COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McGuigan Estate v. Pevach,*
2024 BCCA 106

Date: 20240320
Docket: CA47721

Between:

John David Wright, Executor of the Estate of Hugh McGuigan

Appellant/
Respondent on Cross Appeal
(Defendant)

And

**Vicki Pevach, a mentally incompetent person,
by her Litigation Guardian, The Public Guardian and Trustee**

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated August 3, 2021 (*Pevach v. McGuigan Estate*, 2021 BCSC 1505, Vancouver Docket M170178).

Counsel for the Appellant/Respondent on Cross Appeal:	C.C. Godwin
Counsel for the Respondent/Appellant on Cross Appeal:	K. Gourlay D. Robertson
Place and Date of Hearing:	Vancouver, British Columbia February 2, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 20, 2024

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Horsman

Summary:

This appeal arises from a personal injury action in which the respondent pedestrian was struck by a motor vehicle. The driver was found to be solely liable. The appellant, the executor of the driver's estate, appeals the finding on liability, arguing the trial judge failed to account for the driver's exculpatory discovery evidence and consider the issue of contributory negligence. Additionally, the appellant submits that the cost of future care award was unreasonably high and medically unjustified, and the judge failed to consider negative contingencies and adjust the award accordingly. Held: Appeal allowed in part. The judge did not err in determining liability or make a cost of future care award that was unreasonably high or medically unjustified. However, the judge failed to consider the real and substantial possibility that the respondent would have required significant future care as a result of her pre-existing conditions regardless of the accident and to adjust the cost of future care award accordingly.

Table of Contents

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This appeal concerns liability and damages findings made in a personal injury action. Following a 15-day trial, the trial judge found Hugh McGuigan solely responsible for a motor vehicle accident in which he struck and severely injured a pedestrian, Vicki Pevach. The trial was unusual in that neither party testified; Mr. McGuigan died prior to trial, and Ms. Pevach was mentally incompetent. Nor were there any third-party witnesses to the accident. As a result, in determining liability the judge had to rely on other forms of evidence, including Mr. McGuigan's discovery evidence. After finding Mr. McGuigan solely at fault for the accident, he awarded Ms. Pevach substantial damages, including $388,177 for non-pecuniary loss and $1,261,500 for the cost of future care.

[2] The executor of Mr. McGuigan's estate, John Wright, appeals the trial judgment. In his submission, the judge erred in not dismissing Ms. Pevach's claim based on Mr. McGuigan's discovery evidence, and by failing to consider and determine the issue of contributory negligence. In addition, he submits, the judge erred by awarding unreasonably high and medically unjustified future care costs for community support and taxi services, and by failing to consider negative contingencies and give effect to them by adjusting the award for the cost of future care accordingly. In consequence, he says, we should allow the appeal and dismiss the claim, or, alternatively, reduce the impugned award.

[3] In my view, the judge did not err in determining liability or awarding future care costs. However, he erred in failing to consider negative contingencies and give them effect by adjusting the cost of future care award. For that reason and those that follow, I would allow the appeal to the extent of applying a 15 percent contingency deduction to the extended residential care component of the cost of future care award, and a 20 percent contingency deduction to the community support and taxi services components of the award.

Background

[4] The accident happened on December 12, 2015 at approximately 5:25 p.m. at the intersection of 30th Avenue and 39A Street in Vernon. It was dark and raining intermittently, and traffic was light. Mr. McGuigan was driving his car in the eastbound lane on 30th Avenue.

[5] 39A Street intersects with 30th Avenue from the north in a T-like manner. A stop sign located at 39A Street controlled traffic entering 30th Avenue from 39A Street, but no traffic control devices governed traffic on 30th Avenue. The crosswalk is unmarked. Approaching the intersection from the west, there is a bike lane on the north side, an adjacent westbound lane, and then a left turn eastbound area, the eastbound lane, and an eastbound bike lane. The area is flat and there was no hedge, barrier or anything else that would block the view of a driver travelling eastbound on 30th Avenue.

[6] Mr. McGuigan was driving at or below the 50 kph speed limit when the accident happened. His headlights were illuminated. He was familiar with the area, and knew that pedestrians were “out and about on the sidewalks”.

[7] Ms. Pevach was one such pedestrian. Wearing dark clothing and intoxicated, she was crossing 30th Avenue from north to south when she was struck in the eastbound lane at or near the unmarked crosswalk. Ms. Pevach’s head hit the lower half of the left side of the windshield of Mr. McGuigan’s car when it struck her, leaving a spider web of cracks in the windshield.

[8] Ms. Pevach was 52 years old at the time of the accident. She suffered many serious injuries, including broken bones and a severe traumatic brain injury. As a result of her brain injury, she was rendered mentally incompetent.

[9] Mr. McGuigan provided an audio-recorded statement to police shortly after the accident. In his response to civil claim, he admitted that Ms. Pevach was “at or near an unmarked crosswalk at 30th Avenue and 39A Street” when the accident

occurred. In February 2018, he was examined for discovery by counsel for Ms. Pevach. In February 2019, he died of causes unrelated to the accident.

[10] Before the accident, Ms. Pevach lived alone in a one-bedroom apartment in Vernon. She had moved to Vernon in early 2015 from Kelowna, where her life was marked by many challenges and difficulties, including repeated physical and emotional trauma, mental health problems, and social isolation. She had a long history of regular alcohol use and medically-controlled Hepatitis C, as well as severe anxiety and depression, agoraphobia, and post traumatic stress disorder ("PTSD"). However, after she moved to Vernon, while still challenging, Ms. Pevach's life had improved.

[11] Ms. Pevach's accident-related injuries were devastating. She lost much of her mental capacity and personality, and was no longer the same person she was before. The sequelae of her severe traumatic brain injury include angry outbursts, irritability, paranoia, and seizures. Her memory and insight are poor, she cannot care for herself, and she is vulnerable to exploitation by others. In 2020, following her release from hospital and a few unsuitable housing arrangements, she was admitted to Spring Valley Care Centre, an extended care residential facility where most other residents are seniors who suffer from dementia.

Liability

At Trial

[12] As noted, there were no third-party witnesses to the accident. However, Mr. McGuigan's statement to police was admitted at trial, and counsel for Ms. Pevach read in extracts from the transcript of his discovery evidence, some of which the judge reproduced in his reasons.

[13] Specifically, the judge reproduced an extract from Mr. McGuigan's police statement in which Mr. McGuigan told the officer that he was driving on 30th Avenue when "all of a sudden, like out of nowhere, she came. I seen her and I braked, but it was just too late". The officer asked when he first saw Ms. Pevach, and Mr. McGuigan replied that "[i]t was not even two seconds". As to how Ms. Pevach

crossed the street, he stated “when I had seen her, she was about centre lane. I don’t know if she was just there and all of the sudden like – she kept coming and I nailed the brakes, and she just kept coming on right in front of the car”.

[14] The judge also reproduced this extract from Mr. McGuigan’s discovery evidence, which was read in by counsel for Ms. Pevach:

> Q: Do you recall telling an insurance adjuster that you didn’t see Ms. Pevach crossing the road because she came from your blind spot?
>
> A: Yes.
>
> Q: What – what do you mean by “blind spot”?
>
> A: Well, it’s -- it’s dark outside the road. And when she come out of there, she was all in black. Like, if she had have maybe any different colour of clothes, I might have ---– [snaps fingers] my peripheries would have picked her up maybe. I don’t know.
>
> Q: Okay. So, what did you “blind spot”?
>
> A: Because I’m focused here and -- and --
>
> Q: Sorry, and “focused”?
>
> A: On the -- on the --
>
> Q: You’re -- you are gesturing straight ahead.
>
> A: -- on the -- on the -- on the road, and all of a sudden she was there. Like, at -- I’m not knowing what’s on the other side of me because that’s irrelevant, you know.
>
> Q: Okay. Okay. So, the -- and I just want to make sure because you’re gesturing. So, we need the reporter to get that.
>
> A: Oh.
>
> Q: So, you’re indicating that the – what’s on your right is irrelevant, correct?
>
> A: No. My left.
>
> Q: Your left?
>
> A: Yes.
>
> Q: Okay. And you’d agree that you weren’t looking out for pedestrians because you were focused on going straight ahead in your own lane?
>
> A: Yes.

[15] After Ms. Pevach’s counsel read in the selected discovery evidence, Mr. Wright’s counsel applied to read in other extracts, contending they were necessary for context. For example, he asked the judge to permit read-ins in which Mr. McGuigan testified that Ms. Pevach was running across the road when he struck

her, and that she hit his front fender, did not touch the front of his car, and was brought up on top of the hood by her momentum. Ms. Pevach's counsel objected on the basis that opposing counsel was seeking to read in discovery evidence that was helpful to the defence, and not to clarify or provide context for the prior read-ins. However, the judge allowed the further read-ins for purposes of context.

[16] In addition to Mr. McGuigan's statement to police and discovery evidence, evidence was presented regarding Ms. Pevach's consumption of alcohol on the day of the accident. In particular, there was expert evidence that her blood alcohol concentration was approximately 211 mg of alcohol in 100 mL of blood at the time of the accident. There was also lay evidence that Ms. Pevach was a regular consumer of alcohol.

[17] Other evidence regarding Ms. Pevach's habits and characteristics before the accident was also presented. For example, family members described Ms. Pevach as a "really cautious" person who was never in a hurry, a slow walker, and "not much of a runner".

[18] Counsel for Ms. Pevach urged the judge to find Mr. McGuigan solely at fault for the accident. Counsel for Mr. Wright urged him to dismiss the claim, arguing there was no case to meet given Mr. McGuigan's exculpatory discovery evidence and that Ms. Pevach had failed to establish negligence on his part on a balance of probabilities. Alternatively, he argued, the judge should find Ms. Pevach 80 to 90 percent contributorily negligent given that she crossed 30th Avenue wearing dark clothes on a dark night in an intoxicated state as Mr. McGuigan's vehicle approached.

Reasons for Judgment: Liability

[19] The judge began the liability section of his reasons with a description of the accident. As noted, in doing so he reproduced the portions of Mr. McGuigan's police statement and discovery evidence quoted above. He also reviewed the expert evidence on the effects of alcohol consumption and Ms. Pevach's blood alcohol content at the time of accident. Then he summarized the law, quoting from *Salaam*

v. Abramovich, 2010 BCCA 212 at para. 21 and ss. 119(1), 144(1), 179(1) and (2), 180, and 181 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318.

[20] Under the heading “Findings”, the judge set out his liability analysis. Although Mr. Wright does not contend that his reasons are insufficient, he asks us to conclude from their brevity and content that the judge failed to account for Mr. McGuigan’s exculpatory discovery evidence or consider the issue of contributory negligence. For that reason, it is helpful to reproduce the judge’s liability analysis in its entirety:

> [124] I find that Mr. McGuigan is solely at fault for the accident. The plaintiff was at or near the intersection. She was there to be seen. Mr. McGuigan was unduly focused on the lane in which he was driving without proper regard for pedestrians. As he testified in his examination for discovery that which was to his left was “irrelevant”. He was focussed on “going straight ahead in [his] lane”.
>
> [125] Mr. McGuigan would have had a lit view to his right and left. The headlights of a car illuminate more than that which is only narrowly and directly in front of the car. There were also street lights overhanging from the south side of 30th Avenue. One street light was not working.
>
> [126] Before the point of impact, the plaintiff had crossed the bike lane on the north side of the 30th Avenue, the eastbound lane of 30th Avenue, and the eastbound left turn lane. There was not a hedge, tree, barrier, or something else that would block the view of a driver driving a car eastbound on 30th Avenue. The area is also flat, which favours visibility. Mr. McGuigan did not say that another vehicle blocked or obstructed in any manner his view to his left. Again, the plaintiff was there to be seen.
>
> [127] If Mr. McGuigan had seen the plaintiff other than just immediately before the accident, he would have started to brake much earlier than he did. Mr. McGuigan did not tell the police that he saw the plaintiff and started to brake or slow down before the accident, other than just immediately before the accident.
>
> [128] As noted, the plaintiff was not known to be a runner, a jogger, or a person in a hurry. In *arguendo*, if the plaintiff had been running and if Mr. McGuigan had been keeping a peripheral lookout to his left, he would have been more likely to have been alerted by a runner’s movements. If the plaintiff was walking slowly, Mr. McGuigan would have had more time to see her.
>
> [129] Mr. Miller submitted that the plaintiff may have been crossing 30th Avenue in a diagonal manner, from west to east, before being hit at or near the crosswalk where the accident occurred. Mr. Miller suggested that the plaintiff may have started to cross from near the front of her residence. I find this submission to be based on speculation. There is not a sufficient factual basis to accede to Mr. Miller’s submission. There was no evidence that the plaintiff usually crossed 30th Avenue in this manner.

> [130] I also note that [the] west to east curve of 30th Avenue also favours seeing peripherally to the left. As I have found, Mr. McGuigan was unduly focused on the lane immediately in front of his car.
>
> [131] The fact that the plaintiff was intoxicated is not relevant. The plaintiff was at or near the crosswalk. Mr. McGuigan did not see the plaintiff until just immediately before impact. There was no evidence that an unimpaired pedestrian may have acted differently than the plaintiff did.
>
> [132] Sections 144(1)(a) and (b), 178, 179, and 181 of the *MVA* reflect a legislative intent to protect pedestrians. The risk of physical injury to a pedestrian is readily apparent. For example, the physical forces engaged in the collision of a pedestrian running into a stationary car at 10 mph are dramatically less than a car travelling at 10 mph hitting a stationary pedestrian.
>
> [133] In the case at bar, the defendant admitted in his response that the plaintiff was "at or near" the crosswalk. In my view, the admission allows the Court to find that the plaintiff was "at" the crosswalk. Accordingly, s. 180 of the *MVA* is not engaged. That said, if the plaintiff was "near" the crosswalk, I find that Mr. McGuigan did not "exercise due care to avoid colliding" with the plaintiff: *MVA*, s. 181(a); *Perez-Alarcon v. Lee*, 2013 BCSC 408, para. 122.
>
> [134] In sum, I find Mr. McGuigan solely at fault for the accident. The plaintiff was there to be seen.

On Appeal

[21] On the liability appeal, the issues for determination are whether the judge erred by:

a) not dismissing Ms. Pevach's claim in light of Mr. McGuigan's discovery evidence; and

b) not considering and determining whether Ms. Pevach had an opportunity to avoid the accident, and, if so, whether her conduct justified a finding of contributory negligence.

Standard of Review

[22] The standard of review for findings of fact, including inferences drawn from those facts, is palpable (obvious) and overriding (material) error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–23; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 53–56. Appellate intervention is justified only if the judge has made a "manifest error, has ignored conclusive or relevant evidence, has

misunderstood the evidence, or has drawn erroneous conclusions from it": *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121.

[23] The fact that a judge does not discuss all of the evidence on a particular point does not mean the judge ignored that evidence. Judges are not obliged to describe every aspect of their factual deliberations or grapple with every piece of evidence and argument advanced by the parties in their reasons. Rather, reasons must show that the judge grappled with the substance of the live issues, and they are to be considered on appeal in the context of the record below: *Kakavelakis v. Boutsakis*, 2017 BCCA 396 at para. 46; *Kringhaug v. Men*, 2022 BCCA 186 at paras. 52–57.

[24] The standard of review for questions of law is correctness: *Housen* at para. 8.

[25] In the absence of an extricable legal error or a palpable and overriding error, a trial judge's finding of negligence is subject to appellate deference: *Housen* at para. 31.

Did the judge err by not dismissing the claim based on Mr. McGuigan's discovery evidence?

Positions of the Parties

[26] Mr. Wright contends the judge erred in law by not dismissing Ms. Pevach's claim in light of Mr. McGuigan's uncontroverted discovery evidence. In his submission, Ms. Pevach adopted Mr. McGuigan's exculpatory discovery evidence as part of her case when she read in that evidence. He says the discovery evidence established that Mr. McGuigan was paying attention, travelling at or under the speed limit, and looking straight ahead when the accident happened.

[27] Moreover, Mr. Wright says, Mr. McGuigan's uncontroverted discovery evidence was that Ms. Pevach ran into the side of his vehicle by his front fender, and by the time she presented as a hazard there was nothing he could do to avoid the accident. In his submission, Ms. Pevach did not adduce any evidence to contradict Mr. McGuigan's exculpatory discovery evidence. It follows, he says, that she failed

to prove her claim against him on a balance of probabilities, and the judge should have dismissed the claim.

[28] In his factum, Mr. Wright suggested that Mr. McGuigan's discovery evidence was wholly exculpatory. However, in oral argument, his counsel sensibly retreated from this position, and acknowledged Mr. McGuigan's evidence that he focused solely on the road straight ahead without regard to what was on his left, which he considered irrelevant, was arguably inculpatory. Nevertheless, Mr. Wright submits, the judge failed to grapple with the exculpatory discovery evidence or the defence argument on the absence of any contradictory evidence.

[29] In advancing his submission, Mr. Wright concedes there is no general rule that a party is bound by the discovery evidence of an opposing party read in as part of their case, citing *Toevs v. Williams*, 2019 BCSC 2030. He also concedes that where a plaintiff presents contradictory versions of a critical event by *viva voce* testimony, on the one hand, and discovery evidence, on the other, the two versions may or may not cancel one another out. However, he submits, where, as here, a plaintiff reads in exculpatory discovery evidence and no contradictory evidence is presented, the plaintiff will fail to prove their claim on a balance of probabilities.

[30] Ms. Pevach responds that Mr. Wright is alleging a factual error, not a legal error. In her submission, the judge's factual findings were supported by the evidence and they established that Mr. McGuigan was at fault for the accident on a balance of probabilities.

Analysis

[31] I agree with Ms. Pevach that this ground of appeal is a challenge to the judge's factual findings. Properly characterized, it does not allege an error of law. Accordingly, the standard of review is palpable and overriding error.

[32] As discussed in *Clock Holdings Ltd. v. Braich*, 2008 BCSC 1697, a fact-finder is generally entitled to accept some, all, or none of the evidence. In some cases, where a plaintiff presents contradictory accounts of a critical event by *viva voce*

evidence, on the one hand, and discovery evidence, on the other, the two competing versions may cancel one another out, and thus the plaintiff will fail to prove their claim on a balance of probabilities. However, in other cases, the fact-finder may be able to assess the accounts together with the other evidence and determine the appropriate weight to attach to the competing versions of the event: *Clock* at para. 40.

[33] In my view, regardless of whether competing versions of an event are presented, a plaintiff is not bound by the discovery evidence they adduce in the sense that, unless contradicted, the fact-finder is obliged to accept that evidence as accurate, reliable, and truthful. Rather, like other forms of evidence, discovery evidence may be accepted in whole, in part, or not at all. Moreover, to challenge exculpatory discovery evidence successfully a plaintiff need not contradict that evidence directly. On the contrary, exculpatory discovery evidence may or may not be outweighed by circumstantial evidence and the inferences that may be drawn from such evidence.

[34] In *Dutton v. Schwab*, 2021 BCSC 1314, aff'd 2023 BCCA 161, leave to appeal to SCC ref'd, 40760 (9 November 2023), the plaintiff had no recollection of an accident in which she and the defendant were the only occupants of the vehicle. The key issue at trial was the identity of the driver. The defendant testified on discovery that the plaintiff was the driver. The plaintiff read in the defendant's discovery evidence, but also presented evidence regarding her usual driving practices and a DNA report that showed the defendant's blood was on the air bag on the driver's side of the car.

[35] Although she ultimately dismissed the claim, the judge in *Dutton* rejected the defendant's submission that by reading in her exculpatory discovery evidence, the plaintiff had adopted it, and for that reason the action should be dismissed:

> [30] [The defendant] submits that by reading in exculpatory statements [the defendant] made in her examination for discovery, [the plaintiff] has adopted that evidence and I must dismiss her claim on that basis. [The plaintiff] says that her unchallenged evidence at trial about her driving

> practices supports an alternative version of events and I must weigh all of the evidence before deciding whether she has proved her case.
>
> …
>
> [32] In tendering the DNA reports, [the plaintiff] has presented other evidence to challenge [the defendant's] discovery evidence. Therefore, I must consider all of the evidence.
>
> …
>
> [38] As [the plaintiff] has no memory of the Accident; she asks me to infer from circumstantial evidence that she was not the driver and [the defendant] lied. It is certainly possible that [the defendant] was the driver: I accept that she could have moved from the driver's seat into the front passenger seat after the Accident.
>
> [39] However, the evidence presented does not satisfy the plaintiff's burden of proof…

[36] On appeal in *Dutton*, this Court rejected the appellant/plaintiff's submission that the judge erred in placing the burden on her to establish that the respondent/defendant was the driver of the vehicle. It also rejected her submission that the judge should have weighed the evidence differently, stating "[a]bsent palpable and overriding error, however, the weighing of evidence falls within the purview of a trial judge": at para. 15. In expressing her agreement, Justice Newbury observed that she might well have made a different finding than the finding made by the trial judge. However, she stated:

> [19] … the standard of review is not what we think would have been a more reasonable or likely finding than that reached by the trial judge. The question we must ask is whether a palpable and overriding error has been shown in her findings. It is trite law that we may not re-weigh those findings. No error of law has been shown, as my colleague has demonstrated. Accordingly, I would also dismiss the appeal.

[37] In my view, Mr. Wright is making substantially the same untenable submission made by the unsuccessful appellant in *Dutton*. In other words, rather than identifying a palpable and overriding factual error, he is asking us to re-weigh the evidence and make findings that differ from those made by the trial judge. That is not our role.

[38] The judge found that Mr. McGuigan was at fault for the accident based on the whole of the evidence. Although his analysis was very brief, as I have explained, he

was not obliged to describe or grapple with every piece of evidence or argument presented by the parties.

[39] Contrary to Mr. Wright's submission, the judge did not fail to account for the substance of Mr. McGuigan's exculpatory discovery evidence or the arguments advanced by counsel in making his findings. Rather, he manifestly weighed the discovery evidence in the context of the entire body of evidence, some of which supported inferences that contradicted the exculpatory aspects of Mr. McGuigan's testimony on discovery. That circumstantial evidence included photographs and descriptions of the accident scene, which was unobstructed visually and well illuminated. It also included Ms. Pevach's long-time habit of walking slowly.

[40] The judge accepted some inculpatory aspects of Mr. McGuigan's discovery evidence and rejected some of its exculpatory aspects based on the whole of the evidence, available inferences, and pleaded admissions. For example, he plainly rejected Mr. McGuigan's discovery evidence that Ms. Pevach was running across 30th Avenue when the accident happened (read in for context at the behest of Mr. Wright's counsel), noting that she "was not known to be a runner". In the overall result, the judge found that Ms. Pevach was "there to be seen" in or near the crosswalk, that Mr. McGuigan "was unduly focused on the lane in which he was driving without proper regard for pedestrians", and thus that Mr. McGuigan was at fault for the accident.

[41] In my view, the foregoing findings were all available and supported by the evidence. They were not obviously and materially wrong. They were also capable of establishing negligence on the part of Mr. McGuigan on a balance of probabilities. Ms. Pevach was in or near the crosswalk, she was visible, and Mr. McGuigan was obliged to yield the right of way to her, but he was driving without proper regard for pedestrians and failing to pay due attention: see *Perez-Alarcon v. Lee*, 2013 BCSC 408; *Taggart v. Heuchert*, 2013 BCSC 1248; *Cairney v. Miller*, 2012 BCSC 86.

[42] I would not accede to this ground of appeal.

Did the judge err by failing to consider and determine the issue of contributory negligence?

Positions of the Parties

[43] Mr. Wright goes on to contend the judge erred in law by failing to consider whether Ms. Pevach had an opportunity to avoid the accident when she saw or should have seen Mr. McGuigan's vehicle approaching, and, if so, whether her conduct justified a finding of contributory negligence. In his submission, even if Ms. Pevach was in the dominant position because she was in or near an unmarked crosswalk, she owed a duty to act reasonably, and the judge was obliged to analyse and decide whether she breached that duty. However, he says, the judge failed to undertake the necessary analysis, and proceeded on the basis that Ms. Pevach had no duty to act reasonably.

[44] In support of his submission, Mr. Wright emphasizes Mr. McGuigan's discovery evidence that Ms. Pevach walked or ran into the side of his vehicle when the accident happened. He also emphasizes her state of intoxication at the time. Although he acknowledges that walking while intoxicated is not an offence, he says Ms. Pevach's level of intoxication was relevant to whether she should have seen Mr. McGuigan's approaching vehicle and could have avoided the accident. However, he submits, the judge erroneously treated her intoxication as irrelevant simply because she "was there to be seen".

[45] Mr. Wright also relies on the discussion of Justice Abrioux, then of the trial court, in *Jacobs v. Basil*, 2017 BCSC 1339, regarding accidents that involve vehicles and pedestrians. For example, he notes, Justice Abrioux explained in *Jacobs* at para. 117 that both drivers and pedestrians owe a common law duty to take reasonable care for their own safety and the safety of others when using a roadway. He also emphasizes Justice Abrioux's statements at para. 121 that merely failing to see a pedestrian before striking them "is not in itself sufficient to establish that the driver failed to keep an adequate lookout" and a driver "is required to operate his vehicle so that he will be able to avoid striking a pedestrian who is crossing his path in a reasonable manner". Moreover, he states, citing *Pacheco (Guardian ad litem of)*

v. Robinson (1993), 75 B.C.L.R. (2d) 273 (C.A.) at 278, a pedestrian in the dominant position may be found wholly or partly liable if, after they became aware, or reasonably should have become aware, of an approaching vehicle, acting reasonably, they had a sufficient opportunity to avoid the accident.

[46] Finally, Mr. Wright emphasizes that he is not contending the judge's reasons for judgment are insufficient for appellate review purposes. Rather, he says, the absence of substantive analysis regarding contributory negligence reveals that the judge failed to consider and determine that critical issue, and therefore appellate interference is justified. Accordingly, he says, we should reassess liability and find Ms. Pevach partially responsible for the accident in a percentage we consider appropriate.

[47] Ms. Pevach responds that Mr. Wright is again alleging a factual error, not a legal error. In her submission, the judge manifestly did not accept that she was contributorily negligent, which finding aligned with the absence of persuasive evidence of fault on her part and was consistent with the burden of proof on Mr. Wright.

Analysis

[48] In *Perez-Alarcon*, Justice Griffin, then of the trial court, provided a thorough and helpful review of the law on the question of whether a pedestrian struck in a crosswalk is contributorily negligent. In doing so, she quoted from the summary of the relevant principles in *Dionne v. Romanick*, 2007 BCSC 436, which summary included the following:

> [90] The law applicable to pedestrians in crosswalks was considered by Donald J., when he was a judge of this Court, in *Miksch v. Hambleton*, [1990] B.C.J. No. 1810 (S.C.). He explained that the Supreme Court of Canada, in both *Petijevich v. Law*, [1969] S.C.R. 257 and *Coso v. Poulos*, [1969] S.C.R. 757, had decided as follows:
>
> > … once a pedestrian has safely entered a crosswalk, absent any overt negligence such as running or gesturing that could mislead motorists into thinking they may proceed safely, the pedestrian may assume that the motorists will yield the right-of-way and will share no responsibility if struck in the crosswalk.
>
> …

> [92] The burden on the defendant where the plaintiff pedestrian had the right of way was described by Wallace J.A. as follows in *Feng v. Graham* (1988), 25 B.C.L.R. (2d) 116 (C.A.), at p. 120:
>
> > In my view the plaintiff in the circumstances of this case was entitled to assume that the defendant was going to obey the law and yield the right-of-way to her. Her right to rely on that assumption continued until such time as she knew, or ought to have known, that the defendant was not going to grant her the right of way, whereupon the plaintiff's obligation to avoid injury to herself superseded her right to exercise her right of way. The onus is on the defendants to establish that the plaintiff knew, or ought to have known, that the defendant driver was not going to grant her the right of way, and that, at that point of time, the plaintiff could reasonably have avoided the accident.

[49] Bearing in mind the relevant principles and the judge's reasons, read fairly and in context, I am not persuaded that he failed to consider and determine the issue of contributory negligence. Although, as noted, his liability analysis is brief, he stated twice that Mr. McGuigan was solely at fault for the accident. In my view, that was an implicit finding that Ms. Pevach was not contributorily negligent.

[50] In addition, the judge expressly rejected counsel's submissions that Ms. Pevach was running or may have been crossing 30th Avenue diagonally when the accident happened. Those submissions were advanced in support of the argument that Ms. Pevach was wholly or partially at fault for the accident. Moreover, in noting Ms. Pevach's state of intoxication at the time of the accident, the judge stated that "[t]here was no evidence that an unimpaired pedestrian may have acted differently than the plaintiff did".

[51] The foregoing statement reveals that the judge did not treat Ms. Pevach's state of intoxication as irrelevant simply because she "was there to be seen" in the crosswalk. His observation concerning the absence of evidence that an unimpaired pedestrian might have acted differently shows that he considered and responded to the issue of contributory negligence. Although he conducted a quite cursory analysis of the contributory negligence issue, in fairness to the judge that may be at least in part because the issue received limited attention, at best, in the parties' closing arguments.

[52] A judge is presumed to know the law. As noted, in *Perez-Alarcon* Justice Griffin reviewed the law on the question of contributory negligence when a pedestrian is struck in a crosswalk. In my view, it is telling that the judge cited *Perez-Alarcon* when he concluded that Mr. McGuigan was solely at fault for the accident.

[53] In *Perez-Alarcon*, Justice Griffin emphasized the onus was on the defendant driver to prove on a balance of probabilities that the pedestrian plaintiff he struck failed to pay sufficient attention or take reasonable steps for his own safety to establish contributory negligence: at paras. 76–77. Based on the evidence in that case, she found the defendant had failed to establish contributory negligence because he did not prove the plaintiff should have seen his approaching vehicle and avoided the collision, but failed to do so as a result of his intoxication and insufficient attention. Although her liability analysis was considerably more detailed than that of the judge in this case, the issues for determination in both cases were strikingly similar in several respects. These included the question of whether a pedestrian plaintiff with the right of way was contributorily negligent based on their state of intoxication and alleged failure to pay sufficient attention to an approaching vehicle.

[54] There was no direct evidence in this case regarding Ms. Pevach's actions before Mr. McGuigan struck her as she crossed 30th Avenue. In addition, and importantly, the judge declined to make the factual findings sought by Mr. Wright in support of his argument that Ms. Pevach was wholly or partially at fault for the accident. Mr. Wright has failed to identify any palpable and overriding error in the judge's finding that Mr. McGuigan was solely at fault for the accident. We are in no position to reach different findings and reapportion liability.

[55] I would not accede to this ground of appeal.

Damages

At Trial

[56] The trial was held in November and December of 2020. Ms. Pevach was 57 years old at the time of trial, and living in Spring Valley.

[57] As noted, Ms. Pevach was unable to testify. However, she called several witnesses who described various aspects of her life and functioning, both before and after the accident. Among others, they included: members of Ms. Pevach's family; her friend, Kelly Skelhorne; her former and current treating physicians, Dr. McDonald and Dr. Joshua; an occupational therapist, Melanie Bos; an economist, Darren Benning; a psychiatrist, Dr. Okorie; and a neuropsychologist, Dr. Schmidt.

[58] The evidence showed that Ms. Pevach suffered from many health problems and challenges before the accident. For example, Dr. McDonald confirmed that Ms. Pevach suffered from agoraphobia, PTSD, depression and anxieties, and chronic liver disease, as well as medically-controlled Hepatitis C and head trauma. Records from the Kelowna General Hospital also showed that Ms. Pevach was treated in the emergency department for fall-related injuries due to intoxication.

[59] Dr. McDonald testified that in 2013 she submitted a "Persons with Disabilities Designation Application" form to provincial authorities stating that Ms. Pevach suffered from severe and disabling anxiety and PTSD symptoms, and needed support to leave her home and "for self-care, meal prep, housework etc." She also explained that she took a "very liberal" approach to completing that form in an effort to help Ms. Pevach obtain stable housing, which was important for the continuing success of her Hepatitis C treatment. On cross-examination, Dr. McDonald agreed that before the accident Ms. Pevach would have benefitted from one to two hours per week of assistance from a support worker, as well as one hour per week of assistance from a case manager and a taxi trip once per month.

[60] In December 2013, Ms. Pevach was designated a "Person with Disabilities". In early 2015, she moved to Vernon. As noted, the evidence showed that Ms. Pevach's life improved considerably after the move.

[61] As to Ms. Pevach's condition after the accident, the evidence showed that she lived briefly with family and friends, then moved to a transition house in Kelowna known as Willowbridge. In November 2019, she was admitted to the Kelowna General Hospital for "seizure disorder and homelessness". In February 2020, she

was admitted to Spring Valley, where most of the residents were seniors suffering from dementia or other cognitive impairments.

[62] Ms. Bos, Dr. Okorie, and Dr. Schmidt assessed Ms. Pevach in 2018, when she was living in Willowbridge. They all considered Willowbridge an unsuitable placement, and formulated their recommendations for Ms. Pevach's future care with that view in mind.

[63] In her cost of care report, Ms. Bos assumed that Ms. Pevach would be living independently in government supported housing, with appropriate supports, until she reached the age of 85, then move into an extended residential care facility. She produced a detailed cost chart based on those assumptions, and divided her recommendations into three phases: Phase 1, Ms. Pevach's then-current placement in Willowbridge; Phase 2, independent living; and Phase 3, residential care. On the chart, Ms. Bos specified durations for and amounts of each of the care items that she recommended by referring to their provision in Phases 1, 2, 3, or "Lifetime".

[64] Specifically, Ms. Bos recommended that Ms. Pevach receive: five to eight sessions of psychological counselling per year in Phase 1 and 2; "Lifetime" occupational therapy services for four hours per month in Phase 1, six hours per month in Phase 2, and three hours every three months in Phase 3; "Lifetime" community support services for six hours per week in Phase 1, ten hours per week in Phase 2, and six hours per month in Phase 3; a personal care aid for two hours per day in Phase 1 and four hours per day in Phase 2; and "Lifetime" taxi services, with two trips per week for Phases 1 and 2 and one trip per month for Phase 3.

[65] Ms. Pevach sought various awards, including an award of $1,990,276 for the cost of future care. Her submission in this regard was based on the present value of the cost of the care items recommended by Ms. Bos, including her assumptions regarding Ms. Pevach's living arrangements in each identified phase.

[66] For his part, Mr. Wright sought an award of $68,409 for the cost of future care based on the assumption that Ms. Pevach would spend the rest of her life in an extended residential care facility.

Reasons for Judgment: Damages

[67] At the outset of his reasons, the judge listed Ms. Pevach's accident-related injuries, which included multiple fractures, internal bleeding, and a possible lung collapse. As to her severe traumatic brain injury and mental injuries, he noted that Ms. Pevach suffered from seizures, memory impairment, and word finding difficulties, as well as mental fatigue, social vulnerability, frustration, and a lack of insight. However, he stated, she remained strong-willed and mobile, which, combined with her intermittent seizures, "give rise to safety concerns and other challenges. She still knows who she is."

[68] Next, the judge described Ms. Pevach's life before the accident. He noted that she suffered from several health problems, including chronic liver disease, anxiety, depression, agoraphobia, PTSD, as well as medically-controlled Hepatitis C and head trauma that did not affect her general functioning. He also noted that Ms. Pevach's life in Kelowna was marked by many challenges and difficulties, and referred to hospital records indicating that she had been beaten or punched on several occasions.

[69] The judge contrasted Ms. Pevach's life in Kelowna with her life in Vernon, where she moved in early 2015. He characterized the move to Vernon as beneficial for Ms. Pevach. For example, he observed, in Vernon she lived in an apartment that her daughter described as tidy and well-kept, helped to care for an elderly gentleman, and made friends with her neighbour, Ms. Skelhorne. He also observed that she was not subject to frequent assaults and there were few visits to the emergency department, although she did suffer a head injury in March 2015 and Dr. McDonald continued to provide her with care for agoraphobia and other mental health issues.

[70] The judge also discussed some of Ms. Pevach's personal attributes and characteristics before the accident. For example, he observed that her sister, for whom she had previously worked, described Ms. Pevach, pre-accident, as a "steady, strong, and cautious" worker. In addition, he noted, her sister testified that

Ms. Pevach was “always a drinker”, and that she enjoyed carving, writing poems, and playing the guitar.

[71] Based on the whole of the evidence, the judge found, overall, that before the accident Ms. Pevach consumed alcohol on a daily basis and had several chronic health problems, but that she was returning to a reasonable degree of functionality after she moved to Vernon:

> [59] Ms. Skelhorne’s testimony, elicited by the defence, supports further my finding that the plaintiff, with the better housing Dr. McDonald had sought in supporting the “Persons with Disabilities Application”, was starting to enjoy a much better life than she had experienced in Kelowna.
>
> [60] In Vernon, the plaintiff still had the challenges associated with addressing PTSD, agoraphobia, and anxiety. That said, she was returning to a reasonable degree of functionality. As noted, she helped care for an elderly gentleman until his death not long before the accident. From the testimony of Ms. D. Pevach and Mr. Bott, I find that the plaintiff enjoyed her three-week stay with them in Cherryville immediately preceding the accident and during the time she undertook or helped with various chores.
>
> [61] As noted, Ms. Skelhorne’s testimony also reflects that the plaintiff was enjoying a more normal life in Vernon than she had in Kelowna.
>
> [62] Despite Ms. Skelhorne not seeing the plaintiff drinking alcohol, I find that the plaintiff was still drinking on a regular, daily basis. Mr. Bott’s testimony together with the plaintiff’s blood alcohol reading taken at the hospital after the accident support this finding.
>
> [Emphasis added.]

[72] Turning to Ms. Pevach’s life after the accident, the judge reviewed her general condition and circumstances. He described the many challenges caused by Ms. Pevach’s severe brain injury and her related need for supportive housing, quoting from Dr. McDonald’s testimony. In discussing Dr. Joshua’s evidence, he noted that Ms. Pevach had “eloped” from Spring Valley on several occasions and was returned there with police assistance. In discussing Dr. Okorie’s evidence, he noted her need for a properly supervised and supported living arrangement:

> [89] In his September 17, 2018 report with respect to future living arrangements for the plaintiff, Dr. Okorie opines:
>
> > Ms. Pevach’s cognitive and functional disabilities are permanent and likely to grow with aging. At present, she is unable to independently manage complex activities of daily living such as health and money management. Her social and recreational engagements have been

> significantly hampered by her impairments. She needs to reside in a setting with more supervision and support than where she is at the moment. She needs support and assistance with meals, medication, money management, bathing and housekeeping. She would need a support worker when out and about for supervision, navigation of the town and to protect her from tricksters who may wish to exploit her vulnerability.
>
> [Emphasis added.]

[73] The judge expressly rejected the submission of Mr. Wright's counsel that Ms. Pevach should have been living in a long-term care facility before the accident:

> [90] In cross-examination, Dr. Okorie testified that a long-term care facility warranted serious consideration for the plaintiff even before the accident.
>
> [91] I reject the defendant's assertion that the plaintiff should have been in a long term care facility prior to the accident. I find that after the plaintiff's move from Kelowna to Vernon that she was living and handling circumstances sufficiently well that a long term care facility would not have been warranted at that time.
>
> [Emphasis added.]

[74] The judge concluded his review of Ms. Pevach's post-accident life by quoting from Dr. Schmidt's evidence. In Dr. Schmidt's opinion, it was unlikely that Ms. Pevach would be able to remain in Spring Valley, and that she "would be best off living in a home of her own, but with a care giver present" to monitor her basic safety and other accident-related issues:

> [98] Dr. Schmidt's opinion reflects the reality of the plaintiff's situation. The plaintiff suffered a severe traumatic brain injury as a result of the accident. She lacks insight and can be compulsive and, understandably, frustrated by her injury leading to the irritability, and sometimes anger.
>
> [99] This issue is whether independent living with assistance or extended residential care with assistance would better serve the plaintiff.
>
> [Emphasis added.]

[75] After determining liability for the accident in favour of Ms. Pevach, the judge turned to the assessment of damages.

[76] Dealing first with non-pecuniary damages, the judge summarized the applicable principles by quoting from *Karim v. Li*, 2015 BCSC 498, *Trites v. Penner*, 2010 BCSC 882, and K. Cooper-Stephenson and E. Adjin-Tetty's text *Personal*

Injury Damages in Canada, 3rd ed. (Thomson Reuters, 2018). He concluded that Ms. Pevach's injuries were severe and devastating, and thus that an award of the upper limit was appropriate:

> [140] The defendant submitted that the plaintiff had many challenges prior to the accident. Defence counsel emphasized that it is "the difference between the 'original position' and the 'injured position' which is the plaintiff's loss": *Athey v. Leonati*, [1996] 3 S.C. R. 458, p. 32.
>
> [141] I find that the plaintiff's "injured position" overwhelms her "original position". The plaintiff's severe and devastating traumatic brain injury resulted in the plaintiff not being the person she once was, and will never be so again.
>
> [Emphasis added].

[77] Next, the judge dealt with past and future loss of earning capacity. He awarded Ms. Pevach $10,000 for past loss of earning capacity and $20,000 for future loss of earning capacity.

[78] As to the cost of future care, the judge noted the applicable principles by quoting from *Paur v. Province Health Care*, 2017 BCCA 161. Then he reviewed some of the relevant expert evidence.

[79] The judge reproduced Ms. Bos's cost chart in its entirety. He described the three phases identified by Ms. Bos, noting that she contemplated Ms. Pevach transitioning to extended residential care when she reached the age of 85 and considered Willowbridge an unsuitable placement for Ms. Pevach:

> [162] As may be seen, Ms. Bos contemplated three residential phases. The first phase was the plaintiff's then current living arrangement at Willowbridge. Ms. Bos viewed, as had others, that Willowbridge was not well suited to the plaintiff's needs. Ms. Bos contemplated that it was "unlikely" that the plaintiff would remain at Willowbridge very long. As Ms. Bos noted in her report:
>
> > Based on the assessment, medical review and collateral interviews, it is unlikely that [Ms. Pevach] will remain in her current situation. There are concerns that she does not follow ground rules (smoking in her suite), there is not enough level of care (she does not always take medication and has falls in her suite) and she is not happy in that situation.
>
> [163] Ms. Bos recommended that the plaintiff should transition to phase 2. Under Phase 2, Ms. Bos contemplated that the plaintiff would live in a provincial government independent living facility with regular assistance. I note that under phase 2, independent living, the housing is completely government subsidized.

> [164] Ms. Bos contemplated a transition to phase 3, an assisted living or extended residential care facility, upon the plaintiff reaching 85 years of age.
>
> [165] Spring Valley (where the plaintiff currently resides) provides extended residential care, in other words, within the phase 3 category.
>
> [Emphasis added.]

[80] The judge noted that Mr. Benning calculated the present value of the care items that Ms. Bos recommended assuming the costs listed in her chart under Phase 2 (independent living) would be incurred until Ms. Pevach reached 85 and the costs listed under Phase 3 (residential care) would be incurred thereafter. He stated that in Ms. Bos' view a supervised facility would be safer and better able to meet Ms. Pevach's needs, but that "it is unlikely that she would currently stay in this type of facility". He also quoted Dr. Joshua's description of Spring Valley as a facility in which "dementia predominates".

[81] Ultimately, the judge agreed with Mr. Wright's counsel that "extended residential care, such as provided by Spring Valley" was appropriate for Ms. Pevach for the remainder of her lifetime. However, he found, additional services would be required:

> [173] As Ms. Bos testified, the plaintiff would be safer in an extended residential care facility. The plaintiff has a history of seizures which are a result of the accident. The seizures may be ameliorated by medication. However, the plaintiff lacks insight and consequently does not necessarily take the prescribed medications. The seizures present the risk of further serious injury to her.
>
> [174] I find that an extended residential care facility will provide a greater degree of safety for the plaintiff and, with additional services to facilitate and enhance social interaction and community involvement, will best serve the plaintiff.
>
> [Emphasis added.]

[82] The judge did not agree that the total annual cost of Spring Valley should be excluded from the future care costs award, given that Ms. Pevach "is currently paying for Spring Valley and there was no evidence that she would not be required to do so in the future".

[83] As to the other care items claimed, the judge rejected the submission that Ms. Pevach would have required many of the recommended items for her lifetime regardless of the accident. He went on to "complement" the award for extended residential care with some of Ms. Bos' other recommendations, with modifications:

> [176] With respect to the other items, such as allied health services, Mr. Miller submits that the plaintiff's "pre-accident state of health and her significant mental health challenges" would have required such care for the plaintiff's lifetime. With respect, I disagree. After the plaintiff's move from Kelowna to Vernon, the plaintiff's life became better. I find that the plaintiff would have required far less than the lifetime of care Mr. Miller submits.
>
> [177] To complement the extended residential care, I will adopt some of Ms. Bos's recommendations with some further modifications.
>
> [178] First, I will make provision for her psychological counselling. As Dr. Joshua notes, Spring Valley's primary focus is on cognitive impairment. I will award six sessions of psychological counselling per year until the plaintiff turns 85. The annual cost is $1,200.
>
> [179] I will also make provision for the help of community support workers so that the plaintiff may leave Spring Valley at least twice a week. I will award 15 hours per week for the rest of the plaintiff's life (as a general premise). The annual cost is $35,100 ($45/hour x 15 hours x 52 weeks). The Court expects that the hours may be used with flexibility.
>
> [180] In conjunction with the community support worker, in order to facilitate trips, I will award taxi service for two trips per week (a round trip of $50). The annual award is $5,200 ($50/trip x 2 trips/week x 52 weeks). Again, the Court recognizes that flexibility is necessary.
>
> [181] I will not award any amount for occupational therapy services or a personal care aide. I am satisfied that Spring Valley can address these aspects.
>
> [182] The plaintiff's doctors and family may identify a placement at an extended residential care facility that may better suit the plaintiff's current or future needs compared to Spring Valley. Again, the Court recognizes that flexibility is required. The Court expects such may be addressed with the involvement of the PGTBC.
>
> [183] I will also award the present value for the medications listed by Ms. Bos. As noted, the defendant is in agreement in this regard…
>
> [Emphasis added.]

[84] The judge concluded the cost of future care section of his reasons with a summary of the components of his award and the basis upon which they were calculated:

> [185] By way of summary, using the present value multipliers provided by Mr. Benning, the award of cost of future care is:

a) Psychological counselling until the plaintiff turns 85: $1,200 x 8.843	$ 22,611
b) Support worker: $35,100 x 1.464	$753,386
c) Taxi service: $5,200 x 21.464	$111,612
d) Medication – Lacosamide Vimpat	$ 58,983
e) Medication – Lamotrigine	$ 8,135
f) Medication – Naltrexone	$ 291
g) Extended residential care: 14,276 x 21.464	$306,420
Total	$1,261,438 rounded to $1,261,500

On Appeal

[85] On the damages appeal, the issues for determination are whether the judge erred by:

a) exceeding Ms. Bos' recommendations for community support and taxi services when Ms. Pevach was living in extended residential care, and making awards for those items that were unreasonably high and medically unjustified; and

b) failing to consider negative contingencies and adjust the cost of future care award to give effect to those contingencies.

[86] While Mr. Wright submitted in his factum that the contingency deduction ought to apply to non-pecuniary damages as well, he did not pursue that argument at the hearing of the appeal.

Standard of Review

[87] The standard of review for damage awards is highly deferential: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 27. In *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435, the Court described it this way:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the

> conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial was wholly erroneous, that a Court of Appeal is entitled to intervene.

Did the judge err in awarding future care costs for community support and taxi services?

Positions of the Parties

[88] Mr. Wright contends that the judge made a palpable and overriding error in awarding future costs of a community support worker and taxi services several times greater than Ms. Bos recommended when Ms. Pevach is residing in an extended residential care facility. In his submission, the judge failed to explain why he made such an award when the cost items in question were not medically justified and essentially "pulled from thin air". According to Mr. Wright, even if awards for such costs were medically justified, the quantum awarded was excessive and unreasonable.

[89] In support of his submission, Mr. Wright emphasizes that neither Ms. Bos nor any other witness recommended 15 hours per week of community support and taxi services twice weekly for Ms. Pevach's statistical life expectancy when she is living in an extended residential care facility. On the contrary, he says, Ms. Bos made the only relevant recommendations, namely, six hours per month for a community support worker and one trip per month for taxi services when Ms. Pevach was living in extended residential care. He also emphasizes the striking difference between the annual cost of Ms. Bos' recommendations for community support and taxi services, on the one hand, and, on the other, the judge's awards for those care items. In particular, he states, Ms. Bos' recommendation for community support services in Phase 3 totalled $3,240 per year whereas the award totalled $35,110 per year, and Ms. Bos' recommendation for taxi services totalled $600 per year whereas the award totalled $5,200 per year.

[90] According to Mr. Wright, we should reduce the award for the future costs of community support and taxi services to correspond with Ms. Bos' recommendations when Ms. Pevach is living in an extended residential care facility. In the alternative,

he says, we should reduce the award to correspond with substantially fewer such items than awarded by the judge.

[91] Ms. Pevach responds that the judge was not bound to follow Ms. Bos' recommendations, particularly as the cost of future care award was not premised on the factual assumptions upon which she based her recommendations. In her submission, the awards for community support and taxi services were grounded in the evidence, reasonable, and medically justified based on the whole of the evidence and the findings of the judge.

Analysis

[92] In *Paur*, this Court summarized the principles that apply to an award of damages for future care items:

> [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), 49 B.C.L.R. (2d) 33 [(S.C.)] 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.

[93] As noted, the judge began his cost of future care analysis by quoting from *Paur*. He was clearly alive to the requirements for a proper award, namely, medical justification and a reasonable cost claim. In my view, it is equally clear why he awarded the cost of 15 hours per week of community support and two taxi trips per week for Ms. Pevach's lifetime rather than adopting Ms. Bos' recommendations for those items when Ms. Pevach was living in an extended residential care facility. Read as a whole and in context, his reasons make it obvious: given her age and the medical evidence regarding her condition, he considered it necessary for Ms. Pevach to spend time in the community on a frequent and regular basis for the Spring Valley placement to meet her needs.

[94] As Ms. Bos' cost chart specified, her recommendation for six hours per month of community support and one taxi trip per month related to an assumed period when Ms. Pevach would be living in extended residential care after she reached the age of 85. As the chart also specified, Ms. Bos recommended ten hours per week of community support and two taxi trips per week throughout the period when she assumed Ms. Pevach would be living independently in the community, prior to reaching that age.

[95] The judge identified the question of whether independent living with assistance or extended residential care with assistance would best serve Ms. Pevach as a key issue for determination. In determining that issue, he did not award frequent community support and taxi services "from thin air", nor do the items awarded lack medical justification. Rather, having concluded that extended residential care was currently appropriate for safety reasons based on the medical evidence, the judge went on to find that Ms. Pevach would have a corresponding need for "additional services to facilitate and enhance social interaction and community involvement" based on the same evidence. Although he did not say so expressly, I take the judge to have inferred that she needed the additional services to promote her mental and physical health because of her relatively young age and the challenges posed by her condition, on the one hand, and the nature of Spring

Valley and its patient population, on the other. In other words, the medical assessments provided the requisite evidentiary link.

[96] The medical evidence showed that, at 57, Ms. Pevach remained strong-willed and mobile, and, as the judge put it, still knows "who she is". However, as Dr. Okorie and other experts explained, she was also vulnerable to exploitation, easily frustrated, and needed supervision to "navigate" in the community. And, as Drs. Joshua and Schmidt explained, Ms. Pevach was unhappy at Spring Valley and had "eloped" repeatedly since her admission in 2020. For all of those reasons, the judge decided to make "provision for the help of community support workers so that the plaintiff may leave Spring Valley at least twice a week", together with two taxi trips per week "to facilitate trips".

[97] In my view, the award for those care items was reasonable and medically justified, despite the absence of a directly corresponding recommendation from an expert witness. That Ms. Bos did not make such a recommendation is unsurprising. She assumed that Ms. Pevach would be living independently in the community, with supports, for the vast majority of her remaining life expectancy. In any event, as Ms. Pevach points out, the judge was not obliged to accept Ms. Bos' recommendations. On the contrary, he was entitled to reject or modify them to fit with his other findings and his assessment of Ms. Pevach's needs, so long as the costs he awarded were reasonable and medically justified.

[98] Helpfully from Mr. Wright's perspective, the judge's modifications also included a finding that Ms. Pevach would not require occupational therapy and personal care aide services going forward because she would be living in an extended residential care facility. In my view, it was equally open to him to find for the same reason that she would require frequent and regular trips into the community, facilitated by necessary supports. I see no palpable and overriding errors in his findings on any of Ms. Pevach's future care needs or the costs of meeting them. His conclusions are entitled to deference on appeal.

[99] It follows that I would not accede to this ground of appeal.

Did the judge err by failing to consider contingencies and make corresponding adjustments to the cost of future care award?

Positions of the Parties

[100] Finally, Mr. Wright contends the judge erred by failing to consider negative contingencies and then adjust his awards for future care costs to reflect the relative likelihood of the occurrence of future events that amounted to real and substantial possibilities. In his submission, given the evidence of Ms. Pevach's pre-accident history of serious health problems and alcohol use, a significant reduction for negative contingencies in the award for future care costs was appropriate. However, he says, the judge unduly restricted his consideration to Ms. Pevach's health status and care requirements at the time of the accident, and then awarded the present value of the cost of extended residential care and community support for her statistical life expectancy. According to Mr. Wright, this amounted to an error of law that justifies the interference of this Court.

[101] In support of his submission, Mr. Wright relies on the principles elucidated in the recent trilogy of decisions in *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421. He also emphasizes the large body of evidence regarding Ms. Pevach's pre-accident health problems and related care needs. In doing so, he acknowledges the judge did not accept that extended residential care was warranted for Ms. Pevach at the time of the accident. However, he says, his other findings regarding her pre-existing condition obliged the judge to consider whether there was a real and substantial possibility that Ms. Pevach would have required extended residential care or community support services in the future regardless of the accident, and, if so, the relative likelihood of that event occurring, and then to adjust his award to give effect to those negative contingencies.

[102] According to Mr. Wright, the evidence overwhelmingly showed a risk that Ms. Pevach would have required extended residential care or community support in the future regardless of the accident. Based on that evidence, he says the relative likelihood of the risk materializing was approximately 30 percent. In his submission,

we should therefore reduce the awards for the cost of extended residential care, community support, and taxi services by a percentage in that range.

[103] Ms. Pevach responds that the judge considered Mr. Wright's submission on these points, reviewed the relevant evidence, and made a factual determination that there was no basis for finding a negative contingency. For example, she says, the judge expressly considered Dr. Okorie's evidence regarding the likelihood that she would have needed a long-term care facility and Dr. McDonald's evidence regarding her pre-accident condition, including her description of Ms. Pevach on the disability status application form. However, she says, he placed their evidence into proper context, found that her life had improved significantly after she moved to Vernon, and concluded that before the accident a long-term care facility was not warranted.

[104] In Ms. Pevach's submission, Mr. Wright is again asking us to reweigh the evidence and reach a different factual conclusion than the conclusion that the judge reached. Moreover, she says, any risk that she would have required extended residential care or community support in the future was speculative, not measurable. In other words, Ms. Pevach contends the evidence did not show a real and substantial possibility that due to her pre-existing condition she would have required anything like the kind of care she now requires due to her severe traumatic brain injury.

[105] In particular, according to Ms. Pevach there was no expert evidence specifically tying the symptoms of her chronic health problems to a risk that she would require extended residential care or community support services to manage the tasks of daily living in the future. On the contrary, she says, the evidence was that she was functioning independently and doing reasonably well before the accident, despite her chronic health problems and past difficulties. In her submission, it is speculative to suggest that going forward that was likely to change.

[106] At most, Ms. Pevach submits, the evidence might be taken to suggest that, regardless of the accident, she would have benefited from some community support services to assist her in dealing with the symptoms of her depression and

agoraphobia at some point in the future. Accordingly, she says, if the judge erred and we consider a contingency adjustment warranted, it should not exceed a ten percent reduction in the community support component of the cost of future care award.

Analysis

[107] The general rule for assessing damages is that the plaintiff must be returned to their original position, with all of its attendant benefits, risks, and shortcomings. As explained in *Dornan*, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced regardless of the defendant's negligence, as doing so would place the plaintiff in a better position than that originally occupied. Accordingly, if there is a measurable risk that a pre-existing condition would have affected the plaintiff detrimentally in the future in any event, this can be accounted for by applying a contingency reduction to a damages award: *Dornan* at para. 45.

[108] In *Dornan*, Justice Grauer discussed the two categories of contingencies: general contingencies, which are likely to be experienced by everyone; and specific contingencies, which are peculiar to a particular plaintiff. In the case of the latter, he noted, the party relying on the contingency must be able to point to evidence capable of supporting the conclusion that its occurrence is a real and substantial possibility, as opposed to a speculative possibility. He also clarified the process for evaluating contingencies for hypothetical events in damages assessments for personal injuries:

> [93] The process, then, as discussed above at paras 63-64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.
>
> [94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities. As Mr. Justice Savage put it in *Gao v. Dietrich*, 2018 BCCA 372:

> [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.
>
> [95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[109] In assessing damages for future care costs in a motor vehicle accident case, a judge must consider the likelihood of the plaintiff incurring costs of care in the future as a result of the accident. Inherent in that question is the issue of whether the plaintiff would have incurred those costs regardless of the accident. In this case, the evidence and factual findings made by the judge plainly disclose the existence of a real and substantial possibility that Ms. Pevach would have incurred future care costs even without the accident. Therefore, the judge was required to undertake an analysis of the relative likelihood of that possibility. I agree with Mr. Wright that the judge erred by failing to undertake the requisite contingency analysis given the nature of the evidence and his findings.

[110] In particular, there was evidence that, before the accident, Ms. Pevach had repeatedly sustained fall-related injuries due to intoxication and that she continued to consume alcohol daily, including on the day of the accident. There was also evidence that in 2013 Dr. McDonald believed Ms. Pevach needed assistance with self-care and community support services for her severe anxiety and PTSD symptoms, and stable housing to ensure the success of her ongoing Hepatitis C treatment. Although the judge accepted that her life had improved with the recent move to Vernon, the evidence was that Ms. Pevach continued to suffer from those chronic physical and mental health conditions, with their attendant risks, up to the time of the accident.

[111] Further, the judge appears to have accepted that, while she was "enjoying a more normal life in Vernon" and "a long term care facility would not have been warranted" before the accident, Ms. Pevach would predictably have required future care as a result of her pre-existing conditions, albeit "far less than the lifetime of care

Mr. Miller submits". Although he did not express it this way, I take this as a finding that there was a real and substantial possibility that, regardless of the occurrence of the accident, Ms. Pevach would have required some lesser level of future care than she requires now as a result of the accident.

[112] As Ms. Pevach emphasizes, the expert evidence in relation to her future care needs regardless of the occurrence of the accident was limited and somewhat general in nature. However, the judge was obliged to do the best he could on the evidence. In my view, the evidence showed a risk outside the realm of speculation that Ms. Pevach would have had significant future care needs due to her pre-existing conditions. Accordingly, the judge erred in failing to determine whether there was a real and substantial possibility that Ms. Pevach's pre-existing conditions would have led to a need for extended residential care or community support services in the future regardless of the accident, and, if so, the relative likelihood of that event.

[113] Given the foregoing, I agree with Mr. Wright that appellate intervention is appropriate. I also agree with both parties that, in the circumstances, we should undertake the necessary analysis and apply the appropriate contingency deduction based on the trial record.

[114] In my view, deductions of 15 percent from the extended residential care component of the cost of future care award and 20 percent from the community support and taxi services components of the award are appropriate. Although Ms. Pevach's life improved after she moved to Vernon, the move was relatively recent and she continued to suffer from "the challenges associated with addressing PTSD, agoraphobia and anxiety". Those conditions were chronic, severe, and debilitating, and they compromised Ms. Pevach's ability to manage her Hepatitis C and the other demands of her life successfully. She also continued to consume alcohol daily, and thus remained vulnerable to fall-related injuries, including head trauma, as reflected by her March 2015 attendance at the hospital emergency department in Vernon suffering from a head injury.

[115] In all of the circumstances, I would characterize the likelihood that Ms. Pevach would have required extended residential care prior to the age of 85 regardless of the occurrence of the accident as real, but low, bearing in mind her stabilized housing and its beneficial effect on her ability to manage her pre-existing physical and mental conditions. Bearing in mind the nature, severity, and persistence of those conditions, I would characterize the likelihood that she would have required some form of regular community supports regardless of the occurrence of the accident as moderate.

Conclusion

[116] For the foregoing reasons, I would allow the appeal to the extent of applying a 15 percent contingency deduction to the extended residential care component of the cost of future care award, and a 20 percent contingency deduction to the community support and taxi services components of the award.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Horsman"