IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Roy-Noel v. Buckle,*
2024 BCSC 752

Date: 20240507
Docket: M198738
Registry: Vancouver

Between:

Shelley Ann Roy-Noel

Plaintiff

And

Mark Buckle and Dale Buckle as
Administrators of the Estate of Christopher Mark Buckle

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff:	K.C. Stewart Y. Wong
Counsel for the Third Party	S.M. Lloyd G.W. Griffith
No other appearances	
Place and Dates of Trial:	Vancouver April 2-5, 8-12, 15-18, 2024
Further Written Submissions	April 19, 2024
Place and Date of Judgment:	Vancouver May 7, 2024

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I. INTRODUCTION

[1] On May 1, 2018, a black GMC Sierra truck driven by the defendant, Christopher Mark Buckle, struck the rear bumper and left side of the Toyota RAV4 SUV that the plaintiff had just parked outside a Wharf Street restaurant, between Broughton and Fort Streets in Victoria. Mr Buckle, smelling of alcohol, was taken away in handcuffs. Mr Buckle died a year later, in circumstances unconnected to the collision. His parents — his executors — did not respond to the notice of civil claim; the third party, ICBC, serves as the *de facto* defendant. Liability is not disputed.

[2] While exiting the parked car, the plaintiff saw the truck in her rear view mirror just before impact. The plaintiff dove across her car seat to protect her grandmother, who was leaning forward in the passenger seat to retrieve her purse from the floor. The impact knocked the plaintiff forward and up. She first struck the left side of her head on the windshield and ceiling, and then on the driver's side pillar. She has little recall of running after the truck and yelling at the defendant.

[3] The plaintiff claims that she suffered a mild traumatic brain injury from the impact. She suffers ongoing chronic pain in her left hand and arm, neck, upper back and shoulders; constant migrainous headaches that at times rise to intolerable levels; debilitating light and sound sensitivity; tinnitus; hearing loss in her left ear; dizziness and balance issues; blurred vision; scattered memory and concentration; brain fog; sleep disruption and difficulties; nightmares; post-traumatic stress disorder; generalised anxiety disorder; major depressive disorder; and somatic symptom disorder. These conditions combine to create a state of near-permanent pain, lethargy, distraction, anxiety, and hopelessness. While these symptoms are more or less constant, from time to time they particularly flare up, separately or in combination, such that she does not know whether or not she will be able to function on a given day. In her words, "each day is completely different."

[4] These claims are largely supported and confirmed by the medical experts called by the plaintiff, and were not significantly undermined by the medical experts

called by ICBC. ICBC counsel responsibly acknowledges that the plaintiff suffered significant physical and psychological injuries, which have rendered her incapable of working full time, and in need of significant medical and other interventions and treatments.

[5] For the reasons set out below, I agree that the collision has inflicted significant disability upon the plaintiff, rendering her a shell of her former vibrant, ebullient, enterprising, personable, nurturing, and active self. These debilitating conditions will likely be permanent and will at best be managed rather than cured through any treatments: her various treatments in the six years since the collision have made little progress. The collision has likely rendered the plaintiff competitively unemployable. She is entitled to significant damages, although not to the extent sought.

II. CREDIBILITY AND RELIABILITY

[6] Nothing in the two half-days of cross examination, the trial exhibits, or the expert reports undermined the plaintiff's credibility. The plaintiff presented as frank and forthright: she was restrained and careful (in a positive sense), acknowledging that some of her symptoms (knee and ankle) resolved soon after the collision, and that certain of her remaining symptoms are not constant, but ebb and flow in intensity. Rather than pushing in testimony or argument a claim based upon her "dream" of opening a two-storey daycare, the plaintiff readily admitted that she had taken no formal steps towards its realisation. To its credit, ICBC accepts that the plaintiff was a credible witness, and only questions her reliability.

[7] As expanded below, the quintessence of her diagnosed somatic symptom disorder is her constant preoccupation with her pain and other symptoms. That said, this condition in itself is a manifestation of the effects of the collision. There was no evidence, expert or otherwise, to indicate that this condition should cast doubt on the credibility or reliability of the plaintiff. As set out below, the plaintiff was examined by several medico-legal expert witnesses. None of those witnesses raise concerns about the plaintiff malingering: concocting, or exaggerating her symptoms. Drs

Anderson and Pullyblank, and Ms Szarkiewicz specifically noted that her pain and other symptomatic complaints were consistent with their interviews and testing.

[8] ICBC points to two passages in the clinical records to raise doubts about the plaintiff's reliability. An ICBC psychologist recorded her as stating that she had worked hard on her friend's farm after the closure of her daycare; another clinical record made reference to her climbing ladders. The plaintiff was perplexed by and denied these statements; her friend also affirmatively denied that the plaintiff had carried out any physical work at the farm. The individuals recording these purported statements were not called as witnesses to confirm their accuracy. These two instances did not affect the Court's assessment of the plaintiff's reliability or credibility.

III. DAMAGES

A. Introduction

[9] The parties propose the following damages awards[1]:

Head of damages	**Plaintiff**	**ICBC**
Non-pecuniary damages	$250,000	$125,000 to $175,000
Past wage loss / loss of past earning capacity	$151,098 (gross)	$50,000 to $70,000
Loss of future earning capacity	$950,000	$380,000 to $510,000
Cost of future care	$584,073	$206,660 to $220,016
Special damages	$10,686	$8,672
TOTAL	**$1,945,857**	**$770,332 to $983,688**

B. Medical evidence

[10] The parties relied on the following expert medico-legal reports:

Expertise	**Plaintiff**	**ICBC**
Pain and anesthesiology	Dr Aaron MacInnes (July 5, 2023)	
Neuro-ophthalmology		Dr Briar Sexton (February 18, 2022)
Otolaryngology	Dr Dana Wong (August 3, 2023)	Dr Imran Samad (September 28, 2023)
Vocational	Dr John Pullyblank (August 17, 2023 and August 21, 2023)	Philip Whitford (September 28, 2023)
Occupational therapy	Simone Szarkiewicz (August 11, 2023 and January 12, 2024)	Matt Gregson (September 28, 2023)
Psychiatry	Dr Stephen Anderson (April 27, 2023)	Dr Eugene Okorie (September 26, 2023)
Psychedelic assisted therapy	Dr Pamela Kryskow (December 29, 2023)	

[11] As expanded in the next section, the expert medical, functional, and vocational testimony provided by ICBC, with the exception of that provided by Dr Sexton, was of limited assistance, and is accorded limited weight. With the exception of Dr Sexton, the ICBC expert witnesses only provided brief responsive reports, without having directly examined or interviewed the plaintiff. To be fair to those expert witnesses, they all readily acknowledged the importance of examining and meeting a medical subject before opining on conditions and prognoses, and acknowledged the limitations of their reports. Reflective of these limitations, these ICBC expert reports were based in part on certain key assumptions that were not borne out in testimony. Finally, the ICBC responsive reports took an overly atomistic view of the plaintiff's conditions, focussing on the diagnosis and prognosis of her conditions in their specific areas of expertise, largely in isolation from the stubborn and interrelated constellation of complex symptoms that underlies her somatic pain disorder and general condition.

[12] As a further reason for preferring the plaintiff's expert reports, ICBC did not put material aspects of its expert reports to the corresponding plaintiff experts in cross-examination. For example, ICBC failed to put to Dr Wong most of Dr Samad's contrary opinions on pain, tinnitus, and vestibular impairment. ICBC did not put any propositions from the Whitford report to Dr Pullyblank. While the rule in *Browne v. Dunn* (1893), 6 R 67 (HL) does not strictly apply to expert opinions, an opinion may be granted less weight where the expert providing a contrary opinion is not provided the opportunity to respond or explain on cross: *Danks v. Middelveen*, 2024 BCSC 174 at para. 96; *Larson v. Bahrami*, 2017 BCSC 2308 at paras. 92–93; *Mak v. Blackman*, 2022 BCSC 931 at para. 100.

C. Diagnoses and prognoses

1. Introduction

[13] The plaintiff was 39 years old on the date of the collision; she is now 45. She did not suffer from any relevant pre-existing medical conditions.

[14] Immediately after the collision, she felt considerable pain in her left arm; she could not straighten her elbow. Her neck hurt, and she felt considerable pressure in her head.

[15] When she returned home, light and sound attacked her with a new intensity: conditions that persist to today. She described the feeling of bright lights as "stabbing into [her] brain." Even the low buzz of the refrigerator and other electrical elements sound intense. She hears a constant ringing in her ear, and is frequently dizzy. She suffers from constant migraine headaches, which feel like a clamp squeezing her brain.

[16] The pain in her neck, shoulders, and upper back continue to today. She can only raise her left arm in considerable pain, and has diminished mobility. She feels occasional numbness and tingling in her left fingers, and generally weakened strength all along her left arm, from shoulder to fingers.

2. Pain conditions

[17] Dr MacInnes focused on the plaintiff's physical and pain conditions. He concludes that the collision inflicted chronic whiplash-associated disorder on the plaintiff, with specific injuries to the head, neck, bilateral shoulder girdles, left shoulder, left jaw, left arm, and left-hand regions. As a reaction to these initial injuries, the plaintiff has also developed chronic mechanical neck pain, as well as chronic myofascial pain. These conditions are also to blame for her chronic cervicogenic migrainous headaches. Given the persistence of all these conditions, despite five years of treatment since the collision, they are unlikely to resolve, and the plaintiff will most likely be left with these ongoing pain symptoms.

[18] Dr MacInnes also diagnoses the plaintiff with central sensitisation syndrome: greater sensitivity to pain, and diminished ability to cope with pain. His medical evidence that central sensitisation syndrome makes pain symptoms persistent and unpredictable dovetails with the plaintiff's description of the variability and unpredictability of her various conditions from day to day.

[19] Based on the failure of the plaintiff's treatment attempts since the collision to address her central sensitisation syndrome, and the generally "very challenging" nature of that condition, Dr MacInnes concludes that the prognosis for its resolution or significant improvement is poor, and that her condition is likely irreversible. Generally, he concludes that even if recommended treatments assist to some degree, "she would most likely, at best, receive modest functional gains from these treatment recommendations but it is unlikely to improve significantly with her overall pain symptoms or functional tolerance. She will need to continue to actively manage her chronic pain symptoms for the rest of her life."

3. Ear-related conditions

[20] Dr Wong focused on the plaintiff's ear-related conditions. She concludes that the plaintiff most likely suffered traumatic head and ear injuries related to the concussive and acceleration-deceleration forces to her head and neck in the collision, causing her hearing loss, tinnitus, noise sensitivity, dizziness, and

imbalance. She also believes that the plaintiff's continual neck pain, headaches, chronic pain syndrome, post-concussive symptoms, insomnia, anxiety, and depression may also be contributing to her persistent tinnitus and noise sensitivity, secondary to central sensitisation. Finally, she believes that the plaintiff's dizziness and imbalance may also be due to peripheral persistent postural dizziness, cervicogenic dizziness, headache associated dizziness, side effects of medications, and musculoskeletal deconditioning. She clinically describes the plaintiff's dizziness as a "severe handicap."

[21] Dr Wong's prognosis for these conditions is poor. She believes that the plaintiff's left-side hearing loss is most likely permanent. She also believes that as the plaintiff's vestibular and balance rehabilitation therapy have been ineffective over the past five years, she has a poor prognosis for achieving full compensation and complete recovery. She notes that individuals with bilateral otolithic injury, which she considers likely for the plaintiff, can suffer recurring episodes of dizziness and imbalance during their lifetimes despite vestibular and balance physiotherapy. She concludes that this dysfunction will most likely be permanent and cause her long-term disability.

[22] Dr Wong concludes that the plaintiff's ongoing combination of conditions will affect almost every aspect of her life:

> If Ms. Roy-Noel is unable to achieve adequate recovery or habituation to her tinnitus and noise sensitivity, these symptoms may be permanent and affect her ability to function in social environments. She may continue to struggle to concentrate, fall asleep, hear clearly and participate in groups with her tinnitus. She may have difficulty enjoying activities such as going out for dinner, going to the movies or being in loud public places due to the background noise. Her tinnitus and noise sensitivity have affected her ability to return as a daycare operator.

[23] The ICBC report of Dr Samad did not dislodge these conclusions. Again, he did not meet with or examine or test the plaintiff. As such, his report largely comprises an abstract list of alternative potential causes for her various conditions. For example, he notes that tinnitus can be caused by wax; ear infections; acoustic neuroma; exposure to loud noise; head injuries; disorders of the neck, vertebrae or

temporomandibular joint; cardiovascular disease; allergies; Ménière's disease; an underactive thyroid; or a degeneration of the middle ear bones, none of which have any factual basis in this specific plaintiff. As the plaintiff had no pre-collision history of neck pain, tinnitus, hearing loss, or dizziness, and as these conditions only manifested themselves at the time of or just after the collision, these blunderbuss alternative etiologies are nicked by Occam's razor.

[24] With respect to her dizziness, Dr Samad noted the "discrepancy" that the plaintiff struck the left side of her head, but suffers vestibular weakness on the right side. As set out above, as explained in her report and expanded in her testimony (to be fair, the benefit of the latter of which Dr Samad of course did not have), Dr Wong explained that the plaintiff's conditions were not only caused by the impact of the collision, but also by the acceleration-deceleration whiplash motions; she explained that it is not rare for an injury to manifest itself on the side opposite to that directly struck. Dr Samad ultimately agreed that acceleration-deceleration motions can cause injuries to the otolithic organs and brain.

[25] Dr Samad's report suffered from further superficial limitations. He theorised that her conditions are likely caused by a "viral insult", without any evidentiary basis for that theory and, again, in the face of those conditions only manifesting themselves right after the collision. Similarly, his thesis that the plaintiff's tinnitus is caused by underlying anxiety, based upon psychological abuse by her father as a teenager, was unsupported in the trial evidence. Finally, he sought to downplay Dr Wong's VEMP ("vestibular evoked myogenic potential") testing, while acknowledging that he himself uses such tests, and that they have been in general use for many years in Canada. To avoid potential tester bias, Dr Samad has a separate clinic carry out the tests: the same safeguard that Dr Wong employed.

[26] Dr Samad's report is strongest in his recommendations. With respect to tinnitus, he identifies amplification, masking, tinnitus retraining, drug therapy, biofeedback, dental treatment, counselling, and electrical stimulation of the inner ear. With respect to dizziness, if her dizziness is attributable to persistent postural-

perceptual dizziness (which is not established) that condition may be managed with special physical therapy, serotonergic medication, and cognitive behavioural therapy.

4. Psychological conditions

[27] Dr Anderson diagnoses the plaintiff with both physical and psychological conditions. He opines that she likely suffered a concussion injury or mild traumatic brain injury as a result of the collision. He also diagnoses the plaintiff with major depressive disorder, generalised anxiety disorder, and post-traumatic stress disorder as a result of the collision. Dr Okorie, for ICBC, agrees that the plaintiff's symptoms satisfy the criteria for these three conditions.

[28] Dr Okorie states that it is problematic to diagnose a mild traumatic brain injury where the plaintiff's MRI brain scan showed no evidence of intracranial abnormalities. Drs Andersen and MacInnes confirmed, however, that a mild traumatic brain injury will often be undetectable in medical imaging. In any case, Dr Okorie acknowledges that the plaintiff's cognitive issues could be explained by her emotional distress, headache, pain, fatigue, and insomnia, apart from any brain injury. While that may affect treatment options, it does not undermine the symptomatic effects of the collision.

[29] Jurisprudence also dissuades the Court from obsessing on whether chronic pain, depression, and other conditions are attributable to a brain injury or underlying psychological or other trauma. As noted by Justice N Smith, whose experience and expertise in this area is well known, in *Scoates v. Dermott*, 2012 BCSC 485:

> [103] On the medical evidence, it appears impossible to know with any degree of confidence if the plaintiff's cognitive and personality problems relate to brain injury, if they are the product of depression and chronic pain, or if they stem from a combination of all these factors. In terms of the plaintiff's current condition, I find that it makes very little difference. The symptoms are very real and the chronic pain and depression, which clearly flow from the plaintiff's injuries, are sufficient to cause them with or without an organic brain injury.
>
> [104] The only possible difference is that the plaintiff's condition is theoretically treatable if no physical brain injury is involved. However, I am persuaded by the opinions of Dr Schmidt and Dr Ancill that significant

> improvement is unlikely in this case. The chronic pain is going to be permanent and I believe the plaintiff will continue to experience depression as a result of his pain and limitations and from the loss of his ambulance career, which had been a defining feature of his life.
>
> …
>
> [175] … Although I have found the plaintiff's cognitive, emotional and personality difficulties may result from the complex interaction of chronic pain and depression, rather than organic brain injury, the intractable nature of those problems makes the distinction largely irrelevant.

[30] I thus prefer the diagnosis of Dr Anderson, who had the benefit of interviewing and examining the plaintiff.

[31] Dr Anderson also diagnoses the plaintiff with persistent somatic symptom disorder with predominant pain, which was described in the previous (4th) edition of the *Diagnostic and Statistical Manual of Mental Disorders* as "chronic pain disorder". He describes the condition as follows:

> Ms. Roy-Noel ruminates anxiously about her physical symptoms. Ms. Roy-Noel's life now largely revolves around her pain. Ms. Roy-Noel can no longer be spontaneous. Ms. Roy-Noel needs to decide whether activities could exacerbate her pain and she avoids doing activities which may worsen her pain (kinesiophobia). Ms. Roy-Noel feels hopeless and helpless about her physical symptoms. Ms. Roy-Noel worries about her pain worsening as she ages. When Ms. Roy-Noel is under increased emotional stress her pain worsens. Both anxiety and depression increase pain perception and negatively affect one's ability to cope with pain. Ms. Roy-Noel has likely been caught up in a vicious cycle of chronic pain whereby physical and emotional factors are interacting to create her pain condition.

[32] Dr Pullyblank agrees with this diagnosis. He describes the effects of the persistent somatic symptom disorder as "pain is the centre of her universe."

[33] Dr Okorie disputes the somatic symptom disorder diagnosis:

> SSD with predominant pain applies to a patient who is overly preoccupied, disabled, or invested in their pain. Such patients are consumed by pain, are unreasonably disabled by pain, or overutilize medical resources due to their pain. Despite her headache and pain, Ms. Roy-Noel operated her daycare center for a period, then worked on farms, and for psilocybin companies after the MVA and plans to open a spa in Gabriel Island. Dr MacInnes, a physiatrist, did not opine that Ms. Roy-Noel was overly disabled by her pain and recommended additional treatments for her physical challenges.

[34] This critique is based upon an overly rosy and expansive understanding of the plaintiff's post-collision work history and aspirations. To be fair, Dr Okorie did not have the benefit either of interviewing the plaintiff in person or hearing the later trial testimony, all of which confirmed the plaintiff's general inability to work in the five years since the collision.

[35] Ultimately, Dr Okorie accepted that there was "no question" that the combination of the plaintiff's psychiatric diagnoses, chronic pain, vestibular issues, headaches, tinnitus, and light and noise sensitivity imposed a poor prognosis.

[36] Dr Anderson concluded that the plaintiff will likely continue to have significant anxiety and depressive symptoms and not return to her pre-collision level of emotional functioning. Her long-term prognosis for psychiatric wellness is poor, based upon the persistence of her conditions, coupled with the comorbidity of her multivarious physical and psychiatric conditions.

5. Treatment and prognosis

[37] In contrast to many personal injury plaintiffs, the plaintiff has been dedicated and wide-ranging in seeking multiple forms of treatment for her conditions: a ten-page summary of treatments (which list does not include most pharmaceutical or medical treatments) shows no interruptions in these efforts, spanning all months since the collision. While the plaintiff has made reasonable efforts to try to abate her conditions through treatments, therapies, and medication, however, there remain many untried recommended treatments. To her credit, the plaintiff states that she is willing to try any treatment to break the vicious cycle of pain, depression, and anxiety: she has no idiosyncratic aversions to treatments, as is seen amongst some plaintiffs. The plaintiff's medical experts emphasise the cumulative cyclical interplay of her various symptoms, such that alleviating individual conditions may in turn alleviate or abate this cycle.

[38] As set out above, Dr Wong and Dr Samad recommended several treatments that may manage to some degree her tinnitus, dizziness, and hearing loss.

[39] With respect to her pain symptoms, she has tried diclofenac, escitalopram, cyclobenzaprine, hydromorphone, and bupropion to no significant improvement, and with some adverse side effects such as exhaustion.

[40] That said, Dr MacInnes identifies several medications not yet attempted by the plaintiff that may assist in managing the plaintiff's chronic pain symptoms: nortriptyline, amitriptyline, pregabalin, gabapentin, duloxetine, venlafaxine, and nabilone. Dr MacInnes also conjectures that cognitive behavioural therapy may assist the plaintiff in managing her pain. He cautions that these treatments "would not be curative to Ms Roy-Noel['s] condition and at best may provide modest improvement in her pain control and function."

[41] Two rounds (of the suggested three rounds) of Botox have already partially alleviated her headaches. Drs MacInnes and Sexton confirm that Botox and CGRP inhibitors can assist some patients with persistent headaches, and that if the headaches are addressed, other pain symptoms may improve. The plaintiff has not yet attempted CGRP inhibitor treatments. Nor has she yet tried beta blockers, calcium channel blockers, gabapentin, tricyclic antidepressants, topiramate, or medical grade tinted contact lenses to address her light sensitivity, all of which Dr Sexton recommends.

[42] Dr Anderson recommends further sessions with the psychologist for cognitive behavioural therapy, consideration of medications including nortriptyline and Cymbalta, attendance at a multidisciplinary pain clinic, kinesiology sessions, and occupational therapy sessions.

[43] Given the multiplicity of the plaintiff's conditions, her stated willingness to try any treatment, and her stated intention to explore the various recommendations in the medical-legal reports, which she has had in her possession since autumn 2023, it is disappointing that the plaintiff has not yet tried many of these treatments, most of which are hardly obscure and are regularly prescribed by family doctors for pain relief.

[44] The plaintiff confirms that since receiving the medico-legal reports, she and her nurse practitioner have started a series of trials of the recommended medications. Reasonably, the nurse practitioner is proceeding methodically, trying the medications one-by-one, and monitoring their effects and efficacy. Further, there is no evidence that these medications were in fact recommended to her by her family doctor or nurse practitioner before receipt of the medico-legal expert reports in autumn 2023. Accordingly, her delayed trials of these medications do not work towards a failure to mitigate argument, and ICBC does not advance such an argument. At the same time, the bounty of well-established and promising medications that could significantly improve her pain condition, and thus her overall pain-focused disorder, serves as a considerable positive contingency reducing the damages award.

[45] Dr Sexton opines that if the plaintiff follows the headache treatment recommendations, there is a 50 percent chance of a 50 percent reduction in headache frequency and intensity. However, if none of the treatments are effective, then she is likely to suffer from headaches indefinitely.

[46] Dr Anderson numerically defined his use of the term “likely” — in respect of his prognoses that the plaintiff “will likely continue to have significant anxiety and depressive symptoms and not return to her premorbid level of emotional functioning” and “is not likely competitively employable” and “likely has a permanent disability” — at 90 percent.

[47] Following on the mathematical approach to contingencies urged by the Grauer JA tetralogy referenced below, I apply a 15 percent contingency discount to all heads of damage save past earning capacity and out-of-pocket special damages; the additional five percent (to Dr Anderson’s 10 percent) reflects the more optimistic prognoses presented by Drs MacInnes and Sexton, coupled with the initial successes provided by the Botox treatments, and the promise presented by the bounty of hitherto untried treatments and therapies.

D. Non-pecuniary damages

1. Effects of the collision on the plaintiff's life

[48] The plaintiff was a vibrant, talented, and energetic individual before the collision. She enjoyed a wide variety of activities with her wide circle of friends and family. From high school onwards, she served as a professional singer in various contexts: in bands, in nightclubs, at festivals, and other paying venues. She was an accomplished dancer from youth, and this love of dance continued throughout her adulthood. She enjoyed karaoke with her friends. She would sing for friends and family in her home, often while she hosted dinner parties. She was an accomplished cook. She enjoyed biking, walking at a swift pace, jogging, hiking, and the outdoors.

[49] She can no longer do most of these activities. Her kinesiophobia makes her resist any strenuous or energetic activity. She cannot balance on a bicycle. She can walk short distances, often with some pain and vertigo, shielding the brightness of the sky with sunglasses. The bustle and noise of a dinner party, club, party, or festival is overwhelming. Her tinnitus and headaches prevent her from singing or listening to music; reading provokes blurred and double vision, on paper or on screen; she must keep the light dim on her telephone and computer. While she can occasionally cook, she sometimes loses track of the process, or forgets steps, and soon becomes fatigued and irritable.

[50] The collision has diminished her relationships with her friends and family. While she was formerly a supportive and giving friend, she is now a disproportionately needy person in relationships. She sees even her close friends much less frequently than she did before the collision: as set out above, she is unable to participate in most of the fun activities they enjoyed collectively before. Her pain complaints, irritability, and fluctuating mental states have strained her personal and professional relationships, and have ended several romantic relationships. Her libido is low.

[51] The collision has undermined her confidence in driving. Driving causes anxiety; any approaching vehicle makes her jump. Although psychological

counselling has allowed her a slow return to driving, she generally avoids it, and on some days her anxiety makes her unable to get behind the wheel.

[52] On a theme that speaks to the cost of future care and earning capacity claims as well as the non-pecuniary damage claim, before the collision she took special pride in ensuring that her house and her daycare were immaculately organised, tidy, and clean. Between fatigue, dizziness, pain, and other conditions, and a lack of motivation caused by depression and other conditions, she has lost this zeal and ability.

[53] With her loss of employment, she has also lost her home: with no income, she cannot afford rent. She rotates from one family member to another, staying at their homes, and relying upon them for food and other supports.

[54] I conclude by reference to the factors in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006). The plaintiff is at the young end of middle-aged: she will likely live with her difficult conditions for many decades. Her conditions are omnipresent, severe, and disabling, imposing emotional suffering, and destroying her previous vital and enjoyable lifestyle. She is continually anxious about her pain, and the prospect of the pain and symptoms worsening in the future. Her conditions have severely impaired her personal and social relationships. She has been generally stoic, as illustrated by her attempts to work, and her stated willingness to try any treatments that might improve her conditions.

2. Comparator cases

[55] The plaintiff claims $250,000 in non-pecuniary damages. While distinguishable in some respects, the plaintiff's proffered cases are more factually analogous to the present case:

a) *Donaldson v. Grayson*, 2023 BCSC 1675: $250,000 (which included loss of housekeeping capacity), to the 49-year-old plaintiff, who suffered a traumatic brain injury and associated neurocognitive symptoms, including issues with memory, brain fog, finding words, stuttering under stress,

confidence, and focus; depression; anxiety; chronic pain due to soft tissue injuries to her neck, shoulder, and back; face twitching; headaches; fatigue; sound and light sensitivity; tinnitus; and somatic symptom disorder. The Court found that her mental capabilities had been markedly diminished. She was angry and frustrated by her circumstances. She and her husband took care to modify all of their activities to accommodate her conditions and to avoid triggering pain, headaches, and noise sensitivity. At the same time, the conditions and the accident were more severe than the present, and the plaintiff was wholly unable to return to work.

b) *Ponych v. Klose*, 2023 BCSC 1504: $250,000 to the 43-year-old plaintiff, who suffered a mild traumatic brain injury and ongoing symptoms of constant headaches; cognitive difficulties (including brain fog, difficulty with concentration, and poor memory); dizziness and nausea; chronic pain; difficulties with sleep; persistent depressive disorder; generalised anxiety disorder; and marked personality changes. At the same time, he appears to have been plagued with more suicidal thoughts and physical injuries than in the present case. Further, the resultant sleep disorders forced the plaintiff to sleep apart from his wife, and the accident forced them to abandon their plans to have another child.

c) *Chowdhry v. Burnaby (City of)*, 2008 BCSC 1337: $200,000 ($283,000 adjusted for inflation) to the 64-year-old plaintiff who suffered physical injuries including headaches, neck, shoulder and back pain; post-traumatic stress disorder; and major depression as a result of the collision. The Court found while he probably suffered a mild traumatic brain injury at the time of the collision, he had not sustained a persisting cognitive impairment as a result. The plaintiff's physical injuries had largely resolved by the date of trial, but his psychiatric symptoms endured. As a distinction, the accident was more shocking and serious than the present: the plaintiff's vehicle was crushed by a tipping garbage truck, rendering the plaintiff unconscious, and leaving him in an uncommunicative catatonic

state for six months. The Court found it highly unlikely the plaintiff would be able to return to any sort of gainful employment.

d) *Tan v. Mintzler and Miller*, 2016 BCSC 1183: $210,000 (which included non-pecuniary compensation for lost housekeeping capacity; $262,000 adjusted) to the 56-year-old plaintiff who suffered a mild traumatic brain injury at the time of the accident; ongoing psychological injuries, including mild depression, anxiety, and PTSD; mild cognitive difficulties, including memory issues; chronic pain throughout the left side of her body; frequent headaches; and dizziness. As with *Chowdhry*, the accident was more severe; as with *Donaldson,* the plaintiff was rendered wholly incapable of working.

e) *Hans v. Volvo Trucks North America Inc*., 2016 BCSC 1155, aff'd 2018 BCCA 410: $265,000 ($331,000 adjusted) to the 40-year-old plaintiff, whose "near catastrophic" and "debilitating" (paras. 515–516) PTSD and major depressive disorder destroyed a previously vibrant life and rendered him isolated and withdrawn. At the same time, the accident, involving an out-of-control tractor-trailer, made the plaintiff think that he was about to die; he had attempted suicide on three occasions, and had been hospitalised on multiple occasions, spanning many weeks.

f) *Cheng v. Mangal,* 2021 BCSC 954: $225,000 ($257,000 adjusted) to the 46-year-old plaintiff who suffered a mild traumatic brain injury and concussion; soft tissue injuries and chronic pain; headaches; dizziness; nausea; balance issues; noise and light sensitivity; vision difficulties; sleep disturbance; memory difficulties; depression; PTSD; and substantial changes to her mood that changed her entire personality and relationships. At the same time, the plaintiff was rendered unconscious by the accident, and suffered from more tangible and extensive physical injuries, including to her pelvis, left hip, and left knee, and her balance issues forced her to use a cane. The accident prevented her from carrying

on her pre-accident role as primary caregiver to her husband, who suffered from cancer; it also rendered her incapable of managing her finances. Finally, the Court concluded that the plaintiff would not be able to return to work.

[56] ICBC suggests non-pecuniary damages in the range of $150,000 to $175,000, if the Court agrees with Dr Anderson's diagnosis of somatic symptom disorder, which it does. However, as set out below, the plaintiffs in ICBC's analogous cases suffered less profound and less persistent injuries, had a less vibrant lifestyle to lose than the present plaintiff, or are otherwise distinguishable. Further, when adjusted for inflation, these cases approach the range suggested by the plaintiff:

a) *Sparks v. Keller*, 2022 BCSC 231, aff'd 2023 BCCA 194: $125,000 (including loss of housekeeping capacity; $139,000 adjusted for inflation) to the 44-year-old plaintiff who suffered from chronic pain in her back, neck, shoulder, and arm; burning pain in her hips and buttocks; headaches; nausea; blurred vision; cognitive difficulties, including with memory; sleeping difficulties; and leg spasms. The plaintiff walked with a cane, on the recommendation of an occupational therapist. Notwithstanding this, the plaintiff maintained a positive outlook on life, and was much less seriously impacted by her injuries than the present plaintiff, such that she was still able to do some of the things she did with her family before the accident, but with breaks to sit and rest. Further, the plaintiff had only sought a range of $150,000 to $200,000.

b) *Hauk v. Shatzko*, 2020 BCSC 344: $150,000 ($173,000 adjusted) to the 49-year-old plaintiff who suffered chronic regional myofascial pain in her neck, back, and shoulder; cervical facet joint dysfunction; chronic post-traumatic headaches; major depressive disorder; somatic symptom disorder; and adjustment disorder with anxiety. The plaintiff, however, was largely able to work until shortly before trial, and was indeed promoted. The Court concluded that she did not have memory problems related to

the accident, which also did not cause her tennis elbow symptoms. Importantly, some of her own retained experts opined a hopeful prognosis for the plaintiff.

c) *Macie v. DeGuzman*, 2019 BCSC 1509: $170,000 ($200,000 adjusted) to the 24-year-old plaintiff who suffered multiple soft tissue injuries; mild traumatic brain injury; post-traumatic concussion syndrome; major depressive disorder; panic disorder; somatic symptom disorder, with predominant and chronic pain; generalised anxiety disorder; and PTSD, all of which caused a "radical change" in the plaintiff's capacities and ambitions (para. 90), and stymied her attempts to maintain paid and volunteer work. The plaintiff only sought $200,000 in non-pecuniary damages.

[57] With an eye to the profound effects of the collision on the plaintiff's previously vital life, as measured against the comparator cases surveyed above, the Court awards $220,000 in non-pecuniary damages, which, as expanded further below, includes consideration of her impaired housekeeping capacity.

E. Loss of past earning capacity

1. Law

[58] In *Jajcaj v. Bevans*, 2021 BCSC 834, Justice Ball summarises the assessment of loss of both past and future earnings capacity:

> [190] The value of the loss of income, either past or future, is the difference between what the earnings would have been and what they are or will be, as a result of the tort: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at paras. 29–30. That assessment is based on either the earnings approach or the capital asset approach, and must be based on the evidence. The plaintiff must demonstrate that there is a real and substantial possibility, beyond mere speculation, that the loss has occurred or will occur in the future. It is a matter of assessment and not mathematical calculation: *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–16; *Shongu v. Jing*, 2016 BCSC 901 at paras. 186–187. The overall fairness and reasonableness of the award must be considered: *Kuskis v. Hon Tin*, 2008 BCSC 862 at paras. 153–154.

[85] As stated recently in *Lamarque v. Rouse*, 2023 BCCA 392:

> [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.

2. Discussion and decision

[59] The plaintiff had a consistent but varied work history, from high school onwards. In addition to being a professional singer, and an occasional clothing model, she has worked in sales at mid- and high-level clothing stores, as a representative for a sunglasses company, and in other retail capacities. There is nothing in her testimony or *curriculum vitae* to indicate that she is work shy. On the contrary, her uncontradicted pre-collision work history evidences a solid track record of hard work, adaptiveness, flexibility, perseverance, and ability to gain the trust of present and prospective employers.

[60] From 2014, the plaintiff operated a small daycare centre in the basement of the house she shared with her aunt. The trial evidence made clear that she was a remarkable caregiver and early educator, with special empathy and connection with children. She placed special emphasis on nutrition and outdoor exploration at her daycare. Even in her present diminished state, these qualities shone through during her testimony.

[61] Throughout the history of the daycare, there were on average four to five pre-school children, and three to four older children who attended after their elementary school day ended. She charged $800 a month for the full-time children, and $400 a month for the after-school children; she had plans to increase these fees by $100 and $50 respectively a month, but these plans were overtaken by the collision, the pandemic, and the closure of the daycare.

[62] The collision immediately reduced the plaintiff's ability to operate a daycare. She could no longer lift the children or kneel or crawl with them without pain. The noise and activity inherent in a gaggle of children proved overwhelming; the sound of children's laughter or a dropped spoon or plate would inflict pain. She was forced to wear sunglasses, with cotton stuffed in her ears, for the days she was able to work. The pain wore down her patience, empathy, and gentle tone. She found herself snapping at the children; the children in turn became more disruptive, louder, and harder to control. She lost her ability to organise and clean the daycare to the desired degree. She was forced to rely upon a friend as a primary assistant and replacement, along with the help of her niece, and a mother of one of the daycare children, to fill in for days and hours when incapacity or a medical appointment made her unable to work. Parents began noticing the diminished quality and continuity of care; some withdrew their children. In March 2020, the COVID-19 pandemic necessitated the closure of the daycare; in April 2020, the plaintiff closed the daycare permanently.

[63] The parties approach the issue of loss of past and future earning capacity in roughly the same manner: looking to her income tax filings before the collision to hypothesise what her earnings would have been from 2018 to present and beyond but for the collision.

[64] The plaintiff uses the 2017 net earnings as an earnings model, and assumes that the plaintiff would have made good on her intention to raise the rates by $100 and $50. The plaintiff also testified that she would have further increased her rates in 2021 and 2024; the plaintiff uses the modest measurement of adjusting rates solely for inflation: $950/$475 from 2021 and then $1075/$525 from 2024. The plaintiff accounts for four months of the mandatory pandemic shut down from March 2020, as well as $12,000 the plaintiff owes her friend, Ms Thompson, for her additional assistance at the daycare. These calculations result in a loss of $151,098 from 2018 to 2024: an average of $21,571 per year.

[65] In contrast, ICBC bases its calculation on an average net income for 2015 to 2017, including the early days of the daycare, when the daycare had fewer children, and less of a reputation. ICBC also does not account for the plaintiff's stated intention to raise rates. This baseline results in an average net income of $14,134, for a total loss of $48,816. ICBC suggests a past loss of capacity in the range of $50,000 to $70,000, for an average loss of $7,142 to $10,000 a year, including for the last four years when the plaintiff has received literally or practically zero income.

[66] The plaintiff's economic model of lost past earning capacity (and for that matter, lost future earning capacity) provides a more realistic model. The plaintiff was running a successful daycare centre, largely because of her compelling interpersonal skills with children and creativity: there is no reason to think that that daycare would not have continued to succeed, or that demand would have diminished. To use the first years of the daycare as a baseline is distortive. The Court accepts the plaintiff's commonsensical evidence that she would have raised the rates in the manner presented in the model. The plaintiff's model represents not merely a real and substantial possibility, but a near certainty of what would have occurred but for the collision.

[67] The Court awards $151,098 for loss of past earning capacity for the six years from the date of the collision to today.

F. Loss of future earning capacity

1. Law

[68] In *McHatten v. Insurance Corporation of British Columbia*, 2023 BCCA 271, Madam Justice Fenlon sets out the Court's task in assessing loss of future earning capacity:

> [19] As has oft been noted, assessing loss of future earning capacity is a particularly difficult exercise for a trial judge. The central task involves comparing the plaintiff's likely future working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133. That comparison must be grounded in the evidence before the judge, as limited as it may be.

[69] The Grauer JA trilogy of *Rab v. Prescott*, 2021 BCCA 345, *Lo v. Vos*, 2021 BCCA 421, and *Dornan v. Silva*, 2021 BCCA 228 govern loss of future earning capacity claims. *Rab* sets out a three-step approach:

> [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…***
>
> [emphasis added]

[70] In *Steinlauf v. Deol*, 2022 BCCA 96 (creating a Grauer JA tetralogy), the Court expands on *Rab*:

> [52] In *Rab v Prescott*, 2021 BCCA 345 at para 47, this Court referred to a three-step process 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 step was an evidentiary one: "whether the evidence discloses a *potential* future event that could lead to a loss of capacity". In cases like this one, ***where the event giving rise to a future loss is manifest and continuing at the time of trial, that evidentiary step is a given.***
>
> [53] The second step, which in practical terms may prove to be the first, is whether, on that evidence, the plaintiff has established entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to a future loss: see, for instance, *Perren v Lalari*, 2010 BCCA 140 at para 32. As this Court explained in *Rab* at para 29, establishing that threshold question, too, ***is less challenging in some cases than others***:
>
> > ***… In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous***. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* [*v Silva,* 2021 BCCA 228] was such a case.
>
> …

> [55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:
>
> > …An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that ***the award is an assessment, not a mathematical calculation***. Nevertheless, ***the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened…***
>
> [emphasis added]

[71] In *Rattan v. Li*, 2022 BCSC 648, Madam Justice Horsman, then of this Court, described the application of contingencies to the damages analysis within this framework:

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

2. The plaintiff's post-collision work attempts

[72] After the closure of the daycare, the plaintiff made two attempts at employment, working part-time at two start-up companies. In one, she was to make presentations on Ibogaine, derived from a psychoactive African shrub; that position was only for three to ten hours a week, never progressed to a point where she

actually received a salary, and ended after two or three months. In another, she worked for a ship bilge cleaning company seeking investors. Due to her unpredictable migraines and other conditions, she was unable to consistently attend to her work duties, and was released from each post. Her employer in the latter post testified that the plaintiff was "mentally, not always there – some days she could not do simple tasks…some days she could…. She was very, very inconsistent." Although she was only scheduled to work a three-day week, she regularly missed work due to her conditions. Her employer would have dismissed her earlier, but kept her on for "humanitarian reasons."

3. Expert evidence

a) Evidentiary objection

[73] As a preliminary issue, ICBC objects to the plaintiff's medical experts opining on the plaintiff's general future employability, citing *McWilliams v. Hardy*, 2023 BCSC 1259 at paras. 83–84; *Lo v. Vos*, 2019 BCSC 1306 at paras. 149–150, rev'd on other grounds 2021 BCCA 421; *Amlani v. Holland*, 2022 BCSC 1502 at para. 67. In *Oh v. Fang*, 2023 BCSC 1042 at para. 52, the Court specifically found opinions on that plaintiff's future job functionality to be outside the expertise of the current plaintiff's pain expert, Dr MacInnes.

[74] These cases can be distinguished. In *McWilliams*, the Court noted that the psychiatrist provided no analysis to support his conclusion that "it is highly doubtful" that the plaintiff would ever regain as successful a career as she might have expected, or that she could "sustain the rigours of working in a foreign country" (paras. 83–84); in *Lo*, the report similarly provided no analysis for the conclusion that the plaintiff could not work as a teacher. In contrast, Drs Anderson, MacInnes, and Pullyblank each do provide a sufficient analytical basis to conclude that the combination of the plaintiff's psychological and physical pain conditions make it unlikely that she is able to carry out full-time and possibly part-time work: her general employability. Further, there is no particular vocational or functional analysis necessary to reach these conclusions, which focus on the hindering effects of her

medical conditions. In the present case, as in *Oh* at para. 52 (i.e., in respect of work as a realtor), Dr MacInnes acknowledged that any opinion on the plaintiff's ability to perform specific tasks associated with specific occupations would go beyond his medical expertise.

[75] In this, the plaintiff's medical witnesses perform the same task as set out in the report of ICBC's very own medical expert, Dr Sexton, who opines that the plaintiff "is partially impaired from working due to her ongoing headaches. She is able to compensate for her light sensitivity which does not prevent her from working."

[76] These expert opinions focus on the effects of the plaintiff's medical impairments on general functionality, rather than on the specific vocational and market demands and vagaries of a given occupation. Courts regularly accept medical expert opinions on general employability and vocational function and stamina, just as they accept medical expert opinions on the general effects of medical conditions on other aspects of a plaintiff's life: for example, *Fox v. Danis*, 2005 BCSC 102, aff'd 2006 BCCA 324; *Clost v. Relki*, 2012 BCSC 1393; and *O'Grady v. Virk*, 2023 BCSC 48.

[77] Accordingly, I reach a similar conclusion to that reached in *Rusu v. Willowbrook Motors Ltd.*, 2022 BCSC 1117 at para. 46, another case cited by ICBC for this proposition. There, Justice Shergill "placed a significant amount of weight" on Dr MacInnes's opinion, including his opinion that the plaintiff's moderate level of pain catastrophising may pose difficulty in maintaining full-time employment, but that part-time work was likely a reasonable goal.

[78] Finally, again, ICBC did not provide these doctors an opportunity to explain the basis for their conclusions, by putting it to those experts in their cross examinations that their conclusions were outside their expertise, or were unsupported by facts. It may well have been that specific aspects of these medical experts' practice or experience, or their interviews with and examinations of the

plaintiff did provide them with particular ability to opine on her general ability to work regularly and consistently.

b) Expert opinions on employability

[79] Ms Szarkiewicz was the sole witness at trial who interviewed and tested the plaintiff and who provided an opinion on her specific vocational ability to work in future as a daycare worker. She carried out a functional capacity evaluation with the plaintiff over not one but two days: on June 26 and July 28, 2023.

[80] She concluded that the plaintiff's manifold conditions render her unable to perform that work, which requires a high level of multi-tasking and divided attention in an inherently loud and busy environment. She summarises the plaintiff's functional and vocational limitations:

> As noted above, in addition to not meeting the full physical criteria, Ms. Roy-Noel falls short of the cognitive demands and demonstrated vision dysfunctions and hearing/noise sensitivity in addition to psycho emotional symptoms of anxiety, depression, kinesiophobia, cognitive overload and fatigue that will pose as barriers in terms of her interactions with children, parents and other care givers. Based on the results of cognitive testing she demonstrates limitations with multi-tasking, divided attention, immediate recall, delayed recall, spatial relations/executive function, and language. Her results across all cognitive tests completed were abnormal. While further in-depth cognitive testing can be completed such as a neuropsychological evaluation, the results are unlikely to change her ultimate prognosis for her cognition at this stage or change her level of employability at this stage. In my opinion, her psychiatric conditions (somatic symptom disorder, post-traumatic stress disorder, major depressive disorder and generalized anxiety disorder) in combination with her cognitive, visual, noise and vestibular dysfunctions would render her competitively unemployable in any vocation either on a part-time or full-time basis. Her pre collision role required a high level of multi-tasking and divided attention in a busy and loud environment. Ms. Roy-Noel does not have the capacity to work within this type of environment which is inherently loud and busy.

[81] She concludes that:

> … due to the constellation of her symptoms she is unlikely to be gainfully employed in a part-time or full-time manner. She cannot be relied upon to maintain set hours due to her symptoms. Her ability to talk in groups, answer questions and provide quick responses will be limited based on her fatigue, environmental sensitivities and other cognitive dysfunctions.

[82] In his purely responsive report, Mr Gregson criticises various aspects of Ms Szarkiewicz's methodology and conclusions. As he neither interviewed nor tested the plaintiff himself—particularly damning in any functional assessment—his report was of limited use. The report ultimately provides no independent opinion on the plaintiff's employability.

[83] He notes that the plaintiff was complaining of pain in her ankle (which pain was inflicted the previous day by an ICBC-appointed doctor conducting an independent medical examination), and suggests that her discomfort may have affected the test results. But, at best, this would affect only one of two days of Ms Szarkiewicz's assessment, and for the most part only her walking and balance: only a small portion of her conditions.

[84] Mr Gregson notes that the plaintiff failed to complete three tasks, and that Ms Szarkiewicz did not somehow insist that the plaintiff further attempt to complete those tasks. For example, the plaintiff could not finish the grip strength test because of tinnitus, as well as shoulder, arm, and hand pain, and headaches; a doll chair construction task designed to test multi-tasking ability, as well as a dexterity test, overwhelmed her, triggering kinesiaphobic behavior, dizziness, distress, and fatigue. These incomplete tasks were outliers: the plaintiff was able to complete most of the other testing exercises. In not forcing the plaintiff to continue these tasks, Ms Szarkiewicz was properly exercising her professional opinion in not risking physical or other harm to the plaintiff. Ultimately, Mr Gregson acknowledged that Ms Szarkiewicz was entitled to use her professional judgment in this manner.

[85] It would have been helpful for ICBC to have invested the funds to advance a more compelling and informed functional assessment, based on an interview and series of tests, in the face of a $1.9 million claim. The Court has no affirmative reason or basis to question the professional conclusions and methodology of Ms Szarkiewicz, such as second-guessing her professional opinion not to press the plaintiff further in the tests that she expressed an inability to complete.

[86] The plaintiff's medical experts provide a similarly restrained prognosis for the plaintiff's return to work.

[87] Dr Anderson concludes that the plaintiff is likely permanently disabled as a result of the collision, and that she is not likely competitively employable due to the nature and extent of her persistent symptoms including pain, fatigue, functional limitations, fluctuating symptoms, noise sensitivity, light sensitivity, tinnitus, dizziness, visual difficulties, cognitive difficulties, communication difficulties, and psychiatric symptoms.

[88] Dr Pullyblank, qualified as both a psychology and vocational expert, agrees with Dr Anderson's diagnosis and prognosis, both from a general and a vocational perspective. He identified multiple interwoven barriers to employment:

- **Pain and physical limitations**. As noted in interview, testing, and document review, Ms. Roy-Noel's day-to-day life is severely limited by her experience of chronic pain, including unpredictable flare-ups. A Functional Capacity Evaluation indicated that given her constellation of symptoms, Ms. Roy-Noel is currently unemployable.
- **Neurocognitive problems**. Ms. Roy-Noel reports significant problems with noise and light sensitivity and has been evaluated as having problems as well with dizziness and balance. She reports cognitive problems, such as with word-finding, that may be multiply caused by difficulties such as pain and emotional distress.
- **Emotional problems**. As discussed, Ms. Roy-Noel presents with an array of psychological symptoms consistent with multiple diagnoses and likely to produce and/or exacerbate problems with pain and cognitive functioning.
- **Limited stamina and activity tolerance**. Interview, testing, and document review indicate that Ms. Roy-Noel can produce some effort for periods of time, such as during our testing, but has difficulty with sustained effort as her physical, cognitive, and emotional symptoms increase and interact.
- **Questionable suitability for education/retraining**. In my opinion, formal testing indicates that Ms. Roy-Noel has (and has had) the intellectual and academic potential to take formal education or training. However, while she may have the cognitive ability potential, it is my opinion that the above barriers that are a part of her present functioning will impede her capacity to deal with aspects of training such as classrooms, screen time, studying, and generally the learning, retention, and recall of information.

[89] He concludes that the plaintiff is likely to be realistically unemployable for the foreseeable future, given the severity and longevity of her conditions. He concludes that there is a "very low chance" that the plaintiff's functioning would improve to such a level as to permit retraining in the fields of support work or digital marketing.

[90] Dr MacInnes is a little more optimistic about the plaintiff's vocational future, stating that if she is able to better control and manage her chronic pain and associated symptoms, then she may be able to participate in part-time sedentary work. Nonetheless, he expresses concerns about whether the plaintiff can sustain part-time employment for the long term, while still working on managing her pain.

[91] Apart from the brief Dr Sexton opinion quoted above, the evidence provided by the remaining ICBC experts did not undermine the plaintiff's expert opinions of how her conditions negatively affect her future employability. Again, none of these experts met with, tested, or examined the plaintiff: again, a limitation particularly damning any functional or vocational opinion.

[92] Dr Okorie opined that Dr Anderson's conclusion that the plaintiff is competitively unemployable was premature, given the remaining number of treatment options. As set out above, those treatment options will likely assist the plaintiff in managing, rather than overcoming, her manifold symptoms. Dr Okorie also bases his opinion on a mistaken belief that the plaintiff "has managed to compete, obtain, and work various jobs" since the collision: as set out above, her frustrating post-collision employment experiences corroborate, rather than undermine, the likelihood that the plaintiff will never again be competitively employable.

[93] Mr Whitford agreed with most of Dr Pullyblank's conclusions: specifically that the plaintiff is currently competitively unemployable and that her constellation of symptoms since the collision constitutes a negative feedback loop which has degraded her ability to prosper in a competitive employment market. He agrees that unless she can break out of her current cycle of physical, emotional, and cognitive pain-related stress, she will be competitively unemployable for the long term.

[94] Mr Whitford disagrees with Dr Pullyblank's opinion that she will likely never work part-time again. While acknowledging that he is not a psychologist, and cannot provide an opinion on the medical limitations on her return to work, he sets out a potential course of vocational services that could better equip the plaintiff to do so. That return to work, if successful, may raise her confidence and adaptation sufficiently to break the negative feedback loop. He notes her "energy and tenacity" in obtaining and performing work pre-collision as an optimistic harbinger for future work after she receives this training. While training and assistance of the kind recommended by Mr Whitford could assist the plaintiff, his report, which he concedes was expedited, does not sufficiently take into account the plaintiff's frustrating repeated failed work attempts, even with particularly accommodating and flexible work conditions. Nor does it sufficiently take into account the hindrance to competitive and consistent employment posed by the plaintiff's complex interplay of conditions. These two foundational factors were powerfully conveyed to and by the medical experts who met personally with the plaintiff, and to the Court through trial testimony. Absent full appreciation of these impediments, Mr Whitford's recommendations comprise a generic, while well-meaning, list. Further, even if those recommendations were put in place, it is difficult to conceive of an employer or an employment situation that would provide the necessary wide accommodations. A suggested accommodation of remote work, for example, would be stymied by the computer screen triggering the plaintiff's light sensitivity and blurred vision. Finally, Mr Whitford agreed that "absolutely" the longer a person is out of the workforce, the harder it is to return.

4. Discussion and decision

[95] The plaintiff relies upon the same model set out above for calculating her future earnings capacity losses. Specifically, the plaintiff would continue operating her daycare with the same number of children, with periodic rate increases. She relies upon calculations by Darren Benning (which include a five percent contingency deduction reflecting the risk of extended withdrawal from the labour force through long-term disability) to calculate her losses to an assumed retirement

age of 70. These calculations result in a loss of future earning capacity of $950,000 over the next 25 years: a $38,000 annual average, approximating roughly her immediate pre- collision income.

[96] ICBC proposes a model wherein the plaintiff retires at age 67, the average age at which self-employed Canadian women retire. ICBC also notes that Mr Benning only provided labour market contingencies based upon participation, and did not impose any contingencies based on unemployment, part-time, or part-year work, or on the daycare being shut down temporarily for non-compliance with legislation, or on reduced client demand. Nor are there contingency deductions for external business risks. ICBC proposes a further 12 percent negative contingency deduction. It calculates a $633,183 basis for loss of future earning capacity, from which there will be further deductions based upon the Court's findings about the likelihood of the plaintiff returning to work part time. Hypothesising that the plaintiff may be able to return to up to two days per week if recommended treatments are partially successful, ICBC proposes a range of future loss of earning capacity between $380,000 and $510,000.

[97] Based on the totality of the evidence, the ICBC model is less convincing,.

[98] First, there is no affirmative evidence to suggest any likelihood that the plaintiff will be able to work one or two days per week. Despite stoic attempts, she has been incapable of any steady work in the six years since the collision. No expert hypothesises a probable ability to work one or two days a week. In any case, this possibility has been addressed through the contingent deduction of 15 percent based upon potential efficacy of the various recommended and untried medical treatments.

[99] Second, the plaintiff was self-employed: she would not face the risk of dismissal. She had a love of running a daycare that went beyond economic need. While clearly possible, it is unlikely that she would retire early, or only work part-time. It is also clearly possible but unlikely that demand would abate generally for daycare, or specifically for the plaintiff's successful and popular daycare. The plaintiff's

situation can be contrasted with cases imposing a higher general contingency deduction for plaintiffs who were not self-employed in pursuits of special passion and interest, such as *Hann v. Lun*, 2022 BCSC 1839, aff'd 2023 BCCA 288.

[100] ICBC also notes that as an unlicenced daycare, the plaintiff could care for an unlimited number of children to whom she was related by blood or marriage, but was limited to caring for a maximum of two non-relative children. If there existed insufficient potential familial clientele, the plaintiff would have to apply for a licence, take a first-aid course, conduct criminal record checks, and comply in other manners with regulations governing licensed daycares. There was no evidence that these requirements are particularly onerous, or that the plaintiff would be unable to take these steps if required. If she opted to take a course, which would not be necessary under her pre-collision daycare model, she would likely only be out of the workforce for a few months.

[101] At the same time, these prospects of some diminishment of future earnings, along with the possibility of earlier retirement, coupled with general economic contingencies, are not speculative, and rise above the real and substantial threshold. The Court applies a further modest five percent (not twelve percent, as urged by ICBC) contingency deduction to Mr Benning's model. The Court accordingly awards $902,500.

[102] As set out above, based upon the prognoses of the medical experts, I have applied a further contingency deduction of 15 percent to loss of future earning capacity, as with the other future heads of damage, to reflect the possibility that any or several of the remaining suggested treatments could permit the plaintiff to return to part-time work.

G. Cost of future care

1. Law

[103] An award for the costs of future care compensates the plaintiff for the costs of the services, medications, and aids that are reasonably necessary to promote her

health: *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (SC) at 78, aff'd (1987) 49 BCLR (2d) 99 (CA).

[104] While there must be some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional, it is not necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

2. Future care costs

[105] The plaintiff claims $594,022 for future care costs:

Item	Cost including GST/PST	Frequency	Multiplier Value	Present Value
A. Medications & Supplies				
Cyclobenzaprine	$10	Annual	27,357	$276
Dilaudid	$13	Annual	27,357	$355
Nortriptyline	$157	Year 1	989	$155
Pregabalin	$58	Year 1	989	$58
Gabapentin	$18	Year 1	989	$18
Duloxetine	$142	Year 1	989	$141
Venlafaxine	$44	Year 1	989	$43
Nabilone	$734	Year 1	989	$726
Contingency if one of the medications above is effective, claimed at 50%	50% of $192 ($96)	Annual	27,357	$2,626
B. Surgical Intervention, Treatments and Pain Management				
Botox	50% of $7,271 ($3,636)	Annual	27,357	$99,456

Lidocaine or ketamine infusions	50% of $2,400	Year 1	989	$2,375
CGRP inhibitors	50% of $6,837 ($3,419)	Annual	27,357	$93,534
C. Projected Therapeutic Modalities				
Physiotherapy/massage/ acupuncture/osteopathy	$4,350	Annual to age 80	23,696	$103,078
Vestibular and balance rehabilitation	$3,380	Year 1	989	$3,344
Vestibular and balance rehabilitation	$1,700	Year 2	989	$1,647
Active rehabilitation/kinesiology	$1,999	Year 1	989	$1,978
Active rehabilitation/kinesiology	$506	Annual from yr 2	26,368	$13,331
Tinnitus/hyperacusis therapy	$2,700	Year 1	989	$2,672
Psychological interventions	$1,890	Annual	27,357	$51,705
Occupational therapy	$7,963	Year 1	989	$7,879
Occupational therapy	$4,650	Year 2-4	2,845	$13,230
Multidisciplinary pain program	50% of $8,750 ($4,375)	Year 1	989	$4,327
D. Aids to Daily Living				
Long handled adaptive aids	$102	Every 2 yrs	13,929	$1,418
Moist heat pad	$76	Every 2 yrs	13,929	$1,052
Tub transfer bench	$148	Every 3 yrs	9,454	$1,396
E. Eyeglasses				
Sunglasses	$376	Every 2 yrs	13,929	$5,242
Grey tinted glasses	$360	Every 2 yrs	13,929	$5,008
F. Hearing				

Sound generator	$62	Every 3 yrs	9,454	$586
Binaural hearing aids	50% of $5,000 ($2,500)	Every 5 yrs	5,875	$14,688
G. Household Management, Cleaning, Yard and Garden Care				
Regular household cleaning	$3,358	Annual to age 80	23,696	$79,571
Heavier seasonal household cleaning	$483	Annual to age 80	23,696	$11,445
H. Transportation				
Taxi account	$1,071	Annual	27,357	$29,299
I. Psilocybin				
Psilocybin capsules	$1,218	Annual	27,357	$33,321
Psilocybin assisted therapy	$8,128	Year 1	989	$8,042
Grand Total				**$594,022**

[106] As expanded below, ICBC agrees with the reasonableness of most of these claims, if not the frequency, duration, or amounts.

[107] The Court concludes that most of the claimed costs are reasonable. All of the items are recommended by one or more experts, and the plaintiff confirmed that she would use or be open to using those recommendations. The plaintiff has been modest and restrained in her claims. She does not advance separate line items for physiotherapy, massage, acupuncture, and osteopathy, although all are recommended: she recognises that she is unlikely to pursue all treatment modalities, and that they address similar complaints in a similar manner. Similarly, she does not claim for the recommended gym and pool memberships, or tai chi, as the essence of those benefits will be provided through her active rehabilitation and kinesiology treatments. Similarly, she does not claim the recommended robot vacuum, as it is superfluous with a claim for regular and seasonal household cleaning.

[108] Further, the plaintiff has taken a reasonable approach to the quantification of her claims. While she claims a nominal amount for one-year trials of the recommended medications nortriptyline, pregabalin, gabapentin, duloxetine, venlafaxine, and nabilone, she only claims a lifetime present value of $2,626 for this category of medication, representing the one-year cost of a hypothetical single prescription based on the average cost of those medications, further discounted by a 50 percent contingency that one will be effective. Similarly, the claimed cost of Botox, lidocaine or ketamine infusion, and CGRP inhibitors are discounted by 50 percent to reflect that the latter two treatments may not be successful or may not be necessary. She also applies a 50 percent contingency for binaural hearing aids, as the recommendation addressed the risk of worsening tinnitus or hearing loss. Finally, the plaintiff applies a 50 percent contingency to the claim for pain clinic costs as she may get access to an MSP-funded pain clinic.

3. Disputed cost of care claims

a) Medications and supplies

[109] ICBC generally agrees with the plaintiff's submissions concerning recommended medications, with the exception of nabilone, a synthetic cannabinoid. It argues that the plaintiff is unlikely to use this medication, on the basis that she prefers to avoid pharmaceutics medications. That statement is too broad. The plaintiff provided that testimony in the context of explaining that she tried to avoid pharmaceuticals that could enable an overdose suicide during a spell of deep depression: there is no evidence that nabilone is such a medication. The plaintiff indicated a willingness to try all recommended treatments. The full amount of the medications sought is allowed.

b) Botox injections and other interventions

[110] After Botox injections were recommended in the medico-legal reports delivered in autumn 2023, the plaintiff sought and obtained injections: in December 2023 and March 2024. Consistent with those medical recommendations, she reports

that the treatment relaxes some of the tightness in her muscles around her head and neck and provides some relief for her migraines.

[111] ICBC agrees that costs of limited trials of Botox (as well as lidocaine or ketamine infusions) are appropriately ordered, as medically recommended. It opposes compensation for the costs of long-term or lifetime treatments. ICBC specifically argues that there was no evidence as to the necessary frequency and duration of the Botox treatments, and that they should be disallowed. ICBC cites *Lal v. Singh*, 2021 BCSC 2378 at paras. 150–151, where the Court limited the award for Botox to the initial six treatments that had been specifically recommended by an expert witness.

[112] *Lal* can be distinguished. The plaintiff had not yet trialed Botox: it was not even clear that Botox would be effective, or that she would continue to receive such treatments. There was no evidence before the Court on which to award funds for lifetime ongoing treatment: the plaintiff simply multiplied her expert's cost of the six-injection trial to calculate a lifetime supply. The result in *Lal* matches that in other cases where courts were parsimonious in awarding future care costs for Botox treatments, where the efficacy of such treatments was unproven and hypothetical: see e.g., *Sharma v. Day*, 2020 BCSC 1365 at para. 163; *Wright v. Dillon*, 2009 BCSC 176 at para. 44; *Minenko v. Minenko*, 2014 BCSC 628 at paras. 110–111; *Andreas v. Vu*, 2020 BCSC 1144 at paras. 116–118, 120; *Sunner v. Lee*, 2023 BCSC 988 at para. 126; *Moges v. Sanderson*, 2020 BCSC 1511 at para. 241.

[113] In contrast, again, in the present case, even after two of the three recommended trial injections, Botox has brought some relief to the plaintiff, and the plaintiff has confirmed her desire to continue those treatments.

[114] It is true that the plaintiff's evidence could have been more clear about the need for ongoing Botox treatments, given the regeneration of nerves and tissue. Dr Sexton's report sets out that Botox would be used "at least" three times, spaced 12 weeks apart. In her report, Ms Szarkiewicz provides the ongoing annual costs of Botox: while not a medical expert, as an occupational therapist and life care planner,

she has experience and expertise in providing evidence on medication protocols. Her report confirms that her Botox recommendation is based on the PREEMPT protocol[2] from the American Headache Society, on an ongoing basis. Further and finally, Botox treatments have received sufficient judicial consideration such as to confirm that lifetime or at least long-term treatment is necessary: see e.g., *Dadwan v. Kim*, 2023 BCSC 1903 at para. 63; *Wheeler v. Wilson*, 2021 BCSC 441 at para. 221, 223; *McKenzie v. Lloyd*, 2016 BCSC 1745 at paras. 254–56, aff'd 2018 BCCA 289; *Porter v. Feizi*, 2023 BCSC 491 at para. 88; and *Thiessen v. Kepfer*, 2023 BCSC 1593 at paras. 152, 156, 159.

[115] Further, again, the plaintiff is restrained in claiming the Botox treatments, only seeking 50 percent of those annual expenses.

[116] I agree that Botox is an appropriate subject for the cost of future care, on the plaintiff's model.

[117] The plaintiff also applies a 50 percent contingency to the claim for CGRP inhibitors. In contrast to the ameliorative Botox treatments, the plaintiff has not yet tried this treatment: it falls closer to the scenario in *Lal*. The duration or frequency of such treatments is less established by the evidence at trial or by the consideration in the jurisprudence. The Court reduces that line item to one quarter: $23,338.

c) Projected therapeutic modalities

[118] Again, ICBC largely agrees with the rehabilitation and other therapeutic recommendations sought by the plaintiff as a cost of future care, but argues that the amounts claimed are excessive.

[119] I agree with ICBC that the $103,078 claim for physiotherapy, massage, acupuncture, and/or osteopathy is excessive. The plaintiff's tactile sensitivity when receiving such treatments indicates that she may well not make use of such funds. Further, Dr MacInnes recommended "up to four times each month" (emphasis

added): she will not likely benefit from more treatments, and may well not use the full four sessions. The Court awards $77,320.

[120] ICBC similarly argues that the cost of psychological intervention is medically reasonable, but not to the extent sought by the plaintiff. ICBC notes that Dr Anderson only states that the plaintiff may require long-term supportive therapy, and that she may not in fact need annual treatment to the extent sought. The Court awards $30,000 as the present value for future psychological interventions.

[121] ICBC's disagreement with the vestibular and balance rehabilitation and tinnitus therapy costs are based upon Dr Samad's opinion that those deficits are not causally linked to the collision, as they affect the side of the head opposite to that struck. As set out above, the Court prefers the evidence of Dr Wong in this regard, and awards the amounts sought by the plaintiff.

[122] ICBC argues that the cost of a private pain clinic should be denied, as the plaintiff should have put herself on a public clinic waitlist at an earlier stage. There is no indication, however, that any of her treating physicians made this recommendation, and as soon as the plaintiff received that recommendation in the medico-legal reports, she asked her treating doctors to have her placed on the waitlist. That said, there is no evidence that suggests that the plaintiff will not soon be accepted for a pain clinic at public expense, or that she is likely to have to incur personal expense. The plaintiff relayed her understanding, based on communications from her nurse practitioner, that the waiting list in Nanaimo was approximately 9 to 12 months: on that schedule, she will soon receive treatment: see *Chen v. Crystal Computer Ltd*., 2022 BCSC 1051 at para. 60, where the court denied the cost of a private pain clinic based on the projected modest wait time. Further, the Court agrees that many aspects of the other care costs ordered, such as active rehabilitation and psychological interventions, overlap with the pain clinic treatments: see *Sharma v. Chui*, 2019 BCSC 2115 at para. 130. This aspect of the claim is denied.

d) Aids to daily living

[123] ICBC objects to the modest cost of items such as long-handled adaptive aids, a moist heat pad, and a tub transfer bench, on the basis that many households have these items already, and as no home assessment was conducted to evaluate what was already in the home.

[124] The short answer is that the plaintiff is presently unhoused, rotating from house to house amongst relatives: she does not presently posses these items. The items are not presumptively owned by every household. They clearly address the plaintiff's needs, particularly given ICBC's argument, which the Court has largely accepted, that the plaintiff is not entitled to pecuniary compensation for housekeeping expenses.

e) Eyeglasses

[125] The plaintiff seeks the costs of a new set of sunglasses and grey tinted glasses every two years. The Court agrees with ICBC that this frequency is excessive, and reduces these expenses to $5,000 total.

f) Hearing aids

[126] ICBC's objection to the hearing aids is again based upon Dr Samad's alternative theses for the plaintiff's hearing loss, on which the Court prefers Dr Wong's evidence. Dr Wong recommends the binaural hearing aids, and the plaintiff has responsibly applied a 50 percent contingency reduction. The full amount is allowed.

g) Household management and cleaning

[127] The plaintiff claims the present value of $79,571 for regular household cleaning and $11,445 for heavier seasonal household cleaning. She claims half of the amount of housekeeping assistance that Ms Szarkiewicz has recommended, on the basis that she will move back into a 650 square foot apartment and will require housekeeping assistance every other week (not every week) for a space that size.

[128] The plaintiff testified that after the collision, when she lived on the upper floor of the daycare, and then in an apartment, she struggled with keeping her home clean. She testified that she found organisation to be overwhelming, and that over time the chaos accumulated and she was living in a state of disorganisation. Carrying out housekeeping activities would cause her symptoms and pain to ramp up; she would push herself and end up in bed for days to recuperate.

[129] In *McKee v. Hicks*, 2023 BCCA 109, Justice Marchand (prior to his appointment as Chief Justice) reiterated the restrained approach to specific compensation for impaired ability to carry out household maintenance:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[130] The present case falls somewhere between these two poles. On her own evidence, the plaintiff can perform basic household tasks, such as vacuuming and cleaning the bathroom, albeit with difficulty, frustration, fatigue, and, at times, confusion. We lack the benefit of a home visit by Ms Szarkiewicz or tests specific to housekeeping that would better support a pecuniary claim for housekeeping compensation. The plaintiff may have to pace herself, but with her own projected lack of employment, she should have time to carry out daily tasks without assistance. The Court declines to award a separate amount for this inconvenience, addressing it above under non-pecuniary damages.

[131] At the same time, on the totality of the evidence, including specifically that of Dr MacInnes and Ms Szarkiewicz, the plaintiff is unable to perform and will require assistance with heavier and more intense seasonal deep cleaning and scrubbing, justifying a pecuniary award for that claim. In this, I reach a similar conclusion to

those in the post-*McKee* decisions in *Homan v. Modi*, 2024 BCSC 612 at paras. 141–42, 155–56 and *Riascos v. Raudales*, 2024 BCSC 26.

[132] The Court awards $11,445 for heavier seasonal household cleaning.

h) Taxi

[133] ICBC accepts that it is reasonable and justified for the plaintiff to use a taxi when her conditions flare up. At the same time, the plaintiff can generally drive, and has access to vehicles. I agree that the amount claimed by the plaintiff is excessive, and reduce it to $10,000.

i) Psilocybin

[134] The plaintiff seeks $41,363 as the present value of psilocybin-based treatments and therapy for her lifespan. She has been taking daily doses of a psilocybin product, through a private, presumably unauthorised, supplier, since her first dark spell of suicide ideation, in late 2018. Before the collision, the plaintiff had tried magic mushrooms on a few occasions, but was not a regular user. On the suggestion of a friend, she tried psilocybin as a way to alleviate her symptoms,.

[135] The plaintiff presently takes a daily 0.25 gram microdose of psilocybin, and takes a larger 1.25 gram dose when her migraines are particularly bad. In 2023 she stopped her daily microdose, and was soon plunged back into suicidal thoughts, depression, and an even more diminished ability to manage her pain symptoms: she described the experience as “traumatic”. She testified that her therapeutic use of psilocybin is critical for her ability to function.

[136] Dr Kryskow, a family physician with extensive experience treating patients with psilocybin and related products, conducting clinical trials, and writing and lecturing on the topic, provided compelling testimony for the burgeoning use of psilocybin in the treatment of traumatic brain injuries, amongst other conditions.[3] She notes that the US Food and Drug Administration has recently designated “breakthrough therapy” research status to psilocybin for the treatment of clinical

depression. The use of psilocybin to treat a broad range of conditions, and research in this regard, is widely reported in the mainstream media.[4]

[137] Dr Kryskow herself has over 20 patients with brain injuries who have found tat microdoses of psilocybin helpful in alleviating suicidal ideation, depression, anxiety, headaches, migraines, chronic pain, difficulties in focus and attention, brain fog, as well as sleep and mood disorders. Some of her patients suffering from post-traumatic stress disorders have found scheduled psilocybin microdoses to be beneficial. She is currently treating 12 chronic pain patients with a psilocybin microdose regimen, which brings their pain or discomfort down from an average of 6 or 7/10 to 2 or 3/10 on the standard pain scale. Dr Kryskow opines that the plaintiff's continued access to psilocybin should be facilitated until all of her symptoms resolve.

[138] Other experts called by both sides acknowledged the burgeoning use of psilocybin in treatment of various psychological conditions. Ms Szarkiewicz notes its prescribed use for many of her clients, particularly those suffering from persistent PTSD. ICBC's own psychiatrist expert, Dr Okorie, is engaged in trials using psilocybin to treat alcohol use disorder; he reports promising results. ICBC called no expert evidence contrary to that provided by Dr Kryskow, and does not deny that psilocybin is the subject of many promising mainstream medical trials and studies for therapeutic treatment of various pain and psychological conditions.

[139] At present, psilocybin remains a prohibited Schedule III substance under the *Controlled Drugs and Substances Act*, SC 1996, c 19, s. 4. A treating physician may, however, request prescription of psilocybin for a patient under the Health Canada Special Access Program.[5] Dr Kryskow files on average two requests a month for her patients, and reports a 100 percent Health Canada approval rate for her requests. Based on her opinion and recommendation, there is no reason to think that a request made for treatment of the plaintiff would be rejected by Health Canada.

[140] The plaintiff provides an undertaking to the Court through her counsel that if she is awarded this head of damage, she would only obtain psilocybin using those

funds through the legal and prescribed means described by Dr Kryskow, through a physician.

[141] These factors distinguish this case from ICBC's pre-legalisation cannabis case of *Murphy v. Hofer*, 2018 BCSC 869 at paras. 216–18, where the Court denied a future care award for that treatment, as there was no evidence from any medical professional of the beneficial effects of CBD oil, and there was no reassurance that the plaintiff would comply with Health Canada regulations or obtain the product through a physician.

[142] Based on a jurisprudential review, this would appear to be the first case to make a future cost of care award based on psilocybin in Canada, and indeed, amongst our closest common-law Commonwealth courts in the United Kingdom, Australia, and New Zealand. Our Courts have, however, in the past made future cost of care awards for treatments using restricted substances. For example, in *Joinson v. Heran*, 2011 BCSC 727 at para. 422, decided seven years before the legalisation of cannabis for personal use in Canada, Justice N. Brown found that the medical evidence before the Court supported an award of compensation for some medical use of cannabis, as a reasonably necessary cost of future care. There, as here, Health Canada could issue an exemption permitting medical use of the otherwise prohibited substance. The Court awarded $30,000 ($41,655 adjusted) for medical cannabis, after deductions reflecting the plaintiff's personal cannabis use: see para. 431.

[143] Based on the compelling evidence of the plaintiff and Dr Kryskow, psilocybin, if and as prescribed by a physician in compliance with Health Canada protocols, is a reasonably necessary expense, and appropriately the subject of a cost of future care award. Apart from its assistance in relieving her individual conditions, it has literally been life-saving, in staving off her suicidal thoughts.

[144] That said, consistent with *Joinson*, ICBC need only pay the plaintiff if and when presented with written confirmation from a physician of their prescription for the psilocybin treatment obtained pursuant to Health Canada authorisation and all

other federal requirements, the official documentation of which must also be presented. Even then, ICBC need only pay an amount for the period of the medical prescription. It is contemplated that this amount will be paid out in several installments, over many years.

H. Special damages

[145] ICBC is agreeable to all of the special damages, except for $2,015 for a private MRI, citing cases (*Barkhuizen v. Leguerrier*, 2022 BCSC 153; *Bath v. Singh*, 2022 BCSC 431; and *Flynn v. Raj*, 2023 BCSC 1895) where the Courts disallowed an MRI award absent evidence of urgency, or a recommendation by the plaintiff's doctor. Those cases can be distinguished on the present facts. Here, the private MRI was recommended by the plaintiff's family doctor, in the face of her various significantly debilitating conditions that could have reflected any number of urgent or serious brain or other health issues; her doctor was concerned that the delay could result in long-term damage to her nerves, shoulder, and arm. Waiting for an MRI in the public system could take well over a year. Apart from its medical benefit, it is in the interests of both parties, as well as the judicial system, that the fruits of that valuable diagnostic tool be obtained sooner rather than later. Noting some of these themes, our courts have regularly allowed an MRI as a reasonably necessary expense flowing from an accident: *Dhingra v. Hayer*, 2024 BCSC 160 at para. 329; *Fernandez v. Beltran*, 2022 BCSC 1482 at para. 210; *Morgan v. Ziggiotti*, 2021 BCSC 106 at para. 236.

[146] I allow the cost of the MRI, and thus the full amount for special damages sought by the plaintiff.

IV. CONCLUSION

[147] The plaintiff is awarded the following damages:

Non-pecuniary damages	**$220,000**
Past wage loss / loss of past earning capacity	$151,098

Loss of future earning capacity	**$902,500**
Cost of future care	**$367,916**
Special damages	$10,685
(Less 15% contingency to all present and future heads of damage (in bold above))	**($223,562)**
TOTAL	**$1,428,637**

[148] The plaintiff has been successful, if not to the extent sought. She is presumptively entitled to her costs at Scale B. If any party wishes to dislodge this presumption, that party will advise the others within 20 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter, with provision of written arguments to the other side and to the Court at least seven days before the hearing date.

V. PRACTICE POSTSCRIPT

[149] Four final practice notes.

[150] First, senior counsel for each party are to be commended for permitting junior counsel considerable quality time on their feet in both examinations and argument during this trial.

[151] Second, with an eye to the decreased use of pretrial conferences, all litigants should make it a presumptive practice to provide to the Court on the first day of trial — ideally in MS Word format, or a clean, perfectly OCR-searchable format — copies of all expert reports, as well as any other documents that the Court may need to quote from or search. Each argument should be provided in paper and electronic format, with a table of contents if lengthy.

[152] Third, three weeks was allotted to what could have been a two-week trial, with an unacceptable amount of dead time between witnesses. With the rising and liberal post-pandemic use of video conference testimony on matters not engaging

credibility issues, this laxity should never occur, even where, as here, there were multiple expert witnesses.

[153] Fourth, in a case such as the present, relying significantly on the plaintiff's self-reports of pain and related symptoms, the court yearns for independent objective evidence from both sides. On the plaintiff's side, all but one of the witnesses attesting to her limitations and diminished state described themselves as best, close, or romantic friends of the plaintiff; the sole exception still described himself as a "casual friend." The Court would have benefitted in hearing from someone outside of the plaintiff's circle of friends and family. On the defence side, the Court would have benefited from any testimony or video evidence undermining the evidence of the plaintiff and her expert witnesses as to her limitations. It would have also benefited from evidence of medical experts who had actually examined the plaintiff. In a claim for $1.9 million, such evidence would have been proportionate.

"Crerar J"

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[1] All amounts will be rounded to the nearest dollar.
[2] Phase 3 REsearch Evaluating Migraine Prophylaxis Therapy.
[3] Antonio Inserra, Danilo De Gregorio & Gabriella Gobbi, "Psychedelics in Psychiatry: Neuroplastic, Immunomodulatory, and Neurotransmitter Mechanisms" (2021) 73:1 Pharmacological Reviews 202.
[4] Natasha Loder, "Psychedelic medicines are expanding into the public consciousness", *The Economist* (18 November 2022) online: <www.economist.com/the-world-ahead/2022/11/18/psychedelic-medicines-are-expanding-into-the-public-consciousness>; "Sensible policy on psychedelic drugs is growing more common", *The Economist* (29 January 2022) online: <www.economist.com/united-states/2022/01/29/sensible-policy-on-psychedelic-drugs-is-growing-more-common>; "Ketamine, psilocybin and ecstasy are coming to the medicine cabinet", *The Economist* (21 September 2022) online: <www.economist.com/technology-quarterly/2022/09/21/ketamine-psilocybin-and-ecstasy-are-coming-to-the-medicine-cabinet>; "Psychedelics Are a Promising Therapy, but They Can Be Dangerous for Some", *New York Times* (10 February 2023) online: www.nytimes.com/2023/02/10/well/mind/psychedelics-therapy-ketamine-mushrooms-risks.html (all accessed April 14, 2024).
[5] Health Canada, *Notice to stakeholders: Requests to the Special Access Program (SAP) involving psychedelic-assisted psychotherapy* (Special Access Program, 2003) online: <www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/announcements/requests-special-access-program-psychedelic-assisted-psychotherapy.html> (accessed April 14, 2024).