IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Laley v. Anderson,*
2024 BCSC 1085

Date: 20240624
Docket: M154059
Registry: Victoria

Between:

Jenaya Laley

Plaintiff

And

Robert Kent Anderson

Defendant

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for Plaintiff:	D. MacIsaac M. Brcic
Counsel for Defendant:	N. Mosky K. Egner
Place and Dates of Trial:	Victoria, B.C. February 26–29 and March 4–6, 2024
Place and Date of Judgment:	Victoria, B.C. June 24, 2024

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Introduction

[1] The plaintiff Ms. Laley seeks damages for injuries suffered in a motor vehicle accident on April 11, 2014. Liability for the accident is admitted. Ms. Laley has chronic pain throughout her body, worst in her low back and hips, and depression and anxiety. Other than a brief attempt to return to work soon after the accident, she has not been employed since. She claims limited residual capacity to work.

[2] The defendant submits that Ms. Laley suffered minor injuries which have since resolved, and that her current chronic pain and mental health issues are not caused by the accident, but by pre-existing conditions and post-accident events. Further, to the extent any of Ms. Laley's injuries are caused by the accident, she has failed to mitigate her damages.

[3] Ms. Laley is currently 37 years old. She lives in Victoria with her two children ages 9 and 7. She was 27 years old at the time of the accident.

Ms. Laley's Evidence

[4] Ms. Laley attended high school in Sooke through Grade 12, but did not graduate. Following this, her jobs were almost all in restaurant kitchens. Her annual employment income from 2011 to the time of the accident was between $7,000 and $21,000. At the time of the accident, she had been working full-time as a cook/prep cook at an Original Joe's Restaurant ("Joe's"). Prior to then, she had been unemployed for four to six months. Part of this time was attributed to a foot injury.

[5] Ms. Laley wanted to become a Red Seal chef. To do so, she would have to attend Camosun College. She enjoyed her work at Joe's. She and the manager at Joe's, Dirk Britton, had talked about her going to school to further her skills as a cook. She understood Joe's would pay for her training. Since high school, she has not pursued further education.

[6] At the time of the accident, Ms. Laley was single and had been living with her mother, Jennifer Turner, for about a year. Her mother works full-time as a licensed

practical nurse. They shared household tasks. Ms. Laley did not have any symptomatic health conditions or physical limitations. She was "happy and easy going". Recreationally and socially, she was active. She was "adventurous", and enjoyed various outdoor activities. She read a lot and played video games.

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[7] Ms. Laley had three relevant conditions prior to the accident. First, she was overweight. While reports vary, and she had gained and lost some weight prior to the accident, she was medically obese. Second, unbeknownst to Ms. Laley and her mother, at the time of the accident, Ms. Laley was 30 weeks pregnant. This was discovered when she went to the hospital on the day of the accident. Third, after her first child was born, and when x-rays could be safely taken, Ms. Laley was diagnosed with two pre-existing conditions in her lumbar spine: spondylolisthesis and spondylolysis. Spondylolisthesis is a slippage of one lumbar vertebra over another vertebra. Ms. Laley had a 25% slippage of L5 over S1. Spondylolysis is a breakdown of the bony bridge between two lumbar vertebrae.

[8] On the day of the accident, Ms. Laley was a front seat passenger in a pickup truck driven by her mother, which was stopped at an intersection. Ms. Laley was bent over picking up a water bottle when the truck was rear-ended by the defendant's vehicle. The defendant was driving approximately 65 km/hr in the moments before the collision. The truck was pushed into the vehicle in front. Ms. Laley was wearing a seat belt with a shoulder strap. The air bags did not deploy. Pictures of the vehicles show significant damage to both.

[9] Emergency personnel arrived. While Ms. Laley was speaking to them, her knees felt weak and she fell down. She started to feel pain. It "came over [her] like a wave". Her mother was taken to hospital and discharged later that day.

[10] Ms. Laley did not immediately go to the hospital. Ms. Laley's boyfriend arrived to pick her up. While in his car, Ms. Laley started to feel pain in her chest, shoulder, abdomen, legs, neck, and low back. She had a burning feeling across her stomach and shooting pains. Her chest felt like it was being "squished by an elephant". Her

shoulder felt like it was tearing and a sledge hammer had hit her. Her boyfriend took her to the hospital.

[11] At the hospital, her pregnancy was discovered. Ms. Laley was admitted to hospital for four days. This almost entirely concerned the pregnancy. The placenta was partially detached, which she attributes to the accident. I note that there is no medical evidence to support a causal connection. Ms. Laley stated that she had been losing weight and had “just finished her period” the day before. While in hospital Ms. Laley had pain in her stomach, and “really bad” pain in her back, shoulders, and neck.

[12] Ms. Laley was “in agony” when she returned home. She had pain all over, but mostly in her low back, ribs, stomach, neck, shins and calves, hips, upper thighs, ankles and wrists. The “jolting pan was so bad - trying to sit, especially on the toilet seat” that she was “jumping in pain and screaming uncontrollably every time”. The pain was a nine on a scale of ten.

[13] Her son was born at the end of May. She had another child, a daughter, in January 2017. She and her children moved from her mother’s home in August 2017. She has remained single. The children’s father is not involved in their lives.

[14] Ms. Laley described the pain and symptoms throughout her body, almost all of which have not improved in the ten years since the accident. She states that even now, some days “it feels like I just got out of hospital if not worse” and on a good day it is “maybe 6-7” out of 10. The symptoms, by area or topic, are described below.

a) Lower Back and Hips: These are her worst symptoms. She has back pain every day, all day. It radiates up her back to her arms, and down her legs to her feet. She tries to do little things but she is “screaming in [her] head”. Any movement makes it worse. When the pain in her hips is really bad, it feels like they are tearing apart, and her legs give out and she falls. She can only walk for five minutes without pain and she has a limp. Sitting and standing are both “really uncomfortable”. Her low back has not improved

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in any way. These limitations impact her ability to do housework, to care for and play with her children and take them places, and to work;

b) Neck and Shoulders: Sometimes these are "really sore, especially when [her] pain levels are really high" and the pain radiates there. If she sleeps on her right side, pain from her shoulder radiates up her neck. The pain is activity dependent;

c) Legs: She has pain in her thighs and knees, and numbness and tingling going down to her feet. The tightness in her calves has been alleviated, but nothing else has improved. These impact her ability to walk, do housework and care for and play with her children;

d) Wrists: She has a "tearing feeling" and her fingers "get burning hot and swell and are numb and tingling at times". It impacts her ability to lift things without dropping them, and to do her hair and make-up;

e) Chest: She had bruising and chest pain where the seatbelt crossed over. In June 2015, about a year after the accident, she had a bone scan which suggested old rib fractures. Once in a while she still gets pain there. She will hear a pop and the pain returns until her ribs "pop back in again";

f) Ears: It feels like plastic wrap is crinkling in her ears. Her hearing clouds over like there is a shell over her ears or she has water in them. It is constant and sometimes yawning eases it, but then "it just fills back up". The symptoms have not improved;

g) Jaw: It clicks and is painful when she opens wide, yawns, coughs, or chews hard foods. It has not improved;

h) Sore Eyes and Headaches: Her eyes get "really sore" when reading, and she cannot concentrate on a screen. Keeping up with emails from her

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children's school is "torture". When her pain level is high, it can cause headaches, which she gets a couple of times per week;

i) Concentration and Memory: She "can't seem to organize [her] thoughts well enough to organize [her] home, or appointments". She feels like she is "scrambled, frazzled" and is forgetting things. She disagrees that her cannabis use could be affecting her concentration or memory;

j) Incontinence: She has had urinary and fecal incontinence from some time after the car accident, but the timing is unclear;

k) Mood: Her mood has been "all over the place" since the accident. She has had difficulty controlling it, especially her anger and patience. She is sad and disappointed in herself for not completing daily tasks and feels like she is not properly caring for her children. She has lost some friendships because she does not want to socialize as much;

l) Weight: She has gained over 100 pounds since the accident. She has been advised by doctors to lose weight, and has been told this is contributing to her symptoms. She has tried to lose weight by eating healthy meals, and getting her pain under control so she can exercise more, but has not been successful; and

m) Sleep and Energy: Her sleep is disrupted because of the pain, but when lying on the couch during the day, she often falls asleep. Her energy level is "severely decreased". She is tired and sore, and "just going through the motions, doing the bare minimum".

[15] Prior to the accident, she saw her family physician, Dr. White. Once her pregnancy was discovered, she saw Dr. Olsen. Dr. Olsen told her that she would see her for the accident injuries, but Ms. Laley found her conversations with Dr. Olsen about these were unhelpful, so she returned to Dr. White. Dr. White has since retired, and was not available to testify.

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[16] Once under Dr. White's care again in April 2015, Ms. Laley saw Dr. White mainly for her low back and hip issues. Dr. White ordered x-rays, a bone scan, sent her to specialists, and referred her to counselling, chiropractic treatment, physiotherapy, and massage. Dr. White also gave her an injection in her low back.

[17] Ms. Laley saw a hearing specialist in September 2015. Hearing tests did not show any abnormality. She attended Drs. David and Jannice Bowler for two months in 2016 for injection-based therapy with lidocaine. She saw Dr. Lapp, orthopaedic surgeon, at the request of defence counsel in May 2017. Dr. Lapp told her to lose weight. No report from Dr. Lapp was tendered in evidence. Ms. Laley saw a general surgeon in November 2017, a neurologist in May 2019, and an optometrist in November 2020. She saw a neurosurgeon, Dr. Reid, in September 2021. He told her to lose weight and gain muscle. She saw David Rosen, an occupational therapist, in December 2023 at the request of defence counsel, but that appointment was cut short as she was in a lot of pain, and no report from Mr. Rosen was served.

[18] She talked to Dr. White about her depressed mood. He recommended that she take antidepressants and see a psychologist, but she did not follow his recommendation regarding anti-depressants. She was worried that the medication would make her "comatose", or "like a zombie" for her children. She attended a psychologist six times in November and December 2015. She attended a counsellor between November 2021 and January 2022. There has been no improvement in her mood since the accident. If anything, it "kind of gets worse, the more limited" she is.

[19] Ms. Laley attended massage, physiotherapy, acupuncture and chiropractic treatment at various times between April 2014 and March 2018. From August 2015 to June 2023, she was followed by occupational therapist, James Bardy. She attended a kinesiologist, including through video calls during the COVID-19 pandemic. Otherwise, there is little evidence of active rehabilitation between April 2018 and June 2023 when she attended Ryan Sanderson, a kinesiologist, and subsequently attended 12 sessions with him between August and October 2023.

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[20] Ms. Laley states that she did exercises prescribed by her health care providers, and after the sessions with Mr. Sanderson ended, she does exercises and stretches "here and there by myself". In February 2024, the same month the trial started, she purchased a monthly gym pass. She had a gym pass in prior years when she was attending therapy with a health care provider. When asked why she did not have a gym pass consistently for five years, she said ICBC took a long time to approve gym passes and then only for a limited time, and then there were closures due to the pandemic. Her gym pass is subsidized.

[21] Ms. Laley has equipment and aids at home. This includes light weights, a TENS machine, a back brace, and massager. She sometimes uses a self-prescribed walker in her home, which she inherited, when the pain is bad and she "can't hold [herself] up". If she is grocery shopping, she uses the cart for support.

[22] She takes over-the-counter pain relievers (pills and ointments), CBD lotion for pain, and smokes cannabis daily. She agreed the THC in cannabis can impact her function depending on the amount, but says it takes the edge off the pain and calms her down. She agreed this was not prescribed. She used cannabis prior to the accident but the increase in use since is "quite significant".

[23] She can "sort of" clean and look after her home, but not to her satisfaction. She has to take breaks. Heavier tasks in her home are done by her mother, a friend, or her son as much as he can, or else they are not done. She makes simple, easy meals, or waits for her mother to come and make meals, or orders take-out. Her mother assists her with: doing dishes, cleaning, picking up the children, shopping for groceries, bathing the children, and vacuuming. If Ms. Laley is in a lot of pain, her mother takes over housework and caring for the children.

[24] Ms. Laley has never had a driver's license. She agreed she would be much more independent if she did. No physician has advised her against getting a license. She has put this limitation on herself, along with being anxious. She received counselling for driving anxiety for one session. She is concerned that if her pain is

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too high, she will not be able to react in time if something happens, especially if her children are in the car. Ms. Laley mostly relies on her mother to drive her to appointments and to take her children to school, and to look after her children if she is having treatment. If her mother cannot do it, her friends help.

[25] She believes her injuries have affected her children because they have a “broken mom”. Her injuries have put a strain on her mother as she relies so much on her. She states that her mother “is supposed to be done raising kids and she is raising mine”.

[26] Since the accident, Ms. Laley has not played any sports. She has been on a fishing boat twice with family, but both times they returned early. She has been on driving trips with her mother to Alberta, Vancouver and Abbotsford, but they stopped regularly because she was in pain. She has not played video games. She volunteers at her children’s school occasionally. She does not think she could commit to more.

[27] Within the first two weeks after the accident, Ms. Laley tried returning to work for one or two shifts at Joe’s but was unable to complete a shift. After her son was born, she was on maternity leave for the next year. Other than the attempt to return to work, Ms. Laley has not worked outside the home since the accident, and has not made another attempt to return to work. She is unable to return to work as a cook.

[28] Except for the help she receives from her mother, she is solely responsible for the care of the children. She has full-time custody of the children. Before they were in school, they were not in daycare.

[29] She agreed that even if the accident had not occurred, she would have been off work “for a bit” for maternity leaves. She did not agree that she would not have pursued a Red Seal at Camosun. She said “it could have happened”. Her mother or her partner could have looked after her son. Her children could have gone to daycare and she could have worked around her mother’s shift schedule. Later she said she “definitely” would be working and also going to school, and that she could “figure it out”, as she wanted to make her own way.

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Lay Witness Evidence

[30] Mr. Britton, the former owner of Joe's, described Ms. Laley as a good worker. As kitchen staff are hard to find, she could have moved into management roles given time. He did not testify about discussing further training with Ms. Laley, but said that Joe's encouraged and accommodated staff in pursuing Red Seal certification. He said quantifying tips was challenging, but would generally be $3 to $5 per hour.

[31] Mr. Sanderson, the kinesiologist with whom Ms. Laley attended exercise sessions in the autumn of 2023, testified that Ms. Laley was significantly deconditioned. There were delays in getting the sessions started. He tried contacting Ms. Laley multiple times without response. Ms. Laley said her phone was broken. Once they started, Ms. Laley was always willing to try exercises. He discussed with Ms. Laley the importance of consistency of exercise.

[32] Ms. Laley's mother, Ms. Turner testified. She is currently 59 years old. She gave similar evidence to Ms. Laley regarding their activities, Ms. Laley's household tasks and recreational activities before the accident, and her condition since the accident. While in hospital, her daughter appeared to have lot of pain in her back, shoulder, chest area, and stomach. She saw her daughter walk to the bathroom while holding her back and limping. Ms. Laley lived with her until August 2017. Ms. Laley and her children had to move out because Ms. Turner lives in a mobile home park that is adults only. Ms. Turner would prefer for them to live together if they could afford to do so. She had this plan before the accident.

[33] Ms. Turner sees her daughter every day. If she is working a day shift, she will go to Ms. Laley's home after work, and help with the children and household tasks before returning to her own home. Lately, Ms. Turner has been working more night shifts so that in the morning, she can go to Ms. Laley's home to help get the children ready for school before returning to her home, and then she picks the children up after school. She estimates that she spends "close to 40 hours" per week assisting Ms. Laley. Usually she drives Ms. Laley to her appointments. Ms. Turner agreed that

Ms. Laley is a very good mother, and is capable of looking after her children, of cleaning, shopping on her own, and of running a household, but not completely on her own. Ms. Laley does household tasks in 10 to 15-minute spurts.

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[34] Three friends of Ms. Laley testified. All described Ms. Laley as a good mother. Samantha Bell and Christina Warbrick have each known her since they were children, and Leilani Jonas has known her since 2017. They all testified about their observations of Ms. Laley's function, to the extent they have seen her, which corroborated Ms. Laley's evidence.

Expert Evidence

Dr. Christopher Watt

[35] Dr. Watt is a general practitioner, has a diploma in sports medicine, and has an interest and experience in disability evaluations and in the musculoskeletal aspects of occupational medicine. He was qualified as such. He assessed Ms. Laley on October 19, 2021, at the request of her counsel.

[36] Dr. Watt opined that Ms. Laley had two pre-existing conditions at the time of the accident: (1) bilateral L5 spondylolysis, and grade 1 spondylolisthesis (low grade); and (2) significant type 3 (medical) obesity with a BMI of over 40.

[37] In his report, Dr. Watt noted that the hospital records from Ms. Laley's post-accident admission show that her complaint was primarily of pain in the right shoulder and collarbone area associated with seatbelt injury. While in hospital, "it was noted that she was not reporting any pain in her neck, back, chest or abdomen". Dr. Olsen's records for 12 visits from April to December 2014 also do not document any complaints of accident-related pain symptoms. In January 2015, Ms. Laley reported that she had been having right shoulder, neck, and low back pain. This was the first documentation of pain other than right shoulder pain.

[38] There is a discrepancy between these records and what Ms. Laley told Dr. Watt (and defence expert Dr. de Ciutiis) regarding her symptoms, which is that

her low back pain began immediately after the accident. This discrepancy is the significant factor that (initially at least) separated Dr. Watt's and Dr. de Ciutiis' opinions on the low back pain's cause. Dr. Watt discounted these records, and assumed what Ms. Laley told him is true. Dr. de Ciutiis assumed these records are true, and discounted what Ms. Laley told him. I will return to this later.

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[39] On examination, Ms. Laley was significantly deconditioned and her core strength was very poor. Dr. Watt observed several excessive pain behaviours, and noted a history of this in clinical records in 2016 and 2017. Ms. Laley's responses to even gentle palpation strongly suggested some psychological overlay. Her pain responses in some areas were non-organic, with non-anatomical tenderness distribution, and she demonstrated pain and withdrew on palpation in areas where she had not sustained any injury. Waddell's testing for non-organic pain was positive. This suggests the "presence of significant psychological overlay which is probably colouring her pain perception". This is very common in the context of depression and anxiety.

[40] At the time of his examination, she had the following conditions:

- Low Back – L5-S1 Spondylolisthesis, L5 spondylolysis, mechanical low back pain, post-traumatic myofascial pain syndrome
- Neck/posterior shoulder girdles – Post-traumatic myofascial pain syndrome
- Jaw pain – temporo-mandibular joint syndrome, post-traumatic myofascial pain syndrome
- Knees – Patellofemoral syndrome (bilateral)
- Wrists – ligamentous strain
- Multiple rib fractures (resolved)
- Obesity
- Deconditioning syndrome (severe)
- Major depressive episode (moderate severity, partial remission)
- Post-traumatic stress disorder
- Urinary/fecal incontinence

[41] Dr. Watt opined that all of these, except the incontinence, were caused or contributed to by the accident. The incontinence was outside his expertise, but it is very common for pregnancy and delivery to cause this.

[42] With respect to the low back symptoms, Dr. Watt opined that the accident aggravated and permanently worsened the pre-existing but asymptomatic spondylolysis and spondylolisthesis. These conditions probably increased her vulnerability and are a significant contributing factor (if not the dominant factor) in her condition. He opined that “while it is possible” that Ms. Laley may have developed chronic low back pain without the accident, “the onset of low back pain shortly after the collision” strongly suggests that the accident caused these previous asymptomatic conditions to become symptomatic. The altered bio-mechanics of having and caring for a new baby likely perpetuated the symptoms.

[43] Spondylolysis and spondylolisthesis typically develop in childhood, and in milder forms are often asymptomatic, and in more cases than not are non-progressive. While low back pain from these conditions can develop later in adulthood without trauma, it more commonly presents in childhood and is associated with more severe slippage than in Ms. Laley’s case.

[44] Dr. Watt agreed that Ms. Laley had several conditions that increase the risk of worsening spondylolisthesis. First, during pregnancy, the hormone relaxin causes muscle and ligament laxity, which can promote spondylolisthesis. The pregnancies may have resulted in some progression of the spondylolisthesis that brought out her pain. Second, obesity increases the risk of worsening spondylolisthesis. Ms. Laley’s degree of obesity is a significant risk for joint dysfunction and pain. In this case, he assumed that the low back pain onset was coincident with the accident. At that time, Ms. Laley was already obese and 30 weeks pregnant. If obesity had a significant role, he expects Ms. Laley would have developed some back pain prior to the accident. Third, trauma and deconditioning are common causes of progression of spondylolisthesis, on their own or together.

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[45] CT imaging of Ms. Laley's lumbar spine in March 2019 showed multi-level mild disc bulges from L2 to S1, now grade 2 spondylolisthesis, and mild narrowing of the spinal canal as well as marked narrowing of the neuro-foramina bilaterally at the L5-S1 level. This imaging showed worsening of Ms. Laley's spondylolisthesis and spondylolysis.

[46] Ms. Laley's low back pain is likely permanent. She is at increased risk for progression of the spondylolisthesis/spondylolysis. Ms. Laley did not have adequate active rehabilitation to her low back. He recommends active rehabilitation. Excessive passive therapies should be avoided.

[47] As for the other injuries, Dr. Watt opined that the psychological impairments are multi-factorial and are caused by the chronic pain, inability to work and financial stress, disordered sleep, and stress from a former abusive relationship and being a single parent. There is a "vicious spiral" between depression and chronic pain. Based on Ms. Laley's description, she had symptoms of PTSD including accident related nightmares and intrusive thoughts. Dr. Watt noted that there are clinical records indicating that Ms. Laley did not attend mental health appointments or take anti-depressant medication. Depression generally responds very well to adequate treatment. He strongly recommends anti-depressant medication. He expects that Ms. Laley's pain will improve if her depression and anxiety are treated. However, given the pain's chronicity, and the underlying problem in her back which has progressed, she will never be completely pain free.

[48] The further weight gain is likely due to Ms. Laley's lack of activity and exercise because of pain. Her neck, shoulders and wrists are at maximum medical improvement. In the absence of a history of any other accident, he concluded that she suffered rib fractures because a June 2015 bone scan showed uptake (active healing) in some ribs, and Ms. Laley reported that she had chest pain immediately after the accident. The jaw pain was probably due to unconscious teeth grinding and increased muscle tension in the chewing muscles, which likely arose in response to depression and anxiety symptoms. Dr. Watt agreed that this opinion was "completely

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speculative”. The jaw pain is treatable and should improve. The knee pain is probably from loss of quadriceps strength due to deconditioning and weight gain. The knee pain should improve significantly with conditioning and weight loss.

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[49] Ms. Laley reported to Dr. Watt that she is independent for all activities of daily living (e.g. dressing, bathing) and “essentially independent” for instrumental activities of daily living (e.g. cooking, cleaning), although her mother and friends assist her, particularly with driving. There is no reason why Ms. Laley is not capable of getting her driver’s licence. Ms. Laley would have difficulty driving distances, and her PTSD should be addressed before she attempts to drive.

[50] Dr. Watt opined that Ms. Laley is not fit to return to her job as a cook. She is now only fit for sedentary to light duty work, ideally in a role that permits her to move between sitting, standing, and walking. She should avoid work requiring more than very occasional bending, stooping, or crouching, and should avoid any jobs requiring sustained body positions. Ms. Laley told him she would like to re-train as an ultrasound technician and he “certainly would support her trying this” as she “should be able to meet the physical demands of this job”, which is generally light and where she could move around, although she would work in pain. Dr. Watt agreed nothing is medically stopping Ms. Laley from furthering her education.

[51] Dr. Watt made several treatment recommendations which included anti-depressant and short-term sleep medication, treatment by a psychologist for counselling, a weight loss program, and exercise.

Dr. Julian de Ciutiis

[52] Dr. de Ciutiis is a physiatrist and was qualified in that area. He assessed Ms. Laley on May 8, 2023, at defence counsel’s request.

[53] Dr. de Ciutiis, diagnosed Ms. Laley as follows:

- Chronic multifactorial diffuse back pain originating in lumbar area.
- Grade 2 whiplash-associated disorder with resultant myofascial pain involving her right paracervical, trapezial, and parascapular areas.

- Endorsed soft tissue injuries along her seatbelt line with subsequent bruising.
- Paresthesia's in bilateral lower and upper extremities, etiology unclear. Further electrodiagnostic testing is suggested.
- Concussion is unlikely in this case.
- Cervicogenic headaches.
- Rib fractures for which I defer to Orthopaedics.
- Mood disruption for which I defer to Psychiatry and/or Psychology.
- Sleep disruption.

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[54] In his report, Dr. de Ciutiis opined that except for the back pain and paresthesias, discussed below, these conditions were caused or contributed to by the accident. A concussion was unlikely and Ms. Laley's cognitive complaints are likely caused by the mood disruption.

[55] With respect to the low back pain, in his report, Dr. de Ciutiis opined that although Ms. Laley told him she had severe low back pain that began immediately after the accident, this was not documented in the hospital records. The records document only right shoulder and chest pain, and on physical examination there was no cervical, thoracic or lumbar spine tenderness. As a result, Dr. de Ciutiis concluded that the accident probably did not cause the back pain. The CT from March 2019 showed bilateral spondylosis and grade 2 spondylolisthesis and these are probably contributing to her current back pain. Dr. de Ciutiis referred to the September 2021 consultation report of Dr. Reid, neurosurgeon, who opined that Ms. Laley's weight was overloading her lumbar spine and that this was a large contributor to her chronic back pain. Dr. de Ciutiis agreed, and concluded that absent the accident, Ms. Laley would probably have similar back pain to what she has now. The cause of the back pain is multi-factorial. Ms. Laley has abnormal imaging, and pain with palpation, which suggests there is muscle pain as well.

[56] In cross-examination, Dr. de Ciutiis was provided excerpts from the records of Ms. Kinnis, massage therapist, and Mr. Mitchell, physiotherapist, whom Ms. Laley attended in April and May 2014 after the accident. On April 16, 2014, Ms. Laley's

chief complaint was her right upper shoulder, and there is a note of some numbness and tingling in her fingers and her "legs + lower back starting to hurt". On April 29, 2014, she complained of low back and hip pain. On May 22, 2014, she complained of pain in her right shoulder, upper, middle and low back, and both hips, and sometimes a pins and needles sensation in her legs. Dr. de Ciutiis stated that had he been provided these records, he would have opined that the back pain is in part secondary to the accident, as well as the other factors he had already mentioned, including the spondylolisthesis and spondylosis, her weight, and the pregnancy and relaxin hormone which can worsen spondylolisthesis.

[57] In his report, Dr. de Ciutiis stated that there were no early post-accident reports of paresthesias in Ms. Laley's arms or legs. The earliest mention of leg paresthesias was in May 2019, associated with the worsened CT imaging, and there was no documentation of arm paresthesias. Considering the lack of documentation, he was unable to determine causality. He recommended an MRI of the lumbar spine and electrodiagnostic testing, as there could be many possible causes. However, after being shown Ms. Kinnis' and Mr. Mitchell's records, he opined that if the paresthesias were present then, he would consider them related to the accident.

[58] Given the time since the accident, it is unlikely Ms. Laley's pain will resolve, but by adhering to his recommendations, her symptoms may improve. Those recommendations include an exercise and strengthening program, weight loss, follow-up for psychiatric or psychological treatment, and referral to a pain clinic. Extensive passive therapies should be avoided.

[59] Ms. Laley reported to Dr. de Ciutiis that she is independent for all activities of daily living and instrumental activities of daily living, with the exception of clipping her toenails. He opined that Ms. Laley will continue to be independent with regard to those activities, noting that some higher-level activities may cause some pain. He suggested pacing and activity modification as necessary to maintain independence.

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[60] Ms. Laley advised Dr. de Ciutiis that she is completely unable to work as a result of the accident and her worsening back pain. In Dr. de Ciutiis' opinion, Ms. Laley has not had appropriate intervention to date related to attempts to return to work, and her claimed inability to work and lack of attempts "seem excessive as they relate to her injuries". He recommended a full cognitive and functional capacity evaluation.

Mr. Philip Towsley

[61] Mr. Towsley is an occupational therapist and functional capacity evaluator, and was qualified in those areas. He did a functional capacity evaluation ("FCE") of Ms. Laley on November 17, 2023 at the request of her counsel.

[62] Ms. Laley provided variable physical efforts during testing "due to constraints of her symptoms reactivity". The testing indicated "the presence of disproportionate illness behaviour/ non-organic signs". Ms. Laley underestimated her ability to sit and stand. Otherwise, objective measurements and observations closely correlated with reports of her symptoms and limitations during much of the testing. Her presentation at the end was more consistent with a less pain than she indicated.

[63] He concluded that several indicators suggested that "Ms. Laley's issues are now more multi-factorial than simply a musculoskeletal issue". Factors in the psychosocial realm are likely impacting on her function and symptoms. Screening tests and questionnaires indicated the severe depression and anxiety, and high levels of perceived injustice and a symptoms catastrophizing, the latter two of which have been shown to lead to more severe and persistent symptoms of pain, depression and PTSD and to predict prolonged recovery.

[64] Testing showed that Ms. Laley can function at a sedentary strength level with aspects of light and medium strength. She was able to perform sitting, standing, walking, bending/stooping, neck positioning, reaching, handling/gripping, stair climbing, and low-level work (if seated), but reported symptoms increased with most activities. Tolerances for most positions and activities were limited.

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[65] Ms. Laley does not meet the job demands of a cook. He made recommendations for any future work, similar to that of Dr. Watt. Given Ms. Laley's time away from work and her symptoms, any return to work should be done on a graduated schedule. Ergonomic equipment should lead to an increase in working tolerance. He recommended vocational assistance, further exercise rehabilitation, counselling, and occupational therapy assistance. He agreed that if Ms. Laley's psychological symptoms improved, her ability to work should improve, but could not opine beyond that. This is a complex case, and even with the progressive goal attainment program ("PGAP") which he recommends (discussed below), the program is only about 30% effective, which is considered extraordinary when dealing with people with chronic pain.

[66] Mr. Towsley made equipment recommendations, such as a light weight vacuum and long-handled cleaning tools, to increase household activities. Ms. Laley needs to be encouraged and supported to do her own activities, as being independent has physical and psychosocial benefits. If, after these are implemented, Ms. Laley is not able to be fully independent, it would be reasonable to consider some assistance. At this point, two hours of assistance per week for housekeeping and child care would be reasonable.

Ms. Margherita Bracken

[67] Ms. Bracken is an occupational therapist and a certified vocational rehabilitation professional and was qualified the latter area. She assessed Ms. Laley on November 21, 2023, at defence counsel's request.

[68] Ms. Bracken opined that Ms. Laley would be best served by participating in a work hardening program for physical conditioning and building confidence with computer-based skills. She recommended a gradual period of entry-level work prior to progressing to training. She suggested a six-week schedule of increasing hours. Ms. Bracken suggested a telephone solicitor or telemarketer position, or a cashier position in a smaller business with minimal material handling. Once Ms. Laley's tolerance increases, her residual physical capacity suggests that other opportunities

would be available. Ms. Laley could pursue further training, as this would increase her vocational options considerably. Ms. Bracken gave examples: a medical office administrator or health unit clerk or taxi or non-emergency dispatcher position, all of which require some short-term training.

[69] Ms. Bracken recommended support from a vocational rehabilitation professional, and the PGAP. This is a 10-week program designed by a psychologist, specifically to help persons return to work and activities in the presence of psychosocial factors. She agreed that chronic pain, depression and anxiety can be barriers to employment, depending on the limitation and person. Obtaining a driver's license would increase Ms. Laley's access to the labour market.

Mr. Niall Trainor

[70] Mr. Trainor is a vocational rehabilitation professional and was qualified in that area. He did not assess Ms. Laley, but provided a response report dated January 9, 2024, to that of Ms. Bracken, at the request of Ms. Laley's counsel.

[71] Mr. Trainor agreed with Ms. Bracken's methodology and rehabilitation plan, however, Ms. Bracken's report did not provide a vocational prognosis. Ms. Laley has not returned to work in nearly 10 years. A hiatus of that duration, her chronic pain and functional impairments, and multiple other symptoms, pre-figure a poor vocational prognosis. If Ms. Laley attempts the rehabilitation plan proposed by Ms. Bracken, it is possible but not probable, that she would return to employment and re-establish a durable attachment to the workforce. Workers with chronic pain who remain off work can become discouraged, and chronic pain and functional limitations can induce perceptions of disability, causing efforts to return to work to stop, creating a self-fulfilling prophecy. It is usually very difficult to shift a perception of disability that has been reified over a prolonged period. The PGAP tries to address this. He agreed he had not met Ms. Laley so cannot say this applies to her. The poor prognosis for return to work also reflects labour market realities, where

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employers have access to able-bodied workers, who have not been away from the labour force for a long time. An employer would have to be accommodating.

Mr. James Bardy

[72] Mr. Bardy is an occupational therapist and was qualified in that area. He assessed Ms. Laley at her home on November 2, 2021, at the request of Ms. Laley's counsel for the purpose of providing a cost of future care report.

[73] Mr. Bardy made recommendations in four areas: (1) rehabilitation services (active rehabilitation for strength, dietary help for weight loss, counselling for mood, and some passive treatment for pain flare-ups); (2) medical equipment to assist posture, sleep and stable transfers; (3) vocational assistance to return to employment; and (4) child minding so Ms. Laley can access therapies. Ms. Laley's claims based on his recommendations are discussed under the cost of future care section of these reasons.

Ms. Sheila Branscombe

[74] Ms. Branscombe is an occupational therapist and was qualified in that area. She did not assess Ms. Laley, but provided a response report dated December 20, 2021, to that of Mr. Bardy, at the request of defence counsel.

[75] Ms. Branscombe raised the following issues: (1) Mr. Bardy did not do a full FCE; (2) Mr. Bardy was a treating provider so may not be as objective; (3) Ms. Laley has confounding factors: her weight, two children, and the results of psychosocial testing; and (4) Mr. Bardy used an undefined pain scale which does not provide meaningful measurement of functional impairments. Ms. Branscombe commented on a number of Mr. Bardy's cost of future recommendations. Ms. Branscombe also stated in her report that Ms. Laley "has not worked in 7 years which significantly reduces the likelihood of Ms. Laley returning to any form of work".

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Mr. Robert Wickson

[76] Mr. Wickson is an economist and was qualified in that area. He provided a report dated November 1, 2021, and an updated report dated December 4, 2023, at the request of Ms. Laley's counsel.

[77] He provided present value cost of future care multipliers, and calculations of future capacity loss based on statistical data and certain assumptions. The statistical data was the earnings of all persons working in the National Occupation Classification ("NOC") category for Chefs. This category excludes the NOC category for Cooks, kitchen helpers, and restaurant and food service managers. The description of the Chef category appended to Mr. Wickson's report indicates that it requires secondary school completion, and trade certification or equivalent credentials, or equivalent training and experience. Mr. Wickson was not asked to make calculations for the NOC category for Cooks, or to compare Ms. Laley's historical earnings, to statistical earnings. He opined that at the time of the accident, Ms. Laley was 27 and her earning history was "not solidified". He focused on future capacity based on the assumptions given to him.

Ms. Hua (Judy) Ren

[78] Ms. Ren is an economist and was qualified in that area. She provided a report dated December 22, 2021, and an updated report dated January 9, 2024, in response to Mr. Wickson's reports, at the request of defence counsel.

[79] She made the same calculations as Mr. Wickson, using the same assumptions, but based on the categories for both Chefs and Cooks. Her total for Chefs is lower because in her view, Mr. Wickson's LMCs do not adequately account for the effect of part-time work. Earnings for Chefs are about 26% higher than earnings for Cooks. She attached the NOC description for Cooks. Completion of secondary school is usually required. Trade certification is available, but voluntary. The main difference between the Cook and Chef categories is education. Ms. Ren compared Ms. Laley's historical earnings to that of statistical earnings of her peers.

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Ms. Laley's earnings were about 81% of Chefs and 92% of Cooks for 2011 to 2013, after taking statistical LMCs into account. For 2014, if Ms. Laley had continued at Joe's and worked full-time, with no LMCs, her earnings would be similar to that of full-time full-year Cooks with no LMCs. Unreported tips would not be reflected in the statistical data.

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Legal Framework

Causation and Assessment of Damages

[80] A plaintiff bears the burden of establishing causation on a balance of probabilities. That is, the defendant's tortious conduct in whole or in part, caused the accident, and the injuries the plaintiff suffered in the accident caused or contributed to the loss for which the damages are claimed: *Smith v. Knudsen*, 2004 BCCA 613 at para. 26; *Grewal v. Naumann*, 2017 BCCA 158 at para. 45.

[81] The basic test for causation is the "but for" test: *Clements v. Clements*, 2012 SCC 32. A plaintiff must establish that but for the defendant's tortious act, the injury would not have occurred. A plaintiff is not required to establish that the defendant's tortious act was the sole cause of the injuries so long as it is part of the cause beyond *de minimus*: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183. Causation need not be determined by scientific precision: *Snell v. Farrell*, [1990] 2 SCR 311 at 328, 1990 CanLII 70.

[82] The basic principle in assessing damages is that a plaintiff is to be put in the position they would have been in had the tort not been committed: *Athey* at para. 32; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[83] In considering a plaintiff's original position, tortfeasors must take their victims as they find them, even if the injuries are more severe than would otherwise be expected. But tortfeasors are not responsible for the consequences of a pre-existing condition that the plaintiff would have experienced in any event: *Athey* at paras. 34–35; *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 24–28; *Dornan v. Silva*, 2021 BCCA 228 at para. 44.

[84] In assessing damages, past events must be proven on a balance of probabilities: *Athey* at para. 28. However, for both past and future hypothetical events, both positive and negative, the burden of proof is whether there is a real and substantial possibility, not speculation, of an event occurring. The plaintiff is not required to establish these hypothetical events on a balance of probabilities. The events are given weight according to their relative likelihood: *Athey* at para. 27; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–17.

[85] "If there is a measurable risk that a 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": *Athey* at para. 35; *Dornan* at para. 63.

Mitigation of Damages

[86] A plaintiff has a duty to mitigate damages. A plaintiff can only claim damages that they could not have avoided by taking reasonable measures. This includes undergoing reasonable treatment to alleviate or cure the injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. A defendant has the burden to establish that a plaintiff acted unreasonably in not following a certain course of conduct, and that damages would have been reduced if the plaintiff had followed that course: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. The burden is on a balance of probabilities: *Haug v. Funk*, 2023 BCCA 110 at paras. 72–76. It is an objective/subjective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56. In determining the reasonableness of a refusal of medical treatment, relevant considerations are the degree of risk to the plaintiff of the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 SCR 146 at para. 31, 1985 CanLII 62.

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Findings of Fact regarding Injuries, Causation and Mitigation

[87] In assessing the credibility and reliability of evidence, I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296.

[88] With some specific exceptions, I generally found Ms. Laley to be a credible witness. It is clear from her testimony and the expert evidence, that her condition has a large psychological component. Her description of "screaming uncontrollably" while sitting after being discharged from hospital, is one example. I accept that she has low back pain which radiates up her back and down her hips and legs. I find that she is caught in the spiral described by Dr. Watt. She is depressed and anxious, and has psychological difficulties that are altering her perception of pain and disability. To that extent, the reliability of her evidence is affected.

[89] I had no concerns regarding the credibility or reliability of the evidence of the other witnesses. I generally accept the experts' opinions unless specifically noted. In the end, there is not substantial disagreement between the opinions, and to the extent there are differences, they generally reflect different underlying assumptions or the specific questions they were asked to answer.

[90] Ms. Laley submits that the accident caused all of her injuries. The defendant submits that the accident caused Ms. Laley's soft tissue injuries to her shoulder and neck with attendant pain, cervicogenic headaches and some sleep disruption, all of which would have had an effect on her mood. However, those injuries have largely resolved and Ms. Laley is left with chronic low back pain that was not caused by the accident, but by her pre-existing spinal condition, obesity, subsequent pregnancies and activities as a mother. Her mood disorders and symptom magnification are largely derived from her pre-existing spinal condition which became symptomatic well after the accident from causes unrelated to the accident. The defendant submits this is a factual determination that can be made based on the absence of any documented substantive low back complaints for nine months after the accident. The

defendant also argues that Ms. Laley did not call Dr. Olsen as a witness, and the court should make an adverse inference that her evidence would not support Ms. Laley's evidence of complaints of low back pain.

[91] In considering this issue, I am mindful of Justice N. Smith's guidance in *Edmondson v. Payer*, 2011 BCSC 118 at para. 36, regarding the frailties of relying on clinical records as complete documentation of events. There was no documented low back pain in the hospital records, but the hospitalization focused on the pregnancy and partial placental disruption. Both Dr. Watt and Dr. de Ciutiis stated that it would be unusual for Ms. Laley's claimed degree of pain not to be charted. Dr. Watt suggested one possibility was an absence of a notation (as opposed to a positive report of no symptoms), but that is not how his report describes the hospital records, and there is a note of no tenderness in those areas on palpation, a finding on examination. The massage and physiotherapy records soon after the accident document reports of low back pain, but do not reflect Ms. Laley's claim of severe pain. Dr. Olsen's records after that do not document any back pain for more than six months. Dr. Watt agreed that chronic and unremitting pain would be part of pre- and post-natal care, and he would expect a notation of this. Ms. Laley testified that Dr. Olsen was primarily interested in post-partum care. When she returned to Dr. White, he immediately took steps to investigate and treat her back pain. In trying to explain the discrepancy, Dr. de Ciutiis said there could be a degree of muscle strain that can result in muscle stiffness and pain. However, Ms. Laley told him she had 10/10 back pain. In his experience, sometimes patients do not exaggerate to be deceitful, but are trying to express their degree of suffering. Related to this, there are consistent expert opinions of mood disorders, non-organic pain symptoms, and testing which shows a high degree pain catastrophizing. Ms. Laley also had a number of risk factors for worsening of spondylolisthesis and spondylolysis (excessive weight, deconditioning, and two pregnancies), and her 2019 CT shows worsening of her spinal conditions. I decline to draw an adverse inference regarding Dr. Olsen's possible testimony. Her records were produced to the parties, and she

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was a witness that was equally available to the defence: *Thomason v. Mollar*, 2016 BCCA 14 at para. 35, citing *Zawadski v. Calimoso*, 2011 BCSC 45 at para. 149.

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[92] Considering all of the above, and based on the expert opinions of Dr. Watt and Dr. de Ciutiis, I find the following:

a) Prior to the accident, Ms. Laley had asymptomatic spondylolisthesis and spondylolysis. She had some low back pain soon after the accident, but it was not as severe as she portrayed. Her subsequent psychological difficulties have altered her perception and recollection of that early pain. The back pain is multi-factorial and includes muscle pain. The accident caused her pre-existing spinal conditions to become symptomatic to some extent;

b) The low back pain and radiation worsened as her spondylolisthesis and spondylolysis worsened, and as she gained weight, had two pregnancies, and became deconditioned. The risk of these other conditions materialized and caused or contributed to the worsening of the spinal conditions and pain. The weight gain and deconditioning are themselves caused in part by chronic pain from the accident injuries and resultant decreased activity. As well, her untreated psychological problems have altered her perception of the pain, leading to further inactivity, weight gain, and deconditioning; and

c) There is a moderate chance that, had the accident not happened, Ms. Laley's existing weight at the time of the accident and her two pregnancies would have caused her spinal pathology to worsen and become symptomatic, but given that she had not had back pain up to that point in her life, the pain from this would have been significantly less than it is now.

[93] I find that all of the other conditions listed by Dr. Watt and Dr. de Ciutiis were caused by the accident, with the exception of the following: (1) jaw pain: only

Dr. Watt opined on this and he agreed that causation was "speculative"; (2) PTSD: Ms. Laley did not give evidence of any of the symptoms at the time of the accident or since, which Dr. Watt identified as being symptoms of PTSD; and (3) incontinence: Dr. Watt could not conclude this was caused by the accident.

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[94] The defendant alleges that Ms. Laley failed to mitigate her damages, by failing to exercise and lose weight, and by refusing to take anti-depressant medications. The defendant refers to *Mocharski v. Ly*, 2022 BCSC 996 at para. 114, and *Paschalidis v. Stutely*, 2013 BCSC 1611 at paras. 147–148, as examples where there was a failure to mitigate by exercising, strengthening and weight loss; and *Mullens v. Toor*, 2016 BCSC 1645 at para. 116, where there was a failure to mitigate by not taking anti-depressant medication. The defendant submits that there should be a 50% reduction in any damages awarded under all heads of damages.

[95] Ms. Laley says she did and continues to exercise at home. I do not accept that evidence. I find that Ms. Laley was not doing much, if any, exercise at home, and she has not taken reasonable steps to exercise and increase her strength. If she had, she would not be severely deconditioned. Ms. Laley submits that she had extensive therapy, so she has not failed to mitigate. Dr. Watt and Dr. de Ciutiis opined that she did not have adequate active rehabilitation for her back. In my view, simply attending what Dr. Watt concluded were largely passive therapies, is not the type, level or consistency of exercise required, and the duty is not limited to attending sessions. I find that if Ms. Laley had reasonably engaged in an exercise program, including an active exercise program at home, she would not have become deconditioned, and her spondylolisthesis and spondylolysis would not have worsened as much.

[96] I accept that it is difficult to lose weight, particularly when in pain and depressed, and that despite reasonable efforts, a weight loss program may have set backs, but I find that Ms. Laley has not made a reasonable effort to do so. I find that if Ms. Laley had engaged in a reasonable attempt to lose weight, she would not have

gained weight, or as much weight, and her spondylolisthesis and spondylolysis would not have worsened as much.

[97] Finally, I find that Ms. Laley has unreasonably refused to take anti-depressant medication since after she was pregnant and breastfeeding. She has not tried them at all. There is no expert evidence to support that it would make her a “zombie”. Dr. Watt opined that depression and anxiety are highly treatable, and he would strongly recommend Ms. Laley take the medication. Treating depression and anxiety often improves pain perception and willingness to engage in activities that will improve conditioning. I find that if Ms. Laley had taken anti-depressant medication as recommended by Dr. White, her depression, anxiety and perception of pain, more probably than not, would have improved, and the spiral described by Dr. Watt would have been interrupted at least to some extent.

[98] The defendant has established that Ms. Laley failed to mitigate. Considering all of the above, I assess the deduction as generally being in the range of 25%, which varies by head of damage and how the failure to mitigate affects the quantification of those damages. I have considered that there is a chance her spinal condition could worsen, but given her duty to mitigate, I consider this risk to be very small and have taken that into account.

Damages

Non-Pecuniary Damages

[99] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The amount does not depend solely upon the injury’s seriousness, but upon the court’s assessment of loss and its ability to provide solace and ameliorate the plaintiff’s condition in their particular circumstances. While awards in other cases provide guidance, each case must be determined on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. A list of factors to consider in determining awards is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

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[100] Ms. Laley seeks non-pecuniary damages in the amount of $190,000. She refers to the following cases: *Bhatti v. Jones*, 2020 BCSC 1935 ($190,000, today's dollars $220,000); *Bynoe v. Chuah*, 2020 BCSC 2242 ($190,000, today's dollars $220,000); *Watts v. Lindsay*, 2019 BCSC 2239 ($160,000, today's dollars $190,000); *McMullin v. Trelenberg*, 2020 BCSC 49 ($150,000, today's dollars $174,000); and *Palani v. Lin*, 2021 BCSC 59 ($150,000, today's dollars $172,000).

[101] The defendant submits that non-pecuniary damages should be in the range of $91,000 to $125,000, less a 50% deduction for failure to mitigate. The defendant refers to the following cases: *Latreille v. Downey*, 2020 BCSC 976 ($90,000, today's dollars $104,000); *MacIntosh v. Davison*, 2013 BCSC 2264 ($90,000, today's dollars $118,000, before deduction for pre-existing back condition); *Paschalidis* ($70,000, today's dollars $91,000, after taking into account pre-existing symptomatic conditions which were aggravated, and failure to mitigate); and *Mocharski* ($115,000, today's dollars $125,000).

[102] In my view, the cases cited by the plaintiff are more factually similar than those cited by the defendant. The plaintiff's case authorities involved persistent chronic pain and disability and associated mental health difficulties. The defendant's case authorities generally involved older plaintiffs, with less functionally disabling injuries that to some extent had resolved, or significant pre-existing conditions. For example, in *Latreille*, the plaintiff could work, the injuries did not significantly impair day-to-day life, and there were other non-tortious causes of the conditions. *MacIntosh* and *Paschalidis* are over 10 years old and our Court of Appeal has cautioned against relying on cases more than 10 years old for non-pecuniary guidance: *Valdez v. Neron*, 2022 BCCA 301, leave to appeal to SCC ref'd, 40442 (30 March 2023) at para. 58; *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, at para. 18. *Mocharski* involved a plaintiff with significant pre-existing chronic pain.

[103] Ms. Laley is relatively young. She has experienced significant pain, but has failed to mitigate since the accident. She has developed depression and anxiety and a psychological condition, affecting her perception of pain, but I accept that this is

her perception, and that she has suffered. Her pain will likely be ameliorated with appropriate conditioning, weight loss and medication, but it is chronic, and will likely never resolve. The injuries have affected her relationships with her mother and her children. She is unable to work as a cook, a job which she enjoyed. Her recreational and social activities and her former active lifestyle have significantly changed, although to some extent those would have changed in any event as a result of having children. The way she responded to some questions showed her sadness and disappointment in her current situation and herself.

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[104] Using the case authorities as a guide, I assess non-pecuniary damages at $190,000. I include in this award the pain aggravation that Ms. Laley may have from doing routine household tasks and child care for which I have not made a separate award under loss of housekeeping capacity. However, there must be a deduction for the real and substantial possibility that she would have experienced some much lesser low back pain without the accident, and for her failure to mitigate. In total, I reduce the award by 25% to $142,500.

Loss of Earning Capacity

[105] A loss of earning capacity may be quantified either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach may be more useful when the loss is more easily measurable; the capital asset approach will be more useful when the loss is not easily measurable, for example where the plaintiff has returned to their former employment, but has still established a loss of capacity. In this case, an earnings approach is more appropriate.

[106] While the assessment is not a mathematical exercise, economic or statistical evidence may be useful as a starting point, and in assessing what is fair and reasonable: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. Ultimately, the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[107] In keeping with the principle that the plaintiff is to be put in the position they would have been in absent the tortious conduct, damages for loss of earning capacity are to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28–30.

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[108] In *Rab v. Prescott*, 2021 BCCA 345, the Court set out the three-step process for assessing loss of future earning capacity:

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

[109] The court's overall task is to compare Ms. Laley's working life and capacity if the accident had not occurred, with her working life and capacity after the accident, and to assess the loss.

[110] Ms. Laley claims $338,763 for past loss of earning capacity. This is based on the following assumptions: (1) full-time work at $14 per hour, for an annual income of $29,120 in 2014, and increased for inflation each year until the date of the trial; (2) two six-month maternity leaves; and (3) net of taxes, but including undeclared tips of $4 per hour. Ms. Laley submits that this is conservative because it only accounts for inflation, and not expected raises. She submits that she had the "drive to become a chef", a supportive employer, experience as a cook, and a supportive mother, and she enjoyed the work.

[111] Ms. Laley claims $500,000 for future loss of earning capacity. She submits that future income is best assessed by considering her goal to become a Red Seal chef. Given she had two children since the accident, which would have delayed her plans, Ms. Laley submits that the award should be assessed assuming that she

would have obtained that goal in the year before trial. Ms. Laley calculates her future loss on the assumption that she would have worked full-time as a NOC category Chef, from trial to age 70. Mr. Wickson calculated the present value, net of LMCs to be $936,600. Ms. Laley also refers to Ms. Ren's calculations, based on the same assumptions, with a total of $849,394 for Chefs, and $669,242 for Cooks. Ms. Laley submits that any future earning capacity can be subtracted from the $936,600, and that "mindful of contingencies", she claims $500,000. Ms. Laley submits that to the extent she may have some residual work capacity to do part-time work, it will take much effort to reach that.

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[112] The defendant submits that Mr. Laley has not proved a loss of past or future earning capacity, so no award under these heads of damage should be made. The defendant argues that Ms. Laley would have been on maternity leave from her first pregnancy soon after the accident in any event, and that by the time of her second child and maternity leave, she was recovered from her accident injuries. After that, any loss of earning capacity is from her low back issues which were not caused by the accident. The defendant also submits that there is no evidence that Ms. Laley would have restricted herself to six-month maternity leaves, that her evidence of tips is unreliable because she did not declare them, and that she does not present as someone who is a "driven go-getter" in terms of career. I note that the causation determinations do not support aspects of this argument.

[113] I turn first to consider Ms. Laley's without accident work life. Ms. Laley reported the following income starting in 2011 when she was 24 years old, up to the time of the accident:

a) 2011: $17,319 (employment income);

b) 2012: $20,900 (employment income);

c) 2013: $16,782 ($6,932 employment income, plus $9,850 employment insurance); and

d) 2014: $11,330 (employment income up to the accident on April 11).

[114] Ms. Laley did not report any of her tips. I do not agree that she was in the exploration stage of her career as suggested by Mr. Wickson. Her CV and trial evidence show that she had worked in this industry since high school. I find that work in this industry was her likely career. In my view, the real and substantial possibilities are: (1) her attachment to the workforce; (2) becoming a Red Seal chef; (3) the effect on her work life of the pregnancies and parenting two children; and (4) the risk that her pre-existing conditions would have become symptomatic to the point of affecting her ability to work. I discuss these below.

[115] As for attachment to the workforce, Ms. Laley's earnings from 2011 to 2013, were about 92% of the NOC category Cooks after LMCs. Ms. Laley was described as a good worker, so I infer that she could command average work rates, and that this lower than average earnings indicates either a lesser attachment to the workforce, or higher than average unemployment. However, if only her last six-month period of employment at Joe's is considered, and if she had continued at Joe's full-time, then her earnings would have been close to the average full-time full-year Cook's earnings. This shows a more positive but brief trajectory; however, it was after a year (2013) in which Ms. Laley's earnings were substantially below the average. Some of this was attributed to a foot injury. Considering both the positive and negative possibilities, I consider that apart from the pregnancies and early child rearing, the most likely real and substantial possibility is that Ms. Laley's attachment to the work would have continued to be as it had been before the accident, resulting in earnings a little less than the average of a NOC category Cook after LMC's are taken into account.

[116] The next issue is the positive contingency that Ms. Laley would have become a Red Seal chef. In my view, that is very unlikely. Ms. Laley was ten years out of high school but had not taken steps toward this. Mr. Britton did not testify about any conversation he had with Ms. Laley regarding this training. Further, when Ms. Laley was off work for over six months in 2013, she did not take any steps toward

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obtaining her high school diploma or attending Camosun, nor obtaining a driver's licence. Ms. Laley said that until this lawsuit, she did not know she had not graduated high school. I do not accept that evidence. It is written on her transcript, and I find it hard to believe this had not been brought to her attention.

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[117] As for the effect on her work life of the pregnancies and the sole parenting of her two children, in my view, given her work history, the most likely possibility is that she would have taken one-year rather than six-month leaves following her pregnancies, and that her hours would have been curtailed until both children were in school full-time (in 2023), and that afterwards, she would have resumed her previous level of work to support her family.

[118] Finally, as discussed, there is a moderate risk that Ms. Laley's weight and pregnancies would have resulted in her spinal conditions becoming symptomatic, but to a much lesser extent. That does not necessarily mean that Ms. Laley would not be able to work, so I assess the effect of this on work capacity as low.

[119] I turn next to consider Ms. Laley's with accident work life. I find that given her injuries and the time to rehabilitate in the context of two pregnancies, Ms. Laley was not able to work because of the accident injuries until the end of her second maternity leave in January 2018. By then, as Dr. Watt noted, excessive pain behaviours were already present. I also find that considering her current physical and mental condition without mitigation, Ms. Laley has been competitively unemployable since the start of 2018. Dr. Watt opines she has some limited residual physical capacity to work. Dr. de Ciutiis implies this as well. Mr. Towsley's FCE report found present residual physical capacity for sedentary work with limitations, prior to Ms. Laley embarking on the recommended weight loss and exercise program, but noted the multi-factorial aspects of her condition, in particular the psychological difficulties and the barriers those present. In my view, to be competitively employable, this requires her to embark on treatment for her mental health issues and deconditioning.

[120] The significant issue is the extent to which Ms. Laley would have been able to work since the start of 2018 had she reasonably mitigated, and the extent to which she may be able to work in the future if she mitigates as she is obligated to do. Ms. Bracken provided a return to work plan, and Mr. Trainor agrees that this is a good plan, but opined that the prognosis for successful return to a durable attachment to the work force will be difficult. Ms. Branscombe also opined that the length of time away from the work force is a negative prognostic factor.

[121] Given that even with mitigation, Ms. Laley's physical injuries likely would have improved but not resolved, that her mood disorders had a greater prospect of improvement, the other psychological difficulties which present a significant barrier to employment, and market realities, I find that had Ms. Laley mitigated, she would have been able to engage in some part-time work. I assess that her capacity after mitigation would have been about 25% of her pre-accident capacity. I also find that in the future when she mitigates, her capacity will be about the same. This is the equivalent of one to two days per week of work. Inherent in this is my conclusion that even with mitigation, there is a significant loss of earning capacity.

[122] Turning to past loss, there were 119 months from the accident to trial, less 24 months maternity leaves, being 95 months. As a starting point, I must determine an appropriate without accident earnings figure. Ms. Ren states that if Ms. Laley had continued working at Joe's full-time, her earnings for 2014 ($29,120) would have been very close to those of full-time Cooks. Ms. Ren provides the statistical earnings of full-time Cooks in 2024 ($42,982). The average of these two wages is $36,051 per year, full-time, which is before LMCs. Both Ms. Ren and Mr. Wickson add 9.3% for non-wage benefits, increasing that figure to $39,404, which I use as the average annual full-time earnings for the entire loss period. In addition to the above, I accept that Ms. Laley earned tips, and Mr. Britton's evidence of an average of $4 per hour (not including holidays) as a reasonable estimate ($8,000 per year, full time), for total annual average full-time earnings of $47,404, before LMCs. In my view, starting

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with this figure takes into account any positive contingencies, for example a raise beyond the average, and a job with benefits.

[123] This figure must be adjusted for any negative contingencies. While it is not always appropriate to apply full LMCs to past lost capacity (for example, when a plaintiff has worked full-time at a secure job for the same employer for years), that is not the situation here. Ms. Laley's work history shows a number of short-term jobs. Her historical earnings were 8% below the average earnings of Cooks after statistical LMCs are applied to that category, and before any of her pre-existing risks materialized. There is a low risk that Ms. Laley would have developed back pain affecting her ability to work, and I have found that she likely would have worked less when she returned to the work force, until her children were in school. Further, the statistical LMC rates used by Ms. Ren and Mr. Wickson (in the 35–38% range in the time period closest to this time) are for those who have a trade certificate. Having only a high school diploma increases the LMCs by about 10%. I conclude that Ms. Laley's overall contingencies are greater than statistical LMC rates for her past losses.

[124] Considering all of these, I reduce the average full-time earnings of $47,404 by 55% to $21,332, or $1,778 per month, which, for 95 months, is $168,910. I have found that if Ms. Laley had rehabilitated, her residual capacity was 25% of her without accident capacity. From January 2018 to trial is 74 months. That is $1,778 x 74 months x 25% = $32,893. This calculation produces a with accident figure of $136,017.

[125] Comparing the without and with accident circumstances, and bearing in mind that this is not a mathematical exercise and that the award must be fair and reasonable, I assess past loss of earning capacity to be $140,000 less any income tax that would have been payable on this amount pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. As this is an average of about $17,500 per year (the two maternity leaves are not included), I assume there is no income tax payable, but if I am in error, counsel have leave to attend before me to obtain an

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order to determine the net amount. Similarly, Ms. Laley has received benefits, and counsel can make the appropriate deduction.

[126] As for future loss, in my view, a retirement age of 65 is more likely. Ms. Ren's statistics show that about 70% Cooks leave the market by this time. Taking Ms. Ren's calculations as a starting point, the average statistical lifetime earnings of a Cook to age 65 is $652,739. This already accounts for statistical LMCs, but does not account for the low risk of Ms. Laley's pre-existing spondylolisthesis and spondylolysis, weight gain and pregnancies affecting her ability to work,, and her lower attachment to the work force. I reduce that figure by 10% to $587,465. I have found that with mitigation, Ms. Laley's residual earning capacity is 25% of her without accident capacity, which reduces the above figure to $440,599.

[127] Comparing the with and without circumstances, and considering that it will take time to mitigate, and again keeping in mind this is not a mathematical exercise and the award must be fair and reasonable, I assess the future loss of earning capacity to be $450,000.

In Trust Claim

[128] Housekeeping and other services provided by family members have economic value for which a plaintiff may have a claim, even where those services are provided gratuitously. The court must consider the nature of the services and whether they would have been provided in any event. Only those services which go above and beyond the usual give and take between family members will be compensable: *Dykeman v. Porohowski*, 2010 BCCA 36 at paras. 28–30.

[129] In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, the court summarized factors to consider in the assessment. These include that the services provided must replace services necessary as a result of the injuries, and that the quantification should reflect the reasonable value of those services.

[130] Ms. Laley seeks $50,000 in trust for her mother, Jennifer Turner. Ms. Laley submits that Ms. Turner has provided substantial assistance in the form of

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household tasks, child care, and driving her to appointments. Ms. Turner estimated she spends 40 hours per week doing this. Ms. Laley submits this is well beyond what is normally expected of a grandparent, and parent of an adult child. Ms. Laley calculates that 515 weeks have passed from the accident to trial. Even at 20 hours per week, at a “low end” rate of $25 per hour, the total is $257,500. Ms. Laley acknowledges this is an unrealistic number, but submits that “mindful of contingencies”, a reasonable and conservative in trust award is $50,000. Ms. Laley refers to *Naidu v. Dhami*, 2021 BCSC 668, where an in trust award was made for a mother’s services. In *Naidu*, the mother estimated that she provided 56 hours per week in household services and child care, though some services benefited the plaintiff’s work so were not included in the court’s $47,500 award.

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[131] The defendant submits that Ms. Laley has not proved any loss under this head of damage. Ms. Laley and her mother are very close and have had a symbiotic relationship since before the accident where some reciprocity would be expected. Much of Ms. Turner’s assistance was driving her daughter to appointments because Ms. Laley did not have a driver’s licence, even though she could have obtained one. Further, there is no evidence supporting the $25 per hour rate.

[132] Ms. Laley is capable of most household tasks and childcare. I accept that Ms. Turner provides Ms. Laley with much assistance, but that fact alone is not determinative. Ms. Turner’s assistance with tasks that Ms. Laley is capable of doing is not compensable, even if the tasks are “above and beyond” what would be expected in this family relationship. Ms. Turner testified that both before and after the accident, she preferred that she and her daughter and grandchildren live under the same roof. I conclude that her love for her family motivates her now to do things that her daughter is capable of doing. They have a close bond. Further, some of the tasks Ms. Turner does with Ms. Laley are a result of Ms. Laley failing to obtain her driver’s licence. There is no good reason why Ms. Laley has not done so. I do not accept her driving anxiety or fear is so great that she cannot drive. If she had a

driver's licence, she would not need Ms. Turner to drive her to appointments, to take her shopping, to run errands, or to drive her children to or from school.

[133] However, I conclude that Ms. Turner has provided compensable services, in the form of some heavier tasks that Ms. Laley cannot not do, and on days when Ms. Laley's pain is greater than usual or her activity tolerance has been reached and child care is required. In my view, that care was most needed when the children were younger, but they are now in school full time. Ms. Laley should have more time to complete tasks, with less assistance required. Mr. Towsley opines that reasonable assistance at Ms. Laley's current capacity (before rehabilitation/mitigation) is two hours per week. There is no specific evidence of value other than what can be inferred from the evidence in the special damage documents of what friends were being paid for childcare while Ms. Laley attended appointments. I conclude it was about $20 per hour in 2015. The current minimum wage rate is $17.40 per hour. I accept $25 per hour for two hours per week is reasonable compensation for Ms. Turner's services that are compensable. At 515 weeks, this totals $25,750, but the assistance required would have been greater when the children were younger. Failure to mitigate must also be considered. Taking both into account, I award $25,000 under this head of damage.

Loss of Housekeeping Capacity

[134] The principles which govern when a plaintiff may be awarded damages for loss of housekeeping capacity were summarized in *McKee v. Hicks*, 2023 BCCA 109:

> [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.

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[135] Ms. Laley seeks $60,000 under this head of damage. Ms. Laley submits that she is unable to do heavier tasks and needs assistance to complete instrumental activities of daily living. She relies on Mr. Towsley's recommendation of two hours of assistance per week. At $25 per hour, the annual cost is $2,600. The life-time present value multiplier is 30.643, which results in a total of $79,672. Acknowledging the diminishing need for child care assistance as her children grow older, but balanced with the possibility of further possible pregnancies, Ms. Laley submits $60,000 is appropriate for past and future loss of housekeeping capacity. The defendant submits that there should be no award based on his causation position.

[136] To the extent I have made an in trust award for the past services that Ms. Turner has provided, there cannot also be an award for loss of housekeeping capacity. As with the in trust claim, I find that there are heavier tasks that Ms. Laley cannot do, and on days when Ms. Laley's pain is greater than usual or her activity tolerance has been reached and child care is required, that it is appropriate to provide her with a separate award for assistance. For the present, $2,600 per year is reasonable, but that must be reduced for mitigation and what I find will be an improved condition once she mitigates. Any physical child care required will decrease and likely stop within the next few years. I also consider an end date of the age of 75 to be more reasonable considering the risk of her pre-existing spinal conditions, and that heavier tasks tend to decline as people age. The multiplier for the next six years (until the youngest is about to enter high school) is 6.516 x $2,600 = $16,942, less 25% for mitigation = $12,706. The multiplier from then to age 75 is 19.621 (26.137 less 6.516). At $1,500 per year (accounting for the above possibilities and mitigation in this figure), the remaining loss is $29,432. In total, I assess the loss of housekeeping capacity as $42,500.

Cost of Future Care

[137] An award for cost of future care is intended to provide a plaintiff with physical care or assistance to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed

must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70. The medical justification may be established by health care professionals other than a physician, but there must be a link between the physician's assessment and the other health care professional's recommendation: *Gao* at para. 70. The court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64–72. If it is shown by the evidence that a plaintiff is unlikely to participate in a program, it cannot be said that an award for such a program is reasonably necessary: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 28.

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[138] Based primarily on Mr. Bardy's recommendations, Ms. Laley seeks $66,012 in future care costs, which she submits is conservative as it does not include all of the recommended treatments. Based on the position that Ms. Laley suffered only minor soft-tissue injuries which have resolved, the defendant submits that there should be no award for cost of future care.

[139] In my view, of the costs claimed, the following were supported by the experts, and are necessary and reasonable to support Ms. Laley in rehabilitating and promoting independence, and fulfilling her duty to mitigate. I also find that it is likely that Ms. Laley will use these services, as I find she wants to get better for herself and those that she loves. These are:

a) Dietitian ($1,000);

b) Kinesiology (32 sessions at $80/session = $2,560);

c) Counselling (20 sessions at $225/session = $4,500);

d) Vocational assistance (three to four months: $4,000);

e) Home equipment (tub clamp bar: $50; and bed handle: $100);

f) Walker ($600);

g) Obusforme cushion ($100);

h) Ergonomic chair and computer desk ($808);

i) Fitness pass to age 75 ($612 per year times multiplier 26.137 = $15,996);

j) Massage for five years (10 sessions per year at $95/session, times multiplier 4.750 = $4,513). While both Dr. Watt and Dr. de Ciutiis recommended some intermittent massage or similar passive therapy for acute exacerbations, both stated that these should be limited, and Ms. Laley should avoid over-reliance on passive therapies. Dr. de Ciutiis opined that they can promote "externalizing behaviors" that are ultimately disadvantageous to an individual's recovery. Instead, the focus should be on active rehabilitation. Ms. Branscombe recommends against further passive therapies. In my view, this is necessary and reasonable for a period of time, particularly when rehabilitating. An award for five years is reasonable and recognizes that as Ms. Laley rehabilitates the need will become less over time; and

k) Sit/stand stool ($250 times multiplier 6.635 (replacement every five years until 75) = $1,660).

[140] The list above totals $35,837, which, with applicable taxes, I estimate to total $40,000. I award that amount. There is no deduction for any pre-existing conditions, as the evidence does not support a real and substantial possibility that these costs would have been incurred absent the accident.

[141] In my view, Ms. Laley's claim for an optometry assessment is not justified. It has already taken place, and, in any event, there is no evidence of an eye injury caused by the accident. Similarly, there is no evidence that the accident caused incontinence. Therefore, the pelvic floor physiotherapy is not awarded. I am not persuaded that the differential cost of a high-end mattress is justified. Mr. Bardy had recommended it to help improve sleep, important to managing chronic pain, but

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there was no evidence that her existing quality of mattress was contributing to her poor sleep, as opposed to her pain and mood disorders.

Special Damages

[142] The parties have agreed to special damages of $17,634.53.

Orders

[143] Ms. Laley will have judgment against the defendant as follows:

Non-pecuniary	$142,500
Past loss of earning capacity	$140,000*
Future loss of earning capacity	$450,000
In trust for Ms. Turner	$25,000
Loss of housekeeping capacity	$42,500
Cost of future care	$40,000
Special damages	$17,634.53
Total	$857,634.53*

* subject to any adjustment for taxes and benefits.

[144] Unless there are settlement offers or other matters of which I am unaware, Ms. Laley will have her costs of this action at Scale B. If the parties need to address costs, they may make arrangements through Supreme Court Scheduling to speak to the matter.

"Norell J."

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