

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ziolkiewicz v. Emmanuel*,
2024 BCSC 1174

Date: 20240628
Docket: M170486
Registry: Vancouver

Between:

Sarah Ziolkiewicz

Plaintiff

And

**Natasha Leigh Emmanuel and
Cyrus Daniel Emmanuel**

Defendants

Before: The Honourable Justice Whately

Reasons for Judgment

Counsel for the Plaintiff:

C.H. McDougall

Counsel for the Defendants:

A. Ng
L.L. Seneviratne

Place and Date of Trial/Hearing:

Vancouver, B.C.
December 4-8, 2023
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Place and Date of Judgment:

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[1] This action arises from a motor vehicle accident that occurred near the intersection of SE Marine Drive and St. George Street in Vancouver, on June 16, 2015 (the “Accident”). Liability for the Accident was admitted prior to trial. This decision solely addresses the injuries the plaintiff Sarah Ziolkiewicz suffered from the Accident and the damages she claims.

[2] As liability is admitted and the defendants Natasha and Cyrus Emmanuel did not participate in the trial personally, I will simply refer to them as “the defendants” in these reasons. No disrespect is intended.

[3] Ms. Ziolkiewicz says that she suffers from headaches, neck pain, shoulder pain, upper back pain, lower back pain, and psychological injuries, including anxiety and an adjustment disorder with depressed mood. She claims damages in the range of \$1,000,000 to \$2,400,000 under the following heads:

- a) Non-pecuniary damages;
- b) Future loss of earning capacity;
- c) Future loss of housekeeping capacity;
- d) Cost of future care; and
- e) Special damages.

[4] The disparity between the parties’ positions on damages is significant. The defendants state that Ms. Ziolkiewicz ought to be awarded total damages in the range of \$125,000 to \$175,000.

[5] The defendants do not dispute that Ms. Ziolkiewicz sustained soft tissue injuries as a result of the Accident. However, they dispute whether the Accident caused the claimed psychological issues, the extent to which the various injuries have impacted Ms. Ziolkiewicz’s ability to work, and the reasonableness of her “without Accident” career prospects.

[6] The largest head of damage claimed by Ms. Ziolkiewicz—future loss of earning capacity—is also the largest area of contention between the parties. Ms. Ziolkiewicz was 18 years old at the time of the Accident. At least part of her claim under this head, and much evidence at trial, concerned her desire to become a medical doctor, a goal that she says was fundamentally disrupted by the impacts of the Accident.

[7] The defendants argue that Ms. Ziolkiewicz’s stated career aspirations are unreasonable given her pre-Accident abilities and academic history. Ms. Ziolkiewicz provided the court with various “pathways” to consider in valuing her loss of future earning capacity. The defendants state that this is an incorrect approach for this valuation, and regardless, the evidence does not support any of the purported “pathways” for Ms. Ziolkiewicz.

[8] Even though the visible physical injuries arising from the Accident were not severe, I accept that for Ms. Ziolkiewicz, the Accident was life-changing and caused pecuniary loss. I have attempted to strike a balance between the potential Ms. Ziolkiewicz says was disrupted by her injuries, and the lack of a real and substantial possibility that Ms. Ziolkiewicz would have achieved certain goals, but for the Accident.

Pre-Accident

[9] Ms. Ziolkiewicz grew up in the lower mainland. She was 27 years old at the time of trial. She is single with no children. She has a close relationship with her mother, Edyta or Edith Ziolkiewicz. At trial, Edyta was more commonly referred to as Edith. For clarity, I will refer to Ms. Ziolkiewicz’s mother as Edith. I mean no disrespect in doing so.

[10] Ms. Ziolkiewicz’s parents divorced when Ms. Ziolkiewicz was approximately five years old. She lived with her mother throughout the rest of her childhood. Ms. Ziolkiewicz maintained a relatively close relationship with her father, but it is clear that her mother has been the primary parent and central support in her life.

[11] After the divorce, Ms. Ziolkiewicz and her mother moved into a large house with her maternal uncle and grandparents. In her direct examination, Edith described this as a very good time in their lives, and particularly positive for Ms. Ziolkiewicz. They had a big back yard with a trampoline and a swing set. They were a close knit, happy, and supportive extended family, all of whom clearly doted on Ms. Ziolkiewicz.

[12] Ms. Ziolkiewicz and her mother testified that Ms. Ziolkiewicz was an active child and engaged in many activities including drawing, piano, swimming, basketball, soccer, snowboarding, Kumon, volleyball, and camping. Ms. Ziolkiewicz conceded that she had stopped most, if not all, sporting or other activities by the end of high school and prior to the Accident.

[13] Edith testified that Ms. Ziolkiewicz was assessed as “gifted” early in her schooling, and was briefly placed in a specialized program, before transitioning back to the regular school program. This early designation did not manifest in exceptional school performance. Ms. Ziolkiewicz was an average student and earned Bs and Cs in high school.

[14] Ms. Ziolkiewicz and Edith testified that Ms. Ziolkiewicz did not have any significant health issues as a child. She did not have any pre-Accident physical injuries and she did not experience any significant psychological conditions growing up. One physician’s report entered into evidence contained a brief note that Ms. Ziolkiewicz suffered from “lifelong anxiety.” This was denied by Ms. Ziolkiewicz and her mother, and does not accord with the depiction of Ms. Ziolkiewicz’s pre-Accident demeanor by other witnesses.

[15] In any event, the evidence does not establish that Ms. Ziolkiewicz suffered from serious, chronic or debilitating anxiety prior to the Accident. However, her early life was not free of challenge or difficulty, and certain events in her mid- to late-teens may provide some context for the acute anxiety she now experiences post-Accident.

[16] Edith has run daycares and preschools since 1990, and has been a driven and successful business person in that industry throughout Ms. Ziolkiewicz’s life.

Edith currently runs a daycare business called Fraser Montessori. In 2009, Edith and her brother, Martin Szpyra, went into business together to build a state-of-the-art daycare-specific facility. This process involved purchasing a lot of land in New Westminster, rezoning the land, and designing and building the facility (the “Main Facility”).

[17] This Main Facility is the central part of Edith’s business and is located on 5th Street in New Westminster. It has space for two classes of 25 children aged 2.5–5 years old, has a preschool licenced for 20 children in the morning, 20 children in the afternoon, and can provide before and after school care for up to 20 children in elementary school. The Main Facility has a total capacity of up to 110 children through its various programs.

[18] Edith’s business also includes purchased residential houses converted for use as infant centres that care for up to eight babies each. Edith is justifiably proud of the Main Facility, and of the larger daycare business she has built over time.

[19] When Ms. Ziolkiewicz was 16 years old, Edith was involved in a serious motor vehicle accident. She suffered a pinched nerve in her neck, a severe lower back injury and debilitating headaches that she still experiences today. This resulted in a period of significant disability. Edith recounted that she had trouble getting up out of bed, dressing herself, feeding herself, and doing all the domestic activities required to maintain a house.

[20] This event caused a period of stress, upheaval and added responsibility for Ms. Ziolkiewicz.

[21] For a time, Ms. Ziolkiewicz helped Edith get out of bed, dress herself, feed herself, and do the household and cooking activities. Ms. Ziolkiewicz also helped Edith at the Main Facility. She initially assisted with artwork and other light activities. After graduating high school in 2014, Ms. Ziolkiewicz helped with changing diapers, cleaning tables and floors, and some other childcare tasks.

[22] After Edith's accident, there was a significant falling out between Edith and her brother, Mr. Szpyra. Starting in 2013, Mr. Szpyra was no longer involved with the Main Facility. Mr. Szpyra continued to operate a separate daycare in Burnaby that continues to use the title Fraser Montessori. The falling out between Edith and Mr. Szpyra created significant tension in the family home between Edith and Ms. Ziolkiewicz's grandparents. This led to Edith and Ms. Ziolkiewicz moving to a new house on Marine Way in 2013.

[23] This change of living circumstances was very difficult for both Ms. Ziolkiewicz and her mother. Ms. Ziolkiewicz spoke of this time as being unhappy. Both recalled the difficulty of managing the stress caused by Edith's disabilities, which impacted both home and work life. They each referenced the difficulty they experienced in keeping the house clean due to Edith's injuries and the ongoing demands of her business—a situation that clearly bothered both of them, and caused tension in the home.

[24] Ms. Ziolkiewicz continued to help her mother at the Main Facility until September 2014, when she began attending the University of Fraser Valley ("UFV") in Abbotsford. Ms. Ziolkiewicz intended to study criminology and psychology. However, she did not complete her first-year courses and left the program in the spring of 2015.

[25] Ms. Ziolkiewicz testified that she left the program because of her mother's poor health, and that she had to return home to help with the daycare business. However, there was also evidence to suggest that Ms. Ziolkiewicz simply did not enjoy her courses at UFV and left the program for that reason.

Accident

[26] In June of 2015, Ms. Ziolkiewicz was 18 years old. On the morning of the Accident, Ms. Ziolkiewicz was driving on Marine Drive westbound near Prince Edward Street in Vancouver. She was rear-ended while at a complete stop.

[27] Ms. Ziolkiewicz exchanged information with the defendant driver at the scene of the Accident before driving herself away. There was minimal damage to her vehicle. Later that day, Edith drove Ms. Ziolkiewicz to the hospital where she was assessed for neck pain, lower back pain, headaches and nausea.

Post-Accident

[28] Shortly after the Accident, in September of 2015, Ms. Ziolkiewicz attended Douglas College for business. Edith stated that she and Ms. Ziolkiewicz discussed a plan for her to one day take over the daycare business. At a minimum, Edith thought business courses would allow Ms. Ziolkiewicz to help with the administrative duties Edith now struggled to keep up with.

[29] Ms. Ziolkiewicz did not complete the semester at Douglas College. She testified that she was experiencing neck, shoulder and back pain, headaches and significant anxiety. She stated that she left Douglas College in part due to her pain and mental health, and also to help her mother. Again, conflicting evidence adduced at trial suggested that Ms. Ziolkiewicz left Douglas College simply because she did not like the program.

[30] Between 2016 and 2018, Ms. Ziolkiewicz continued to work for her mother at the Main Facility. At this time, she was performing light duties only. She did not change diapers, do any heavy cleaning such as mopping or sweeping, or pick up the children. Edith observed that it was common to see Ms. Ziolkiewicz sitting down at work, and she often complained about headaches, and pain in her neck and back.

[31] It is not entirely clear whether, or during what time periods, Ms. Ziolkiewicz worked part-time or full-time hours at the Main Facility. One reason for this is that Ms. Ziolkiewicz was paid a salary based on full-time hours by her mother regardless of whether she was working full time, part time, or was not working at the daycare at all. Edith testified that other employees logged their hours, but she and Ms. Ziolkiewicz did not. This financial arrangement between Ms. Ziolkiewicz and her mother persisted throughout the time period relevant to this action.

[32] In May of 2018, Ms. Ziolkiewicz traveled to Italy to take an entry test for Charles University Medical School in the Czech Republic, following a friend who had done the same. She passed the entry test and moved to Pilsen, Czech Republic in September of 2018 to start a six-year medical program at Charles University with the intention of eventually seeking to qualify as a medical doctor in Canada.

[33] Ms. Ziolkiewicz was supported by her mother in this endeavour. Edith paid for her schooling and living expenses. During this time, Ms. Ziolkiewicz continued to receive her salary as an employee of Fraser Montessori.

[34] Ms. Ziolkiewicz reported significant physical and psychological struggles while attending Charles University. She testified that the commute from her apartment to school, long study sessions, and carrying heavy text books caused her pain and anxiety. She suffered from severe panic attacks that increased in frequency until they were occurring almost daily.

[35] In June of 2019, Ms. Ziolkiewicz flew home on an urgent basis in the midst of an acute mental health crisis. Upon her return, she attended at the emergency room at Vancouver General Hospital and was diagnosed with Generalized Anxiety Disorder (“GAD”) with associated panic attacks.

[36] Ms. Ziolkiewicz did not complete her first-year academic program at Charles University. She did not return to school after her return to Canada in June 2019, and formally withdrew in October 2019. Her academic record from her year in Pilsen was very poor. She failed her courses in medical chemistry, biology, Czech for foreigners, anatomy, biophysics, biology, histology and embryology. Certain of those courses Ms. Ziolkiewicz took and failed twice.

[37] Upon her return to Canada, Ms. Ziolkiewicz was encouraged by her psychologist to find employment with someone other than Fraser Montessori. As of the spring of 2019, Ms. Ziolkiewicz had only ever worked for her mother.

[38] Ms. Ziolkiewicz found employment as a hostess at an Earls restaurant. She left this position after two months due to her anxiety. She subsequently worked at

Nella Cutlery, in a warehouse office. She was tasked with calling customers who were delinquent in their payments. Ms. Ziolkiewicz lasted one month at this job.

[39] Ms. Ziolkiewicz ultimately returned to her mother's employ at the Main Facility in January 2020. Between 2020 and the summer of 2023, Ms. Ziolkiewicz continued to perform "light duties", meaning that she did not do heavy cleaning, tasks requiring lifting or bending, or tasks that required lifting the children, such as diaper changes.

[40] At some point during 2020, Ms. Ziolkiewicz obtained a certificate as an Early Childhood Educator's Assistant ("ECEA"), which entails a multi-week course. She chose not to pursue further training to qualify as an Early Childhood Educator, which requires a longer course of study and practical work training.

[41] Two of Ms. Ziolkiewicz's former coworkers at the Fraser Montessori, Mai Thi Trinh, and Ronette Arnello testified about Ms. Ziolkiewicz's work during this time. Ms. Arnello and Ms. Mai both testified that Ms. Ziolkiewicz often left the room to cry, and that she appeared to be in pain, sometimes trembling and pale. She was often observed rubbing her neck or shoulder. They both testified that Ms. Ziolkiewicz did not do all the usual tasks assigned to ECEAs at the centre, and she was often the first staff member permitted to leave when the child-to-staff ratio allowed.

[42] Ms. Ziolkiewicz's friend, Ms. Inderpreet Bains also testified as to Ms. Ziolkiewicz's manner and personality before and after the Accident. She said that before the Accident, Ms. Ziolkiewicz was social and outgoing. After the Accident, she was often visibly agitated or anxious. She required help carrying her books and managing her stress when they attended Douglas College together. Ms. Bains also recalled Facetiming with Ms. Ziolkiewicz when she was in the Czech Republic, and said that she would often cry during those calls.

[43] In the summer of 2023, a disturbing event caused Ms. Ziolkiewicz great distress and led to a change in her working life. Following a summer field trip to a park Ms. Ziolkiewicz specifically, and Fraser Montessori generally, were accused of leaving a child unsupervised at a pool. An investigation ensued, which ultimately

revealed that the child in question was not from Fraser Montessori at all. Regardless, the accusation and subsequent investigation took an additional toll on Ms. Ziolkiewicz, whose work was already regularly impacted by her existing anxiety.

[44] Following the investigation, Ms. Ziolkiewicz ceased working regular hours at the Main Facility. Starting in September of 2023, she began doing “pick up” and “drop off” off the school age children, which takes approximately 45 minutes to an hour per day. These duties do not include driving children to and from school herself, rather, at the start of the school day, Ms. Ziolkiewicz drives herself to the school and walks the children from the school bus to their classrooms, and at the end of the school day, she walks the children from their classrooms to the school bus.

[45] Ms. Ziolkiewicz testified that since July 2023, she has substituted once or twice when the ratio required another staff member. For the most part, however, she is no longer working at the daycare, and does not work directly with the children at the centre in any capacity.

[46] At the time of trial, Ms. Ziolkiewicz was not working, and did not have a plan to return to work at the Main Facility. She did not have a specific plan to apply for any other job. She did not have plans to return to school or undergo other training. She testified that she continues to suffer from the physical and psychological effects of the Accident.

Experts

[47] Ms. Ziolkiewicz called several expert witnesses.

[48] Dr. Sami Zaki, a physiatrist, testified that he saw Ms. Ziolkiewicz two times, in December 2018 and in July 2023. Dr. Zaki opined that, as a result of the Accident:

- a) In 2018, Ms. Ziolkiewicz presented with soft tissue injuries to her neck, upper shoulder girdles, mid-thoracic and lower-thoracic areas, and experienced chronic headaches referred from her neck pain.

- b) In 2023, Ms. Ziolkiewicz continued to experience chronic myofascial pain syndrome in her neck, upper shoulders and upper interscapular muscles, mechanical lower back pain, and ongoing post-traumatic headaches of mixed type, including tension headaches; and
- c) Ms. Ziolkiewicz has likely developed sensitization of the nervous system.

[49] Dr. Zaki opined that “experiencing pain seemed to be one of the significant trigger factors for [Ms. Ziolkiewicz’s] anxiety but also being anxious adds to the limiting effects of pain on function and a vicious circle is created.”

[50] Under cross-examination, Dr. Zaki confirmed that when he saw Ms. Ziolkiewicz in July of 2023, she reported the following:

- a) Ms. Ziolkiewicz went for walks two to three times a week for up to 20 to 30 minutes.
- b) When at work, Ms. Ziolkiewicz helped with cleaning, sweeping, washing surfaces, cleaning toys, and providing childcare. She took a few days off per month, sometimes for mental health and sometimes to get her own chores done.

[51] Mr. Zaki also conceded the following:

- a) Ms. Ziolkiewicz’s symptoms are intermittent and sporadic. For example, she was pain free on the date of her second assessment.
- b) He did not identify “trigger points” when he performed palpations on Ms. Ziolkiewicz in 2018.
- c) “Chronic” pain does not mean “permanent”, it means “ongoing”.

[52] Dr. Lee Rasmusen, a psychiatrist, testified that he saw Ms. Ziolkiewicz for an independent medical assessment in June 2023. Dr. Rasmusen testified that:

- a) Ms. Ziolkiewicz suffers from General Anxiety Disorder with associated panic attacks;
- b) Ms. Ziolkiewicz has an adjustment disorder with depressed mood, although during her most recent assessment she would be categorized as having mildly low mood as opposed to major depression; and
- c) Ms. Ziolkiewicz's musculoskeletal pain is the cause of her psychological diagnoses.

[53] Dr. Rasmusen stated that Ms. Ziolkiewicz is unlikely to regain her pre-Accident functioning.

[54] Dr. Rasmusen confirmed that usually psychological conditions caused by a specific event occur close in time to that event. The records he reviewed suggested that the more serious limitations due to Ms. Ziolkiewicz's anxiety did not manifest until three years after the Accident. Dr. Rasmusen conceded that it is possible that Ms. Ziolkiewicz's current anxiety may not be linked to the Accident.

[55] Dr. Rasmusen opined that Ms. Ziolkiewicz's physical injuries could improve with treatment, and that her psychiatric condition would also likely improve as a result.

[56] Matthew Cole is a kinesiologist. He performed a functional capacity evaluation and cost of future care assessment of Ms. Ziolkiewicz in July 2023. He conducted a battery of tests involving grip strength, fine and medium dexterity, sitting, standing in stooped position, repetitive movement, lifting, carrying, push and pull, and stairs. He conceded that he did not test Ms. Ziolkiewicz's ability to perform specific work tasks or movements like mopping, sweeping or diapering.

[57] Mr. Cole determined that Ms. Ziolkiewicz is now limited to primarily sedentary work. His findings on Ms. Ziolkiewicz's requirements for house and yard care were based on this determination, but he conceded that he did not inquire as to whether Ms. Ziolkiewicz actually required (or would continue to require) the level of inside

and outside cleaning/upkeep he recommended. For example, it was not clear that Ms. Ziolkiewicz had ever shovelled her own snow, or intended to do so.

[58] Mr. Derek Nordin performed a vocational assessment of the plaintiff in July 2023. He found Ms. Ziolkiewicz to be a poor historian, generally. He determined that Ms. Ziolkiewicz had a 10–20% possibility of become a medical doctor in Canada. He said that while Ms. Ziolkiewicz was not strong academically, the possibility remained that she could work have worked very hard to achieve this goal.

[59] Mr. Nordin agreed that at a minimum, there are some stepping stones to a career in medicine that he would expect to see, such as high school chemistry and biology courses. Ms. Ziolkiewicz earned a C and a C- in these two classes respectively. Mr. Nordin agreed that having an interest in medical science is different than demonstrating an aptitude for same.

[60] Mr. Nordin opined that currently, outside of employment by a sympathetic employer, namely Ms. Ziolkiewicz's mother, Ms. Ziolkiewicz may be competitively unemployable.

[61] Two experts were called by the defendant. Dr. Robin Rickards, an orthopaedic surgeon, provided an opinion on the etiology, treatment and management of chronic pain. Crystal Wong, a vocational rehabilitation consultant, conducted a vocational assessment of Ms. Ziolkiewicz.

[62] Dr. Rickards testified that the only symptoms reported to him by Ms. Ziolkiewicz were intermittent right shoulder pain, posterior skull headaches and intermittent low back pain. His recommendations for treatment and improvement were consistent with most protocols for soft tissue injuries, namely exercise, anti-inflammatory medication and, possibly, cortisone injections.

[63] Ms. Wong was an articulate and thorough witness. Like Mr. Nordin, Ms. Wong also found Ms. Ziolkiewicz to be a poor historian, and reported her difficulty recalling details about her education, work history and various details about her life.

[64] As will be discussed later with respect to Ms. Ziolkiewicz's credibility, some of Ms. Ziolkiewicz's poor recall may be related to her anxiety, and the decisions she makes in order to avoid, or get through situations that exacerbate her symptoms.

[65] Ms. Wong conducted tests aimed at measuring Ms. Ziolkiewicz's aptitudes, academic achievement, mood and occupational interests. She concluded that it was not probable that Ms. Ziolkiewicz would have become a qualified medical doctor in Canada, absent the Accident.

[66] Ms. Wong could not state definitively whether, absent the Accident, she would have counseled Ms. Ziolkiewicz to take over or continue working with her mother at Fraser Montessori. Ms. Wong stated that individuals with physical and psychological barriers do not necessarily have multiple barriers to employment. She concluded that anxiety symptoms may affect Ms. Ziolkiewicz's abilities, but much also depends on treatment and symptom management.

Credibility

[67] Counsel for Ms. Ziolkiewicz and for the defendants agree that the court will have to assess and come to conclusions about Ms. Ziolkiewicz's credibility in this case, not only with reference to her testimony at trial, but also her reporting during expert assessments and certain of her answers during examinations for discovery.

[68] Assessing credibility involves a consideration of a number of factors as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 SCR 142, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*,

[1952] 2 D.L.R. 354 (B.C.C.A.) [[*Faryna*]]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[69] Ms. Ziolkiewicz acknowledged that she gave some inaccurate answers during her November 2023 examination for discovery. Specifically, she claimed to be working full time at the daycare when she was not, and she also underreported the frequency with which she experiences pain.

[70] Ms. Ziolkiewicz testified that leading up to the examinations for discovery in November 2023 and trial in December, she was experiencing significant anxiety, such that she did what she whatever could to limit the questioning by counsel, which, in her mind, included saying "what he wanted to hear."

[71] Ms. Ziolkiewicz provided an explanation for not advising the experts she attended for assessments in July 2023 that she was off work, or planned to go off work. She said that at that time, she did not know that she would be substantially off work in the coming months.

[72] Counsel for the defendants pointed to other instances where Ms. Ziolkiewicz's testimony or evidence was contradicted by her own earlier reporting, intentionally vague or misleading, or simply inaccurate. For example, Ms. Ziolkiewicz:

- a) Reported to Dr. Zaki that her vehicle was disabled by the Accident and then admitted on cross-examination that this was not the case;

- b) Reported that she quit educational programs due to anxiety related to the Accident or to help her mother, and then reported on other occasions that she quit the same programs because she did not like the classes; and
- c) failed to report anxiety or other psychological injuries during her February 2018 examination for discovery, claiming that she believed an open-ended question about injuries only referred to physical injuries.

[73] Counsel for the defendants also cautioned me to pay similar scrutiny to Edith's testimony as she would potentially be motivated to favour her daughter in her evidence. He also stated that I should view Edith's evidence regarding a plan to sell her daycare with suspicion. He pointed to the fact that neither of the Fraser Montessori employees knew of any potential sale and the "suspicious timing" of the plan as cause for caution.

[74] While I accept that Edith may not be an entirely objective witness in terms of her daughter, I find that her testimony was frank and straightforward. No evidence was presented to me to suggest that she was being less than honest, or to otherwise cast doubt on her testimony. I take nothing from the fact that certain employees were not apprised of plans to sell the business. I was not provided anything other than "suspicion" to establish that this was unusual in terms of communication between a business owner and staff. Nor do I find the timing to be particularly surprising given that Edith and her daughter had both struggled for years to maintain or continue work following their respective car accidents.

[75] In any event, I was not provided with any evidence that the daycare was in fact sold, or that a deal was imminent or, for that matter, not imminent. Therefore, I can place little weight on this "possibility" one way or the other regardless of what it says or does not say about Edith's credibility. I accept Edith's evidence at face value.

[76] Ms. Ziolkiewicz's credibility, however, provides a challenge to the court. She admitted to being less than honest under oath, and her reporting generally was

unreliable. I do believe that Ms. Ziolkiewicz tried to be as honest as she could during the trial, but her recall and judgment is hampered by her anxiety in several respects.

[77] Under all the circumstances, I cannot find her to be a reliable witness and I have viewed her testimony in that light. I relied on Ms. Ziolkiewicz's testimony or reporting when it was corroborated by other witnesses or by documents, or if it was in accord with common sense based on the evidence before me. This is in line with the guidance provided in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

Findings and Causation

[78] Considering the evidence presented at trial, I make the following findings of fact:

- Prior to the Accident, Ms. Ziolkiewicz was largely healthy. She was a normally active child and teen who played recreational sports and enjoyed outdoor activities, but nothing to a serious or committed degree, nor did she continue such activities after high school.
- Prior to the Accident, Ms. Ziolkiewicz may have suffered from occasional anxiety or other transient mental health challenges common to a young person of her age, but this did not prevent her from functioning in, or enjoying her day-to-day life.
- Ms. Ziolkiewicz suffered soft tissue physical injuries as a result of the Accident. These injuries resulted in myofascial pain syndrome in her neck, upper shoulders and upper interscapular muscles, mechanical lower back pain as well as persistent headaches. Her pain is chronic in nature.
- Also a result of the injuries sustained in the Accident, Ms. Ziolkiewicz developed GAD with panic attacks, as well as depressed mood, which has improved over time from a major depressive disorder to an adjustment

disorder with low mood. Her psychological symptoms are linked to her physical symptoms, and vice versa.

- Ms. Ziolkiewicz has a spotty, inconsistent academic record and extremely minimal work experience, both pre- and post-Accident. Ms. Ziolkiewicz’s lack of career progression after high school can—in part—be attributed to the effects of the Accident, but it is not the sole factor.
- Despite the chronic and persistent nature of her pain and mental health issues, Ms. Ziolkiewicz experiences days without pain, can walk short distances for exercise and pleasure and can complete light household tasks on her own time.

Damages

[79] Ms. Ziolkiewicz suffered musculoskeletal injuries as a result of the Accident, leading to chronic pain. These physical injuries caused or significantly contributed to her GAD and depressed mood which now appears to be her primary limiting factor in terms of her ability to work and enjoy life.

[80] While it is possible Ms. Ziolkiewicz could see improvement with a commitment to consistent therapy, physical exercise and non-steroidal anti-inflammatory medication, based on the evidence presented by both expert and lay witnesses, I accept that the pain and anxiety “loop” that Ms. Ziolkiewicz has been in for the past nine years will not be resolved with a quick or easy fix.

[81] Ms. Ziolkiewicz is entitled to be restored to the position she would have been in but for the Accident, so far as can be accomplished, and with regard to the difficulties inherent in comparing potential future paths of a person who was just starting out in life.

Non-Pecuniary Damages

[82] Both parties rely on the list of factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal to SCC ref’d [2006] S.C.C.A. No. 100. The

inexhaustive list of common factors to consider that influence an award of non-pecuniary damages includes:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism.

[83] At the time of trial, Ms. Ziolkiewicz was a young woman in her late twenties. Her injuries have both physical and psychological aspects, and affected every facet of her life for almost a decade.

[84] The Accident occurred before she was able to establish a clear career plan, or to demonstrate the perseverance and commitment she would need to pursue her later ambition of becoming a doctor.

[85] There is no consensus that her symptoms will substantially improve, whether she continues existing treatments or tries others recommended for her. However, given her age and general good health, most experts conceded that it was possible that with effective and consistent treatment of her anxiety, Ms. Ziolkiewicz's chronic pain may also resolve or improve in time, or vice versa.

[86] Ms. Ziolkiewicz does not display a high level of stoicism. She is fortunate that she has the level of family support she has enjoyed, such that she has not had to “muscle through” her symptoms in order to survive. Of course, this also means that she has not developed skills, gained an education or started a career. While stoicism should not penalize a plaintiff (*Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at para. 55), it is also true that a damages award should not over-compensate those who have the benefit of a “soft place to fall”.

[87] In light of this significant family support, and Ms. Ziolkiewicz’s ability to complete her own light housekeeping tasks on her own schedule, I do not find that a separate award of housekeeping capacity is warranted in this case. Ms. Ziolkiewicz’s symptoms do not prevent her from completing most light household tasks, and her abilities may improve over time, enabling her to take on more housekeeping tasks in future or to complete them more efficiently. The evidence shows that she is not now, and has never been required to do heavy household tasks (i.e., snow removal) on her own. In my view, this situation is best assessed as a non-pecuniary loss.

[88] In her written submissions, Ms. Ziolkiewicz refers to several cases in which non-pecuniary damages ranged between \$140,000 to 350,000. Some of the more relevant cases are:

- a) *Tritton v. Lai*, 2023 BCSC 956 (\$190,000 reduced by 20% for pre-existing conditions)
- b) *Fletcher v. Biu*, 2020 BCSC 1304 (\$200,000, or \$230,000 if valued in 2023)
- c) *Gundarah v. Teves*, 2023 BCSC 1540 (\$200,000)
- d) *Moges v. Sanderson*, 2020 BCSC 1511 (\$200,000, or \$230,000 if valued in 2023)
- e) *Khosa v. Kalamatimaleki*, 2014 BCSC 2060 (\$140,000, or \$175,000 if valued in 2023)

- f) *Sebaa v. Ricci*, 2015 BCSC 1492 (\$180,000, or \$222,000 if valued in 2023)
- g) *Watts v. Lindsay*, 2019 BCSC 2239 (\$160,000, or 185,000 if valued in 2023)
- h) *Cole v. Sandhu*, 2020 BCSC 709, (\$175,000, or \$201,000 if valued in 2023)

[89] The above cases involve plaintiffs with soft tissue injuries resulting in significant chronic pain. Most also experienced depression, anxiety and other mental health issues arising from the chronic pain, with significant impacts on their personal and professional lives that were unlikely to improve.

[90] Ms. Ziolkiewicz submits that an award of \$200,000 is warranted, in light of her physical and psychological injuries, and the significant impact they have had on her ability to develop skills as a young adult, to pursue her career plans, or to enjoy life. She also suggests this amount is appropriate given the likelihood that she will remain competitively unemployable going forward.

[91] The defendants rely on cases with non-pecuniary awards in the range of \$55,000 to \$80,000. These cases involve similar physical and psychological injuries, but are distinguished from the cases cited by Ms. Ziolkiewicz, in that the plaintiffs in those cases were found to have experienced comparatively minor impacts on day-to-day functioning.

[92] For example, the defendants argue that the most applicable case to the present facts is *Manhas v. Jaswal*, 2020 BCSC 586, in which the plaintiff was awarded \$60,000 in non-pecuniary damages. In that case, the plaintiff was found to have difficulty studying, experienced increased irritability, and that her injuries impacted her ability to help with caring for her siblings and doing household tasks.

[93] Similarly, in *Glass v. Dhaliwal*, 2020 BCSC 186 (\$65,000), *Warkentin v. Allan*, 2022 BCSC 1998 (\$80,000), and *Bhumrah v. McLeary*, 2021 BCSC 285 (\$55,000),

the plaintiffs were found to have sustained soft tissue injuries, some of which became chronic in nature, leading to varying impacts on the ability to perform at work, complete household tasks as quickly as before, or to enjoy some recreational activities.

[94] As a result of the Accident, Ms. Ziolkiewicz has chronic pain with anxiety and an adjustment disorder which has significantly limited her enjoyment of life. It is not clear from the evidence what the long-term prognosis may be for Ms. Ziolkiewicz, but I find, and the evidence supports, that the Accident has had a profound impact on Ms. Ziolkiewicz’s personal and professional life in the almost nine years following.

[95] I largely accept and rely on the opinions of Dr. Zaki and Dr. Rasmusen in terms of the full scope of the injuries suffered by Ms. Ziolkiewicz as result of the Accident. I also accept the evidence of Dr. Rickards with respect to Ms. Ziolkiewicz’s physical injuries. However, I consider Dr. Zaki’s opinion concerning the “vicious cycle” of pain triggering anxiety, and anxiety amplifying pain to be the primary factor in Ms. Ziolkiewicz’s post-Accident trajectory, and one that adds significant complexity to the task of predicting her prognosis.

[96] Given Ms. Ziolkiewicz’s age, the support she enjoys, and the somewhat inconsistent regime of treatment, therapy and medication undertaken thus far, I do find the likelihood that Ms. Ziolkiewicz will improve over time to be greater than the most negative of prognoses suggested by Ms. Ziolkiewicz.

[97] In all the circumstances, I find an appropriate award under this head of damages to be \$150,000.

Past Wage Loss

[98] Ms. Ziolkiewicz does not seek an award for past wage loss.

Loss of Future Earning Capacity

[99] A claim for loss of future earning capacity raises the following questions: (1) has Ms. Ziolkiewicz’s earning capacity been impaired by her injuries; and, if so, (2)

what compensation should be awarded for the resulting harm that will accrue over time?

[100] Assessing loss of future earning capacity involves a comparison between Ms. Ziolkiewicz's likely future working life with and without the Accident: *Rattan v. Li*, 2022 BCSC 648 at para. 145, citing *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157.

[101] The accepted approach to the assessment of damages for loss of future earning capacity is found in the trilogy of *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421.

[102] In *Rab* at para. 47, the court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Does the evidence disclose a potential future event that could lead to a loss of capacity?
- b) On the evidence, is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[103] There are two approaches to the assessment of the value of the possible future loss, the “earnings approach” or the “capital asset approach”: *Rattan* at para. 150.

[104] The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. Often, this occurs when a plaintiff has an established work history and a clear career trajectory. The capital asset approach is appropriate where, at the time of trial, the plaintiff has not suffered a loss of earnings but a loss of earning capacity, a capital asset. It is particularly helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff's potential future: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 16–17.

[105] Where the capital asset approach is used, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72, citing *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43, 1995 CanLII 2871 (C.A.); *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[106] Finally, the court must ultimately determine whether the damage award is fair and reasonable: *Lo* at para. 117.

[107] On balance, I think it is clear that a capital asset approach is appropriate. Ms. Ziolkiewicz was very young at the time of the Accident. While the extent or intensity of her efforts to gain skills and experience may be under scrutiny, the fact that she had not yet established herself in a career is not really in dispute: *Ploskon-Ciesla* at para 17.

[108] This is the most contentious issue in this trial. The parties value Ms. Ziolkiewicz's loss very differently.

[109] Ms. Ziolkiewicz provides three different "pathways" as real and substantial possibilities had the Accident not occurred:

- a) First, that Ms. Ziolkiewicz would have completed medical school in the Czech Republic and subsequently qualified to practice as a physician in BC.
- b) Second, that Ms. Ziolkiewicz would have taken over Fraser Montessori from her mother in or around 2024.
- c) Third, Ms. Ziolkiewicz would have trained for, or otherwise pursued another type of job, earning somewhere between the average of a high school graduate and someone who has earned a bachelors degree from a university.

[110] Ms. Ziolkiewicz seeks an award based on the amalgamation of the three pathways. The defendants object to this methodology, which, if applied, would be a

novel legal analysis using a combination of all three potential pathways to arrive at a valuation.

[111] I agree that this approach is not supported by the caselaw, but more to the point, I do not find the first or second pathway to be real and substantial possibilities. For clarity, I will address the pathways suggested by Ms. Ziolkiewicz in turn, but not for the purpose of finding a combined, multi-pathway percentage for the purpose of valuation.

Physician

[112] The standard for proving whether a hypothetical future event is a real and substantial possibility is less onerous than the balance of probabilities, but the evidence must establish that the future hypothetical is more than speculative: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183.

[113] Experts for the defence and Ms. Ziolkiewicz agreed that the likelihood of Ms. Ziolkiewicz becoming a doctor in BC even without the Accident is very low. Ms. Ziolkiewicz states that the likelihood that she would have successfully become a doctor in BC should be assessed at 15% and that a possible salary had she done so would be (as suggested by Mr. Nordin) \$164,930.

[114] The defendants argue that as there is no real or substantial possibility that Ms. Ziolkiewicz would become a doctor qualified to practice in BC, this should not be factored into any valuation.

[115] In the absence of any of the usual indicia of a potential career as a physician in Canada (for example, a proven aptitude for sciences, volunteering in medical settings, a post-secondary degree of any kind, taking the MCAT, or even just a long-standing goal of pursuing such a goal) the only evidence before me in support of this first pathway is Ms. Ziolkiewicz's brief, unsuccessful tenure at Charles University.

[116] I accept that the "trigger" for Ms. Ziolkiewicz's abrupt departure from this program was her anxiety and panic attacks, which I have found to be linked to the

Accident. However, I was provided with nothing to suggest she would have been successful at this course of study but for the Accident. On the contrary, Ms. Ziolkiewicz's pre-Accident academic record and work history does not indicate a different outcome, and her success rate in the program suggests that the subject matter may have not been within Ms. Ziolkiewicz's capabilities even if she were healthy.

[117] In her report, Ms. Wong opines that it is not probable that Ms. Ziolkiewicz could or would qualify for medical school in Canada, or graduate from the program in the Czech Republic. Mr. Nordin did not provide an opinion on this point, given that Ms. Ziolkiewicz did not have an undergraduate degree in Canada. I agree with the conclusions in Ms. Wong's report in this regard.

[118] Ms. Wong, to her credit, goes to great lengths in her report to quantify the likelihood of any student from the Charles University medical program qualifying in BC, a factor relied on by Ms. Ziolkiewicz in coming to her "percentage". Ms. Wong suggested an 11% chance of success for such a student. Regardless, given all the evidence before me, I do not consider this pathway to be a real or substantial possibility for Ms. Ziolkiewicz.

Daycare Owner

[119] Ms. Ziolkiewicz suggests that the second pathway, taking over Fraser Montessori, is the most likely. She argues that given her mother's legacy and her unwavering support, it would have been in Ms. Ziolkiewicz's "best interest" to pursue this career option, and that this would have "become clear" to her over time.

[120] The defendants argue that despite the longstanding default nature of her employment at Fraser Montessori, there is scant evidence that Ms. Ziolkiewicz would have chosen to continue working in the childcare field, or that she would have taken over her mother's business. They further argue that it is also not likely that Ms. Ziolkiewicz would be able to capitalize on her mother's goodwill and business acumen.

[121] I accept that there is a non-trivial possibility that absent Edith's car accident, Ms. Ziolkiewicz may have—one day—agreed to take over Fraser Montessori.

[122] However, I find that quite apart from Ms. Ziolkiewicz's Accident, this possibility would have likely been overtaken by Edith's need to retire or sell the business due to her own post-accident circumstances before Ms. Ziolkiewicz would be qualified, or willing to assume responsibility for it.

[123] The evidence on this point was limited, and irrevocably coloured by Ms. Ziolkiewicz's near-constant employment by her mother (regardless of whether she actually worked at the daycare). At no time did Ms. Ziolkiewicz demonstrate serious interest of taking over the daycare business.

[124] As an aside, the evidence was thin on the ground in terms of what this pathway would mean in terms of a financial capital asset for Ms. Ziolkiewicz. Edith testified that her business has a revenue of approximately \$1.3 million per year, and that, it earns \$400,000–\$450,000 in profits, including what the business pays her.

[125] Ms. Ziolkiewicz concedes that there is uncertainty as to how she might profit if she were to take over the business. However, she speculates that she would have earned \$112,500 per year, and that the likelihood of her taking over Fraser Montessori by 2024 is 70%, but for the Accident.

[126] Under all the circumstances, I do not consider it to be a reasonable and substantial possibility that Ms. Ziolkiewicz would have taken over her mother's business by 2024.

Other Careers

[127] Under the third pathway, Ms. Ziolkiewicz argues she would have competed on the open job market after completing some unspecified post-secondary education. She suggests that absent the Accident, she would have earned an average income of \$52,000 per year and had the capacity to work full time. She suggests this scenario has a 15% likelihood.

[128] The defendants argue that \$52,000 is still higher than any amounts supported by evidence (such as Ms. Ziolkiewicz's income tax returns) and the amount provided by Mr. Nordin for workers with a university degree or diploma, which Ms. Ziolkiewicz does not have. The defendants allow that \$50,000 is the "closest" to an accurate valuation of Ms. Ziolkiewicz's without-Accident earning capacity.

[129] Without detailing the mathematical formulas used to arrive at the combined total, Ms. Ziolkiewicz seeks an award for future loss of earning capacity of \$2,000,000, based on the amalgamation of the three pathways.

[130] As an alternative submission, Ms. Ziolkiewicz proposes an award of \$650,000. This award is based on her yearly present earnings as an employee of Fraser Montessori, which are approximately \$50,000 per year, discounted to reflect a 50% residual earning capacity and adjusted for a 10% negative contingency to account for general contingencies, such as death or disability for other reasons. To arrive at both submissions, she uses present value multipliers based on 38 years of lost earning capacity to her age 65 (except for the first pathway, for which she uses multiplier based on 28.8 years to account for the time it would take her to complete the degree), and applies a 10% contingency reduction.

[131] The defendants recommend a loss of future earning capacity award based on a potential salary of \$50,000, which in their view is the most realistic earnings scenario. The defendants suggest that the loss of capacity should be in the range of 5–7% of the whole, given that Ms. Ziolkiewicz has minimal physical symptoms, is capable of performing sedentary work, has many pain-free days and demonstrated an ability to work full time at the daycare between 2020 and 2023, albeit performing modified duties as compared to her co-workers. The defendants state that using this analysis, the award should be in the range of \$64,812–\$90,736.

Conclusion on Loss of Future Earning Capacity

[132] I find that the evidence suggests that potential future events could give rise to a loss, namely that there is a real and substantial possibility that Ms. Ziolkiewicz's injuries will prevent her from achieving an independent career outside of Fraser

Montessori in the future. Ms. Ziolkiewicz is entitled to compensation for the loss of a capital asset caused by the Accident.

[133] While I do not find that there is a substantial likelihood that Ms. Ziolkiewicz would have become a doctor or taken over Fraser Montessori by 2024, I do find that there is a real and substantial possibility that Ms. Ziolkiewicz would have pursued some limited further education and found employment other than with her mother.

[134] Even if the education was in a field other than early childhood education, I find that that Ms. Ziolkiewicz likely would have obtained employment with a salary that is roughly equal to what she earned at Fraser Montessori. In the alternative, I find that she likely would have continued to work for her mother for as long as the daycare remained under her ownership, and then she would have found comparable employment in a similar industry.

[135] I find that Ms. Ziolkiewicz likely would have worked until the age of 65. Where the capital asset approach is employed to valuing future lost earning capacity, it is acceptable to award the equivalent of some multiple of annual earnings as the basis for compensation: *Mannella v. Obregon*, 2020 BCSC 715 at para. 45.

[136] I am not prepared to find that Ms. Ziolkiewicz is entitled to compensation based on the loss of 38 years of employment as proposed. The evidence does not establish that Ms. Ziolkiewicz is entirely incapacitated. She has an established ability to work with accommodations (albeit for a sympathetic employer who may or may not close or sell her business within the next few years). It is also likely that with some improvement to either her physical or mental health, her prognosis overall will improve.

[137] The assessment of damages is a matter of judgment and not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. Assessing an award for future loss of income is not a purely mathematical exercise; although the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such

loss: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 54.

[138] In line with the alternative methodology proposed in Ms. Ziolkiewicz' s submissions, I assess Ms. Ziolkiewicz' s loss as a percentage of her “without Accident” earning capacity. I do so with reference to the (approximate) \$50,000 number as proposed by Mr. Nordin as an average income in BC for an individual with a university certificate or diploma (but not a bachelors degree), which is also largely in line with the occupations Ms. Wong considered reasonable possibilities for Ms. Ziolkiewicz. This is also roughly the amount Ms. Ziolkiewicz was paid by Fraser Montessori, and was (at least nominally) accepted by the defendants as a baseline.

[139] Assuming she would have worked in a similar fashion making similar money, Ms. Ziolkiewicz' s without accident earning capacity can be measured as follows: $\$50,000 \times 28.8051 \times 90\% = \$1,296,230$ (namely, salary x present value multiplier, factoring in a 10% negative contingency.)

[140] In her submissions, Ms. Ziolkiewicz argues that she should be assessed a loss of earning capacity in the range of 40-60% of that total, in order to arrive at her alternative award of 650,000. I would not accede to that percentage of loss. Instead, I consider her loss of earning capacity to be in the 25-30% range.

[141] While Ms. Ziolkiewicz has obtained experience and even some training in the childcare field, her time at Fraser Montessori is inextricably linked to the devoted and generous support of her mother. The Accident deprived Ms. Ziolkiewicz of the opportunity and ability to find her own path in the manner and on the timeline she might have otherwise. This award reflects this reality but also indicates that Ms. Ziolkiewicz still has potential to improve, manage and treat her symptoms, and to find a vocation outside of the support currently provided by her mother.

[142] I therefore award Ms. Ziolkiewicz \$350,000 for loss of future earnings. I consider this to be a fair and reasonable assessment given all the circumstances. Ms. Ziolkiewicz has suffered a significant loss, but not a total one

Future Cost of Care

[143] *Chavez-Salinas v. Tower*, 2022 BCCA 43 provides a helpful legal framework for future care awards at para. 83. Some relevant points include:

- The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff
- It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable.
- The court must be satisfied the plaintiff would, in fact, make use of the particular care item
- The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred;
- The court must be satisfied that there is no significant overlap in the various care items being sought
- Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss.

[144] The standard of proof for assessing cost of future care is real and substantial future possibility: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.

[145] Ms. Ziolkiewicz advances a claim for cost of future care that totals \$128,945. The defendants argue that an award in the range of \$10,000-\$15,000 is appropriate.

[146] The defendants' primary argument for denying most of the items claimed by Ms. Ziolkiewicz is her sporadic and inconsistent efforts to follow courses of treatment recommended by care providers in the past. They refer to *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74 for the proposition that the person making the claim must also establish that she will use the recommended items.

[147] It is not particularly difficult, based on the expert evidence, to assess what is necessary, or what could be helpful to promote the mental and physical health of Ms. Ziolkiewicz. It is more difficult to assess what she will make actual use of.

[148] Ms. Ziolkiewicz testified that she would undertake the treatments recommended by medical professionals.

[149] I accept that Ms. Ziolkiewicz's past efforts at treating her physical and mental health challenges have not been consistent, and she has at various times proved resistant to suggested treatment options. I am sympathetic to the fact that at various times during the period in question, Ms Z was depressed, suffering from anxiety, attending school in Europe (however briefly), and like the rest of the population, dealing the impacts of COVID on health services.

[150] Ms. Ziolkiewicz states that she was not lackadaisical, but conceded that she did not continue with appointments, medications or regimes that she felt were not helping. The defendants have not specifically argued that Ms. Ziolkiewicz failed to mitigate.

[151] I am not satisfied that it would be fair to deny otherwise reasonable claims based solely on Ms. Ziolkiewicz's treatment history. As Ms. Ziolkiewicz matures, I am confident that she will seek out treatments that will improve her quality of life over time, if pursued with focus and determination.

[152] That said, some of Ms. Ziolkiewicz's claims are not supported by much more than a suggestion that an item might be a treatment option to "explore" (ie. botox injections). In this award, I focused on those items that were supported by more than suggestion, or that were rationally linked to less speculative treatment plans.

[153] Based on the evidence adduced at trial, I consider the following to be supportable claims for cost of future care. I reference, in part, the table of care recommendations as claimed by Ms. Ziolkiewicz, which includes some replacement costs and present discount factors where applicable:

| | | | |
|------------------------------|---|---|-----------------|
| Physiotherapy Kinesiology | or \$95/session | 25 sessions | \$2375 |
| Massage Therapy | \$110/session | 12 | \$2,860 |
| Counselling | \$160/session \$200 for initial report \$200 for discharge report | 16 | \$2,960 |
| TENS machine | \$65 - \$300 (\$150) | 1 at \$150, with 2 further replacements | \$450 |
| Personal Massager | \$100 – 170 (\$135) | 1 at \$135, with 2 further replacements | \$405 |
| Cymbalta | 215 | Yearly (30.6731) | \$6,595 |
| Naproxen | \$148.80 | Yearly (30.6731) | \$4,564 |
| TOTAL | | | \$39,183 |

[154] Dr. Zaki and Dr. Rickards referred to the benefit of a structured exercise or physical rehabilitation program. I did not award amounts for attendance at a gym. Ms. Ziolkiewicz reported that lifting weights at a gym was aggravating to her symptoms, and I find that Ms. Ziolkiewicz is more likely to attend physio appointments, and implement simple at-home exercises than she is to attend a gym.

[155] I have awarded amounts for massage therapy as recommended by Dr. Zaki, for the purpose of pain management. Also in line with the recommendation of Dr. Zaki, and in light of my finding that simple, at home strategies may be effective for Ms. Ziolkiewicz, I have awarded the amounts proposed by Ms. Ziolkiewicz for a home massager and TENS machine, and allowed for two replacements as Ms. Ziolkiewicz works over time to improve her symptoms.

[156] I decline to make an award for participation in a pain program. This was recommended by Dr. Zaki and Mr. Cole, but the evidence at trial and in their respective reports in support of this program and how it might benefit Ms. Ziolkiewicz was vague and non-specific. Similarly, the amount claimed for this program was presented as a “range” between \$9,000 and \$25,000. I cannot allow this claim on the evidence presented.

[157] I awarded the full amount claimed by Ms. Ziolkiewicz for counselling.

[158] I also allowed the claims for Naproxen and Cymbalta. There is evidence that Ms. Ziolkiewicz currently uses Naproxen to manage pain. I awarded the for Cymbalta, which, while on the more hypothetical end of the spectrum, was recommended by Dr. Zaki and Mr. Cole as potentially helpful in managing Ms. Ziolkiewicz’s mood once she establishes a relationship with a psychiatrist or counsellor.

[159] Based on the evidence before me, I have not awarded further amounts for any other medications, nor for botox or trigger injections.

Conclusion

[160] Ms .Ziolkiewicz is awarded the following damages:

- a) Non-pecuniary – \$150,000
- b) Loss of Future earning capacity –\$350,000
- c) Cost of future care \$39,183
- d) Special damages (as agreed to by the parties before trial) - \$3883.00

Total: \$543,066

[161] Ms. Ziolkiewicz was largely successful in this matter, and is therefore entitled to her costs at Scale B. If any party seeks an alternative costs order, they may advise the registry of this within 30 days of the date of this judgment and I will direct a schedule for written submissions.

[162] The parties have leave to appear before me to address any issues arising from this assessment.

“J. Whately J.”