IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bolgar v. Fraser*,
2023 BCSC 468

Date: 20230328
Docket: M188667
Registry: Vancouver

Between:

Ellie Bolgar

Plaintiff

And

Caitlyn Ann Fraser and Mac & Mac Hydrodemolition Inc.

Defendants

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	K.G. Grady
Counsel for the Defendants:	A. Rowshanzamir
Place and Dates of Trial:	Vancouver, B.C. August 15-19, 2022
Place and Date of Judgment:	Vancouver, B.C. March 28, 2023

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Introduction

[1] On January 5, 2017, the plaintiff, Dr. Ellie Bolgar, was injured in a motor vehicle accident when she was struck from behind by the personal defendant, Caitlyn Ann Mills ("Accident"). The defendants have not admitted liability for the Accident.

[2] The plaintiff was 54 years old at the time of the Accident and was employed as a clinical psychologist. She enjoyed an active lifestyle and was an avid runner, having completed multiple marathons. The plaintiff suffered a number of myofascial injuries as a result of the Accident that have impacted her personal and professional life.

[3] In this action, the plaintiff seeks compensation for the injuries she sustained as a result of the Accident and the impact those injuries have had on her life.

Facts

[4] While I have considered all of the evidence put before the Court, the factual findings set out below focus on those matters material to the determination of the issues before me.

Plaintiff's Pre-Accident Condition

[5] Prior to the Accident, the plaintiff was a highly motivated and very independent person with a successful career and an extremely active lifestyle.

[6] The plaintiff is a clinical psychologist who, at the time of the Accident, held two positions: she worked part time in private practice as a counsellor at Living Wellness Centre, and full time as a clinical supervisor at Sources Community Centre ("Sources"). In late December 2016, the plaintiff gave notice to terminate her position at Sources. Her last day was to be February 28, 2017. However, Sources was unable to immediately fill her position as clinical supervisor, so she agreed to work periodically, a few hours per week, on a contract basis until her position was filled.

[7] The plaintiff's work at Living Wellness was in the nature of providing counselling to individual patients. She rented office space at Living Wellness to treat her patients. At the time of the Accident, she was intending to, and had taken steps towards, start her own counselling clinic. She intended to buy or rent office space commencing April 2017 and use that space for her practice, and also rent space to other associates in a variety of disciplines.

[8] In furtherance of this, in November 2016, the plaintiff obtained a Certificate of Incorporation for "Dr. Ellie Bolgar Inc." ("Bolgar Inc.") and had prepared a business plan for her clinic. The plaintiff and her husband, Sean Lawlor, intended to have Mr. Lawlor's holding company, Guttornio Holdings ("Guttornio"), purchase office space and then charge rent to Bolgar Inc. Bolgar Inc. would, in turn, sublease space to other therapists, charging them rent as an additional source of income for the plaintiff. The plaintiff owns 50% of Guttornio and 100% of Bolgar Inc. The intention was that the therapists practicing with the plaintiff would make referrals amongst themselves based on their areas of expertise.

[9] In additional to her professional activities, the plaintiff participated in a number of outdoor recreational activities prior to the Accident, including running, hiking, cycling, and skiing. She trained for and participated in many marathons, including the Boston Marathon in 2016.

[10] The plaintiff did not have any health concerns of note prior to the Accident. While she received massage treatments from time to time, she did not have any ongoing injuries affecting her neck or upper back, and did not suffer from headaches, irritability, or sleep disruption.

[11] Prior to the Accident, the plaintiff was responsible for the majority of the housework, including cooking and cleaning. She had high standards of cleanliness and kept her and Mr. Lawlor's home in accordance with those standards.

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The Accident

[12] On the morning of the Accident, the roads were icy. The plaintiff was on her way to work, driving on 88th Street westbound just west of 200th Street in Langley B.C. in her husband's Porsche SUV, which was equipped with snow tires. The defendants' vehicle was not equipped with snow tires.

[13] The plaintiff testified that due to the road conditions, she was driving slowly and intending to merge from 88th Avenue onto 200th Street, which required her to merge from the right-hand lane—which was ending—into the left-hand lane. The plaintiff testified that traffic was busy and that she was moving slowly in her lane, and still had some distance before the right-hand lane ended, when she was rear-ended by Ms. Mills. Contrary to the plaintiff's evidence that there were other vehicles on the road at the time of the Accident, Ms. Mills testified that in the moments before impact, there were not vehicles around.

[14] Ms. Mills testified that she was familiar with the intersection as she drives through it multiple times per week on her way to work. She also testified that there was nothing impeding her view of what was transpiring in front of her immediately prior to the Accident. Ms. Mills estimated that while she had come over the preceding overpass at approximately 50–60 km/h, she had reduced her speed to approximately 10–20 km/h at the point of the collision.

[15] At the time of impact, the plaintiff had not yet commenced the merge and her vehicle remained fully in the right-hand lane. Ms. Mills testified that as she approached the plaintiff from behind and just prior to impact, she took her eyes off the plaintiff's vehicle to look left to do a "quick shoulder check" in anticipation of her own merge. She testified that when she looked back, the plaintiff had stopped her vehicle "a little ways" ahead of her and Ms. Mills slammed on her brakes but was unable to stop her vehicle and hit the plaintiff from behind. However, in cross-examination, Ms. Mills conceded that she was not certain whether the plaintiff's vehicle had come to a stop and that, consistent with the plaintiff's evidence, she could have been moving slowly at the time of impact.

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[16] Ms. Mills did not dispute that she failed to stop and drove her vehicle into the rear end of the plaintiff's vehicle. The tenor of her evidence was that this was not her fault because the plaintiff either stopped unexpectedly when she ought not to have, or was driving too slowly for the road conditions. Notably, Ms. Mills acknowledged in cross-examination that there was snow on the ground, that the roads were icy, and that her vehicle was not equipped with snow tires.

[17] The plaintiff testified that the impact of the collision caused her forehead to hit the steering wheel and then the back of her seat, and also knocked her briefcase and purse off the passenger seat and into the footwell. Ms. Mills testified that the impact pushed the plaintiff's vehicle forward approximately 5–6 feet.

[18] The plaintiff testified that following the Accident, she spoke with Mr. Lawlor by phone and then exited her vehicle and spoke with Ms. Mills. The plaintiff testified that Ms. Mills apologized and asked if she was ok. Ms. Mills initially denied apologizing to the plaintiff, but on cross-examination said she did not recall whether she apologized or not. The plaintiff's vehicle was damaged in the Accident, but she was able to continue to drive to work.

Plaintiff's Post-Accident Condition

[19] Immediately following the Accident, the plaintiff called her receptionist and had her cancel her 9:00 a.m. appointment. She initially thought she would be able to continue with the rest of her patients that day, but developed a headache by the time she arrived at work and as a result, cancelled the balance of her patients.

[20] The plaintiff saw her general practitioner, Dr. Benjamin Tyrell at Hilltop Medical the following day, who diagnosed her as having a concussion and whiplash, and recommended that she commence massage and physiotherapy, which she did. The plaintiff continued to work in the weeks immediately following the Accident, but testified that she was experiencing intense headaches and by the end of the day, her shoulder and neck would become very stiff and the headaches would intensify. She was also having difficulty sleeping, waking around 3:00 a.m. and unable to get back to sleep.

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[21] The plaintiff's symptoms remained consistent, and she would have to cancel patients' appointments when the headaches become too severe or when the pain in her neck and shoulder prevented her from sitting for long periods. The plaintiff came to realize that working long days with patients scheduled back to back throughout the day exacerbated her symptoms.

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[22] As a result of the Accident, the plaintiff testified that she experiences pain in her neck, upper back, and shoulder area. The plaintiff has issues sitting or working at a computer for extended periods of time. She continues to suffer from headaches once or twice per week that can last for hours when they come on. She also suffers from irritability and sleep disruption. The plaintiff testified to the limitations these injuries have caused to her tolerance for and ability to work as a counsellor, particularly her inability to sit for long periods of time and how she requires "micro-breaks" throughout the day to manage her pain.

[23] As a result of her injuries, the plaintiff's participation in and enjoyment of her pre-Accident recreational activities have been curtailed. However, despite her ongoing pain and discomfort, the plaintiff has returned to many of her pre-Accident activities, such as running and training for marathons, though in a more limited capacity. She testified that running helps loosen her neck and shoulder area. Other activities, such as skiing, have been more significantly curtailed.

[24] The plaintiff testified that while the Accident and her resulting injuries have not affected her relationship with her husband, it did significantly impact her relationship with her son. Following the Accident, the plaintiff testified that she was generally more irritable and impatient, particularly with her son, and that this led to a breakdown in their relationship for a time. She testified to being easily frustrated with him, and reactive and judgmental towards him. She testified that this was a contributing factor to him moving out of the family home for a period of time and not speaking to her, though their relationship has since improved. Her evidence in this regard was consistent with her son, who also testified to the difficulties he

experienced as a result of the plaintiff's increased irritability and decreased patience following the Accident.

[25] The plaintiff has continued to resume the responsibility for the majority of the housework following the Accident, initially with help, at a slower pace, and not to the same standards as she did prior to the Accident. She and Mr. Lawlor both testified that the plaintiff is no longer able to maintain the house at the same fastidious standard she did prior to the Accident.

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Impact of Accident on Plaintiff's Work

[26] As a result of the injuries suffered in the Accident, the plaintiff has difficulty with periods of prolonged sitting, which is required for treating patients in her private practice. More specifically, the plaintiff testified that sitting for prolonged periods aggravates her neck and upper back pain and causes headaches. Consequently, she reduced the amount of time spent working as a private therapist. She has also had to adapt her practice in light of her physical limitations, including by retraining to qualify to do legal expert work on family custody claims, which she can do at her own pace.

[27] The plaintiff testified that on a good day, her pain is more manageable, however, she requires extra time to complete her work, particularly the family custody reports she writes, and cannot sit for extended periods of time. She continues to require micro-breaks and stretching to reduce her pain and enable her to focus on her work.

[28] The plaintiff's post-Accident condition also delayed the start of the plaintiff's business venture through Bolgar Inc. The plaintiff and Mr. Lawlor testified that as a result of the Accident, the plaintiff did not feel physically well enough to embark on a new professional venture and as such, her plan to start Bolgar Inc. was delayed by approximately 1.5 years. As such, the plaintiff continued to work at Living Wellness, though she worked on contract through Bolgar Inc., rather than as a sole proprietorship as she had done prior to the Accident. The plaintiff continued to work three days per week, remaining part time, because that is all she felt she was

physically capable of doing. The plaintiff's evidence was that her private counselling clientele was growing, and that had she been capable of working longer hours or more days as a private therapist, full time work would have been available to her.

[29] In order to supplement her income following the Accident, the plaintiff undertook additional qualification training to do child custody and parenting coordination work. This entails interviewing parents and children, then preparing reports. This type of work gave her the flexibility she needs to move around from time to time and can be done utilizing a sit-stand desk. Report writing can be done at the plaintiff's own pace, allowing her to take breaks when needed, though she is slower in writing than she was pre-Accident because she needs to take multiple breaks. Nonetheless, this work is more lucrative than private therapy as it commands a higher hourly rate.

[30] Commencing in September 2017, the plaintiff also began teaching courses one day per week at Adler University in Vancouver.

[31] In July 2018, the plaintiff and Mr. Lawlor located a suitable property for her clinic, and Guttornio purchased strata office space in Langley, taking possession in September 2018. At that time, the plaintiff started her private practice counselling business through Bolgar Inc. In the first six months of operations, Bolgar Inc. only rented space to one associate therapist. However, the business began to grow in 2019, and by March 2020, prior to the onset of the COVID-19 pandemic, the plaintiff had filled all of the Langley office space with paying tenants.

[32] The plaintiff testified that as a result of the pandemic, Bolgar Inc.'s tenants—many of whom were new therapists and therefore not well-established—were not able to maintain their clientele and ceased renting office space. The onset of the pandemic also resulted in the plaintiff being unable to continue teaching at Adler. The University switched to online teaching, which the plaintiff was unable to do because the injuries she suffered from the Accident made sitting in front of her computer for the extended periods of time required for online teaching too painful.

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[33] At the time of trial, the plaintiff was also working towards completing her postdoctoral studies through the University of Washington. This work is research-based and as such, the plaintiff is able to complete and submit her work at her own pace.

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The Plaintiff's Credibility

[34] The plaintiff's credibility is a key issue in this trial. As the Court noted in *Gee v. Bock*, 2019 BCSC 1348 at para. 36, "[t]his is not unusual in cases of chronic pain, where the court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints". This is the case as the absence of objective findings in chronic pain cases increases the opportunity for exaggeration, distortion, or even fabrication: *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.

[35] The applicable principles were summarized by Justice Abrioux (as he then was) in *Buttar v. Brennan*, 2012 BCSC 531 at para. 24:

> - the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397 (S.C.);
> - the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery (*Price* at 399);
> - an injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury (*Price* at 399);
> - the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the

> examining room *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;
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> • in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73;
>
> • in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given *Tai v. De Busscher*, 2007 BCCA 371 at para. 41.

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[36] I am also guided in my assessment of the plaintiff's credibility by the approach set out in Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), and *Faryna v. Chorny*, 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[37] Applying these principles, I find the plaintiff to be an accurate and impressive witness. Her evidence was credible, and she was a reliable historian of the material events in issue in this litigation and the progression of her injuries. She did not overstate or embellish her evidence; to the contrary, I find it likely that her stoic nature likely resulted in her understating the extent of her ongoing pain and its impact on her personal and professional life.

Expert Medical Evidence

Plaintiff's Medical Expert – Dr. Sangha

[38] Dr. Harpreet Sangha is certified in physical medicine and rehabilitation and is licensed in B.C. and Ontario. Dr. Sangha primarily practices in Toronto, Ontario, at the University Health Network and associated hospitals, where he performs electrodiagnostic testing, ultrasound-guided procedures, and other treatments for musculoskeletal and pain conditions. Dr. Sangha was qualified as an expert in the areas of physical medicine and rehabilitation and pain management. He assessed the plaintiff on February 7, 2022, and provided a report dated March 16, 2022.

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[39] Dr. Sangha diagnosed the plaintiff as suffering the following injuries as a result of the Accident:

a) Whiplash associated disorder type two ("WAD II"), resulting in left C4-5 and C5-6 facet mediated pain with superimposed myofascial pain, most predominantly in the left upper fibers of the trapezius;

b) Cervicogenic headaches; and

c) Disordered sleep, secondary to the first two diagnoses.

[40] In light of the plaintiff's presentation evincing a flat affect suggestive of depressive symptomatology, Dr. Sangha also questioned the possibility of psychoemotional distress, but did not make any diagnosis in that regard.

[41] Dr. Sangha opined that the plaintiff's Accident-related impairments have left her with diminished physical and functional tolerances, and that these impairments would reasonably be expected to result in limitations with:

a) Static postures of the head, neck, upper back, and periscapular region, including prolonged sitting or standing;

b) Activities that involve lifting, carrying, pushing, and pulling; and

c) Activities that place strain on the cervical spine, in particular actions that place the arms away from the body.

[42] Dr. Sangha opined that the plaintiff's injuries were caused by the Accident. He did not identify any pre-existing conditions that would have led or contributed to her current presentation, or any new or intercurrent complications that would otherwise explain her symptomatology. In the result, Dr. Sangha opined that "the [Accident] is the cause of her pain and the physical/functional limitation stemming therefrom". Dr. Sangha's opinion on causation was not challenged in any significant way.

[43] Dr. Sangha testified that the vast majority of recovery from injuries of the type sustained by the plaintiff occurs within the first year, with maximum recovery generally achieved by the end of the second year. Accordingly, in Dr. Sangha's view, it is reasonable to expect that the plaintiff has essentially reached maximum medical recovery with respect to her underlying physical impairments. As such, the recommended treatment options are aimed at minimizing the symptoms and maximizing function within the parameters of her chronic impairment state. In particular, Dr. Sangha opines that flare-ups of pain and dysfunction are to be expected and at such time, the appropriate therapies to hasten symptom resolution and functional recovery and prevent maladaptive postures and behaviours include physiotherapy, chiropractic, or massage treatments.

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Defendants' Medical Expert – Dr. Hummel

[44] Dr. Jonathan Hummel is an orthopaedic surgeon with experience in the treatment of musculoskeletal injuries as a surgeon and practitioner in a fracture clinic. Dr. Hummel was qualified to give expert evidence in the area of orthopaedics.

[45] Dr. Hummel practices primarily in Ontario; his work in B.C. consists of conducting medicolegal assessments. He travels to B.C. to assess multiple patients at a time. He assessed the plaintiff on May 11, 2022, and provided a report dated May 20, 2022. Dr. Hummel has no independent recollection of the plaintiff. He was asked to assess her from an orthopaedic perspective.

[46] Dr. Hummel opined that the plaintiff sustained a soft tissue injury to her cervical spine in the Accident, but that it resolved with treatment. He ascribes her presentation on examination and ongoing pain complaints as being "associated with subsequent complaints including the problem with lifting a pot in the garden, and injuries related to her running". Dr. Hummel went on to say that in his opinion, it is "unclear" whether the ongoing flare-ups that the plaintiff continues to experience are related to the Accident, though he opines that this is "unlikely".

[47] Dr. Hummel's penultimate opinion was that the plaintiff suffered soft tissue injuries that resolved with treatment by 2019, and that her "occasional intermittent

discomfort" would not interfere with her ability to return to her employment, her employment prospects, or vocational capacity. He opined that based on his evaluation of the plaintiff, "I could find no evidence of any disability as a result of the [Accident]. [The plaintiff] appears to have resolved her complaints from the [A]ccident by 2019 and then sustained subsequent flare-ups or further problems".

[48] I do not accept Dr. Hummel's opinion that the plaintiff's injuries from the Accident were resolved as of 2019 and any subsequent flare-ups are attributable to other causes. His opinion in this regard is not consistent with the preponderance of the evidence before me, including in particular the plaintiff's evidence as to her ongoing pain and Dr. Sangha's opinion. Throughout his opinion and testimony, Dr. Hummel appeared to make a concerted effort to minimize the plaintiff's reported pain, preferring to refer to it as mere "discomfort" and discounting the import of a positive facet loading test, initially describing a positive finding as indicating the facet is "irritated", but eventually conceding that could indicate a source of pain.

Conclusion on Expert Evidence

[49] In soft-tissue injury cases such as this, this Court has repeatedly recognized that evidence from a physiatrist is generally of more assistance than that of an orthopaedic surgeon. In *Smith v. Law*, 2021 BCSC 1789, Justice Lyster framed the issue as follows:

> [126] In considering the evidence of both Dr. Boyle and Dr. Perey, I have considered *Goudbout v. Notter*, 2018 BCSC 1043, in which the Court discussed the report of an orthopaedic surgeon, Dr. Hummel, who had given opinion evidence about the plaintiff's soft-tissue injuries. The court in *Godbout* stated that, "[a]s the physical injuries claimed to have been suffered by [the plaintiff] are essentially soft issue injuries, the opinions of an orthopaedic surgeon such as Dr. Hummel are of little assistance to the court. In assessing soft tissue injuries, an evaluation by a physiatrist would have been more appropriate."
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> [127] In this regard, I find the following passage from the decision of Madam Justice Sharma in *Shinzay v. McKee*, 2014 BCSC 2317, apposite:
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>> [87] There is no reason to suggest any particular field of medicine is more reliable than another but I do think as a discipline, orthopedic medicine is more inclined to discount pain where there is no corresponding musculoskeletal injury. Dr. Oliver and Dr. Maloon opine on what is causing the pain, but they do so through an orthopedic

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> surgeon's lens. That lens filters out the possibility that soft tissue injuries can cause pain that is not temporary. I am not disparaging orthopedic surgeons. My point is that their training is system-specific and less holistic than Dr. Kleinman's approach. I find this justifies placing greater weight on Dr. Kleinman's evidence.
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> [128] The same is true in this case, and I find the opinions of Dr. Caillier of much greater assistance than those of Dr. Perey or Dr. Boyle.

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[50] Likewise, I accept Dr. Sangha's evidence, which was essentially unchallenged on cross-examination, and find his opinion of greater assistance on the facts before me that that of Dr. Hummel. Further, for the reasons set out below, where there are conflicts between Dr. Sangha and Dr. Hummel's opinions, I prefer Dr. Sangha's evidence.

[51] Leaving aside Dr. Hummel and Dr. Sangha's differing areas of expertise, I agree with the plaintiff that Dr. Sangha's opinion is to be preferred to that of Dr. Hummel. Dr. Hummel was not an impressive witness. He refused to concede errors in his analysis even when confronted with contradictory documentary evidence. He was argumentative, defensive, and at times testified in a manner akin to advocacy that is not consistent with an expert's duty to the Court.

[52] Dr. Hummel also demonstrated a tendency throughout his report to focus on evidence that could assist in attempting to link the plaintiff's ongoing pain to any cause other than the Accident, even when inconsistent with her clinical records and the history he took from her. By way of example, Dr. Hummel focused on one entry in a physiotherapist's records indicating that in late 2019, the plaintiff had improved to the point of doing normal activities and interpreted this to mean that she had fully recovered by that date and any ongoing sequelae of pain were attributable to other things, e.g. lifting a pot or running. He referred to "other therapists" arriving at the same conclusion but could not point to them.

[53] When asked to identify other potential causes for the plaintiff seeing a physiotherapist in 2019 if her injuries had resolved, Dr. Hummel pointed to an incident in March of 2020 where she fell while running and incurred an unrelated injury to her ribs. I agree with the plaintiff that this explanation is "non-sensical". Dr.

Hummel also demonstrated a tendency to attribute any ongoing complaints of neck pain to an incident where the plaintiff lifted a garden pot in 2021. The evidence establishes that the pot incident involved the plaintiff's lower back, not her neck.

[54] Dr. Hummel also appears to have relied heavily on the plaintiff's ability to return to distance running as evidence that her injuries had fully resolved, testifying to the effect that if she could run marathon distances, she would be "well on the way" to recovery. Not only is this not akin to being fully recovered, but Dr. Hummel's speculation on this point is inconsistent with the plaintiff's evidence that running actually helped her manage her pain, but she nonetheless required ongoing massage treatment to ameliorate the effects of her injuries. Dr. Hummel also conceded in cross-examination that the plaintiff's history demonstrated ongoing symptoms, despite returning to running, and that she could well have returned to her activities of daily living while still having ongoing symptoms.

[55] In the result, I give Dr. Hummel's opinion little weight and prefer Dr. Sangha's opinion as to the nature and causation of the plaintiff's injuries and her prognosis.

Findings Regarding the Plaintiff's Accident-Related Injuries

Legal Framework

[56] The applicable legal framework was recently summarized by Justice Horsman (as she then was) in *Rattan v. Li*, 2022 BCSC 648:

> [105] The onus is on the plaintiff to prove on a balance of probabilities that the defendants caused or contributed to the injuries for which she seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14 [*Athey*].
>
> [106] Tortfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff's injuries, even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a *better* position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a "measurable risk" that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.

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> [107] Unrelated intervening events are taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's wrongful conduct is not as great, and damages are reduced proportionately: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 36 [*T.W.N.A.].*
>
> [108] The question of whether the plaintiff's original position would, regardless of the tort, have been adversely affected by a pre-existing condition or an unrelated intervening event turns on a consideration of hypothetical events. Hypothetical events need not be proven on a balance of probabilities—rather, they are given weight according to their relatively likelihood. A future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. Where the evidence establishes a real and substantial possibility of the occurrence of a future or hypothetical event, this is a contingency that must be accounted for into the assessment of damages: *T.W.N.A.* at paras. 35 and 48.
>
> [Emphasis in original.]

Findings

[57] The defendants generally accept the plaintiff's medical evidence and that she suffered soft tissue injuries in her neck, upper back, and shoulder area. The defendants also accept Dr. Sangha's diagnosis of a WAD II injury, cervicogenic headaches, and sleep disruption.

[58] Based on the evidence before me, in particular Dr. Sangha's opinion, I find that the plaintiff suffered the following injuries as a result of the Accident:

a) Chronic pain in her neck, upper back, and shoulder area;

b) Cervicogenic headaches; and

c) Sleep disruption and irritability.

[59] The defendants say the plaintiff's injuries are not disabling, and that the evidence does not establish that they have "caused any disability or substantial interference with her life". I disagree. I reject Dr. Hummel's opinion to that effect and find, consistent with Dr. Sangha's opinion, that the plaintiff continues to experience pain, disability, and functional limitations as a result of the injuries she sustained in the Accident.

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[60] I also conclude that the plaintiff's injuries have resulted in functional limitations that have affected and are likely to continue to affect her tolerance for static postures of the head, neck, upper back, and periscapular region, including prolonged sitting or standing, and, therefore, her ability to work at full capacity as a psychologist.

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Findings on Liability

[61] As I found above, the Accident was a rear-end collision. The law with respect to liability for rear-end collisions is well-settled, as summarized in *Dubitz v. Knoebel*, 2019 BCSC 1706:

> [242] The case law is clear that:
>
> 1. The driver of a rear-ending vehicle is generally at fault, and the onus shifts to that driver to prove otherwise: *Robbie v. King*, 2003 BCSC 1553 at para. 13; *Cue v. Breitkreuz*, 2010 BCSC 617 at para. 15.
>
> 2. The driver of a following vehicle must leave enough space to stop safely in the event of a sudden or unexpected stop by the vehicles ahead: *Pryndik v. Manju*, 2001 BCSC 502 at para. 21; *Cue* at para. 15.
>
> 3. When a driver encounters unexpected and unforeseeable conditions, negligence cannot be presumed on the part of a driver who rear-ends another vehicle: *Vo v. Michl*, 2012 BCSC 1417 at para. 14.

[62] As noted in the first point above, in rear-end collisions, the onus is often said to fall upon the rear driver to show that the collision was not their fault. However, this does not mean that the legal burden of proof is reversed. Rather, it reflects the fact that a rear-end collision is itself *prima facie* evidence that the rear driver failed to keep a safe distance or drive with due care and attention: *Chauhan v. Welock*, 2020 BCSC 1125 at para. 65, aff'd 2021 BCCA 216. It is undisputed that the Accident was a rear-end collision, and this fact is, therefore, *prima facie* evidence of Ms. Mills' failure to keep a safe distance or drive with proper care and attention, given the icy road conditions.

[63] The defendants take issue with the volume of traffic at the time of the Accident. Contrary to the plaintiff's evidence, the defendants say that there were no

other cars in the vicinity at the time. The tenor of the defendants' submissions was that because there were no other cars around, the plaintiff was at fault for the Accident by driving too slowly.

[64] I disagree. Considering the evidence in its totality, I find Ms. Mills entirely at fault for the Accident. The Accident occurred as the parties were approaching a merge and when road conditions were icy. Had Ms. Mills been more cautious in light of the road conditions or not taken her eyes off the plaintiff's vehicle, the Accident would have been avoided. I find that, as in *Dubitz*, this was a "run of the mill" rear-end accident where the defendant was either not paying attention or following too closely given the road conditions, or both: para. 247. It is unclear to me why liability was not admitted in this case.

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Assessment of Damages

[65] The plaintiff claims non-pecuniary damages and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care and loss of housekeeping capacity, and special damages.

Non-Pecuniary Damages

Legal Framework

[66] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those she will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.

[67] Common factors influencing an award of non-pecuniary damages include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital, and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006). Generally, stoicism should not penalize the plaintiff: *Rattan* at para. 123; *Tisalona* at para. 39.

[68] An award of non-pecuniary damages must be fair and reasonable to each party, with fairness measured in part against awards made in comparable cases: *Rattan* at para. 124. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award depends on the seriousness of the injury considered in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

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Discussion

[69] The plaintiff seeks a non-pecuniary damages award in the range of $90,000–$125,000, relying on the following cases: *Wheeler v. Wilson,* 2021 BCSC 441; *Blackman v. Dha*, 2015 BCSC 698; *Foran v. Nguyen et al,* 2006 BCSC 605; *Kaur v. Bual,* 2021 BCSC 1385; and *Layes v. Stevens*, 2017 BCSC 895.

[70] The defendants submit that the appropriate range of non-pecuniary damages is $40,000–$70,000. The defendants do not point to any prior case law to establish that this is an appropriate range. Rather, they say that while "a common approach in the BCSC is to use other cases and damage award[s] therein for illustrative purposes", "this approach offers limited utility" because awards in other cases are made based on the evidence adduced therein and that by consequence:

> Distilling this entire dynamic down into brief paragraphs about comparable dynamics and surface level contrasts as it relates to physical or psychological injuries, even if they are informed by the same diagnoses and the same symptoms and from the same collision trajectory, does disservice to the very purpose of a trial, which is to adjudicate a claim on its own merits.

[71] I reject the defendants' approach and adopt the usual method of assessing non-pecuniary damages by reference to the *Stapley* factors, as applied in prior decisions involving similarly situated plaintiffs.

[72] The plaintiff was 49 years old at the time of the accident and 54 years old at the time of trial. She had been extremely active both professionally and recreationally. The injuries she suffered have had a significant impact on her life, both personally and professionally. As a result of the Accident, she now suffers from

chronic pain in her neck, upper back, and shoulder area; headaches; sleep disruption; and irritability. The injuries she sustained have affected her ability to tolerate some of the demands of her employment as a clinical psychologist, perform household duties, and her recreational pursuits, particularly running. The chronic pain she experiences has affected her mood and overall demeanour, and her relationship with her son. While the plaintiff's relationships with family appear to have improved, and she has now returned to running and other activities that she enjoys, I find that this is due in large part to her stoicism and strength of character, and does not detract from her pain and suffering.

[73] The plaintiff also submits that she ought not to be penalized for her stoicism. I agree. Stoicism is a factor that must be considered in conjunction with other factors, and it would be unjust for the plaintiff to be penalized for her strength of character: *Gardner v. Yoo*, 2019 BCSC 2230 at para. 70, citing *Beaton v. Perkes*, 2016 BCSC 2276 at para. 53.

[74] Based on my consideration of the *Stapley* factors, and the cases cited by the plaintiff, I conclude that $100,000 is a fair and reasonable award of non-pecuniary damages to the plaintiff in the circumstances of this case.

Expert Economic Evidence – Report of Mr. Gosling

[75] The plaintiff tendered an expert report dated May 19, 2022, from an economist, Mark Gosling, regarding past and future income loss. The defendants did not tender any expert evidence on past or future income loss. As such, Mr. Gosling's report evidence was essentially unchallenged and uncontradicted.

[76] However, many of the facts and assumptions underpinning Mr. Gosling's report were not borne out in the evidence at trial. For example, Mr. Gosling assumed that from the date of the Accident to August 31, 2018, the plaintiff only worked three days per week and therefore suffered a 40% loss of capacity during this time frame. This was not consistent with the evidence at trial, which was that the plaintiff continued her employment with Sources until February 28, 2017, and did ongoing contract work for them thereafter, and also began teaching one day per week at

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Adler in September 2017. This amounts to at least four days of work per week, and likely slightly more, or a capacity reduction of 20% or less.

[77] Similarly, Mr. Gosling assumed that the plaintiff reduced her working days from full time down to four days per week in March 2020 on account of her Accident-related injuries. The evidence at trial did not support this assumption; rather, it appears the onset of the COVID-19 pandemic contributed at least in part to the reduction in work in March 2020 and thereafter over the course of the pandemic.

[78] As such, in light of many of the key factual underpinnings of his report being unproven on the evidence before me, I am unable to give Mr. Gosling's report significant weight in assessing the plaintiff's damages. Unsurprisingly in the circumstances, the plaintiff did not rely heavily on that report in support of her claim for past, and notably, future, income loss, other than in respect of her claim for reduced earning capacity in the March 2017 to September 2018 timeframe. With respect to her claim for future income loss, the plaintiff abandoned reliance of Mr. Gosling's report and instead took the position in closing argument that the capital asset approach was preferable to the earnings approach.

Loss of Past Earning Capacity

Legal Framework

[79] An award of damages for past or future loss of earning capacity compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have—not could have—earned but for the accident-related injuries: *Sekhon v. Cruz*, 2023 BCSC 319 at para. 78, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. A claim for loss of earning capacity is in substance a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe* at para. 30.

[80] The burden of proof of actual past events is a balance of probabilities. However, an assessment of past loss of earning capacity also involves consideration

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of hypothetical events, which are then accounted for by contingencies. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Dornan v. Silva*, 2021 BCCA 228 at paras. 63–64, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183.

Discussion

[81] The plaintiff says that any losses suffered by either Guttornio or Bolgar Inc. can and should be treated as if they were losses suffered by the plaintiff in her personal capacity. In support of this assertion, she relies on *Martin v. Dardengo,* 2016 BCSC 1371, and *Rivers v. Rivers,* 1993 CanLII 226, [1996] B.C.J. No. 1226 (S.C.).

[82] In *Rowe*, the Court of Appeal recognized that injured plaintiffs who earn their income through a closely-held corporation should not be denied damages for their loss simply because, strictly speaking, the loss of income was suffered by the corporation. The rationale for this is that the relevant loss is not the income itself, but rather, is the value of the loss of earning capacity for which the tortfeasor must pay compensation: *Rowe* at para. 23.

[83] The plaintiff asserts three components to her past income loss claim:

a) The delay in the start-up of Bolgar Inc.;

b) Her reduced capacity to work after the Accident from when she left Sources on February 28, 2017, to when she started working full time hours through Bolgar Inc. in September 2018; and

c) The loss of her teaching job at Adler.

[84] The defendants say that the evidence does not justify any award for past income loss. In the defendants' submission, "[t]he evidence simply isn't there". In

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light of this position, the defendants did not address the three components of the award sought by the plaintiff or provide any submissions in the alternative.

Delayed Start of Bolgar Inc. Business

[85] The plaintiff seeks past income loss arising from what she asserts was an 18-month delay in acquiring a property and starting her private counselling business caused by the injuries she sustained in the Accident. The plaintiff claims for the loss of the rental income that would have been payable by other therapist tenants to Bolgar Inc. She testified that this rental income amounted to $9,500 per month, which results in a total claim of $171,000 over the 18-month period of alleged delay.

[86] The plaintiff and Mr. Lawlor provided evidence that the plaintiff's plan to start Bolgar Inc. was delayed from March 2017 to September 2018 because she did not feel physically ready to embark on this venture because of her Accident-related limitations. In the plaintiff's submission, had she been able to start her business as planned in April 2017, she would have started earning rental income from her tenants earlier.

[87] The plaintiff says that her new business venture was not a "pipe dream". Rather, she and Mr. Lawlor had taken active steps prior to the Accident in furtherance of establishing the business. The plaintiff incorporated Bolgar Inc. in November 2016, a business plan had been prepared, and her and Mr. Lawlor had started looking at properties. Most significantly, the plaintiff had given notice at Sources just before the Accident occurred. I agree with the plaintiff that these concrete steps show that she was embarking on establishing her new business at the time of the Accident.

[88] The plaintiff acknowledges that this claim is problematic to calculate. However, she analogizes it to a delayed entry into the workforce situation and says that she did not lose the earnings of the first year and half of her business; she eventually got that, just a year and a half later. Accordingly, the plaintiff claims she lost the most recent 18 months of rental income and to calculate the loss, relies on

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the 2020 corporate income tax returns for Bolgar Inc. and her testimony that she received $9,500 in rent from other therapists.

[89] With respect to the impact of the pandemic on her business, the plaintiff's evidence was that she lost a lot of her tenants because they were new therapists who had not had sufficient time to establish themselves in practice before the onset of the pandemic and resulting closures. In the plaintiff's submission, had her business started up on time in April 2017, her tenants' practices would have been more established and they would have been more likely to withstand the impact of the pandemic and continue as tenants throughout.

[90] I accept that there is a real and substantial possibility that but for her injuries, the plaintiff's business would have started sooner than September 2018 and thus she would have began earning rental income prior to that time. However, I do not accept the plaintiff's analogy to a delayed entry into the workforce claim (which is unsupported by any case authorities), or her contention that there is no explanation for the delay other than the injuries she suffered from the Accident. In particular, the plaintiff and Mr. Lawlor had not yet located a property to purchase as of April 2017, and there was no evidence before me as to the availability or cost of suitable properties in the plaintiff's target location during the relevant time frame.

[91] Furthermore, there was also no admissible evidence before me as to the impact of the pandemic on established therapists in the practice areas of Bolgar Inc.'s tenants generally, or the likelihood that they would have continued to pay rent for office premises irrespective of how established their practices were, particularly in light of the shift to online service delivery brought on by the pandemic. The plaintiff and Mr. Lawlor's evidence as to what would have happened with Bolgar Inc.'s therapist tenants during the pandemic had the business not been delayed amounts to speculation and lay opinion evidence and as such, I give it no weight. In my view, the plaintiff's submission that had her business started earlier, her therapist tenants would have been more established and therefore continued to pay rent throughout the course of the pandemic is speculative.

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[92] In my view, these contingencies require a substantial reduction to the plaintiff's calculation of $171,000 arising from the delayed start-up of her business venture. I thus find that a reduction of approximately 75% is appropriate, and an award of $42,750 is warranted on the evidence before me.

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Reduced Capacity to Work in March 2017–September 2018

[93] The plaintiff's employment with Sources ended on February 28, 2017. However, as a replacement was not immediately available, she continued to do contract work for Sources for a few hours a week from March 2017 to some point in 2018.

[94] During this time frame, the plaintiff also continued to work at Living Wellness, which she did through Bolgar Inc., rather than as a sole proprietorship as she had done prior to the Accident. The plaintiff worked three days per week at Living Wellness as that was all that she felt physically capable of doing. The plaintiff's evidence, consistent with Dr. Sangha's opinion, was that she has difficulty with periods of prolonged sitting as is required for treating patients in her private practice and could not tolerate sitting over the course of a full work day. The plaintiff's evidence was that her clientele was growing and that had she been capable of it, full time therapist work with her private clients would have been available to her.

[95] To supplement her income, in September 2017, the plaintiff started teaching one day per week at Adler. In-person teaching did not require prolonged periods of sitting that clinical counselling required; it allowed her to stand and move around. Thus, from September 2017 to September 2018, she was working a combined four days per week—three days at Living Wellness and one day at Adler—along with a few hours of contract work per week with Sources.

[96] I accept a real and substantial possibility that, if not for the pain and discomfort from her injuries, the plaintiff would have worked full time counselling her private clients from March 2017 to September 2018 at Living Wellness, and would also have continued to provide the additional contract support work to Sources. This is based on the whole of the evidence before me as to the plaintiff's dedication to her

profession, drive to succeed, and demonstrated capacity to work long days at various locations over the course of her career as a counsellor.

[97] Using the average statistical earnings for male and female psychologists combined in the National Occupational Classification, Mr. Gosling quantified a 40% reduction in capacity (working three days per week instead of five) over this time period as a loss of $76,286. However, as the plaintiff concedes, this may over-estimate the loss because of the contract work the plaintiff did at Sources until the end of February. In my view, it also overstates the loss given that the plaintiff commenced teaching one day per week at Adler from September 2017 onwards, thereby reducing the amount of time she would have had available to see private clients.

[98] Accordingly, Mr. Gosling's calculations must be adjusted to reflect the uncertainty as to whether the plaintiff would have worked full time at Living Wellness and also taught one day per week at Adler or reduced her private therapy time to train to be able to do child custody and parenting coordination report work. In the latter respect, the evidence shows that during the time that she cut back on her clinical counselling work, the plaintiff undertook additional training to enable her to do more lucrative child custody work.

[99] In light of this, the 40% impairment applied by Mr. Gosling overstates the effect of the plaintiff's injuries on her ability to work during this time frame as demonstrated on the evidence before me. Rather, I find that an impairment of 20% (equivalent to the plaintiff working approximately four days per week) is appropriate. Applying a 20% impairment to Mr. Gosling's average income statistics yields a loss of $38,143. In my view, an award of $38,000 is appropriate.

Loss of Alder Teaching Income

[100] The plaintiff testified she could not withstand the long periods of sitting required to teach online. This testimony is consistent with the medical evidence before me, in particular, Dr. Sangha's opinion that her injuries limited her tolerance for prolonged sitting or standing. Accordingly, I accept that the plaintiff suffered a

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loss of income resulting from her inability to continue teaching at Adler once classes transitioned from in-person to online learning.

[101] The plaintiff did continue to do a limited amount of thesis supervision (mostly by phone) at Adler through to March 2021, some of which she did without compensation, and some of which she was compensated for. She could not, however, continue to teach two classes or eight hours a week in-person as she had been doing prior to the pandemic as the extended time at the computer required for online teaching caused headaches and did not enable her to walk and move while teaching. I find that the plaintiff has established a real and substantial possibility that absent her injuries from the Accident, she would have been able to continue teaching at Alder after the switch to online classes, and would have therefore continued to earn income from her teaching position.

[102] The plaintiff's loss in this regard commenced when classes moved online during the pandemic, and she agreed in cross-examination the loss arising from her inability to continue teaching at Adler applied to the last half of 2020—e.g. from June 2020 onwards. She testified that she was offered the opportunity to return to in-person teaching at Adler shortly before trial in 2022, when in-person teaching resumed, but declined to do so.

[103] In the result, I find that the plaintiff's loss of past earning capacity attributable to loss of her ability to teach at Adler spanned the approximately two-year period from June 2020 to June 2022. The plaintiff's 2019 earnings from Adler were $34,799 per year, for a total claimed loss of $69,598. However, I find that a reduction is appropriate to account for the contingency that given the demands of Bolgar Inc. and the highly remunerative nature of the child custody report work she was doing, the plaintiff would not have chosen to return to teaching or would have taught fewer hours or classes. As such, I apply a contingency of 50% to account for this and award $35,000 for this loss.

[104] In the result, I award damages for past loss of earning capacity of $115,750. Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, income tax

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must be deducted from this award. If the parties are unable to agree on the appropriate deduction and net amounts, they may appear back before the Registrar to settle the deductions.

Future Loss of Earning Capacity

Legal Framework

[105] An award for loss of future earning capacity represents compensation for pecuniary loss. Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Rattan* at para. 145, citing *Dornan* at paras. 156–157.

[106] The proper approach to assessing damages for loss of future earing capacity was clarified by the Court of Appeal in the trilogy of *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

> [146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.
>
> [147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*,

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2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[107] The three-step process for considering claims for loss of future earning capacity is as follows:

a) Does the evidence disclose a potential future event that could give rise to a loss of capacity;

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and

c) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

See *Rattan* at para. 148, citing *Rab* at para. 47.

[108] There are two approaches to the assessment of damages for loss of earning capacity: (a) the earnings approach; and (b) the capital asset approach. Where the earnings approach is used, valuation of the future loss typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91, citing *Lo* at para. 109; *Dornan* at paras. 155–156. Where the capital asset approach is used, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72, citing *Pallos v. Insurance Co. of British Columbia*, 100 B.C.L.R. (2d) 260 at para. 43, 1995 CanLII 2871 (C.A.); *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[109] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

Discussion

[110] The plaintiff submits that she has suffered functional limitations and ongoing pain as a result of the Accident that puts her at a competitive disadvantage in terms

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of employability. As such, she says that an award for future income loss is warranted despite the fact that she has returned to work full time and presently earns a higher income than prior to the Accident.

[111] The defendants simply deny that the plaintiff has proven that there is a real and substantial possibility of future income loss. In the defendants' submission, while the plaintiff had ongoing pain symptoms, those symptoms did not substantially interfere with her life or undermine her capabilities. As such, no matter what approach is adopted, no award for loss of future income capacity is warranted.

[112] A real and substantial possibility of future income loss can be made out even where a plaintiff has a secure job and plans to continue working in that job without difficulty, if the plaintiff is nonetheless put at a competitive disadvantage in the market as a result of her injuries. Even in circumstances where the plaintiff is able to continue with their employment and is unlikely to change careers, the loss of ability to work without pain and exhaustion is compensable under loss of future earning capacity: *Broman v. Pang*, 2023 BCSC 353 at para. 163. This is so even where non-pecuniary damages have already addressed a loss of satisfaction and joy in the time the plaintiff spends working: *Cheung v. MacDonald et al.*, 2004 BCSC 222 at paras. 88–89.

[113] The factors to be considered in assessing damages for loss of earning capacity set out in *Grewal v. Sanghera*, 2021 BCSC 621 at para. 161 [*Grewal* 2021], citing *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at para. 8, 1985 CanLII 149 (S.C.):

a) The plaintiff has been rendered less capable overall from earning income from all types of employment;

b) The plaintiff is less marketable or attractive as an employee to potential employers;

c) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and

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d) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[114] The defendants say that these conditions have not been established on the evidence before me. I disagree. Considering the whole of the evidence before me, I find that the first and second steps as set out in *Rab* have been met. The plaintiff has established that there is a potential future event that could lead to a loss of capacity, namely that she suffers from headaches, pain, disability, and functional impairment arising from the injuries to her neck, shoulder, and upper back from the Accident. I find that there is a real and substantial possibility that these injuries will impair her ability to earn income in the future, as I have found it did in the past.

[115] More specifically, I find that the injuries the plaintiff suffered from the Accident and the ongoing pain she experiences as a result have rendered her less capable overall from earning income from all types of employment and less marketable to other employers. The plaintiff's inability to take full advantage of available job opportunities in her field is evidenced by the reduction in the amount of time that she is able to devote to therapy sessions with her clients and her inability to continue teaching when classes were required to be conducted online during the pandemic arising from her inability to endure prolonged periods of sitting.

[116] Further, if the plaintiff were for whatever reason unable to continue doing child custody report work, she would likely find it difficult to replace that work and earn a comparable income in a competitive labour market. The evidence also clearly establishes, in my view, that despite the plaintiff's stoicism, she is less valuable to herself as a person capable of earning income in a competitive labour market.

[117] A plaintiff is not excluded from an award for loss of future earning capacity simply because they are still able to work after the accident and even where their income has been steady or increased since the accident: *Broman* at para. 151. As Justice Smith concluded in *Willett v. Rose,* 2017 BCSC 627:

> [69] Even in circumstances where employment data appear to show no reduction or even an increase in income following an injury, where a plaintiff

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> continues to suffer to some degree from the effects of an accident which have an impact on his work, there is an impairment of earning capacity. For example, in *Cheung v. MacDonald et al*, 2004 BCSC 222, it was argued that the plaintiff's income following the accident was higher than it had ever been. Mr. Justice Ehrcke said at paras. 84 and 85:
>
> > [84] As logically rigorous as that approach seems to be, it ignores the reality that Dr. Cheung continues to suffer to some degree from the effects of the accident, and that these effects have an impact on his work. While he may have demonstrated that he can, if he wills himself to, carry on and produce billings as high as before, one must ask whether it is reasonable to expect him to do so in the face of the pain he must endure.
> >
> > [85] The proper question under this head of damages is not simply whether a plaintiff will suffer an actual wage loss, but rather whether there has been an impairment of his income-earning capacity. This latter approach treats the ability to earn income as a capital asset, and the proper question is then whether that asset has in any way been diminished by reason of the defendant's negligence.

[118] In my view, the circumstances of this case are akin to *Cheung*, where the plaintiff was a dentist who returned to work after the accident working less and doing less physically demanding but more lucrative work. His billings following the accident were therefore higher than pre-accident. This did not disentitle him to an award for loss of future earning capacity. Rather, the Court acknowledged the plaintiff's demonstrative ability to continue working post-accident, and noted that the proper question was not simply whether a plaintiff will suffer an actual wage loss, but rather whether there has been an impairment of his income-earning capacity: *Cheung* at para. 84; see also *Broman* at para. 163.

[119] In the present case, the evidence establishes that the plaintiff's continued ability to work has come as a result of her stoicism and ability to persevere. It is not reasonable to expect that the plaintiff will be able to continue to endure working through the pain she continues to experience indefinitely. As a matter of common sense, I find that the pain she experiences will have a detrimental impact on her ability to work in the future: *Broman* at para. 163, citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. This is evident from the accommodations the plaintiff has already had to make in her work, including limiting the amount of private client therapy work she can do and adapting the type of counselling work she does, to

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mitigate her symptoms. I find that there is a real and substantial possibility that the plaintiff's opportunities to work in her field may be more limited and she may face additional barriers in completing the work that she is capable of doing on account of the injuries she suffered in the Accident.

[120] As Dr. Sangha testified in his report, while the plaintiff is fortunate to be able to self-accommodate for her injuries, she is nonetheless at a competitive disadvantage. Dr. Sangha opined that while she is able to work, it is not without a level of pain and "her ability to complete job demands has been compromised as a direct result of the injuries that were sustained" in the Accident. This is consistent with the plaintiff's evidence, which was to the effect that she requires accommodations throughout her work day and is limited in terms of the work and hours she can perform while managing her ongoing pain. In particular, while she currently spends the majority of her time doing child custody reports, if that work were to become unavailable to her or should she wish to resume doing more therapy work, the option to do so would be limited as she would struggle with the physical demands of prolonged sitting. This is also consistent with Dr. Sangha's opinion that he does not foresee any changes in the plaintiff's condition and "[the plaintiff]'s ability to earn an income has been permanently impacted as her impairments would reasonably be expected to interfere with the sustained postures required to provide clinical care".

[121] In the result, I am satisfied that the evidence before me discloses potential future events that could give rise to a loss of capacity. I conclude that the plaintiff's earning capacity has been reduced, even though she presently earns a significant income, greater than her pre-Accident earnings. I find that the plaintiff has proven a real and substantial possibility that her diminished capacity could generate a pecuniary loss in the future.

[122] Turning to the third step of the analysis articulated in *Rab*, the plaintiff submits that the capital asset approach is appropriate and, using that approach, an award of $200,000 is fair compensation for her future loss of earning capacity. The plaintiff

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abandoned her reliance on the earnings approach in closing argument and did not rely on the calculations for future income loss set out in Mr. Gosling's report, conceding that the report is of limited assistance given that many of the underlying assumptions had not been established on the evidence.

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[123] Rather, and while she acknowledged in closing argument that there is no evidence before me as to her earnings in 2021 or 2022, the plaintiff advocates in favour of the approach originating from *Pallos*. In closing argument, the plaintiff submitted that her pre-Accident 2016 annual income from Sources was approximately $70,000 and, when taken together with net business income of approximately $15,000, this supported an award of two years of income close to the $200,000, which she submits is the appropriate measure of her loss.

[124] Given their position that no award was warranted, the defendants did not advance an alternative position as to what a fair and reasonable award would be in the event that the plaintiff was found to have established a real and substantial potential future loss of earning capacity.

[125] The capital asset approach and resulting calculation of loss was considered in *Pallos* at para. 43, where the Court noted various methodologies for assigning dollar value to the loss of capacity to earn income, concluding that the various methods "seem equally arbitrary". Nonetheless, subsequent cases have relied on *Pallos* to assess loss of future earning capacity where the plaintiff continues to earn income at or above their pre-accident level, but has suffered an impairment that may affect the plaintiff's ability to continue to do so in the future, resulting in a loss that is difficult to calculate with any mathematical certainty: see e.g. *Thomas v. Campbell*, 2023 BCSC 36 at para. 179, citing *Rab* at para. 72. Under this approach, the typical award is one to two years' income: *Thomas* at para. 179, citing *Daleh v. Schroeder*, 2019 BCSC 1179 at para. 146; *Kania v. Evans*, 2021 BCSC 797 at para. 91; see also *Langston-Bergman v. Orchard*, 2022 BCSC 762 at para. 102.

[126] I agree with the plaintiff that the capital asset approach is appropriate in the present case as the plaintiff's career was in transition at the time of the Accident and

her earnings through Bolgar Inc. were not yet established or readily calculable: see e.g. *McKee v. Hicks*, 2023 BCCA 109 at para. 77, citing *Kringhaug v. Men*, 2022 BCCA 186 at para. 43; *Broman* at para. 149; *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 17. In the assessment of damages for future income loss, I must also consider both positive and negative contingencies: *Ploskon-Ciesla* at para. 35, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9.

[127] The positive contingencies supported by the evidence include that the plaintiff has experienced some improvement in her pain symptoms and is able to manage her pain by adapting her work habits and lifestyle, and through massage. It is possible, though not probable based on the guarded prognosis established on the medical evidence before me, that she may continue to experience further improvement. The plaintiff has continued to work as a therapist and, indeed, has established a successful business and positioned herself well in terms of finding lucrative work in her field that she can do in a manner that allows her the flexibility and respite she needs to manage her pain. The plaintiff's income post-Accident is greater than prior to the Accident.

[128] However, certain negative contingencies also come into play. This includes the fact that while the plaintiff, due in large part to her positive attitude, drive, and stoicism, has been able to manage her symptoms to date, there is no guarantee that she will continue to be able to do so, or to maintain the pace of work she is currently handling, in the future as she ages. Further, if she is unable to continue with the child custody work, her ability to replace that work with private client therapy sessions is limited. I must also factor in negative labour market contingencies and the fact that the plaintiff's condition may worsen over time.

[129] In my view, the plaintiff has suffered a reduction in her capacity to earn income in the future as a result of the Accident. However, I do not agree with the plaintiff that the evidence before me suggests that two years of annual income supports an award of $200,000. Even where the capital asset approach is

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appropriately used, the court should "ground itself as much as possible in factual and mathematical anchors": *Broman* at para. 150, citing *Knapp v. O'Neill*, 2017 YKCA 10 at paras. 17–19. As noted above, there was no evidence before me as to the plaintiff's income for 2021 or 2022. The plaintiff's T4 income from Sources for the years 2014–2016 was approximately $70,000 per annum. In 2017, her employment income consisted of $32,890 from Sources and Adler and $42,120 in dividends paid from Bolgar Inc. for a total of $75,010 (exclusive of investment income and a pension payout). In 2018, her employment income consisted of $23,400 from Adler and $54,606 in corporate dividends from Bolgar Inc. for a total of $78,006. In 2019, the plaintiff's income consisted of $34,799 from Adler; she did not receive dividends or salary from Bolgar Inc. And in 2020, the plaintiff's employment income consisted of $42,600, comprised of income from teaching at Adler and income paid to her as an employee of Bolgar Inc.

[130] Bolgar Inc. in turn had gross business income consisting of the plaintiff's work as a psychologist and rent received from other therapists of $115,319 in 2017, $130,943 in 2018, $304,380 in 2019 and $325,022 in 2020. However, after payment of rent to Guttornio and deduction of other expenses, Bolgar Inc.'s net income was relatively modest prior to 2020, having net income of $39,285 in 2017, $26,558 in 2018, and $19,933 in 2019. Yet in 2020, Bolgar Inc.'s net income increased significantly to $107,122, apparently resulting from significant reductions in advertising, sub-contracts, and "other" expenses.

[131] Considering the positive and negative contingencies outlined above, and anchoring my assessment in the factual evidence available to me, I find that a fair and reasonable assessment of the plaintiff's loss of income earning capacity on a capital asset approach is $150,000. In considering the fairness and reasonableness of this approach, I note that this is approximately equivalent to two years of the plaintiff's pre-Accident income at Sources. It also reflects her work ethic, stoicism, and the real and substantial possibility that absent the Accident, she would have continued to work more than full time hours both in the early years of setting up her

private counselling practice through Bolgar Inc. This award, in my view, properly accounts for the negative and positive contingencies discussed above.

Cost of Future Care

[132] The principles that govern the assessment of cost of future care were recently summarized by Justice Gomery in *Gill v. Borutski*, 2021 BCSC 554:

> [107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [*Gignac*] at paras. 29–30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta,* 2008 BCCA 420 at para. 41.
>
> [108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31–32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell,* 2018 BCCA 53 at para. 55.
>
> [109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri,* 2008 BCCA 462 at paras. 28–31.

[133] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Quigley v. Cymbalisty*, 2021 BCCA 33 at paras. 43–44, citing *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.). An award of future care costs is not intended to account for the cost of amenities that make the plaintiff's life more bearable or enjoyable, but are not medically justified: *Rattan* at para. 181, citing *Warick v. Diwell*, 2018 BCCA 53 at para. 24.

[134] Future care costs are a matter of prediction. The court must determine the present value of the future reasonable care needs of the plaintiff, allowing for contingencies to account for the fact that the future may differ from that suggested by the evidence at trial: *Rattan* at para. 182, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

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[135] The plaintiff's claim for future care is limited to massage therapy. She seeks a present value award inclusive of interest of $46,300. This amount represents the cost of monthly massages at Spa Utopia to the age of 80, namely for 26 years.

[136] The plaintiff's relies on Dr. Sangha's report in support of this award, noting that he recommended treatment as appropriate with flare-ups of pain and dysfunction, including physiotherapy, chiropractic, and massage. Dr. Sangha also made other recommendations, but the plaintiff's evidence was that she finds massage therapy to be most effective for managing her pain and dissuading her headaches. The plaintiff testified that current rate of massage therapy for a 50-minute session is $190.05 and that she attends as needed, but usually on a monthly basis, resulting in a yearly cost of $2,280.60. Prior to the Accident, the plaintiff attended Spa Utopia for massage therapy on an as-needed basis while training for marathons.

[137] The defendants question the need for future treatment as the plaintiff has not undertaken treatment other than massage for some time. In the defendants' submission, an award of $2,000–$5,000 is reasonable for physical rehabilitation treatment given the nature of the injuries involved and their progression to date.

[138] In my view, the necessary medical justification or evidentiary link supporting an award equivalent to monthly massage therapy sessions to the age of 80 is lacking. Dr. Sangha did not make any such recommendation; rather, he recommended treatment as appropriate with flare-ups of pain. As such, the amount sought by the plaintiff is not reasonably necessary, based on the medical evidence before me, to promote the plaintiff's physical health.

[139] While the plaintiff obtained massage treatment quite frequently in 2017 and 2019, the frequency of treatments has declined in more recent years. This is substantiated in the plaintiff's evidence tendered in support of her special damages claim, which shows that she obtained massage treatment ten times in 2019 and seven times in each of 2020 and 2021.

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[140] Considering the evidence as a whole, and recognizing that future care awards are a matter of prediction and must be reasonable to both parties, I find that an appropriate award in the present circumstances, consistent with Dr. Sangha's recommended treatment for flare-ups, is the cost of bi-monthly treatments (six times per year) which results in an annual cost of $1,140.30, which I award to the age of 65 (11 years). In the absence of expert evidence as to the appropriate present value multipliers, the accepted methodology is to apply the present value multipliers set out in Appendix E of *Civil Jury Instructions,* 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf updated 2023): *Colgrove v. Sandberg*, 2022 BCSC 671 at para. 127, citing *MacGregor v. Bergen*, 2019 BCSC 315 at para. 116; *Basi v. Xia*, 2021 BCSC 1324 at para. 114. Applying that multiplier results in a present value award, inclusive of interest, of $11,160 consistent with s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and s. 1 of the *Law and Equity Regulation*, B.C. Reg. 352/81.

Loss of Housekeeping Capacity

[141] Damages for loss or impairment of housekeeping capacity may be awarded where the plaintiff has established that she has lost the ability to perform household tasks as she did previously: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28. These damages will be valued as the cost of replacement services where that value is available: *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67–68; *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34.

[142] Loss of housekeeping capacity may also be compensated through a non-pecuniary award, where appropriate, including where a plaintiff is able to perform tasks with difficulty or chooses not to complete the tasks at all: *McTavish* at paras. 67–69; *McKee* at para. 112.

[143] Recognizing that her claim in this regard is not strong, the plaintiff seeks what she characterizes as a modest award of $20,000 for loss of housekeeping capacity. While Dr. Sangha's report concluded that the plaintiff is functionally limited in her ability to perform housekeeping duties as she did prior to the Accident, the plaintiff's

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evidence was that she is independent in her activities of daily living and is able to do most of the household chores, though with occasional assistance from her husband or others. In light of this evidence, I have taken the plaintiff's loss of capacity in this regard into consideration in making my award of non-pecuniary damages. I decline to make a separate award under this head of damages.

Special Damages

[144] The parties agree that the plaintiff has incurred $13,865.80 in documented special expenses. The plaintiff says that these expenses were all reasonably incurred and directly attributable to the injuries suffered in the Accident.

[145] The defendants dispute that the claimed housekeeping services were medically reasonable and caused by the Accident. The defendants rely on the fact that the hired housekeepers performed general cleaning services, which were not prompted by the plaintiff's post-Accident limitations. The defendants also identify discrepancies and lack of specificity in the housekeeping payments that call into question the causal link between the Accident and such services. The defendants take the position that the treatment expenses up until 2019 were reasonable and rely on the opinions of both Dr. Hummel and Dr. Sangha in this regard, in particular Dr. Sangha's testimony about most soft tissue injuries resolving within a one to two-year period.

[146] I agree with the plaintiff that the special expenses documented were reasonably incurred and directly attributable to the injuries she suffered as a result of the Accident. As I have found that the plaintiff suffered a loss of capacity to perform household tasks as a result of the Accident, the housekeeping costs were reasonably incurred and directly attributable to the Accident. The treatment expenses claimed are also recoverable as special damages for the same reason, particularly in light of my rejection of Dr. Hummel's evidence that the plaintiff's injuries had resolved by 2019. In the result, I award special damages in the amount sought by the plaintiff, namely $13,866.

CONCLUSION

[147] The plaintiff is awarded the following damages against the defendants, jointly:

a)	Non-pecuniary damages	$100,000
b)	Past loss of earning capacity	$115,750
c)	Loss of future earning capacity	$150,000
d)	Cost of future care	$11,160
e)	Special damages	$13,866

[148] The total damages are awarded in the amount of $390,776, subject to the parties settling the appropriate deductions.

[149] As the successful party, the plaintiff is presumptively entitled to her costs from the defendants, at Scale B. If any party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

"Hughes J."

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