

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Waltmans v. Murovec*,
2024 BCSC 1398

Date: 20240801
Docket: M126345
Registry: Kelowna

Between:

Devon Waltmans

Plaintiff

And

Owen Murovec

Defendant

- and -

Docket: M126347
Registry: Kelowna

Between:

Todd Waltmans

Plaintiff

And

Owen Murovec

Defendant

Before: The Honourable Justice Basran

Reasons for Judgment

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proceedings):

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Place and Dates of Trial:

Kelowna, B.C.
February 5–9, 12–15, 2024

Place and Date of Judgment:

Kelowna, B.C.
August 1, 2024

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Introduction

[1] Mr. and Mrs. Waltmans, the individual plaintiffs, are husband and wife. On November 12, 2018, they were driving south on Lakeshore Drive in Kelowna, BC. They stopped for traffic when a vehicle driven by Owen Murovec, the defendant, struck them from behind (the “Accident”).

[2] Mr. Murovec admits liability for the Accident.

[3] The Waltmans each filed separate actions. By agreement, the matters were heard together on common evidence in one trial.

[4] Prior to the Accident, the Waltmans were in good physical, mental, and emotional health. They were an active couple who exercised regularly and enjoyed a range of outdoor activities with their two daughters.

[5] In 2018, Mrs. Waltmans worked three days a week as a dental hygienist in Kelowna. Mr. Waltmans worked two-weeks-on and two-weeks-off at an oilsands project in Alberta.

[6] The Accident caused pain in Mrs. Waltmans’ neck, shoulders, and upper back. She also suffers from headaches, sleeplessness, anxiety, and other emotional issues. Mr. Waltmans suffers ongoing mild intermittent back pain.

[7] Mrs. Waltmans seeks damages for her pain and suffering, past and future loss of income-earning capacity, loss of housekeeping capacity, and cost of future care. She also seeks special damages.

[8] For the reasons that follow, I have concluded that Mrs. Waltmans is entitled to:

- a) Non-pecuniary damages: \$140,000
- b) Past loss of income-earning capacity: \$40,000
- c) Future loss of income-earning capacity: \$292,146
- d) Cost of future care: \$150,746

e) Special damages:	\$1,422
Total:	<u>\$624,314</u>

[9] Mrs. Waltmans is not entitled to damages in respect of loss of housekeeping capacity.

[10] Mr. Waltmans seeks damages for pain and suffering. For the reasons that follow, I find that Mr. Waltmans is entitled to \$30,000 in non-pecuniary damages.

Credibility Assessment

Legal Principles

[11] It is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any witness, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...]. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[12] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *[[Faryna] v. Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.) *[Faryna]*; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*[Faryna]* at para. 356).

The Parties' Positions and Analysis of Credibility

[13] Mr. and Mrs. Waltmans submit that the evidence they provided was credible and reliable.

[14] Mr. Murovec suggests that I should be cautious in accepting their evidence because Mrs. Waltmans did not immediately follow her doctor's recommendation to try kinesiology and Mr. Waltmans did not undergo any recommended therapies.

[15] I have no concerns with the truthfulness of the Waltmans' evidence. Mrs. Waltmans' testimony was open, honest, and vulnerable. She made reasonable admissions on her treatment decisions. Mr. Waltmans' evidence was somewhat halting and reserved but I do not doubt the accuracy or veracity of it.

Non-Pecuniary Damages

Relevant Legal Principles

[16] Mr. and Mrs. Waltmans must prove that the Accident caused their injuries. They need not establish that the admitted negligence of Mr. Murovec was the sole cause of their injuries, but they must demonstrate a substantial connection between the Accident and their physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[17] Some of the relevant factors in assessing non-pecuniary damages include:

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

- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff).

See: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[18] Failure to mitigate serves to limit the recovery of damages if the plaintiff has not taken reasonable steps to limit their loss. The defendant bears the onus of showing that the plaintiff could have reasonably avoided some part of the loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35.

[19] The mitigation test is subjective/objective. If the plaintiff has not pursued a recommended course of treatment, the onus is on the defendant to prove, first, that it was unreasonable for the plaintiff to decline that treatment and, second, the extent, if any, to which their damages would have been reduced had they sought that treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

Mrs. Waltmans' Position on Non-Pecuniary Damages

[20] Mrs. Waltmans is a 40-year-old mother of two daughters. She submits that she continues to suffer from significant pain and limitations as a result of the Accident. Her pain has had a permanent effect on her overall quality of life and her work, which she enjoys. Physical activity is a large part of her lifestyle but many of her activities have been significantly curtailed or eliminated. She says that she faces the rest of her life in pain and also suffers from consistent sleeplessness, anxiety, and a lowered mood.

[21] Mrs. Waltmans denies that she failed to mitigate her damages. She asserts that she pursued a reasonable course of therapy and, in any event, there is no evidence that other therapies would have reduced or eliminated her symptoms.

[22] Mrs. Waltmans relies on the following cases in support of her claim for \$175,000 in non-pecuniary damages:

- a) *Kam v. Van Keith*, 2015 BCSC 1519: The plaintiff was 35 years old when she was injured in a rear-end accident. She had pain in her neck, shoulders, upper and lower back, in addition to fatigue, sleep disturbance, driving anxiety, depression, and headaches. The plaintiff was extremely active physically prior to the accident and her injuries negatively impacted her lifestyle. The court awarded her \$125,000 in non-pecuniary damages, \$156,423 in 2024 dollars;
- b) *Bieling v. Morris*, 2021 BCSC 1905: The plaintiff was 53 years old when she was injured in a rear-end accident. She was pain-free prior to the accident. Due to the accident, she suffered from chronic pain in her back, leg and foot, was restricted at work, and her overall well-being and quality of life were reduced. Her relationships were negatively affected and the constant pain affected her mood. It was likely that she would suffer pain for the rest of her life. The court awarded her \$165,000 in non-pecuniary damages, \$181,385 in 2024 dollars;
- c) *Mattson v. Spady*, 2019 BCSC 1144: The plaintiff was 30 years old when she was injured in a rear-end accident. She worked as a kinesiologist. She continued to work after the accident but suffered from pain which limited her ability to work full-time. At the time of trial, she suffered from pain in her neck and right shoulder, in addition to headaches and psychosocial symptoms relating to chronic pain. The medical evidence indicated that her injuries were expected to persist in the years to come. Her injuries limited her interactions with her children and she struggled with household chores. The overall impact her injuries had on her life had been devastating. The court awarded her \$150,000 for non-pecuniary damages, \$174,084 in 2024 dollars;
- d) *Boal v. Parilla*, 2022 BCSC 2075: The plaintiff was 32 years old when she was injured in a rear-end accident. At the time of trial, she suffered from soft tissue injuries which caused chronic pain in her neck, right shoulder, right arm, chronic headaches, irritation of her jaw, somatic symptom disorder, and chronic adjustment disorder that led to major depressive disorder. The court awarded her \$220,000 in non-pecuniary damages, \$227,472 in 2024 dollars;
- e) *Lavoie v. Purwonegoro*, 2021 BCSC 1511: The plaintiff was 37 years old when she was injured in a rear-end accident. At the time of trial, she experienced neck and upper back pain, headaches, disruptions to her sleep, fatigue, and anxiety. Her injuries impacted her ability to work and her relationship with her husband. Her injuries had a negative affect on her personality and mood. Her injuries rendered her less capable of engaging in parenting activities and recreational activities. The plaintiff's young age went into the court's assessment. The court awarded her \$135,000 in non-pecuniary damages, \$148,406 in 2024 dollars.

Mr. Waltmans' Position on Non-Pecuniary Damages

[23] Mr. Waltmans asserts that he suffered a whiplash injury with mild, intermittent, chronic back pain, and some sleeplessness, caused by the Accident. Due to his injuries, he no longer rides an ATV or plays golf and has curtailed the frequency of other activities such as hunting, camping, and hiking.

[24] Mr. Waltmans denies that he failed to mitigate his losses. He relies on the following cases in support of his claim for \$75,000 in non-pecuniary damages:

- a) *Harle v. Williams*, 2020 BCSC 1684: The plaintiff, aged 29, suffered soft tissue injuries to his shoulder, neck, and upper back. He was diagnosed as having soft tissue injuries with a limited range of motion. Therapy provided temporary relief. He would likely experience ongoing pain, but no disability. He continued with his activities, such as work, recreation, and physical activity, but experienced pain and limitations while doing so. He became moodier and more withdrawn. The court awarded him \$50,000 in non-pecuniary damages, \$57,606 in 2024 dollars.
- b) *Hann v. Lun*, 2022 BCSC 1839: The plaintiff, aged 30, suffered soft tissue injuries to his back, neck, jaw, and shoulder. The neck, back, and jaw injuries healed a few weeks after the accident. His mid and lower back injuries continued to cause him discomfort, although the pain decreased in intensity and frequency over time. The plaintiff's injuries reduced his ability to participate in his usual recreational activities, to engage freely with his nieces, and to perform household chores. The court awarded the plaintiff \$90,000 for non-pecuniary damages, \$93,056 in 2024 dollars.
- c) *Kim v. Morier*, 2013 BCSC 673: The plaintiff suffered injuries to her neck, back, hip, and foot. She also suffered headaches. Over time, her symptoms improved and she essentially recovered except for her right lower back and hip. She suffered a second accident and was left with continuing pain in her back and hip, which did not respond to treatment. Her injuries limited her ability to enjoy many of her previous leisure activities, detrimentally affected her marital relations, and reduced her ability to perform household chores. The plaintiff was awarded \$55,000 in non-pecuniary damages, \$70,958 in 2024 dollars.
- d) *McBurney v. Levesque*, 2019 BCSC 1897: The plaintiff, aged 23, suffered soft tissue injuries to his neck, upper back, and left shoulder. Although the defendant put forward a mitigation argument, they were unsuccessful because they did not show how the plaintiff's position would have improved if he followed any specific treatment recommendations. The court noted that the plaintiff's symptoms affected his enjoyment of life, and persisted for up to two years. At the time of trial, the symptoms were

largely resolved. The court awarded the plaintiff \$50,000 in non-pecuniary damages, \$58,028 in 2024 dollars.

Mr. Murovec's Position on Mr. and Mrs. Waltmans' Non-Pecuniary Damages

[25] Mr. Murovec submits that Mrs. Waltmans acted unreasonably by not following her doctor's recommendation to undergo physiotherapy and kinesiology treatments because all the experts support kinesiology treatments. Mr. Murovec submits that these treatments would have modified and guided her own exercise routine. Accordingly, he seeks a reduction of 60 percent for all heads of damages based on Mrs. Waltmans' failure to mitigate her damages.

[26] Mr. Murovec acknowledges that Mrs. Waltmans experiences pain in her neck, upper back, and shoulder, as well as intermittent headaches and the occasional migraine. He also acknowledges her symptoms of anxiety, difficulty with sleep, and general feeling of being poorly rested. He notes that Mrs. Waltmans returned to the majority of her activities shortly after the Accident. This included snowboarding, exercising, running, hiking, paddleboarding, hunting, camping, annual vacationing to Mexico, and maintaining her property. Mr. Murovec submits that these activities are limited by pain to a certain extent, but other than quadding, Mrs. Waltmans' injuries do not prevent her from engaging in them altogether. She also continues to exercise at least five times per week.

[27] Mr. Murovec relies on the following cases in support of his assertion that Mrs. Waltmans is entitled to \$75,000 in non-pecuniary damages:

- a) *Hoffman v. Luan*, 2021 BCSC 811: the plaintiff was 28 years old at the time of the trial and suffered from soft tissue injuries to his neck, mid and lower back, chronic cervicogenic headaches, sleep disturbance, mood disturbance, and anxiety from two motor vehicle accidents. The court concluded that although there likely would be some improvement to his symptoms with treatment, the symptoms would not entirely resolve, and it was expected that his pain would continue throughout his life. The court awarded him non-pecuniary damages of \$75,000.
- b) *Dosangh v. Xie*, 2017 BCSC 1937: the court found that the 50-year-old plaintiff had sustained moderate soft tissue injuries and that the pain from

those injuries had become chronic. The injuries had not disabled the plaintiff but continued to affect her ability to work and enjoy work, and have a happy home life. Her symptoms would likely continue into the foreseeable future. The court awarded non-pecuniary damages of \$70,000.

- c) *Khademolhosseini v. Ji*, 2019 BCSC 854: the 28-year-old plaintiff suffered soft tissue injuries as a result of the accident, which caused ongoing neck and upper back pain as well as cervicogenic headaches. There was a clear reduction in his recreational activities. He continued to work albeit in pain. The pain was not expected to get worse but also not expected to get much better. The court awarded him \$85,000 in non-pecuniary damages.
- d) *Dueck v. Lee*, 2019 BCSC 1936: the plaintiff was 52 years old when she was injured in a motor vehicle accident. At the time of the accident, she was self-employed as a part-time piano teacher and had a small catering business. She suffered mild to moderate soft tissue injuries to her neck, lower back, left shoulder, left arm, hand and knee. As a consequence, she suffered chronic pain, periodic debilitating headaches and sleeplessness, which persisted at the time of trial in 2019. She also had diminished strength in her left shoulder and arm. Her prognosis for recovery was poor. The court awarded her non-pecuniary damages of \$75,000.

[28] With respect to Mr. Waltmans, Mr. Murovec submits that he did not mitigate his damages due to his failure to obtain any treatment for his back pain symptoms. Accordingly, Mr. Murovec seeks a 75 percent reduction in Mr. Waltmans' non-pecuniary damages.

[29] Mr. Murovec acknowledges that Mr. Waltmans experiences intermittent lower back pain and some sleep disruption. He relies on the following cases in suggesting that Mr. Waltmans is entitled to non-pecuniary damages of \$35,000:

- a) *Chapman v. Zilm*, 2020 BCSC 695: The plaintiff was a 33-year-old RCMP officer at the time of the accident. He sustained chronic neck pain that was likely permanent. There was no significant interference with his personal or working life. However, he exercised less and continued with most of his pre-accident recreational activities with less intensity. Non-pecuniary damages were assessed at \$30,000—\$34,563 adjusted for inflation; and
- b) *Erwin v. Buhler*, 2017 BCSC 362: The 53-year-old plaintiff suffered from ongoing back, neck, and shoulder problems as a result of a motor vehicle accident. Most of his symptoms resolved within a year of the accident, but the plaintiff continued to suffer from intermittent headaches, neck, and back pain related to activity. The plaintiff also had pre-existing injuries at

the time of the accident. As a result, the court noted the difficulty in disentangling the effects of the accident from the plaintiff's other soft tissue injuries. The court assessed damages as \$40,000—\$49,509 adjusted for inflation.

Findings of Fact on Non-Pecuniary Damages

Mr. and Mrs. Waltmans' Pre-Accident Conditions

[30] Mrs. Waltmans was born in December 1983. She graduated from high school in 2001. As of trial, she is 40 years old.

[31] Mr. Waltmans was born in April 1983 and was also 40 years old at the date of trial. The couple married in August 2010.

[32] Mrs. Waltmans' health in the two years prior to the Accident was very good. She had no pre-existing injuries, accidents, or complaints. She did not require any treatments and was not on any therapeutic medication. Similarly, prior to the Accident, Mr. Waltmans exercised regularly and was in good shape with no health issues.

[33] The Waltmans were a physically-active couple prior to the Accident. In addition to regularly exercising, they enjoyed hiking, riding ATVs, camping, boating, paddleboarding, wakeboarding, and snowboarding.

[34] The couple also enjoyed hunting. Mrs. Waltmans used to hunt once or twice a month during hunting season from September to December with Mr. Waltmans. This activity required carrying a pack and rifle.

Circumstances of the Accident

[35] On November 12, 2018, Mr. and Mrs. Waltmans and their children were driving south on Lakeshore Road in Kelowna, BC. They stopped at its intersection with Richter Street and were rear-ended by the vehicle driven by Mr. Murovec. Mrs. Waltmans recalls that the impact jolted her forward without any warning.

[36] Mr. Waltmans recounted that the vehicle he was driving had stopped when Mr. Murovec struck it from behind. The parties drove to a safe location and exchanged information.

Mrs. Waltmans' Post-Accident Condition

[37] Mrs. Waltmans went to work the day following the Accident, but she was sorer that morning than she had been the night before. Her symptoms worsened as the week went on, and on November 16, 2018, she and her husband both went to see their family practitioner, Dr. Adrian Hughes.

[38] Dr. Hughes recommended over-the-counter medication for Mrs. Waltmans and that she monitor her symptoms. Mrs. Waltmans next attended at Dr. Hughes' office in December 2018. She received trigger point injections and he recommended chiropractic treatment. Mrs. Waltmans required the trigger point injections because of significant pain in her neck for which she had to leave work. The injections, however, did not alleviate her symptoms.

[39] Mrs. Waltmans attended chiropractic treatment twice but felt worse after each of these treatments. Mrs. Waltmans worked with a different chiropractor, tried massage therapy, and exercised as recommended by Dr. Hughes.

[40] In the year after the Accident, Mrs. Waltmans continued to use over-the-counter pain medication and she received physiotherapy approximately seven or eight times. Her pain symptoms persisted.

[41] Her current symptoms are frequent headaches (up to three times a week), migraine headaches every six weeks, and a sharp, shooting, burning pain from the back of her head to her shoulder. She also experiences right and left arm numbness. Her predominant pain symptoms are in her upper shoulder and neck. She describes this as excruciating to the extent that it effects her ability to focus and concentrate.

[42] Mrs. Waltmans also experiences anxiety issues that she did not have prior to the Accident. She is moody, irritable, and short-tempered especially with her family.

These symptoms affect her relationships with her husband and children as well as her social life.

[43] Mrs. Waltmans has difficulty sleeping for more than five or six hours a night because of her pain symptoms. She is unable to rest comfortably and usually wakes up at around 4:30 a.m. Prior to the Accident, she regularly slept for seven to eight hours. Since the Accident, she no longer feels rested after sleeping.

[44] Mrs. Waltmans continues her daily exercise regimen, runs, and use weights but she does so for shorter distances and using lighter weights. Mrs. Waltmans completes cardiovascular and weight training six days a week. Her post-Accident exercise routine involves 30 minutes of cardiovascular exercises on either a treadmill or elliptical machine followed by 20–25 minutes of strength and conditioning using light weights, and floor exercises. She also does recommended neck and shoulder exercises every morning and in the evening before going to sleep. In addition, she walks or jogs regularly and takes her dog for short hikes and walks. She takes some prescription and over-the-counter medication as required but generally avoids them.

[45] Dr. Hughes recommended kinesiology therapy but Mrs. Waltmans has not pursued this.

[46] While working as a dental hygienist, Mrs. Waltmans' neck and shoulders tighten up. She needs to pause every 10–15 minutes to walk, stretch, and take a short break. This was not necessary prior to the Accident.

[47] Mrs. Waltmans also often experiences a headache, shoulder, or neck pain during the day and is usually in “rough shape” by the time she gets home from a day of work. Her pain symptoms have affected her mood over the last three years.

[48] Mrs. Waltmans estimates that she gets a migraine headache once every six to eight weeks. Dr. Hughes prescribed medication for her migraines to be used on as-needed basis.

[49] Mrs. Waltmans experienced an increase in anxiety and panic attacks over the past year, probably related to her unrelenting pain symptoms combined with the financial pressure of an uncertain employment future.

[50] Mrs. Waltmans is no longer able to ride an ATV because she is afraid she will hurt herself and it is too jarring. She used to hike three times a week and although she still does this activity, she now goes on easier and shorter hikes, less frequently.

[51] Mrs. Waltmans has not gone boating or wakeboarding since the Accident because of her pain symptoms. She has gone snowboarding but has to limit herself to easier runs because she is afraid of hurting herself or falling. Her frequency of snowboarding has not changed after the Accident.

[52] Mrs. Waltmans is disappointed by her inability to go wakeboarding, surfing, and horseback riding with her children while they are on vacation. She worries about aggravating her neck pain.

[53] The effects of the Accident have notably affected Mrs. Waltmans' relationships with her husband and children. She has also lost friendships because she often cancels plans at the last minute and she feels that she is no longer fun to be around. She feels a deep sense of loss over not being able to physically play with her children as much she would like to. She occasionally missed taking them to some of their activities because of her pain symptoms. She has also periodically been unable to attend family functions and dinners. Her symptoms have affected her relationship with her husband, friends, and co-workers because she is no longer as social as she used to be. Her pain symptoms have fundamentally changed her as a person and she does not like the person that she has become in the wake of the Accident.

[54] Mrs. Waltmans waited for two years after the Accident before commencing physiotherapy. She attended ten sessions of physiotherapy commencing in October 2020 after the COVID-19 pandemic restrictions ended. She stopped physiotherapy in January 2021 because she finds that she received only short-term benefits from

this treatment. Notwithstanding the notations in the physiotherapy notes, she denies that she was “improving overall, or significantly improving”. Her clear recollection is that any benefit she received from this therapy was short-lived.

[55] From September 2023 to January 2024, shortly before the trial, Mrs. Waltmans took an extended medical leave from her work as a dental hygienist. During this period, her pain symptoms improved. The frequency and severity of the headaches decreased. She also felt better mentally, and her mood improved with her husband and children. She experienced less anxiety, however, she continued to suffer from significant neck pain.

[56] During her graduated return to work in January 2024, Mrs. Waltmans’ headaches resumed, and her neck and shoulder felt sore after completing a four-hour shift. She did the graduated return to work schedule three times before resuming her medical leave.

[57] Mr. Waltmans describes Mrs. Waltmans’ predominant symptoms as severe headaches and constant and unrelenting neck pain. He thinks she feels some stress over her symptoms as well as concerns about the future. He describes her as being very tough because even though she has difficulty sleeping, she is in the gym exercising at 5:00 a.m. every morning as she has done for the past 20 years.

[58] Mr. Waltmans was employed with Canadian Natural Resources Ltd. (“CNRL”) in Alberta and had a successful career there which paid him well. He strongly asserts that the reason he left his employment with CNRL and returned to Kelowna was because Mrs. Waltmans was struggling with serious neck pain and headaches and was unable to cope with caring for their children and managing their household on her own. For several years prior to the Accident, he and his wife successfully managed the routine of him working in Alberta. Following the Accident, this was not possible given the extent of Mrs. Waltmans’ injuries.

[59] In describing the impact of Mrs. Waltmans’ pain symptoms, Mr. Waltmans described her as irritable and moody when she is suffering with pain. Their

communication suffers when she is in pain because she is short-tempered and miserable. He says that this is a significant change from her pre-Accident demeanour.

[60] Mr. Waltmans also said that since the Accident, Mrs. Waltmans no longer rides an ATV, goes camping, or boating. This evidence is entirely consistent with the testimony provided by Mrs. Waltmans. Mr. Waltmans does more cooking and other household activities because of Mrs. Waltmans' pain symptoms.

Mr. Waltmans' Post-Accident Condition

[61] The day after the Accident, Mr. Waltmans experienced pain in his chest and back. He attended an appointment along with Mrs. Waltmans with Dr. Hughes on November 16, 2018. He recalls Dr. Hughes' recommendations that he exercise and use over-the-counter medication as required.

[62] Since the Accident, Mr. Waltmans suffers from intermittent back pain that is sometimes provoked by bending, twisting, or lifting. He suffers from the symptoms three to four days a week and the severity of the pain is variable. His pain symptoms affect his sleep approximately three nights a week. His symptoms have not subsided and have persisted without any improvement since the Accident. He does not have any pain-free weeks.

[63] Mr. Waltmans experienced a 50 percent improvement in his pain symptoms in the first two to four weeks after the Accident. He suffers intermittent back pain three to four days a week, and one to two days a week, this pain is moderately painful.

[64] Mr. Waltmans continued the same exercise regime before and after the Accident. This regimen includes exercising on an elliptical machine, push-ups, and sit-ups. Since the Accident, he avoids playing golf with his father, George Waltmans, because he is afraid of aggravating his back pain.

[65] George Waltmans lives in a basement suite in the residence owned by Mr. and Mrs. Waltmans. According to George Waltmans, his son seldom has sleep problems.

[66] Mrs. Waltmans observed that Mr. Waltmans has a sore back to varying degrees, interrupted sleep, and occasional mood issues. He also exercises regularly and has actually increased the frequency of his exercising after the Accident. Some of his activities are limited by his lower back pain. For example, he is also not able to tolerate riding an ATV or boating. As a result, the Waltmans sold both of their ATVs and their boat.

[67] Mrs. Waltmans regrets not being more supportive of Mr. Waltmans because she is preoccupied with dealing with her own pain symptoms arising from the Accident.

Medical Expert Evidence

Dr. Adrian Hughes – Family Practitioner

[68] Dr. Hughes is Mrs. Waltmans' family practitioner. He produced an expert report dated April 27, 2020 based on the five occasions on which Mrs. Waltmans attended at his medical office regarding her Accident-related symptoms.

[69] Mrs. Waltmans first attended at Dr. Hughes' office for injury-related symptoms on November 16, 2018, four days after the Accident. She reported neck and upper back pain. Dr. Hughes observed that she had decreased range of motion in her neck, tightness and tenderness of her cervical, trapezius, and upper rhomboid muscles.

[70] Dr. Hughes diagnosed Mrs. Waltmans having neck strain and soft tissue injuries. He provided her with what he characterized as his "normal post MVA advice" to stay active and use over-the-counter medication such as Tylenol for pain. During the November 16, 2018 appointment, Dr. Hughes recommended that Mrs. Waltmans consider physiotherapy if her recovery was slow. He generally recommends physiotherapy over chiropractic treatment.

[71] Mrs. Waltmans reported a significant benefit from doing a home exercise program with self-guided stretching.

[72] Dr. Hughes opined that the Accident caused Mrs. Waltmans' injuries. She was not totally disabled from working but her pain symptoms prevented her from working additional shifts and limited some of her recreational activities such as hunting, riding an ATV, and wakeboarding. He expects that Mrs. Waltmans' symptoms will continue into the near future and may be permanent.

[73] Dr. Hughes recommended that Mrs. Waltmans work with a kinesiologist and advised her that she may concurrently benefit from massage therapy and/or physiotherapy to assist with pain symptoms. Dr. Hughes thinks kinesiology treatment is more useful than physiotherapy, particularly for motivated patients such as Mrs. Waltmans.

[74] During Mrs. Waltmans' next visit on December 20, 2018, Dr. Hughes reiterated his treatment recommendations, including physiotherapy, chiropractic treatment, massage therapy, and kinesiology. He thinks he probably reminded Mrs. Waltmans to stay active and try these other modalities if her symptoms were not improving.

[75] The first notation of Mrs. Waltmans suffering from migraine headaches is on March 17, 2022. She reported that this was the second time she had sustained a migraine headache.

[76] Mr. Waltmans attended at Dr. Hughes office on November 16, 2018, along with Mrs. Waltmans. Dr. Hughes assumes that he provided him with the same advice to remain active, use over-the-counter pain medication as required, and undertake physiotherapy if his symptoms were not steadily improving.

[77] Mr. Waltmans also attended a virtual appointment by telephone on April 21, 2020. These are the only two Accident-related attendances by Mr. Waltmans with Dr. Hughes. As of April 21, 2020, Mr. Waltmans had not tried physiotherapy or kinesiology to alleviate his pain symptoms.

[78] Dr. Hughes provided an expert report dated April 27, 2020 regarding Mr. Waltmans' condition.

[79] Dr. Hughes diagnosed Mr. Waltmans with thoracic back pain from a soft tissue injury caused by the Accident. He recommended that Mr. Waltmans remain active and use over-the-counter pain medication as required. Mr. Waltmans was not disabled from work but was unable to do some recreational activities such as hunting and riding an ATV.

[80] Dr. Hughes opined that Mr. Waltmans would likely recover if he did an active kinesiology and physiotherapy program but that if his symptoms did not improve in three to six months, he would probably have ongoing limitations. Dr. Hughes also recommended massage therapy to alleviate acute pain symptoms.

Dr. Sathishkumar Rajasekaran - Physiatrist

[81] Dr. Rajasekaran is a qualified physiatrist. He examined Mrs. Waltmans on October 30, 2020 and produced an expert report dated November 13, 2020.

[82] Mrs. Waltmans reported that she continued exercising, including weight training after the Accident, but she avoided some exercises that exacerbate her symptoms. She has difficulty playing with her children.

[83] Dr. Rajasekaran noted that Mrs. Waltmans' range of neck motion was limited in all planes. He diagnosed her with Whiplash-Associated Disorder Level 2 and cervicogenic headaches, both caused by the Accident. He opined that her recovery has been impacted by her delayed pursuit of physiotherapy and this probably contributed to the chronicity and severity of her symptoms. He recommended that she work with a physiotherapist and, if her symptoms improved, that she progress to an active therapy program followed by kinesiology-based treatments.

Dr. Tony Giantomaso – Physiatrist

[84] Dr. Giantomaso assessed Mrs. Waltmans on October 12, 2023, and produced an expert report dated November 8, 2023. He also provided a rebuttal

report dated November 25, 2023 to the expert report of Dr. McCann, another physiatrist.

[85] Dr. Giantomaso observed that Mrs. Waltmans moved stiffly and experienced pain in her neck, shoulders, and upper back. The range of motion in her cervical spine was significantly limited by at least 40 percent. This is a much greater restriction than as compared to most of his chronic pain patients.

[86] Dr. Giantomaso does not think that physiotherapy or chiropractic treatment reduces the likelihood of a patient experiencing chronic pain. According to him, there is no evidence that undergoing these therapies shortly after a traumatic injury improves outcomes. Active rehabilitation is better than those therapies but it is also not necessarily curative. Dr. Giantomaso opined that the most effective treatment is kinesiology because it provides motivated patients with details of the specific exercises that may alleviate pain symptoms.

[87] Dr. Giantomaso diagnosed Mrs. Waltmans with the following chronic conditions, caused by the Accident:

- a) cervical sprain/strain injury, Whiplash-Associated Disorder Level 2;
- b) thoracic sprain/strain injury grade 1-2; and
- c) post-traumatic headaches with both cervicogenic and mixed migrainous features.

[88] Dr. Giantomaso opined that Mrs. Waltmans' headaches were not properly diagnosed and treated. He tempers this criticism by noting that referrals to specialists were difficult during the period from March 2020 to March 2022 as a result of the pandemic restrictions. Nevertheless, Mrs. Waltmans should have been referred to a specialist for her headache symptoms because her related neck pain persisted for more than six months.

[89] Dr. Giantomaso notes that Mrs. Waltmans reported persistent and ongoing neck pain and that, accordingly, her treatment providers should have referred her to a neurologist or physiatrist with expertise in chronic pain. This is because muscular

neck pain often causes cervicogenic headaches, that if left untreated, can eventually lead to the onset of migraine headaches.

[90] Dr. Giantomaso disagrees with Dr. Rajasekaran's view that Mrs. Waltmans' pain symptoms would have improved with timely physiotherapy.

[91] Dr. Giantomaso's recommendations include a referral to a neurologist or physiatrist for treatment of her headaches, quarterly occipital nerve blocks, trials of migraine medication and/or Botox injections, referral to a pain clinic, occasional passive therapy, active rehabilitation, and a worksite assessment.

[92] Dr. Giantomaso believes that his treatment recommendations will not cure Mrs. Waltmans' symptoms but they can be sufficiently managed to enable her to resume working. Dr. Giantomaso's prognosis is that Mrs. Waltmans will continue to experience chronic pain to some degree that may decrease if she follows the long-term pain management strategy he recommends. He thinks that focusing on her headaches and neck pain will result in significant improvement in her symptoms and enable her to work part-time. However, she will probably continue having difficulties performing intense physical activities and doing some strenuous household chores may provoke pain symptoms.

[93] Dr. Giantomaso rejects the assertion contained in some of the physiotherapy consult notes that Mrs. Waltmans' symptoms were improving, because these notes lack context and are often subjective. He notes that objective examinations in March and October 2022 continued to show that Mrs. Waltmans suffered from neck spasms, so any alleged improvement was temporary and must be assessed within the overall context of Mrs. Waltmans suffering from chronic pain.

[94] In his November 25, 2023 rebuttal report, Dr. Giantomaso takes issue with Dr. McCann's prediction that Mrs. Waltmans' symptoms will resolve and that she will be able to return to work full-time. This is because Dr. McCann did not factor Mrs. Waltmans' ongoing cervicogenic and migraine headaches into his assessment. Dr. Giantomaso also highlights Dr. McCann's failure to consider that soft tissue

injuries that persist for more than two years are unlikely to subside. Dr. Giantomaso opines that Mrs. Waltmans' pain symptoms are chronic and unlikely to improve.

Dr. Shawn McCann – Physiatrist

[95] Dr. McCann is a qualified physiatrist. He examined Mrs. Waltmans on October 24, 2023, and produced an expert report on that date.

[96] On physical examination, Dr. McCann observed that Mrs. Waltmans had restrictions in the range of motion of her neck. Her neck extension and lateral flexion right and left were all assessed at half of the normal range of motion. On palpation, Mrs. Waltmans had myofascial trigger point tenderness in her upper trapezius, cervical spine, and scapular areas.

[97] Dr. McCann diagnosed Mrs. Waltmans with Whiplash-Associated Disorder Level 2 of the cervical spine and associated cervicogenic headaches and occasional migraine headaches caused by the Accident. He also diagnosed sleep disturbance and related irritability and depressed mood.

[98] Dr. McCann opines that Mrs. Waltmans is capable of doing most household activities, with some assistance with heavier chores.

[99] Dr. McCann examined Mrs. Waltmans while she was on her recent medical leave. His prognosis for her return to work is somewhat puzzling because he describes her medical leave as a “setback” that will resolve over time such that she will be able to return to working eight-hour shifts, three days a week. His basis for concluding that this constituted a “setback” that would resolve is unexplained.

[100] Dr. McCann recommended that Mrs. Waltmans be referred to an interventional pain clinic for consideration of medial branch blocks in her cervical spine to reduce her pain symptoms. He also suggested that she try medication to enable better sleep.

[101] It is Dr. McCann's impression that Mrs. Waltmans should have undergone medial branch blocks and that, if she had, she would likely have significant pain

relief. He points out that it is not too late for her to try this and other similar procedures such as platelet-rich plasma injections.

[102] Dr. McCann's opinion is that Mrs. Waltmans' prognosis for returning to physically demanding activities is guarded, but there is "some hope" that she may be able to return to them if the recommended treatment alleviates some of her pain symptoms. He also opines that the treatment of her underlying sleep problems may improve her overall pain tolerance and function.

[103] The only significant distinction between the reports of Dr. Giantomaso and Dr. McCann is on the prognosis of Mrs. Waltmans' return to work. Both doctors believe that she has not undergone adequate treatments, and that if she does, her symptoms may improve. However, Dr. Giantomaso testified that those treatments do not reduce the likelihood of chronic pain.

Dr. Darren Lee - Psychiatrist

[104] Dr. Lee is a qualified psychiatrist. He conducted an independent medical examination of Mr. Waltmans on October 26, 2023, and produced an expert report dated October 30, 2023.

[105] As noted, Mr. Waltmans did not undergo any treatment after the Accident although Dr. Hughes has recommended physiotherapy treatment to him in April and June 2020. I note that this was early during the pandemic shutdown.

[106] Mr. Waltmans reiterated his view that his symptoms improved by about 50 percent since the Accident. He reported experiencing intermittent back pain, once or twice a week. Dr. Lee observed tenderness to palpation of the mid and lower back. He diagnosed Mr. Waltmans with a whiplash injury with residual mild chronic myofascial pain in the mid and lower back.

[107] Dr. Lee opined that Mr. Waltmans did not receive adequate treatment for his injuries and that he may experience significant improvement, if not resolution of his symptoms, if he receives treatment. This treatment should include a full course of

active rehabilitation, in conjunction with massage therapy and physiotherapy, for at least three to six months, use of over-the-counter analgesic medications as required, and myofascial release techniques such as intramuscular stimulation and trigger point injections.

[108] Dr. Lee concludes that there is a possibility that Mr. Waltmans' pain may completely resolve if he undergoes the recommended treatment. As of trial, Mr. Waltmans has not undergone any of the treatments recommended by Dr. Lee.

Analysis of Non-Pecuniary Damages – Mrs. Waltmans

[109] Mrs. Waltmans suffers from soft tissue injuries to her neck, shoulders, and upper back, as well as headaches, migraines, sleeplessness, anxiety, and mood disruption issues. I am satisfied that the Accident caused Mrs. Waltmans' injuries because she was pain-free with no complaints or injuries prior to it.

[110] Mrs. Waltmans' physical and emotional injuries impact her daily routine and reduce her enjoyment and quality of life. As a result of the Accident, her personality changed and the quality of her relationships with her family has been negatively impacted by her moodiness, short temper, and irritability. Specifically, and unfortunately, Mrs. Waltmans' injuries have negatively impacted her role as a mother. She misses taking her daughters to activities and doing the range of activities she previously enjoyed with them. She is anxious and her social life has changed because she is often in pain and discomfort.

[111] Mrs. Waltmans suffers ongoing pain symptoms with associated difficulties with sleep and anxiety. To her credit, she remains physically active by frequently exercising, walking regularly, running, trail hiking and snowboarding, albeit at a lower intensity than before the Accident.

[112] Mrs. Waltmans' chronic pain is probably permanent. Treatments may temporarily alleviate these symptoms, but they are unlikely to be curative.

[113] Mrs. Waltmans chose chiropractic treatment from the choices Dr. Hughes suggested to her at the first appointment she attended after the Accident. At first instance, this decision was reasonable. Mrs. Waltmans describes a very good relationship with Dr. Hughes in which she talks with him about a range of issues.

[114] Mrs. Waltmans did not pursue kinesiology treatments because she did some general research and concluded that this treatment was similar to the cardiovascular, stretching, and weight training that comprised her regular exercise routine that she was already doing. It may have been preferable for Mrs. Waltmans to try kinesiology, particularly in the wake of the unsuccessful chiropractic treatments. However, her decision to remain active by adhering to her own rigorous and regular exercise routine was reasonable. This is because she properly understood that the purpose of Dr. Hughes' treatment was to ensure that she remained active and continued to exercise. She chose to do so by following her own exercise regime, rather than pursuing kinesiology treatments.

[115] I accept Dr. Giantomaso's view that prescribed treatments are not a panacea that inevitably lead to symptom improvement. To be clear, I accept that it would have been preferable for Mrs. Waltmans to work with a kinesiologist to ensure that her exercise regimen maximized her chances of symptom improvement. However, in the context of the injuries she sustained, her efforts to remain active via a very regular, varied, and sustained exercise program were reasonable.

[116] I reject Mr. Murovec's assertion that Mrs. Waltmans failed to mitigate her damages. She remained active by doing a range of exercises on a very regular basis and she also continued to run, hike, and walk. It is mere speculation that she missed a window of opportunity to improve her symptoms by undergoing other treatments such as physiotherapy or kinesiology in the period immediately after the Accident.

[117] Considering the cases relied on by the parties, I am satisfied that Mrs. Waltmans is entitled to damages of \$140,000 in respect of the pain and suffering caused by the Accident.

Analysis of Non-Pecuniary Damages – Mr. Waltmans

[118] Mr. Waltmans suffers from mild intermittent back pain, three to four days per week. His pain symptoms affect his sleep and have not subsided since the Accident. He does not have any pain-free weeks. His pain prevents him from doing some of the rigorous activities he previously enjoyed, such as boating and riding an ATV.

[119] Mr. Waltmans did not undertake any of the specific treatments recommended by Dr. Hughes. For example, Dr. Hughes recommended that Mr. Waltmans undertake physiotherapy or massage therapy if his pain symptoms did not steadily improve. Dr. Hughes concluded that Mr. Waltmans would probably recover if he did an active kinesiology and physiotherapy program but that if his symptoms did not improve in three to six months, he would likely have ongoing limitations.

[120] Dr. Lee concluded that Mr. Waltmans did not receive adequate treatment for his injuries because he did not undertake any treatment for them. Dr. Lee also believes that Mr. Waltmans may experience significant improvement, if not resolution of his symptoms, if he had received appropriate treatment consisting of active rehabilitation, massage therapy, physiotherapy, along with use of over-the-counter analgesic medications as required, and myofascial release techniques.

[121] I appreciate that Mr. Waltmans continued to exercise regularly after the Accident and this is consistent with some of the advice he initially received from Dr. Hughes. However, in my view, his decision not to undertake any of the recommended treatments, in the face of ongoing pain symptoms, was unreasonable. Two physicians opined that the recommended treatments may resolve his symptoms.

[122] Mr. Waltmans' explanations that the pandemic and cost of these treatments are reasons why he did not pursue them do not withstand scrutiny. Several post-pandemic years have passed since he received these recommendations and he still has not undertaken any of them. Furthermore, there is no evidence that Mr. Waltmans was unable to afford these treatments or sought funding for them.

[123] On the issue of Mr. Murovec's onus that Mr. Waltmans could have reasonably avoided some of the loss, I note that Dr. Hughes testified that he recommends physiotherapy and massage therapy to motor vehicle accident victims as a matter of course. It is reasonable to conclude that he makes these recommendations because in his experience, they are usually beneficial.

[124] Mr. Waltmans may have missed an opportunity to alleviate or resolve his symptoms by not doing any of the recommended treatments. In my view, a 25% reduction in damages accounts for Mr. Waltmans' failure to mitigate his losses by not doing physiotherapy, massage therapy, or any other treatments after the Accident.

[125] Considering the cases relied on by the parties, and accounting for a 25% reduction based on Mr. Waltmans' failure to mitigate his damages, I am satisfied that Mr. Waltmans is entitled to \$30,000 in non-pecuniary damages caused by the Accident.

Loss of Income-Earning Capacity

Factual Findings

[126] The Waltmans moved to Alberta in 2003. Mrs. Waltmans completed a dental hygienist program and obtained a bachelor of science degree from the University of Alberta in 2006. Next, she worked full-time, eight hours a day, four days a week, as a dental hygienist until June 2011, when her first daughter was born.

[127] After taking maternity leave for one year, Mrs. Waltmans returned to work part-time, three days a week, until December 31, 2012, when her second daughter was born.

[128] Mrs. Waltmans did not regularly work four shifts per week after 2011, when her first daughter was born. For a brief six-week period commencing in June 2022, after the pandemic restrictions were lifted, she worked four shifts per week. She did this to help alleviate the backlog caused by the pandemic shutdown.

[129] She testified that her plan was to return to working four days a week in 2017 or 2018 when her children were both in full-time attendance at school. However, she was not consistently working four days a week up to the date of the Accident in November 2018.

[130] Mrs. Waltmans worked for Dr. Gainey from July 2018 to March 2020. From July 2020 until September 2023, Mrs. Waltmans worked three days a week, eight hours per shift for Dr. Black. She earned approximately \$50 per hour for this work. Her intention in leaving Dr. Gainey's office was to try to obtain additional hours with Dr. Black because she prefers the variety of work in his clinic.

[131] Mrs. Waltmans' work as a dental hygienist is physically demanding. It involves standing upright, twisting, turning, and leaning forward. This work exacerbates the pain symptoms in her neck and shoulders.

[132] At the time of the Accident, Mrs. Waltmans was working three days a week, eight hours a day with Dr. Black. Mrs. Waltmans testified that she would have liked to work four days a week but she could only tolerate working three days a week following the Accident. From the date of the Accident until June 2020, Mrs. Waltmans estimates that she would have been able to work one additional shift per month but for the Accident.

[133] Prior to the Accident, Mrs. Waltmans took four or five weeks of vacation per year. After the Accident, she takes eight or nine weeks per year because she needs weeks off to recover and recuperate from her symptoms after every eight to ten weeks of working. Mrs. Waltmans also estimates that she takes five or six unpaid sick days per year in addition to the five sick days that are paid.

[134] From 2016 to 2018, prior to the Accident, Mrs. Waltmans earned an average of \$35,083.95 per year working as a dental hygienist part-time, three days per week with occasional extra shifts.

[135] After the Accident, until September 2023, Mrs. Waltmans continued to work part-time, three days per week, picking up extra shifts on occasion.

[136] Mr. Waltmans' employment income for three of the years following the Accident was as follows:

<u>Year</u>	<u>Income</u>
2019:	\$43,240
2021:	\$50,355
2022:	\$55,978

[137] Mrs. Waltmans worked the following hours per year:

<u>Year</u>	<u>Hours</u>
2017:	816
2018	778
2019	910
2020	878*
2021	989
2022	1011

* The dental office was shutdown for approximately three months due to pandemic.

[138] Mrs. Waltmans' working hours increased in the years after the Accident and this is despite her reportedly taking more vacation time.

[139] Mrs. Waltmans took a medical leave from her employment in September 2023 because of her pain symptoms. Dr. Hughes supported this decision. Mrs. Waltmans attempted to return to work in January 2024 by working one four-hour shift once a week. She was only able to do this three times before she had to stop and return to medical leave, which she continues on as of the date of trial.

[140] Mrs. Waltmans' intention was to work until she was 65 and then retire. She denies that she told Christina Peters that she intended to retire at 55. She testified that if she said that, it was an error.

[141] Mrs. Waltmans would like to continue working in some capacity because she likes to be productive and busy. Ideally, she would like to continue working as a

dental hygienist, but she is not sure how feasible this is given the nature of her ongoing pain symptoms.

[142] Mrs. Waltmans testified that she used to love her job but she does not think she can continue doing it because of the pain she experiences after a day of doing this work. Her symptoms are worse on days when she works.

[143] In addition to Mrs. Waltmans, Dr. Black employs five other dental hygienists. Four of them work three days a week and one works two days a week. He would be happy to have Mrs. Waltmans, or another hygienist, work four days a week and these additional hours would have been available to Mrs. Waltmans if she had been capable and willing to work more hours.

[144] The two most experienced dental hygienists in Dr. Black's office have worked there for 43 years and 36 years, respectively. The former is 68 years old. This suggests that working to 65 was not an unreasonable plan.

[145] Dr. Black described Mrs. Waltmans as outgoing, friendly, personable, and chatty. She had many interests outside of work. She was an excellent employee and very efficient with her use of the allotted time for each appointment.

[146] After the Accident, Mrs. Waltmans stood while doing her work. This is rare for dental hygienists and none of the others in Dr. Black's office routinely stand while doing their work. Mrs. Waltmans stands because of her neck pain symptoms. She frequently needs to stretch during and between appointments. She did not do this prior to the Accident. Dr. Black described her as stoic.

[147] A typical 70-minute appointment for a dental hygienist involves working in the mouth of a patient for 35-40 minutes. This requires bilateral hand movement while working in the same position for an extended period. Dr. Black noted that of all employees in his office, dental hygienists get the least positional variability over the course of a day. Dental hygienists require a flexible neck because it is not always possible to position patients optimally.

[148] The National Occupational Classification description of the duties performed by dental hygienists is limited because it does not include the demands that this type of work places on the worker's back, neck, and shoulders.

Vocational Evaluation – Derek Nordin

[149] Derek Nordin is a qualified vocational evaluator. He interviewed Mrs. Waltmans on September 13, 2023 and prepared an expert report dated November 9, 2023.

[150] Mr. Nordin's office administered a series of aptitude tests. Mrs. Waltmans was in a rush to complete them and this may have affected her scores, but there is no notation that she finished them earlier than the allotted time.

[151] Mrs. Waltmans was very weak on the numerical aptitude test and this result decreased her overall results. However, Mr. Nordin understandably places more weight on Mrs. Waltmans having completed a four year degree in assessing her overall aptitude.

[152] Mrs. Waltmans self-reported feelings of anxiety in the severe range, so Mr. Nordin recommended that she seek treatment from appropriate providers. This could be caused by the ending of a career she enjoys and uncertainty over what she will do next, as well as economic concerns.

[153] Mr. Nordin opines that Mrs. Waltmans' work as a dental hygienist exacerbates her neck and upper back pain. She is not able to avoid the activities required of this position and, if she does, she will likely not be able to work competitively in this occupation. She would also be unlikely to continue working as a dental hygienist without the kinds of accommodations provided by Dr. Black. These are not always provided by employers but they are not uncommon. He concludes that she is unlikely to be able to continue working as a dental hygienist on a full-time basis.

[154] Mr. Nordin noted that Mrs. Waltmans' skills as a dental hygienist are not readily transferrable, but he is confident that she is capable of retraining for clerical work, such as dental office administrative assistant work. This would be consistent with her past experience working in a dental office and would require completion of a 120-hour training program. The income range for this work is from \$17 per hour to \$36 per hour, with a median of \$24.85 per hour, which is approximately one-half of what Mrs. Waltmans earns as a dental hygienist.

[155] Mr. Nordin also recommends career and vocational counselling.

[156] Mr. Nordin concluded that Mrs. Waltmans' pain symptoms make her less competitive in the open job market, so she will require an understanding and accommodating employer. She is a less valuable employee to future employers compared to those without pain symptoms. Her likelihood of job stability is lower because of the Accident, so she risks periods of unemployment. This finding is somewhat offset by Dr. Black's evidence that dental hygienists are in high demand.

Occupational Therapist – Christina Peters

[157] Christina Peters is a qualified occupational therapist. She assessed Mrs. Waltmans on May 25, 2023 at a clinic and on June 1, 2023 at Mrs. Waltmans' residence, for an approximate total of ten hours of testing. Ms. Peters produced a functional capacity evaluation and cost of future care report dated June 14, 2023.

[158] Ms. Peters found that Mrs. Waltmans' reported levels of pain were consistent with the descriptors in the functional scale and with test findings. She observed that Mrs. Waltmans consistently demonstrated signs of physical discomfort when bending her neck forward during testing. She also found that Mrs. Waltmans demonstrated less than normal range of motion in her neck, and that this finding was consistent with test findings and Mrs. Waltmans' reports of neck and upper back and shoulder pain.

[159] Ms. Peters found that Mrs. Waltmans is able to meet the physical demands of working as a dental hygienist, but that she reports ongoing pain in her neck, upper

back, fatigue, and headaches at the end of a workday. These symptoms limit her ability to engage in activities with her family and perform chores in her home and property.

[160] Ms. Peters concludes that Mrs. Waltmans is less competitively employable as a dental hygienist because of the injuries she sustained in the Accident.

Responding Occupational Therapist Report – Mary Jo Mulgrew

[161] Ms. Mulgrew is a qualified occupational therapist. She provided a responding report to the one prepared by Ms. Peters, dated December 21, 2023. Ms. Mulgrew did not assess or test Mrs. Waltmans, but she provided an analysis of Ms. Peters' report.

[162] Ms. Mulgrew's analysis of Ms. Peters' functional capacity evaluation report questions the distinction between the scores Mrs. Waltmans reported in respect of pain catastrophizing and pain-provoked fear avoidance as compared to her demonstrated abilities to maintain her home and yard and engage in paddleboarding, hiking, and snowboarding. She also suggests that Mrs. Waltmans' non-Accident related diagnosis of carpal tunnel syndrome may have affected her ability to continue working as a dental hygienist irrespective of the Accident.

Past Loss of Income-Earning Capacity

Relevant Legal Principles

[163] The principles applicable to the assessment for past loss of income-earning capacity are:

- a) An assessment of a loss of income involves a consideration of hypothetical events.
- b) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- c) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.

- d) Once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages.
- e) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- f) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[164] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[165] A contingency deduction to a past loss of income-earning capacity may be appropriate where the material risk impairs the plaintiff's ability to maintain employment regardless of the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 81–84; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 100–102.

The Parties' Positions on Past Loss of Income-Earning Capacity

[166] Mrs. Waltmans asserts that, if not for the Accident, she would have worked full-time from June 2020 to September 2023. However, due to her pain symptoms, she only worked three days per week with occasional additional shifts. She suggests that she lost approximately \$62,403 due to not working full-time during this period. She also suggests that she lost approximately \$4,640 owing to her failed attempt to return to work in January 2024. She submits that she takes two weeks of unpaid

time off per year due to her pain symptoms. In total, she seeks \$75,000 for past loss of income-earning capacity.

[167] Mr. Murovec accepts that Mrs. Waltmans would have worked an additional shift per week but for the Accident. Taking into account a 10 percent contingency based on her work history and a 20 percent deduction for the net loss, he suggests that Mrs. Waltmans is entitled to \$36,000 in respect of loss of past income earning capacity.

Analysis of Past Loss of Income-Earning Capacity

[168] Mrs. Waltmans' payroll information shows a steady increase in hours worked since the Accident.

[169] In 2017, prior to the Accident, Mrs. Waltmans could have worked temporary shifts up to four total shifts per week, but she chose not to do so. For this reason, I decline to award Mrs. Waltmans damages for loss of past income earning capacity for the period prior to June 2020.

[170] In March 2020, she left Dr. Gainey's office to work exclusively with Dr. Black. She expected to work three shifts per week and a fourth shift if it became available.

[171] I am satisfied that the injuries Mrs. Waltmans sustained in the Accident led to a past loss of income-earning capacity. I accept her evidence that her pain symptoms affect her ability to do the physically demanding work of a dental hygienist. These symptoms generally limited her ability to work three shifts per week, not four as she purports to have preferred.

[172] Mrs. Waltmans worked four shifts per week after dental offices re-opened in June 2020. This was presumably to deal with a backlog of cases that accumulated during the pandemic shutdown.

[173] I am satisfied that Mrs. Waltmans would have continued to work four shifts per week but for the Accident after June 2020. Her children were older and she was motivated to work four shifts per week in Dr. Black's office.

[174] Mrs. Waltmans is entitled to compensation for the loss of one shift per week from June 2020 to the date of trial. Her hourly wage rose steadily from \$45 per hour in June 2020 to September 2021, to \$47 per hour from September 2021 to August 2022, and \$50 per hour from August 2022 to trial. A 25 percent contingency reduction should be applied to the award to account for the possibility that she may not have otherwise chosen to continue working four shifts per week for reasons unrelated to the Accident. In my view, this is reasonable because she did not have any consistent history of working four shifts per week prior to the Accident, aside for a short period of time before her daughters were born.

[175] Taking vacation pay and net earnings into account, I assess Mrs. Waltmans' damages for past loss of income-earning capacity to be \$40,000.

Future Loss of Income-Earning Capacity

Relevant Legal Principles

[176] The court's assessment of a plaintiff's future loss of income-earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise. The court engages in an assessment that depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[177] As noted earlier in these Reasons, in *Rab*, at para. 47, the court set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[178] This three-step process applies to both past and future income-earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–164.

[179] The third step of the *Rab* test may involve either the “earnings approach” or the “capital asset approach”. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset, their earning capacity, rather than a loss of earnings. It is also helpful when a plaintiff has yet to establish a settled career path, as it creates a more holistic picture of a plaintiff’s potential future: *Ploskon-Ciesla* at paras. 16–17.

[180] In *Dornan*, Justice Grauer, writing for the majority, stated that in undertaking the analysis of positive and negative contingencies, courts are required to assess what happened to the plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to the plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities: *Dornan* at para. 94.

The Parties’ Positions on Future Loss of Income-Earning Capacity

[181] Mrs. Waltmans asserts that her working capacity is likely half of what it was prior to the Accident. Applying a 1.5 percent discount rate, she submits that her loss of future income earning capacity is approximately \$591,000.

[182] Mr. Murovec concedes that the first two parts of the *Rab* test are met and that the issue in this case turns on the valuation of Mrs. Waltmans’ future loss of income-earning capacity. He submits that Mrs. Waltmans is entitled to \$150,000 in future loss of income-earning capacity based on a number of positive contingencies and the application of the capital asset approach for two years of her current income. Mr. Murovec also submits that a two-year period would allow for Mrs. Waltmans to obtain the benefit of recommended treatment and see an improvement in her symptoms, and also factors in the possibility of her being unable to return to work full-time. He further seeks a reduction of 60 percent based on Mrs. Waltmans’ alleged failure to mitigate her damages.

Analysis of Future Loss of Income-Earning Capacity

[183] I accept that Mrs. Waltmans intended to work until she was 65 years old. She was only 40 years old as of the date of trial so the lack of detailed evidence regarding her retirement plans is unsurprising. Mrs. Waltmans thoroughly enjoys working as a dental hygienist, and she was entirely healthy and vigorous prior to the Accident. I accept that she likes to keep herself busy and would want to continue working for a longer period of time.

[184] I also accept that Mrs. Waltmans cannot work full-time, four days a week, as a result of the Accident. The medical evidence suggests that there is a possibility that her symptoms may improve if she seeks proper and more specific treatments. However, the experts agree that even with some improvement, Mrs. Waltmans will likely be unable to work full-time as a dental hygienist.

[185] There is some chance that Mrs. Waltmans' condition will not improve and she will not be able to return to work as a dental hygienist even on a part-time basis.

[186] Mrs. Waltmans' skills and experience are not easily transferable to a less physically demanding job with similar pay. For example, working as a dental office administrative assistant pays about half of what a dental hygienist earns.

[187] I am satisfied that Mrs. Waltmans' ongoing pain symptoms from the Accident is a potential future event that could result in a loss of capacity. The evidence supports that she suffers from permanent injuries and long-term pain that will affect her ability to maintain full and/or part-time employment and remuneration. She is currently off work, and it is unknown when she will be able to return to work. If she is able to return, the experts agree that she will continue to experience pain and limitations that affect her employability and competitiveness in the labour market.

[188] Mrs. Waltmans' loss of capacity will affect her ability to earn income. It is not disputed that she has chronic pain and a permanent injury that affects her ability to work. She cannot work full-time as a dental hygienist, even with some improvement. The evidence is clear that full-time work as a dental hygienist would be available to

her but for the Accident. It is also established that due to her injuries, she is at a competitive disadvantage if she chooses to change careers.

[189] I reject Mr. Murovec's contention that ergonomic eye loupes will entirely address Mrs. Waltmans' inability to work full-time, four shifts a week. This submission is nothing more than speculation, because I do not accept that using this device would be a panacea that would resolve Mrs. Waltmans' neck pain. They may make this work easier on the neck, but the work requires neck mobility, head movement, and involves several positional demands that are not all addressed by the speculative use of this tool.

[190] Mrs. Waltmans' future loss of income-earning capacity will be based on the probability that she would work full-time, four shifts a week. A contingency must be applied because she did not regularly work four shifts a week in 2017 and 2018, despite the evidence of Dr. Black, the dentist she works with, that there is a high demand for the work performed by dental hygienists.

[191] In my view, Mrs. Waltmans ought to be compensated for missing one shift per week for the rest of her working life to age 65. Doing so takes into account Mrs. Waltmans' recent experience of being unable to work while balancing this against the reality that her working hours generally increased since the Accident. I am convinced that her pain symptoms permanently reduce her capacity to work in the future.

[192] Accordingly, Mrs. Waltmans' damages for future loss of income-earning capacity is assessed as \$389,528. This is based on an hourly rate of \$50, over 47 working weeks per year for 25 years, using a discount rate of 1.5 percent. A 25 percent deduction shall be applied to account for the possibility that she would have not worked four times a week had the Accident not occurred. As I have already found that Mrs. Waltmans did not fail to mitigate her damages, no further deduction shall be applied.

[193] Mrs. Waltmans is entitled to damages for loss of future income earning capacity of \$292,146.

Loss of Housekeeping Capacity

Relevant Legal Principles

[194] In *McKee v. Hicks*, 2023 BCCA 109 at paras. 94–112, Justice Marchand, as he then was, set out the framework for the consideration of a claim for loss of housekeeping capacity:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated: *Kim v. Lin*, 2018 BCCA 77 at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset: *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation: *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages: *Riley* at para. 102.
- e) A plaintiff who has suffered an injury that would make a reasonable person in the same circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages. However, in such cases, the trial judge retains the discretion to address the plaintiff's loss by the award of non-pecuniary damages: *McKee* at para. 112.
- f) However, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering, and loss of amenities: *McKee* at para. 112.
- g) When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that is

evidence of loss of housekeeping capacity: *McTavish v. MacGillivray et al.*, 2000 BCCA 164 at para. 63.

The Parties' Positions on Loss of Housekeeping Capacity

[195] Mrs. Waltmans asserts that she is entitled to a \$100,000 for loss of housekeeping capacity. This is based on her diminished ability to do housekeeping and yard work on the family's large home and property.

Factual Findings and Analysis on Loss of Housekeeping Capacity

[196] I am not convinced that Mrs. Waltmans is entitled to damages for loss of housekeeping capacity as a separate head of damages because she continues to do most of the house and yard work. I have taken her reduced ability to do housekeeping into account in the award for non-pecuniary damages. To the extent that she needs some assistance with heavier cleaning and yard work, this will be compensated in the following section on cost of future care.

Cost of Future Care

Relevant Legal Principles

[197] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.
- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.
- f) "Medical justification" is broader than "medically necessary".

- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for expenses that the plaintiff would incur in the absence of the accident.

See: *Thompson* at para. 149; *Singh v. Storey*, 2021 BCSC 1825 at para. 104.

The Parties' Positions on Cost of Future Care

[198] Mrs. Waltmans claims \$25,000 for the cost of future passive and active therapies as well as vocational counselling. She also claims \$15,000 for the cost of as of yet unprescribed migraine medication.

[199] Mr. Murovec submits that Mrs. Waltmans is entitled to approximately \$10,000 for the cost of future care but that this amount ought to be subject to a 75 percent contingency reduction based on the possibility that her condition may significantly improve.

Factual Findings on Cost of Future Care

[200] Mr. Waltmans now does most of the cooking for the family. As previously discussed, he quit his employment in Alberta and now lives full-time with his family. Mrs. Waltmans continues to do most of the day-to-day housekeeping but she requires assistance with heavier tasks. She hires seasonal cleaners once a year to do deep cleaning. Prior to the Accident, she did all the housekeeping and cooking for the family.

[201] Mrs. Waltmans testified that she used to do two hours of yard work per day prior to the Accident. At first blush, this may seem high, but the Waltmans live on a large piece of property that requires extensive maintenance. Mrs. Waltmans now does this work for approximately two to three hours per week and she hires friends twice a year for eight hours to assist her with spring and fall cleanup. She pays them \$700 per visit.

[202] Mrs. Waltmans purchased a treadmill for her exercise routine because she was worried about exposure to COVID-19 and was more comfortable with exercising in her own home.

[203] Ms. Peters makes the following treatment recommendations:

- a) six sessions per year of Mrs. Waltmans' choice of physiotherapy, massage therapy, or acupuncture to manage pain flareups to age 80 at a median rate of \$130 per session;
- b) 10 to 20 hours of vocational support and/or job search assistance at a cost of \$125 per hour; and
- c) 15 to 20 sessions with a kinesiologist over her lifetime at a cost of \$90 per session.

[204] Ms. Peters recommends the following assistive equipment for Mrs. Waltmans:

- a) Automatic vacuum cleaner: \$600;
- b) Long-handled battery-operated tile scrubber: \$75 with one replacement every five years;
- c) Long handled duster: \$20;
- d) Automatic lawn mower: \$3,600 to \$4,000 with one replacement required; and
- e) Long-handled garden tools: \$100 for one or two tools.

[205] Ms. Peters recommends the following support services:

- a) 75 hours per year of home cleaning services based on 25 visits, three hours in length, per year for assistance with intensive biweekly household cleaning. This amount to be reduced after ten years to 20 to 30 hours for seasonal cleaning, assuming a smaller home, at a cost of \$35 per hour; and
- b) 100 hours per year for yard maintenance based on four hours per week during the growing season and 48 hours per year for semi-annual heavy seasonal yard maintenance, at a cost of \$60 per hour.

[206] On the possibility that an ergonomic dental loupe may improve Mrs. Waltmans' ability to continue working as a dental hygienist, Ms. Peters declined

to recommend one because Mrs. Waltmans tried this device but did not find it helpful. Use of this device may reduce the need for neck flexion but it does not eliminate the need to work bilaterally while manoeuvring to access a patient's teeth.

[207] On the cost of future care recommendations, Ms. Mulgrew disagreed with some of them on the basis that they were not justified or reasonable based on the injuries sustained in the Accident. Specifically, she opined that pain management treatments ought to be provided to the anticipated year of Mrs. Waltmans' retirement, not to age 80, because her symptoms worsen when she is working.

[208] Ms. Mulgrew also disagreed with the recommendation for vocational counselling because she believed that Mrs. Waltmans continued working since the Accident. Ms. Mulgrew did not know that Mrs. Waltmans has been on medical leave for most of the period from September 2023 to the date of trial.

[209] On assistive equipment, Ms. Mulgrew supports funding for the automatic vacuum if it was bought after the Accident to enable Mrs. Waltmans to continue doing this task. She accepts the recommendation for an automatic lawn mower but suggests that this ought to be a one-time cost with no replacement because Mrs. Waltmans will probably eventually move to a residence with a smaller yard.

[210] Ms. Mulgrew opines that the biweekly housecleaning for three hours is unreasonable and should instead be halved. Similarly, she recommends three hours of heavier seasonal cleaning four times a year, a total of 12 hours per year to age 65, as compared to the 20 to 30 hours recommended by Ms. Peters to age 80.

[211] Ms. Mulgrew asserts that 100 hours for regular yard maintenance is unreasonable and excessive and that Mrs. Waltmans is capable of doing this work, albeit to a lesser extent than she did before the Accident. Similarly, she suggests 12 hours per year for seasonal yard maintenance assistance instead of the 48 hours suggested by Ms. Peters.

Analysis of Cost of Future Care

[212] In my view, six treatments per year of Mrs. Waltmans' choice to manage pain flare-ups until the age of 65 is medically justified and reasonable. This number of sessions takes into account Mrs. Waltmans' reluctance to obtain these treatments because it is one half of the number of treatments usually recommended by Ms. Peters. The rounded net present value of this amount for 25 years is \$12,300.

[213] I am also satisfied that Mrs. Waltmans is entitled to vocational counselling as well as a vocational assessment. There is a real and substantial possibility that she may not be able to continue working as a dental hygienist, so it is reasonable for her to obtain vocational services that will enable her to potentially transition to a new career. This is particularly important given Mrs. Waltmans' age and the likelihood that she has many working years, potentially 25 more, until she retires, assuming she works until she is 65 years old. Accordingly, I award Mrs. Waltmans a one-time cost of \$2,500 for vocational support.

[214] Dr. Hughes, Dr. Rajasekaran, and Dr. Giantomaso all support active rehabilitation under the guidance of a kinesiologist. Ideally, this treatment should have been undertaken by Mrs. Waltmans within 12 to 18 months of the Accident to ensure she was doing exercises that maximized her recovery. A one-time cost of \$1,800 for this item will provide Mrs. Waltmans with access to 20 kinesiology sessions over the rest of her life to ensure that her exercise regimen is supervised, monitored, and adjusted as required.

[215] The next step in Mrs. Waltmans' treatment process is attendance at a pain clinic as recommended by Dr. Hughes. In my view, this item is medically justified and reasonable, given Mrs. Waltmans' ongoing pain symptoms.

[216] Mrs. Waltmans' claim for migraine medication is also accepted as this item is medically justified and reasonable given her recurring migraines.

[217] I am not satisfied that the cost of an automatic vacuum cleaner is medically justified or reasonable. I am also not convinced that an automatic lawn mower is

medically justified or reasonable, because Mrs. Waltmans has continued mowing the lawn since the Accident, with some minor assistance of Mr. Waltmans with clearing the clippings. She uses a self-propelled lawn mower and she did not testify that she had difficulty using one.

[218] The amounts for tools that will enable Mrs. Waltmans to maintain her home and yard are medically justified and reasonable. An amount of \$200 replaceable five times is reasonable, for a total amount of \$1,000 for these tools.

[219] Biweekly home cleaning for three hours is medically justified and reasonable because this is not intended for all of the cleaning tasks, only the heavier ones that Mrs. Waltmans is not able to do because of the effects of the Accident. I also agree that this amount should be reduced after ten years with an allowance for 20 hours of seasonal cleaning assistance thereafter in respect of heavier tasks. In making this determination, I have taken into account the work done by Mrs. Waltmans' children, George Waltmans' maintenance of the suite he occupies in the basement of the family's residence, and the ongoing home maintenance performed by Mr. and Mrs. Waltmans.

[220] The Waltmans own a large 2.5 acre property and Mrs. Waltmans had no difficulty maintaining this property prior to the Accident. I do not accept that the amount claimed for weekly yard maintenance is excessive and unreasonable. This amount is only two hours per week and, in my view, is both medically justified and reasonable. The amount of \$6,000 per year for the next ten years is accepted.

[221] For heavier yard maintenance tasks, I am satisfied that 30 hours per year is reasonable based on the size of the Waltmans' property and the work required to maintain it. This amount is reasonable for ten years, followed by 15 hours per year for the following 15 years. I accept the hourly rate of \$60 for yard work.

[222] In total, applying the appropriate discount rate of two percent for all recurring costs, Mrs. Waltmans is awarded \$150,746 for the cost of future care.

Special Damages

Relevant Legal Principles

[223] The principles applicable to the assessment of special damages are as follows:

- a) Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained, once causation is established;
- b) Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite; and
- c) Subjective factors, such as whether the plaintiff believes the treatment is medically necessary, may also be considered.

See: *Hancott v. Barnes*, 2015 BCSC 1308 at para. 164; *Derksen v. Nicholson*, 2015 BCSC 1268 at para. 78; *Devilliers v. McMurchy*, 2013 BCSC 730 at paras. 72 and 75.

The Parties' Positions on Special Damages

[224] Mrs. Waltmans seeks special damages in respect of a treadmill and vitamin D injections, for a total amount claimed of \$1,605. Mr. Murovec opposes these claims.

[225] Mr. Murovec agrees to special damages of \$1,422, consisting of the cost of massage therapy sessions and a subrogated claim for amounts denied by Pacific Blue Cross.

Factual Findings and Analysis on Special Damages

[226] I am not convinced that the cost of a treadmill was reasonable or medically justified, notwithstanding that it was recommended and prescribed by a healthcare provider. Mrs. Waltmans did in-home cardiovascular exercise before and after the Accident. This was part of her regular routine. She continued to remain active without the use of the claimed treadmill and it was purchased in January 2021, more than two years after the Accident. Mrs. Waltmans is not entitled to special damages in respect of this item.

[227] There was no evidence to support the expenditure on vitamin D injections. The amount claimed for this item is denied.

[228] Mrs. Waltmans is entitled to special damages of \$1,422.

Conclusion

[229] Mrs. Waltmans is entitled to a damages award consisting of:

a) Non-pecuniary damages:	\$140,000
b) Past loss of income-earning capacity:	\$40,000
c) Future loss of income-earning capacity:	\$292,146
d) Cost of future care:	\$150,746
e) Special damages:	\$1,422
Total:	<u>\$624,314</u>

[230] Mr. Waltmans is entitled to non-pecuniary damages of \$30,000 in respect of the injuries caused by the Accident.

Costs

[231] If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, or other matters related to the implementation of this judgment, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe. If no submissions are received, the plaintiffs will have their costs at Scale B.

“Basran J.”