IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Valcourt v. Tariq,*
2024 BCSC 818

Date: 20240514
Docket: M219839
Registry: New Westminster

Between:

Jane Annette Valcourt

Plaintiff

And

Rubina Tariq and Qazi Uzaif Tariq

Defendants

- and -

Docket: M227882
New Westminster

Between:

Jane Annette Valcourt

Plaintiff

And:

Jagdev also known as
Parnam Singh Jagdev

Defendant

Before: The Honourable Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff in both actions:	P.W. Unruh R. Morgan
Counsel for the Defendants in both actions:	V.J. Anderson S. Alimirazee
Place and Dates of Trial:	New Westminster, B.C. March 4-8, 2024 March 11-15, 2024
Place and Date of Judgment:	New Westminster, B.C. May 14, 2024

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I. INTRODUCTION AND ISSUES

[1] This is an assessment of damages for injuries to the plaintiff arising from two motor vehicle accidents. The plaintiff's two actions were tried together. The defendants in both actions admit liability.

[2] The two accidents occurred:

1. November 11, 2017, at the intersection of Clearbrook Road and Peardonville Road, in Abbotsford ("MVA #1");

2. February 1, 2019, on Glover Road at or near the 6800 Block, in Langley ("MVA #2");

[3] As indicated above, in these reasons I will generally refer to these accidents as MVAs #1 to #2, or the first or second accident.

[4] MVA #1 was relatively minor, and on its own, would not have had major consequences to the plaintiff. However, the plaintiff asserts that MVA #2 resulted in permanent injuries that will prevent her from returning to work as a registered nurse ("RN"), or working in any other capacity, and will have lifelong effects on her quality of life.

[5] At trial, more than five years after MVA #2, the plaintiff's most significant complaint is of chronic and debilitating headaches, and associated dizziness, and fatigue. She also suffers from significant cognitive difficulties, associated with her headaches and body pain. She continues to suffer from neck, right shoulder, and upper back pain. She also complains of injury to her lower back and right knee, mood consequences, nausea, noise and light sensitivity, and poor sleep.

[6] The medical and expert opinion evidence is largely consistent. On the basis of the evidence at trial including the expert evidence and the evidence of the plaintiff and collateral witnesses, there is no doubt that the plaintiff has suffered the injuries that she complains of, and that her injuries have had severe detrimental effects on the plaintiff's ability to function, including her ability to work, her domestic abilities, her activities of daily living, her leisure activities, and her personal relationships.

[7] The defendants concede that the plaintiff was injured in the accidents and that substantial damage awards are appropriate. Very fairly, they acknowledge that the plaintiff was a sympathetic and generally credible witness, and that the plaintiff's collateral witnesses were also credible.

[8] Their defendants confirmed at trial that there is no practical need to allocate damages as between the defendants in the two actions, or to determine, for legal purposes, whether the injuries of the plaintiff are divisible or indivisible. Therefore I will assess the plaintiff's damages on a combined basis.

II. BACKGROUND

A. The Plaintiff

[9] The plaintiff is a married mother of two children. At trial, she is 43 years of age. She was 37 years of age at the time of MVA #1, and 38 at the time of MVA #2. She married her husband John Valcourt in July 2007. They have two children: a son, born in March 2009; and a daughter, born in May 2013. She resides with her family in a single family residence in Langley. The family has resided there since October 2018. At the time of MVA #1, she resided together with her family in a home in Abbotsford. The plaintiff's husband works in a family business, as a sales representative and technical support person.

[10] The plaintiff was born in Langley, where she grew up. She has two older sisters, Karen Lindahl, and Lisa Dubois, both of whom testified at the trial. Her mother remarried when she was ten years of age, to Dennis Brawdy, her stepfather. In addition to her two sisters, she has two older stepbrothers, and two younger half-sisters. Her stepfather passed away in May 2017. Her mother and her biological father remain living.

[11] The plaintiff graduated from Aldergrove Community Secondary School in 1998.

[12] As a child, she played soccer. She and her siblings were involved in youth activities at their church, went to church on Sundays, and participated in youth group

activities on the weekends. While in school, she was a member of the student council, and sang in a jazz choir. After high school graduation, she attended Trinity Western University, beginning in 1998. She completed a degree in international studies, which involved political science, economics and sociology. She worked in order to put herself through university, at a retail store, Winners. Later after she met her future husband she worked for her husband's family garage door sales company, part-time while at university, and full-time during breaks. She graduated from Trinity Western University in 2002 with a Bachelor of Arts degree in international studies, with good grades.

[13] For about five years from 2002 until 2007, the plaintiff was employed full-time by Mennonite Central Committee (“MCC”), where she provided support to seniors, in order to assist them in remaining in their homes. At MCC, she developed a program to assist seniors needing help to remain at home. Her role involved connecting with local services, recruiting volunteers, and then overseeing the program, working with volunteers and seniors. This experience interested her in a career in nursing.

[14] During their engagement the plaintiff's fiancé obtained work in Edmonton, Alberta. The plaintiff was accepted into the nursing program at the University of Alberta, Edmonton, for a two-year condensed program of studies leading to a Bachelor of Science in nursing, which she was awarded November 19, 2009. While in the condensed program, she became pregnant with her first child. She completed the required clinical hours in March 2009, just prior to the birth of her son, that month. By then her husband had returned to British Columbia. The plaintiff returned to the University of Alberta approximately one month after her son was born to complete her last nursing course and to write her exams. She obtained very good grades, generally As and Bs.

[15] She then returned to British Columbia to complete her nursing preceptorship program in the summer of 2009, working full-time hours at Abbotsford Regional Hospital. She took no maternity leave. After qualifying as a registered nurse, she worked as an RN at Abbotsford Regional Hospital. In 2011, she was offered a sponsorship to undertake hemodialysis training at BCIT, to enable her to work in the

renal department of the hospital. She studied full-time at BCIT for three months, and then did a clinical practice for one month at Surrey Memorial Hospital. She completed the hemodialysis program in June 2011, and was hired into the renal unit at Abbotsford Regional Hospital.

[16] Thereafter, she worked part-time in the renal unit at the hospital and in the Abbotsford Community Dialysis Clinic. Her second child, a daughter, was born in May 2013. Following the birth of her second child, she was on maternity leave for a year.

[17] At the time of the first accident, she had returned to work in the renal department at the hospital. She also worked in renal care at Abbotsford community renal (kidney) care facilities.

[18] At the time of MVA #1, the plaintiff was working part-time, with a ".7" line. This involved working on average 22.125 hours per week. She also worked overtime, on average, once or twice per month.

[19] At the time of MVA #1, the plaintiff was in good health. She suffered a work-related strain to her right shoulder in approximately July 2017. She obtained physiotherapy treatment for this condition in 2017. She missed little if any time from work as a consequence of the injury. Her employer accommodated her, by moving her from night shifts to day shifts, where the physical demands were less.

[20] The plaintiff had instability issues with her left ankle since approximately 2011. I accept the plaintiff's evidence that the injury was bothersome, but not significantly limiting. At times, she wore an ankle brace, such as if she went hiking, or as a precautionary measure, at work**.** Her ankle condition resulted in corrective surgeries on June and July 2018, to repair a torn tendon. As a result of her ankle surgeries, the plaintiff was off work as of June 2018, and continued to be off work at the time of MVA #2 on February 1, 2019.

[21] The parties agree that but for her MVA #2 accident injuries, she would have returned to work by July 1, 2019.

[22] The plaintiff underwent a third surgery to her ankle or foot in January 2023, for removal of hardware on the top of her foot that had been placed during the surgery in 2018 and had been causing her pain.

[23] The plaintiff's left ankle condition is good, currently. She does not experience pain, and her ankle functions well.

[24] The plaintiff began receiving Long-Term Disability (“LTD”) benefits from Canada Life in approximately October 2018, prior to MVA #2. She has continued to receive LTD benefits since that time. Her LTD benefits are her only source of income.

B. The Accidents

[25] The parties have agreed to a number of basic facts relating to the accidents.

1. MVA #1 – November 11, 2017

[26] MVA #1 occurred on Clearbrook Road at or near the intersection at Peardonville Road in Abbotsford, British Columbia.

[27] The plaintiff was driving a 1996 Toyota Camry northbound on Clearbrook Road near the intersection of Peardonville Road, intending to travel through the intersection. She was on her way to the Abbotsford Community Dialysis Clinic, for work, at approximately 6:45 AM. The defendant's vehicle was travelling southbound on Clearbrook Road. The defendant was intending to turn left from Clearbrook Road, on to Peardonville Road. The defendants’ vehicle turned left into the path of the plaintiff's Toyota, causing the collision. The damage to the plaintiff's Toyota was estimated at $2786, and the damage to the defendants’ Nissan was estimated at $3856. At trial, the plaintiff described damage to the front end of her vehicle. At the scene, the plaintiff called her husband, who was at their home, about 10 minutes away. He went to the scene. Although the plaintiff felt shocked and upset by the collision, she proceeded to work. However she developed a headache during the course of the day, as well as a sore neck and back. She left work early, rather than completing her shift. That evening she had headaches, as well as neck, shoulder

and back pain. She had pain in both shoulders, with her right shoulder being more painful.

[28] The plaintiff's right shoulder had been improving prior to the MVA, but she still had right shoulder pain at times, with activities. She was still receiving physiotherapy treatment for her right shoulder when MVA #1 occurred.

[29] The plaintiff suffered frequent headaches in the initial period after MVA #1. Her headaches resolved after several months. She described the headaches as "tension headaches", rather than migraine type headaches. Several months after the MVA, the plaintiff still had some pain in her neck, shoulders, and back, with limited range of motion.

[30] The pain in her back was in the upper middle area, as well as some low back pain.

[31] The plaintiff was treated with physiotherapy, massage therapy, and chiropractic treatment.

[32] By the spring of 2018, a few months after the accident, her headache complaint was mostly resolved. She continued to have some neck pain with limited range of motion as well as right shoulder pain. She still had low back pain. Her shifts as a renal nurse were modified until February 2018. She lost no time from work, and had little if any restriction in relation to her domestic (household) activities.

[33] By the time of her ankle surgery in June 2018, her headache condition was resolved. She was working. Her neck, shoulder and back pain were still present, but did not interfere with her work.

[34] Following her ankle surgeries in June and July 2018, the plaintiff was in a wheelchair for some time, then progressed to using crutches, an air boot, a night boot, and then orthotics. By early 2019 her ankle was "doing well". As noted, she had some continuing pain in her foot, which was relieved by further surgery in January 2023.

[35] In summary, by January 2019, just prior to MVA #2, the plaintiff's condition had substantially improved. Her headaches had resolved. She still had some right shoulder, neck and back pain, involving stiffness and soreness. However she was able to do housekeeping activities without limitations. She had not yet returned to work from her ankle surgery, but anticipated doing so in the near future.

2. MVA #2 – February 1, 2019

[36] On February 1, 2019 the plaintiff was again driving her 1996 Toyota Camry. She was travelling northbound on Glover Road near the 6800 Block, in Langley. She was driving home from Surrey, going to Abbotsford, to pick up her son from his school, at approximately 1:45 PM. She was in the process of stopping her vehicle for a line of traffic stopped at a traffic light at 216th St. She had almost completely stopped her vehicle when it was rear-ended by the defendants' vehicle. The force of the collision was such that her Toyota was propelled into the vehicle in front of it. Her Toyota was rendered a total loss. The damage to the defendants' Dodge Charger was estimated at $18,244.

[37] The plaintiff recalls that her body was "flung around" in the accident. Her right knee hit the centre console of the vehicle. Police, fire and ambulance personnel attended. She called her husband to attend the scene. She had immediate pain, including headache, neck and back pain. She declined an offer of transport to hospital. Her husband took her home. After a few minutes of lying on the couch, she became nauseous, dizzy, and her condition worsened generally. Her husband took her to the emergency department at the Abbotsford Hospital. She had a lot of pain, dizziness, nausea, sore neck and back, headache, and sensitivity to light and sound. An emergency doctor diagnosed a concussion. Analgesics and anti-inflammatory medications were recommended, and the plaintiff was told to follow up with her family doctor. Her husband was instructed in concussion protocols.

[38] In summary, then, the plaintiff's immediate injuries from MVA #2 were:

1. Headache;

2. Neck pain;

3. Right shoulder pain;

4. Back pain; and

5. Right knee pain.

[39] Her right knee was painful and bruised for several weeks. She still has soreness in the right knee with certain activities, and at times.

[40] Following MVA #2, the plaintiff was almost completely incapacitated for several weeks. She spent several weeks in bed. She needed help to go to the bathroom. She was unable to eat for several days, due to nausea. She stayed in a dark, quiet room. She had difficulty sleeping. She had severe head, shoulder, neck and back pain. Analgesics and ice packs had little effect.

[41] As weeks went by without substantial improvement, she was frustrated at the lack of progress, and her inability to take care of her children and family. She noted she was short tempered and impatient. She had difficulties with mental processing, and memory problems. She struggled with ordinary activities of daily living such as getting dressed. She sent her two children to stay with her mother for a period of time. Her husband took time away from work, and worked from home, as much as he could. She was helped with domestic activities such as cooking and cleaning and childcare by her mother-in-law, her own mother, her two sisters, and her husband. Her husband took her to medical and treatment appointments.

[42] As of Mother’s Day, in mid-May 2019, her condition remained poor. She continued to suffer from headache and body pain. She went outside the home and sat under a canopy for a few minutes, wearing sunglasses and earplugs. She remained very sensitive to light and sound. She recalls having constant headaches during 2019.

[43] During 2019 she received physiotherapy, massage therapy, chiropractic treatment, and vestibular physiotherapy. The vestibular therapy involves exercises to decrease her sensitivity to light and sound.

[44] After the MVA she experienced nausea to the point that she was vomiting. Her nausea continued into 2020.

[45] Her sister Karen Lindahl did all the grocery shopping for her family. She still does the grocery shopping for the plaintiff's family. The plaintiff is unable to tolerate the grocery store environment, due to the busy, noisy environment and lighting, which triggers headaches.

[46] At the time of MVA #2, the plaintiff's children were eight and four years of age. She had an excellent relationship with both children pre-accident. After the accident, it was difficult for the plaintiff to maintain the excellent relationship she had with them previously. The children were told they had to remain quiet because “mom has a headache”. The plaintiff had been very involved with the children's homework, schooling, and school activities. She was no longer able to do these things.

[47] The plaintiff's headaches and other injuries continued in the years that followed. She began seeing Dr. Butterfield for management of her headache pain in late 2021. He adjusted her medications, which helped somewhat. By then she was experiencing headaches four to five times per week, which could last four to five hours, or all day. Three or four times per month she had migraine type headaches that would last two or three days. During those times, she would spend most of the day in bed. Her other “tension type” headaches were less severe. She continued to suffer from cognitive difficulties. Multitasking was impossible. As an example, she could not cook potatoes and do other cooking tasks at the same time. Her cooking was limited to very simple meals, such as heating frozen vegetables, or boiling noodles.

[48] By 2022, there was some improvement in her neck and back pain and stiffness, and in her right shoulder pain. By then, she was able to lift a milk jug weighing approximately eight or ten pounds. She was unable to carry a bag of groceries. She was dizzy, with headaches. Her headaches were aggravated by warm weather, noise, bright lights, or busy environments, lack of rest, or other circumstances. Her low back pain continued into 2022, but was no longer constant. It was aggravated by bending, or extended sitting or standing.

C. The Medical Opinion Evidence

[49] The following physicians provided expert opinion evidence at the trial. Doctors Mok, Latimer, Adrian, and Berger also testified orally. The evidence of Doctors Robinson and Cheung was provided through their expert reports, alone.

1. Dr. Hiram Mok – Psychiatrist – report date November 13, 2019

[50] Dr. Mok saw the plaintiff on November 13, 2019 for an independent medical examination, at the request of plaintiff's counsel.

[51] Notably, Dr. Mok's assessment was conducted about nine months after MVA #2, and more than four years prior to the trial, and much earlier than any of the other expert assessments in evidence.

[52] Dr. Mok noted that the plaintiff was reliable and cooperative during the assessment. She told Dr. Mok that she thought she was about 75% recovered from her shoulder and upper back pains from MVA #1 when MVA #2 occurred on February 1, 2019. When seen, she complained of persistent pain in her neck, across both of her shoulders, dizziness, nausea, daily occipital headaches, with noise and light sensitivity, and disabling migraine headaches every two weeks. She also complained of persistent pain in her left foot following her ankle surgery in June, 2018. She was taking Gabapentin at 300 mg three times per day, which made her feel drowsy and groggy. Her family physician had suggested that she take Prozac (generic name, Fluoxetine, a drug used to control depression or mood) at 20 mg per day. Dr. Mok understood that she was doing so, but actually she was using that medication only premenstrually for control of premenstrual dysphoric disorder.

[53] She was receiving weekly physiotherapy, massage therapy, and chiropractic treatment. She had been seeing a registered clinical counsellor, Stephanie Davis, since March 2019, on a weekly basis. She described feeling anxious as a passenger in a motor vehicle since the accident. She was anxious about not feeling better after all the physical treatments she had undergone, still being in pain, and not being able to return to work. She was concerned about having a home and family to take care

of, and a job to go back to. She noted that since the accident she did not have much energy, motivation, or interest in socialization, and was very frustrated about being in pain and having headaches. The higher Gabapentin dose of 300 mg three times a day was helping with her headaches. The counselling was helping, but the progress was too slow for her liking.

[54] Dr. Mok noted that her score on a PHQ-9 questionnaire (a tool used for assessment of depression) was 8 out of 27, which indicated mild depression (his report says this score indicates “minimal" depression but in testimony, Dr. Mok said it indicates was “mild” depression). Her score on a GAD-7 questionnaire was 6 out of 21, which indicated mild anxiety.

[55] Dr. Mok diagnosed:

1. Somatic Symptom Disorder, with predominant pain, persistent. Current severity – moderate;

2. Specific phobia, situational type [traffic]; and

3. Major Depressive Disorder, with anxious distress, in early full remission.

[56] These diagnoses were all as a result of MVA #2.

[57] In Dr. Mok's opinion, the physical treatments that she had received to date were medically necessary, appropriate and reasonable. He deferred to other medical colleagues with regard to her physical prognosis.

[58] She did not have any pre-existing emotional difficulties that predated MVA #2. Although she had developed situational phobia regarding traffic, there was no suggestion of post-traumatic stress disorder.

[59] In evidence at trial, and in his report, Dr. Mok noted that Somatic Symptom Disorder was formerly known as “chronic pain disorder". Somatic Symptom Disorder involves chronic pain (in her case, neck, shoulder, and low back pain) coupled with excessive thoughts, feelings and behaviours related to the physical symptoms.

[60] Dr. Mok made the following treatment recommendations:

1. The plaintiff should be referred to a physiatrist or neurologist for further evaluation of her headaches and Somatic Symptom Disorder;

2. She should "continue with" Prozac 20 mg once per day and have her mental status monitored by her family physician for at least another six months;

3. She should have concurrent individual psychotherapy through a registered clinical counsellor or clinical psychologist. He suggested cognitive behavioural therapy ("CBT") pertaining to her Major Depressive Disorder and chronic pain management. He suggested another 10 one hour sessions, subject to clinical review thereafter. (Notably, he does not say that the counselling the plaintiff was receiving from Ms. Davis was CBT, or equivalent to it.)

[61] Dr. Mok declined to provide a final prognosis, pending treatment as recommended.

[62] In cross-examination, Dr. Mok noted that he presumed she had increased her use of Prozac to 20 mg per day, but did not actually know whether she was taking the medication or not. He noted that Prozac is for treatment of mood, as an antidepressant. It does not provide a benefit for headaches.

[63] In cross-examination, Dr. Mok was asked about other issues in the plaintiff's life as apparently indicated in the counselling clinical records of Ms. Davis, such as parenting issues involving her two children, relationship issues with her husband and his parents, and other stressors in her life. He denied that any of these issues would have affected his opinion on the cause of the plaintiff's mental health complaints.

[64] Regarding CBT, he noted that Ms. Davis seem to be doing mostly supportive type therapy.

[65] In Dr. Mok's view, from a mental health point of view, she could probably work, but her headaches were disabling.

[66] Although Dr. Mok never saw the plaintiff again, at trial he noted that she had seen Dr. Robinson, a well regarded neurologist concerning her headaches, and had been treated by Dr. Butterfield for more than two years, and that he was also well regarded in the field.

[67] I have no difficulty accepting the opinions of Dr. Mok.

2. Dr. Paul Latimer – Psychiatrist – report date December 1, 2023

[68] Dr. Latimer saw the plaintiff for an independent medical examination on November 22, 2023, at the request of defence counsel.

[69] Dr. Latimer reports that the plaintiff told him she had not returned to work because of the second MVA. She estimated that she was getting headaches three to four times a week and they were severe for two or three days per month. She was taking Desipramine, primarily for her headaches, as well as several other headache medications. She had undergone three surgeries for her ankle, the most recent being in January 2023, and the condition of her ankle and foot was now fairly good.

[70] Dr. Latimer noted that the plaintiff did not acknowledge being depressed, but she could be under-reporting her depressive symptoms.

[71] Unlike Dr. Mok, Dr. Latimer had access to the extensive clinical notes of the plaintiff's treating counsellor, Stephanie Davis, and reviewed them in detail.

[72] Dr. Latimer diagnosed:

1. Premenstrual Dysphoric Disorder (“PMDD”) pre-existing, unrelated to the accidents;

2. Adjustment Disorder with depressed mood, in partial remission.

[73] I summarize Dr. Latimer’s opinions as follows:

1. The plaintiff’s symptoms of depression since 2019 could be partially related to MVA #2, but she has had other issues including the illness and

death of her stepfather; three miscarriages; illness of other family members; significant weight gain, and criticism in that regard by her husband; and other family problems including problems involving her children. According to Dr. Latimer, these other issues are all very prominent in the counselling records of Ms. Davis;

2. Although Dr. Latimer says that the plaintiff's symptoms of depression could be partially related to the MVA, he does not make the same comment with respect to his diagnosis of Adjustment Disorder with depressed mood, in partial remission. As I interpret his evidence, he does not deny that this condition resulted from MVA #2;

3. The plaintiff's failure to return to work seems to be primarily related to her headaches;

4. In view of her lack of progress and ongoing problems with headaches, he suggests that she try Fluoxetine [Prozac] at a dose of 20 mg per day. He noted that she was already taking 10 mg of Fluoxetine premenstrually for five days and did not report any adverse effects;

5. He was concerned that, based upon the clinical records, the plaintiff's husband and family were averse to the use of medication;

6. On the basis of her mental health complaints alone, the plaintiff's time off work was not reasonable. However, as he noted, the plaintiff was off work primarily because of her headaches;

7. Similarly, the plaintiff reported that her activities of daily living, and her occupational, household and recreational activities were limited, primarily by headaches. In Dr. Latimer's view, these may have a mental health component, but were not primarily a mental health problem;

8. It is very difficult to predict whether the plaintiff would be able to return to her pre-accident employment as a registered nurse. That would depend

on her response to treatment. He noted she would have to requalify for licensing;

9. The plaintiff's prognosis is poor, because of the length of time she has been ill and off of work;

10. He expects her ability to function to continue as it had in the recent past, in the absence of effective treatment; and

11. The plaintiff has already received a lot of counselling, and more of the same without some other additional ingredient was unlikely to be of benefit, in relation to her headaches.

[74] Unfortunately Dr. Latimer did not have the report of Dr. Mok of November 13, 2019, and was not asked to comment upon it at trial. His diagnosis of Adjustment Disorder with depressed mood, in partial remission, appears to me to be similar to the diagnosis that Dr. Mok made of Somatic Symptom Disorder, formerly known as chronic pain disorder.

[75] Although Dr. Mok diagnosed Major Depressive Disorder, with anxious distress, in early full remission, unsurprisingly, given the past passage of time, and Dr. Mok's view that it was in "full remission”, Dr. Latimer does not make the same diagnosis.

[76] At trial, the plaintiff said she was surprised by Dr. Latimer's concerns about her husband’s resistance to medication. The plaintiff testified that her husband is hesitant about medications, with concerns about long-term side effects, but has never asked her not to take medications. She was also surprised by Dr. Latimer's comments regarding her husband's attitude to her weight. The plaintiff testified that she has followed the advice of her physicians regarding medications and treatment. At trial, the plaintiff’s husband testified that he did not discourage the plaintiff from taking medications as recommended.

[77] The plaintiff has in fact taken many medications as prescribed, and continues to do so.

[78] The defendants do not argue that the plaintiff has failed to mitigate her loss by failing to follow treatment recommendations.

[79] Notwithstanding Dr. Latimer's suggestion that other issues could also be partially to blame for the plaintiff's mild depression, the defendants do not argue that this condition is not caused by the accident injuries she sustained.

[80] The defence position is in this regard is consistent with the applicable legal principles as to causation, as set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 and many other cases. In this respect, I adopt my discussion of causation set out in *McNabb v. Rogerson*, 2022 BCSC 1514, at paras. 125 through 128, which I will set out below in reference to causation of the plaintiff's injuries, generally.

[81] I conclude that although the plaintiff's symptoms of depression could be partially related to other issues in her life as mentioned by Dr. Latimer, these non-tortious contributing factors are not legally relevant to the causation analysis. I conclude that the plaintiff's symptoms of depression since 2019 have been caused by the motor vehicle accidents, in particular MVA #2, as a matter of law.

3. Dr. Mark Adrian – Physiatrist – report date October 5, 2023

[82] Dr. Adrian saw the plaintiff August 23, 2023 at the request of plaintiff's counsel.

[83] The plaintiff told Dr. Adrian that prior to MVA #1, she had symptoms involving her left ankle, and was anticipating surgery. She wore an ankle brace at work. Infrequently, she took shifts off from work due to her ankle condition. In general, however, her ankle did not affect her work. She also recalled that she injured her right shoulder at work in 2017. She could not recall if this condition required time off from work. However Dr. Adrian noted that the right shoulder injury occurred in July 2017, and she took a day off of work on November 6, 2017 due to right shoulder pain.

[84] Dr. Adrian noted that following MVA #1 she had left ankle surgery in June 2018 and again in July 2018. At the time of MVA #2 on February 1, 2019, she was recovering from her ankle surgery, was undergoing rehabilitation treatments, and was anticipating a return to work. Her left ankle pain was improving.

[85] Dr. Adrian noted that the medical records indicated that she had symptoms of headache, neck and back pain following MVA #1. The plaintiff told Dr. Adrian that her symptoms from MVA #1 gradually improved to the point that she did not experience limitations with respect to her employment, recreational or household activities.

[86] Dr. Adrian noted that the plaintiff was off work due to her left ankle surgery from June 2018.

[87] She told Dr. Adrian that before the ankle surgery, she was able to perform her work duties without modification. Her right shoulder pain did not prevent her from working as a renal nurse at 70% of full-time position.

[88] The plaintiff advised Dr. Adrian that her left ankle continued to improve over time. She no longer uses a brace for her left ankle. She experiences occasional left ankle pain with prolonged standing or walking, but her left ankle symptoms do not limit her activities.

[89] According to Dr. Adrian, the plaintiff's most limiting problem is headache. The intensity of her headaches fluctuates. Headaches are triggered by fatigue, certain lighting conditions, tasks that involve focus, concentration, or memory, and busy or loud environments. Neck pain can trigger headaches.

[90] She has neck pain, and pain involving her mid back and low back. She continues to have right shoulder pain, radiating into her back and neck. Her shoulder pain symptoms are triggered by reaching, pushing, and pulling.

[91] She told Dr. Adrian that the second accident affected her concentration, focus, memory and decision-making, and affected her emotionally as well. The accident injuries affected her mood and ability to multitask.

[92] For her headaches, she was taking a number of medications, including Desipramine, Emgality, Diclofenac, and Sumatriptan.

[93] On physical examination, Dr. Adrian noted that the plaintiff was pleasant, cooperative, and attentive. She had greater than ideal body weight. She had poor posture. She had a full range of motion in her neck, without pain. There was tenderness involving her neck. She had a full range of motion in her mid and lower back. There were no neurological symptoms. She had some pain in her shoulder on outward reaching. There was tenderness in her shoulder, and signs of impingement (pain in the bursa).

[94] Dr. Adrian diagnosed:

1. chronic mechanical neck and lower back pain; and

2. right shoulder soft tissue pain.

[95] Dr. Adrian explained that mechanical spinal pain means that the source of the pain stems from the tissues of the spinal column.

[96] Her right shoulder symptoms, in part, are related to pain emanating from her neck.

[97] I summarize Dr. Adrian's further opinions as follows:

1. The second accident aggravated the neck injury that she suffered in MVA #1;

2. Her low back pain is causally related to MVA #2. She had some history of lower back pain symptoms, and her lower back was probably vulnerable to injury;

3. Her right shoulder symptoms are consistent with bursitis. The accidents probably caused an aggravation of her pre-accident right shoulder pain. Her shoulder pain is also in part due to referred pain from her neck injuries;

4. Her headaches are probably related to her neck injury. Her headaches are also triggered by tasks that require focus and concentration, concentration and memory, certain lighting, and louder, busy environments;

5. As to headaches, and her psychological and cognitive symptoms, Dr. Adrian defers to specialists in other fields;

6. With respect to her mechanical spinal pain or soft tissue pain, the prognosis for further recovery of her injuries to her neck, lower back and right shoulder is poor;

7. It is unlikely that the injuries to her spinal column and right shoulder will progressively deteriorate over time. However, these areas are vulnerable to future injury;

8. She will probably continue to experience difficulty performing employment, recreational and household activities that involve prolonged sitting and standing, prolonged static or awkward spinal positioning, or forceful, prolonged and repetitive reaching with her right upper extremity, or repetitive or prolonged bending. These limitations will likely continue into the future;

9. The plaintiff is permanently partially disabled due to the injuries suffered in the accidents;

10. The plaintiff is not suited to employment whose core components involve physical exertion as described by Dr. Adrian;

11. Physical therapy, massage therapy, and chiropractic treatments will help her with pain management, and she will probably continue to experience short-term benefit with these forms of treatment. However they will not likely lead to long-term healing of her injuries. These forms of treatment assist with pain management, allowing her to minimize her medications, and it is therefore reasonable that she continue with such treatment into the future;

12. A trial of right shoulder subacromial steroid injection into the bursa may be worthwhile. However the results are unpredictable and the relief is usually short term; and

13. It is most likely that the plaintiff's condition will not improve, or worsen.

[98] At trial, Dr. Adrian was asked to comment on the opinion of Dr. Berger, in relation to the plaintiff's treatment.

[99] Dr. Berger states that the plaintiff has "… participated in an atypically high number of treatment sessions" and that many of her treatments are passive in nature, such as massage therapy, chiropractic treatments, and physiotherapy. In Dr. Berger's view, these treatments should be immediately discontinued, as there is no role for such passive modalities in the treatment of chronic muscular pain.

[100] Dr. Adrian did not "necessarily" agree with this. He noted that these treatments provided temporary relief, which may allow the plaintiff to better manage her conditions, and may help her reduce use of medications, with resultant side effects. He also did not agree with Dr. Berger that a more active exercise program would be beneficial. In Dr. Adrian's view, her current exercise regimen was suitable.

[101] In cross-examination Dr. Adrian was asked whether he agreed with Dr. Berger that there was room for improvement in the plaintiff's condition, and that a change in treatment could lead to improved tolerance for pre-accident activities. He was asked whether he agreed that there was at least some room for optimism. In response, Dr. Adrian did not directly answer this question. He reiterated his view that the plaintiff's condition would most likely not improve, nor worsen.

4. Dr. Mike Berger – Physiatrist – report date November 21, 2023

[102] Dr. Berger saw the plaintiff for an independent medical examination on November 21, 2023, at the request of the defence. He also testified at the trial.

[103] Dr. Berger noted that the plaintiff was alert, cooperative and pleasant on physical examination. There were minimal physical examination findings of note.

[104] Dr. Berger noted evidence of entrapment of the occipital nerve between tight paracervical muscles leading to headache, on Tinel's test.

[105] Active range of motion of the cervical spine was slightly restricted. Active range of motion in the lumbar spine was normal. Some symptoms were mildly reproducible with palpation.

[106] I summarize Dr. Berger's opinions as follows:

1. The plaintiff did not suffer a concussion in the MVA, notwithstanding that diagnosis as shown in the clinical records, early on.

2. He is concerned that the concussion diagnosis "permeated her treatment and has been the primary focus of her health care team". He notes that her treating neurologist [actually, a psychiatrist], Dr. Butterfield, did not provide a diagnosis of concussion. Dr. Butterfield diagnosed post-traumatic headache with migrainous features.

3. He agrees with Dr. Butterfield that her headaches are likely "cervicogenic" in nature, stemming from tight paracervical muscles.

4. The cognitive changes she described are likely secondary to her chronic pain and headache.

5. He suggests that she be enrolled in a multidisciplinary chronic pain management program, to receive psycho-education about the nature of her pain, and the importance of increasing the intensity of her activities, and mitigating maladaptive movement patterns.

6. It is possible the plaintiff's tolerance for both vocational and avocational activities could improve with changes in treatment. He states that myofascial pain and cervicogenic headache are not contraindications to performing any physical activity, and she should be encouraged to incrementally increase the intensity of her activities.

7. Her capacity for pre-accident activities should improve with implementation of more intensive cardiovascular and resistance training exercise. He adds that “mitigating the disability stereotype as much as possible is important".

8. The plaintiff has participated in an “atypically high number of treatment sessions, many of which do not appear to be targeting the underlying causes of her symptoms”. He states that “many of her treatments are passive in nature". He notes that she has undergone approximately 170 chiropractic treatments, 120 massage therapy treatments, approximately 75 sessions with an occupational therapist, and 150 sessions with a kinesiologist. She continues to receive massage therapy twice a week, chiropractic treatment once per week, physiotherapy twice per month, and sees an occupational therapist one to two times per month. In his view, the massage therapy, chiropractic treatment and physiotherapy should immediately cease. He also questions the utility of cognitive exercises with an occupational therapist.

9. Rather than home-based kinesiology, he suggests that she participate in group fitness classes that focus on whole body physical fitness, including Pilates, Aqua fit, or Yoga, four to five times per week. He suggests that her physical exercise needs to increase in frequency.

10. He defers her headache management to Dr. Butterfield, but suggests that a greater occipital nerve block be considered, given the positive Tinel’s test, or he could consider Botox injections.

11. He is not able to predict whether a change in treatment could mitigate her entrenched disability behaviour and improve her physical fitness to the point where she could return to part-time nursing on the dialysis ward. He suggested it would take six to 12 months of further active rehabilitation and psycho-education before determination could be made in that regard.

12. Her long absence from work is a negative prognostic factor. Other negative prognostic factors include chronicity of her symptoms, entrenched disability behaviour, physical deconditioning and elevated body mass.

13. There are also positive prognostic factors, including her relatively young age, absence of other medical comorbidities, supportive family, and high level of education.

14. In the absence of alterations to her treatment, the plaintiff's functional ability is unlikely to change, and she is likely to remain off work. An immediate return to work and pre-accident activity levels is not realistic, but a change in treatment could lead to improved tolerance for pre-accident activities.

5. Dr. Gordon Robinson – Neurologist – report date October 13, 2023

[107] Dr. Robinson examined the plaintiff September 20, 2023 at the request of plaintiff's counsel. He did not testify at the trial.

[108] The plaintiff told Dr. Robinson that she was nearly completely recovered from the symptoms of MVA #1 when she was involved in MVA #2 on February 1, 2019. Prior to that, she had occasional mild headaches that were "not a problem" as well as neck pain that she did not feel impaired her ability to function. Dr. Robinson noted that when the plaintiff was seen by her GP, Dr. Hansen, on February 6, 2019, she was complaining of dizziness, headache, and neck and back pain. In the days and weeks after MVA #2, she had constant headache, neck and back pain, as well as dizziness, and a sense that her "whole body was hurting". She describes spending the next couple of weeks lying in bed with ice packs on her neck and back. She was gradually able to mobilize and begin treatment with physiotherapy. She continued to see her family physician and have physiotherapy. She began other treatments including chiropractic treatment and massage therapy, visits from an occupational therapist, and regular exercise with a kinesiologist.

[109] The plaintiff noted that initially she avoided driving mainly because of her headaches, but this has improved and that currently driving locally is not a problem. She avoids driving into Vancouver (from her residence in Langley), but can manage it if necessary. (Dr. Cheung noted that she had driven 1.5 hours to see her.) She remains anxious as a passenger in a vehicle.

[110] The plaintiff described having headache on most days with severe headaches on average once a week until July 2021, when she began taking Amitriptyline at bedtime. The dosage was gradually increased and there was a substantial increase in headache-free days. Her headaches were moderately severe only, and only occasionally incapacitating. At about the same time, she began seeing Dr. Michael Butterfield, psychiatrist at the UBC Headache Clinic, in August 2021. She has continued to see Dr. Butterfield regularly. Dr. Butterfield changed her medication from Amitriptyline to Nortriptyline. She continued to have a reduction in her headaches. She began using Galcanezumab (Emgality) in January 2023. This is a CGRP monoclonal antibody administered monthly by subcutaneous injection. It is a biological agent. The plaintiff said that she did not believe it had any benefit in reducing the frequency or severity of her headaches. In April 2023 Dr. Butterfield changed her medication again from Nortriptyline to Desipramine, as a result of weight gain associated with her use of Nortriptyline. Her weight gain has not continued. She continues to have improvement in her headaches with use of Desipramine, but it has caused difficulty maintaining sleep.

[111] The plaintiff told Dr. Robinson that her headaches remain her most difficult symptom along with “not thinking quickly or clearly” which she describes as “brain fog". She said her cognitive challenges are most pronounced during more severe headaches. Her headaches are usually mild to moderate in severity, experienced most days of the week. At times she will go for days to a week without a headache. She will experience a severe headache on average once per month. Use of Amitriptyline improved her severe headaches substantially. Prior to that, she had weekly incapacitating headaches lasting two to three days, during which she could be bedridden.

[112] The plaintiff noted that her headaches are aggravated by factors including stress, lack of sleep, exposure to bright sunlight, mental concentration, as well as physical exertion particularly involving repetitive bending such as unloading the dishwasher.

[113] The plaintiff stated that she was usually in bed by 10 p.m. She usually wakes up once or twice during the night and has difficulty getting back to sleep. She usually arises by 7 a.m., feeling “very tired”. Most days she will nap for one to two hours. She continues to have regular appointments for chiropractic massage and physiotherapy treatment. She exercises with a kinesiologist twice a week, and continues to see an occupational therapist. Every other week she has a session with a registered clinical counsellor. She continues to use Desipramine and Galcanezumab (Emgality) once per month. As needed, she uses other medications such as Diclofenac, Acetaminophen, and Sumatriptan. On average once a week she may take 10 mg Fluoxetine (Prozac) but was uncertain as to the effect of the drug on her mood.

[114] Disability scores showed “severe disability from headache”, mild depression (PHQ-9 score of 8), and no or mild anxiety (GAD-7 score of 3).

[115] On examination, Dr. Robinson noted no apparent deficits in attention, language or memory. She did not appear anxious. Speech was normal. There was mild restriction of motion in her cervical spine and she complained of tightness. There was mild tenderness in her paracervical musculature, but no tenderness in her parathoracic or paralumbar muscles.

[116] In general, then, as I interpret the report, Dr. Robinson's physical and mental examination showed very little of note.

[117] In Dr. Robinson's opinion:

1. The plaintiff suffered soft tissue injury to her neck and back in both motor vehicle accidents;

2. Prior to MVA #2, she was having occasional headaches as well as discomfort in her neck. These conditions were non-disabling and probably would have gradually resolved had she not been involved in MVA #2;

3. After MVA #2 there was a diagnosis of “concussion" but there was no loss of awareness, or other symptoms of cerebral dysfunction at that time. It was unlikely that she sustained a mild traumatic brain injury. Her cognitive difficulties are better explained by the distracting effects of pain and mood disorder;

4. Her headaches are consistent with a diagnosis of persistent headache related to soft tissue injury to the neck sustained in MVA #2. The formal diagnosis is “persistent headache attributed to whiplash”;

5. The underlying cause of the development of chronic pain following neck injury is unknown. Although the term “soft tissue injury” is often used, there is no evidence that the soft tissues (muscles and ligaments) sustain any permanent damage. Research suggests that chronic pain from complex psycho-biological factors may result in changes in the neurological processing of sensory impulses within the pain system. Pain occurs without any ongoing tissue injury;

6. Further investigations such as CT and MRI would undoubtedly be normal, although degenerative changes in the cervical spine may be reported. Treatment of chronic headache is difficult;

7. No physical therapy has been found to be curative. At most, patients will experience temporary benefit;

8. The plaintiff should maintain an active lifestyle. Regular exercise directed to improving general fitness may increase her sense of well-being and her ability to cope with pain;

9. Although medications are often unhelpful in treating chronic post-traumatic headache, Dr. Robinson makes a number of recommendations in relation to medications, that may assist;

10. Analgesics, muscle relaxants and anti-inflammatory drugs are usually of little value. Triptans such as Sumatriptan may be helpful when headaches have migrainous features. Other medications for frequent migraines such as Candesartan and Topiramate could be helpful, but these medications have common side effects. The Emgality does not appear to be helping her. She could try a different CGRP treatment, but Dr. Robinson's expectations are not positive;

11. It would be reasonable to consider Botox injections. Large trials are not available in relation to chronic post-traumatic headache, but clinical experience has been positive for many patients. Headaches and neck pain may be less severe for up to three months following administration of Botox. The side effects are minimal and there are no known long-term risks. If there is a substantial positive response, treatments will be required every three months, usually indefinitely. The cost is high ($425–$850), however most third-party payors cover the drug cost;

12. The plaintiff will continue to have post-traumatic headaches indefinitely, although she could possibly have further improvements with the treatments recommended and suggested in his report. He does not believe that her headaches will worsen;

13. The plaintiff has had “considerable treatment”. She continues to have regular appointments for massage, physiotherapy and chiropractic manipulation, she sees a psychiatrist [Dr. Butterfield] primarily for headache management, and continues to see a registered clinical counsellor. Dr. Robinson does not comment one way or another as to whether she should continue with these treatments;

14. “From her account of her difficulties”, he doubts that she is employable in a competitive job market. Considerable re-training would be required for her to be recertified as a nurse. He doubts that the plaintiff has the capacity to complete the retraining required.

6. Dr. Christina Cheung – Neurologist – report date November 23, 2023

[118] Dr. Cheung saw the plaintiff for an independent medical examination on October 26, 2023, at the request of the defence. Her report was relied upon at trial by both the plaintiff and the defendants. She did not testify at the trial.

[119] Dr. Cheung's patient history as set out in her report is detailed and thorough, and is well supported by the plaintiff's testimony and other evidence at trial. Dr. Cheung's review of the plaintiff's clinical records as summarized in her report is also detailed and thorough.

[120] Dr. Cheung noted that the plaintiff's past medical history was significant for premenstrual dysphoric disorder, left ankle pain, right rotator cuff injury, and some occasional headaches with her first pregnancy, but otherwise, she did not struggle much with migraines or regular headaches.

[121] On physical examination, Dr. Cheung noted no evidence of pain, except a mild headache which the plaintiff rated at 3/10. She had driven independently for 1.5 hours to the assessment. Her Montréal cognitive assessment was normal. Her speech was clear, but she paused frequently to find words and organize her thoughts. Her neurologic examination was normal aside from mild unsteadiness. There was full neck and shoulder range of motion without pain.

[122] The plaintiff denied any significant mood issues aside from irritability.

[123] In Dr. Cheung's opinion:

1. The plaintiff likely sustained a mild traumatic brain injury with the second accident;

2. She still experiences chronic post-traumatic headaches;

3. She has ongoing soft tissue injuries related to her neck and shoulders;

4. Her right shoulder injury predated the MVAs, but was not presently an issue;

5. Her chronic neck, shoulder and back pains continue, but have been significantly lessened;

6. She has had brief episodes of disequilibrium lasting about 10 minutes, likely due to an inner ear condition;

7. As to the plaintiff's ongoing cognitive symptoms, Dr. Cheung says “I cannot attribute these solely to a concussive injury/post-concussion syndrome". Dr. Cheung suggests that the plaintiff's cognitive problems relate in part to her medication, sleep problems, and headaches, as well as her mild traumatic brain injury;

8. The plaintiff remains completely disabled from working as a renal nurse, due to her ongoing fatigue and cognitive difficulties, including difficulties in decision making and cognitive efficiency;

9. In this respect, Dr. Cheung notes that:

> In her role as a nurse, while she did not have to manage emergency situations often, she would need to respond to these appropriately when the situation arose. She would also be responsible for procedural tasks that required precision, efficiency, and memory, in a hospital setting with overhead lighting, background noise, and various distractions. As her role as dialysis nurse would be safety sensitive, it is my opinion that it is reasonable that she has not returned to her role. In my opinion, based on Functional Capacity Evaluation deficits and reported symptoms along with the nature of her position, Ms. Valcourt remains completely disabled from this role.

10. In Dr. Cheung's view, the plaintiff is also partially disabled from recreational, household and activities of daily living;

11. With respect to treatment, Dr. Cheung defers to Dr. Butterfield, who continues to treat her for headache. However she notes that Botox has not been considered or suggested, and would be worth considering, especially in light of the fact that a trial of Emgality has not offered benefit, and she had already tried at least three different prophylactic classes of oral medication. She says Botox typically costs $1000, together with a physician fee of at least $150 for each injection, administered every three months in a physician's office;

12. Improvement in the plaintiff's headache management could help with her fatigue and cognitive issues, but she is unlikely to become headache free;

13. Management strategies “[aim] to decrease headache frequency and severity by 50%";

14. It is unlikely that the plaintiff will be able to return to her pre-accident employment as a registered nurse in a renal dialysis unit in light of the cognitive requirements and the low margin for error allowable in the interest of patient safety;

15. While she would not be able to return to a nursing role in direct patient care in a dialysis unit, with potentially improved headache management, it is possible she would be able to return to nursing duties, potentially in an administrative or teaching capacity, though it would remain to be seen if cognitive fatigue would be a limiting factor;

16. The prognosis was generally negative. She does not expect the plaintiff to become headache free; and

17. The plaintiff will continue to be prone to cognitive fatigue and sensitivity to external stimuli over the long term.

D. Other Expert Opinion Evidence

1. Russell McNeil – Occupational Therapist – Report date December 6, 2023

[124] Mr. McNeil is an occupational therapist who assessed the plaintiff November 14, 2023 at the request of plaintiff's counsel, for a functional capacity evaluation, and

to provide recommendations and costs for future care. Mr. McNeil testified at the trial.

[125] Mr. McNeil noted that the plaintiff is right-handed, stands 5'4", and weighs 190 pounds. On the assessment, she exhibited her best, consistent efforts, and the results provided a reliable assessment of her functional capacity.

[126] A summary of Mr. McNeil's findings and opinions is as follows:

1. The plaintiff's functional neurocognitive score was average, in overall terms. However she showed specific weaknesses in phonological short-term memory (an auditory memory test), response time, visual scanning across a computer screen, focused attention, and processing speed;

2. In Mr. McNeil's opinion, the weaknesses identified in the test would likely have an impact on aspects of her work function. For example, with increased pain and fatigue, one could expect difficulties with attention, response time, and processing speed, which would impact her work;

3. In relation to physical capacity, the plaintiff showed some restrictions in cervical range of motion and range of motion in her trunk. Shoulder mobility was average. Her strength tests were generally average. She had restrictions in her capacity for reaching above shoulder level, which resulted in increased upper back and neck pain. Her ability to reach below shoulder level was compromised;

4. She demonstrated restrictions in movement of her neck and trunk, and in her ability to kneel and crouch. Her ability to lift and carry was very low. She had limited standing tolerance;

5. Overall, she had the physical capacity to engage in sedentary work, and light work, but would need to pace herself and would also benefit from ergonomic accommodations;

6. She would have difficulty maintaining a competitively employable work pace;

7. The work of a general duty nurse requires medium strength;

8. The plaintiff did not demonstrate the capacity to perform work as a registered nurse on a part-time or full-time basis, at a competitively employable/productive work pace;

9. With accommodations, she would likely have the capacity to perform some aspects of light-duty nursing on a part-time basis, but would struggle to obtain and maintain a competitively employable, productive work pace;

10. She is not suited to 12 hour shifts, but with accommodation, including pacing herself, she could be able to increase her tolerance to perform work on an eight hour shift;

11. She is not capable of heavier aspects of nursing, such as pre- and post-operative care, acute care, working on medical or surgical wards, emergency care, or long term care;

12. She could work with a limited scope of practice in light-duty nursing, with accommodations to manage pain, but would struggle to obtain and maintain a productive work pace. Working in education or community nursing are examples of the kind of nursing work that she could do.

[127] Mr. McNeil also provided cost of care recommendations. I will refer to these in connection with the plaintiff's claims for cost of future care.

2. Joyce Lee – Occupational Therapist – report date January 17, 2024

[128] Ms. Lee is an occupational therapist, who provided a “Response Report” at the request of the defence, responding to the report of Mr. McNeil. Ms. Lee testified at the trial. She did not personally examine or assess the plaintiff.

[129] Ms. Lee states that Mr. McNeil used reliable and valid tools to assess the physical capacity of the plaintiff. His findings appear consistent throughout the testing, and he noted that the plaintiff put forth a full effort.

[130] Ms. Lee has some minor criticisms of Mr. McNeil's report. For example Ms. Lee criticizes Mr. McNeil's use of the words "restricted" and "restrictions". Ms. Lee advocates for a distinction, based upon whether the restriction is medically indicated, or otherwise. This seems to me to be largely a semantic distinction that in the circumstances of this case does not affect Mr. McNeil's opinions and would not affect my findings. I therefore see no need to address this point. More generally, Ms. Lee's report does not affect the weight I place on the assessment and opinion of Mr. McNeil.

[131] Ms. Lee also commented on Mr. McNeil's cost of care opinions.

3. Derek Nordin – Vocational Rehabilitation Consultant – report date December 11, 2023

[132] Mr. Nordin saw the plaintiff November 27, 2023 for a vocational assessment, at the request of plaintiff's counsel. He did not testify at trial.

[133] Mr. Nordin reviewed the plaintiff's school records. He noted that she was generally an average student between grades one and nine, but in grades ten and 11, achieved As or Bs in all courses, except for a C+ in Mathematics 11.

[134] Mr. Nordin reviewed and relied upon the medical reports of Dr. Mark Adrian, and Dr. Gordon Robinson, and the functional capacity evaluation of Russell McNeil.

[135] Mr. Nordin administered an aptitude test battery, which produced a general ability score of 67, which was in the upper half of the average range. However, the plaintiff scored below average in numerical aptitude [15th percentile] and below 50th percentile in perceptual aptitude and manual dexterity.

[136] On the patient's self-reports, she indicated minimal anxiety, and mild depression.

[137] Based on the plaintiff's self-reporting, and the opinions of Doctors Adrian and Robinson, and Mr. McNeil, Mr. Nordin opined that the plaintiff is not competitively employable at this time. She would need to see a noticeable improvement in physical, cognitive, and emotional domains in order for a return to work to be a realistic possibility.

III. THE PLAINTIFF'S INJURIES AND THEIR CONSEQUENCES

A. Discussion

[138] The plaintiff was a credible and reliable witness at trial. I have no concerns about the sincerity or truthfulness of her testimony. She did her best to be as accurate as possible. There are no substantial reliability concerns.

[139] As noted, the medical evidence is very largely consistent. The other expert opinion evidence is also quite consistent.

[140] I have no significant concerns regarding the reliability of the information the plaintiff provided to the experts. The plaintiff's evidence as to her injuries as given at trial accords with the descriptions of her complaints as set out in the expert reports, which I have summarized.

[141] The plaintiff's own evidence as to her injuries and complaints is strongly supported by the evidence of the collateral witnesses. The plaintiff's collateral witnesses were also credible, sincere, and generally reliable.

[142] The plaintiff's husband testified that prior to the MVAs the plaintiff's personality was "crazy outgoing". She was a "bubbly" (a description provided by several witnesses), loving, energetic, extremely social, and active person. Her cognitive abilities were, as he put it, "spectacular". She was able to multitask her work activities, domestic activities, social life, and family responsibilities. I accept his evidence that prior to the accident she had no real physical limitations. Her ankle injury was a minor inconvenience. She wore an ankle brace at times, and subject to that, she was essentially unrestricted in terms of physical activities.

[143] He described her as being “very active” and “outdoorsy" physically. She enjoyed extensive travel with the children, moderate hikes, boating, camping, and other outdoor physical activities.

[144] As the plaintiff and her husband and others testified, the plaintiff was an active participant in religious and church activities.

[145] Prior to the accidents, the plaintiff and her husband enjoyed going to lakes, swimming, boating, moderate hikes, bicycling, camping, and other outdoor activities. They enjoyed travelling, often by long road trips by car, and also extended foreign travel. Even after their first and second child was born, they managed to take trips of several weeks in length to South East Asia and other parts of Asia. Even with two children, the plaintiff was able to manage these trips, without limitation. So for example in 2015 the plaintiff, her husband and their two children travelled to Singapore, the Philippines, India, Nepal, and Thailand, for six-and-a-half weeks.

[146] The plaintiff was active in her children's schooling. She participated as an active parent in reading, arts and crafts, sports days, fundraisers, field trips, and other activities.

[147] Prior to the accidents, the plaintiff was active in her church and in church activities. Her family attends a small church in Abbotsford. Religion and church activities have always been a very important part of the plaintiff's life and that of her family. Pre-accidents, she attended church regularly on Sundays, and would arrange for and set up church socials after Sunday services. She participated in Bible study one night per week. She attended the children's school at least once a week.

[148] At the time of the accidents, the plaintiff and her family were residing in an 1800 square-foot four-bedroom, two-bathroom residence in Abbotsford.

[149] She had no physical difficulties with domestic and household tasks.

[150] She and her husband loved entertaining at their home. Along with other family members they often hosted events or celebrations with family and friends at the

Valcourt residence. The plaintiff was the primary organizer and worker at these frequent events.

[151] This included celebrations for events such as birthdays, and anniversaries. They would often have 20 or 30 guests at a time, including friends and family. These events occurred typically at least once per month, and more often (two or three times per month) in the summertime. They often hosted barbecues. In relation to large social gatherings, the plaintiff made all the preliminary arrangements, including shopping, cooking and cleanup, together with help from other family members such as her sisters and mother.

[152] The plaintiff was primarily responsible for most domestic, indoor activities such as shopping, laundry, and cleaning. She enjoyed gardening.

[153] The plaintiff's evidence as to her busy, unrestricted family and social life was strongly supported by the evidence of her husband, as well as her sisters Karen Lindahl and Lisa Dubois, and her friends Daena Janela, Stephanie Metcalf, and Samantha Riarh.

[154] Pre-accidents, the plaintiff was a very effective, and highly regarded renal nurse.

[155] Dr. Susan Cooper, a nephrologist (renal specialist), testified about her work association with the plaintiff during the years 2012 through 2018. She worked with the plaintiff both at Abbotsford Hospital and, in particular, at the chronic kidney disease clinic in Abbotsford from 2014 to 2018. She regularly worked “side-by-side” with the plaintiff, in the plaintiff's role as a renal nurse. I accept without hesitation her description of the plaintiff's work capabilities. She described her as “exceptionally organized”. She had “impressive people skills” and was highly respected by the other staff, including the doctors. She was diligent, and “very conscientious”. She went “above and beyond” her strict duties and responsibilities. She excelled in all aspects of her work. She testified the plaintiff was an effective educator of patients. Dr. Cooper recalled that the plaintiff assisted her in preparing and presenting a presentation for a large audience for BC Kidney Day.

[156] Dr. Cooper testified that only a small proportion of nurses would have the skills to move up from the position of renal nurse to that of Patient Care Coordinator ("PCC") (a managerial and supervisory position) or manager. She encouraged the plaintiff to consider moving into a PCC role.

[157] A friend and colleague, Daena Janela, who was also a renal nurse, testified about working with the plaintiff at the Abbotsford Hospital Community Dialysis Clinic, as well as the Abbotsford Community Kidney Care Clinic, and described the plaintiff as a very competent, confident, decisive renal nurse with excellent organizational and communication skills. As a result of their work association, they developed a personal friendship over the course of a number of years. As with other witnesses, she described the plaintiff has being able to work without any limitations, and having a very high level of energy, and a positive person with a "bubbly outlook on life".

[158] She notes that the plaintiff's personality is not the same as it used to be. She is no longer happy, bubbly, and outgoing, as she formerly was. She does not laugh as much. She does not call or text or contact Ms. Janela as she used to do. Subsequent to the accidents, Ms. Janela has seen the plaintiff on only a few occasions.

[159] Samantha Riarh is another registered nurse and friend of the plaintiff's who testified at the trial. She and the plaintiff became friends as mothers of children who attended the same school, Mennonite Educational Institution ("MEI"). Ms. Riarh is an intensive care nurse at the Abbotsford Hospital. She would interact with the plaintiff at times, and noted that the plaintiff was effective, efficient, and well-liked in her work. In her personal life, she noted the plaintiff was a happy, bubbly, loving mother who was very involved with school activities, and with her children.

[160] Post-accidents, the plaintiff is a "completely different person", Ms. Riarh testified. They now rarely see each other. She has seen the plaintiff only occasionally since the accidents. She describes her as a "shadow of her former self". They no longer engage in the walks and social activities they used to do together, and seldom if ever sees the plaintiff at church. She is no longer the energetic, confident, happy person she was previously.

[161] Another friend, Stephanie Metcalf, a bank manager, has known the plaintiff for more than 20 years. Her evidence was similar to that of other witnesses. She testified that the plaintiff previously displayed a sweet, bubbly, energetic, fun personality. Ms. Metcalf frequently attended social gatherings at the plaintiff's home, as well as church events such as Bible study, camping together with their respective families. She and the plaintiff were and remain close friends.

[162] Ms. Metcalf testified that after the second accident, she saw the plaintiff within a day or two. She was “out of it". Her actions were slow, her speech was slurred, and she seemed to be mentally not “all there”. She had difficulty carrying on a conversation. Ms. Metcalf helped the plaintiff with day-to-day activities such as picking up and dropping off the children from school, and looking after them, for several times per week for a number of months following MVA #2. She continues to assist the plaintiff regularly. They continue to speak or communicate via text almost daily.

[163] Ms. Metcalf testified that social gatherings still occur at the plaintiff's residence, but are less frequent than they used to be. However, the plaintiff's participation is very limited. The plaintiff no longer hosts the events. Ms. Metcalf, and the plaintiff’s sisters and mother make arrangements and prepare food.

[164] Ms. Metcalf observes that the plaintiff is now easily overwhelmed, and struggles with organizing things, at any level. She struggles even to make a simple meal. Her previous bubbly enthusiasm is gone. Her energy is gone. Ms. Metcalf notes that when the plaintiff has a headache, her speech becomes slurred and slow, and she has difficulty sustaining a conversation.

[165] In summary, the picture painted by the plaintiff herself, the medical evidence, and the plaintiff’s collateral witnesses is all very consistent.

[166] A summary of her injuries is as follows:

1. Chronic headaches, debilitating at times, with dizziness and fatigue, and sensitivity to light, sound, and busy environments;

2. Cognitive impairment, likely secondary to her headaches and physical pain complaints;

3. Aggravation of her pre-existing right shoulder complaint;

4. Neck and back pain;

5. Right knee pain following MVA #1, now largely resolved but still bothersome at times;

6. Anxiety with driving;

7. Mild depression;

8. Somatic Symptom Disorder, or Adjustment Disorder, with depressed mood;

9. Weight gain;

10. Sleep impairment;

11. Disequilibrium, episodic;

12. Possible MTBI;

13. Fatigue, lack of energy;

14. Mood and personality changes, including no longer being the active, outgoing, energetic, cheerful, and confident person she used to be.

[167] The prognosis for substantial recovery is poor.

B. Causation of the Plaintiff's Injuries

1. Legal Principles

[168] I adopt my discussion of causation set out in *McNabb v. Rogerson,* 2022 BCSC 1514, as follows:

[125] The defendant argues that there have been independent intervening events that have contributed to the plaintiff's current mood issues. The defendant argues that the plaintiff's move from Kelowna to the small and relatively isolated community of Beaverdell in November 2018, and the death of a close friend approximately three years ago, have contributed to her mood issues.

[126] This is an argument of causation. As I perceive the defendant's argument, the defendant argues that some of the plaintiff's loss is attributable to independent events that would have occurred regardless of the Accident, and that the plaintiff's loss should be apportioned between tortious and non-tortious causes.

[127] However, the plaintiff's injuries are indivisible. It is not possible to separate them as to those caused by the Accident and otherwise. Where the plaintiff's injuries are not divisible, it is wrong in principle to attempt to divide them between tortious and non-tortious causes. This was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (SCC) as follows:

> 12. The respondents' position is that where a loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation. This is contrary to well-established principles. It has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability.
>
> ...
>
> 17. It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> …
>
> 25. In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.
>
> …
>
> 32. … The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore

> necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.
>
> …
>
> 35. …The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. …Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award…
>
> [Emphasis in original.]

[128] The relevant principles were further discussed in *Moore v. Kyba*, 2012 BCCA 361. The court stated:

> [32] Much judicial ink has been spilled concerning the characterization of multiple injuries as divisible or indivisible, and the impact of that characterization on the determination of causation and assessment of damages in a negligence case.
>
> [33] The legal principles underlying these concepts are clear, but explaining them to a jury "is no easy task" (see *Laidlaw v. Couturier*, 2010 BCCA 59 at para. 40). Nor is their application in varying particular factual contexts always straightforward.
>
> [34] The relevant principles were clearly set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Their elaboration in *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, and by this Court in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 22-37, *B.P.B. v. M.M.B.*, 2009 BCCA 365, *Bradley v. Groves*, 2010 BCCA 361 and *Laidlaw* are also helpful.
>
> [35] The basic principles at play in this analysis are that a "defendant is not liable for injuries which were not caused by his or her negligence" (*Athey* at para. 24), and "the defendant need not put the plaintiff in a position better than his or her original position" (*Athey* at para. 35). These two principles, which deal with the concepts of causation and assessment of damages, were distinguished in *Blackwater* (at para. 78):
>
> > It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for"

> the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.
>
> [36] Thus, whether a defendant is liable to a plaintiff for an injury is a matter of causation; the amount of compensation the defendant must pay is a matter of assessment of damages.
>
> [37] The concepts of divisible and indivisible injury are relevant at both stages of the analysis. At the stage of determining causation, the characterization of the plaintiff's injury or injuries as divisible or indivisible is relevant in determining what the defendant is liable for.
>
> …
>
> [42] If the injury is divisible, then the plaintiff is entitled to be compensated for the injury caused by the defendant…
>
> [43] If the injury is indivisible, then the plaintiff is entitled to be compensated for the loss flowing from the indivisible injury. However, if the plaintiff had a pre-existing condition and there was a measurable risk that that condition would have resulted in a loss anyway, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the defendant's negligence. This principle is called the "crumbling skull" rule. As explained in *Athey* (at para. 35): "This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position."

2. Analysis – Causation of Injuries

[169] As noted, I accept the plaintiff's evidence that prior to MVA #1, her health was good, although she had pain in her left shoulder which was persistent, but caused only a minor degree of disability. She also had left ankle instability, which resulted in the need for surgery. The condition was not significantly limiting, and improved after surgery.

[170] As noted, although Dr. Latimer suggested that other issues could also be partially to blame for the plaintiff's mild depression, the defendants do not argue that this condition is not caused by the accident injuries she sustained.

[171] In summary, I accept that the plaintiff's complaints are caused by the injuries she sustained in the MVAs.

[172] As previously noted, the defendants do not argue that the plaintiff has failed to mitigate her loss by failing to follow treatment recommendations.

IV. ASSESSMENT OF DAMAGES

A. Loss of Income or Income Earning Capacity

1. Legal Principles

[173] I adopt the statement of legal principles I set out in *Cochran v. Bliskis,* 2023 BCSC 710, as follows:

> [100] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal summarized the principles related to loss of future earning capacity, having regard to the court's recent decisions. The court stated:
>
> > [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
> >
> > [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. …
> >
> > …
> >
> > [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
> >
> > > [47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving

> rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

First Step

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

> [36] … are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
>
> [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

Second Step

[15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

Third Step

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation

> by creating a more holistic picture of a plaintiff's potential future.

[101] By contrast, assessing the plaintiff's past (that is, pre-trial) loss of earning capacity involves looking backwards. A claim for past loss of earning capacity is "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury": *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[102] I discussed the principles relating to a claim for past (that is, pre-trial) loss of earnings in *Sendher v. Wong*, 2014 BCSC 140:

> [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 153; *X. v. Y.*, 2011 BCSC 944, at para. 185.
>
> [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.
>
> [160] In *Smith v. Knudsen*, 2004 BCCA 613, at para. 29, Rowles J.A. stated:
>
> > What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140, at para. 32; *Falati v. Smith*, 2010 BCSC 465, at para. 41, aff'd 2011 BCCA 45.
>
> [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

2. Past Loss of Earnings or Earning Capacity

[174] The evidence fully supports that the plaintiff has been incapacitated from work as a result of her accident injuries, following MVA #2. Primarily this is due to her headache problems, but is also due to the associated cognitive issues she has, and continues to suffer from, as well as her physical pain and restrictions.

[175] Mr. Nordin, the vocational rehabilitation consultant, states that based on the plaintiff's self reporting (which, as I have said, is credible, and reliable), together with the opinions of Doctors Adrian and Robinson, and of Mr. McNeil, the plaintiff is not competitively employable at this time. The neurologist, Dr. Cheung, opined that the plaintiff is completely disabled from working as a renal nurse, due to her ongoing fatigue and cognitive difficulties. Dr. Cheung noted that the demands of her work as a renal nurse are such that it is reasonable that she has not returned to her former role. Dr. Cheung relies on the functional capacity evaluation deficits as well as the plaintiff's reported symptoms and opines that the plaintiff remains completely disabled from her former role. Dr. Robinson doubted that she was competitively employable at all, and that considerable retraining would be required for her to be recertified as a nurse. He doubted she would have the capacity to complete the retraining required. The evidence of the physiatrists, Dr. Adrian, and Dr. Berger, supports that, without improvement in her physical condition, she is not capable of performing work duties as a renal nurse.

[176] The evidence of the plaintiff herself, together with the evidence of Daena Janela and Dr. Cooper, as well as the opinion evidence I have referred to, more than fully supports the conclusion that the plaintiff was unable to return to her former position and has been unable to work as a renal nurse since MVA #2. The defendants do not argue otherwise.

[177] As noted, the parties agree that, due to the plaintiff's ankle surgery, and the time needed for recuperation from that, she would have returned to work as a renal nurse on July 1, 2019.

[178] The parties have also agreed as to the hourly rates of pay that were or would have been applicable to the plaintiff from 2018 to 2024. For example as of February 8, 2019, just after MVA #2, her regular rate of pay was $43.28 per hour. Increases have occurred annually since then. The rate of pay as of April 1, 2024 is $53.77.

[179] In addition, the plaintiff is entitled to various shift premiums which add to her hourly rate of pay, in addition to extra pay for overtime hours. So evening shifts, night shifts, weekend shifts, statutory holiday shifts, hours worked with insufficient staff, hours worked on short notice, nurse in charge, and other premiums increase her hourly pay as a renal nurse.

[180] The plaintiff submits that taking into account the plaintiff's work history (average hours worked) together with typical amounts of overtime and shift premium pay, her past wage loss can be calculated at $358,100.94. The plaintiff recognizes that she underwent surgery to remove hardware from her foot and ankle in January 2023, and that she probably would have missed approximately two months from work as a result of the surgery. The plaintiff claims $344,235, after a reduction for the time needed to recover from the January 2023 surgery.

[181] The defence submits that past earnings could be assessed at between $265,775 and $295,306, depending upon the amount added for shift premiums that the plaintiff would have worked.

[182] The major difference between the parties relates to the number of annual hours that the plaintiff would have worked. In this respect, both parties rely on the plaintiff's actual hours worked between 2014 and 2018.

[183] The defendants calculate the loss based upon annual hours lost of 1,150, whereas the plaintiff calculates the annual lost hours at 1,356.

[184] There is a discrepancy in the evidence in this respect. The parties agree that full-time hours for a registered nurse is 37 hours per week, and therefore 1,950 hours per annum, when multiplied by 52. The plaintiff's calculations rely on .7 or 70% of this number to derive regular annual hours of 1,365. This number is similar to the

plaintiff's submission as to the average number of hours worked by the plaintiff between 2015 and June 2018, of 1,356 hours per year. This calculation is supported by the records.

[185] The defendants' submissions utilize presumed hours per week of 22.125, for an annual total of 1,150.5. There is also some support for this calculation in the evidence. The documents and the evidence of the payroll supervisor, Ms. Dhillon, indicate that the plaintiff's regular hours pursuant to her contract were 44.25 in a two week period, which is 1,151 hours per annum. Faced with this discrepancy, I prefer to rely on the evidence as to the hours the plaintiff actually worked. Therefore, I accept that the plaintiff's submissions are more accurate in this respect.

[186] I also accept the plaintiff's submissions as to the likely effect of the shift premiums and overtime that the plaintiff would have worked, which result in annual pay approximately 20% higher than her base salary. In general, I accept the detailed calculations put forward by the plaintiff, which are supported by the evidence.

[187] The defence submits that a reduction of 10 to 15% in the past income loss should be made for the possibility that the plaintiff would not have been able to work between July 2019 and January 2023, due to ankle pain. However, in my view, it is not likely that the plaintiff would have lost additional time prior to the January 2023 surgery on account of her left ankle issues. She was able to function fully at work prior to the 2018 ankle surgery. She continued to work right up until the time of the surgery. She saw a surgeon, Dr. A. Veljkovic, on December 29, 2022 about her continuing ankle issues. At that time, the decision was made to undergo further surgery in January 2023 for removal of the hardware. She reported to Dr. Veljkovic that she was significantly better since the 2018 surgery, by at least 60%. However she still had some pain which was bothersome.

[188] At trial, the plaintiff explained that the pain was on the top of her foot, where the hardware was rubbing. As the plaintiff was able to perform her work functions without limitation prior to the surgery, and the January 2023 surgery improved her ankle and foot condition significantly, it is unlikely that her relatively limited post

surgery complaints would have limited her work hours. In my view no specific negative contingency is warranted in this respect, on the evidence.

[189] However, a small general contingency reduction is warranted. The plaintiff could have lost work for some other reason, such as work-related exacerbation of her shoulder condition, or a new work-related injury, or any other life circumstances that could have necessitated work loss that was non-recoverable. As I see no positive contingencies that could have affected her past income, the negative contingencies should be considered.

[190] I apply a negative contingency of about 5% to the past wage loss assessment. I assess the plaintiff's claim for past wage loss at $325,000.

[191] In relation to past income loss, taxes must be deducted pursuant to s. 98 of the *Insurance* (*Vehicle*) *Act,* R.S.B.C. 1996, c. 231. I did not receive detailed submissions from the parties concerning the potential application of s. 98. The parties have liberty to apply in the event that they are unable to agree on the relevant deduction, as well as in relation to any off-set applicable for the plaintiff's disability benefits she has received.

3. Loss of Future Earning Capacity

[192] In this case, as the plaintiff is incapacitated at trial, and her incapacity will continue, the existence of a real and substantial possibility of an event giving rise to future loss is obvious: *Rab v. Prescott,* 2021 BCCA 345 at para. 29; *Canada (Minister of Public Safety and Solicitor General) v. McLellan*, 2023 BCCA 279 at paras. 49–52.

[193] Accordingly, what needs to be assessed is the value of the plaintiff's future loss including assessment of all relevant possibilities and likelihoods of future hypothetical events that may affect the quantification, including potential positive or negative contingencies: *Rab* at para. 29.

[194] The plaintiff argues that she is completely and permanently disabled from gainful employment.

[195] The defendants concede the first two steps of the *Rab* test, namely, that the evidence discloses a future event that could give rise to a loss of capacity, and that there is a real and substantial possibility that the future event will cause an economic loss. However they submit that the plaintiff's award for loss of future earning capacity should be reduced, to take into account:

a) the plaintiff's residual working capacity, including part-time or possibly full-time work;

b) the possibility that the plaintiff might not have returned to full-time work in September 2024, as she submits;

c) the possibility that the plaintiff would not be able to work continuously until age 65 due to health, or injury, or that she might choose to retire early earlier than that.

[196] The medical evidence establishes that the plaintiff is not competitively employable in any field, at present. Her persistent chronic headaches including frequent migraine type headaches, together with her significant cognitive limitations, and chronic physical pain all combine to support that conclusion. I refer again to the medical opinion evidence of Doctors Adrian, Robinson, and Cheung, in particular.

[197] In summary, the most likely future scenario for the plaintiff is that she will remain disabled from any kind of employment, permanently.

[198] However, while the prognosis for any substantial recovery as it would relate to her working capacity is definitely negative, a real and substantial possibility of an improvement in her symptoms such that she could potentially work in future remains. The consequences to the plaintiff of her injuries have been devastating, but the injuries themselves are not of a catastrophic variety. The medical evidence supports the possibility of improvement in her condition.

[199] As noted, the plaintiff remains under the care of Dr. Butterfield. I do not have opinion evidence from him, but I note that, according to the plaintiff, he continues to recommend various therapeutic alternatives.

[200] For example, a number of experts (Doctors Adrian, Robinson, Cheung) suggested that Botox treatment could be of benefit to the plaintiff. These doctors and Dr. Mok deferred to her current treating physician, Dr. Butterfield, in relation to her headache treatment. There is no opinion evidence from Dr. Butterfield. At trial the plaintiff testified that she has discussed trying Botox with Dr. Butterfield, who has told her that it could be tried in future, if necessary, but that during the last year her medications have been changed regularly and he did not favour a further change until the effects of previous changes were assessed. The plaintiff testified that she was open to trying all of Dr. Butterfield's recommendations, and has taken all medications that he has prescribed.

[201] The treatment the plaintiff has been receiving from an occupational therapist does not seem to have included CBT, as suggested by Dr. Mok, and in addition, it would appear to me, Dr. Berger, and Mr. McNeil.

[202] In addition, I rely on the opinion evidence of Dr. Berger. He thought the plaintiff's headaches could be related to nerve irritation (as detected on Tinel's test) and suggested that a nerve block procedure be considered.

[203] I also accept Dr. Berger's views that changes to the plaintiff's treatment regimen could be beneficial, such as by reducing reliance on passive treatment, and increasing active treatment such as exercise, coupled with counselling and psychoeducation, and possibly participation in a multidisciplinary chronic pain program. I note that it seems quite clear that the plaintiff's chronic pain condition has been very resistant to the abundant physical therapy treatment that she has had to date. So far, the plaintiff's treatment program does not seem be working very well. In relation to this point, I prefer the evidence of Dr. Berger to that of Dr. Adrian. I formed the view that Dr. Adrian may have been somewhat reluctant to be critical of the plaintiff in any way.

[204] Dr. Berger's views on the potential benefits of more active treatment are supported by the opinion of Dr. Robinson. Dr. Robinson recommended that the plaintiff maintain an active lifestyle, with regular exercise directed to improving general fitness. He made other treatment recommendations. While his view was that

her post-traumatic headaches would continue indefinitely, he noted there could possibly be some improvement with the treatments he suggested.

[205] Dr. Robinson noted that the plaintiff probably did not sustain a mild traumatic brain injury, and that her cognitive inefficiency is better explained by the distracting effects of pain and mood disorder.

[206] In short, if there is a significant improvement in the plaintiff's headache condition, and in her pain and mood disorder, improvements in her cognitive abilities will likely follow. Her physical complaints could also diminish with different and more effective treatment.

[207] I consider it highly unlikely that the plaintiff would ever return to the specialized and demanding work of a renal nurse. However Mr. McNeil noted that from a physical point of view she was capable of sedentary or light work, with accommodations, but would struggle to maintain a competitively employable work pace. She did not demonstrate the capacity to perform her work as a registered nurse on a full or part-time basis at a competitive pace, but with accommodations could have capacity to perform some aspect of light-duty nursing on a part-time basis, although she would struggle to maintain a competitively employable or productive work pace. Mr. McNeil suggested working as a nurse in education or community nursing, although accommodations would likely be required, as would re-training or additional training to obtain the skills to transition to other areas of practice.

[208] Thus, from his point of view, working in some capacity was not out of the question. Moreover, his comments are made without reference to a possible improvement in the plaintiff's condition.

[209] I also place weight on the opinion of Dr. Cheung that, while the plaintiff is permanently disabled from working as a renal nurse in a dialysis unit, with improved headache management, it is possible she would be able to return to nursing duties, potentially in an administrative or teaching capacity.

[210] The plaintiff contends that damages for future loss of earning capacity should be assessed on the basis that she will not work again, and a conventional 65 years of age retirement date. She will be 65 years of age on April 1, 2045, approximately 21 years following the trial.

[211] The plaintiff testified that she had no particular retirement plans. She noted that her mother is aged 69, and continues to work full-time as a teacher's assistant, at MEI. She testified that she loved her work as a registered nurse working in the renal department, and was good at it. Collateral evidence and the evidence of the other witnesses support this evidence. She testified that pre-MVA, her longer-term goal was to become a patient care coordinator (PCC). She explained that a PCC is a nurse who has supervisory or management duties. The PCC is the supervisor for the nurses on the renal unit, responsible for a patient load that could be approximately 120 patients, in total. Of this, 21 patients could be treated during the morning, 21 patients in the afternoon, and others overnight. Not all 120 patients are treated at the same time. The PCC is a full-time position. The plaintiff testified that her objective was to move into a PCC role when her daughter, her second child, entered middle school, which would be in September 2024.

[212] The plaintiff suggests three primary scenarios that should be considered for purposes of assessing future loss of earning capacity:

1. the plaintiff remaining in her pre-accident role as a renal nurse at .7 FTE until age 65;

2. the plaintiff working full-time [1.0 FTE] until age 65;

3. the plaintiff working full-time as a PCC or another senior nursing position, full-time until age 65.

[213] The plaintiff submits that scenario one [.7 FTE until age 65] generates anticipated earnings of $90,773 per year, calculated at 1,365 hours per year, and assuming shift premiums and overtime work roughly equivalent to her historic pattern from 2014 to 2018. The plaintiff submits that applying a 1.5% discount rate,

as required, results in a present value of $1,635,989. Allowing for a general contingency reduction of 5 to 10% for general life events, including other health issues that could result in loss of work, or voluntary reduction in her work hours, the range of loss under this scenario is $1,472,000–$1,554,000.

[214] For this calculation, I infer that the plaintiff has used a discount factor of 18.0229, slightly above the factor stipulated in the tables attached to CIVJI, which is 17.9001 for 21 years.

[215] The plaintiff's second scenario is for full-time work as a renal nurse, without advancing into a PCC position. In this scenario, she argues that anticipated yearly earnings would be $130,350 per year, including shift premiums and overtime, and that this results in a present value of $2,349,000. The implied discount factor in this calculation is 18.0208.

[216] The plaintiff submits that in this scenario a 5 to 25% contingency range could be applied for general life events, including voluntary reduction in hours, or other health issues, giving a range of $1,761,750 to, $2,231,500.

[217] Finally, the plaintiff's third scenario assumes that the plaintiff would work as a PCC, or would otherwise work at a higher pay level as a senior nurse. According to the plaintiff's calculations, including overtime and shift premiums, annual earnings in this position would be $146,600. Applying the discount rate, and a 5 to 25% contingency, gives a range of $1,981,500 to $2,509,900.

[218] The plaintiff submits that there is no real and substantial possibility that the plaintiff will return to work, and therefore no allowance should be made in relation to her residual work capacity. Alternatively, the plaintiff submits that the chances that plaintiff will return to work in any capacity are no higher than 10%. A deduction in the range of $23,000 to $117,500 could be considered, with the range depending on the nature of the work, amount of work hours, and the timing of the work. The plaintiff suggests that if she works part time (50%, or 20 hours per week) at minimum wage commencing within the next five years, the deduction would be in the range of

$23,000 to $31,500. If she works as a nurse at 50% of full time, within the next five years, the deduction would be in the range of $86,100 to $117,500.

[219] In summary, the plaintiff submits that in view of these scenarios, the overall range for her loss of future earning capacity is $1,354,500, ($1,472,000 minus $117,500) on the low end, and at the high end, $2,510,000.

[220] The plaintiff submits that the realistic and likely scenario is that the plaintiff would have worked full-time as a PCC, but for the accidents, to age 65, the conventional date of retirement.

[221] The defence submissions are structured in a similar manner to those of the plaintiff. The defence calculations differ significantly. The defendants submit that the plaintiff's annual earnings as of April 1, 2024, at .7 FTE, and the presently applicable rate of pay, amounts to lifetime earnings (to age 65) of $1,104,119. The defendants suggest that shift premium and overtime pay would add 8% to that total. Alternatively, relying on the plaintiff's submissions, the defendants suggest that 20% could be added for overtime and shift premiums. This would result in lifetime earnings of $1,324,943, using the 17.9 001 CIVJI multiplier at 1.5% discount rate, for 21 years.

[222] Alternatively, the defendants, with a similar analysis, suggest that if the Court accepts the plaintiff would likely work full time (37.5 hours per week) to age 65, then she would turn $104,481 per annum, and with either 8% or 20% added, lifetime earnings would range from $2,019,837 to $2,244,264. However, as noted, the defendants submit that the plaintiff’s loss of future earning capacity claim should be reduced by 40 to 50%, in order to reflect future possible events or circumstances that could have reduced her future earnings.

[223] Neither party has adduced actuarial or economists’ evidence. There is, therefore, no statistical information regarding the usual contingencies such as mortality, or unemployment. There is no statistical evidence before me concerning such things as typical retirement dates for registered nurses. Therefore, I am required to do the best I can, on all the available evidence.

[224] I accept that the plaintiff's three scenarios as suggested are reasonable starting points for the analysis.

[225] The defendant's calculations for the first scenario (continuation of .7 FTE work, lifetime) are too low. As noted, the parties agree that full-time work (37.5 hours per week on average) amounts to 1,950 hours per annum. .7 FTE is 1,365 hours per year, as the plaintiff submits, and in any event better accords with the plaintiff's actual history of work hours.

[226] The evidence at trial is that overtime is very frequently available to registered nurses. The numerous shift premiums can be stacked. That is, in other words, they are cumulative. The effect is to significantly increase the rate of hourly pay.

[227] As a starting point, I assess the annual salary of the plaintiff in the three scenarios posited as follows:

1. Scenario 1 (Continuation of renal nursing position at .7) – $90,000 per annum;

2. Scenario 2 (Full-time renal nursing position) – $130,000 per annum;

3. Scenario 3 (Patient Care Coordinator, or other senior or managerial position in nursing) – $146,600 per annum.

[228] The salary in Scenario 1 is calculated with reference to 1,365 hours per annum at an hourly wage of $55.37. This is slightly above the agreed applicable wage of $53.77 effective April 1, 2024, but recognizes the somewhat higher wage that the plaintiff would earn as a salary increment shortly after the trial, based on the evidence at trial. To this, I add 20% as an allowance for both overtime and shift premiums, in order to derive an estimated salary of approximately $90,000.

[229] The second scenario is based upon 1,950 hours per year, at the same wage rate, and adding a similar factor for overtime and shift premiums, thus deriving an estimated annual salary of approximately $130,000.

[230] The third scenario is based upon the plaintiff becoming a PCC, or working in some other similar senior role. I accept that the plaintiff had the desire and aptitude to move into a PCC role. The evidence of her colleagues and particularly that of Dr. Cooper, and of the plaintiff herself, supports a finding that the plaintiff was clearly capable of a more senior role, and would have thrived in such a role.

[231] The defendants point out that there is no evidence specifically pertaining to the pay of a Patient Care Coordinator. The plaintiff is a Level III registered nurse. There are six levels under the collective agreement. The plaintiff's submissions assume that a Patient Care Coordinator would be paid at the next higher grade, Level IV. The applicable rate of pay is $62.86 per hour, compared with $55.37 for a Level III RN.

[232] Although I have no specific evidence on the point, in my view it is reasonable to infer that a PCC, being a senior position with substantially greater responsibility, would earn a significantly higher income. A differential of about 13% seems reasonable. I therefore accept that as a patient care coordinator, the plaintiff could have earned an income of approximately $146,600, as submitted by the plaintiff.

[233] Applying the CIVJI multiplier of 17.9001, and 21 years, lifetime earnings under these three scenarios can be calculated as follows:

1. Scenario 1 – $1,611,090;

2. Scenario 2 – $2,327,013; and

3. Scenario 3 – $2,624,154.

[234] Most likely, the plaintiff will earn nothing in future. However, there is a real and substantial possibility that the plaintiff could be employed at some point in the future. On the evidence, the probability is quite low. An improvement in her condition would be required. The prognosis is poor. The most likely scenario would be for work in a more limited capacity, probably part-time, using the plaintiff's nursing education and skills, as suggested by Mr. McNeil and Dr. Cheung. I must assess the

value of this outcome. As noted, without the benefit of economists' evidence, I must do the best I can in order to assess the value of this possibility.

[235] If the plaintiff works part time, such as 50% of full-time, then it seems she could earn as much as $65,000 per annum (50% of her salary of $130,000 as a full-time RN). Her pay could be less than this, if her hourly earnings are less, due to working in a lesser position of some sort.

[236] I place little weight on the prospect of the plaintiff working more than 50% of full-time in the future, as a nurse or in a related field. At best, the plaintiff will recover to the point that she can do some remunerative work, some years in the future.

[237] If the plaintiff would become re-employed in five years, then she would work for 15 years, to her retirement at age 65. The multiplier for 15 years from the present is 13.3432. This results in potential lifetime earnings of $867,308. Reducing that by 10% as a present value factor to account for the five year delay results in the sum of $780,578.

[238] I assess the chance of the plaintiff earning this money at one-third, which gives an estimate of the value of the plaintiff's residual earning capacity at approximately $260,000. This, then, is one estimate of the value of the plaintiff's residual earning capacity. Other assumptions would result in a higher or lower estimate, but in my view this amount is a fair and reasonable middle ground estimate of the value of the plaintiff's residual working capacity.

[239] Reducing the amounts set out above for the three scenarios by $260,000 in each scenario results in the following lifetime earning estimates:

1. Scenario 1 – $1,351,090

2. Scenario 2 – $2,067,013

3. Scenario 3 – $2,364,154.

[240] Against these figures, general contingencies must also be considered.

[241] In relation to the first scenario, I apply a 5% general negative contingency for factors such as mortality, or illness or disability unconnected to the accidents, or early retirement, or a further reduction in work hours. In this scenario she is already working part-time, so the chances of some these factors coming into play is probably reduced as compared to full time work.

[242] A higher general contingency factor is warranted with respect to the other scenarios. For example, the chances that the plaintiff would reduce her work to less than full-time are higher in these positions, as is the possibility of early retirement, or work injury. According to Mr. McNeil, work injury is a serious risk factor for nurses. He testified that the rate of work injuries for nurses is as high as that of construction workers. No statistics are available. I therefore apply a 10% general contingency allowance in relation to scenarios two and three.

[243] The result of all this is lifetime lost earning estimates as follows:

1. Scenario 1 – $1,283,536

2. Scenario 2 – $1,860,312

3. Scenario 3 – $2,127,739.

[244] I apply a one-third likelihood factor to each of the three scenarios. I accept the plaintiff's evidence that it was likely she would move to a full-time position, and also, that there was a good likelihood that she would advance to a PCC or other senior position. Therefore, cumulatively, these two scenarios are weighted at two-thirds.

[245] Weighing each scenario equally results in an estimated lifetime earnings loss due to the plaintiff's accident injuries of approximately $1,757,196. I round this up to the sum of $1,760,000. This is my assessment of the plaintiff’s damages for loss of future earning capacity.

B. Non-Pecuniary Loss

1. Legal Principles

[246] I adopt the summary of the applicable legal principles I set out in *Gillam v. Wiebe*, 2013 BCSC 565 at paras. 68–71.

[247] The plaintiff submits that a reasonable award for non-pecuniary damages would be an amount in the range of $190,000–$210,000.

[248] The plaintiff also claims for a pecuniary award of $25,000 for loss of housekeeping capacity, in addition to her pecuniary claims for the cost of housekeeping services, and her non-pecuniary claim for general damages.

[249] As guidance, the plaintiff relies on the following authorities:

	Case Name	Non-pecuniary Damage Award	2024 Dollars
1.	*Vo v. Navarro*, 2021 BCSC 1534	$160,000	$183,270
2.	*Colgrove v. Sandberg*, 2022 BCSC 671	$180,000	$196,100
3.	*Meckic v. Chan*, 2022 BCSC 182	$190,000	$207,000
4.	*Jantzi v. Moore*, 2020 BCSC 1489	$185,000	$214,000
5.	*Tompkins v. Meisters*, 2021 BCSC 2080	$190,000	$217,600
6.	*Antignani v. Heaney*, 2022 BCSC 228	$200,000	$217,900
7.	*Choi v. Ottahal*, 2022 BCSC 237	$210,000	$228,800
8.	*Cheng v. Mangal*, 2021 BCSC 954	$225,000	$257,700

[250] The defendants submit that the plaintiff is entitled to an award of non-pecuniary damages in the range of $150,000, inclusive of loss of housekeeping capacity. As guidance, the defendants refer to the following authorities:

Case Name	Non-Pecuniary Damage Award	2024 Dollars
1. *Palani v. Lin,* 2021 BCSC 59	$150,000	$171,500
2. *Porter v. Feizi,* 2023 BCSC 491	$150,000	$154,175

2. Assessment – Non-Pecuniary Loss

[251] As noted, the plaintiff's injuries from MVA #1 largely resolved within a few months. Those injuries remain a factor in the assessment of the plaintiff's non-pecuniary loss, which I will assess on a combined basis, consistent with the positions of the parties.

[252] I summarized the plaintiff's persisting injuries and some of their consequences previously, under the headings "Introduction" and "The Plaintiff's Injuries and Their Consequences". I will refer to the effects of the plaintiff's injuries on her housekeeping capacity below.

[253] As I have previously noted, the consequences to the plaintiff of her injuries have been devastating, in terms of the loss of her previous independent, happy, successful, and fulfilling life and lifestyle. In all likelihood, she has lost the satisfaction of the meaningful and productive nursing career that she worked hard to achieve, that she was good at, loved, and that would likely have brought her much happiness in the future. Her life has been very negatively transformed in all facets: work and career, domestic or household abilities and activities, recreational activities including travel, family and social relations, independence, and relations with her community including her religious community. Previously she was a high-achieving, high functioning, and happy person. Her life is now characterized by pain and limitations. Ms. Riarh testified that she is a "completely different person", and this was the general tenor of all the collateral witnesses.

[254] However, the plaintiff's injuries are not of the sort that is often characterized as "catastrophic". She is able to do most things, with limitations. Also, while the

prognosis for substantial recovery is poor, over time her condition has improved somewhat, and she continues to undergo treatment. There is some reasonable prospect of improvement in her condition. The improvement could possibly be significant.

[255] A detailed review of the authorities cited by the parties is unnecessary. Every case is different, of course. However, the cases cited by the plaintiff are more reflective of the plaintiff's non-pecuniary loss than those cited by the defence. I will refer to a few of the authorities cited.

[256] The plaintiff in *Vo* was 47 years of age at the time of the MVA, as compared with 37 and 38 in the case of Ms. Valcourt. Her injuries are broadly similar to those of the plaintiff. Justice Brundrett noted that the plaintiff is a different person than before the accident, but her injuries were not debilitating, and she remained able to work as a tailor and do some household chores. The inflation-adjusted non-pecuniary award was $183,270. The consequence of the injuries to Ms. Valcourt are significantly worse than in *Vo*.

[257] *Colgrove* is a broadly similar case. The plaintiff was 46 years of age at the time of the MVA, and worked as an executive assistant to the managing partner of a medium-sized firm of professional accountants. She had a pre-existing history of migraine headaches and other conditions, as well as subsequent non-MVA injuries which were relevant to the assessment of her non-pecuniary loss. Justice Gomery found that the plaintiff's injuries had effectively disabled her from paid employment and had profoundly affected her life for the worse. The plaintiff's physical injuries would likely continue indefinitely, but there was some possibility of relief with respect to her headaches, and a substantial potential for improvement with respect to her mood disorders, with intensive treatment over the course of years. Justice Gomery would have awarded $200,000, but after taking into account the prior conditions and subsequent injuries, awarded $180,000, or $196,100 in 2024 dollars.

[258] *Jantzi* is also broadly similar, except that the plaintiff was a homemaker when the accident occurred. However, she planned to return to the workforce after the eldest of her three children graduated from high school, upon obtaining education

and training to become an early childhood educator or teaching assistant. Justice Wilkinson concluded that this path had been rendered unlikely, although she could perhaps work in an entry level position, possibly part-time. The non-pecuniary award was $185,000, or $214,000 in current dollars.

[259] In *Palani*, relied upon by the defendants, Justice Brundrett awarded $150,000 for non-pecuniary damages, or $171,500 in present dollars. The plaintiff suffered from somatic symptom disorder, mood disorder, and depression as a result of the accident. She also suffered soft-tissue injuries to her neck, shoulder and back. She experienced headaches and sleep disturbance. The prognosis was guarded. In my view the award in this case and the award of $150,000 ($154,175 in 2024) in *Porter* reflect less serious consequences than those of Ms. Valcourt.

[260] Having regard to the authorities, and the evidence in this case, I accept the plaintiff's submission that a range of $190,000 to $210,000 for non-pecuniary loss is appropriate. I assess the plaintiff's non-pecuniary damages at $200,000.

C. Loss of Housekeeping Capacity

1. Legal Principles

[261] The test for a pecuniary award for future loss of housekeeping capacity is set out in *Kim v. Lin,* 2018 BCCA 77:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
>
> [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any

> deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[262] *Kim* was recently endorsed by the Court of Appeal in *McKee v. Hicks,* 2023 BCCA 109. In *McKee*, the Court stated:

> [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.

2. Assessment – Loss of Housekeeping Capacity

[263] A separate, pecuniary award for loss of housekeeping capacity is warranted in this case. As previously noted, prior to the accidents, the plaintiff was primarily responsible for most indoor domestic activities such as cleaning and laundry. She enjoyed gardening. She did the bulk of the family grocery shopping. She was a proud cook, and enjoyed cooking for the family, and for the many social gatherings she and her husband hosted at their home. She and her husband had never paid for outside housekeeping services in the past.

[264] The plaintiff is now able to do very little of this. Her sister Karen Lindahl does most of the grocery shopping. The plaintiff finds it difficult even to attend a grocery store, due to the noise, lights, and general busy surroundings. She has resumed cooking only on a very limited basis, relatively recently. As of late 2022 and early 2023, she became capable of preparing simple meals such as heating frozen vegetables, or boiling noodles. She cannot follow a complex recipe. Her energy is very limited. If she has prepared dinner, she goes to bed soon after dinner. She can do light housekeeping tasks only, such as wiping a counter, or sweeping the floor. Her light housekeeping is limited to about 20 minutes, then she must rest. She is required to pace herself and prioritize her tasks. She cannot clean floors or bathtubs. Changing bed linens is usually too much for her to do.

[265] She drives her children to school, which is 18 minutes away, but often relies on her husband, her mother and her sister to take the children to activities.

[266] In relation to hosting family and social events at her home, she does very little, now. She relies on her sister and her mother to prepare food, host the event, and cleanup. She can no longer cook for big groups. Her participation is limited. She often has to excuse herself to go and rest. She attempted to put in a garden in 2020. Her husband and family helped her get it started. She was unable to take care of it due to headache and pain, and being outside in the heat. She has abandoned gardening. She does no yardwork.

[267] Her evidence in this respect is corroborated by the evidence of her sister Karen Lindahl and her husband. Her husband testified that she cooks simple meals, occasionally, only. She struggles with recipes. She can take something out of the freezer and heat it. She can prepare spaghetti. As a result, he fills in with domestic duties that he did not formerly do. He estimated that he prepares many meals, does some laundry, and probably spends two to three hours per day in housekeeping work. He also helps hosting family and social events.

[268] The award must recognize that some allowance has been made for the cost of cleaning services. However, the award in that respect is modest, representing only two hours of homemaking assistance weekly, and seasonal cleaning of 16 hours annually.

[269] In summary, this is not a case where the plaintiff's housekeeping ability is diminished, such that she could still generally perform such activities, but with discomfort, or modest limitations. She is largely unable to perform housekeeping activities in anything approaching her previous level. In the main, housekeeping is now done by her husband and other family members, or is left undone.

[270] Her husband noted that her ability to do housekeeping tasks is very slowly improving. She is able to do a little more, depending on the day, for such tasks as cleaning and laundry.

[271] The plaintiff claims $25,000 for loss of housekeeping capacity. I accept that this modest sum should be awarded. I note that according to Mr. McNeil housekeeping services typically cost $35 per hour. Therefore, one hour per day would cost $12,275 per year.

D. In-Trust Claim

[272] The plaintiff makes a modest claim of $5,000 for the benefit of her husband, sister (Karen Lindahl) and mother.

[273] The position of the defendants is that, on the evidence, Mr. Valcourt did no more than would be reasonably expected of a husband and father and the circumstances, and there is no basis for an in-trust award to the plaintiff on his behalf.

[274] The defence suggests that if the Court is satisfied that Ms. Lindahl's assistance post MVA #2 is above and beyond that expected of a family member, then the plaintiff's claim in her favour of $5,000 could be accepted.

[275] In *Dykeman v. Porohowski,* 2010 BCCA 36, Justice Newbury, for the Court, stated:

> [29] …Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services – were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? – and with respect to causation – were the services necessitated by the plaintiff's injuries or would they have been provided in any event?
>
> [Emphasis in original.]

[276] Relevant factors are set out in the decision of Justice Savage (as he then was) in *Frankson v. Myre*, 2008 BCSC 795 at paras. 50 and 51:

> [50] The law of "in trust" claims is governed by the principles set out by the British Columbia Supreme Court in *Bystedt (Guardian ad litem of) v. Bagdan* 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124.
>
> [51] The six relevant factors are:
>
> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;

> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[277] After MVA #2, the plaintiff was essentially bedridden for a month or more. I accept the plaintiff's husband's evidence that her incapacity was worst for the first three months, and that for about eight months, she needed a great deal of help from him, and other family members, including her sister and mother. He testified that during that stretch of time (the eight months) she was “not functional" in relation to household activities. There has been gradual, noticeable improvement over time, but she remains “nothing like she was”. He worked nights and weekends in order to make up for the time that he spent assisting her.

[278] Karen Lindahl testified that the plaintiff was non-functional for the first month or so. Ms. Lindahl moved into the home in order to help. The plaintiff did not leave the bedroom. Ms. Lindahl made the meals, looked after the children, and generally, kept the household operating.

[279] The plaintiff testified that her children stayed with her mother and sister (Karen Lindahl) several times during the initial period after MVA #2, and that they helped with cooking and cleaning. The defence notes that Ms. Lindahl moved into the plaintiff's house for the first month or so after MVA #2, because the plaintiff could not function, and during that time, she took care of the children, prepared meals, and cleaned the home. She continues to do the family's grocery shopping.

[280] In summary, the evidence satisfies me that a modest in-trust award for Ms. Lindahl in the amount of $5,000 is appropriate.

[281] I am not satisfied that a claim is made out on behalf of the plaintiff's husband, or mother. The evidence regarding their assistance was vague, and I find it difficult to assess their contributions as compared with what one might reasonably expect for a loving, caring husband or parent.

E. Loss of Pension Benefits

[282] The plaintiff claims that her pension benefits over her lifetime had been reduced by something in the order of $250,000–$307,000. On this basis, applying a 5 to 25% contingency reduction, the plaintiff claims a loss of $187,500–$291,650.

[283] The plaintiff argues that her pension is calculated based on a formula that multiplies the five highest years of pensionable salary, and her years of pensionable service at retirement. She contends that, due to the accident injuries, she lost the opportunity to earn higher income, and accrue additional pensionable service at a higher rate, and that both losses reduce the pension that she would otherwise be entitled to. The plaintiff argues that she continues to earn pensionable service while on long-term disability, at a rate of 7.08 months per year, thus she will accrue an additional 12.4 years in pensionable service. However, if she were working full time, she would accrue an extra 8.6 years of pensionable service, for a total of 19.5 years of pensionable service at age 65.

[284] The pension statement in evidence indicates that the plaintiff is currently eligible to receive a pension at age 65 of $2,478 per month. She argues that but for the accident injuries her pension benefit would be $5,083 per month. On this basis, she claims that the annual difference in pension is $31,260. Assuming the pension is received to age 80, she calculates the loss at $307,206.

[285] The defendants argue that without expert evidence, the Court is in no position to assess this loss. The defendants point out that the plaintiff's calculations ignore the effect of the pension contributions that the plaintiff would otherwise have made. They note that in *Porter*, the Court (at para. 66) refused a claim for lost pension benefits, based upon expert opinion evidence from an economist, Sergiy Pivnenko, that there was little or no loss of pension benefits because the plaintiff saved the

contributions she would otherwise have made. The defendants note that the plaintiff's income tax returns in evidence for the years 2015 through 2018 show that she made substantial pension contributions (2015 – $4189; 2016 – $4547; 2017 $3875; 2018 – $2936).

[286] The defendants also note that the plaintiff is no longer paying union dues.

[287] The defendants also note that the evidence at trial relating to pensions was limited. I have only the evidence of the payroll manager, Ms. Dhillon, who acknowledged she had limited knowledge of the pension program. She is not an expert in pensions. She is not employed by the municipal pension plan, which manages the plaintiff's pension. So for example she was unable to explain the difference between “pensionable service" and "contributory service” as referenced in the plaintiff's annual members benefit statement for 2022, upon which the plaintiff relies.

[288] I agree with the defendants that this claim requires expert evidence. However, the defendants do not say that they were taken by surprise by the claim. There is no doubt that such a claim could be made, as a matter of legal principle. It would be unfair to dismiss the claim.

[289] Accordingly, I direct a reference to an associate judge or registrar to assess the amount of the plaintiff's damages, if any, relating to loss of future pension benefits, under R. 18-1 of the *Supreme Court Civil Rules*. I direct that the results of the assessment be certified by the registrar (or associate judge) pursuant to R. 18-2.

[290] Upon the assessment, the Court may consider the evidence at trial (I note that transcripts have already been prepared) and any additional evidence the parties may wish to provide. Specifically, however, the plaintiff is required to provide appropriate expert evidence in relation to this claim. The defendants have the option of adducing responsive expert evidence.

[291] The parties also differ on the applicable discount rate. The plaintiff contends that the discount rate is 1.5%. The defendants contend that the discount rate is 2%. The associate judge or registrar may need to decide this question.

F. Loss of Bankable Sick Time

[292] The plaintiff claims that but for the accidents, she could have accrued sick bank pay up to a maximum of 1170 hours to the date of her retirement, at which point unused sick bank pay would be paid out at a value of 40% of the banked hours. The plaintiff submits that the full amount, at $55.37 per hour, would be $25,913.16. The plaintiff suggests that an award in the range of 75 to 100% of this amount is reasonable, allowing for some portion of the sick bank hours to be used for sick pay. The plaintiff calculates the present value of this claim at $13,000–$18,866.

[293] However, the plaintiff's sick bank was almost completely depleted at the time she stopped work just prior to her ankle surgery, in June, 2018. She had 7.5 hours in her sick bank. There is no specific evidence as to why the sick bank was depleted. I infer, however, that historically the plaintiff had used up her sick hours, rather than banking them. As noted, Mr. McNeil testified that nurses have a high rate of work injury. The plaintiff had injured her shoulder at work in the past. Thus, the sick bank might have been used in future in relation to her existing shoulder injury, or some other future injury, whether work-related or otherwise. Finally, as the defendants submit, the likelihood that the plaintiff's need for sick hours in relation to sickness or injury would increase as she ages.

[294] The employment records indicate that the plaintiff had used 386.421 sick hours from November 28, 2014 until she stopped work in 2018, a period of about three-and-a-half years.

[295] In summary, I am not persuaded that the plaintiff would have accumulated a sick bank that would have paid money to her upon her retirement. This claim is denied.

G. Expenses Incurred to Replace Extended Health Benefits

[296] The plaintiff is required to pay extended health care insurance premiums to maintain her family's extended health benefits. When she was working with Fraser Health, her employer paid these premiums. The plaintiff has been paying $258.88 a month to maintain these benefits. The defendants have agreed to pay $15,000 for this expense as part of the plaintiff's claim for special damages, in respect of premiums paid prior to trial.

[297] The plaintiff calculates this claim at $258.88 per month ($3106.56 per year), over 21 years. The claim is $55,989. The defendants say that the discount rate ought to be 2%, not 1.5% as the plaintiff submits. On this basis, the defendants say that the present value of the claim should be $52,846.31.

[298] I agree with the defendants that the appropriate discount rate is 2%, pursuant to the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56(4). The award is for compensation in relation to future expenses to be incurred by the plaintiff, and therefore does not fall within s. 56(3), which refers to loss of future earnings, or loss of dependency under the *Family Compensation Act*, R.S.B.C. 1996, c. 126. Accordingly, s. 56(4) applies, and the applicable discount rate is 2%.

[299] Therefore the award in this respect is $52,846.31.

H. Costs of Future Care

1. Legal Principles

[300] The applicable legal principles were summarized in *Paur v. Providence Health Care*, 2017 BCCA 161:

> [109] The law is clear that in order to be included in an award of damages, an item of future care must be medically necessary. In *Tsalamandris v. McLeod* 2012 BCCA 239, this court reviewed the applicable principles:
>
> > The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

> > 3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.
>
> McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:
>
> > The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
> >
> > These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. [At paras. 62–3.]
>
> While there must be some evidentiary link between a medical expert's assessment of disability and the care recommended, it is not necessary that a medical expert 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; *Aberdeen v. Zanatta* 2008 BCCA 420 at paras. 43, 63.

[301] This passage from *Paur* was recently applied by the Court of Appeal in *McGuigan Estate v. Pevach*, 2024 BCCA 161. See, also, *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70, and *Pang v. Nowakowski*, 2021 BCCA 478 at paras. 56–58.

2. Assessment – Costs of Future Care

[302] The plaintiff claims for cost of future care in an amount ranging from $259,953 to $308,927, before reduction for contingencies.

[303] The plaintiff submits that an overall reduction ranging from 10 to 30% with respect to these claims is appropriate to account for various contingencies, including the possibility that the plaintiff may not use all of the recommended items or services, or that she might have required them in any event as she aged. The plaintiff's net claims are approximately $182,000–$278,000. The variance largely relates to the range in the expense for Botox injection treatment.

[304] The defendant submits that an award of $47,087.43 is appropriate.

[305] I will assess each of the claims in turn.

a) Body pillow, TENS device

[306] Mr. McNeil recommends the plaintiff purchase a body pillow, the cost of which is $49.99, plus taxes, and should be replaced every two years. The claim is for $480, based upon the replacement cost of the body pillow every two years to age 65.

[307] Mr. McNeil reports that the plaintiff reported to him that she continues to have difficulty sleeping through the night. He states that restorative sleep is an important part of her pain management strategies.

[308] At trial, the plaintiff testified that she continues to have difficulty with sleeping. She often has trouble falling asleep. She wakes up in the night due to pain, such as headache or neck and back pain. She often naps during the day in order to make up for her poor sleep at night, for two to three hours. The defence points out that, according to Dr. Adrian's report, the plaintiff reported to him on August 23, 2023 that her right shoulder and back pain do not affect her sleep.

[309] I accept the plaintiff's testimony that she continues to suffer from problems with sleep, and the opinion of Mr. McNeil that the body pillow would be beneficial. I accept that the expense is reasonable and justified based upon her injuries.

[310] Mr. McNeil recommended a portable TENS unit, which can be purchased at prices ranging from $45-$90, and should be replaced in five years. The plaintiff's closing submissions make no claim for this item, however.

b) Weekly Homemaking

[311] Mr. McNeil recommends two hours a week in weekly homemaking assistance, which costs on average $35 per hour, for total yearly cost of $3630. The plaintiff claims $94,107 for this item, based upon usage to age 75, and discounted at 2%, as required. The defendants acknowledge that the plaintiff has utilized homemaking assistance since MVA #2 and will require it for some time. However the defence suggests the claim should be discounted substantially, on various grounds.

The defence suggests that five years of housekeeping costs at $3600 per annum, discounted, should lead to an award of $16,968 for this item.

[312] Following MVA #2, the plaintiff hired cleaners to assist with housekeeping. She and her husband had not hired cleaners in the past. The cleaners come every two weeks. She has paid $40 per hour for two persons, for two to three hours. The defence agreed to pay the plaintiff's past housekeeping costs as special damages.

[313] The claim should be discounted substantially. My future loss assessment is predicated on the idea that the plaintiff would likely return to full-time work, with a strong possibility of working full-time at a more senior position. The evidence indicated that the plaintiff's husband works long hours in his position with the family business. In a growing family with two busy high income earners, I would expect that the plaintiff and her husband would have hired homemaking assistance in any event, particularly as they age. I have already made a modest pecuniary award for loss of housekeeping capacity. I allow the claim at 50% of the amount claimed, or in other words, $47,000.

c) Seasonal Cleaning

[314] Mr. McNeil recommends seasonal cleaning assistance, at a cost of $552 yearly. On this basis, the plaintiff claims $14,517. For the same reasons indicated previously with respect to weekly homemaking, the claim should be discounted substantially to account for the factors I identified. The claim is also allowed at 50%, or in other words, $7250.

d) Fitness Equipment

[315] The plaintiff claims $1020 for certain equipment items, as recommended by Mr. McNeil: stability ball, yoga mat, resistance bands.

[316] The plaintiff testified that she has home fitness equipment, including an elliptical machine, treadmill, and a Bosu ball, and resistance bands. I note that she does not claim for maintenance or replacement costs for her home gym equipment, generally, perhaps in recognition of the fact that the household would have had such

items anyway. I accept the defendant's submission that $500 would be reasonable for the incremental cost of these minor fitness equipment items.

e) Kinesiology

[317] Mr. McNeil recommends that she see a kinesiologist for 12 sessions, at a cost of $89 per session, for a cost of $1068. At trial he testified that she could continue with exercise independently after that.

[318] The plaintiff has already engaged in regular sessions with a kinesiologist for two years. A kinesiologist attends her home twice a week, for 45 minutes on each occasion. In my view the plaintiff has had more than ample professional kinesiology guidance already, and no further award is justified.

f) Massage therapy, Physiotherapy, Chiropractic treatment

[319] Mr. McNeil recommends 12 sessions per year for each of these therapies. The plaintiff claims for the cost of these treatments to age 75. The annual cost is $3600. With tax, and discounted, the total claim is $93,329. Mr. McNeil's recommendation is based upon medical advice for continuation of passive treatments of this nature. This is apparently based upon the opinion of Dr. Adrian. As previously noted, however, Dr. Berger was of the view that continuation of these passive treatments was not warranted, and that she had already undergone a very high number of treatment sessions. The defendants submit that these forms of passive therapies should cease, in favour of a more active exercise program, in line with the opinion of Dr. Berger. The defence suggests that immediate cessation of such treatments could be difficult for the plaintiff, and therefore suggests an award of $12,600, for two years of monthly treatments.

[320] Dr. Adrian recognizes that these therapies provide short-term benefit, only. He contends that they help her with pain management, and allow her to minimize her medications. However, in this regard, I place more weight on the opinion of Dr. Berger, that these treatments have had minimal benefits and may even be counterproductive. I note that Dr. Robinson, a headache specialist, comments that

the plaintiff has had “considerable treatment" and continues to have regular appointments for massage, physiotherapy and chiropractic manipulation. However, he does not make a recommendation for continuation of such treatment. He emphasizes the importance of maintaining an active lifestyle, and engaging in regular exercise directed to improving general fitness.

[321] On the evidence as a whole, I am not persuaded that very long-term continuation of the plaintiff's passive therapies is justified. I accept the defence's submission that an allowance of $12,600 for a further two years is reasonable.

g) Psychological Counselling

[322] Mr. McNeil suggests 12 sessions of ongoing counselling to explore “cognitive/behavioural pain management and issues related to her mood”.

[323] In cross-examination at trial, Dr. Mok noted that, based upon the clinical records, the plaintiff's existing counsellor, Ms. Davis, seems to be doing mostly supportive type therapy, rather than CBT. Dr. Latimer was of the view that her current program of counselling was unlikely to be of assistance to her. On the other hand, Dr. Berger, whose opinion is relied upon by the defence, suggests that the plaintiff needs more active treatment, coupled with counselling and psycho-education, and possibly participation in a multidisciplinary chronic pain program.

[324] Taking all of the evidence into account, I allow the plaintiff’s claim in the amount claimed of $3,024. The claim is justified for CBT or similar pain management education.

h) Occupational Therapy

[325] Mr. McNeil suggests six sessions with an occupational therapist. The treatment would include: “biomechanical management and daily activity” and “cognitive and behavioural pain management strategies”. The plaintiff claims $1693 for this item. The defence position is that the plaintiff has been seeing an occupational therapist on a regular basis since July 2019, and contends that there is

no basis to conclude that ongoing OT involvement would accomplish anything further.

[326] The defendants have agreed to pay for numerous OT services as part of the plaintiff's special damages claim. I am not persuaded that further occupational therapy treatment is reasonable in the circumstances.

i) Vocational counselling

[327] The plaintiff claims for $1613 for this item. At trial, the plaintiff testified that she was not interested in seeing a vocational counsellor. She wants to return to work as a renal nurse, only, and would not choose to pay for vocational consulting.

[328] In view of the limited prospect of the plaintiff returning to work, together with her lack of interest in vocational consulting, the claim is not justified.

j) Botox injections

[329] The plaintiff claims for the cost of Botox injections, based upon the costing in Mr. McNeil's report. He relies on Dr. Robinson's suggestion that these injections cost between $425 and $850 per treatment, and should be repeated every three months. The annual cost is therefore $1,700–$3,400. The plaintiff's claim is based upon these expenses continuing to the plaintiff's age 80. I note that Dr. Cheung has given a much higher cost for Botox injections. She says Botox typically costs $1,000 for the 200 units used in the migraine injection protocol, and that physicians will charge at least $150 for the injection fee.

[330] Although there are strong recommendations in the medical evidence for a trial of Botox treatment, that decision remains to be made by the plaintiff in consultation with Dr. Butterfield. Thus, Botox may not be attempted at all, or could be attempted, and found to be ineffective in fairly short order. It is also possible that Botox injections could prove beneficial, and could be sustained over the long term. There is really no way to assess the probabilities involved. It seems very unlikely that Botox treatment would be continued until the plaintiff reaches age 80, however, and no medical opinion evidence so indicates. In my view, an award of $35,000 is

reasonable, and quite likely generous. This amount represents approximately one-third of the upper end of the plaintiff's claim.

[331] In summary, the plaintiff's cost of future care claims are allowed as follows:

a) Body Pillow: $480;

b) Weekly Homemaking: $47,000;

c) Seasonal cleaning: $7,250;

d) Fitness Equipment: $500;

e) Massage therapy, Physiotherapy, Chiropractic treatment: $12,600;

f) Psychological Counselling: $3,024;

g) Botox Injections: $35,000.

TOTAL: $105,854

I. Special Damages

[332] The parties have agreed to special damages in the amount of $79,217.24, as a consequence of both of the accidents. The agreed schedule of special damages relates to such expenses as medication, physiotherapy, massage therapy, chiropractic therapy, occupational therapy, mileage (including mileage for 826 attendances for treatment), housekeeping services, and $15,000 for extended health premiums the plaintiff has paid in lieu of payment that otherwise would have been paid by her employer, Fraser Health.

V. CONCLUSION AND SUMMARY

[333] The plaintiff's claims are allowed in the following categories and amounts:

Head of Damage	**Award**
a. Past Loss of Earning Capacity	$325,000
b. Loss of Future Earning Capacity	$1,760,000
c. Non-Pecuniary Damages	$200,000
d. Loss of Housekeeping capacity	$25,000
e. In-trust Award	$5,000
f. Loss of Pension	(Reference)
g. Loss of Bankable Sick Time	$0
h. Loss of Extended Health Benefits	$52,846.31
i. Costs of Future Care	$105,854
i. Special Damages	$79,217.24
TOTAL	**$2,552,917.55**

[334] Subject to any applicable prior costs orders, or issues about offers to settle and the application of R. 9-1(15) of the *Supreme Court Civil Rules*, the plaintiff is entitled to costs.

[335] As noted, the parties have liberty to apply with respect to any deductions required by law.

"Verhoeven J."