exercises and rehab work. She addended counselling to work on sleep problems and driving anxiety. At that time, she felt that as long as she followed the instructions of her doctors and other therapists she would heal and move on. However, her pain – especially in her hip – persisted despite her regimented exercises and activity and her knee was unstable due to ligament damage. She would later receive surgery to improve the knee but, before that, it would give out from time-to-time and she would collapse. She also developed a persistent ache in her back that became progressively worse. She believes this is

related to using her back to overcompensate for her hip limitations which have caused her to alter her gait. She also developed severe headaches that became worse and more frequent over time and insomnia that also worsened.

[19] Eventually, Ms. Michael's emotional state and mental health took a marked turn for the worse and she has developed severe depression or Post Traumatic Stress Disorder (PTSD). She saw a psychiatrist once while living in Penticton who started her on an anti-depressant. With time and a dose increase this medication helped with some of her more severe and spontaneous anxiety symptoms but overall her depression grew.

[20] In July 2020, Ms. Michael had a fall in her Penticton home. The previous day she had been doing some home exercises when her knee collapsed. This turned out to be a tabular fracture (from the accident) but that was not diagnosed until later. She managed to drive herself to the emergency ward but the fracture was not diagnosed at that point. The next day as she was getting Journey ready for a walk she collapsed again and was not able to get up. A friend found her some time later.

[21] This incident scared Ms. Michael intensely. It made her feel alone and vulnerable so she decided to move back to Victoria where she was more accessible to family and closer to the medical professionals that had treated her. Friends helped Ms. Michael pack up the townhouse, which she sold, and in October 2020 her brother and nephew rented a truck and moved her to Victoria. She felt defeated having to leave Penticton where she had her home and friends and had built a very happy life before the accident.

[22] Shortly before leaving Penticton, Ms. Michael had to put Journey down. Journey had developed some medical problems of her own and was not able to walk. Although Journey was elderly by then, Ms. Michael felt intense guilt about not being able to treat her. She thought there might be some treatment for Journey's condition but since she was not working she could not afford the cost of veterinarian treatments, Ms. Michael was left with no choice but to put Journey down. That still weighs heavily on Ms. Michael.

[23] In Victoria, Ms. Michael bought a two-bedroom condominium. It had some features to accommodate her condition but, being on the third floor, it is not ideal. It is not unusual for the elevator to be out of service and it is challenging for Ms. Michael to walk up the stairs. There is a lip on the shower sill which is a tripping hazard for her dropped foot. However, she is content with the home and likes the area she is in because it is close to the community centre where she works on her fitness and rehabilitation and to her appointments.

[24] In August 2021 Ms. Michael had knee surgery to repair some of the ligament damage. The recovery was lengthy and painful. She was on crutches for several weeks and Ms. Hetherington came from Portland again to look after her. Over the course of several weeks she transitioned to a cane and ultimately her knee was in much better shape. She said that the number of times she feels it is going to give out has drastically reduced and she no longer has an imminent fear of collapsing. However, she still feels pain in her knee when she is walking up or down a hill.

[25] In February 2023 she had hip replacement surgery. She was hopeful this would finally resolve her chronic hip pain but it has not and, while the surgery was well performed, the continuation of her hip pain has deeply disappointed Ms. Michael and this has profoundly impacted her mood and depression.

Present Circumstances

[26] Ms. Michael continues to have significant pain in her hip despite the two surgeries. It, along with her PTSD or depression, is her most limiting injury and the one that upsets her the most. She described it as ranging from a “nagging, constant throbbing in the hip” to more severe pain that feels like “someone is twisting [her] leg off”. It is not completely debilitating in that she is able to drive, walk short distances, and move about her home but she is not able to sit in one place for more than 20 or 30 minutes unless on a couch where she can open up the angle of the hip. This will give her approximately an hour before she must move. She can stand for no more than 10 or 15 minutes and must hold something for support. She can walk short distances but carries a cane for security or walking poles for support. She can walk

on a treadmill using support bars for 20 or 30 minutes. When she overuses her hip or pushes herself too hard at the gym she will have a flare up that sends pain down her leg to her foot and it takes a day or so to subside. She is not able to bend down to do her own footcare so a care aid comes in once a month to assist. She continues to have a dull ache in her lower back which she relates to the twisted way she sits to manage her hip pain but says this back pain is not always present and is the least of her problems.

[27] Her knee is much more stable since the surgery but it still gives her some pain when walking up or down hills. Her left foot naturally falls in a downward slope, apparently because of the sciatic nerve injury but also perhaps due to muscle damage in the leg (both accident-related). This makes it difficult to walk without catching or dragging her toes. She wears a dynamic ankle foot orthotic which holds up her foot. This is a permanent condition. After the accident she had a constant feeling of pins and needles in her foot. It would feel ice-cold at times and then move to feeling like it was on fire. These sensations have subsided to some degree but she still experiences them.

[28] She had regular headaches that started while she was in the hospital and became more frequent and intense over time. Before the accident, she managed headaches by distracting herself with a book or chatting with someone but the post-accident headaches reached a point where she must be still in a dark room until they subside. She says they vary in frequency but generally come two to four times a month and can last a day or up to four days.

[29] Due to her limited mobility, Ms. Michael has again put on some weight and her cholesterol levels and blood pressure crept up. Her blood work indicates she is back in the range for diabetes but, as of yet, has not had to resume medication for that. She has managed to get her blood pressure under control at the moment.

[30] Ms. Michael regularly attends her medical, physio/kinesiology, and counselling appointments. She has also found some pleasure in a recumbent trike that was recommended by her knee surgeon. It allows her to sit back in a semi-

reclined position and pedal with her legs stretched. She has an electric version with pedal assist. She has used it to get around to do some errands or attend her nearby appointments while getting some exercise which makes her feel better. She used to take the bike to a local coffee shop to read and be around people but, since she is not working, she can no longer afford to do that.

[31] Ms. Michael's sleep problems persist every night. When she closes her eyes to go to sleep at a reasonable hour her "brain takes over" and she relives the accident in her mind. This prevents her from sleeping. She has taken sleep medications – primarily Zopiclone – but it has limited benefits and makes her foggy in the morning. She has tried other medications, including Dayvigo, but she found this gave her nightmares and night sweats so she stopped taking it. She is receiving counselling and Cognitive Behavior Therapy (CBT) to assist with her mental health and her sleep but with limited success. She has taken to staying up as late as she can so that she becomes so tired she is forced to sleep.

[32] Her depression or PTSD is severe. She has taken various medications for it that have helped to cope somewhat with the anxiety but she is still intensely depressed. She has frequent suicidal ideations and questions the point of living in her present condition. Recently these have been as much as once a week or more. She says there are days where she cannot bring herself to get out of bed because her future seems bleak to her. She fights with herself to make her counselling appointments but rarely misses them.

[33] She lives a fairly reclusive life. She sees her dad once in a while and she gets out the gym or to her appointments during the day but she does not like socializing and described one very difficult time at Christmas when her neighbours invited her over for a visit. She was grateful for the invitation but found the interaction overwhelming, except that it gave her some time to sit with their dog.

[34] She said on a good day she will be out of bed by 9:00 and will get to her physio or other appointments and to the gym in the morning and do some errands in

the afternoon. She spends time at home reading and has taken up painting. She and Ms. Heatherington paint together over Zoom calls once or twice a week.

[35] On a bad day, Ms. Michael struggles to get out of bed. She said these usually happen when she has been unable to sleep the night before and everything seems bleak in the morning. There are days when she simply does not get out of bed and cannot find the energy to move around. She said she is having bad days more frequently now than she used to and attributes it to the feeling of hopelessness she has over her chronic pain, knowing it is not likely to get better.

[36] In June 2023 she was able to secure a family doctor in Victoria who has referred her to a physiatrist, Dr. Winston, who specializes in the treatment of chronic pain. She is still waiting for Dr. Winston's office to contact her for an appointment. Her family doctor has also started her on Brexpiprazole to treat her anxiety and depression, apparently because of a recommendation in Dr. Lu's expert report, discussed below. She has not seen a psychiatrist in Victoria and her family doctor has not referred her to one. She has received regular counselling and CBT which she says is helpful but extremely difficult.

Expert Evidence

Physical Medicine and Orthopaedics

[37] Dr. Hubert Anton is a physical medicine specialist called by Ms. Michael. His opinions about Ms. Michael's physical injuries are largely undisputed. He described the dislocation and fractures in her hip as having been serious. He opines that her ongoing hip pain is related to the soft tissue structures around the hip and pelvis rather than the joint itself and this pain is now chronic and unlikely to improve.

[38] He opines she has suffered permanent damage to her sciatic nerve and her foot drop, which he believes is caused by damage to the muscles in the leg, is likely now permanent and may worsen with increased muscle fatigue. He suggests she will always require her ankle orthotic to support the foot. He opines that she has reached maximal medical improvement with her chronic pain and her mobility.

[39] Dr. Anton opined that Ms. Michael is at increased risk of further surgeries for her hip and knee. A prostatic hip will typically last 20 or 25 years depending on the strain placed on it so she may be due for a hip replacement in her mid to late 70s. A second hip replacement will be more difficult because of the old hardware that was used to reconstruct the hip immediately after the accident. He also suggested another knee surgery may be necessary, although he agreed in cross-examination that she is at "very low risk for needing more knee or hip surgery." He suggested she has mild osteoarthritis in her left knee, but Dr. Leith disagreed with this and Dr. Stone, who did her knee surgery, said she is at increased risk for osteoarthritis in the knee. I take Dr. Stone to mean she does not presently have that.

[40] Dr. Anton opines that Ms. Michael's back pain is likely related to mechanical loads on her spine that may emanate from sustained bending of the waist, prolonged sitting without good trunk support, and/or repetitive impact. This is consistent with Ms. Michael's own belief that her back pain has resulted from her distorted postures to manage her hip pain.

[41] Dr. Anton commented briefly on her anxiety and depression, essentially noting that it rated high on screening tests he administered. He opined that depression or post-traumatic stress disorder can make chronic pain worse and harder to treat. Chronic pain, in turn, exacerbates depression and PTSD as a constant reminder of the traumatic event. That is consistent with Ms. Michael's condition, which is further complicated by her disordered sleep and her weight gain.

[42] Dr. Anton opines, and it is not disputed, that all of these conditions were caused by her accident injuries. He suggests those injuries increase her risk for a more rapid decline in mobility and physical activity with aging than would otherwise have been the case without the accident.

[43] Dr. James Stone is an orthopaedic surgeon who began treating Ms. Michael in September 2018, shortly after the accident. He has seen her in excess of 15 or 20 times since. He also did her knee surgery in August 2021 and referred her for hip replacement surgery. He states in his report that the knee surgery was successful in

gaining stability of the joint but there was some remaining instability due to muscle function around the knee. He said he would not expect her to be perfect after the knee surgery, just better. He said the knee will “never be normal” and he puts the chances of her needing a full knee replacement at some point at higher than 50%.

[44] He opines she is at significant risk to develop post-traumatic osteoarthritis in the knee which is further heightened by the sciatic nerve injury. He opines the sciatic nerve damage, which is permanent, and unstable muscles in the leg are causing the foot drop. He says she is likely to be permanently dependent on assistive devices for walking, although he notes that her recovery, which he attributes to her perseverance and adherence to rehabilitation, has surpassed his own expectations.

[45] Dr. Jordan Leith is an orthopaedic surgeon who was called by the defendant. His opinions are largely consistent with Dr. Anton’s. They differ somewhat on the cause of the foot drop in that Dr. Leith considers it to be related to the sciatic nerve damage but since it is not disputed that the injury was ultimately caused by the accident, nothing turns on this difference of opinion.

[46] Dr. Leith opines her knee surgery was very successful and, although Ms. Michael suggests some ongoing pain when walking up or down an incline, he opines that the reconstruction of her knee was very good and it should not give her trouble. He opines there is a “theoretical risk” that she may require a total knee replacement but considers it to be unlikely. I prefer Dr. Stone’s opinions about the condition of Ms. Michael’s knee for the simple reason that he did the surgery himself and has been Ms. Michael’s treating orthopedic surgeon for several years who has seen her frequently, albeit not recently.

[47] Dr. Leith disagreed with Dr. Anton that osteoarthritis has developed in the knee and commented that there is no longer osteoarthritis in the hip after the replacement surgery. He opines that another hip replacement is highly unlikely.

[48] The main difference in opinion between Dr. Leith and Dr. Anton is that Dr. Leith is quite optimistic about Ms. Michael's ability to resume work, albeit in a sedentary job.

Psychiatry

[49] There is substantial agreement between the two psychiatric experts that Ms. Michael is suffering from serious psychological injuries that were caused by the accident. As Dr. Derryck Smith, the defendant's expert psychiatrist, states in his report, "Ms. Michael is seriously ill from a psychiatric point of view and needs immediate and intensive psychiatric treatment."

[50] Dr. Shaohua Lu, a psychiatrist called by Ms. Michael, opines that she is suffering from moderate-to-severe PTSD. This condition is chronic with her having experienced it for more than five years. He writes:

> The 2018 MVA fully meets the DSM-5 definition of a traumatic event; she suffered life-altering injuries and her life was threatened. She clearly reacted to the accident with fear and anxiety. Her anxiety was markedly aggravated by her multitude of injuries.

[51] Dr. Smith states that Ms. Michael is experiencing symptoms of "significant psychiatric illness". He opines that she is suffering from severe Major Depressive Disorder, severe PTSD, severe Insomnia Disorder, and Somatic Symptom Disorder with predominant pain.

[52] For the Court's purpose, the fact Dr. Lu focuses on PTSD while Dr. Smith focuses on major depressive disorder is not material. As Dr. Lu states, there are "multiple overlaps between PTSD and major depression; they share similar underlying biological and psychological mechanisms." He adds that Ms. Michael would meet the criteria for major depression in that its symptoms and effects on the patient are similar to PTSD and the treatments are "basically the same". It is the fact that Ms. Michael is fighting serious mental illness due to her accident injuries that is significant for the Court's perspective.

[53] Dr. Lu does not believe Ms. Michael fully meets the diagnostic criteria for Somatic Symptom Disorder but he does not especially quarrel with Dr. Smith's diagnosis of it. Dr. Lu notes that he (Dr. Lu) tends to be conservative when diagnosing that condition, but says she is clearly at risk of developing it and he would not be surprised if she did. He says it would greatly worsen her prognosis and condition if she did. He says the treatment he recommends for PTSD is largely the same as the treatment for Somatic Symptom Disorder.

[54] Dr. Lu comments on the reciprocating link between chronic pain and major depression/PTSD, including the fact they build off each other. He identifies this as a significant problem for Ms. Michael.

[55] Dr. Lu suggests some medication adjustments for Ms. Michael and says this will likely need ongoing monitoring. He suggests she has benefitted from counselling and should continue with psychological support on an as-needed basis with at least 24 sessions per year for at least five years. He suggests when her mental health is more stabilized she have specific trauma therapy.

[56] Dr. Lu opines that Ms. Michael has a poor prognosis and is likely to have indefinite disability. He states her PTSD is "unlikely to remit even with optimal treatment."

[57] Dr. Smith opines that Ms. Michael should have immediate treatment from a psychiatrist and CBT from a Ph.D.-level psychologist. He opines that a less qualified psychologist is unlikely to have the skill and training needed for the kind of therapy Ms. Michael needs. He also suggests some different approaches to medications. He emphasizes as well that it is crucial that Ms. Michael's insomnia disorder be treated quickly and effectively as that is an impediment to her improving her other mental health conditions. He opines that Ms. Michael is currently impaired from any type of employment due to the severity of her psychiatric illness. He considers Dr. Lu's recommendation for 24 sessions of psychological counselling a year for a minimum of five years to be excessive. He suggests 12 to 16 sessions followed by a report

from the treating psychologist from which it can be assessed what additional treatment would be appropriate.

[58] As I read Dr. Smith's report, he is guarded in his prognosis, meaning (as he explains) there is not enough information available to know or foretell an outcome. He states that Ms. Michael has received less than ideal psychiatric treatment to date and he anticipates significant improvement in her symptoms and functioning within six months with his treatment recommendations. He says the long-term prognosis can be more effectively addressed after six months of active treatment.

[59] Dr. Lu does not disagree that Ms. Michael would benefit from psychiatric treatment but he did not recommend it in his report because, as he put it, "I know it is not going to happen." He said even with a referral there is no reasonable prospect of Ms. Michael seeing a psychiatrist within a year or more.

[60] There is no dispute in the expert evidence that all the injuries and conditions I have described were caused by the accident and the defendant does not suggest otherwise. I would add that Ms. Michael was a very credible witness and I accept her evidence, which was largely unchallenged.

Non-Pecuniary Damages

[61] Ms. Michael was in a serious and traumatizing accident that caused her significant permanent physical and psychological injuries. The severity of the accident itself – a head-on collision while she was in the vulnerable and exposed position of being on a motorcycle – is illustrated by the fact she cannot fall asleep at night without envisioning the accident. The immediate aftermath of the accident involved a lengthy hospital stay and months of acute mobility limitations while she worked at rehabilitation. Though her shattered hip was repaired with surgery and later replaced, the chronic pain has persisted and severely limited her mobility compared to her pre-accident active life. Once a marathon runner and hiker, Ms. Michael can now only walk short distances using a cane or poles for security. She cannot sit for longer than 45 minutes or an hour without being in pain. She has a permanent foot drop that impedes her ability to walk and move safely about her

home. She has lost the ability to work at the job she was passionate for. She is severely mentally ill because of the accident and has regular suicidal thoughts. She had to give up the life she built for herself in Penticton around her work, her friends, her outdoor activities, and her dogs to move to Victoria where she now lives an isolated life. There is no real prospect for her physical injuries to improve but some prospect for her mental health to improve if she can get access to the necessary treatment.

[62] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Money awarded under this head of damages does not place a dollar value on the loss but rather is intended to provide a plaintiff with reasonable solace for injuries and to substitute other enjoyments and pleasures for those that have been lost: *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 262; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636. A common but non-exhaustive list of factors typically considered in assessing non-pecuniary damages include the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital, or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

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

[64] Counsel for Ms. Michael argues she should be awarded $430,000, which is close to the current rough upper limit for non-pecuniary damages. The upper limit is generally reserved for cases involving injuries that are catastrophic or close to catastrophic but not necessarily limited to cases of paralysis or severe brain injury:

Wilhelmson v. Dumma, 2017 BCSC 616 at paras. 182-184. Counsel argues that Ms. Michael's severe depression has had a catastrophic or near catastrophic impact on her life, warranting an award at the upper limit. He argues that it is past time for courts to recognize that a severe mental illness, such as major depressive disorder or PTSD, that is caused by a defendant's negligence should be treated on an equal footing with physical injuries such as paralysis or a brain injury when it has a similarly debilitating effect on the plaintiff's life.

[65] I agree with the plaintiff that there is no reason to treat a mental disorder any differently to a physical injury if its effect on the plaintiff's life is equally severe. I also accept that a mental illness can be equally debilitating as a severe physical injury. Severe depression can be paralyzing. However, my task is not to start with the upper limit and justify its application but rather to assess an appropriate award for non-pecuniary damages without consideration of the upper limit. The upper limit only becomes relevant if the award I find appropriate exceeds that limit, in which case the upper limit acts "like a governor on an engine" to limit what might otherwise be an unlimited sum: *Boyd v. Harris,* 2004 BCCA 146 at paras. 31-32.

[66] In support of her claim, Ms. Michael cites *Grabovac v. Fazio*, 2021 BCSC 2362 ($350,000 or $384,757 with inflation); *Sebaa v. Ricci*, 2015 BCSC 1492 ($180,000 or $225,249 with inflation); *Zacher v. Prescesky*, 2019 BCSC 500 ($300,000 or $348,167 with inflation); *Tomkins v. Bruce,* 2012 BCSC 266 ($200,000 or $261,221 with inflation); and *Ho v. Ip,* 2019 BCSC 2220 ($280,000 or $324,956 with inflation). Of these, I consider *Zacher* and *Tomkins* to most closely parallel Ms. Michael's circumstances, and *Grabovac* merits some comment. However, I keep in mind counsel's submission that none of these cases meaningfully address the severity of the mental illness in the nature Ms. Michael is experiencing.

[67] In *Zacher*, the plaintiff was a 25-year-old chef who was struck by a car when crossing a street at night in a crosswalk with the walk signal in his favour. Like Ms. Michael, he suffered a hip fracture that required immediate surgery and gave him chronic pain thereafter, affecting his gait and ability to walk for more than an

hour. Also like Ms. Michael, he suffered a knee injury (though not treated with surgery), back injury, headaches, weight gain, insomnia, and major depression or PTSD. He had also been passionate about his job as a chef but was unable to work because of the accident, other than doing some volunteer hours. Unlike Ms. Michael, he suffered cognitive problems attributed to a concussion but also unlike Ms. Michael, there is no suggestion in the evidence of frequent suicidal ideations like those Ms. Michael experiences. Justice Affleck found that the injuries had a profound adverse and permanent impact on the plaintiff's life and it was "no exaggeration to describe them as catastrophic". He noted at para. 50 that the upper limit was then $350,000 and at para. 51 awarded $300,000 for non-pecuniary damages which is $348,167 in today's values.

[68] In *Tompkins*, the 50-year-old plaintiff was in a head-on, high-speed collision on the Sea-to-Sky Highway. He was knocked unconscious and suffered, among other injuries, multiple hip fractures and a knee fracture, both requiring surgery and a 28-day stay in hospital. He also suffered rib fractures and a collapsed lung. He required constant care in the months after leaving hospital but gradually became more independent. He required further knee and hip surgery the following year and had a hip replacement two years later. Like Ms. Michael, he continued to suffer chronic pain and was unable to sit or stand comfortably except for short periods of time. He would not be able to return to work. The likelihood of further surgeries in the future was relatively high – more so than I consider likely for Ms. Michael. He also suffered from "psychological mood change" caused by the accident and that led to "irritability, anger and depression." These psychological injuries appear to be much less severe than Ms. Michael's and Justice Curtis found they can "quite likely be treated and improved". Curtis J. found that the plaintiff's injuries were not so severe that they warranted an award at the upper limit (then about $330,000). He said there is a "good chance that continued physical training will maintain [the plaintiff's] strength and may well improve his mobility and flexibility". The expert evidence in this case does not suggest this kind of optimism for Ms. Michael's condition. Curtis J. awarded $200,000 in non-pecuniary damages which is about $260,000 in today's values.

[69] While *Tompkins* has some close parallels with Ms. Michael's physical injuries and their impact, I treat the case with some considerable caution, even making an inflation adjustment to the award. *Tompkins* is now twelve years old and in *Valdez v. Neron*, 2022 BCCA 301 at para. 58 Justice Abrioux warned that simply adjusting awards in older cases for inflation "ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component". Moreover, Ms. Michael's psychiatric injuries are substantially more severe than what Curtis J. described for Mr. Tomkins.

[70] The defendant argues that non-pecuniary damages should be in the range of $225,000 to $275,000. The defence relies on *Moges v. Sanderson*, 2020 BCSC 1511 ($200,000 or $230,000 with inflation); *Burr v. Sharma*, 2023 BCSC 1559 ($215,000); *Carver v. Or,* 2017 BCSC 1496 ($130,000 or $159,000 with inflation); *Jackson v. Lindsay*, 2022 BCSC 793 ($200,000); *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96 [*Steinlauf*] ($225,000 or $250,000 with inflation); *Gill v. Apeldoorn*, 2019 BCSC 798 ($200,000 or $230,000 with inflation); and *Tan v. Mintzler and Miller*, 2016 BCSC 1183 ($210,000 or $275,000 with inflation). Of these I consider *Moges, Jackson*, and *Steinlauf* to most closely parallel this case.

[71] In *Moges* the 25-year-old plaintiff (31 at trial) suffered injuries to his knees, arms, neck, wrist and ankle with myofascial pain that became chronic. Unlike Ms. Michael, none of his injuries required surgery but they did limit the duration of the time he could walk or do sedentary tasks to about an hour. On my read of the judgment, however, the physical injuries are less severe than Ms. Michael's. The plaintiff also developed migraine headaches, major depressive disorder, generalized anxiety disorder, somatic symptom disorder and insomnia. He had suicidal ideations and Shergill J. said his deep personal religious convictions prevented him from attempting suicide. His psychiatric injuries persisted despite treatment from several different psychiatrists. Shergill J. described his psychiatric disorders as "moderately severe". She awarded $200,000 in non-pecuniary damages.

[72] In *Jackson*, the 26-year old plaintiff suffered severe physical injuries when he rode his dirt bike into a metal-link chain strung across the road that was barely visible. His injuries included two broken arms and a shattered pelvis, both of which required immediate and significant surgery. He also suffered a cracked eye socket and nerve damage in his leg. He was in hospital for about two months post-accident and, like Ms. Michael, he had to use a wheelchair and later crutches in his slow rehabilitation. He walked with a permanent limp after the accident and suffered from chronic pain with limitations that were expected to worsen over time. He suffered from mood and personality challenges, which Verhoeven J. attributed to the accident, but there was no expert psychiatric evidence and it does not appear that the plaintiff's psychiatric injuries are comparable to Ms. Michael's. Verhoeven J. awarded $200,000 in non-pecuniary damages.

[73] In *Steinlauf*, the 26-year-old plaintiff suffered significant physical (myofascial) and psychiatric injuries from a severe accident. He had been working as a police officer and was unable to return to that work after the accident but was able to do sedentary, administrative duties. He developed chronic pain and walked with a heavy limp. Unlike, Ms. Michael, he did not require any surgeries. His PTSD, anxiety and depression, and Somatic Symptom Disorder was particularly severe. Like Ms. Michael, he had regular nightmares and visions reliving the accident. All his physical and psychiatric injuries led to disrupted sleep and cognitive problems. Justice Basran awarded him $225,000 ($250,000 in today's values) in non-pecuniary damages.

[74] No two cases are ever identical and thus it is not surprising that none of the cases cited by either party capture the specific constellation of Ms. Michael's injuries or the effect they have had on her life. Counsel for Ms. Michael suggests *Grabovac*, though not particularly on point for the specific injuries, represents something of a new threshold for considering non-pecuniary damages for cases involving chronic pain and depression. In that case Chief Justice Hinkson awarded $350,000 in non-pecuniary damages. Counsel points out that while the plaintiff's physical and psychological injuries in that case are not especially comparable to Ms. Michael's,

Ms. Michael is, overall, no better off then the plaintiff in *Grabovac*. A substantial reason for the relatively high award in *Grabovac* was Hinkson C.J.S.C.'s conclusion that it was unlikely the plaintiff would be capable of having children because of the accident. While this is a reason to distinguish *Grabovac* from the present case, people like Ms. Michael who do not have children (by choice or otherwise) have other passions in their lives that provide particular meaning, the loss of which can be devastating. Ms. Michael certainly had that in the life she built for herself in Penticton that she had to give up. I thus tend to agree that the impact of the accident on Ms. Michael's life is different but no less severe than the impact on Ms. Grabovac's life.

[75] With respect to Ms. Michael's mental health, she is, as Dr. Smith observed, "seriously ill". Her frequent and ongoing suicidal ideations are very concerning and illustrate the severity of her condition. I accept that there is reason to anticipate improvement if Ms. Michael is able to get regular treatment from a psychiatrist but the wait time for a referral could be considerable and, even then, it is difficult to assess her prospects for improvement. The fact Ms. Michael has regularly received cognitive behavioral therapy, albeit not with a psychologist with the level of education Dr. Smith believes in necessary, suggests a persistence with her mental health challenges. There are days when Ms. Michael's depression or PTSD is so severe as to be debilitating, to the point she is unable to get out of bed or leave the house. Most days, fortunately, she is able to get herself up and going but it is a struggle.

[76] I am persuaded that Ms. Michael's depression and/or PTSD that was caused by the accident is particularly severe and, at times debilitating but not constantly so. It is, however, more severe than even the significant levels of depression and PTSD described in *Steinlauf*, *Moges*, and all the cases cited by the plaintiff herself. Thus, while I am not persuaded that it tops out the upper limit of non-pecuniary damages, I agree that, when considered along with Ms. Michael's permanent physical injuries and the overall disruption and impact of all the injuries on Ms. Michael's life, an award in the higher range of non-pecuniary damages is appropriate. I award Ms. Michael **$350,000** in non-pecuniary damages. I include in this a non-pecuniary

element for future loss of housekeeping capacity that has not been provided for in the future care costs.

Loss of Earning Capacity

[77] Ms. Michael has not worked since the accident. It is not disputed that she has been unable to do so and still cannot at present. Thus, the parties agree she is entitled to be compensated for her past loss of earning capacity but disagree on quantification.

[78] With respect to future loss of earning capacity, Ms. Michael would like to work again someday and agrees it would probably be good for her mental health to do so. However, her counsel argues that is not a real and substantial possibility. The defendant agrees that Ms. Michael is not presently able to work and that she will never be able to return to work as a veterinarian technician but maintains that with treatment recommended by Dr. Smith, there is a real and substantial possibility of retuning to part-time sedentary work within a year or two. Thus, while the defence accepts there is a substantial loss of future earning capacity, it maintains there is some residual capacity.

[79] It is not disputed that, but for the accident, Ms. Michael would have continued working at Lindsey Veterinarian Clinic in Penticton at least until the date of trial and almost certainly beyond. She loved her work and was happy at that clinic. The clinic's owner, Dr. Grant Nixon, testified that Ms. Michael was a very good veterinarian technician and a reliable employee with a very good work ethic. Since the accident, a large corporation has acquired a majority ownership stake in the clinic but Dr. Nixon has retained an interest. He said there were no layoffs with the new ownership structure. In fact, business has grown and the clinic has faced challenges attracting and retaining qualified staff. Dr. Nixon said if Ms. Michael were physically able he would "100%" hire her back. He said with her abilities and work ethic she would be hired "10 times over".

[80] At the time of the accident, Ms. Michael was earning, by my estimate, $23.25 per hour.[1] However, Dr. Nixon said that starting in 2020, pay for technicians rose at a higher rate than previously because of the increase in business and staffing challenges. He testified that an experienced technician who left the clinic (voluntarily) in 2022 was earning $32 per hour. He estimated that if Ms. Michael was still there, she would be earning between $32 and $34 an hour which is significantly more than even the inflation-adjusted income she was earing at the time of the accident. The new ownership also provides benefits with the company paying 75% of that cost which amounts to a company contribution of about $1,800 per annum. The company also matches employee RRSP contributions to a maximum of $1,000 per annuum at Ms. Michael's level.

Past Loss of Earning Capacity

[81] Both parties tendered expert reports from economists to assist in calculating Ms. Michael's loss of earning capacity, past and future. Unfortunately, both reports were prepared before it was known what Dr. Nixon's evidence would be. Thus, they assess Ms. Michael's income loss by applying inflationary projections to her 2017 annual income without considering the additional increase Ms. Michael likely would have seen starting in 2020 or the benefits provided by the new ownership. Fortunately, both experts addressed that evidence in their testimony.

[82] Ms. Michael submits that her past loss of earning capacity should be assessed based on the projection made by her expert economist, Peter Sheldon, with an adjustment starting in 2021 to account for the higher rate of pay and benefits. The base amount assessed by Mr. Sheldon is $58,000 for 2024. That is the inflation-adjusted value of her 2017 salary. The increase suggested by counsel for Ms. Michael is based on the hypothetical that Ms. Michael would now be earning $33 per hour, which is the midpoint of Dr. Nixon's estimate. Applying that rate to a 40-hour work week provides a base annual salary of $68,640. Ms. Michael's pay

[1] Her most recent pay stub in evidence is dated November 2017 and shows an hourly rate of $22.50. Dr. Nixon testified that employees were given a standard 1.5% increase each quarter. Thus, she would have received a 1.5% increase effective January 1, 2018 and another 1.5% increase effective April 1, 2018. This would put her hourly rate at $23.18 which I round up to $23.25.

stubs indicate that she worked an average of 2.5 hours of overtime per week at 1.5 times her regular rate of pay. Estimating 115 hours of overtime per year adds another $5,692 per annum. The employer contribution to benefits adds a further $1,800 per annum bringing her estimated hypothetical gross income for 2024 to $76,132. That is 31.26% more than the estimated 2024 salary of $58,000. That 31.26% increase can then be applied retroactively to the Sheldon-projected incomes for 2021 through 2024 which are $53,200, $55,100, $57,000, and $58,000. That generates the following:

Year	Sheldon-projected income	Gross Additional Income (base plus 31.26%)	Tax	Net Additional Earnings
2021	$53,200	$16,630	28.4%	$11,907
2022	$55,100	$17,224	28.4%	$12,332
2023	$57,000	$17,818	28.4%	$12,757
2024	$58,000	$18,132	28.4%	$1,082*
Total additional net earnings with post-2020 increases				**$38,078**

*prorated to one month loss to account for February 2024 trial date

[83] Mr. Sheldon calculated Ms. Michael's after-tax past loss of earnings at $177,800. This includes a deduction of $72,900 to account for CPP disability benefits Ms. Michael received. However, as the defendant's expert economist, Mark Szekely points out, Mr. Sheldon neglected to account for $8,085 in employment insurance benefits that Ms. Michael received. Mr. Szekely's own calculation of the after-tax loss based on a 2024 annual salary of $58,000 and accounting for CPP and EI deductions is $170,391. The additional net earnings loss of $38,078 would bring the total after-tax loss to $207,470.

[84] I would add to this $1,000 per year starting in 2021 to account for the employer's matching RRSP contribution. While counsel for Ms. Michael proposes to count this in the assessment of Ms. Michael's future loss of earing capacity, they suggest ignoring it for the past loss. I do not understand why. Ms. Michael was regularly putting money into an RRSP while working and I am satisfied that when the matching program came in she would have put aside at least $1,000 per year, which is the maximum amount the new clinic ownership matches. This brings the total loss to $211,469.

[85] The defence does not propose a substantially different approach to calculating Ms. Michael's past loss of earning except to suggest Ms. Michael's additional earnings should be based on $32 per hour as of 2024 rather than $33. It is argued this would generate an increase from the inflation-adjusted base of around 20% (although I calculate it to be around 24%). On this basis, defence counsel suggests the after-tax additional loss of $25,000 is appropriate giving a total after-tax loss (and accounting for CPP and EI payments) of approximately $195,000.

[86] In my view, using $33 per hour in 2024 to account for the increase in estimated salary starting in 2021 is more reasonable. It is only one dollar an hour more than the comparable technician who left the clinic in 2022 was earning. An increase to $33 by 2024 indicates only a 3% increase over more than a year which is less than the rate at which pay was increased even before the 2020 bumps. Further, Dr. Nixon testified that Ms. Michael was a dependable and valued employee with a strong work ethic. In my view, it more likely that she would be earning $34 per hour which is the high end of the range estimated by Dr. Nixon. If anything, taking the midpoint of $33, as counsel for Ms. Michael proposes, probably undervalues Ms. Michael's loss. I therefore accept Ms. Michael's approach to calculating her past loss of earning capacity at $33 per hour.

[87] Recognizing that past loss of earnings is an assessment rather than a calculation, I would assess Ms. Michael's after-tax past loss of earning capacity at **$210,000**.

Future Loss of Earning Capacity

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

> [76] … The objective of an award for loss of future earning capacity is to return the plaintiff to the position they would have been in had they not been injured: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 32; *T.W.N.A. v. Clarke*, 2003 BCCA 670 at paras. 24-28. This task involves a comparison of the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Rab* at para. 65, citing *Gregory*

> *v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

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

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

[90] In the present case, the first two steps of *Rab* are conceded. As I have said, the defendant admits that Ms. Michael is not presently able to work, and, even if she is capable of working in the future, it will be in a part-time sedentary role and not in her former vocation as a veterinarian technician. Thus, the future loss claim in this case turns on the third step in *Rab* as well as the assessment of Ms. Michael's likely with and without accident future.

Likely Without Accident Future

[91] There is little dispute about Ms. Michael's hypothetical without accident future. She planned to work as a technician at the Lindsay Clinic in Penticton until she had saved enough for a comfortable retirement. She proposes that her loss should be calculated on the basis of a 2024 annual income $76,132 (base income at $33/hour + overtime + benefits) plus an annual $1,000 RRSP matching contribution from the employer. This generates an annual loss of $77,132 in 2024 values. The two economists substantially agree that the multiplier to carry this annual loss to age 65 is 10.8 which generates a total present-value loss of $777,490.

[92] The defence proposes only a slightly different without-accident future using $32 per hour as a base rather than $33 and a retirement age of 64 rather than 65. The defence suggests that with the substantial pay increase starting in 2021, Ms.

Michael would have been in a position to retire earlier than 65. The defence also points out that Ms. Michael's mortgage at the time of the accident was only $40,000 which would position her well for retirement before 65.

[93] Thus, the defence argues the without accident scenario should have Ms. Michael with a base income of $72,080 and retiring at 64. Adding in the employer contribution for benefits and the employer's annual $1,000 RRSP matching contribution, this results in an income of $74,880. That generates a present-value loss of $720,420 before applying labour market contingencies which I will discuss in a moment.

[94] For the reasons given earlier, I accept Ms. Michael's submission that $33 per hour is appropriate. In fact, I would have been inclined to assess her income based on $34 per hour but instead I will treat that as a positive contingency with a substantial relative likelihood. If this contingency was applied in full, it would increase the loss by almost $23,000.

[95] Defence counsel makes a fair point about the potential for an earlier retirement and the proposal for an age 64 retirement is modest reduction. Nevertheless, I decline to accept it. Ms. Michael liked to be busy, clearly enjoyed her job, and was well-liked by her employer. She was invigorated by her work and loved helping the animals. She was active, in good shape, and in good health. In my view, there is a real and substantial possibility that she would have continued working at least part-time past 65 and that positive contingency at least cancels out the negative contingency of an earlier retirement. In my view, assuming retirement at 65 is the appropriate basis from which to assess her future loss.

Labour Market Contingencies

[96] It is widely accepted in this court that an assessment of loss of future earning capacity would ordinarily, though not invariably, apply labour market contingencies. These are contingencies that account for rates of unemployment, voluntary withdrawal from the workforce, part-time work, and related matters in the general workforce. Labour market contingency multipliers are typically provided in

economists' reports to assist the court in future earning assessments. Mr. Szekely's data suggests a discount of around 17% for labour market contingencies but counsel for the defendant concedes this is high and suggests instead 12%.

[97] Ms. Michael argues this is a case where labour market contingencies should not be applied. While counsel concedes they are applied in most cases, there are exceptions. Given Ms. Michael's stable employment, her strong attachment to work, her love of her job, her high value to her employer, and the fact she had no other income earner to depend on, counsel argues the labour market contingencies for the general population do not reflect Ms. Michael's subjective circumstances. Counsel further argues that any discount for labour market contingencies is more than offset by the positive contingency that Ms. Michael would have worked past 65 as a real and substantial possibility in a without accident scenario.

[98] Labour market contingencies are "general" contingencies because they are based not on the plaintiff's specific circumstances but factors that apply generally to the population. A trial judge may apply them to a future pecuniary loss award but is not obligated to do so. In *Graham v Rourke* (1990), 74 D.L.R. (4th) 1 (Ont CA), [1990] OJ No. 2314, the court discussed general contingencies in the following passage that was quoted with approval by our Court of Appeal in *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 93 and *Dornan v. Silva*, 2021 BCCA 228 at para. 92:

> [46] …contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs." A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>
> [emphasis added]

[99] In *Boal v. Parilla*, 2022 BCSC 2075 at paras. 172-174, Justice Warren declined to apply labour market contingencies in a case where the plaintiff had a strong pre-accident attachment to the workforce and very secure employment. She found the general labour market contingencies were offset by the real and substantial possibility that the plaintiff would have been promoted.

[100] In my view, the defendant's proposal for a 12% deduction for general labour market contingencies is more than setoff by the real and substantial possibility that Ms. Michael would have been earning $34 per hour by 2024. As I said earlier, that would add almost $23,000 to the overall loss. Even if there was only a 50% chance of this higher hourly wage, it would still offset the 12% deduction proposed for labour market contingencies.

[101] For that reason, I decline to apply a deduction for the general labour market contingency.

Residual Capacity – The With-Accident Scenario

[102] The only issue to determine for the with-accident scenario is whether there is a real and substantial possibility that Ms. Michael will return to some kind of work and, if so, the value of that potential opportunity and its relative likelihood.

[103] The defence argues there is a real and substantial possibility that Ms. Michael will be able to return to part-time, sedentary work, albeit not the specialized work of a veterinarian technician. Relying on the evidence of Colleen Quee-Newell, the defendant's vocational rehabilitation expert, the defendant argues there are opportunities for sedentary work in Victoria, including government positions that accommodate working from home.

[104] The defence argues Ms. Michael's residual work capacity may be calculated based on a part-time 20-hour-a-week job earning minimum wage which would generate an annul income of $16,000, which is about 20% of her hypothetical 2024 without-accident income. Thus, the defence submits a 20%, or alternatively 10%, overall reduction in the assessment of Ms. Michael's future loss is appropriate.

[105] Dr. Anton opines that, from a physical perspective, Ms. Michael might, at best, tolerate limited, part-time sedentary work with a supportive employer some time in the future.

[106] Dr. Lu opines that Ms. Michael's physical capacity to work has been significantly affected by her mental illness and she is unlikely to regain her occupational capacity. Optimistically, he says, she may be able to do a few hours of work periodically in a flexible capacity.

[107] Dr. Smith was clear that Ms. Michael is presently incapable of working because of her mental health. He is optimistic that she will see substantial improvement with his recommended treatment and considers it to be "at least a possibility that she will be able to return to part-time, probably sedentary employment in the future."

[108] Dr. Leith considers Ms. Michael to be physically capable of some part-time sedentary work but his expertise do not extend to opining on whether her mental health would affect her ability to sustain work and he did not purport to do so.

[109] Ms. Michael would like to be able to return to some form of work in the future but is pessimistic about her ability to do so. She hopes she would be able to handle some kind of sedentary work and feels it would be good for mental health to go back to work, noting that if she had a purpose, such as paid work or a volunteer position, she would likely feel more fulfilled. All the medical expert evidence supports that view. However, Ms. Michael was also realistic in suggesting that she could not be a reliable employee. With her present physical condition, which is unlikely to improve, she feels she could not be counted on to always attend work when scheduled. She said her condition is so unpredictable that she never knows from one day to the next when she might have a good or a bad day. She maintained that if she returned to work it would be important to her to be a reliable employee and she does not feel she could commit to a job where an employer was depending on her.

[110] I find that Ms. Michael's concerns about her ability to work are genuine. She is not looking for a reason to avoid work. Dr. Nixon confirmed in his evidence that she was a reliable, committed, and valued employee. I cannot see how Ms. Michael could bring herself to take on a job which she could not be counted on to do.

[111] I also find that Ms. Michael's fears about her ability to commit to regular work, even part-time for a few hours at a time, are well founded. Even if there are improvements in her mental health as Dr. Smith expects, it is evident that her chronic pain and her inability to sit in one position, apart from being on a couch, are significant impediments to working even a sedentary job.

[112] Ms. Michael is in her mid-fifties and has been out of the workforce for over six years. With the wait lists for psychiatric treatment, it will be at least 18 months or two years (and probably more) before she might see improvement in her mental state such that she may attempt some work. Moreover, her only work experience as an adult is as a veterinarian technician, which is a specialized, skilled job but one that she is now unable to do. Thus, if she were to go back to work, she would face the prospect of having to learn a new job in the latter part of her working years. Even without her physical injuries these are far from ideal circumstances to re-enter the workforce. When her physical injuries and limitations are factored in, only an extraordinarily accommodating employer would likely hire her.

[113] In short, I accept that returning to part-time sedentary work is a possibility, but not a real and substantial one. I apply no discount for residual work capacity.

Conclusion of Loss of Future Earning Capacity

[114] In summary, I accept that Ms. Michael's future loss based on the likely without-accident scenario is $777,490. I base this on 2024 earnings of $33 per hour in a 40-hour work week plus overtime, benefits, and employer RRSP contribution and working to age 65. I consider the relative likelihood of an earlier retirement is cancelled out by the relative likelihood that she would work past 65. I consider the potential negative labour market contingencies are more than offset by the contingency that Ms. Michael would have been earning $34 an hour by 2024 rather

than $33. As this is an assessment rather than a calculation, I would round Ms. Michael's loss of future earning capacity to **$775,000**.

Loss of Housekeeping Capacity

[115] An injured plaintiff is entitled to an award for loss of housekeeping capacity if such a loss is established: *Kim v. Lin*, 2016 BCSC 2405, aff'd 2018 BCCA 77 [*Kim*]; *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178; *McTavish v. MacGillivray*, 2000 BCCA 164. An award may be made under one or more separate heads of damages, including pecuniary, non-pecuniary, and cost of future care.

[116] Whether a loss of housekeeping capacity should be assessed as pecuniary or non-pecuniary is in the discretion of the trial judge, but the main guiding principle is this: where the plaintiff is capable of performing the housekeeping tasks but with difficulty, a non-pecuniary award is usually appropriate; where the plaintiff must have others perform or assist in the housekeeping tasks, be it through a paid service provider or gratuitously by friends or family members, a pecuniary award may be appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101; *Liu v. Bains*, 2016 BCCA 374 at para. 26.

[117] In *Kim* at para. 189 (BCSC), the court cautioned that care should be taken not to duplicate awards under different heads of damages. Likewise, in *Firman v. Asadi*, 2019 BCSC 270 at para. 236 Justice Verhoeven said:

> [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made [as part of non-pecuniary damages].

[118] That said, damages for loss of housekeeping are distinct from an award for cost of future care, although the two may overlap. As Justice Kirkpatrick observed for the Court of Appeal in *O'Connell (Litigation guardian of) v. Yung*, 2012 BCCA 57 at para. 65, quoting from Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, loss of housekeeping

capacity is a “negative loss” in that it is the loss of something the plaintiff would have had – the ability to work in manner that was valuable to the plaintiff or others – but now does not have because of the accident.

[119] As with loss of earning capacity, damages for loss of housekeeping capacity, even as pecuniary damages, are an assessment and not a rigid mathematical calculation. Nevertheless, it is acceptable to utilize labour force information regarding the value of replacement services in making that assessment: *Liu,* para. 28.

[120] Thus, in *Kim*, where the plaintiff suffered a “profound loss of capacity” to perform household tasks and childcare, the trial judge assessed that a minimum of two to three hours per day of assistance at $15 per hour was reasonable approach. Having made a pecuniary award for loss of housekeeping capacity, the trial judge made no award for this under cost of future care, thus avoiding the duplication cautioned against in *Firman*. His approach was upheld by the Court of Appeal.

[121] More recently, in *Steinlauf*, Justice Basran found the plaintiff was rendered incapable of performing household tasks, including light duties, and would require assistance from others to do this work indefinitely. He assessed the plaintiff’s need for assistance to be five hours per week at a rate of $20 per hour and assessed the future loss of capacity at $164,000. He made no additional award for housekeeping assistance under cost of future care. His analysis and conclusion were upheld by the Court of Appeal, including his adoption of a $20 per hour rate for the value of housekeeping services. Speaking for the Court of Appeal, Grauer J.A. said “[i]f anything, it seems to be a conservative estimate.”

[122] In *Anssari v. Alborzpour*, 2019 BCSC 512 Justice Fleming found the plaintiff was incapable of performing all housekeeping duties. Though physically able to perform light cleaning and meal preparation, her psychological injuries precluded her from doing these. Fleming J. made a pecuniary award for past loss of housekeeping capacity and an award under cost of future care (to age 75, with certain contingency deductions to account for potential improvement). Relying on *O’Connell,* she

recognized a further entitlement to compensation for loss of housekeeping capacity as a “negative loss” but addressed that as part of a non-pecuniary damage award. In doing so she noted the risk of duplicating the cost of future care award.

[123] Ms. Michel has had paid housekeeping assistance for two hours a week every other week. The evidence does not indicate what she paid for this service. The medical and occupational therapy experts seem to agree that this is reasonable having regard to Ms. Michael’s needs and lifestyle. Simone Szarkiewicz, an Occupational Therapist and cost of care expert called by Ms. Michael, suggests professional cleaning costs are between $35.00 to $52.50 per hours. However, a direct comparison cannot necessarily be made between housekeeping capacity and rates charged by professional cleaners. As Justice Lamb observed in, *Buezo v. Ng,* 2022 BCSC 857 at para. 140, “there is a difference between having the capacity to complete a few hours of family housekeeping over the course of the day and the capacity to sustain employment and earn income as a cleaner.”

[124] Having regard to these authorities, for the purposes of assessing Ms. Michael’s past loss of housekeeping capacity, I would use a rate of $30.00 per hour. I would exclude the first six months after the accident when Ms. Hetherington was caring for Ms. Michael since that loss is captured by the in-trust claim discussed below. That leaves just over five years for past loss of housekeeping capacity. Calculating the loss based on two hours every two weeks for 5.25 years at $30.00 per hour and recognizing this is an assessment and not a calculation, I would assess the past loss of housekeeping capacity at **$8,000**.

[125] Following Fleming J.’s approach in *Anssari*, I assess Ms. Michael’s future loss of housekeeping capacity through a combination of cost of future care for the “positive” loss and non-pecuniary damages for the “negative” loss of capacity.

In-Trust Claim

[126] Ms. Michael makes an “in-trust” claim for the care and assistance provided by Ms. Hetherington in the six months following the accident. It will be recalled that immediately after learning of the accident, Ms. Hetherington flew from her home in

Portland, Oregon to Vancouver to be with Ms. Michael while she was in the hospital and then looked after Ms. Michael for the five or so months when she was recovering and rehabilitating at their father's home in Victoria. She also took Ms. Michael home to Penticton in November 2018 and got her settled there.

[127] Apart from one or two weeks in August 2018 when she returned home to Portland for a brief check-in, Ms. Hetherington provided essential, full-time care for Ms. Michael in Victoria during this period. She helped her dress, attend to personal care, shower, use the washroom, and do wound care for the substantial laceration on her leg. She cooked all the meals, did the laundry, and cleaned the house. She helped Ms. Michael get out of the house and drove her to all her medial and physio appointments. She took notes of the advice Ms. Michael was given and she was an emotional support for Ms. Michael during that difficult period.

[128] Ms. Hetherington returned to Victoria again in August 2021 for about two weeks to help Ms. Michael recover and rehabilitate from her knee surgery.

[129] The parties agree that the law respecting "in-trust" claims was summarized in *Cummings v. Olson*, 1996 CanLII 3130 (B.C.C.A.) and *Frankson v. Myre*, 2008 BCSC 795 at para. 51. To receive damages for services provided by a family member in aid of the injured plaintiff, it must be shown that the family member experienced a direct economic loss because of the time and effort put into the services or that the family member's efforts replaced an expense that would otherwise have been incurred: *Cummings*, at paras. 56-63. In *Frankson* at para. 51 Justice Savage identified six factors for consideration in assessing an in-trust claim:

> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

(e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;

(f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[130] In my view, Ms. Hetherington's services fall squarely within these criteria. I have no doubt Ms. Hetherington had no intention or expectation of compensation when she jumped in to help Ms. Michael. She testified that this was "a gift I could give my sister". Objectively, however, I find the services she provided were essential and well over and above what would be expected from a sibling, particularly one who lives so far away and uproots her life to relocate for six months to help out. Were it not for Ms. Hetherington's sacrifice, Ms. Michael would have required paid professional help.

[131] Ms. Michael says the value of Ms. Hetherington's assistance should be quantified using the cost of professional care for eight-hour-a-day care, seven days a week for 24 weeks. At $40 per hour (the mid-point of Ms. Szarkiewicz's estimate of care-aid costs), this amounts to $53,760. Ms. Michael claims $50,000.

[132] A challenging part of assessing this claim is the requirement to consider the opportunity cost to the caregiver. From a pure financial perspective, Ms. Hetherington gave up no earnings by devoting herself to Ms. Michael's care. She had recently retired from teaching in Alberta and had just moved to Portland. She would eventually start teaching again there but during the time she was caring for Ms. Michael, she did not yet have authorization to work in the United States. Thus, even if she had stayed in Portland she could not have earned an income.

[133] However, it would be an absurdity to say it cost Ms. Hetherington nothing (other than out-of-pocket travel expenses) to suspend her life in Portland and leave her husband for six months to live in Victoria to care for Ms. Michael. While the opportunity cost is a factor to consider, it has more significance when the person providing the care services is a family member living in the home or nearby. It could not have been intended to deny an in-trust claim for someone in Ms. Hetherington's

circumstances. The opportunity cost is not an irrelevant factor but, in my view, a strict application of it in the circumstance of this case would result in an injustice.

[134] Taking all these points into account, I consider an in-trust award for **$45,000** to be appropriate.

Special Damages

[135] The parties have agreed to Ms. Michael's special damages claim as it relates to treatments, medications, and other items identified in the Agreed Statement of Facts at Appendix B totalling $10,504. The following additional items are contentious.

Mileage for Travel to Appointments

[136] Ms. Michael claims $4,000 based on an estimated 8,000 kms of travel to appointments. The defence agrees a mileage claim is appropriate and the distance claimed is reasonable but submits it should be discounted by 25% to account for the fact Ms. Michael gets to some of the appointments on her recumbent trike rather than in her car. I am not convinced that her evidence suggests she took her trike 25% of the time, particularly in the winter months. I will award $3,500 for this item.

Dog Boarding

[137] Ms. Michael claims $3,305 for the cost of boarding her dogs with Ms. Russell while Ms. Michael was in the hospital and recovering in Victoria. Ms. Russell is a good friend to Ms. Michael who felt that taking the dogs was something she could do for her friend. For this reason the defence argues it is not a cost to Ms. Michael for which the defendant is responsible. At one point, Ms. Michael and Ms. Russell discussed compensation for boarding at $5.00 per dog per day, which would essentially cover the cost of their food. Ms. Russell was not concerned about receiving the payment and still has not been paid.

[138] Despite this being an act of friendship, I am satisfied it is a reasonable item for which Ms. Michael should be compensated. I have no doubt that once Ms. Michael receives her damage award she will pay Ms. Russell at least the

amount they discussed regardless of whether a specific award is made for this item. The actual cost is a tiny fraction of what commercial dog boarding would have cost. I see no reason why Ms. Russell or Ms. Michael should be out-of-pocket for this modest but necessary expense that would not have been incurred but for the accident. I award the $3,305 claimed.

Ms. Hetherington's and Mr. Pederson's Expenses

[139] Ms. Hetherington did not retain her receipts or credit card bills for her travel expenses when she flew to British Columbia to care for Ms. Michael. The fact Ms. Hetherington no longer has receipts for these expenses is not entirely surprising. Provided the claims are reasonable, I would not deny recovery for them but in the absence of receipts, the benefit of any doubt relating to the estimates must go to the defendant.

[140] Ms. Hetherington initially booked and paid for a flight to Penticton before learning Ms. Michael had been airlifted to Vancouver. She recalls the cost of this cancelled flight, for which she did not receive a refund, was between $800 and $1,200. She estimated her flight to Vancouver was around $800. She rented a car in Vancouver during the month Ms. Michael was in hospital and recalls this cost round $1,200. She estimated her gas expense to be $150 to $200. In my view, these amounts appear reasonable and I would allow these items on the low end of the estimates. The air fare estimates seem a little high but they do not consider Ms. Hetherington's travel costs for her brief respite back to Portland in August 2018. Nor do they account her travel costs to help with Ms. Michael after her knee surgery in 2021.

[141] Ms. Michael's brother, Brent Pederson, helped her move from Penticton to Victoria. He rented a moving van and paid for gas. He also did not keep receipts but estimated the total cost to be $1,040 which, in my view, is reasonable particularly since no in-trust claim is made for his or his son's time in helping with the move. The move was necessary because of Ms. Michael's accident injuries and the cost of professional movers would have been significantly higher.

[142] I award a total of $4,000 for these expenses.

Summary of Special Damages

[143] In summary, I award **$21,009** in special damages.

Cost of Future Care

[144] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition to the extent that is possible. When full restoration cannot be achieved the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30. The award is a matter of prediction as to what will likely happen in the future: *Peters v. Ortner*, 2013 BCSC 1861 at para. 143.

[145] The test for determining the appropriate award is objective, based on medical evidence. There must be a medical justification for each item claimed, and the claim must be reasonable: *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63. Justification means the cost is both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not used a service in the past, it may be inappropriate to include it in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung,* 2012 BCCA 57 at paras. 55, 60, 68–70.

[146] Ms. Michael has tendered a report from Ms. Szarkiewicz, who has done a functional capacity evaluation of Ms. Michael and prepared a cost of care report based on the medical expert reports and her own opinions as an occupational therapist. The defence has tendered a responding report from Robert Gander who is also an occupational therapist. Mr. Gander did not assess Ms. Michael. His report only comments on Ms. Szarkiewicz's report.

Medications

[147] Ms. Michael currently uses over-the-counter pain medications, mostly Advil and Tylenol. She takes each for a different purpose so they are not duplicative. I award the mid-point Ms. Szarkiewicz' cost estimate of these which is $19.44 annually. I round this to $20.00. The present value of this annual cost for Ms. Michael's lifetime is **$510** (applying Mr. Sheldon's multiplier of 23.533).

[148] For prescription medications, Ms. Michael is currently taking Amitriptyline and Gabapentin, both of which are covered by pharmacare. She is also taking Duloxetine, which Dr. Smith would increase by 50-100%, and Brexpiprazole which was recommended by Dr. Lu although Dr. Smith suggests it is unnecessary given its expense. Dr. Smith agreed that new drugs are continually introduced and those drugs are expensive when still under patent. Ms. Michael's depression or PTSD is severe and its treatment is uncertain. Even if she does not continue with Brexpiprazole as her course of treatment, I find there is a reasonable likelihood that she will be prescribed some kind of medication that is still under patent and costly. The defence concedes that Ms. Michael may need to trial a patented anti-depressant at some point but suggests that Duloxetine at $395 per annum is a better proxy.

[149] Given the severity of her condition and the uncertainty of her future treatment, I consider it appropriate to assess the cost of an anti-depressant at the higher end. Considering the annual cost of Duloxetine is $395 (which she will continue taking with a potential increase in dose as Dr. Smith suggests) and the additional cost of Brexiprazole is $1,405, I assess $1,800 annually for the cost of anti-depressant medications. The present value of this is approximately **$42,650**.

[150] Dr. Anton recommended topical medication creams for neuropathic pain in Ms. Michael's foot. Ms. Michael has tried one of the creams and it was not effective but there are others. Ms. Michael acknowledges that others may or may not work and, while she argues this should be included as a cost of care item, a 50% contingency discount may be justified. The defence acknowledges that this item is

reasonable, even though one cream has not proven effective. I consider one of the options costed out by Ms. Szarkiewicz is reasonable and I would award the midrange of $500 annually less a 50% discount to $250. The present value of this is approximately **$5,900**.

[151] Dr. Anton has recommended that Ms. Michael try Triptan for her migraines. The defence suggests that Ms. Michael tried medications for her migraines but they did not help and she is not presently taking any medication (other than Advil or Tylenol) for migraines. However, she said in cross-examination that she would be willing to try other migraine medication but it has not been a priority to discuss with her doctor. Defence also suggests migraines are more likely related to her weight rather than the accident, but I find her more recent weight gain is attributable to her greatly reduced physical activity because of the physical injuries from the accident. Ms. Szarkiewicz estimated the cost of two different migraine medications, one with an annual cost of $63 and the other with $31. I award the midpoint of this with a 30% deduction (total $33/annum) to account for the possibility that Ms. Michael will not take these medications since she is not taking them now. The present value of this is **$777**.

[152] Ms. Michael occasionally takes Zopiclone to help her sleep. She has taken Dayvigo for this in the past (which Dr. Lu strongly prefers over Zopiclone) but she found it gave her nightmares. Sleep aids is not part of her regular medication at this point but getting her insomnia under control is an important part of her treatment. The present value of a regular course of Dayvigo is just under $500 but a discount approximately 50% would be in order due to the uncertainty of whether she would regularly take a sleep aid.

[153] For these reasons, I consider **$50,000** is reasonable for all medications.

Therapies and Treatments

Foot Care

[154] The parties agree that foot care services are necessary for Ms. Michael as she is unable to lean over to reach her feet. She has had this service since the accident. The parties agree the present value of this item is **$23,700.**

Psychological Counselling

[155] Dr. Lu recommends that Ms. Michael have at least 24 sessions of psychological counselling per year over the next five years with more support during times of increased stress. He also recommends that once her mental condition is more stable she should resume specific trauma therapy, although it is not clear whether he contemplates this as part of the five-year program. Ms. Szarkiewicz suggests another 12 sessions per year indefinitely after this first five-year period. The defence agrees with the first five years of counselling but, based on Dr. Smith's evidence, argues it is unlikely she will require counselling after that. Alternatively, the defence argues that, at most, a session once every two months (6 sessions a year) is reasonable.

[156] This is an area where it is particularly hard to predict what will unfold in the future. Dr. Smith is optimistic that Ms. Michael's condition will improve with psychiatric intervention and high-level psychological treatment but his opinion in this respect struck me as being "guarded", which, according to him, means there is not presently enough information for a reliable prognosis. Dr. Lu did not suggest any specific amount of ongoing psychological therapy after the first five years, although he did suggest that "at least" this amount should be counted on, inferring that more may be necessary. Given the severity of Ms. Michael's depression or PTSD and the potential but significant uncertainty for improvement, I find there is strong likelihood that ongoing psychological counselling will be needed indefinitely and a frequency of once a month after the first five years seems reasonable. I will discount this by 20% to account for the contingency of her condition improving and requiring less counselling after five years.

[157] I award $27,000 as the mid-range of the present value for the first five years and $43,000 for year six and onwards (being Mr. Sheldon's present value of $50,000 less 20%). The total is **$70,000**.

Physiotherapy

[158] Ms. Szarkiewicz suggests 48 sessions of physiotherapy over the next six months, followed by 24 sessions over the following three months and 12 to 24 sessions annually after that. The defence accepts this, at least at the low end of the present value of Ms. Szarkiewicz's cost estimate. In my view, the mid range of the estimate would be appropriate given that Ms. Michael is very diligent about regularly attending physiotherapy and similar treatments. However, Ms. Michael claims the low end of the range which she says is a reasonable allowance.

[159] Ms. Szarkiewicz also recommends additional physiotherapy for post-surgical care on the assumption that further hip and knee surgery will be required. I would place the relative likelihood of another hip replacement quite low but I accept Dr. Stone's opinion that the likelihood of a knee replacement is at least 50%. The present value of the mid-range of the post-surgical physiotherapy is $3,415 per surgery. I would award 50% for potential knee surgery and 15% of this for potential hip surgery.

[160] Thus, while I would discount the post-surgery physiotherapy, I believe an amount closer the mid-range for other physiotherapy would have been reasonable. I therefore award the **$35,000** that Ms. Michael claims.

Kinesiology

[161] Dr. Anton also recommended that Ms. Michael work with a kinesiologist. Dr. Smith also opined this would be beneficial. Ms. Michael claims $36,0000 which is the midpoint of the present value of Ms. Szarkiewicz's estimated range: $21,000 to $51,000. The defence generally accepts this item but suggests it be calculated at the low end. I note that Dr. Anton seemed to suggest that kinesiology would be an alternative to at least some amount of physiotherapy. Moreover, there appears to be

some overlap in Ms. Michael's current treatment in that some kinesiology services are available through her physiotherapist. For those reasons I will award **$30,000**.

Occupational Therapy

[162] Ms. Szarkiewicz recommends 40 to 50 hours of occupational therapy assistance for the next six to eight months followed by 15 to 20 sessions annually. Ms. Michael argues this is reasonable and justified on the basis that Ms. Michael is relatively isolated and needs occupational therapy assistance to navigate the medical field and assist her in integrating into the community. She claims the midpoint of the present value of Ms. Szarkiewicz's recommendations, being $55,000. The defence accepts some amount of occupational therapy assistance is reasonable but suggests the amount recommended by Ms. Szarkiewicz is more than needed in that it seems to assume Ms. Michael is starting fresh with that help when in fact she has had OT assistance for some time. The defence suggests ongoing OT help every three months is reasonable.

[163] I agree that Ms. Szarkiewicz's recommendations probably overestimates the amount of occupational therapy that Ms. Michael needs and it seems she did not account for the fact that Ms. Michael has an existing relationship with an OT. On the other hand, I agree she is isolated and I find her needs are more than every few months and that need will likely persist indefinitely. I would award a total of **$45,000** for occupational therapy.

Private Pain Clinic

[164] Ms. Michael seeks $17,000 for the cost of attending a private multi-disciplinary pain clinic. This is available through the public health program but has a wait list of a year or two. Ms. Michael, however, has chosen to accept a referral to a physical medicine specialist in Victoria rather than pursue a pain clinic. She is currently waiting for that referral to come through. The defence argues that she has chosen this route instead of a pain clinic and thus is unlikely to pursue a private pain clinic option. Had she sought a referral to pain clinic, she would be nearing the top of the waitlist in Victoria by now. In my view, it is likely that the referral to the physiatrist

will serve substantially the same objective as the pain clinic. I would not make an order for this item.

Dietitian

[165] On Ms. Szarkiewicz's recommendation, Ms. Michael seeks $7,300 for initial and ongoing consultation with a dietitian: six sessions to start and three sessions annually thereafter. Her counsel points to the fact she has put on weight since the accident with her reduced physical activity and with her chronic pain and especially her depression, she finds it a struggle to motivate herself to avoid less healthy food choices. The defence "reluctantly" accepts that the initial consultation may be reasonable "as a refresher" but points out that Ms. Michael acknowledged she knows how to eat healthy from her pre-accident commitment to her own fitness and conditioning. In my view, while Ms. Michael is aware of how to eat healthy, her circumstances now are considerably different and more complicated than when she lost her weight pre-accident. At that time she was able to run and had other physical activities such as horseback riding and hiking with her dogs. Her circumstances are much more complicated now due to her reduced physical activity and her mental health. I find that ongoing help from a dietician would be quite important for Ms. Michael, particularly given her history of diabetes. I award **$7,000** for this item.

Therapy or Service Dog

[166] Ms. Szarkiewicz has recommended that Ms. Michael have a therapy or service dog, noting that her dogs were important to her and it is "well known that pets are an affective [*sic*] intervention for depression, PTSD, stress and anxiety." She also recommends dog walking as a future care item. She estimates the cost of a therapy dog to be between $208 and $824 (which seems exceedingly low for a dog) and a service dog at $25,000. Ms. Michael's counsel says the cost of a service dog is appropriate as Ms. Michael would likely need a dog that is already trained given her physical limitations. Counsel argues a further $17,000 should be awarded for the present value of a second dog in the future. I note there is no evidence of the cost of conventional dog training and it is almost certainly much less than the highly

specialized training needed for a service dog which is well beyond Ms. Michael's need.

[167] I have no doubt that Ms. Michael would benefit from having a dog. As I have said earlier, she has had a passion for dogs her whole life and it is one of the things that sent her down her career path as a veterinarian technician. I have also commented that Ms. Michael now lives a reclusive life which is quite different to how she lived before the accident. She has tried socializing but struggles with it. One of the few bright spots of her recent social interaction with her neighbour was the opportunity to spend some time with their dog.

[168] Ms. Michael is not convinced she is ready for a dog. She continues to have immense guilt over having to re-home Twist and not being able to help Journey when she became disabled. She says there are times when she would love to have a dog but feels she does not deserve another pet. This certainly speaks to her mental health.

[169] In my view, though, an emotional support dog or a service dog does not meet the test for a future care item in that the evidence for a medical justification is not met for it. There is no medical evidence to suggest a fully certified assistance dog is justified. I accept that Ms. Michael would benefit from having a dog that is suitable to her living conditions and her functionality, which likely means getting a mature dog who has been trained. However, I consider this to be more properly covered by the non-pecuniary damage since it is really a substitute of other enjoyments and pleasures for those she had before the accident. I therefore decline to make an award for this item.

[170] Ms. Szarkiewicz also recommends equine therapy once or twice a month at a cost of $35 per session. Equine therapy is a treatment involving activities with animals to enhance a person's mental health. I am satisfied that Ms. Michael would benefit from this. It would not only get her out of her home but would put her around animals like horses without triggering the guilt she feels about giving up Twist to another owner and putting Journey down. Ms. Michael did not comment on this

recommendation and, while it seems well-suited to her, the evidence does not permit me to fully assess whether she is likely to pursue this therapy. I would therefore award this at the low end of the range and apply a 25% discount to account for the uncertainty. I would award **$7,500** for this item.

Aids to Daily Living

[171] Ms. Michael claims $27,000 for daily living aids such as heat pads, long-handled adoptive aids, grab bars for the bathroom and similar items. The defence only takes issue with some of these items. It says a shower stool or tub transfer bench is unnecessary because Ms. Michael already has a bench in her walk-in shower. It says raised toilet seats are unnecessary because Ms. Michael has already fitted her condominium with raised toilets that meet her need (and claimed the cost as special damages). Finally, the defence argues that a Lifeline monitoring link is unnecessary since a cell phone will suffice.

[172] I agree with the defence on all but the last item. It may well be that cell phones will usurp the role of a Lifeline monitoring system but the evidence does not persuade me it is presently a reasonable substitute. A cell phone did not help Ms. Michael when she fell in her home in Penticton and was alone on the floor for the better part of a day. Ms. Szarkiewicz testified that a Lifeline unit will detect when a person falls and will send an alert if the person is not responsive.

[173] That said, Ms. Szarkiewicz also said Ms. Michael is unlikely to use a Lifeline system now but expects that she will in the future. With that in mind, I would reduce the amount claimed for the Lifeline by about one third and eliminate the other two items with which the defence takes issue.

[174] Ms. Michael also seeks between $1,000 and $3,000 for a power recliner. This is not specifically addressed in Ms. Szarkiewicz's report but Ms. Michael testified that she feels it would enable her to sit in a more comfortable position and allow her to move positions with more ease. She also sees it as potentially another place where she might be able to fall asleep. In my view, this is reasonable given the

importance for her to be able to find more comfort in her home. She has sourced out the price range herself and I will order the midpoint of that at $2,000.

[175] I therefore award **$17,000** for aids to daily living.

Mobility Aids

[176] Ms. Michael claims $20,000 as present value for mobility aids that range from small items such as a cane to larger items such as a power scooter. These were largely recommended by Ms. Szarkiewicz. The defence accepts the cane, a parking pass, replacement cost and maintenance for the recumbent trike but disputes the need for a “Rollator” (which is a type of walker) and the power scooter including ongoing maintenance. The defence argues the recumbent trike serves the same purpose as a scooter but I am not persuaded. Both assist with mobility but the trike is more of a fitness or recreational item even though it has pedal assist and Ms. Michael uses it to get around to appointments. She could not, though, take it into a supermarket for instance. In my view, the potential need for a scooter and a rollator-type walker is real and substantial though likely not for some years. That would also affect the need for a replacement of both so a reduction in the claim is appropriate. I award **$12,000** for mobility aids.

Orthotics

[177] Ms. Michael claims $28,000 for orthotics but this includes $18,000 for a custom unloader brace for her knee. She testified that since her surgery she has not used a knee brace and does not need one. The defence accepts the other claimed orthotics which includes the AFO brace to support her dropped foot. I award **$10,000** for orthotics.

Ergonomic Equipment

[178] Ms. Michael claims **$2,300** for a standing desk, a sit-to-stand stool and anti-fatigue mats. The defence agrees to this and I award that amount.

Bathroom Renovations

[179] Ms. Michael claims $63,000 for bathroom renovations that would accommodate her physical limitations. She acknowledges that her present bathroom is largely accommodating of her needs, except for a lip on the walk-in shower which is a hazard because her dropped foot can catch on it. However, her condominium is not ideal being on the third floor of the building with an elevator that is not entirely reliable. Her needs would be better met with a ground-floor condominium, preferably in the same neighbourhood, and it is reasonable to expect she would have to renovate the bathroom of any new place to accommodate her condition.

[180] The defence argues this item is not recommended by any medical professional except for Ms. Szarkiewicz. However, this is precisely the kind of thing that an occupational therapist would be alive to and would not necessarily occur to a physiatrist. In my view, Ms. Michael's submission is logical and persuasive. Ms. Szarkiewicz has provided a range of $20,000 to $50,000 per renovation and suggests one to three such renovations may be anticipated. I disagree with the latter point. In my view, if Ms. Michael moves and has to renovate the bathroom, it is unlikely she will move again to another place she must renovate. If she does not move, the cost would be comparatively minor to just fix the lip on the walk-in shower. Having regard to the range and the relative likelihood of a move, I award **$40,000** for bathroom renovations.

Care Aid

[181] Ms. Michael claims $1,200,000 for a home care aid to provide home support twice a day starting at around age 65. The claim is based on an ambiguous recommendation made by Ms. Szarkiewicz that was only clarified in re-examination. Ms. Szarkiewicz recommended that Ms. Michael receive two hours per day of care aid assistance in the three months following a potential future hip or knee surgery. The recommendation goes on to say this:

> Followed by 3-6 hours per day at a time over the next 5 years. Given the severity of her injuries I anticipate that this will be over the next 5 years or so.
>
> [Emphasis added]

[182] The words “Followed by” suggest this more intensive level of home care should follow the initial three months of home care after surgery. However, the recommendation is ambiguous because there is no suggestion that there will be surgery within the next five years and it makes little sense to increase the amount of home support three months after a surgery when, presumably, Ms. Michael will likely be more mobile.

[183] During re-examination, Ms. Szarkiewicz clarified that the second recommendation for three to six hours a day of home care is intended to be independent of any post-surgical care Ms. Michael may need and is contemplated to take effect five years from now. This clarification seemed to take everyone by surprise.

[184] The defence argues “there is absolutely no medical evidence to support this, no medical practitioner has recommended or even discussed it in passing and it simply is not supported by the evidence or anything else.” Counsel for Ms. Michael concedes that the medical evidence “does not clearly support the assumption that Ms. Michael will experience the relatively rapid decline anticipated” but suggests she will decline physically and “the need for a care aid at some point seems reasonable.” For this reason, counsel submits a care aid starting at age 65 is appropriate and argues that six hours a day is necessary because two visits a day would be needed and it is suggested there is a three-hour minimum charge.

[185] I agree with the defence. There is no question that Ms. Michael’s physical abilities are compromised, particularly because of her hip but also with her dropped foot. However, none of the medical experts has suggested she will require daily home care in the next five years or, for that matter, at any point. Dr. Anton opines that her injuries increase her risk for a more rapid decline in mobility than might normally be expected but nowhere in his fairly extensive list of anticipated future care does he suggest a daily home-care aid in the future. Nor is the recommendation made or contemplated in any other report or medical record. I accept that there are some care items that fall within the expertise of an

occupational therapist that might not have been specifically contemplated by medical doctors but to support such a significant recommendation with its $1.5 million cost and intensive level of care, there should be some medical evidence offered in support.

[186] In my view, the recommendation for a care aid post-surgery is reasonable. Based on Dr. Stone's evidence I assess the relative likelihood of knee replacement surgery at 50%. Based on Dr. Anton and Dr. Leith's evidence I would assess the relative likelihood for another hip replacement surgery at around 15%. Using Mr. Sheldon's present value calculations for this, I would order **$1,000** for this item.

Household Management and Cleaning

[187] Ms. Michael claims a total of $55,000 for housecleaning and grocery delivery. Ms. Szarkiewicz recommends that Ms. Michael receive four hours per month of housecleaning and 12 hours per year for heavier seasonal housecleaning to age 80. The defence agrees this is reasonable. The hourly rates provided by Ms. Szarkiewicz are $35 to $52.50 and the present value of her recommendations with tax are $33,650 to $40,000 for the regular cleaning and $8,400 to $12,600 for the seasonal cleaning. She also claims for grocery delivery with a present-value range of $5,000 to $6,300. The defence argues Ms. Michael does not need grocery delivery in that she normally does small shops for herself several times a week rather than a large shopping to stock up on items.

[188] It seems to me that two hours every two weeks is low for Ms. Michael, even though her home is small. For that reason, I would have ordered this amount at the higher end of the range and seasonal cleaning at the midpoint. This would bring the total to **$55,000** which is what Ms. Michael has claimed. I accept that is reasonable and need not consider grocery delivery.

Summary of Future Care

[189] In summary, I make the following award for cost of future care items:

Item	**Amount**
Medications	$50,000
Foot care	$23,700
Psychological Counselling	$70,000
Physiotherapy	$35,000
Kinesiology	$30,000
Occupational Therapy	$45,000
Dietitian	$7,000
Equine Therapy	$7,500
Aids to Daily Living	$17,000
Mobility Aids	$12,000
Orthotics	$10,000
Ergonomic Equipment	$2,300
Bathroom Renovations	$40,000
Care Aid (Post Surgery)	$1,000
Housecleaning	$55,000
Total	**$405,500**

Conclusion and Costs

[190] In conclusion, I award the following damages:

Non-Pecuniary Damages	$350,000
Past Loss of Earning Capacity	$210,000
Future Loss of Earning Capacity	$775,000
Past Loss of Housekeeping Capacity	$8,000
“In-trust” Claim (Ms. Hetherington)	$45,000
Special Damages	$21,009
Cost of Future Care	$405,500
Total	**$1,814,509**

[191] Subject to the parties’ submissions and potential settlement offers, I award Ms. Michael her costs of this proceeding. As requested, the parties have liberty to make submissions on tax gross-up and may arrange that through Supreme Court Scheduling.

“Kirchner J.”