IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nolan v. Kohl,*
2024 BCSC 1202

Date: 20240705
Docket: M214630
Registry: Vancouver

Between:

Annette Nolan

Plaintiff

And

Pierre Kohl

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:	K. Hamilton M. Salako, Articled Student
Counsel for the Defendant:	D. Merchant J. Guest
Place and Dates of Trial:	Vancouver, B.C. October 10-13; 16-20; 23-27, 2023
Place and Date of Judgment:	Vancouver, B.C. July 5, 2024

I. Introduction

[1] Annette Nolan was injured on September 23, 2020 while crossing a street at an unmarked crosswalk. She was struck by a vehicle driven by the defendant, Pierre Kohl.

[2] Ms. Nolan's injuries have been life-altering in their effects. She has gone from being a steadily employed, active and vivacious 37 year old woman to being an essentially housebound individual with no employment capability and highly uncertain prospects for the future.

[3] Both liability and damages are in issue. On liability, the defendant argues fault should be apportioned 65-35 in favour of the plaintiff. On damages, the defendant concedes the plaintiff is currently disabled from all forms of employment, but says her impairment is solely psychological in nature and may be treatable to the point of return to her former employment.

[4] The plaintiff maintains the defendant is entirely at fault. On damages, she says she should be awarded damages that reflect her injuries, their devastating effects, and her bleak future prospects.

II. Liability

A. Plaintiff’s Evidence

[5] The accident occurred at the intersection of Harwood Street and Thurlow Street in the West End of Vancouver. Ms. Nolan was familiar with the neighbourhood and was in the process of moving to an apartment in that area.

[6] Harwood Street runs nominally east-west, while Thurlow Street runs nominally north-south. Thurlow is a one-way street with two southbound travel lanes. Ms. Nolan was walking westbound on Harwood Street and arrived at the end of the sidewalk at Thurlow, intending to cross Thurlow. She looked to her right, where she saw a blue car in the lane next to her, and a red/burgundy car behind it.

The blue car stopped to let her cross. She knew the blue car had stopped for her because she waved at it and looked at the driver and the driver waved back at her.

[7] Ms. Nolan then walked straight across Thurlow toward the sidewalk on the other side. She said there was no car approaching in the second of the two travel lanes. She was three quarters of the way across the road when she saw a car hood, red/burgundy in colour, which she described as “a flash coming at my leg”. She was struck at her right hip, which sent her up in the air. She hit the right side of her head as she landed.

[8] She remembered sitting on the pavement with her leg out. Her right ankle was sore. She felt dazed and “pretty annoyed, because I had checked the lane”. A bystander told her to stay put and said she would call 911.

[9] The driver of the car came over to check on her. Ms. Nolan said she felt really upset and confused. Someone, possibly that driver, asked her questions such as what day it was. Emergency responders came and Ms. Nolan was transported to hospital.

[10] Ms. Nolan identified a photograph of the car that hit her, which shows a large dent or depression in the vehicle’s hood, just to the left of the “Toyota” badge at the front from the viewpoint of the driver.

[11] In cross-examination, Ms. Nolan said:

a) she believed it was not raining prior to the accident, although it did rain afterward. She said it might have been drizzling at the time;

b) she was wearing a long black jacket with a hood. She had the hood up, but it was not a big hood and just came to the side of her face;

c) she was not wearing or using any earbuds or headphones. In direct, she said her cell phone was in her purse; and

d) the accident happened around 6:00 pm and it was light out.

[12] Ms. Nolan said that both the blue car and red car were in the same lane. She had a clear view of Thurlow Street and there was nothing impeding her view. As she was passing the front of the blue car, she glanced up to check the other lane and saw no car coming. She emphasized that she glanced at the other lane *prior* to passing beyond the front of the blue car. She made no further glances to her right until she saw the red car contact her leg. She agreed that at that point she was looking straight, but she said that was because she had already checked that there was nothing in that lane.

[13] Ms. Nolan said the red car hit her right leg and she hit the hood and then hit the ground. The red car was in the far lane at the time of the collision. She believed the dent in the hood was due to an impact with her head, not her leg, because her leg was hit by the car's license plate area. When pressed on that matter, she said that she remembered hitting her head but “it is all blurry”. She reiterated her understanding that her head hit the car’s hood.

B. Bystander’s Evidence

[14] Trina Littlejohns is a bystander who saw the immediate aftermath of the collision.

[15] Ms. Littlejohns was walking towards Pacific Avenue on Thurlow and had just crossed Harwood diagonally, towards Burrard Street, when she heard a screech. She turned around and saw someone lying on the ground, with a red car stopped behind her. She ran to assist. She testified that the pedestrian that had been struck was “more than halfway across the road”.

[16] At trial, she marked a Google Street View image of the scene to denote the location of the person after she had been struck. This mark is located approximately three quarters of the way across the second (or west) lane of Thurlow Street. She said the person who had been struck was about five feet away from the red car.

[17] She went to see if the woman was okay. The woman said she wanted to get up and leave but Ms. Littlejohns told her to stay in place. Ms. Littlejohns said the

woman seemed a bit disoriented and confused, and in shock. Ms. Littlejohns called 911. She waited for a bit and during this time it was raining heavily so she gave the woman her umbrella. She was still on the 911 call at that time.

[18] Ms. Littlejohns said the woman stayed where she was after being told to stay put. She reiterated that the woman was very disoriented and in shock, noting that the woman was "very wide-eyed and looking at me".

C. Defendant's Evidence

[19] Mr. Kohl was the driver of the vehicle that struck Ms. Nolan. He was coming from a work location in West Vancouver and was on his way home.

[20] Mr. Kohl said the accident occurred around 6:00 – 6:30 pm. He said it had just started to rain lightly, and the road was wet. He was driving south on Thurlow in the right lane. As he approached Harwood Street he saw a car stopped on Thurlow at Harwood. He said he had "no memory of a car in front of me", meaning in his lane. He said that as he approached the stopped car, the plaintiff stepped out past the stopped car. He then saw her and "jammed on the brakes, slid and hit her".

[21] Mr. Kohl said he saw the hood of the plaintiff's coat "and then she disappeared", but she then got back up. He went out to help the plaintiff and asked her some questions, such as her name, whether she knew where she was, and so on, and she answered every question. He said the plaintiff was "very quiet". In cross-examination, he acknowledged she was probably dazed and said the plaintiff "fell down again" after getting up. She was sitting a short distance in front of his car. He retrieved his jacket from his car and put it underneath her. Someone else had already called 911.

[22] His car suffered some damage, a "concave bump" to the front of the hood, and also some damage to the bumper.

[23] The plaintiff was wearing a hooded jacket but he did not remember much else about her clothing. Mr. Kohl said that after the accident he saw the plaintiff gather a set of earphones and put them away.

[24] In cross-examination, Mr. Kohl acknowledged that the other car had stopped for the plaintiff, but in re-examination he said he did not know that at the time. He was not sure where his car was at the time he first noticed the stopped car, noting "it's a blur" and that he did not have "any precise picture" of that.

[25] He denied that he had been in the left of the two travel lanes prior to the collision.

D. Positions of the Parties

Plaintiff

[26] The plaintiff argues that she was lawfully in the crosswalk and had the right of way. She ensured the blue car had stopped for her and she checked for other traffic. The defendant was obliged to yield the right of way to her. The plaintiff submits the defendant was also negligent because he failed to anticipate that the blue car had stopped to allow a pedestrian to cross.

[27] The plaintiff maintains that the defendant was actually in the same lane as the blue car, as the plaintiff testified, and moved to the right lane to get around the stopped vehicle. The plaintiff submits this is the reason she did not see the defendant's vehicle as it approached her.

Defendant

[28] The defendant acknowledges it did not occur to him that the blue car had stopped to allow a pedestrian to cross. However, he argues that the plaintiff failed to take care for her own safety by not pausing at the front of the stopped vehicle and checking to ensure if it was safe to cross. The front of that vehicle was a "position of safety" and she left that location without taking the same care and caution she exercised when stepping in front of the stopped vehicle.

[29] The defendant says it is significant that the dent on the hood of his car is located just to the left of centre. Assuming that his vehicle was travelling in the middle of his lane, this indicates that the plaintiff was struck near the centre of his lane and not "nearly to the other side" as suggested by the plaintiff.

[30] The defendant submits the plaintiff's lack of care must also be considered in light of the following circumstances: (a) she was wearing a dark coat with a hood over her head; (b) she was aware of traffic on Thurlow Street and that there were two travel lanes; and (c) she was aware that the blue car was an SUV, a larger vehicle, that was more likely to obscure her from the view of other drivers.

[31] The defendant argues that the "quick glance" of the plaintiff was insufficient to give her a proper view of the lane she was stepping into, and she ought to have made a further visual check before doing so.

[32] As already noted, the defendant says that the appropriate division of liability in this situation is 65 percent to the defendant and 35 percent to the plaintiff.

E. Discussion

Statutory Provisions

[33] As a starting point, an unmarked crosswalk is a "crosswalk" for the purposes of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, s. 119(1) [*MVA*]. The defendant concedes the plaintiff was in a "crosswalk" when she was hit by his vehicle.

[34] Section 179 of the *MVA* sets out the right of way as between drivers and pedestrians. This section was revised in 2024, but at the material time, it read:

> 179 (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that the pedestrian is in danger.
>
> (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

> (3) If a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, the driver of a vehicle approaching from the rear must not overtake and pass the vehicle that is slowing down or stopped.

[35] Section 181 imposes additional duties on drivers:

> 181 Despite sections 178, 179 and 180, a driver of a vehicle must
>
> (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
>
> (b) give warning by sounding the horn of the vehicle when necessary, and
>
> (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

[36] Despite these statutory provisions, drivers and pedestrians still have a general common law duty to exercise due care for their own safety and the safety of others: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 21, citing *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194, 1990 CanLII 1077 (C.A.).

Analysis

[37] I begin with some brief comments on credibility. I will return to this subject later when dealing with the plaintiff's injuries and their effects.

[38] I found both the plaintiff and defendant to be credible witnesses insofar as they both did their best to recount events as they had perceived and remembered them. Any issue with accuracy is one of reliability of their testimony, not credibility.

[39] The essential facts are not in dispute. The accident occurred around 6:00 pm and it was light out. It had not yet started to rain (according to the plaintiff) or light rain had just begun (according to the defendant). The plaintiff entered an unmarked crosswalk after a car had stopped to allow her to cross. She was well into the second lane of travel when she was struck. Exactly where she was is hard to say on the available evidence, but it was at least at the halfway point, approximately. After the collision, the plaintiff was located at the three-quarter point across the lane, which might suggest she had crossed more than halfway, presuming that the plaintiff

was thrown straight forward in the collision. However, there may be other factors that could account for her end location. One possibility is that the defendant swerved to the right to some extent in order to avoid hitting the plaintiff. Another is that the plaintiff's forward walking momentum had an effect on her end position. As there is no evidence supporting either of these possibilities, I conclude that the plaintiff was probably struck at a point when she was at least halfway across the second lane, as I have already noted.

[40] The most contentious point is whether the defendant's vehicle was in the same lane as the stopped car and then pulled out to proceed in the other lane, or whether it was in the other lane the entire time. The evidence of the plaintiff and defendant stands in stark contrast on this issue.

[41] There is little evidence on which to favour one version or the other. The plaintiff points to the defendant's uncertainty about the location of his car as providing a basis on which to conclude the plaintiff's version is the correct one. However, his expressed uncertainty was only in terms of how far away he was when he first noticed the stopped blue car. He was otherwise adamant that he was in the right lane the entire time.

[42] From this limited body of conflicting evidence between otherwise credible witnesses, I conclude the defendant's version is the more likely. The defendant knew where his car was because he was driving it. He said he did not change lanes to get around the stopped car. For the plaintiff, the pre-collision location of the defendant's car would have been a momentary perception at best. Absent a finding that the defendant was being untruthful on this point, a finding which I decline to make, I conclude his evidence on this issue is the more reliable.

[43] The defendant says Ms. Nolan left a "position of safety" by walking past the stopped car, arguing she "knew she was in a position of safety in front of a vehicle which she had confirmed was stopped". This argument stems from an incorrect legal premise. Section 179(2) of the *MVA* provides that "[a] pedestrian must not leave a curb or other place of safety" where "it is impracticable for the driver to yield

the right of way". A pedestrian who is in front of a stopped car in a crosswalk is not in a "place of safety": *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242, 1994 CanLII 1147 (C.A.). The defendant's argument therefore fails on this point.

[44] Accordingly, the point at which the plaintiff left a "place of safety" was when she stepped off the curb into the unmarked crosswalk, after the blue car had stopped to let her cross. I find that she did so with care, having looked to her right before proceeding into the crosswalk. She then had the right of way. At that point, she was entitled to assume other approaching traffic would obey the rules of the road and not attempt to overtake the stopped car.

[45] In contrast, the defendant breached his statutory responsibilities in two ways: he failed to yield the right of way to a pedestrian (s. 179(1)) and, critically, he attempted to overtake another vehicle that had stopped to allow the plaintiff to cross via the unmarked crosswalk (s. 179(3)).

[46] I turn now to the general duty on both parties to exercise due care for their own safety and the safety of others. Again, I am satisfied, and find as a fact, that the plaintiff looked to her right before proceeding into the crosswalk, and that she glanced rightward again before she passed beyond the stopped car. I am satisfied that this fulfilled her duty to exercise due care. With the benefit of hindsight we know the defendant's car must have been approaching, but I conclude the plaintiff took adequate precautions. The fact that the precautions were not effective does not mean she was negligent.

[47] The defendant placed particular emphasis on *Dewar v. Finnigan*, 2020 BCSC 1721, where in a vehicle-pedestrian collision the Court found the pedestrian 35 percent at fault. However, *Dewar* is easily distinguished from the present case. There, the plaintiff jaywalked across a street wearing dark clothes in heavy rain. He saw the approaching vehicle but thought it saw him and would stop. It did not stop. The Court said "any expectation on Mr. Dewar's part that an approaching vehicle would see him in time to slow down if necessary was a risky proposition in the

circumstances" (para. 58). These facts have little resemblance to those in the present case. *Dewar* is of no assistance here.

[48] In *Traynor v. Degroot*, 2003 BCCA 483, a pedestrian was struck while crossing a busy urban street in an unmarked crosswalk. The street had two travel lanes in each direction, plus a curb lane on the near side, meaning the pedestrian had to cross three lanes on that side. The pedestrian looked both ways, and cars in both the curb lane and the adjacent lane stopped for her. The driver in the stopped car in the second lane motioned the pedestrian to proceed but, unlike Ms. Nolan, the pedestrian did not look again. She was struck by the defendant driver, who pulled out and overtook the stopped cars in the other two lanes. He was held wholly liable.

[49] In affirming the decision on liability, the Court of Appeal quoted from *Coso v. Poulos*, [1969] S.C.R. 757 at 760, 1969 CanLII 95, where the Supreme Court of Canada endorsed the following comments on contributory negligence from the trial judgment in that case:

> Was the plaintiff guilty of contributory negligence? He had the right-of-way and was entitled to expect that motorists would respect it. The truck did respect it. Was he not then entitled to expect that vehicles to the south of the truck would observe the action of the truck and act accordingly? I think he was. I do not say that he might not, by the exercise of extreme vigilance, have avoided this accident, but I do not think that in the circumstances such a degree of vigilance was required of him. I find that the defendant is wholly liable.

[50] Those same comments apply here.

[51] In submissions, the defendant mentioned the size of the stopped vehicle (an SUV) and the plaintiff's height (five feet, three inches), as well as the evidence the plaintiff was wearing a hood, without developing a specific argument in relation to those matters. If the suggestion is that the SUV would have blocked her from the view of other drivers, then that is the very justification for the s. 179(3) requirement that a driver not overtake a stopped vehicle in these circumstances. If the suggestion is that those facts imposed a greater duty on the plaintiff to take care for

her safety, then I remain of the view she took reasonable measures to care for her safety.

[52] In relation to the point about the plaintiff wearing a hood, she testified that the hood came to the side of her face. There was no evidence that the hood interfered with her ability to see anything.

[53] Most of the cases involving findings of contributory negligence on the part of pedestrians at crosswalks who are hit by overtaking vehicles involve an identifiable element of lack of care on the pedestrian's part, such as jaywalking outside the crosswalk area, running through the crosswalk without looking, not waiting for traffic to stop, or crossing in poor weather at night while wearing dark clothing. None of those features is present here.

[54] I conclude the defendant is wholly liable for the collision in this case.

III. Plaintiff's Case – Damages

A. The Plaintiff

Background

[55] Ms. Nolan had just turned 37 by the accident date; she was 40 years old at trial. She was born and raised in Ireland and came to Canada in 2016 after some years spent travelling in Australia, New Zealand and Southeast Asia.

[56] Ms. Nolan has a three-year bachelor of arts degree in tourism, granted in 2005 by a post-secondary institution in Ireland, which she augmented by a further educational year at another Irish post-secondary institution, through which she obtained an honours degree in business in 2006.

[57] At the time of the accident, Ms. Nolan was working at UBC as a senior administrative assistant in the finance department, a position she had had since 2017. She assisted the director of the department, which had about 150 employees. Her duties included helping employees with administrative issues, onboarding and outboarding new employees, organising the director's travel, and organising

workplace events and special days. She found particular satisfaction in the latter work given her degrees in business and tourism, and she hoped to pursue a career in travel and event planning. To that end, in September 2019 she had applied for an administrative assistant position with UBC Ceremonies and Events, a department that organises and coordinates university ceremonies and events, but her application was not successful.

Pre-Accident Health and Social Life

[58] Ms. Nolan was very active in sports until her later teens, playing rounders, softball and basketball, and she was the captain of her school's basketball team. Her activities took her to numerous locations around Ireland. She also followed sports closely, especially county and Irish rugby teams, and she was a dedicated fan of Liverpool F.C., even attending Liverpool games on two occasions. She shared that passion with her father, who is also a committed Liverpool fan.

[59] In recent years, Ms. Nolan was active, both physically and socially, and she had a lot of friends. She attended a pub trivia night every week and met a lot of her friends there. With her friends she travelled throughout British Columbia and the United States, attended concerts and went to dance classes and yoga. She had a particular love of music and attended concerts by major acts both in Vancouver and in Ireland. Ms. Nolan also did yoga at her home and was an avid walker.

Post-Accident Status

[60] Ms. Nolan was transported to St. Paul's Hospital, where she was fully assessed and x-rays were taken of her left ankle. She was discharged on crutches and advised to watch for symptoms of concussion. Post-accident photographs show bruising and a black eye at her right eye, a noticeably swollen left ankle, bruising to her right hip and lower right leg, scrapes and bruises to her left knee and lower leg, and bruising to her left elbow and lower arm.

[61] She was very unwell the day after the accident, and "it got worse and worse". Her doctor told her she had a concussion and that she should rest.

[62] Ms. Nolan used crutches for a few weeks, and then used just one crutch. She "really struggled" to walk and continually fell to the side. A cane was recommended, and so she now uses that instead of a crutch.

[63] Ms. Nolan regularly saw her family doctor, Dr. Melissa Martens. The symptoms she reported to her were severe headaches, constant dizziness, nausea, difficulties concentrating, forgetfulness, noise sensitivity and general difficulties doing things, talking to people, or reading.

[64] When attempting to read, she found the words were "all muddled" and she could not separate them. She found it painful to move her eyes from left to right. She could only attempt a couple of lines before the onset of severe headaches and eye pain, and she then had to lie down.

[65] Ms. Nolan has seen several eye specialists, including ophthalmologist Dr. Heather O'Donnell, optometrist Dr. Kevin Loopeker, and Dr. Sarah Simpson, a neuro-ophthalmologist. At the time of trial she was seeking Dr. Loopeker weekly as he was trying to help her with reading. She saw Dr. Simpson in 2022 and was scheduled to see her again in late 2023.

[66] Ms. Nolan has seen a neurologist (Dr. Damon Li), and she described to him four types of headaches that she has: (1) her whole head; (2) a constant headache on the right side; (3) shooting pain from the right to left temple; and (4) pain on the inner right side of her head which is like "a razor blade going round and round". She said "I'm in trouble if I get all of them at the same time".

[67] Dr. Li has tried her on a couple of different medications, without positive results, and Botox was recently tried. She said "it was worse at first" but it has helped "a little bit" since by reducing the pain somewhat. It has not done anything to help with any of her other symptoms, however.

[68] Ms. Nolan acknowledged she had some headaches prior to the accident, but said these were due to birth control medication and once that medication was

changed, the headaches ceased. She noted that those headaches were of a different type to those she gets now.

Current Status

[69] Ms. Nolan said the following are her current symptoms:

a) pain in her hip, ankle and back;

b) severe constant neck pain;

c) constant headaches;

d) eye pain;

e) noise and light sensitivity, and tinnitus; and

f) dizziness and balance problems.

[70] Ms. Nolan said her severe neck pain is located at the top and bottom of her neck. If she turns her head she feels nauseated. She receives both physiotherapy and massage treatments for her neck pain, which have to be done very carefully to avoid nausea. Her problems with nausea have improved with the massage therapy.

[71] Ms. Nolan also receives treatments for her hip, ankle and back. She gets hip pain with any movement, and she said her hip was sore while sitting in the witness box. Initially, treatments were done at a physiotherapy clinic, but now they are done through a concussion clinic, which she attends each week.

[72] In cross-examination, she said her left ankle has improved over time (“it’s getting a bit better”) but it is still “very puffy” and she cannot put weight on her heel. The swelling has gone down as of this year. The use of an ankle brace helps her to walk. She said she could “barely walk” in the first year after the accident.

[73] Ms. Nolan was cross-examined on notes made in various clinical records. One massage therapy note dated July 7, 2022 indicated she had reported “marked

improvement" due to "appointments with other practitioners being less cognitively demanding". At trial, Ms. Nolan did not recall saying that, but said "I do feel I have improved some, given that I couldn't leave my bed for six months". She added that she felt she had improved emotionally as she had been very irritable and got upset easily, but she said she is still irritable.

[74] Ms. Nolan has significant issues with visual and auditory sensitivity. She said the problems with noise sensitivity came first. With any kind of noise "it's like the volume is turned up to the maximum, and it gives me headaches". She is also unable to tell how far away a noise is. Loud noises make her jump. Listening to music is no longer a pleasant experience. In addition, she also has ear-ringing, or tinnitus, and sees an audiologist (Carol Lau) for that issue. She has done tinnitus training with Ms. Lau and she has been fitted with hearing aids as part of that therapy. These things all contribute to a severe slowing of her ability to process information, and she finds she cannot keep up with what people are saying.

[75] Excessive auditory stimulation causes "ringing and buzzing" for hours afterward. This can happen even if she merely goes outside for a walk.

[76] Ms. Nolan is hypersensitive to light and so she wears special glasses. Her eyes get strained without them, and she struggles with any amount of screen time. Even making an appointment online will make her eyes really sore and she has to lie down. The glasses help her "get steadier". She suffers from double vision, which waxes and wanes, and a sense of objects floating or moving around. She has been given eye exercises to do on her own.

[77] She also has significant balance issues, and so she uses a cane when walking. It has been explained to her as her brain "not knowing where her body is". She said a patterned carpet, for example, "sets me off" and leaves her confused. This becomes particularly acute when she leaves her apartment, as she becomes easily confused because "it's too much information for my brain".

[78] Ms. Nolan said she cannot use her stove because she forgets it is on, gets tired and then lies down.

[79] Ms. Nolan said she "takes notes for everything because I can't remember anything" and she has a lot of "brain fog". She finds it difficult to focus on what people are saying. If someone says something, then adds something else, she will forget the first thing that was said. When asked to explain what she meant by "brain fog", she said words to this effect:

> It's the worst. It's hard to explain, but since the accident it's like someone shook my head and everything just fell in different places and they're not connected anymore. When I try to do something, I just blank. I have to really force myself to concentrate. There are no images in my brain anymore, since the accident. It's like empty clouds.

[80] When asked what she meant by "no images in my brain", she said that, prior to the accident, if someone said "I went to a beautiful beach" she could imagine what that might look like, but now no image comes up.

[81] She keeps notes of everything she has to do, including taking breaks, she makes lists, and she takes notes during her medical or treatment appointments. Everything is planned out ("get breakfast", "get rest") and she has to stick with the daily plan in order to get through the day.

[82] She is unable to go grocery shopping because she cannot stand the noise and lights at the grocery store. The overstimulation causes her headaches, eye pain and further balance problems. On occasions when she has tried to go there, she has ended up sitting on the floor, crying, or just dropping the groceries and leaving.

[83] Ms. Nolan does her own grooming but everything about that takes a long time to do. She cannot take showers due to her balance issues and so she only has baths. She also said she does not want anyone to touch her head. She has headaches all the time, and they get worse if that happens.

[84] Ms. Nolan said she is unable to do any of the activities she used to do. She said "I can barely walk for ten minutes, and I then need a break". She gets very

fatigued and tired, her headaches and eye, neck and hip pain become more severe. She also has continuing issues with her ankle ("it kind of collapses and gets very wobbly"), the worst consequence of which is falling to the side.

Home Support and Counselling

[85] Ms. Nolan has home support, with a support person coming to her apartment twice a week. They assist with laundry, grocery shopping, cleaning and preparing meals for use over several days.

[86] She has a treating occupational therapist, Denise Edwards, who performs tests to see how she is doing, checks on Ms. Nolan's walking ability, sees how her house is and ensures Ms. Nolan has the things she needs. She also gives Ms. Nolan exercises to do.

[87] The equipment Ms. Nolan uses includes heat pads for her eyes, ankle and hip, a foam roller for her neck, neck pillows, ankle braces (one for walking and one for sleeping), a special mattress top, a long pillow and a weighted blanket, the latter because it helps calm her down. Ms. Edwards also helped Ms. Nolan get the special glasses from the optometry specialist.

[88] In addition to the medical professionals already mentioned, Ms. Nolan regularly sees her family doctor, Dr. Martens, and she sees a clinical counsellor, Teah Scotten, every week. She said her situation is very hard for her to accept, and she is working with Ms. Scotten to deal with the grief associated with how she is now compared to how she was before.

Post-Accident Work Life

[89] Ms. Nolan has not worked since the accident.

Post-Accident Social Life

[90] Ms. Nolan's social life is extremely limited, to the point of being virtually non-existent.

[91] In June 2023, Ms. Nolan was visited by a friend from university days, Andrea McAlonan, who travelled from Ireland to Vancouver to visit. Ms. Nolan said the two of them lived together for two years while at university, and during that time they did things together such as exercise, going out dancing and going to bars.

[92] Ms. Nolan wanted to show Ms. McAlonan the Vancouver area, but she was just not up to it. They tried to go to a restaurant, but Ms. Nolan could not handle the noise and it caused a flareup of her headaches. She had to leave so that she could lie down. They went to Stanley Park but Ms. Nolan had to sit down a lot and she had to wear her headphones, which I assume are noise-cancelling headphones.

[93] Ms. Nolan had another pre-accident friend, Julianne Freitag, whom she met at a pub trivia night. They used to hike together and they had travelled together to Ireland, Kelowna and the United States. Ms. Nolan said she is only rarely in touch with Ms. Freitag now. Ms. Nolan said they have met up a few times but Ms. Freitag told her she struggles with what she can do with her, given Ms. Nolan's substantial limitations. One outing consisted of Ms. Freitag picking up Ms. Nolan, getting some takeout food and then going to a park near the beach. Even then, the beach was too noisy and "there were too many things going on", so they had to leave.

[94] A third friend, Emmett Gorman, used to go to trivia night with Ms. Nolan every week prior to the accident. They also watched football games together as he was also a keen football fan. After the accident he helped Ms. Nolan by doing her grocery shopping over the course of a few months, and by making tea for her.

[95] Ms. Nolan said that since the accident she has done none of the activities she used to do, including trivia nights, attending concerts, travelling and hiking.

Current Plans

[96] Ms. Nolan said she expects she will return to Ireland because her family is there and can support her. Her concern is that she will not have the same level of medical and related support that she has here, as she has continuing medical and other needs that will be challenging to find in the small town where her family lives.

[97] As for her hopes for the future, Ms. Nolan said she would have liked to get her own business. She would also like to get married and have children, but sees no prospect for that now. She said she would not be able to bear listening to the sounds children make because they irritate her ears and head. She said this is particularly difficult for her as she used to work in child care and she loves children.

B. Collateral Witnesses

Emmett Gorman

[98] Mr. Gorman has been friends with Ms. Nolan since early 2017. They were housemates for several years and they socialized together. He said they went to pub trivia nights together and Ms. Nolan was very good at trivia. They also went to a karaoke place a number of times.

[99] Mr. Gorman described Ms. Nolan as a nice, positive person, fun and outgoing, and “always wanting to get out and about”. The accident left her “very broken” and she “basically spent most of the time in her room”. When outside, she was very confused. He said she found it hard to do anything and so never went out.

[100] Mr. Gorman did her shopping for her. All her meals were pre-prepared because she could not cook.

[101] Mr. Gorman has called in on her a couple of times. He said she does not appear to have improved. She is unable to deal with loud noises. She walks with a cane and she does not appear to have physically recovered. He has invited her out but she is unable to be around people.

Andrea McAlonan

[102] Ms. McAlonan, who lives in Ireland, has been a friend of the plaintiff since 2002. They roomed together at college for several years and both of them did business and tourism degrees. They have stayed in touch to this day.

[103] When rooming together they socialized a lot and travelled together, both in Ireland and in continental Europe. They went to concerts, shows, the cinema and watched movies at home. Ms. Nolan was always outgoing and wanting to do things.

[104] During that time, they discussed their plans for the future. They both wanted to work in business tourism, and to have a family and children. Ms. Nolan's particular interest was to be a tour guide, or being responsible for setting up events.

[105] Ms. McAlonan visited Ms. Nolan in June 2023. She found her to be very different, with a very different personality. Ms. Nolan was wearing a boot cast, headphones and coloured glasses, and walking with a cane. They tried to go to a restaurant for breakfast but it was too noisy and Ms. Nolan "kind of shut down". She was clearly in discomfort. The same thing happened when they later went to another restaurant, and so that visit was cut short. They took an Uber to Stanley Park, but Ms. Nolan was unable to walk around. Ms. McAlonan organised some day trips but Ms. Nolan was unable to join in. Everything was difficult.

[106] Ms. McAlonan visited Ms. Nolan at her apartment. Ms. Nolan was unable to make dinner, and she was forgetful. Ms. Nolan became tired, and so Ms. McAlonan did not stay long.

Mary Nolan and John Joe Nolan

[107] Mary Nolan and John Joe Nolan are the plaintiff's parents. In this section, I will use first names for Mary Nolan and the plaintiff to avoid confusion, without intending any disrespect.

[108] Mary said Annette was a very active child and teen. She was involved in many sports and activities both with school and outside school. This included scouts, girl guides, majorettes, Irish dancing, swimming, basketball, rounders, badminton and athletics. She also enjoyed watching sports, particularly rugby and football. She had "loads of friends" in their neighbourhood.

[109] Annette was a very healthy child. She was diagnosed with asthma at age seven, but it never interfered with her sports. Around that same age a school nurse felt Annette had a “lazy eye” and this was successfully treated by having Annette wear an eye patch for a few weeks.

[110] After Annette moved to Canada they stayed in touch by way of video calls. Prior to the accident this was only “now and then” because Annette was so busy. These calls were more frequent after the accident, although at first they were very short as Annette was not able to make much conversation. They are a bit longer now, although it depends how tired Annette is. Sometimes she can go for five minutes, but other times her head falls and she “crashes”.

[111] Mary visited Annette in Vancouver in May 2019 and Annette visited her family in Ireland in December that year. Annette discussed her plans for the future, which included working at a job where she organised events, starting her own business, getting married and having children.

[112] Mary said Annette is a “different person now”. She said it is difficult to explain the differences. Formerly, Annette was happy and loved life, she tried everything, and she was always doing something or going somewhere. Now she just sits on her couch and talks about her treatments. Mary said “there’s no joy in her life”. She has no quality of life from what Mary can see.

[113] Annette wants to return to Ireland and continue her treatment there. She will need someone to look after her. The plan is for her to live with her family for a time and then get a place of her own nearby.

[114] Mary and her husband live in County Carlow, which has limited services. They will have to travel for any specialized treatment. The nearest eye specialists are in Waterford, which is some distance away, and the nearest counselling would be in Kilkenny, in the county to the south. All other specialists would be in Dublin.

[115] Mr. Nolan gave evidence to a similar effect. He described Annette as a very happy, lovable person who was involved in many sports and had many friends. He too said Annette "is not the same person".

C. Dr. Izabela Schultz – Registered Psychologist

[116] Dr. Schultz prepared two reports, the first dated January 2023 and the second dated July 10, 2023. Dr. Schultz performed various psychological tests with Ms. Nolan but her limited tolerance meant that testing took longer than usual. Testing took place over 7.5 hours for the first report and 8 hours for the addendum.

First Report

[117] Dr. Schultz noted that Ms. Nolan's limited stamina meant that initially planned cognitive tests could not be administered. Dr. Schultz said that from a clinical point of view, Ms. Nolan was not in a position to complete a full neuropsychological assessment.

[118] Under the heading "Psychological Test Results", Dr. Schultz said:

> In the current assessment, Ms. Nolan presented with symptoms of depression, dysphoria, generalized anxiety, fears, posttraumatic stress with dissociative symptoms, emotional dysregulation and lability, insomnia, obsessive-compulsive features, social detachment, chronic headaches and pain, fatigue, tinnitus, and multiple sensory intolerances. These issues are accompanied by a decline in a sense of self, perceived personality change, and loss of independence. In observation, Ms. Nolan demonstrated slow and dysfluent speech with word finding difficulties. She also had significant cognitive complaints.

[119] Dr. Schultz noted a consistency in the test results measuring similar psychological domains, and no atypical or inexplicable results. She also noted a consistency among other sources as reflected in various clinical and other records.

[120] In terms of mental health and psychological impairment, Dr. Schultz said:

> At the time of the current psychological assessment, Ms. Nolan presented with multiple mental health and psychological symptoms, including those consistent with post-concussive symptoms, those of posttraumatic nature and those that were somatic and sensory, including fatigue, pain, and visual and auditory intolerances.

[121] Dr. Schultz went on to discuss Ms. Nolan's various psychological conditions, noting that her "severe and persistent depression is the most prominent aspect of her psychopathology". She concluded:

> Ms. Nolan's complex posttraumatic emotional disturbance is multifaceted, chronic, and multiply comorbid. Her depression, PTSD, OCD [obsessive-compulsive disorder], GAD [generalized anxiety disorder], Somatic Symptom Disorder, emotional dysregulation, insomnia, and negative alterations in the sense of self interact with her post-concussive sequelae and somatic and sensory problems and intolerances. Together with cognitive difficulties, all these issues form a severe disability burden.

[122] Dr. Schultz added that Ms. Nolan's "post accident struggle is compounded by loneliness, social isolation, limited and protracted recovery, medicalization of life, ongoing functional limitations, daily strain, and low levels of local social support".

[123] Dr. Schultz's formal diagnosis pursuant to the DSM-5-TR was:

a) Persistent Depressive Disorder (PDD) with Intermittent Major Depressive Episodes, with Current Episode, with Anxious Distress, Severe;

b) Posttraumatic Stress Disorder (PTSD), Moderate;

c) Generalized Anxiety Disorder (GAD), Moderate;

d) Obsessive-Compulsive Disorder (OCD), with Fair Insight, Mild;

e) Somatic Symptom Disorder with Predominant Pain (SSD), Moderate to Severe; and

f) Unspecified Neurocognitive Disorder, likely multifactorial; provisional diagnosis, full neuropsychological assessment recommended following treatment for other mental health disorders.

[124] Dr. Schultz attributed these disorders to the accident, saying:

> In conclusion, "but for the accident", Ms. Nolan would not have gone on to develop the current protracted, treatment-resistant and disabling psychopathology and emotional distress.

[125] Under “Prognosis”, Dr. Schultz noted Ms. Nolan’s limited clinical improvement “despite considerable rehabilitation efforts to date and dutiful involvements in recommended therapies”. Dr. Schultz recommended “significant and well-orchestrated further multidisciplinary rehabilitation efforts”, noting that her present course of treatment is “unlikely to result in significant improvement”. She said she expected Ms. Nolan’s treatment to be “complicated”.

Addendum Report

[126] Further questions were posed to Dr. Schultz, and Dr. Schultz attempted to have Ms. Nolan undergo standardized neuropsychological testing. Dr. Schultz noted that Ms. Nolan was unable to tolerate the demands of the testing, resulting in fluctuating or suboptimal effort, “with a significant negative impact on the validity of her quantitative test results”. Nonetheless, there was consistency in her presentation and “consistent qualitative evidence of cognitive difficulties and intolerances”. She said:

> In my opinion, Ms. Nolan likely does have a Mild Neurocognitive Disorder due to multiple post-accident etiologies, including protracted post-concussive sequelae, augmented and maintained by chronic emotional distress (depression, anxiety, posttraumatic stress and poor sleep), persistent headaches/pain, mental fatigue, tinnitus, and possible Central Auditory Processing Deficit. … This impairment is likely exacerbated by an accumulation of post-accident clinical factors that have persisted over time, resulting in the current serious protracted functional disability.

[127] In considering the likelihood of recovery, Dr. Schultz noted the chronic, multifaceted, complex and difficult-to-treat nature of Ms. Nolan’s neuropsychological and psychological disability. Improvement has been limited and her function and symptomatology “have actually been worsening in many respects”. She said:

> Ms. Nolan’s depression and anxiety, together with insomnia and somatic preoccupations, are bound to worsen with her ongoing loneliness, emotional and social alienation, loss of sense of self and associated resentment, frustration, anger and inability to cope adaptively. Ms. Nolan is caught in a persistent vicious disability cycle...
>
> Spontaneous recovery is unlikely.

[128] Dr. Schultz concluded:

> The recommended treatment and rehabilitation for Ms. Nolan are delineated in my psychological assessment report dated January 2023. In the absence of a well-orchestrated (and complicated to deliver) treatment and rehabilitation, no recovery is expected and a significant risk of deterioration is very real.

[129] In answer to a question concerning prospects for a return to work, Dr. Schultz said Ms. Nolan is "presently not capable of transition to any part time or full time competitive employment". She added that her vocational prognosis is "pessimistic" and "long term occupational disability with significant loss of earnings and costs of care is anticipated".

At Trial

[130] In testimony, Dr. Schultz elaborated on the problems Ms. Nolan had while attempting to complete the administered tests. She showed various pain behaviours or signs of suffering or distress, and she needed breaks every 20 or 30 minutes. Ms. Nolan also exhibited speech problems such as dysfluency, stuttering and word-finding problems.

[131] In cross-examination, Dr. Schultz acknowledged she is not a physician and she would defer to a neurologist on neurological matters, and to a psychiatrist on matters relating to medication, though her training is similar to that of a psychiatrist in terms of making DSM-5 diagnoses. Similarly, she would defer to a physiatrist on physical issues, though not on the psychosocial aspects of physical issues.

[132] When it was suggested she had made no inquiries about Ms. Nolan's pre-accident mental health, she said she asked Ms. Nolan about that, and she also reviewed her medical history. There were no "red flags" in the medical records. There was no evidence of any pre-accident psychological issues and there was no mention of any such issues in her interviews.

[133] Dr. Schultz acknowledged that two of the tests she administered had validity scales and those scores were somewhat elevated, but they was not in the "malingering" range. She said that some degree of exaggeration can be seen as a "cry for help" or a "negative evaluation of self" and noted that "people with a history

of trauma typically have elevated scores here". She added that this validity testing is not effective to detect malingering where depression and anxiety are present.

D. Dr. Donald Cameron – Neurologist

[134] Dr. Cameron prepared a report dated November 29, 2022.

[135] Dr. Cameron provided the following diagnosis:

> It is my opinion that Ms. Nolan probably did suffer a brief altered state of consciousness or loss of consciousness at the time of the motor vehicle pedestrian accident on September 23, 2020. Ms. Nolan has incomplete recall of the impact with the vehicle. It is my opinion that she fulfills the criteria to make a diagnosis of a mild traumatic brain injury (concussion) at the time of the accident on September 23, 2020.
>
> …
>
> It is my opinion that Ms. Nolan has developed symptoms of post-traumatic brain injury syndrome (post-concussion syndrome) following the mild traumatic brain injury that she sustained at the time of the accident. These symptoms include decreased memory, decreased concentration, decreased attention span, multitasking difficulties, difficulty making decisions, irritability, mood swings, anger outbursts, fatigue, disturbed sleep pattern, headaches, photophobia, phonophobia, decreased tolerance of stress, slow in processing information, decreased ability to socialize, being overwhelmed with crowds of people, and decreased libido, all present following this accident.

[136] Dr. Cameron noted that Ms. Nolan was seen by another neurologist, Dr. Li, who came to the same opinion.

[137] Dr. Cameron also noted Ms. Nolan also suffered soft tissue and musculoskeletal injuries in the accident and, as a result, she has developed a chronic pain condition.

[138] Dr. Cameron said the following about the headaches that developed after the accident:

> The initial headaches were probably residual to the mild traumatic brain injury and intermixed with post traumatic musculoskeletal and common migraine headaches. It is my opinion that the ongoing headaches are probably a combination of post-traumatic musculoskeletal or cervicogenic headaches with infrequent intermixed post-traumatic common migraine headaches. Ms. Nolan has described to me [that] she is suffering with ongoing daily headaches at the time of my neurological assessment.

[139] In terms of treatment, Dr. Cameron said there were a number of prophylactic anti-headache and pain medications that could be trialled, and Ms. Nolan is also a candidate for botulinum toxin (Botox) injection therapy.

[140] Dr. Cameron said:

> It is my opinion that Ms. Nolan's ongoing cognitive complaints are probably multifactorial, i.e., still residual to the mild traumatic brain injury that she sustained at the time of the accident, contributed by or aggravated by the chronic pain that she has developed as a result of the soft tissue and musculoskeletal injuries that she sustained at the time of the accident, and also contributed by the psychological problems that have developed following this accident.

[141] Turning to prognosis, Dr. Cameron noted that patients in Ms. Nolan's age group improve up to approximately two years after any type of physical injury, and here, at a point two years post-accident, Ms. Nolan has been rendered completely disabled. He said:

> It is my opinion that Ms. Nolan has been rendered permanently competitively unemployable as of the date of my neurological assessment on October 28, 2022.
>
> Patients may have further improvement with respect to psychological problems following psychological therapy beyond the two-year interval. I would defer to a specialist in Psychiatry to provide an opinion regarding future recommended psychological or psychiatric therapy and long-term prospects.
>
> Ms. Nolan has reported to me that her memory has improved following counselling since this accident. It is possible that her cognitive problems will improve to a further mild degree following further psychological therapy in the future. It is difficult to state whether or not this will be sufficient to Ms. Nolan to be able to return to work at her previous job or an equivalent job even on a part-time basis.

[142] In cross-examination, Dr. Cameron agreed that his diagnosis of mild traumatic brain injury (MTBI) is based in part on Ms. Nolan's lack of recall of the accident. He said there are three criteria for a diagnosis of MTBI, any one of which will satisfy the definition. In this case she had a period of time involving an absence of memory and so she met the definition.

[143] Dr. Cameron said most MTBI patients do not develop post-concussion syndrome. With those that do, the symptoms typically resolve within weeks or

months, but in 10 to 20 percent of those patients the symptoms do not resolve. He agreed that if symptoms develop, they will develop within the first two weeks, and often within several days.

[144] Dr. Cameron saw no significance to the "no LOC" entry in the hospital emergency department record of Ms. Nolan's attendance. He noted that the person who made that note would not have been at the accident scene. It is critical that the information comes from the patient. He added that 90 percent of diagnosed cases have *altered* consciousness, not outright loss of consciousness, and so when they are asked if they lost consciousness they respond "no". In Dr. Cameron's view, the proper inquiry is to ask the patient what they do and do not remember.

[145] Dr. Cameron said that after two years he would not anticipate any dramatic improvement with a post-concussion syndrome patient . While there are medications available, it is important not to convey false hope.

[146] Dr. Cameron did not agree that chronic pain or psychological issues could produce the same complaints as Ms. Nolan's in the absence of an MTBI. He said the cognitive complaints associated with those matters are not of the same degree. They have a different profile and are "not in the same ballpark". He was satisfied that Ms. Nolan's cognitive problems were caused by a brain injury, and so improvements in psychological symptoms will not result in an improvement to Ms. Nolan's cognitive issues. No therapy exists for cognitive problems and so those core problems will not resolve.

E. Teah Scotten – Clinical Counsellor

[147] Ms. Scotten has provided counselling to Ms. Nolan starting in November 2020. Counselling sessions have taken place most weeks and take 50 minutes. Ms. Scotten said that her own observations of Ms. Nolan over that time have been consistent with the things Ms. Nolan told her about her physical, cognitive and emotional state.

[148] Physically, Ms. Nolan reported ankle pain, difficulty walking, shoulder and neck pain, headaches, fatigue, vision problems and discomfort and, sometimes, dizziness and disorientation. Many of the counselling sessions have been virtual, due both to Covid and to Ms. Nolan's difficulties with commuting, but Ms. Scotten has observed Ms. Nolan to be in obvious discomfort due to neck pain during counselling sessions.

[149] Cognitively, Ms. Nolan reported problems with forgetfulness, difficulty retaining information, comprehension difficulties, sensory processing difficulties and organisational difficulties.

[150] Emotionally, Ms. Nolan reported difficulties with emotional regulation; anxiety; feelings of shame, grief and loss; and symptoms of trauma. She was self-conscious about how she looked and shameful about what other people might think of her.

[151] Ms. Scotten said Ms. Nolan grieves what she has lost, physically and socially, including a loss of her identity, and she also feels a loss of her hopes for the future. Her expressed hopes included a plan to have a business that did event and travel planning, and also to have a life partner, get married and have children.

[152] Ms. Scotten has observed minor improvement in Ms. Nolan's cognitive functioning in terms of clarity and comprehension, and moderate improvement in her emotional regulation. The majority of that progress has taken place in the last six to eight months.

[153] Ms. Scotten has used various techniques in her sessions, including breathing exercises, grounding strategies, cognitive behavioural therapy, emotional regulation strategies, eye movement desensitization and reprocessing therapy and meditation.

[154] Ms. Scotten sees Ms. Nolan most weeks. Latterly, she has provided her counselling services *pro bono* as she no longer has an ICBC billing number.

F. Cecile Petra – Occupational Therapist

[155] Ms. Petra prepared an occupational performance evaluation (OPE) and cost of future care report dated February 24, 2023.

[156] In her report, Ms. Petra summarized both the medical reports and other information made available to her and the results of the standardized testing she did with Ms. Nolan. Briefly, that testing revealed the following results, among others:

a) the Pain Disability index indicated 91 percent disability, with 100 percent in the occupation category;

b) the Modified Fatigue Impact Scale, the Headache Disability Index and the Dizziness Handicap Inventory all indicated severe interference by those issues on daily living;

c) the Beck Depression Inventory and Burns Anxiety Scale showed “severe range of symptoms” and “extreme experience of anxiety”, respectively;

d) other testing showed cognitive limitations that impact participation in daily activity, including limitations with memory, attention and functional cognition; and

e) various aspects of reduced physical capacity, including the inability to walk outdoors without the use of a cane due to risk for falls.

[157] Ms. Petra noted that during OPE testing, Ms. Nolan “demonstrated full effort and provided the examiner with reliable information regarding her function”.

[158] Ms. Petra concluded as follows:

> Ms. Nolan presents with a range of physical, cognitive/sensory, and psychological limitations. Physical limitations include decreased capacity for reaching, lifting, carrying, low level postures, standing, and walking. Cognitively, she presents with impairments in auditory and visual memory, visual attention, planning, organizing, and cognitive tolerance. From a psychosocial perspective, she scored as having fear of movement. Experience of pain, anxiety, low mood, fatigue, headaches, visual disturbance, and dizziness further impact overall activity tolerance.

> Limitations impact Ms. Nolan's ability to mobilize, perform self-care, homemaking, and work tasks, as well as her participation in leisure, social, and community activity.
>
> It is my opinion that future care is required to ensure optimal participation in daily living and to minimize the impact of functional limitations on Ms. Nolan's participation in daily living activities. Rehabilitation efforts are ongoing, with new disciplines recently started. Future care costs are required to continue to provide services already in place in order to maintain, and where possible, improve functional gains.

[159] Ms. Petra made recommendations concerning Botox treatments, a pain clinic, medications, psychiatric care, occupational therapy, physiotherapy and vestibular therapy, counselling, massage therapy, vision therapy, speech therapy, a functional driving evaluation, homemaking support, assistive equipment, and transportation.

IV. Defendant's Case – Damages

A. Dr. George Medvedev – Neurologist

[160] Dr. Medvedev prepared a report dated June 2, 2023 and a responding report dated August 10, 2023.

[161] Dr. Medvedev described his neurological examination as "unreliable" because Ms. Nolan was "not cooperative", giving the example of Ms. Nolan "continuing to squint" after he asked her to take off her glasses.

[162] Dr. Medvedev concluded Ms. Nolan probably suffered a mild concussion in additional to soft tissue injuries, but said her degree of disability "is probably out of proportion to what is expected from the type of accident that she suffered".

[163] He also concluded:

a) Ms. Nolan's headaches represent an aggravation of predating migraines, posttraumatic and cervicogenic headaches;

b) her cognitive symptoms are likely multifactorial and attributable to the presence of pain and mood disorder;

c) her dizziness issues are non-specific and may represent a complication of migraines or neck soft tissue injury. In cross-examination, he said it was difficult to determine the exact nature of Ms. Nolan's dizziness, "but it did not seem to be of the neurological type"; and

d) as to prospects for a return to work, he deferred to an occupational expert, but from a neurological perspective he did not see any barriers to her return to work.

[164] Dr. Medvedev concluded Ms. Nolan's current condition is related to the accident. However, he said "the degree of true physical symptoms versus the psychological effects of trauma is unclear".

[165] Dr. Medvedev suggested Botox treatments should be considered to address Ms. Nolan's headaches. He said at least nine months of treatments is necessary to determine the efficiency of that treatment.

[166] As to prognosis, Dr. Medvedev said:

> Ms. Nolan's prognosis is guarded, as her symptoms have not improved over the last two and a half years and, as a matter of fact, have gotten worse. Ms. Nolan is more disabled today than she was on the day of the accident. This is an unusual pattern suggestive of underlying non-neurological factors that are playing a principal role in perpetuating her disability.

[167] Dr. Medvedev prepared a second report in order to respond to Dr. Cameron's report. He said:

> I agree with Dr. Cameron's description of Ms. Nolan's cognitive problems as multifactorial. I concur with Dr. Cameron identifying psychological problems and chronic pain as function-defining mechanisms responsible for Ms. Nolan's ongoing complaints. The results of my assessment and record review, keeping in mind that almost three years have passed since the accident, however, suggest that the effects of the concussion, so called post-concussive syndrome currently are unlikely to substantially contribute to the overall burden of Ms. Nolan's disability.

[168] In response to Dr. Cameron's comment that individuals of a similar age as Ms. Nolan typically experience improvement for a maximum of two years,

Dr. Medvedev noted that only 15 percent of patients develop symptoms of post-concussive syndrome, recovery time varies significantly among those patients, “and often can be prolonged”. He said “there are no specific timelines for recovery in such cases”.

[169] Finally, Dr. Medvedev said that given the absence of significant neurological or structural injury, Ms. Nolan should be capable of returning to employment if her non-neurological symptoms are appropriately managed.

Testimony

[170] Dr. Medvedev testified that cognitive function can be impaired not only by neurological issues but also by other factors such as mood disorders and pain. These can have distracting effects that result in cognitive inefficiency and dysfunction.

[171] In cross-examination, Dr. Medvedev was questioned about a report from neurologist Dr. Damon Li, who concluded Ms. Nolan’s symptoms were “in keeping with a post concussive syndrome”, her headaches were related to that, and her headaches had features of chronic migraine. Dr. Medvedev agreed with that latter statement, but said Ms. Nolan’s presentation was not supportive of that diagnosis. While he acknowledged Dr. Li had described Ms. Nolan as an “excellent historian”, he said “He [Dr. Li] had a different patient, it seems. With the data I had I could not say post-concussive syndrome was the main cause of her symptoms and instead were related to multifactorial factors”.

B. Dr. Hernish Acharya – Physiatrist

[172] Dr. Acharya is a specialist in physical medicine and rehabilitation. He prepared a report dated June 1, 2023.

[173] Dr. Acharya performed a physical examination of the plaintiff. In direct, he said that his examination methods were “basically structural tests” on various part of the body. He noted that “neurological examination revealed give way weakness, but no true loss of strength”. He testified that this is a pain behaviour associated with

chronic pain. He said her reported inability to walk on her heels was similarly a pain behaviour as she made appropriate heel contact when asked to walk.

[174] Dr. Acharya noted the following from his physical examination:

a) Neck: Normal range of motion. "Very superficial palpation resulted in excruciating neck pain even almost no pressure was applied to the top of the head". No clear taut bands or trigger points in the cervical or periscapular region although there was widespread pain in the area;

b) Hips: The process of "resisted hip flexion required a lot of encouragement but was unremarkable and did not result in any pain symptoms in the groin region". He had the same findings with hip abduction;

c) Left ankle: Normal range of motion, no swelling and no redness. Widespread tenderness around the ankle and foot but the ankle was stable in all directions.

[175] Dr. Acharya said the description of Ms. Nolan's symptoms in the time shortly after the accident is consistent with a whiplash associated disorder and a left ankle soft tissue injury. He said "there is no evidence that there was a brain injury sustained".

[176] Dr. Acharya noted Ms. Nolan "has an ongoing constellation of symptoms with vague cognitive dysfunction, mood dysfunction and ongoing pain symptomatology". He concluded;

> From within my area of expertise, I did not find any clear musculoskeletal nor neurological structural problem to account for any of her ongoing symptoms. However, in this case, there is significant psychiatric dysfunction and she reports that she is severely depressed and anxious. As such, I would defer further diagnosis to a psychiatrist.
>
> …
>
> In her case, the overwhelming picture is that of a psychiatric condition.

[177] In cross-examination, he acknowledged that neurologist Dr. Damon Li diagnosed post-concussion syndrome, but he felt Dr. Li's report did not reveal

"critical thinking" and consider other explanations or differential diagnoses. Dr. Acharya said all of Ms. Nolan's symptoms have an explanation outside of a finding of post-concussion syndrome. He said concussion is not a valid diagnosis where there is no evidence of concussion and there are other available diagnoses.

C. Dr. Eugene Okorie – Psychiatrist

[178] Dr. Okorie prepared a two reports, the first dated June 19, 2023 and the second dated August 15, 2023. The second report was written in response to Dr. Schultz's reports.

First Report

[179] Dr. Okorie assessed Ms. Nolan virtually on June 9, 2023. In his report, he noted Ms. Nolan told him that she did not lose consciousness or memory during the accident, and she did not become confused or disoriented.

[180] Dr. Okorie commented on her presentation:

> She answered questioned with a slow and laboured tone of voice. Although coherent, her answers lacked detail and often ended with I cannot remember, or I am too tired and sleepy. She noted depressed and anxious mood, congruent with her affect. She was quite disability focused with a belief that she has been rendered incapable of most functional tasks due to the accident.

[181] In his testimony, Dr. Okorie noted Ms. Nolan "repeatedly spoke of things she cannot do and of her disabilities in a manner that was excessive".

[182] In his report, Dr. Okorie said:

> Even though Ms. Nolan bumped her head on the hood of the car resulting in a small right eyebrow hematoma, she did not sustain any of the relevant features of a traumatic brain injury. Later neurological examination (Dr. Li) and brain MRI revealed no abnormal neurological signs.
>
> Consequently, it is my opinion that Ms. Nolan did not sustain any traumatic brain injury from the subject MVA. In my opinion, her subject cognitive concerns are due to emotional distress, fatigue, sleep disturbance, and headache rather then any organic brain pathology.
>
> Ms. Nolan's somatization (physical expression of emotional distress) and catastrophization (thinking the worst of situations/outcomes) have interacted

> with medical iatrogenesis (diagnosis based on flawed methodology) and lack of education to cause Somatic Symptom Disorder with a focus on headaches, pain, fatigue, dizziness, and cognitive symptoms.
>
> She had developed severely disordered relationships with these symptoms with resultant disproportionate preoccupation with the seriousness of her symptoms, maladaptive disability focus, over-investment of her resources into these symptoms, and overutilization of health care resources due to these symptoms.

[183] Dr. Okorie said Ms. Nolan's symptoms satisfy the diagnostic criteria for SSD and PDD. He concluded these were caused by the accident.

[184] Dr. Okorie was highly critical of her treatment thus far, and made his own recommendations:

> Lack of proper education (including that she did not sustain any brain injury), inadequate/inappropriate focus of her treatment, and misguided enablement of her disability by taking over management of her activities of daily living have maintained her disorders.
>
> As her treatments have yielded no benefits, I will recommend an overhaul of her treatment with different therapists and a shift from a symptom to function-based care plan that includes measurable goals and homework to ensure accountability.

[185] Dr. Okorie's recommendations include referrals to a psychologist experienced in goal-driven therapy for chronic pain patients, an occupational therapist who will guide her in increasing her functional growth, and a psychiatrist for medication management and mental status monitoring. He also recommended antidepressant medications as well as home care through a provider who will encourage her to take over her domestic chores.

[186] As for prognosis, Dr. Okorie said:

> Given historic iatrogenesis and undermining enablement that have entrenched her disability and symptoms, the prognosis for her SSD and PDD is guarded. However, compliance and robust engagement with treatment recommendations described above would improve her SSD and PDD. Dr. Acharya's opinion that she does not have any ongoing limiting physical difficulty raises the possibility that she could return to her old job or any other job she suitably qualifies with appropriate and effective treatment of her emotional disorders.

Second Report

[187] In his second report, Dr. Okorie disagreed with Dr. Schultz's diagnosis of a neurocognitive disorder given that Ms. Nolan did not sustain any traumatic brain injury from the subject accident. He said:

> Given that neurocognitive disorder should only be diagnosed when other conditions cannot adequately explain a patient's cognitive complaints, I disagree with Dr. Schultz that Ms. Nolan has a Neurocognitive Disorder.

[188] Dr. Okorie also disagreed with Dr. Schultz's diagnosis of Posttraumatic Stress, Generalized Anxiety and Obsessive-Compulsive disorders. He said the symptoms falling under these headings are nondominant and can be explained by SSD and PDD.

Cross-Examination

[189] In cross-examination, Dr. Okorie said it is not enough that Ms. Nolan "bumped her head on the hood" in order to make a diagnosis of a traumatic brain injury because you have to have an impact *plus* other symptoms. Here, Ms. Nolan told him that she did not lose consciousness or memory and she did not become confused or disoriented.

[190] When asked about his comment that Ms. Nolan was "disability focused", Dr. Okorie said "disability focused" is her presentation. Dr. Acharya found there to be no musculoskeletal or neurological issues, yet she has problems brushing her hair. What he made of that is that she is overly disability focused.

[191] In answer to a question from the bench, Dr. Okorie acknowledged there is a shortage of psychiatrists in British Columbia.

V. Positions of the Parties

A. Plaintiff

[192] Counsel for the plaintiff emphasized the stark difference between the plaintiff's before and after life. The plaintiff says causation is clear.

[193] Before the accident, Ms. Nolan was working as an administrative assistant, but she had plans to start working as a travel event manager in the near future. Her plans also included being married and having a family. She was active and social. Now, she is socially isolated and essentially housebound. She has intolerances for light and sound, headaches, tinnitus, vestibular problems, cognitive impairment and problems with vision.

[194] Relying on *Spehar v. Beazley*, 2002 BCSC 1104, a case where the upper limit of non-pecuniary damages was awarded, the plaintiff submits that her similarly devastating effects warrant non-pecuniary damages of $300,000.

[195] As to past loss of capacity, the plaintiff says it is clear she is not capable of employment. She relies on the report of her economist, Darren Benning, who has calculated her pre-trial loss based on the assumption she would have worked at her UBC position until the end of 2020 and would then have had average earnings of a British Columbia male with a bachelor's degree. In his report, Mr. Benning calculated the plaintiff's loss to be $197,302 before deduction of income-replacement payments, and $102,582 after deduction of those payments. There may be a correction to be made to this figure, but I will discuss that later.

[196] The future loss calculation is similarly based on average earnings of British Columbia males with bachelor's degrees other than in law, and it assumes a retirement at age 70. The present value of lost earnings to that date is $2,131,571. The plaintiff has rounded this down to $2,100,000.

[197] The plaintiff also claims $400,000 for the loss of future marriage benefits, based on a figure provided by Mr. Benning.

[198] Based on the recommendations and cost figures of Ms. Petra, the present value of which has been calculated by Mr. Benning, the plaintiff claims the sum of $2,240,000 for future care costs. The most significant costs are those for Botox treatments; occupational therapy and massage therapy, physiotherapy, homemaking support and transportation.

[199] The plaintiff also seeks awards for income tax gross-up ($300,000) and investment management fees ($190,000).

[200] The plaintiff presented her claim for special damages at $13,319, but at the conclusion of submissions counsel informed the Court that $5,000 of recent expenses had been omitted. I will address this later.

[201] The plaintiff's claim is summarized in the following table:

Non-pecuniary damages:	$300,000
Past loss of earning capacity (net):	$102,582
Loss of future earning capacity:	$2,100,000
Loss of future marriage benefits:	$400,000
Cost of future care:	$2,240,000
Income tax gross-up:	$300,000
Investment management fee:	$190,000
Special damages (subject to revision):	$13,319
Total:	$5,645,901

B. Defendant

[202] The defendant does not dispute that the plaintiff experiences a variety of symptoms and "perceives them as disabling". The defendant submits it is useful to compare the injuries as first reported with the issues that are now said to be present and disabling, as they are quite different. The defendant prepared a detailed chart summarizing how those complaints have evolved.

[203] The defendant says the actual injuries suffered by the plaintiff are a whiplash related injury and soft tissue injuries to her left ankle. Her current condition is the result of purely psychiatric issues, which have been diagnosed as Somatic Symptom Disorder and Persistent Depressive Disorder. More specifically, the defendant says

that none of the plaintiff's current symptoms were caused by, or derive, from a traumatic brain injury or other neurological cause, and so they are treatable.

[204] The defendant submits the evidence shows the plaintiff's condition will improve with appropriate treatment, and she may be able to return to work, potentially returning to her former employment.

[205] The plaintiff submits that an appropriate range for non-pecuniary damages is $100,000 to $135,000, citing *Smith v. Ries*, 2023 BCSC 1434; *Shaw v. Rogers*, 2023 BCSC 177; *Amer v. Geoghegan*, 2022 BCSC 1311 and *Ledwon v. Baines*, 2019 BCSC 450.

[206] As for loss of earning capacity, the defendant says the plaintiff had taken no steps toward her stated goal of running her own business as a travel event planner. The one step she took more generally (her application to the UBC Events and Ceremonies Department) was not successful. The defendant says the most appropriate basis on which to assess earnings losses is to use her anticipated income from the employment she had when the accident occurred. On this basis, a defence economist, Mark Gosling, has calculated the plaintiff's pretrial loss to be $145,307, which is net of taxes.

[207] The defendant says a similar approach ought to be used for the loss of future earning capacity. Further assumptions are that the plaintiff would retire at 63.6 years of age, the average retirement age for Canadian females in 2022, and to discount that figure by 50 percent to represent the "very real possibility" that the plaintiff will recover to the point of returning to her former employment. The resulting figure is $438,965.

[208] The defendant says the plaintiff's claim for loss of marriage benefits ought to be disallowed because this claim was not pleaded and there was no evidence led about them.

[209] As for future care costs, the defendant submits Dr. Okorie's recommendations ought to be followed, with all treatments and care discontinued other than psychiatric care, counselling and assistance from an occupational therapist to assist the plaintiff in moving to independent functioning over what the defendant suggests should be a three year period. The defendant says that the plaintiff's balance, vision and hearing issues will improve with psychiatric treatment. The defendant calculates the associated costs at $19,861.

[210] The defendant said any amount income tax gross-up should be determined after judgment. As for investment management fees, the defendant says the plaintiff has not shown that this sort of assistance will be necessary.

[211] The defendant agrees with the amount of $8,106.51 for special damages, which was the total of the amounts reflected in the special damages documents submitted by the plaintiff.

[212] The following is a summary of the defendant's position on damages:

Non-pecuniary damages:	$100,000 to $135,000.00
Past loss of earning capacity (net):	$145,307.00
Loss of future earning capacity:	$438,965.00
Cost of future care:	$19,861.00
Loss of marriage benefits:	$0
Income tax gross-up:	$0
Investment management fees:	$0
Special damages:	$8,106.51
Total:	$712,239.51 to $747,239.51

VI. Discussion

A. Credibility

[213] As I noted earlier, I found the plaintiff to be a credible witness in the sense that she did her best to tell the truth and relate events as she remembered them, with reliability being the only concern with her testimony.

[214] At this point, I consider it helpful to describe Ms. Nolan's presentation in the witness box. She wore special glasses and, with leave of the Court, a hat, to reduce the amount of light. Unfortunately, one of the courtroom lights was directly above the witness box and it bothered her to the extent that the court clerk arranged to have it disabled.

[215] Ms. Nolan testified in a slow and somewhat laboured fashion and often asked that questions be repeated or clarified. On a few occasions she lost track of the question. Ms. Nolan had very limited stamina while in the witness box and so we took frequent breaks. On some occasions, she put her head down on the table in front of her.

[216] Her memory appeared sound for significant incidents and events, but she had limited capacity to convey more routine detail, particularly details relating to treatment and symptoms at given points in time. Given the vast number of treatments she has had, and clinical professionals she has seen, that is perhaps understandable. However, when treatment or similar records were put to her, she often said they did not aid her in her recall of whatever matter was the subject of the question. More generally, she said "I'm not sure" in answer to many questions.

[217] Taken as a whole, I conclude that Ms. Nolan's testimony is reasonably reliable for significant matters and events, though perhaps not for matters of detail, as I have mentioned. I bear in mind those limitations when making findings of fact.

[218] Based on the pre-accident descriptions by the collateral witnesses, Ms. Nolan appears to be a shell of the person she once was. However, I did not at any time suspect or conclude that her presentation was the result of feigning, artifice or

exaggeration on her part. I am satisfied that the symptoms and difficulties she described are symptoms she subjectively perceives and experiences.

B. Findings of Fact

[219] I begin with perhaps the most contentious issue on damages, which is whether Ms. Nolan's symptoms are the result of a concussion suffered in the accident and resulting post-concussion symptoms, or whether they are purely psychological in nature.

[220] There is a distinct division of opinion on this issue. Both Dr. Schultz and Dr. Cameron concluded Ms. Nolan's symptoms derive in part from post-concussion syndrome. Dr. Medvedev concluded the effects of concussion are "unlikely to substantially contribute to the overall burden of Ms. Nolan's disability", although he also said "the degree of true physical symptoms versus the psychological effects of trauma is unclear". Dr. Acharya said "there is no evidence that there was a brain injury sustained" and "the overwhelming picture is that of a psychiatric condition". Dr. Okorie flatly rejected the suggestion that Ms. Nolan suffered any traumatic brain injury in the accident, although I cannot help but note his distinct understatement in describing Ms. Nolan as having merely "bumped her head" given the significant indentation made on the vehicle's hood, as well as the photographs showing Ms. Nolan with a prominent black eye.

[221] In the respective views of both Dr. Cameron and Dr. Okorie, the issue turns on whether Ms. Nolan suffered any loss of consciousness, loss of memory, or confusion and disorientation as a result of the accident. Dr. Cameron said Ms. Nolan probably did suffer a brief altered state of consciousness or loss of consciousness because she had incomplete recall of the impact with the vehicle. Dr. Okorie relied on Ms. Nolan's report to him that she did not lose consciousness or memory and she did not become confused or disoriented.

[222] The evidence on this key factual point is unsatisfactory. Although the hospital emergency records note "no LOC" and other records indicate the same, I consider

Dr. Cameron to have made a valid point in noting that these sorts of reports often derive from incomplete questioning of the patient. The evidence of the bystander, Ms. Littlejohns, that Ms. Nolan was very disoriented and in shock is perhaps evidence in favour of post-concussion syndrome, but that description is still somewhat vague and it is not clear if it would meet the level of clarity required for a neurological diagnosis.

[223] Given the unsatisfactory nature of the evidence, and the mixed opinions on the subject, I am unable to say it is more likely than not that, as a result of the accident, Ms. Nolan suffered a traumatic brain injury beyond what might have been an initial mild concussion, or that she developed post-concussion syndrome.

[224] In contrast, there is a clear consensus amongst the experts that Ms. Nolan suffers from severe psychological issues as a result of the accident. Dr. Schultz describes these as “protracted, treatment-resistant and disabling psychopathology and emotional distress”, specifically diagnosing the following psychological disorders: PDD, PTSD, GAD, OCD and SSD. Dr. Cameron described the issues as “multifactorial”, that is, the result of post-concussion syndrome, chronic pain and psychological problems. Dr. Medvedev concluded Ms. Nolan’s symptoms were non-neurological in nature and were the result of psychological problems and chronic pain. Dr. Acharya said “the overwhelming picture is that of a psychiatric condition”. Dr. Okorie attributed Ms. Nolan’s symptoms to PTSD, GAD and OCD.

[225] It is clear from the evidence, and I find, that as a result of the accident Ms. Nolan developed significant psychological problems which continue to severely impact all aspects of her life. Her symptoms are numerous and disabling, and include chronic headaches and pain, fatigue, insomnia, tinnitus, cognitive problems, forgetfulness, vestibular problems, irritability, emotional dysregulation and various sensory intolerances. These symptoms have led to serious depression and social isolation and left her unable to work or to look after herself without assistance.

[226] The prospects for improvement of her psychological disorders and related symptoms is very difficult to gauge. The defendant made much of what was very

little evidence on this issue, pointing to the evidence of Dr. Medvedev and Dr. Okorie, and noting Ms. Nolan has shown both symptom improvement and fluctuating symptoms over the years.

[227] Dr. Medvedev said that from a neurological perspective he did not see any barriers to Ms. Nolan's return to work. Given that he concluded Ms. Nolan's issues were psychological in nature, this really tells us nothing in terms of her prognosis for substantial recovery.

[228] Dr. Okorie, who bluntly asserted that her treatment thus far has been inadequately and inappropriately focused, said the absence of any ongoing limiting physical difficulty "raises the possibility" she might return to work following appropriate and effective treatment. However, he did not provide any quantification of that "possibility".

[229] Dr. Schultz was not at all optimistic. She described Ms. Nolan's psychopathology as being "treatment-resistant" and her vocational prognosis as "pessimistic". She noted that the treatment she recommended for Ms. Nolan was "complicated to deliver" and would have to be "well-orchestrated".

[230] Ms. Scotten, the clinical counsellor who has been treating Ms. Nolan since November 2020, said she has observed minor improvement in Ms. Nolan's cognitive functioning in terms of clarity and comprehension, and moderate improvement in her emotional regulation. The defendant argues that this shows Ms. Nolan may yet recover. However, this report of improvement must be placed in perspective. Ms. Nolan's evidence and presentation at trial was of a person with profound disabling symptoms who was quite obviously unfit for any employment, and this was *after* the improvements noted by Ms. Scotten.

[231] On a considered assessment of all the evidence, I conclude the prospects for Ms. Nolan's return to gainful employment are relatively small. I will address this in more specific terms when I deal with damages.

[232] It must not be forgotten that Ms. Nolan also suffered objectively proven physical injuries. Post-accident photographs show bruising and a black eye at her right eye, a bruised and swollen left ankle, bruising to her right hip and lower right leg, scrapes and bruises to her left knee and lower leg, and bruising to her left elbow and lower arm. Dr. Acharya concluded the symptoms reported by Ms. Nolan shortly after the accident were consistent with a whiplash associated disorder and a left ankle soft tissue injury. He said Ms. Nolan's physical injuries have resolved. I accept that the physical aspects of Ms. Nolan's injuries have likely resolved.

C. Non-Pecuniary Damages

[233] Given the profound consequences the accident has had on all aspects of Ms. Nolan's life and the very limited prospects for improvement, much less a return to normalcy or employment, I conclude that the appropriate award for non-pecuniary damages is $280,000.

[234] The cases cited by the defendant involve injuries and effects far less than those suffered by Ms. Nolan. In *Smith*, the plaintiff suffered from chronic pain and depression, a more straightforward situation than Ms. Nolan's, and the Court found the plaintiff's employment prospects to be "fairly good" (at para. 50). In *Shaw*, the plaintiff was able to return to work, albeit with limitations. In *Amer*, the plaintiff was no longer able to manage physical work or recreational activities, but he was still capable of light duty work and mild activities. In *Ledwon*, the plaintiff was in a "complicated medical and psychological state" before the accident and had a pre-accident history of psychiatric illness. The Court found the plaintiff had failed to prove permanent or future long-term limitations arising from the accident. These cases are readily distinguishable from the present case.

D. Loss of Past Earning Capacity

[235] The differing calculations of the economists stem from their respective assumptions concerning Ms. Nolan's work situation in the pretrial period. Mr. Benning, for the plaintiff, was directed to assume Ms. Nolan would have continued working as an administrative assistant to the end of 2021, and thereafter

she would secure work that would provide an income equal to the average earnings of a British Columbia male with a bachelor's degree (excluding law). Mr. Gosling, for the defendant, assumed Ms. Nolan would continue her existing job throughout the pretrial period.

[236] I pause to note that Mr. Benning also provided an income loss figure after deduction of accident benefits, which will be helpful at some point (although he noted there may be a correction needed), but not now, because this is to be done after the court has assessed damages: *Insurance (Vehicle) Act*, RS.B.C. 1996, c. 231, s. 83(4).

[237] I do not consider either scenario likely. I agree with the defendant that it is unlikely Ms. Nolan would have launched a successful travel events business by the end of 2021 given the uncertainty caused by the pandemic. At the same time, I not consider it likely that Ms. Nolan would have remained in her existing employment and not sought to advance her career in some way. I come to that conclusion because Ms. Nolan started regular, career-type employment in 2017 when she was 34 years old, as she had spent a number of years travelling in various countries. This is later in life than most. The evidence indicates the UBC position was her first career-type job. Given her stated ambition to move on to other things, I consider it reasonable to conclude she would have advanced beyond that entry-level position.

[238] Just when that transition would have occurred is a matter of informed prognostication. Doing the best I can with the available information, I conclude Ms. Nolan likely would have secured better-paying work by the end of 2022, and at that point she would be earning an average income for a person with a non-law bachelor's degree, albeit with some adjustments.

[239] This brings me to the subject of gender-based statistics. The plaintiff argued for male statistics to be used, and the defendant for female statistics if his primary position (using income figures based on Ms. Nolan's existing job) was not accepted. Unfortunately, the submissions on this subject were not particularly helpful.

[240] The leading case on the use of gender-based statistics is *McColl v. Sullivan*, 2021 BCCA 181. In *McColl*, the Court reviewed several authorities including *Gill v. Lai*, 2019 BCCA 103, *Steinebach v. O'Brien*, 2011 BCCA 302; and *Crimeni v. Chandra*, 2015 BCCA 131, and then said:

> [41] In my view, the following principles can be drawn from the above:
>
> a. damages for loss of future earning capacity are to be assessed on an individual basis: *Gill* at para. 55;
>
> b. gender-based earning statistics "may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings": *Crimeni* at para. 23;
>
> c. however, gender-based earning statistics require caution because they may incorporate bias: *Steinebach* at para. 55; *Crimeni* at para. 23; *Gill* at para. 54; and
>
> d. it may be reasonable, depending on the evidence, for a court to assume a convergence in earnings: *Crimeni* at para. 23.

[241] The "bias" referred to in that quote has to do with the risk that female-based statistics may be based in part on income and other data that reflect discriminatory incomes and practices.

[242] The Court in *McColl* emphasized that the assessment of damages must be done on an individual basis, and that neither male nor female statistics should be regarded as the "default". The Court went on to say:

> [43] Suffice it to say, gender-specific statistics *guide* rather than *determine* damages. Gender-specific statistics may incidentally align with a plaintiff's gender, but not invariably so. Two examples illustrate this point. To the extent that female economic multipliers reflect a greater likelihood of leaving the workforce to care for children, they may be appropriate for a male plaintiff who intends to be a "stay at home dad". Those same statistics may be inappropriate for a female plaintiff who intends to remain in the workforce without interruption. In every case, the burden is on the plaintiff to demonstrate their future losses.
>
> [Emphasis in original.]

[243] Returning to the present case, Ms. Nolan expressed a strong interest in marrying and having children. Because the evidence suggests she was not in a long-term relationship at the time of the accident, I consider it unlikely she would have started a family by the time of trial, so I am satisfied that male earnings

statistics are appropriate as a guide for the pretrial period. I am satisfied that female statistics are appropriate for the assessment of future losses in order to reflect the likelihood Ms. Nolan would have interruptions in her career in order to have a family.

[244] So, returning to the subject of loss of past earning capacity, I conclude the most appropriate approach is to assume Ms. Nolan would have earned income at the level of her UBC employment until the end of 2022 and then in 2023 she would have moved to earnings at a level *guided* by reference to those of B.C. males having a non-law bachelor's degree.

[245] Mr. Gosling's figures, which are based on Ms. Nolan's existing employment, show the cumulative loss to the end of 2022 to be $101,127. Mr. Benning's report indicates the 2023 loss to the date of trial is $71,713, based on B.C. males with non-law bachelor's degrees. This translates to a full-year loss (including non-wage benefits) of $92,820. However, I conclude that this figure must be adjusted to reflect the fact that Ms. Nolan, due to the late start in her career, would have had fewer years of experience than many other persons in her age cohort, and also because this would have been her first year working in a new field. I conclude that 25 percent is an appropriate downward adjustment to reflect those circumstances, which brings the full-year figure to $73,678 ($92,820 x .75).

[246] Assuming that non-wage benefits amount to 10 percent of salary (as did Mr. Gosling), this equates to an annual salary of $66,310. I have performed that salary calculation as an additional check on the reasonableness of my 25 percent allowance, and I note that it accords reasonably well with the type of salary increase one might expect when moving up from an entry-level job like Ms. Nolan's UBC job.

[247] There must be a further adjustment to reflect just the loss to the date of trial. The resulting figure is $56,924 ($73,678 x .7726, with the latter figure being the part-year proportion provided by Mr. Gosling in his Table C).

[248] I therefore assess the pretrial loss of earnings capacity at $158,051 ($101,127 + $56,924).

E. Loss of Future Income Capacity

[249] For the reasons expressed earlier, I conclude that the most likely "without accident" scenario would involve Ms. Nolan advancing her career beyond the UBC job she had at the time of the accident. Just what that job would have been is not clear as Ms. Nolan had expressed an interest in being a travel event planner but had not taken any concrete steps toward that type of employment.

[250] Given the uncertainty concerning future employment it might have been an option to utilize the average earnings of B.C. females with a non-law bachelor's degree as a guide, but that evidence was not led by either party.

[251] The defendant provided income statistics for Canadian females working full-time in the National Occupational Classification (NOC) category "Conference and Event Planners". This reveals an average 2023 income of $73,788 (extrapolated from Mr. Gosling's part-year figure), not including non-wage benefits. To put this in perspective, the 2023 income for B.C. males with a non-law bachelor's degree is $88,401, also excluding non-wage benefits.

[252] I conclude that the earnings for conference and event planners provides the most appropriate benchmark in Ms. Nolan's case. Equally, I might have used the average income for B.C. males with non-law bachelor's degrees along with the type of adjustments I applied earlier, but I conclude the result would be largely the same. As per Mr. Gosling's report, the present value to age 65 of average earnings in that NOC occupational category is $1,430,520. That figure reflects labour market contingencies (save retirement) at 20 percent, non-wage benefits at 10 percent, and the relevant female survival rates.

[253] I have used a retirement age of 65, which is greater than the average for Canadian females (which was 63.6 years in 2022) because of the nature of the work and because of Ms. Nolan's later start to her career.

[254] Again, I consider it appropriate to adjust that figure ($1,430,520) to reflect the fact that the same-age individuals within that NOC category would be generally more

advanced in their careers than Ms. Nolan, and she would be catching up. I conclude 10 percent is an appropriate adjustment here as it reflects a narrowing of the gap, with $1,287,468 being the resulting figure.

[255] As a further check, I used the economic multiplier (15,692) provided by Mr. Gosling for B.C. females with non-law bachelor's degrees and used a starting income figure of $73,000. This resulted in a present value loss of $1,145,516. This is roughly comparable to the figure in the previous paragraph and thus provides some assurance of ballpark accuracy.

[256] In my assessment of loss of future earning capacity I must also consider the likelihood of Ms. Nolan returning to some form of employment. As I noted earlier, I conclude the prospects for Ms. Nolan's return to any form of gainful employment are relatively small. I consider it very unlikely she will become capable of regular, full time employment. There would have to be some remarkable treatment successes for that to occur.

[257] On an assessment of all of the evidence, I conclude that 20 percent is an adequate adjustment to reflect the small prospect that Ms. Nolan will return to remunerative employment of some sort.

[258] Applying that adjustment to the earlier figure ($1,287,468), reduces the amount to $1,029,974. I round that to $1,030,000.

F. Loss of Interdependent Economic Relationships

[259] The plaintiff says she is no longer able or likely to enter into a committed relationship, and this is a loss to her as she no longer has the ability to share expenses and enjoy the other financial benefits that financial interdependency offers.

[260] The plaintiff led no evidence on this subject. The only mention of it in the evidence is a solitary figure in a table within Mr. Benning's report on income tax gross-up and management fees. The body of the report makes no mention of that particular claim and the figure is not explained.

[261] The defendant objects to the claim on the basis that it was not pleaded, as it should have been, and the plaintiff led no evidence on it.

[262] I make no award under this heading because there was no evidence led to support an award in any amount. On that point, I note that while there may be financial advantages to an interdependent economic relationship, there might also be costs, with the obvious costs being those relating to children. I would expect that the basis for both the claim and for the amount sought would have to be proven through the expert evidence of an economist. No such evidence was led at trial.

G. Cost of Future Care

[263] There is a vast gulf between the parties on the matter of cost of future care. The plaintiff claims amounts for a wide variety of therapies, treatments and supports that she will need for the rest of her life. The defendant maintains his view that since there are no remaining physical problems with the plaintiff, there should be no amounts awarded for any physical therapies or treatments.

[264] The plaintiff's cost of care claim is based on the recommendations of Dr. Schultz and Dr. Cameron, as well as the cost of care report of Ms. Petra. The defendant's position is based primarily on the report of Dr. Okorie. I deal with the various items as follows:

a) Psychiatric treatment: The defendant agrees that the plaintiff needs a combination of psychiatric treatment, psychological counselling with a qualified counsellor, and occupational therapy, and suggests a three year treatment period.

   Dr. Okorie confirmed the already-notorious fact that there is a shortage of psychiatrists in British Columbia. I am not confident that Ms. Nolan would get the psychiatric treatment she needs through occasional, perhaps even infrequent, psychiatric consultations that might begin only after an extended waiting period. Ms. Petra has provided a cost estimate

($66,150) for in-patient treatment lasting nine weeks. I am satisfied this cost is warranted here.

b) Psychological treatment: Dr. Schultz recommended 24 sessions in year one (totalling $5,400), 12 sessions in each of years two ($2,700) and three ($2,700), and four maintenance sessions annually thereafter ($900 per year). This is in line with the defendant's submission, although the defendant argued these sessions should end or taper off after three years.

I agree with Dr. Schultz's recommendations, except to the extent that she recommended access to psychological treatment indefinitely. The need for that sort of long-term therapy is very speculative and I do not consider it concrete enough to found an award for that expense. I conclude that four further years of maintenance sessions should suffice, with four sessions ($900) each year.

c) Occupational therapy: Ms. Petra recommends lifelong OT support, which would include the services of a rehabilitation assistant (RA). The defendant says OT support should be provided for three years and then be tapered off.

Although I have concluded that Ms. Nolan's prospects for return to gainful employment are very small, I believe there is a prospect that Ms. Nolan may achieve reasonable independence in her activities of daily living at some point in the future. Accordingly, I do not consider it reasonable to make an award for lifelong OT support.

Ms. Petra's recommendations for OT support include a recommendation for the services of an RA, three hours a day for three days a week, to facilitate fitness and community activity, schedule planning, attending appointments, meal management and "supervision for overall safety". The services of an occupational therapist (as distinct from an RA) would "maintain gains made in active rehabilitation and promote a balanced

lifestyle". Later in her report, Ms. Petra notes that the RA would also provide the kinesiologist-facilitated exercise program that Ms. Nolan is currently receiving at her physiotherapy clinic.

I accept the need for OT support (which the defendant concedes), but the substantial additional support provided by an RA seems excessive beyond the near or medium term.

I consider an appropriate balance is struck by an award that covers OT services for four years at the frequency recommended by Ms. Petra ($6,854 per year), OT services at half that frequency for one further year ($3,427), and RA services as follows: three times a week for the first year ($30,420), two times a week for the next year ($20,280) and once a week for the third and fourth years ($10,140 per year).

d) Massage therapy: Ms. Nolan is receiving massage therapy once a week, which she says alleviates her symptoms for a few days. Ms. Petra recommends that Ms. Nolan have access to massage therapy for symptom management.

   I agree that Ms. Nolan should have access to massage therapy for occasional symptom management, but I consider the plaintiff's claim for lifelong weekly massage therapy to be excessive. At a certain point, she will have to develop her own strategies for managing pain.

   I conclude a reasonable balance will be achieved by an award that allows for 24 sessions in the first year ($2,580, using the midpoint rate) and 12 sessions per year for three years after that ($1,290 per year).

e) Physiotherapy: Ms. Petra recommended physiotherapy to address symptom management for musculoskeletal issues. I have concluded it is more likely than not that there are no longer any musculoskeletal issues,

and symptom management is provided for with massage therapy. I make no award for this item.

f) Vestibular therapy: Ms. Nolan has had vestibular therapy but, as Ms. Petra notes, this type of therapy is usually of finite duration. Since there was no evidence that further therapy is needed, I make no award for this item.

g) Housekeeping or homemaking assistance: Ms. Petra recommends six hours per week of homemaking support for meal preparation, shopping, laundry and heavier cleaning. I agree that an award for homemaking support is warranted. One of the key items here is Ms. Nolan's forgetfulness, which means she cannot safely use a stove or oven. I expect that this issue will decline with therapy and treatment, and that eventually she will be able to attend to all or most activities of daily living.

Again, it is no easy task to balance the needs and the uncertainties, but doing the best I can with the available evidence, I conclude that an award for housekeeping for four years ($12,910 per year) is appropriate here.

h) Pain clinic: Dr. Schultz recommended treatment through a pain clinic, but only if outpatient mental health treatment does not prove effective. She notes that a pain clinic would provide in-patient mental health treatment combined with pain treatment, the implication being that there would be both mental health treatment and treatment for the underlying physical pain. As I have concluded there is likely no physical source of Ms. Nolan's subjective pain complaints, all that is left is the mental health element, which is being addressed elsewhere. I make no award for this item.

i) Speech therapy: Dr. Schultz recommended speech therapy, but she did not explain the basis for that recommendation. In the general body of her report, Dr. Schultz noted Ms. Nolan's slow speech and verbal disfluencies, but the overwhelming impression from this and other reports is that

Ms. Nolan's issues are cognitive and psychological in nature, and are not issues with speech, as such.

I am not persuaded that an award to cover speech therapy is warranted here.

j) Vision therapy: Ms. Petra noted that the plaintiff had been given funding for 10 sessions of vision therapy, which was in progress as of the date of her February 2023 report, but that further vision therapy might be required. Ms. Nolan testified that at the time of trial she was still getting vision therapy, with this therapy directed at helping her to read. I conclude that further sessions were or are warranted. The associated cost is $1,500.

k) Neuropsychological assessment: Dr. Schultz recommended that Ms. Nolan have a full neuropsychological assessment in two years, plus follow-up sessions for the next five years "to monitor cognitive status". I presume the proposed timing of that assessment had to do with Dr. Schultz's conclusion that Ms. Nolan might be capable of completing such an assessment after intense therapy and treatment.

I accept the need for a neuropsychological assessment, but I am not persuaded that there is a need for follow-up sessions as those would be dependent on the assessment results. I award $3,495 for this item.

l) Driving evaluation: Dr. Schultz noted that Ms. Nolan has "constant fear when in a car". Ms. Nolan did drive before the accident, although she did not own a vehicle.

I consider it reasonable for her to have assistance in returning to driving when she reaches the point of being able to do so. I award the sum of $3,768 for this item, in accordance with the sums identified by Ms. Petra.

m) Botox treatments: Both Dr. Cameron and Dr. Medvedev recommended a trial of Botox injections to ameliorate Ms. Nolan's headaches, with

Dr. Medvedev noting a minimum treatment period of nine months. This is a difficult cost to assess because, as Dr. Cameron noted, this treatment is not always effective. In her testimony, Ms. Nolan indicated that she had just begun this treatment this treatment and she thought it had helped "a little bit".

I conclude that a course of Botox treatment is warranted for a period of two years. I do not accept that there should be an award for lifetime treatment given the uncertainties. Treatments cost $1,050 each and take place every 12 weeks, so a two-year course would involve nine treatments, rounding up. This item is therefore allowed at $9,450.

n) Medications: Ms. Petra notes that Ms. Nolan takes over-the-counter pain medications daily, and Dr. Cameron has recommended trials of other medications such as gabapentin, Lyrica, amitriptyline, nortriptyline and topiramate. In the case of the latter medications, it is unclear whether they will work, or if they do, how long they might be needed.

I consider that an allowance for medication is appropriate. I allow $150 per year, for life, for over-the-counter medications, which is about two-thirds of Ms. Petra's recommended amount. I have reduced the figure to reflect likely reduction in use over time. I also allow a one-time sum of $2,000 in order to engage in reasonable trials of the other medications.

o) Assistive equipment: Ms. Nolan has been prescribed devices (hearing aids and a white noise generator) associated with her tinnitus retraining therapy. Ms. Petra says these devices will have to be replaced in due course. However, there is no evidence that this therapy will continue indefinitely and so the foundation for this item has not been made out. The same comments apply to her prescription glasses.

The plaintiff also claims for replacement canes, which Ms. Petra says will be needed every three or four years. I allow $40 for one replacement, as I

consider it reasonably likely she will have no need for a further replacement cane after a few years of intensive psychological treatment.

My conclusion that Ms. Nolan will likely achieve reasonable independence in her activities of daily living at some point answers the remaining claims for assistive equipment, which are items to assist her in her declining years. I make no award for those items.

p) Fitness pass: From the earlier OT award, Ms. Nolan will have fitness assistance in her home for four years and so she will have no need for a fitness pass during this time. There was insufficient evidence on which to draw any conclusions about the need for a fitness pass after that, or the likelihood it would be used. I make no award for this item.

q) Transportation: Ms. Nolan has additional costs associated with transportation as she cannot drive or take public transit, and so she takes taxis to any location that is beyond her ability to walk. Ms. Petra estimates this cost at $600 per month, but she deducts the cost of a transit pass to arrive at a net claim of $463 per month.

I accept this is a valid claim, but the question is duration. I consider five years of transportation assistance to be appropriate. This is in line with other supports, but recognizes that navigating a transit system may be more challenging for Ms. Nolan than other aspects of daily living. At the same time, I expect that her treatment schedule will ease off over time, and so her monthly taxi expense will diminish.

I award the sum of $18,000 (60 months x $300) for this item.

[265] I leave it to the parties to work out the total award for these items, taking into account any necessary present value calculations, with leave to address the matter if the parties cannot agree.

H. Special Damages

[266] The plaintiff claimed special damages totalling $13,319 and referred to a binder of documents, marked as an exhibit, said to comprise all the related documents. The defendant agreed to special damages in the amount of $8,106.51, noting that this was the total of the amounts shown in the exhibit documents.

[267] Counsel for the plaintiff then said that she had mistakenly omitted receipts for the remaining $5,000 in special damages items.

[268] I directed counsel to work this out between them. As of the date of these reasons, counsel had not communicated to the Court what, if anything, has been resolved on this issue. Counsel therefore have leave to speak to this matter.

I. Tax Gross-Up and Management Fees

[269] During submissions, I indicated to counsel that these items were better left to be dealt with after judgment. Counsel have leave to address these.

VII. Summary

[270] The defendant is wholly liable for the accident of September 23, 2020.

[271] I assess the plaintiff's damages as follows:

Non-pecuniary damages:	$280,000
Past loss of capacity (net):	$158,051
Loss of future earning capacity:	$1,030,000
Loss of interdependent economic relationships:	$0
Cost of future care:	To be determined by counsel in accordance with these reasons
Special damages:	To be determined
Total (ascertained items only):	$1,468,051

[272] The parties have leave to address awards for tax gross-up, management fees and special damages, and any other matters necessary to finalize the award, if they are not able to agree.

[273] Costs will be to the plaintiff unless there are matters the parties wish to bring to my attention.

"Blok J."