IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rathwell v. Shorey,*
2024 BCSC 1578

Date: 20240827
Docket: M198776
Registry: Vancouver

Between:

Jessica Leigh Rathwell

Plaintiff

And

Travis Shorey

Defendant

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for Plaintiff:	A.C.R. Parsons C. Berry
Counsel for Defendant:	C. Boulton R. Moore
Place and Date of Trial:	Vancouver, B.C. April 8–12, April 15–19, and April 22–26, 2024
Place and Date of Judgment:	Vancouver, B.C. August 27, 2024

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I. INTRODUCTION

[1] The plaintiff, Jessica Leigh Rathwell, was involved in a rear-end collision on September 20, 2017. The defendant, Travis Shorey, admits liability for the accident and this action proceeded to trial on damages issues only.

[2] The parties' positions on damages are diametrically opposed. Ultimately, I concluded that neither was reasonable.

[3] Ms. Rathwell seeks to recover total damages in excess of $3 million; the defendant argues that she has sustained no compensable loss or, alternatively, that it is limited to modest damages for minor soft tissues injuries which have improved. The defendant denies that the accident caused all of Ms. Rathwell's ongoing problems and submits that her referral to a concussion clinic in late 2020 resulted in extensive and unnecessary treatment which precipitated her ongoing somatic symptoms.

[4] A key point of contention at trial was whether or not Ms. Rathwell sustained a mild traumatic brain injury in the accident and, if so, its impact on her past and future earning capacity. For the reasons that follow, I conclude that the trial evidence as a whole does not support the conclusion that she did, a finding which has informed my overall assessment of damages.

II. BEFORE THE ACCIDENT

[5] Ms. Rathwell was born in Winnipeg, Manitoba in 1986. She was 30 years old at the time of the accident and 37 by the date of trial. I accept her evidence, as corroborated by her many close friends who testified at trial, that she was generally happy, physically active, and engaged in life before the accident.

[6] Ms. Rathwell met her current partner, Megan Lowrie, an elementary school teacher, in the spring of 2017. They started dating in June of that year and now have a young child together.

A. Educational History

[7] Ms. Rathwell completed high school in Winnipeg in 2004. In 2005, she attended the University of Manitoba for one year. In 2006, she enrolled as a full-time student at the University of Victoria, graduating with a Bachelor of Arts degree in Sociology and Psychology (with honours in Sociology) in 2009.

[8] In 2014, Ms. Rathwell began her master's degree in Counselling Psychology at City University. This program permitted her to attend classes on Saturday while she continued working. Ms. Rathwell said that she had obtained approval and started working on her master's thesis before the accident. On her evidence, she loved academia and hoped that she might pursue a PhD at some point in her life.

B. Employment History

[9] In 2006, Ms. Rathwell travelled to Switzerland to work as an au pair. In 2009, during her last year at the University of Victoria, she worked as a research assistant. After her graduation, she worked at an adult group home and as an education assistant in Victoria for about one year before moving to Vancouver in 2011.

[10] In 2011, Ms. Rathwell began working at Nexus, an organisation operated by the Boys & Girls Club of Vancouver, providing outreach services to youth who were struggling with substance use issues on Vancouver's Downtown Eastside. She described this as a difficult job with a high turnover rate.

[11] In early 2015, Ms. Rathwell witnessed a client stab a nurse with a needle at work. Thereafter, she experienced a depressed mood, anhedonia (a lack of interest, enjoyment, or pleasure in life), tearfulness, insomnia, poor energy, and impaired concentration. Ms. Rathwell met her close friend, Jennifer Donovan, in 2012 when they both worked at Nexus. Ms. Donovan recalled that Ms. Rathwell experienced considerable distress and sought support following this workplace incident.

[12] Ms. Rathwell admitted she had panic attacks after this stabbing incident; she could not recall how often they occurred. She said that she took a three-month medical leave before quitting her Nexus position. On her own evidence, she was

suffering vicarious trauma and burnout from work and realised that she needed to find a less intense job. Dr. Kalyani Chung, her family physician, recommended counselling and sleep medication. No Nexus employment records are in evidence.

[13] In 2015, Ms. Rathwell was prescribed Cipralex, an anti-depressant which she took for about one year, and Ativan, an anti-anxiety medication. In 2017, she was prescribed Ativan again and started taking Effexor (also known as Venlafaxine), a new anti-depressant, due to ongoing low mood. Ms. Rathwell preferred Effexor to Cipralex, saying it helped her mood but did not leave her with a blunted affect.

[14] Ms. Rathwell also did some shift work in 2015 at Peak House, a residential treatment program for youth in recovery. In November of 2015, she started working with the Vancouver School Board as an on-call education assistant providing care for disabled children, including assisting them with toileting and feeding.

[15] In 2016, Ms. Rathwell did some part-time fit model work, a job she likened to being a human mannequin. From January to June of 2017, she continued to work at the Vancouver School Board as an on-call education assistant. Based on a letter dated October 31, 2017 from the school board to Ms. Rathwell, she worked seven shifts from February 1 to June 30, 2017. She remained employed by the school board at the time of the accident but had worked no shifts in the 2017 fall semester. According to Ms. Rathwell, this kind of work was typically slow at the start of a school year.

C. Medical History

[16] In 2013, Ms. Rathwell underwent surgery to remove part of her right kidney. She was later diagnosed with interstitial cystitis; on her evidence, it is currently well-managed.

[17] Ms. Rathwell described some pre-accident head trauma: she was kicked in the head by someone wearing work boots at a concert in 2003, and was in a rear-end car accident in 2014. Following the 2014 car accident, she took two days off work due to shoulder, neck, and upper back pain, and symptoms of headache,

dizziness, nausea, and fatigue. While Ms. Rathwell was not formally diagnosed with a concussion after either event, she now thinks retrospectively that she might have had a concussion. She denied any residual symptoms from her 2014 injuries before the subject accident, evidence Dr. Chung, her longstanding family physician, corroborated.

[18] Ms. Rathwell admitted she had migraine headaches as a teenager; she understood they were associated with her use of birth control medication. Dr. Chung testified that Ms. Rathwell took Imitrex in university for migraine headache. Ms. Rathwell admitted she had panic attacks before the accident; she was then taking medication for anxiety and depression. In 2016, she sought counselling to address relationship issues.

[19] At her examination for discovery on May 23, 2023, Ms. Rathwell admitted she could not recall the longest period of time she had gone without seeing a counsellor in the last 15 years, an answer she adopted at trial. According to Ms. Donovan, Ms. Rathwell has always had access to, and periodically pursued, counselling since they met in 2012. Ms. Rathwell admitted her pre-accident need for emotional support was sufficiently severe that it prompted her to seek professional counselling.

[20] Dr. Chung described Ms. Rathwell as relatively healthy before the accident. She noted that Ms. Rathwell's medical history was significant for a childhood diagnosis of ADHD (managed without medication), interstitial cystitis, non-obstructive hydronephrosis of the right kidney, a right pyeloplasty, endometriosis, menstrual irregularities, cervical dysplasia, depression, and anxiety.

[21] Dr. Chung conceded that Ms. Rathwell had anxiety and depression before the accident. In May 2017, she recorded in her clinical notes that Ms. Rathwell had been off Cipralex for about one year and reported low mood "x 6 weeks". She described Ms. Rathwell's "long term familiar mood level", "++ fatigue", and "good enough" concentration, a description that she admitted was not the best possible. In May 2017, Ms. Rathwell underwent EMDR, which Dr. Chung described as a very

specialised kind of counselling, usually to address trauma. Those records are not in evidence; the counsellor who provided this treatment did not testify at trial.

[22] According to Dr. Chung, Ms. Rathwell's anxiety and depression were well-managed on medication at the time of the accident; Ms. Rathwell was then taking Ativan and had been on an anti-depressant for at least one year. Dr. Chung admitted Ms. Rathwell had experienced pre-accident panic attacks and migraine headaches.

III. THE ACCIDENT

[23] Ms. Rathwell recalled that the accident occurred at about 3:00 pm on a mostly sunny day. She had been driving a 2001 Honda Accord westbound on First Avenue in Vancouver. She had left Metrotown Mall and was returning to her apartment on Nanaimo Street. Ms. Rathwell said that she tends to sit close to the steering wheel when driving and that she was wearing her seatbelt.

[24] Ms. Rathwell recalled that the vehicles ahead of her had slowed to a stop just before the accident; she stopped the Honda behind them. She recalled seeing the defendant's vehicle briefly in her rear-view mirror before impact, thinking he would be unable to stop, and leaning forward before impact. She said that the back of her head hit the headrest, her chin tapped the steering wheel, and her forehead (or the top of her head) touched the sun visor on impact. Ms. Rathwell admitted she did not sustain a severe hit to the chin; she described the headrest impact as harder and clearer in her memory. At her examination for discovery, she conceded that she had no visible marks on her forehead or chin, and no chin or forehead tenderness after the accident that she could recall, answers she adopted at trial.

[25] No airbags deployed. Ms. Rathwell was uncertain about whether or not the Honda was pushed forward on impact. At her examination for discovery, she did not recall this detail nor whether the Honda came close to the car ahead of her after impact. When asked on discovery if she was dazed immediately after the accident, Ms. Rathwell said "I would imagine"; when asked to clarify how long she was dazed, she said that she did not know.

[26] Ms. Rathwell recalled opening the driver's side door of the Honda after the accident, feeling nauseated, and being anxious that she might vomit. At her examination for discovery, she said that she vomited at the accident scene, an answer she adopted at trial. Ms. Rathwell testified on discovery that she pulled onto a side street after the accident. She thought that this might have been where she vomited and exchanged information with the defendant; she could not recall if she had any difficulty doing so. At trial, Ms. Rathwell denied any recollection of pulling onto a side street after the accident, saying this information came from others.

[27] While Ms. Rathwell now has no memory of doing so, she admitted she must have exchanged information with the defendant after the accident; she said that she had a piece of paper with information on it and therefore knows that she must have done so. This document was not produced at trial. Ms. Rathwell denied any memory of how she left the accident scene or when she next saw the Honda.

[28] According to Ms. Rathwell, she does not recall but has since been told that she telephoned several people after the accident; she admitted she made five calls to friends. Ultimately, Ms. Lowrie picked Ms. Rathwell up about 30 minutes after the accident and drove her to the hospital. Ms. Rathwell's friends neither advised her to call an ambulance nor did so on her behalf.

[29] Mr. Shorey was driving a 2016 Toyota Corolla at the time of the accident. He then worked for an Edmonton company installing engineered buildings and was in Vancouver visiting his grandparents and ex-girlfriend.

[30] Mr. Shorey remembers driving westbound on First Avenue immediately before the accident and that drivers ahead of him had signalled their intention to turn left. Mr. Shorey did a right shoulder check to determine whether he could change lanes. Once he had done so, the vehicle ahead of him had stopped and he was unable to move the Toyota far enough to the left to avoid hitting it. Mr. Shorey recalls braking as hard as he could, steering towards the concrete median to avoid impact, but being unable to avoid bumping the Honda. The right front of the Toyota contacted the left rear of the Honda.

[31] According to Mr. Shorey, his body did not move much on impact. On his evidence, the Toyota pushed the Honda forward minimally, if at all. He admitted at his examination for discovery that his speed had been in the range of 40–45 km/hour before he braked hard about one second before the accident, answers he adopted at trial.

[32] Mr. Shorey recalled that Ms. Rathwell signaled to her right after the accident, and that he followed her onto a residential side street where they both stopped. He said that he got out of the Toyota, walked over to the Honda, and that Ms. Rathwell opened her door. On his evidence, he asked her if she was okay and she replied that she was startled but otherwise alright. He recalled that they both then inspected the damage to their respective vehicles. From his perspective, Ms. Rathwell seemed completely fine: she was not disoriented and spoke clearly and without difficulty.

[33] Mr. Shorey recalled seeing some scuffed paint and a small crack on the Honda's plastic rear bumper cover. On his evidence, he and Ms. Rathwell discussed some previously unrepaired damage to the Honda, exchanged insurance information (by taking pictures with their cell phones), and spoke about differences between the claims process in BC and Alberta.

[34] According to Mr. Shorey, he and Ms. Rathwell spent about five to ten minutes together; he recalled that she was very coherent the whole time. He denied that she had any balance issues or vomited at the accident scene; he saw no need for her to require medical attention. No emergency personnel attended the accident scene.

[35] Gregory Kirkby estimated the damage to the Honda after the Accident. He has been in the autobody industry for more than 30 years. He took photographs of the damage to the Honda's rear bumper. When shown these photographs, Ms. Rathwell admitted it was difficult to identify any visible damage to the rear bumper.

[36] Mr. Kirkby confirmed that the Honda was inspected for hidden damage and that there was none. The Honda's plastic rear bumper cover was removed; scuffs and marks from licence plate screws were repaired and the bumper cover was then

painted and reinstalled. Total repair costs were $959. Mr. Kirby agreed that almost every vehicle is equipped with a foam absorber for safety purposes; no costs were incurred to repair or replace a foam absorber on the Honda after the accident.

[37] Based on the repair estimate in evidence, costs to repair damage to the right front of the newer Toyota after the accident totalled $3,465.24, before GST.

[38] Defence counsel described the accident as minor. Neither party adduced any expert evidence regarding the force of the impact. Plaintiff's counsel objected to defence counsel inviting speculation about the involved forces, while simultaneously arguing that the overall evidence suggests the impact was significant.

[39] While I make no assumptions about the nature of Ms. Rathwell's injuries based on the degree of force involved or the extent of vehicular damage, the trial evidence permits me to draw some conclusions: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at paras. 29–30. I accept that the deployment of airbags requires a certain degree of force; that did not occur here. The damage to Ms. Rathwell's vehicle was objectively minimal. On Ms. Rathwell's own evidence, her chin lightly tapped the steering wheel and she sustained no facial cuts, lacerations, or bruises.

IV. AFTER THE ACCIDENT

[40] Ms. Rathwell testified that she now has a fragmented recollection of the accident's immediate aftermath. With leave and no objection from the defendant, Ms. Rathwell was permitted to adduce otherwise presumptively inadmissible evidence at trial of prior consistent statements to rebut the defendant's allegation of recent fabrication that she had vomited at the accident scene; those prior consistent statements are not in evidence for their truth.

[41] Ms. Rathwell contacted five of her close friends from the accident scene: Caitlin Iu, Tiffany Wu, Ms. Donovan, Ms. Lowrie, and Sam Kaplan (who did not answer the telephone). Sam Kaplan uses they/them pronouns; for clarity in these reasons, I have referred to Sam Kaplan by their full name. These individuals testified

about their impressions of Ms. Rathwell after the accident, variously saying that she sounded confused, upset, scattered, disoriented, and generally not herself.

[42] I accept that Ms. Rathwell called five friends from the accident scene and that she told several of them that she had vomited after the accident. I do not accept this as definitive evidence that she actually vomited. I find that Ms. Rathwell did not vomit in Mr. Storey's presence at the accident scene. In my view, whether or not she did so before arriving at the hospital is not determinative of any material issue.

A. September 20, 2017 ER Visit

[43] Ms. Lowrie took Ms. Rathwell to the Mount St. Joseph ER on the day of the accident. These hospital business records are in evidence.

[44] The hospital chart records Ms. Rathwell's presenting complaint on arrival as "neck pain/stiffness". The ER discharge summary records her complaint of neck pain and the gradual onset of a mild headache after being rear-ended while stopped and hitting her head on the steering wheel. It was noted that her scalp and facial bones were non-tender and that her teeth were intact.

[45] At her examination for discovery, Ms. Rathwell testified that she sought medical attention after the accident because she felt nauseated, had chest pain (from the seatbelt), and pain in her neck and shoulder. She could not recall if she had any head pain. She denied throwing up at the hospital. Ms. Rathwell adopted those answers at trial.

[46] Ms. Rathwell has some recollection of her hospital attendance the day of the accident, now almost seven years ago. Ms. Donovan met her there to provide emotional support. Ms. Rathwell recalls speaking to someone at the hospital (although she is not sure if this was a physician), struggling to take off her shirt, and someone applying a cervical collar. On her evidence, she was anxious, disoriented, and had neck and headache pain. She admitted she was ambulatory and that the hospital records indicate that she looked well.

[47] At trial, Ms. Rathwell said that she had difficulty communicating “super effectively” at the hospital. She thinks that the history she provided of hitting her head on the steering wheel refers to her chin lightly contacting the steering wheel and visor. She thinks that she reported hitting her head on the headrest and having a gradual onset of headache.

[48] Ms. Rathwell had a CT scan of her neck at the hospital; the hospital records indicate that she requested anxiety medication before this investigation. This CT scan disclosed the presence of moderate degenerative changes in the cervical spine and a disc bulge at C5-C6; it was reported as being otherwise unremarkable. No imaging of Ms. Rathwell’s head was done the day of the accident.

[49] Based on the ER records from the day of the accident, Ms. Rathwell was prescribed Lorazepam, Acetaminophen, and Tylenol 3. She was discharged the same day with a primary discharge diagnosis of cervical strain and a secondary diagnosis of minor head injury. The care provider comments in the ER records reference “MRI C[ervical] spine as outp[atien]t”, “concuss[io]n precaut[io]ns”, and “ED if neuro changes”.

[50] The parties disagree about whether or not reference in the ER physician’s note to a minor head injury means that Ms. Rathwell was diagnosed with a concussion. This physician did not testify at trial. This record makes no reference to a diagnosis of mild traumatic brain injury or concussion.

B. September 21, 2017 GP Visit

[51] Ms. Rathwell visited Dr. Chung, her family physician, the day after the accident. Dr. Chung has been Ms. Rathwell’s GP for about ten years; she testified at trial. The portions of Ms. Rathwell’s medical chart that Dr. Chung authored were admitted into evidence as business records. The references to Ms. Rathwell’s subjective history that she accepted as accurate at trial were admitted into evidence for their truth.

[52] On September 21, 2017, Dr. Chung recorded a fairly detailed history from Ms. Rathwell about the accident. According to Ms. Rathwell, she had written this information on a piece of paper; she did not produce this document at trial. Dr. Chung neither recalled nor recorded any reference to this document in her chart. Based on Dr. Chung's note, the only impact that Ms. Rathwell reported was her chin lightly tapping the steering wheel.

[53] There is no reference in Dr. Chung's clinical notes from September 21, 2017 to Ms. Rathwell hitting her head on the headrest, the impact that Ms. Rathwell described at trial as being both the hardest and the one she recalls most clearly. Dr. Chung confirmed that Ms. Rathwell presented with no obvious signs of head trauma; she charted "no head trauma" and understood that Ms. Rathwell had sustained no major impact to her head. She did not diagnose Ms. Rathwell with a concussion; she noted that Ms. Rathwell reported feeling dizzy, vomiting at the accident scene, and being diagnosed with a mild concussion in hospital.

[54] Ms. Rathwell told Dr. Chung that her headache and bilateral shoulder pain had improved, she felt nauseous, had ribcage pain (worse on the left and attributed to the seat belt), mid-back pain (worse on the right side), and jaw pain (from clenching her teeth). Ms. Rathwell denied any bowel, bladder, motor, or neurological symptoms. Dr. Chung admitted her complaints were then all physical.

[55] Dr. Chung examined Ms. Rathwell; apart from a limited range of motion in the neck (due to pain) and tight neck muscles, Dr. Chung's objective findings were unremarkable. She attributed Ms. Rathwell's complaints of headache, neck, back, and ribcage pain to soft tissue injury. She recommended over-the-counter pain medication, physiotherapy and/or massage therapy (if Ms. Rathwell's symptoms persisted), and a reassessment (if her symptoms worsened).

[56] Ms. Rathwell described some "patchiness" in her memory the day after the accident. She was somewhat vague about how long this persisted and said that her memory became clearer over time. Dr. Chung's clinical notes from September 21, 2017, make no reference to any complaints about absent or impaired memory. Ms.

Rathwell agreed at her examination for discovery that she did not think she reported any post-accident gaps in her memory to Dr. Chung and that she did not know why she did not do so. At trial, Ms. Rathwell suggested that she did not then appreciate that she had gaps in her memory, describing her appointments with Dr. Chung as typically short and focused on only one agenda item. She said that she trusted her doctor to ask her the appropriate questions and that she was not then trying to advocate a theory. Ms. Rathwell acknowledged the passage of almost seven years since the accident and agreed it is possible that she might simply have forgotten some uneventful details.

C. Subsequent Course

[57] Ms. Rathwell stayed with Ms. Lowrie for about five days after the accident. She had planned to travel to Winnipeg for a wedding on September 22, 2017; Ms. Donovan's sister was then staying at Ms. Rathwell's apartment. Ms. Rathwell returned home on September 26, 2017, the same day she had planned to return from Winnipeg. While she had ongoing pain, headache, dizziness, and nausea, she said that she was then optimistic her symptoms would improve with rest and time.

[58] Ms. Rathwell saw Dr. Chung again on October 3, 2017. She admitted her symptoms were then mildly improving. Dr. Chung noted that Ms. Rathwell's memory was intact; Ms. Rathwell did not know how this was assessed. She did not dispute Dr. Chung's note of October 10, 2017, indicating that her dizziness and mild headache were then slowly improving.

[59] According to Ms. Rathwell, her post-accident symptoms continued to be challenging thereafter. She complained of neck pain, headache, dizziness, and episodes of vertigo (described by her as a sensation that the room was spinning). She said that these vertigo symptoms initially occurred every day or two but diminished over time; while they usually lasted no more than one to two minutes, they made her cautious about driving. On Ms. Rathwell's evidence, her mood was negatively affected by pain, headache, dizziness, and vertigo, and she became more anxious. At some point, she increased her Venlafaxine dosage.

[60] Ms. Rathwell continued working on her master's degree in the fall of 2017. She took two courses and did well in both: she obtained a GPA of 3.6 in one, and a GPA of 4.0 in the other, for a cumulative GPA of 3.823.

[61] By letter dated October 31, 2017, Mary Yung, Employee Services Coordinator with the Vancouver School Board, notified Ms. Rathwell that she had worked seven shifts from February 1 to June 30, 2017, and had "made [herself] unavailable for call-outs" from September 5 to October 31, 2017. Ms. Yung wrote that, despite requesting medical documentation after the accident, the school board had not received anything and that Ms. Rathwell had not responded to their voicemail messages left on October 25 and 30, 2017. Ms. Yung asked Ms. Rathwell to provide an update regarding her availability for on-call school and student support by November 9, 2017, failing which her name would be removed from the school board's on-call list.

[62] Based on the record of employment in evidence, Ms. Rathwell stopped working for the school board in November 2017. She said that she decided she could not manage the driving (due to pain with shoulder checking), the physical requirements of this position, or the busy, loud work environment, and that she needed to look for another job.

[63] After the accident, Ms. Rathwell worked variable hours as a fit model; she said that she found this job more physically difficult than she had anticipated. On her evidence, she had difficulty taking clothes off and on, standing for extended periods due to her accident-related neck, shoulder, and upper back pain, and found the work environment difficult due to ongoing nausea and dizziness.

[64] Defence counsel note the absence of any reference to the accident in the records of Ms. Rathwell's counselling sessions on November 22 and December 20, 2017. They highlight Dr. Chung's clinical record for January 4, 2018, indicating that Ms. Rathwell reported some right-sided neck pain after going snowshoeing twice, and suggest that this is inconsistent with a significant disability. Ms. Rathwell described her visits with Dr. Chung as typically brief and confined to only one issue.

Dr. Chung said that she focuses on what is bothering her patients the most and that her clinical notes are as comprehensive as time allows.

[65] In January 2018, Ms. Rathwell began her master's degree practicum with Vancouver Coastal Health ("VCH"), Child and Youth Mental Health. She worked about two eight-hour days per week with children and youth who had moderate to severe mental health issues. Ms. Rathwell said that she found this work to be more challenging than she had anticipated, and that she had ongoing vertigo/dizziness, neck and headache pain, found extended screen time and driving to be a challenge, had word-finding difficulties, and felt slowed down in her communications. This evidence was not corroborated by any documentary or other evidence from VCH.

[66] In March 2018, Ms. Rathwell began working as a casual on-call counsellor at the BC Women's Hospital ("BCWH") Care Clinic, assisting mothers who had experienced pregnancy loss. She took available shifts as she was able to do so while she worked on her practicum; she said that she was trying to prioritize school.

[67] On April 9, 2018, Ms. Rathwell told Dr. Chung that her mood was good and that she was exercising and going to the gym twice weekly. Ms. Rathwell saw her counsellor on June 5, 2018; the notes from this visit make no reference to the accident. The absence of a reported complaint in a clinical record is evidence of nothing: *Edmondson v. Payer,* 2011 BCSC 118 at para. 36, aff'd 2012 BCCA 114; *Wishart v. Mirhadi*, 2023 BCSC 627 at para. 81. I do not draw the inference that Ms. Rathwell then had no accident-related complaints because her counselling records make no reference to the accident.

[68] In June 2018, Ms. Rathwell completed her practicum and her master's degree. She abandoned her plan to complete a thesis in the summer of 2018, after deciding that this was no longer possible. She chose to do a capstone paper instead, describing it as a less complicated and more sustainable option which involved less screen time; it precluded her from obtaining a PhD.

[69] On Ms. Rathwell's uncorroborated evidence, Herschel, one of her fit model employers, terminated her employment in October 2018 because she had become ineligible to do this work due to weight gain.

[70] In November 2018, Ms. Rathwell stopped working at the BCWH Care Clinic and obtained a full-time position with VCH's Boundaries Program. She said that she advised her new employer about her accident-related injuries. Ms. Rathwell admitted she was really excited and passionate about this job, which involved preventative work with youth who had many of the same issues as those at Nexus.

[71] In January 2019, Ms. Lowrie moved into Ms. Rathwell's apartment.

[72] According to Ms. Rathwell, she was fairly quickly humbled after starting her Boundaries Program job and she began missing work right away. She attributed all of her recorded post-accident sick days to her accident-related injuries. According to Ms. Lowrie, it seemed that Ms. Rathwell was then taking more sick days than usual. Ms. Donovan understood that Ms. Rathwell connected with VCH's "employee health" department. There was no trial evidence from VCH about Ms. Rathwell's missed time from work due to sickness after the accident. Ms. Rathwell took 30 hours of vacation in July 2019 and 45 hours of vacation in August 2019. She did not attribute those absences from work for vacation to her accident-related injuries.

[73] On October 21, 2019, Dr. Chung completed an occupational fitness assessment and noted that:

a) Ms. Rathwell's primary diagnosis was interstitial cystitis, mechanical neck pain, and degenerative disc disease;

b) Her secondary diagnoses were major depressive disorder and generalized anxiety disorder, treated with Venlafaxine;

c) Treatment included physiotherapy, registered massage therapy, acupuncture, and medication;

d) Ms. Rathwell needed a sit/stand desk and a reduced number of work sites or reduced hours as the current load was too taxing on her heath; and

e) Ms. Rathwell had no psychological or cognitive restrictions or limitations, no vision issues, and no other barriers to work.

[74] At the end of 2019, Ms. Rathwell's Boundaries Program position was reduced to a 0.8 full-time equivalent (i.e., 4 days a week). She was accommodated with a decreased number of daily job sites (with a corresponding decrease in driving), and a sit-stand desk (which she used while a colleague was away on maternity leave). Ms. Rathwell said that she was initially optimistic after these changes were made but that she still had quite significant symptoms, including pain, headache, migraine, dizziness/vertigo, fatigue, and cognitive symptoms.

[75] On January 27, 2020, about two years after the accident and more than four years before trial, Dr. Chung authored an expert report. Dr. Chung was qualified at trial as an expert in family practice. She summarized Ms. Rathwell's status in her January 27, 2020 report. Dr. Chung admitted she was aware that the court would rely on her report when assessing Ms. Rathwell's accident-related injuries and that she intended it to provide a comprehensive picture of her status at that time.

[76] By January 2020, Ms. Rathwell was reporting some ongoing neck and upper back pain but no other concerns. Dr. Chung identified no complaints regarding ongoing constant or recurring headache, migraines, dizziness, vertigo, or perceived cognitive issues in her January 27, 2020 report. Ms. Rathwell reported having returned to playing dodgeball and softball (in a more limited capacity than before the accident) and to jogging (shorter distances than before the accident).

[77] Dr. Chung agreed that by January 2020, Ms. Rathwell had made significant progress: she was working four days a week, had resumed regular exercise, and had lost some of the weight she gained after the accident. From her perspective, Ms. Rathwell seemed to be getting better; on her evidence, they were both optimistic that Ms. Rathwell's condition would either stay the same or improve. Dr. Chung did not recommend that Ms. Rathwell attend a pain or concussion clinic or pursue further treatment for headaches, concussion, or psychological difficulties. She did not diagnose Ms. Rathwell with chronic pain.

[78] In March 2020, Ms. Rathwell took a one-month medical leave of absence. She found the increased screen time due to working remotely from home during the COVID-19 pandemic worsened her migraine symptoms and dizziness/vertigo. She said that, at some point, despite the passage of time and a significant investment of energy into her recovery, she realized that she had not made substantial gains and she became discouraged, which increased her anxiety and decreased her mood.

[79] Ms. Rathwell agreed that the COVID-19 pandemic might have adversely affected her mental health and contributed to an increase in the dosage of her anti-depressant medication in 2020. She and Ms. Lowrie were both working from their small one-bedroom apartment; Ms. Rathwell admitted that was difficult. During the COVID-19 shutdown, Ms. Rathwell's father had a serious heart attack and required open-heart surgery. Ms. Rathwell conceded that those events, combined with her "concussion symptoms", resulted in increased mental health symptoms.

[80] On November 4, 2020, Dr. Chung noted that Ms. Rathwell was having intermittent menorrhagia (heavy menstruation) and was on a wait list for an endometriosis clinic. On November 26, 2020, Dr. Chung noted that Ms. Rathwell had reported intermittent vertigo for the past two months, not associated with headache, usually worse after working on the computer for an extended period or after sleeping awkwardly, apparently described by a physiotherapist involved in her care as "cervicogenic vertigo".

[81] In December 2020, more than three years after the accident, on the recommendation of a physiotherapist, who apparently noted that Ms. Rathwell was having difficulty "tracking" with her eyes, Dr. Chung referred Ms. Rathwell to a concussion clinic. Ms. Rathwell began extensive treatment there, including vestibular rehabilitation, kinesiology, occupational therapy, and counselling. The defendant argues that this treatment signalled a turning point for Ms. Rathwell whose complaints thereafter focused largely on her apparent belief that she had sustained a concussion and was experiencing ongoing post-concussion symptoms.

[82] On December 20, 2020, Ms. Rathwell had a CT scan of her head; it showed no intracranial abnormalities. On December 26, 2020, Ms. Rathwell had an MRI of her brain; it showed no focal or diffuse brain abnormalities.

[83] On February 4, 2021, Dr. Chung noted that Ms. Rathwell had been referred to a "behavioural optometrist" and needed to take time off work to attend appointments and to follow the concussion clinic recommendations. Ms. Rathwell left her position with the VCH Boundaries Program that month; thereafter, she remained off work on a leave of absence for about two years until May 2023. On May 13, 2021, Dr. Chung noted that Ms. Rathwell requested an extension of her medical leave. In September 2021, Ms. Lowrie became pregnant with the couple's first child.

[84] In January 2022, Ms. Rathwell had endometriosis surgery following many years of worsening dysmenorrhea; she said this surgery resolved those symptoms.

[85] In June of 2022, Ms. Lowrie gave birth to a daughter. Thereafter, she took a one-year maternity leave from her position as an elementary school teacher. According to Ms. Rathwell, she and Ms. Lowrie had discussed becoming parents after the accident and agreed that Ms. Lowrie would need to assume more than half of the associated childcare responsibilities. Ms. Lowrie has a close and supportive family and this was a factor in their decision to start a family. Following her one-year maternity leave, Ms. Lowrie accepted a contract to work three-days a week; she did not return to full-time employment.

[86] In January 2023, following complaints of right-sided abdominal pain and a diagnosis of gallstones, Ms. Rathwell's gallbladder was surgically removed. Apart from some dietary restrictions, she denied having any issues thereafter.

[87] In or about February of 2023, Ms. Rathwell began work in her own private counselling business. This work initially involved supervising master's students through Expressive Wellness, a collective operated by her friend, Sam Kaplan. It progressed to providing mostly short-term virtual counselling support for individuals

dealing with life challenges or transitions. Ms. Rathwell described this as part of a work-hardening process.

[88] In or about June 2023, Ms. Rathwell attempted a graduated return to work with VCH's Raven Song program, doing work that was similar to what she had done during her practicum position. She said that she experienced an increase in her migraine symptoms after returning to work and that she was unsuccessful in building up to working three days a week (i.e., a 0.6 full-time equivalent position).

[89] Ms. Rathwell stopped doing this work in December 2023; she said that she has been on unpaid leave from VCH since then. According to Ms. Rathwell, she was unable to progress beyond working two days a week. On her uncorroborated evidence, VCH has, to date, made no offers of employment that fit the kind of accommodated position she seeks: namely, a maximum of four hours a day of screen time, with breaks, an ergonomic work set-up, the ability to work from home as necessary, and no work with high-risk clients (i.e., those at risk of suicide, self-harm or harm to others, or who lack protective factors like safe housing). Ms. Rathwell is not optimistic that she will be offered such a position. She continues to do some private counselling work; she said that she usually sees about three clients, two to three days a week. In her view, this pace is unsustainable.

[90] Ms. Rathwell has had substantial treatment since the accident. Despite undergoing 711 treatments (including 119 in the first three years after the accident and 523 in the next three years), she acknowledged only modest improvement in her post-accident condition (limited to less vertigo and pain). According to Dr. Chung, Ms. Rathwell has seen multiple neurologists. None authored an expert report or testified at trial; their clinical notes and records are not in evidence. Dr. Chung suggested that Ms. Rathwell's recovery has not followed a linear course.

D. Current Condition

[91] Ms. Rathwell complains of longstanding ongoing neck and back pain, headaches, and debilitating migraines which are associated with pain, nausea, vomiting, and sensitivity to light and sound.

[92] Ms. Rathwell said that she is unable to function when she has severe migraines: she cancels her plans, takes Ubrelvy (the prescription medication recommended by defence neurologist, Dr. Webber), and lies down in a dark room with an ice pack, evidence Ms. Lowrie corroborated. Ms. Rathwell agreed that her migraines have waxed and waned over time and are now less frequent; she said that she continues to have a debilitating migraine at least once every two weeks. She takes Ubrelvy as soon as she has signs of a migraine but is limited to doing so only eight times a month. She conceded that this medication is effective at reducing (but not eliminating) her pain and nausea but said that it sometimes leaves her feeling like she has a mild hangover the next day.

[93] In addition to Ubrelvy for migraine headache, Ms. Rathwell currently takes Venlafaxine for depressive symptoms, and Tylenol and Aleve for migraine and body pain. She said that she has not tried Botox for her migraines as it is cost prohibitive.

V. CREDIBILITY AND RELIABILITY OF EVIDENCE

[94] Ms. Rathwell's ongoing symptoms are wholly subjective. She seeks to recover a substantial award, in an amount that would be consistent with catastrophic injuries, following a disproportionately minor accident. All of the medical experts relied heavily on Ms. Rathwell's subjective history. Those facts make Ms. Rathwell's credibility and the reliability of her evidence central issues at this trial. Credibility is concerned with a witness' veracity (i.e., speaking the truth); reliability is concerned with a witness' ability to observe, recall, and recount the events in issue accurately: *Ford v. Lin*, 2022 BCCA 179 at para. 104. In assessing credibility, I have applied the principles set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.) and *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[95] In cases where there is little or no objective evidence of continuing injury and complaints of persistent pain beyond the usual recovery period, there must be evidence of a convincing nature; the plaintiff's own evidence, if consistent with the

surrounding circumstances, may suffice: *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 at para. 16, 1993 CanLII 2465 (C.A.).

[96] Ms. Rathwell was an articulate witness; she had no difficulties communicating effectively or understanding and answering questions at trial. She had the stamina necessary to testify over four days.

[97] Ms. Rathwell periodically speculated about various matters, rather than testifying based on personal knowledge or recollection. For example, when asked about her conversation with the ER physician in hospital the day of the accident, she said that she “imagined” she was then confused. She also said that she “imagined” the drugs she was given that day helped; when asked about the specific symptoms that those medications helped, she said maybe her headache or maybe her pain generally, she was not sure. Despite conceding that she did not recall much about this hospital attendance, Ms. Rathwell maintained that she thinks she was then fairly dazed and confused. When asked about the fluctuation in her post-accident hours of work as a fit model, she said this decline was probably due to increased symptoms.

[98] It was my general impression that Ms. Rathwell tended to minimize both her pre-accident medical difficulties and her post-accident accomplishments. On occasion, she seemed reluctant to make unqualified admissions. Objectively, she did well in her post-accident master’s courses in the fall of 2017; she admitted she made the dean’s list. Despite this admission, she suggested that she would have to look at her transcripts to confirm whether she had done well in those courses. She downplayed her marks by suggesting that these courses were easy. She similarly minimized her favourable score on an occupational therapy verbal learning test in 2021, saying this is one of her strengths and it is therefore not surprising that she did well on this test.

[99] There was a notable inconsistency between Ms. Rathwell’s trial evidence (when she said that the hardest impact to her head, and the one she recalls most clearly, is when her head hit the headrest) and the subjective history she provided to the ER physician the day of the accident and to Dr. Chung the following day. It is

also inconsistent with what she apparently told her own psychiatrist expert, Dr. Shaohua Lu (whose recorded history made no reference to any part of Ms. Rathwell's body hitting the vehicle on impact). The subjective history that Ms. Rathwell provided to her physiatrist expert, Dr. Mian, about having a significant lapse in her post-accident memory is inconsistent with the ER records from the day of the accident, and Dr. Chung's records from the following day, neither of which reference any complaints by Ms. Rathwell about post-accident memory loss. Ms. Rathwell's evidence of significant ongoing post-accident difficulties is inconsistent with Dr. Chung's January 2020 report which indicates that her condition was then substantially improved. In Dr. Webber's opinion, some of Ms. Rathwell's complaints are consistent with non-organic findings, a possibility that I am unable to rule out.

[100] The trial evidence supports the conclusion that Ms. Rathwell is heavily focused on her symptoms and that she has both a heightened and distorted perception of her own disability. It was my general impression that she has come to view herself as a chronically disabled person. I accept the opinion of Dr. Mian that psychological factors (including catastrophization and kinesiophobia) are reinforcing Ms. Rathwell's symptoms, and the view of defence psychiatrist expert, Dr. Kulwant Riar, that Ms. Rathwell is capable of more than she thinks. I accept that Ms. Rathwell genuinely believes she is significantly disabled as a result of the accident, but conclude that her somatic symptom disorder and tendency to catastrophize undermine the reliability of some of her evidence. The inconsistencies in Ms. Rathwell's reported complaints, and her admitted non-reporting of complaints that she described as significant at trial, undermined her credibility.

[101] I have looked for corroborating evidence to the extent possible. There was a notable lack of objective evidence from independent witnesses regarding Ms. Rathwell's function before and after the accident.

[102] Five of Ms. Rathwell's close friends testified at trial. Ms. Rathwell described them as her chosen family. While I found them all to be relatively straightforward witnesses, it is clear that they share a close bond and want what is best for Ms.

Rathwell. I conclude that none was an independent or disinterested witness. While these witnesses were able to testify about their observations of Ms. Rathwell after the accident, none was qualified to distinguish between stress or anxiety-induced confusion and neurological impairment.

[103] I found Ms. Lowrie, Ms. Rathwell's partner, to be a candid witness. However, she was often vague about material dates, unclear about timelines generally, and admitted her recollection of many details is now a blur.

[104] The defendant was a straightforward witness whose evidence I accept without difficulty.

[105] I found the medical experts to be generally credible. The report of the plaintiff's occupational therapist expert, Jacquelyn Abdel-Barr, contained numerous surprising errors; I do not accept her description of them as typographical. Ultimately, they undermined my confidence in her report.

[106] The plaintiff's psychologist expert, Dr. John Pullyblank, made several speculative comments; when asked about Ms. Rathwell specifically, he often spoke about "this clientele", "high achievers", or concussion patients generally. When asked about Ms. Rathwell's high marks in her post-accident master's courses, he replied that he "imagined" she accepted the level of discomfort required in order to obtain good grades. His opinions are premised on the assumption that Ms. Rathwell sustained a traumatic brain injury in the accident, a finding I have not made. He "presumed" that Ms. Rathwell entered her full-time Boundaries Program job after the accident with the intention of performing it before finding that she could not do so, reducing her time, and then leaving.

[107] Dr. Pullyblank's medical legal work comprises 90% of his practice; he works exclusively for plaintiffs. Dr. Lu's medical legal work is similarly confined almost exclusively to plaintiffs; the same is true of Ms. Abdel-Barr. It was my general impression that these experts were favourably predisposed to the plaintiff's position in this case.

[108] Dr. Lu periodically answered questions about Ms. Rathwell specifically with general, non-responsive answers. When asked if she told him that she was embarrassed about having vomited after the accident, he said that "people" sometimes have that problem. When asked about the timeframe for Ms. Rathwell's post-accident weight gain, he responded by saying that this obviously occurred over weeks or months. Despite diagnosing Ms. Rathwell with a mild traumatic brain injury after the accident, Dr. Lu obtained no detailed information about her pre-accident history of head trauma. He described the reference in his report to Ms. Rathwell being transported to hospital by ambulance after the accident as a "typographical" error. When asked if Ms. Rathwell had started research on her thesis at the time of the accident, Dr. Lu said that he imagined she either had or was about to do so.

[109] Dr. Lu's opinions are also premised on the assumption that Ms. Rathwell sustained a mild traumatic brain injury in the accident. Ultimately, I prefer the psychiatric opinions of Dr. Riar to those of Dr. Lu to the extent there are conflicts; in my view, he was a more balanced witness.

[110] Dr. Chung's comments regarding Ms. Rathwell's extensive efforts to become well give rise to questions about whether she might inadvertently have misperceived her role to include advocating on behalf of her longstanding patient.

[111] Dr. Webber, Dr. Briar Sexton, and Dr. Steven Ma impressed me as candid witnesses who offered balanced opinions. While I found Dr. Riar to be a credible expert in the area of psychiatry, I was not persuaded that he is an expert in the diagnosis or treatment of traumatic brain injury.

VI. EXPERT EVIDENCE

[112] Nine experts testified at trial. Ms. Rathwell called:

a) Physiatrist, Dr. Najam Mian;

b) Neuro-ophthalmologist, Dr. Briar Sexton;

c) Psychiatrist, Dr. Shaohua Lu;

d) Registered psychologist, Dr. John Pullyblank;

e) Family physician, Dr. Kalyani Chung; and

f) Economist, Darren Benning.

[113] Physiatrist, Dr. Mian, assessed Ms. Rathwell on July 24, 2023, and authored a report dated December 27, 2023. Dr. Mian is a specialist in physical medicine and rehabilitation, pain medicine, and sports medicine. He was qualified as an expert in those areas at trial.

[114] Neuro-ophthalmologist, Dr. Sexton, assessed Ms. Rathwell on January 10, 2024, and authored a report dated January 12, 2024. She was qualified at trial as an expert in general and neuro-ophthalmology.

[115] Dr. Lu has been a psychiatrist since 2016. He is on the active clinical staff of Vancouver General Hospital and is a Clinical Associate Professor in the Department of Psychiatry at the University of British Columbia. He assessed Ms. Rathwell on October 5, 2023, and authored two reports: the first one dated December 14, 2023, and a second response report dated January 26, 2024. Dr. Lu was qualified at trial as an expert in the area of forensic psychiatry, with training and experience in the management of chronic pain.

[116] Registered psychologist, Dr. Pullyblank has expertise in rehabilitation psychology and vocational rehabilitation, an area that focuses on working with individuals who have barriers to employment. He conducted an interview and psychological testing of Ms. Rathwell at her lawyer's request over about ten hours on November 2 and 14, 2023. He authored a report dated January 10, 2023. Dr. Pullyblank was qualified as an expert in the areas of psychology, rehabilitation psychology, and vocational rehabilitation.

[117] Mr. Benning was qualified as an expert in the area of labour market economics, able to give opinion evidence in that area.

[118] The defendant called:

a) Neurologist, Dr. Alina Webber;

b) Ophthalmologist, Dr. Steven Ma; and

c) Psychiatrist, Dr. Kulwant Riar.

[119] Dr. Webber completed her five-year post-graduate training in neurology at McGill University in 2015, followed by a one-year fellowship in multiple sclerosis. She is currently in practice as a general neurologist, with a special interest in headache and concussion. Dr. Webber assessed Ms. Rathwell on November 29, 2023, and prepared a report dated December 22, 2023. She was qualified as an expert in neurology at trial.

[120] Dr. Ma has been an ophthalmologist for 25 years. He assessed Ms. Rathwell on December 3, 2023, and authored a report dated January 8, 2024. He was qualified at trial as an expert in ophthalmology.

[121] Dr. Riar has been a forensic psychiatrist since 1993. He assessed Ms. Rathwell in person on two occasions: November 22, 2023, and December 11, 2023. Dr. Riar authored a report dated January 10, 2024. He was qualified at trial as an expert in forensic psychiatry.

[122] Despite serving reports from multiple experts who offered opinions about Ms. Rathwell's accident-related injuries, defence counsel's primary position in closing was that she had no compensable loss. Plaintiff's counsel objected to defence counsel taking this position, describing it as entirely inconsistent with the defendant's own expert reports, citing *Grabovac v. Fazio*, 2021 BCSC 2362 at paras. 271–272.

[123] Defence counsel deny that they are wholly bound by the expert evidence they introduce into evidence, citing *S.M. v. C.L.D.M.*, 2003 BCSC 626 at para. 38; *Tradition Fine Foods Ltd. v. Oshawa Group Ltd.*, 2005 FCA 342 at para. 14; *Sutherland v. Leon and Ostrander*, 2004 BCSC 220 at para. 12.

[124] I have found that Ms. Rathwell sustained some accident-related injuries, resulting in a compensable loss. Accordingly, I need not address this issue.

A. Musculoskeletal Injuries

[125] I conclude that, of all the experts who testified at trial, Dr. Mian is the one best qualified to assess musculoskeletal injuries. Dr. Mian diagnosed Ms. Rathwell with a type II whiplash associated disorder, resulting in the development of chronic mechanical axial cervical and lumbar spine pain. Those opinions are uncontroverted and I accept them.

[126] Dr. Mian confirmed that Ms. Rathwell's neurological examination showed no features of nerve root or spinal cord compression in the cervical, thoracic, or lumbar spine. However, he noted MRI findings of a C5-C6 disc that was contacting the cervical spinal cord. In his opinion, given Ms. Rathwell's age and lack of pre-existing trauma, there is a high likelihood that this cervical disc herniation is secondary to the accident. He opines that this finding could become neurologically significant for Ms. Rathwell in the future, particularly if she suffers additional neck trauma.

[127] It is unclear what Dr. Mian intended by his reference to a "high likelihood"; notably, he does not state that it is probable or more likely than not that the accident caused this cervical disc herniation. While Dr. Mian understood that Ms. Rathwell had been kicked in the head as a teenager, he admitted he did not obtain a lot of detail from her about this incident. Notably, Ms. Rathwell did not tell him that she had been involved in a car accident in 2014, or that she thought she had sustained a concussion as a result. Those gaps in Ms. Rathwell's history are inconsistent with Dr. Mian's statement that she had suffered no pre-accident trauma.

[128] I am unable to conclude on the evidence that the accident probably caused a cervical spine disc herniation. Dr. Mian conceded that this is impossible to confirm absent pre-accident imaging. In my view, it is equally plausible that this MRI finding pre-dated the accident. On Ms. Rathwell's own evidence, she sustained direct trauma to the head as a teenager and, based on her symptoms, thinks that she likely sustained a head injury in the 2014 accident.

[129] Dr. Webber agrees it is possible that Ms. Rathwell developed some post-accident radiculopathy symptoms. In her view, while the symptoms of numbness and

tingling that Ms. Rathwell reported in her hand after the accident might have been due to nerve root irritation, they have now resolved and are more likely related to soft tissue injuries.

B. Mild Traumatic Brain Injury or Concussion

1. Dr. Webber

[130] Dr. Webber is the only neurologist who testified at trial. In my view, she is the expert best qualified to opine on the diagnosis of neurological conditions including, in particular, mild traumatic brain injury. While I appreciate that other experts have some overlapping expertise in this area, I prefer Dr. Webber's evidence to that of the other experts who opined on this matter where there are conflicts.

[131] In Dr. Webber's opinion, it is possible, but not probable, that Ms. Rathwell sustained a concussion or mild traumatic brain injury in the accident. By extension, she opines that it is improbable Ms. Rathwell's ongoing symptoms are due to post-concussion syndrome.

[132] Based on her examination findings, Dr. Webber concluded that Ms. Rathwell's sensation, coordination, gait, and cervical range of motion were all unremarkable. Ms. Rathwell's MoCA score (a screening test for cognitive difficulties) was normal. Ms. Rathwell scored well above the cut-off for normal on the word-finding test that Dr. Webber administered. Dr. Webber noted an atypical bobbing of Ms. Rathwell's left upper extremity in the absence of any pronator drift; she explained that this is not typical for a brain injury and implies a non-organic finding.

[133] Dr. Webber testified that anxiety (which can cause a subjective alteration in mental status) can mimic mild traumatic brain injury. Accordingly, she looks to the "very early" medical records when there is less recall bias to diagnose concussion. She explained that because the brain "prunes memories", individuals may not recall events as clearly years later, a statement which also accords with common sense. In Dr. Webber's opinion, symptoms reported long after the event in question are less relevant in diagnosing concussion.

[134] As noted, the hospital records from the day of the accident indicate that Ms. Rathwell:

a) Suffered no loss of consciousness in the accident;

b) Endorsed no confusion or amnesia; and

c) Received a primary diagnosis of cervical strain, with a minor head injury.

[135] Dr. Webber does not equate a minor head injury (which she said could be many things, including a scratch, bump, or bruise) to a brain injury. She does not use those terms interchangeably; in her view, no neurologist would do so. While she acknowledged that a reasonable force would be required to cause a concussion, she appropriately conceded that she is not an expert in biomechanics. I accept her evidence that she did not weigh the information defence counsel gave her about how the accident occurred heavily in reaching her opinions.

[136] The hospital ER nurse assessment from the day of the accident records Ms. Rathwell's complaints of neck pain, but no other symptoms. The next day, Dr. Chung noted that Ms. Rathwell had no neurological symptoms and reported lightly tapping her chin on the steering wheel but sustaining no head trauma. Dr. Chung diagnosed headache with neck and back strain; she did not diagnose concussion.

[137] Dr. Webber confirmed that there are no biomarkers to support the diagnosis of concussion. She identified the three main clinical diagnostic features of concussion: 1) a loss of consciousness; 2) an alteration in the patient's level of consciousness; and 3) amnesia. She said that these features must present at the time of the traumatic event and noted that the failure to recognise this fact is a common diagnostic error. There is no suggestion that Ms. Rathwell suffered a loss of consciousness in the accident; this diagnostic feature is undeniably absent.

[138] Several of Ms. Rathwell's close friends testified about their observations of her after the accident. Dr. Webber does not know how these lay witnesses assessed Ms. Rathwell's post-accident mental state. She confirmed that patients who have headache, neck pain, musculoskeletal injuries, or anxiety commonly feel altered

mentally; anxiety can mimic concussion and result in an altered perception of events or a subjective feeling of an altered mental state. Dr. Webber also noted that pain can make patients feel “foggy”. She opined that slowed speech is an unusual and typically non-organic finding; on her evidence, it could be due to many possible causes and would not be significant to her assessment.

[139] Ms. Rathwell provided a subjective history to Dr. Webber; she stated that she could not recall how she got to the hospital the day of the accident. Notably, Ms. Rathwell conceded that her partner, Ms. Lowrie, also no longer recalled how this occurred. At her examination for discovery, Ms. Rathwell testified that she was unsure when she became aware that she had post-accident blanks in her memory, an answer she adopted at trial. She thinks that she became aware of gaps in her memory slowly over time, as she tried to piece events together.

[140] Dr. Webber noted that the symptoms of “post-concussion syndrome” are frequently critiqued because all are non-specific and multiple other conditions (including chronic pain from soft tissue injuries) can mimic them. She confirmed that anxiety and depression can cause many of the same symptoms. In her opinion, Ms. Rathwell’s current symptoms are probably multi-factorial. Notably, none of the involved health care professionals referenced any of the three cardinal diagnostic features of concussion, either in hospital the day of the accident or the next day.

[141] On Dr. Webber’s evidence, concussion symptoms are more common and severe in the early post-traumatic period; she said that they tend to improve and plateau within about two years. In her opinion, it would be unusual for a post-concussion syndrome attributable to an accident in 2017 to result in disability in 2021. In her view, escalating anxiety or other factors would be more probable causes. Dr. Webber noted (based on her review of Dr. Chung’s clinical records) that Ms. Rathwell’s anxiety worsened in 2020, with a corresponding increase in many of her symptoms; this history reinforces her view that post-concussion syndrome was not the underlying cause.

[142] In Dr. Webber's opinion, Ms. Rathwell did not clearly meet the diagnostic criteria for concussion and her symptoms are probably due to other causes. She admitted it is important to have a low threshold for concussion; she would not be surprised if Ms. Rathwell was provided with a concussion protocol in hospital the day of the accident as a precaution. Significantly, Dr. Webber does on-call ER work as a neurologist and assesses patients for possible head injury in that context.

2. Dr. Mian

[143] Dr. Mian diagnosed Ms. Rathwell with a mild traumatic brain injury with persistent symptoms, including headaches, migraines, dizziness/visual disturbance, imbalance, disrupted sleep, and psycho-emotional distress. He admitted it can be difficult to parse out the cause of overlapping physical, cognitive, and emotional symptoms. He concluded that Ms. Rathwell sustained a mild traumatic brain injury in the accident based on her reported post-accident symptoms (including a reported lapse in continuous post-accident memory), the mechanism of the accident, and his understanding that some involved health care practitioners diagnosed concussion.

[144] Ms. Rathwell told Dr. Mian that she had a "big gap" in her memory of events around the time of the accident. Dr. Mian conceded that this history is inconsistent with the hospital chart (from the day of the accident) and Dr. Chung's notes (from the next day), neither of which record any complaints of amnesia. In re-examination, he suggested that detailed cognitive assessments are not always completed in the ER and that patients are sometimes diagnosed with concussion months after a traumatic event. Those statements are speculative and not specific to Ms. Rathwell.

[145] Dr. Mian received no photographs of any post-accident damage to the involved vehicles and conceded that he had no understanding of that matter. He documented no information about any contact that Ms. Rathwell's body might have had with the inside of her vehicle at the time of the accident.

[146] Dr. Mian admitted he has no formal training in performing cognitive evaluations. Despite Ms. Rathwell's reports of worsening cognitive symptoms, he

agreed that she had no apparent confusion, word-finding problems, or other difficulties providing a history at his assessment.

3. Drs. Lu and Riar

[147] Drs. Lu and Riar offered conflicting views about whether or not Ms. Rathwell sustained a mild traumatic brain injury or concussion in the accident. Neither was qualified as an expert in this area at trial. I give their opinions on this issue substantially less weight than those of neurologist, Dr. Webber. Ultimately, I was not persuaded that either is an expert regarding the diagnosis of mild traumatic brain injury or concussion.

[148] In Dr. Lu's opinion, Ms. Rathwell's post-accident symptoms met the 2023 American Congress of Rehabilitation Medicine ("ACRM") diagnostic criteria for a mild traumatic brain injury. In his opinion, she has the "classic triad" of cognitive, physical, and psychological symptoms associated with mild traumatic brain injury, including headache, reduced mental focus, non-specific vision changes, tiredness, poor concentration, irritability, anxiety, and sleep disturbance. Dr. Lu conceded that these symptoms are all non-specific and could be explained by Ms. Rathwell's chronic pain, headaches, and psychological issues; he admitted these conditions are mutually aggravating.

[149] Dr. Lu agreed that he did not obtain a lot of detail from Ms. Rathwell about her history of pre-accident head trauma. Notably, she did not tell him that she recalled any part of her body striking the interior of her vehicle on impact. In his opinion, it is possible that Ms. Rathwell has some residual concussion symptoms.

[150] In Dr. Riar's opinion, Ms. Rathwell did not sustain a concussion in the accident. He relies on the DSM-5 diagnostic criteria for a neurocognitive disorder due to brain injury, combined with his clinical skills, to reach this conclusion. He noted that Ms. Rathwell's memory of events leading up to the accident is intact and that there is some inconsistency in her reporting of post-accident events. He attributes her subjective report of gaps in her post-accident memory to probable acute stress.

[151] Based on his records review, Dr. Riar concluded that Ms. Rathwell did not experience the constellation of symptoms required for the diagnosis of mild traumatic brain injury or concussion and that most of her symptoms emerged after some time and became prominent after 2020. Like Dr. Webber, he testified that concussion symptoms emerge immediately after impact to the head and improve, rather than worsen, over time.

4. Dr. Sexton

[152] Dr. Sexton conceded that she was unable to determine whether or not Ms. Rathwell's post-accident cognitive complaints were due to chronic pain and anxiety or mild traumatic brain injury. She was similarly unable to conclude that Ms. Rathwell had any permanent cognitive impairment due to brain injury.

5. Conclusion

[153] As noted, Dr. Chung referred Ms. Rathwell to a concussion clinic in late 2020, based on the recommendation of a physiotherapist involved in Ms. Rathwell's care and an understanding that the diagnosis of concussion had been "established from the outset" (i.e., in hospital the day of the accident). Dr. Chung admitted she did not see the hospital records from September 20, 2017 until the first day of trial. Unlike neurologist, Dr. Webber, she interpreted the reference in them to a minor head injury to be synonymous with a minor brain injury.

[154] Ms. Rathwell was assessed by several specialists before trial. All confirmed that she had no difficulty providing a history or answering their questions. Those observations are consistent with my own. Ms. Rathwell was an articulate witness who consistently answered questions without difficulty at trial.

[155] I find that Ms. Rathwell did not sustain a mild traumatic brain injury in the accident. In my view, her mental health conditions, combined with residual pain symptoms, are an equally plausible and more probable explanation for her ongoing perceived cognitive complaints. Ms. Rathwell reports a worsening of her "post-concussion" symptoms over time. I accept the evidence of Drs. Webber and Riar

that this history is inconsistent with the usual progression of symptoms due to mild traumatic brain injury or concussion.

C. Headaches

[156] Ms. Rathwell identified migraine headache as her primary concern and the predominant source of her disability in the six months before Dr. Webber's assessment; she described neck pain as an ongoing issue.

[157] Concussion patients are often referred to Dr. Webber for headache concerns. She described headache as a common, non-specific, and subjective complaint, which is easily attributed to other causes; notably, she confirmed that it was not included in the recently updated ACRM guidelines for diagnosing concussion. Dr. Webber described headache, nausea, and vomiting as non-specific complaints which are present in about 60% of all patients with whiplash injuries.

[158] In Dr. Webber's opinion, Ms. Rathwell likely has persistent headache due to whiplash. She noted that Ms. Rathwell reported using Aleve, Advil, and Tylenol most days and that she meets the International Headache Society ("IHS") criteria for medication overuse headaches. Dr. Webber noted that the diagnosis of headache is entirely subjective and that it is impossible to determine to what extent Ms. Rathwell's current headaches are post-traumatic in nature or due to medication overuse. Ultimately, she diagnosed Ms. Rathwell with probable multi-factorial headaches.

[159] In Dr. Sexton's opinion, Ms. Rathwell meets the IHS diagnostic criteria for chronic post-traumatic migraine headaches.

[160] Defence ophthalmologist expert, Dr. Ma testified that Ms. Rathwell reported no complaints of headaches, nausea, or dizziness at his assessment, saying he would have noted those complaints if she had reported them. He agreed that migraine headaches are often associated with visual symptoms and that patients with headache disorders can have light and motion sensitivity. Dr. Ma does not purport to comment on whether or not Ms. Rathwell has a headache disorder.

[161] I find that Ms. Rathwell has probable multi-factorial post-accident headaches.

D. Vision

[162] Drs. Sexton and Ma assessed Ms. Rathwell's vision; both confirmed that it is completely normal.

[163] Dr. Sexton said that Ms. Rathwell's depth perception is as "good as we record it". Ms. Rathwell had 20/20 vision in both eyes, with and without her glasses; she presented with no difficulty tracking at the time of Dr. Sexton's assessment.

[164] In Dr. Ma's opinion, Ms. Rathwell sustained no eye injury in the accident and there is no evidence to support any relationship between the accident and her vision complaints or any related limitations. He opines that Ms. Rathwell has: 1) excellent visual acuity and binocular vision function; 2) no difficulty with near vision tasks using her glasses; and 3) no visual limitations on her ability to participate in work and recreational activities.

[165] Dr. Ma concludes that Ms. Rathwell has "computer vision syndrome" which is unrelated to the Accident. He explained that this is a fairly common syndrome which presents in individuals who use computers for extended periods and is characterized by difficulty focusing up close, eye strain, and fatigue. He noted that this condition is common in individuals who (like Ms. Rathwell) have hyperopia (farsightedness); on his evidence, it requires no trauma or intervening cause. Dr. Sexton denies that computer vision syndrome is a medical term and she would not use it.

[166] Dr. Ma found that Ms. Rathwell has some borderline peripheral field defects. In his opinion, they could be attributable to her eyelid blocking her peripheral vision on the right and to artefact on the left.

[167] Dr. Chung admitted she has never assessed Ms. Rathwell for any reported difficulty tracking with her eyes. Ms. Rathwell denied any significant visual symptoms in the history she provided to Dr. Webber at the time of her November 2023 assessment.

[168] I find that Ms. Rathwell has no accident-related difficulties with her vision.

E. Balance

[169] Dr. Webber diagnosed Ms. Rathwell with suspected multi-factorial vestibular symptoms. She noted that Ms. Rathwell has seen neurologist, Dr. Katherine Beadon, for complaints of dizziness, sometimes associated with headaches. Dr. Beadon provided no evidence at trial.

[170] Dr. Webber opined that a "slight component" of Ms. Rathwell's complaints of unsteadiness could be secondary to migraine headache. In her opinion, it is improbable that Ms. Rathwell's vestibular symptoms are related to post-concussion syndrome. She explained that "give-way weakness" has no organic etiology and is usually a somatic symptom secondary to pain.

[171] After initially reporting only intermittent vertigo, Ms. Rathwell complained of increased daily spells of vertigo in 2020. Dr. Webber agrees with treating neurologist, Dr. Beadon, that no clear neurological etiology explains why Ms. Rathwell's dizziness escalated suddenly in 2020; she would not attribute this increase to either the accident or post-concussion syndrome. Dr. Webber would defer to an ENT specialist regarding balance issues; no otolaryngologist testified at trial.

[172] Dr. Mian concluded that Ms. Rathwell had a positive Romberg sign, a test of imbalance. Notably, Dr. Sexton referenced in her report two neurologists involved in Ms. Rathwell's care (neither of whom testified at trial) who reported negative Romberg tests.

[173] Dr. Sexton first assessed Ms. Rathwell in January 2024, about six and a half years after the Accident. She testified that "cervicogenic vertigo" (i.e., dizziness due to neck pain) is not a term she would use or one which, in her view, a specialist would support. In her opinion, the accident is the most likely cause of Ms. Rathwell's complaints of vertigo and disequilibrium which started in the immediate aftermath of the accident (a reference she clarified at trial to mean within 72 hours and up to one

week after the accident). Based on the history Dr. Sexton obtained, Ms. Rathwell reported having daily vertigo during the COVID-19 lockdown, when her father had suffered a heart attack and Ms. Rathwell was experiencing peak anxiety. Ms. Rathwell also reported that she now has true vertigo very rarely but experiences some disequilibrium with long drives or bus trips.

[174] I find that Ms. Rathwell has had some post-accident balance issues, possibly associated, in part, with migraine headache, and which have now largely resolved.

F. Mental Health Issues

1. Dr. Lu

[175] Dr. Lu opines that Ms. Rathwell had some psychiatric vulnerability before the accident. He notes that she had prior anxiety and depression and probable elements of PTSD due to her repeated exposure to death and losses at work. In his opinion, given Ms. Rathwell's pre-accident vulnerability, a disruption in her balance of work, educational and personal activity would negatively impact her mental health. In his view, a loss of healthy coping mechanisms would have enduring negative impacts on all aspects of her daily function and increase her risk of psychiatric distress.

[176] In Dr. Lu's opinion, Ms. Rathwell's chronic pain and pain-related psychiatric symptoms of anxiety and negative mood changes are intermingled: chronic pain reinforces her health-related anxiety and general distress. In his view, her psychiatric symptoms (which include some clinical features of major depression) negatively impact her overall functional capacity and chronic pain perpetuates her emotional distress. He opines that she meets the DSM-5 diagnostic criteria for a chronic adjustment disorder with mood and anxiety symptoms, perpetuated by chronic pain.

[177] In Dr. Lu's opinion, Ms. Rathwell meets some of the DSM-5 clinical criteria for a somatic symptom disorder, with predominant pain. In his view, she is preoccupied with her pain and physical limitations which is the hallmark of somatic symptom disorder; he opines that Ms. Rathwell's somatic symptom disorder has reinforced her

fear and avoidance. He said that somatic symptom disorder and central sensitization are interrelated: both involve the interaction of pain and psychological distress.

[178] Dr. Lu described central sensitization as a physiological phenomenon which can result in hypersensitivity to noxious and non-noxious stimuli; the severity of pain and perceived disability are disproportionate to the nature and extent of the original injury or pathology.

2. Dr. Riar

[179] Based on the history Dr. Riar obtained from Ms. Rathwell, she believes that she always had a vulnerability to anxiety but that her pre-accident anxiety was not debilitating. She reported pre-accident panic attacks which started in 2010 and occurred in 2011, 2014, and 2015, increased anxiety, depression, tearfulness, and mild agoraphobia in 2015. In May 2017, she reported low mood and disturbed sleep; Dr. Riar noted that she was then diagnosed with dysthymia (a persistent depressive disorder) and that she was receiving EMDR.

[180] In Dr. Riar's opinion, Ms. Rathwell had fluctuating anxiety and depression after the accident, conditions which he concluded both pre-dated the accident. He assessed her anxiety as mild to moderate in severity and her depression as mild. In his view, her complaints of cognitive dysfunction are related to her ongoing anxiety and depression and not a head injury. He opines that Ms. Rathwell would likely have had ongoing problems with anxiety and depression, absent the accident. While he agrees that her social anxiety probably emerged after the accident, he concluded that it was not a significant issue at the time of his assessment.

[181] Dr. Riar diagnosed Ms. Rathwell with a mild somatic symptom disorder. While he concludes that she was vulnerable to developing this disorder before the accident, he concedes that she probably would not have developed it absent the accident. In his opinion, her somatic symptom disorder is aggravated and perpetuated by her depression, anxiety, personality profile, and other social stressors. He concludes that her symptoms have fluctuated over time and were mild in intensity at the time of his assessment. He agreed that Ms. Rathwell was then off

work but said that it is necessary to look at the whole picture when assessing the severity of somatic symptom disorder.

[182] Dr. Riar admitted Ms. Rathwell: 1) has high anxiety; 2) disproportionate and persistent thoughts about the seriousness of her symptoms; and 3) devotes excessive time and energy to her symptoms (which have now persisted for about seven years). In his opinion, psychiatric factors exacerbate and contribute to the severity of her neck and back pain. He concluded that Ms. Rathwell was not disabled due to psychiatric reasons at the time of his November 2023 assessment.

3. Dr. Pullyblank

[183] Psychologist, Dr. Pullyblank diagnosed Ms. Rathwell with somatic symptom disorder and adjustment disorder. He agreed that pain features prominently in the lives of people with somatic symptom disorder: they think about pain, and often experience it, constantly.

4. Drs. Mian and Webber

[184] Dr. Mian diagnosed Ms. Rathwell with chronic pain-related psychological factors associated with chronic pain conditions, including kinesiophobia (fear of movement) and catastrophization (rumination, amplification, and helplessness); he said that both require specialized treatment and are associated with a poorer prognosis.

[185] At the time of Dr. Mian's assessment, Ms. Rathwell presented with ongoing features of low mood, anxiety, and disordered sleep. In his view, it is now impossible (several years after the accident) to clearly differentiate whether mild traumatic brain injury, chronic pain syndrome, or psychiatric pathology is the primary driver of her ongoing symptoms.

[186] Dr. Webber agreed that Ms. Rathwell likely has anxiety and depression. Like Dr. Mian, she defers to a psychiatrist in this area.

5. Conclusion

[187] I find that Ms. Rathwell's mental health conditions, including an adjustment disorder, somatic symptom disorder, anxiety, and depressive symptoms, feature prominently in her ongoing perception of her disability.

VII. CAUSATION

[188] The basic test for determining causation is the "but for" test. The plaintiff bears the burden of establishing that "but for" the defendant's negligent act or omission, the injury would not have occurred: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 21; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14, 1996 CanLII 183. The "but for" test must be proven on a balance of probabilities: *Athey* at para. 13. The accident need not be the only cause of the plaintiff's injuries but it must be a causal factor beyond the "*de minimis*" range: *Athey* at para. 15. If a defendant's negligence exacerbates or aggravates an existing condition, the defendant is liable for causing the resulting injury: *Athey* at para. 47.

[189] The most basic principle of tort law is that the plaintiff must be placed in the same position they would have been "but for" the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for another person. However, a defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway: *Dornan v. Silva,* 2021 BCCA 228 at paras. 44–45. If there is a pre-existing condition, the question becomes whether there is a measurable risk that this condition would have detrimentally affected the plaintiff in the future, regardless of the negligence: *Dornan* at para. 62.

[190] A defendant's actions need not be the only cause of the subsequent injury. A defendant is not excused from liability simply because his actions are not the sole basis for causation, and there are other causal factors for which he is not responsible that also helped produce the harm: *Athey* at paras. 17–19. A defendant is liable for the plaintiff's injuries, even if they are unexpectedly severe owing to a pre-existing condition: *Athey* at para. 34.

[191] It is not uncommon for plaintiffs who sustain physical injuries to develop a mental illness, including adjustment or somatoform disorders: *Yoshikawa v. Yu*, 21 B.C.L.R. (3d) 318, 1996 CanLII 3104 (C.A.). Where psychiatric injury is consequential to a physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury, even if it was unforeseeable: *Yoshikawa*; *Hussack v. Chilliwack School District No. 33,* 2011 BCCA 258 at para. 74.

[192] I make the following findings of fact, based on the trial evidence I accept:

a) Ms. Rathwell sustained soft tissue injuries to her neck and back in the accident which have resulted in ongoing pain;

b) Ms. Rathwell has not established on a balance of probabilities that the accident caused a disc herniation in her cervical spine;

c) Ms. Rathwell did not sustain a mild traumatic brain injury in the accident;

d) Ms. Rathwell's post-accident complaints of perceived cognitive changes are due to chronic pain and mental health issues and not a head injury;

e) Ms. Rathwell had pre-accident migraine headaches that were sufficiently severe to require treatment with medication and she would probably have had some ongoing migraine headaches, absent the accident;

f) Ms. Rathwell now has multi-factorial post-accident headaches due, in part, to the soft tissue injuries she sustained in the accident;

g) Ms. Rathwell's post-accident headaches are likely also partly due to her overuse of over-the-counter medications, including Aleve, Advil, and Tylenol;

h) Ms. Rathwell had some post-accident balance issues, possibly associated with migraine headaches, and now largely resolved;

i) Ms. Rathwell has no accident-related vision abnormalities;

j) Ms. Rathwell was vulnerable before the accident to the physical and psychological effects of trauma and would likely have experienced some mental health difficulties, including anxiety and depressive symptoms, absent the accident;

k) The accident worsened Ms. Rathwell's pre-accident anxiety and depressive symptoms;

l) The accident caused Ms. Rathwell to develop an adjustment disorder and a somatic symptom disorder; and

m) Psychological factors, including kinesiophobia and catastrophization, magnify and distort Ms. Rathwell's experience of chronic pain.

[193] I find that the COVID-19 pandemic and the significant health issues Ms. Rathwell's father experienced in 2020 likely resulted in increased mental health symptoms that would have occurred, absent the accident. In my view, her significantly increased anxiety and worsened mental health in 2020, for reasons unrelated to the accident, are the most plausible explanations for why she then perceived that her condition was worsening.

[194] I find that Ms. Rathwell had multiple pre-accident physical and psychological health issues, including a significant vulnerability to the physical and psychological effects of trauma that would have persisted, absent the accident. Ms. Rathwell had a significant response to a workplace incident in 2015, and to the 2017 accident. In my view, she would likely have responded in a similar manner to other comparable life events, including those that individuals without her pre-existing vulnerabilities would manage more easily.

[195] I find that Ms. Rathwell's accident-related injuries set in motion a sequence of events which ultimately lead to her developing adjustment and somatoform disorders. The evidence does not permit me to find that the extensive (and, on my findings, largely unnecessary) treatment that she received at a concussion clinic beginning in 2021 was an intervening event which interrupted this chain of causation: *Hussack* at para. 77. There is no expert opinion to support the conclusion that this treatment caused or materially contributed to a somatic symptom disorder, adjustment disorder, or a decline in Ms. Rathwell's mental health. However, having regard to the trial evidence as a whole, I am not persuaded that all of this extensive treatment was either required, or that Ms. Rathwell derived significant benefit from it.

[196] However, as noted by Justice N. Smith in *Cohen v. Torrenueva*, 2024 BCSC 639 at para. 92, the case law is clear that a defendant who puts a plaintiff in the position of needing medical help assumes the risk of errors in diagnosis or

treatment, unless the treatment is so negligent as to be a new intervening act that would give the patient a remedy against the doctor, citing *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273 at para. 84, 1986 CanLII 745 (S.C.).

VIII. NON-PECUNIARY DAMAGES

[197] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. Such cases, while helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[198] The Court of Appeal outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include the: plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and plaintiff's stoicism, a factor which generally ought not to penalize a plaintiff.

[199] Ms. Rathwell seeks to recover $300,000 and relies on the following authorities:

a) *Grabovac* ($350,000, including the loss of housekeeping capacity); and

b) *Fletcher v. Biu*, 2020 BCSC 1304 ($200,000, including the loss of housekeeping capacity).

[200] The defendant relies on one decision where no non-pecuniary damages were awarded and argues that the same result should follow here: *D.H. v. Doe*, 2021 BCSC 112. Alternatively, he submits that modest compensation for minor soft tissue injuries would be appropriate.

[201] I conclude that none of these authorities are comparable to the case before me. It follows that I do not accept the corresponding range for non-pecuniary damages as either reasonable or appropriate here.

[202] The plaintiff in *Grabovac* was involved in two accidents. In the second accident, the defendant's vehicle spun out of control before striking the side of the vehicle where Ms. Grabovac was seated as a passenger. Chief Justice Hinkson (as he then was) found that the second accident caused Ms. Grabovac to suffer: musculoskeletal injuries to her neck, shoulders, and back; sensorimotor symptoms in her right upper extremity with numbness, weakness, and hand tremors; sensorimotor symptoms into her legs; and headaches, fatigue, insomnia, and problems with memory and concentration. He found that her injuries progressed over time into a chronic pain condition, major depressive disorder, generalized anxiety disorder, post-traumatic stress disorder, and somatic symptom disorder. He concluded that she was totally disabled from any kind of remunerative employment following the second accident and that she had no real prospect of having children. Those facts are not comparable to the case before me.

[203] The plaintiff in *Fletcher* was a passenger in a vehicle which collided multiple times with a transit bus. She was diagnosed with chronic mechanical discogenic thoracic pain and cervicogenic headache. MRI imaging identified objective multi-level intervertebral disc and facet joint pathology attributable to the accident; subsequent imaging demonstrated pronounced kyphosis, progressive disc degeneration, and multiple thoracic disc bulges and protrusions. The uncontroverted expert evidence at trial confirmed that Ms. Fletcher's severe disc pain would be difficult to treat, surgery would be considered rescue therapy, and she had a poor prognosis. She was diagnosed with a major depressive disorder, generalized anxiety disorder, and post-traumatic stress disorder. Those facts are not analogous.

[204] In *D.H*. at para. 27, Justice Baird concluded that the plaintiff had consciously exaggerated his symptoms in an attempt to mislead experts and bolster his claim. He neither trusted nor accepted the plaintiff's evidence about the nature of his

injuries or the extent and degree of his present difficulties. I do not make all those findings in this case.

[205] In my view, a case that is more comparable on its facts to the one before me than any of the decisions counsel cited is *Smith v. Hsu,* 2020 BCSC 523. The plaintiff in *Smith* was 35 years old when her stationary vehicle was struck from behind at low speed. Before the accident, she had occasional migraine headaches and anxiety. The accident resulted in soft tissue injuries to her neck and upper back, which progressed to a chronic pain condition and major depressive disorder. She also suffered driving anxiety and aggravation of her pre-existing migraines.

[206] Like Ms. Rathwell, the plaintiff in *Smith* alleged that she had suffered a traumatic brain injury in the accident and related cognitive issues, a finding the trial judge did not make. As in the case before me, the plaintiff's injuries did not follow an expected course: *Smith* at para. 48. About five years after the accident, following significant treatment and some initial improvement in her symptoms, the plaintiff stopped working on the basis that her pain was totally disabling. The trial judge found that the plaintiff's symptoms did not have the significant effect she alleged at trial; her "catastrophizing" and "high degree of perceived disability" influenced his assessment of her credibility and the reliability of her evidence: *Smith* at paras. 19 and 163. Justice Ross awarded non-pecuniary damages of $120,000, before a reduction of 10% due to the plaintiff's failure to mitigate.

[207] Ms. Rathwell described how her accident-related injuries have impacted her close friendships, evidence her friends corroborated. All said that they now do different things together. Ms. Rathwell no longer participates in the same sports, sees her friends less often, and cancels pre-arranged plans more frequently. However, it is clear that Ms. Rathwell still enjoys strong support from her circle of close friends. It has now been almost seven years since the accident. Ms. Rathwell is no longer single and she and Ms. Lowrie are now parents to a young child. In my view, those significant life events would probably have resulted in some changes to the lifestyle Ms. Rathwell had when she was a student.

[208] I accept the evidence of Ms. Rathwell's friends about the changes they have observed in her since the accident. They variously described Ms. Rathwell as active, outgoing, confident, funny, and friendly before the accident; none was aware of her having any physical difficulties. They consistently described her after the accident as often appearing to be in pain, periodically complaining of headaches, and generally being less engaged, more easily overwhelmed, and having less stamina. None was able to testify about the cause of these post-accident changes. Some of these witnesses neither live in Vancouver nor see Ms. Rathwell regularly.

[209] Ms. Donovan impressed me as a candid witness. She has known Ms. Rathwell since 2012 when they worked together at Nexus; they clearly have a close friendship. Ms. Donovan testified that Ms. Rathwell is currently the most stable she has been since the accident. Ms. Donovan acknowledged, and I accept, that the resolution of this litigation will be positive for Ms. Rathwell. On Ms. Donovan's evidence, if Ms. Rathwell now has any difficulty engaging in conversation, it is usually associated with a headache or migraine.

[210] I have found that the accident caused Ms. Rathwell's chronic pain due to soft tissue neck and back injuries, multi-factorial headaches, an adjustment disorder, and a somatic symptom disorder. I accept Dr. Mian's view that psychological factors, including catastrophization, kinesiophobia, anxiety, and symptoms of depression impact how Ms. Rathwell experiences pain. I also accept Dr. Riar's view that Ms. Rathwell is capable of more than she thinks. I conclude that there is potential for significant improvement in her condition with different treatment, which targets her most disabling problems.

[211] Ms. Rathwell had multiple significant health issues before the accident, including a longstanding history of anxiety, depressive, and post-traumatic symptoms which were sufficiently severe to require counselling and medical management. I accept Dr. Lu's evidence that she probably had symptoms of post-traumatic stress disorder in response to a workplace event in 2015. She also had

congenital kidney problems, interstitial cystitis, and a longstanding history of dysmenorrhea before being diagnosed with endometriosis.

[212] Ms. Rathwell left her Nexus position in 2015 due to workplace stress; on her own evidence, as corroborated by Ms. Donovan, she has pursued counselling most of her adult life. On Dr. Chung's evidence, she underwent specialized EMDR treatment in 2017, roughly two years after she had a severe reaction to a traumatic event at work. I have found that Ms. Rathwell was vulnerable to the physical and psychological impact of trauma before the accident, and that she would likely have experienced mental health problems in her life, absent the accident.

[213] I have considered Ms. Rathwell's pre-existing mental health difficulties and corresponding vulnerability to life's usual stresses in assessing non-pecuniary damages. In my view, those difficulties would have periodically disrupted Ms. Rathwell's life and caused her emotional distress, absent the accident.

[214] I accept Dr. Mian's evidence that Ms. Rathwell has multiple degenerative changes in her spine, including MRI findings consistent with a cervical disc herniation which might result in future neurological issues. I have found that the evidence does not support the conclusion that the accident caused this disc herniation but accept that this condition might progress and cause future difficulties. On my findings, that would have been true, absent the accident.

[215] Ultimately, having regard to the *Stapley* factors, including Ms. Rathwell's age, accident-related injuries, and the impact of the accident on her relationships, life, work, and ability to engage in recreational and household activities, I assess non-pecuniary damages in the amount of $125,000. This award reflects Ms. Rathwell's multiple pre-existing conditions and the impact that they would likely have had on her life, absent the accident: *Dornan* at para. 53.

IX. SPECIAL DAMAGES

[216] Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred for treatment aimed at

promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[217] Ms. Rathwell has received a substantial amount of treatment since the accident. She claims $81,114.51 in special damages. This amount includes costs for physiotherapy, massage therapy, kinesiology, counselling, naturopathic treatment, a neurology referral (she thinks to an EMG clinic for arm symptoms), a referral to Muscle MD (for trigger point injections), acupuncture, and occupational therapy. Of this amount, $22,761.30 relates to treatment provided at the Advance Concussion Clinic (excluding counselling) plus $9,461.85 for additional counselling expenses.

[218] The defendant admits Ms. Rathwell incurred these expenses but denies that the accident necessitated them. Defence counsel submitted in closing that, if any special damages are awarded, they would be appropriately limited to costs for physiotherapy, massage therapy, and acupuncture in the amount of $6,169.65.

[219] Doing my best on the available evidence, I award $70,000 for special damages. This amount excludes the cost of concussion/vestibular rehabilitation and neuropsychology treatment at the Advance Concussion Clinic (which are not supported on my findings) but includes the cost of physiotherapy, occupational therapy, and kinesiology. I have discounted the Advance Concussion Clinic and other counselling costs by about 50% given the trial evidence that Ms. Rathwell regularly pursued counselling before the accident; in my view, this pattern would likely have continued, absent the accident. On Ms. Rathwell's own evidence, some of her post-accident counselling was related to relationship issues and couples' therapy.

[220] On all the evidence, I conclude that the extensive treatment Ms. Rathwell received at the Advance Concussion Clinic likely reinforced and perpetuated her somatic symptoms. I did not find Dr. Chung's evidence that Ms. Rathwell derived benefit from this treatment to be persuasive. Dr. Mian's evidence that Ms. Rathwell

has received medically appropriate treatment is premised on his conclusion that she sustained a mild traumatic brain injury in the accident, a finding I have not made.

X. LOSS OF EARNING CAPACITY

A. Past Loss

[221] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The burden of proof regarding actual past events is a balance of probabilities. When courts are assessing past loss of income, they are really assessing lost earning capacity: *Rowe* at para. 30.

[222] An assessment of the loss of past earning capacity involves a consideration of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. The plaintiff is not required to prove these hypothetical events on a balance of probabilities; a hypothetical possibility will be considered as long as it is real and substantial and not mere speculation: *Grewal* at para. 48. It is an error to award damages for the loss of earning capacity if the evidence establishes only a speculative loss: *Gao v. Dietrich*, 2018 BCCA 372 at para. 66.

1. Parties' Positions

[223] Ms. Rathwell claims $218,334 in damages for the loss of past earning capacity. She relies on the calculations of her economist expert, Mr. Benning, to support this claim. This figure is based on a comparison of Ms. Rathwell's actual pre-trial earnings with her projected earnings (based on her 2016 earnings until she started at the Boundaries Program in November 2018, and thereafter on the assumption that she would have earned income at her VCH full-time rate until the first day of trial). It is discounted to reflect Ms. Rathwell's actual pre-trial earnings of $189,733 and adjusted for sick pay, income tax, and EI premiums, but no negative contingencies.

[224] The defendant denies that Ms. Rathwell has sustained any loss of past earning capacity. Alternatively, if there is a finding that she suffered some soft tissue injuries in the accident, the defendant concedes that he might be liable for some modest income loss up to 2020 (i.e., a minimal loss before Ms. Rathwell started her Boundaries Program job in November 2018, and the difference between full-time and 0.8 of full-time equivalent earnings in 2020). In the further alternative, defence counsel submits that, if any loss is awarded for the years 2021 to 2024, it would be appropriately assessed based on the difference between a full-time VCH position and a 0.8 full-time equivalent, less Ms. Rathwell's actual earnings. Defence counsel provided no corresponding figures for any of these estimates. The defendant denies that it was reasonable or necessary for Ms. Rathwell to stop working completely in February of 2021 due to any accident-related injuries.

2. Pre-Accident Earnings

[225] Ms. Rathwell's modest employment earnings in the two years before the accident are set out below.

Year	**Position**	**Income**
2015	Nexus Peak House Vancouver School Board Café du Soleil **TOTAL**	$17,353 $793.32 $328.50 $80 **$18,554.82**
2016	Vancouver School Board Peak House Fit Model Work **TOTAL**	$12,257.86 $1,821.15 $53 **$14,132.01**
2017	Vancouver School Board* Peak House Fit Model Work* **TOTAL** *Reflects earnings for the full year.	$2,286.66 $913.07 $9,332.60 **$12,532.33**

3. Pre-Trial Earnings

[226] Ms. Rathwell's T4 earnings in the post-accident pre-trial period (excluding 2017) are summarized below.

Year	Position	Income	Total
2018	Fit Model Work (January–March) BCWH Care Clinic (March–November) VCH Boundaries Program	$2,152.80 $2,481.32 $5,578.70	$10,212.82
2019	VCH Boundaries Program	$65,468.31	$65,468.31
2020	VCH Boundaries Program	$58,135.81	$58,135.81
2021	VCH Boundaries Program (January–February)	$7,590.84	$7,590.84
2022	On Leave	$0	$0
2023	VCH Raven Song Self-Employed Counselling Income	$10,264.66 $18,691	$28,955.66
2024	Self-Employed Counselling Income (January–trial)	$8,682	$8,682

4. Analysis and Conclusion

[227] In my view, Ms. Rathwell overstates her loss and the defendant does the opposite. It follows that I have adopted neither party's approach.

[228] Ms. Rathwell left her challenging Nexus position in 2015, citing work stress and burnout. Thereafter, she had less demanding casual, part-time, and on-call jobs before the accident. Her income stream was neither consistent nor predictable. Assessing her past loss of earning capacity with precision is therefore impossible.

[229] Ms. Rathwell worked only seven shifts for the Vancouver School Board between February and June 2017. According to Ms. Donovan, it was her impression that Ms. Rathwell enjoyed better stamina and was generally able to do more by the

end of the summer of 2017. The school board removed Ms. Rathwell from its on-call list for the period of September 5 to October 31, 2017.

[230] The accident occurred about nine months into 2017. It is unclear from Ms. Rathwell's tax return what portion of her 2017 fit modelling income she earned before the accident. On her uncorroborated evidence, she was unable to do fit modelling work by the spring of 2018 due to accident-related weight gain. On May 7, 2018, Dr. Chung recorded in her clinical notes that Ms. Rathwell "had 4 jobs, quit 2 recently" and was in her "last year of grad school". Neither of Ms. Rathwell's former fit modelling employers testified at trial.

[231] Absent the accident, I conclude that it is likely Ms. Rathwell's earnings in the last quarter of 2017 would have been comparable to her earnings in the first three quarters of that year. While I accept that she would probably have had higher earnings from her fit modelling work absent the accident, I find that this income would likely have remained modest. The trial evidence does not permit a precise calculation of this loss. I have used Ms. Rathwell's 2017 fit modelling income as a statistical anchor. Ms. Rathwell said that she worked only occasional shifts at Peak House in 2015; she had comparable modest earnings there in 2016 and 2017. I have not included earnings from Peak House in my assessment of past loss of earning capacity. This income was modest and Ms. Rathwell was engaged in other work in 2018 and thereafter.

[232] In January 2018, Ms. Rathwell started work on her master's program practicum. Her close friend, Sam Kaplan has a master's degree in behavioural science and worked adjacently with Ms. Rathwell until she left Nexus in 2015. In 2018, part of Sam Kaplan's job involved overseeing practicum students, including Ms. Rathwell. Sam Kaplan said that Ms. Rathwell struggled to maintain her case notes and written assignments but acknowledged that she completed the requirements of the program, graduated, and obtained her master's degree.

[233] In March 2018, Ms. Rathwell started working at the BCWH Care Clinic; she continued doing so until November 2018, when she accepted full-time employment

with the VCH Boundaries Program. She held this position until the end of 2019, when it was reduced to a 0.8 full-time equivalent job (i.e., four days a week) in January 2020. In my view, there is a real and substantial possibility that Ms. Rathwell would have had some income from fit modelling and on-call school board work in the fall of 2018, before she accepted a full-time position with the Boundaries Program, absent the accident. While this loss cannot be calculated with precision, I conclude based on Ms. Rathwell's past earnings that it would likely have remained modest.

[234] Ms. Rathwell worked full-time in 2019; her 2019 income was then the highest it had ever been. I conclude that the evidence does not support a loss of income in 2019.

[235] Ms. Rathwell's position changed to a 0.8 full-time equivalent from 2020 until February 2021 when she stopped work in the Boundaries Program. Ms. Rathwell testified that she missed a substantial amount of time from work when employed in the Boundaries Program. The defendant denies there is any evidence about why she did so. On the trial evidence, Ms. Rathwell then had a variety of non-accident related health problems; her evidence about why she took a significant number of sick days after the accident is uncorroborated. Given the nature and severity of Ms. Rathwell's various health issues, I find it improbable that all of her VCH recorded sick days in the pre-trial period were due to her accident-related injuries.

[236] Ms. Lowrie said that Ms. Rathwell's headaches seemed to worsen after she started in the Boundaries Program position. Ms. Donovan recalled that Ms. Rathwell was having significant symptoms when she stopped working at the Boundaries Program in February 2021. No one from VCH testified about how Ms. Rathwell actually managed at work in her VCH positions after the accident.

[237] The VCH records in evidence show Ms. Rathwell's absences from work due to sick leave or LTD leave, as set out below.

Year	Description	Hours
2018 (November–December)	Paid Sick	17
	Unpaid Sick	0.5
2019	Paid Sick	117.52
	Unpaid Sick	42.48
2020	Paid Sick	84
	Unpaid Sick	86
2021	Paid Sick	50.6
	Unpaid Sick	1,125.65
	Unpaid LTD Leave	180
2022	Paid Sick	0
	Unpaid Sick	0
	Unpaid LTD Leave	960

[238] The defendant argues that Ms. Rathwell's somatic symptoms emerged after she began extensive unnecessary treatment at a concussion clinic in early 2021. There is a significant increase in Ms. Rathwell's unpaid sick time in 2021, as compared to previous years. Ms. Rathwell did not work between March 2021 and June 2023. I find that the evidence does not support the conclusion that it was necessary for Ms. Rathwell to stop working altogether as a consequence of her accident-related injuries. From June to December 2023, she worked in a 0.6 full-time equivalent position with the VCH (i.e., three days a week).

[239] Since February 2023, Ms. Rathwell has been providing counselling services through a private collective which operates like a non-profit organisation. Sam Kaplan administers this collective and earned income of $126,0000 doing this work (which included some time spent engaged in less lucrative administrative work) in 2023; there was no trial evidence about their corresponding business expenses. I do not assess past income loss on the basis of Sam Kaplan's 2023 gross business income.

[240] I accept that Ms. Rathwell has a claim for the loss of past earning capacity. In my view, it is relatively modest. Doing my best on the available evidence, and recognizing that this is an assessment and not a mathematical calculation, I award $55,000 for the loss of past earning capacity.

[241] This award includes a modest loss in 2017, assuming a comparable number of shifts worked in the fall of that year as in the preceding nine months for the school board and as a fit model. It assumes no loss in 2018, when Ms. Rathwell was doing her practicum (from January to June), working at the BCWH Care Clinic (from March to November), and employed full-time with the VCH Boundaries Program (from November to December). I conclude that, at best, Ms. Rathwell would have had nominal additional capacity to work in 2018, absent the accident. Ms. Rathwell was employed full-time in 2019; I am not persuaded that the evidence supports a past loss of earning capacity in 2019.

[242] For the years 2020–2023, I assess Ms. Rathwell's loss (before discounting to reflect negative contingencies) based on the difference between her full-time earnings in the VCH Boundaries Program and the rough mid-point between a 0.8 and 0.6 full-time equivalent position.

[243] I have discounted this award in the range of 25–35% to reflect the real and substantial possibility that Ms. Rathwell would have missed time from work in the pre-trial period, absent the accident, for many reasons, including her father's significant health issues and major surgery, the COVID-19 pandemic, her pre-accident vulnerabilities (including those arising from her pre-accident mental health conditions), recovery from two unrelated surgeries in January 2022 and January 2023, and the birth of her child in 2022.

[244] In my view, this award is reasonable and fair to both parties. It has not been discounted for tax or any disability income that Ms. Rathwell may have received in the pre-trial period. I leave it to counsel to address those matters, as necessary.

B. Future Loss

[245] A claim for future loss of earning capacity requires the court to compare the plaintiff's likely future working life if the accident had not happened with the likely one after its occurrence, accounting for negative and positive contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11. Allowance must be made for the contingency that

the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28.

[246] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone; a specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency: *Rattan v. Li,* 2022 BCSC 648 at para. 147. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91. The burden of proof in establishing that a contingency applies is on the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

[247] Depending on the facts of the case, the loss may be quantified on either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach is typically used in cases where there is an identifiable loss of income: *Kringhaug v. Men*, 2022 BCCA 186 at para. 43. The capital asset approach is typically used when this is not the case and the court makes an award for the loss of opportunity.

[248] The Court of Appeal recently clarified the law regarding the assessment of lost future earning capacity in a trilogy of cases: *Dornan*; *Rab*; *Lo*. In *Rab* at para. 47, Justice Grauer set out a three-step process for assessing future income loss:

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

[249] The assessment of damages is a matter of judgment and not calculation: *Rosvold* at para. 18. While assessing an award for future loss of income is not a purely mathematical exercise, the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 54.

1. Parties' Positions

[250] The parties presented polarized positions regarding Ms. Rathwell's claim for the loss of future earning capacity. Ms. Rathwell claims $1.9 million; the defendant denies she has sustained any loss.

[251] Plaintiff's counsel submits that, on all the evidence, Ms. Rathwell functioned well before the accident. There is a notable lack of objective trial evidence from independent witnesses, including, in particular, Ms. Rathwell's former employers. Plaintiff's counsel concedes that Ms. Rathwell had some pre-accident anxiety which resulted in her leaving her Nexus job in 2015; he attributes this to the high stress nature of this work, citing Ms. Donovan's stated understanding that most workers remained in this job for only about two years. He argues that Ms. Rathwell returned to work after a few months off and that her mental health symptoms were thereafter managed well on medication. This assertion appears to be inconsistent with Dr. Chung's admission that Ms. Rathwell underwent EMDR, a specialised form of trauma counselling, in 2017, two years after the Nexus workplace incident.

[252] Ms. Rathwell was 30 years old and working part-time while taking classes for her master's degree at the time of the accident. She did well in her courses, completed her practicum, became a registered clinical counsellor, and secured her self-described dream job with the VCH Boundaries Program. Absent the accident, she said that it was her plan to remain in a public sector job for about ten years (to gain experience and access benefits while she started her family) before making a transition to more lucrative private practice work. Ms. Rathwell testified that she planned to have two children and to take two maternity leaves of maybe six months

or one year each. Ms. Rathwell wanted to be the children's biological mother. Ms. Lowrie took a one-year maternity leave after the birth of their daughter in 2022.

[253] Plaintiff's counsel argues that Ms. Rathwell has demonstrated that she is capable: she secured her Boundaries Program job and a position doing private counselling work, despite her accident-related injuries. He says that, absent the accident, she would have found a full-time job similar to the Boundaries Program position and continued doing this work for about ten years, earning $115,479 per year, inclusive of non-wage benefits (as estimated by Mr. Benning). He calculates the present value of annual earnings in this amount up to age 70 (using Mr. Benning's male labour market contingencies) to be $2,306,327. He deducts $100,000 from this amount (to reflect two six-month maternity leaves), thereby reducing this figure to about $2,200,000.

[254] Alternatively, if it is instead assumed that Ms. Rathwell would have transitioned to more lucrative private practice work after year ten, and earned $150,000 per year doing so, the present value of this income stream (using Mr. Benning's male labour market contingencies up to age 70) is $2,698,250, or approximately $2.6 million, after deducting $100,000 (representing the estimated cost of two six-month maternity leaves).

[255] Plaintiff's counsel selects a mid-range figure of $2.4 million. He estimates Ms. Rathwell's residual earning capacity to be only $25,000 per year (or lifetime present value earnings of about $500,000), resulting in an estimated net loss of $1.9 million, a figure which he describes as conservative (because it is discounted by 20.6% for male labour market contingencies).

[256] Defence counsel deny that Ms. Rathwell has any accident-related vocational limitations. They underscore that she worked full-time from November 2018 until the end of 2019, and four days a week from 2020 until early 2021. They rely on Dr. Chung's January 27, 2020 report as support for the conclusion that Ms. Rathwell had recovered from any accident-related injuries by then and ought to have returned to full-time work that year.

[257] Alternatively, the defendant suggested that a minimal (unquantified) award would be appropriate, if it is found that Ms. Rathwell sustained soft tissue injuries in the accident, as assessed by Dr. Chung in January 2020. In the further alternative, defence counsel argues that, if the accident is found to have caused all of Ms. Rathwell's ongoing complaints (which defence counsel deny), proper treatment can be expected to improve her capacity to work to at least 75% within two years. In the result, they say that, even assuming a worst-case scenario, Ms. Rathwell's loss is "magnitudes lower" than Mr. Benning's estimate. Defence counsel provided no figures for any of the hypothetical scenarios they proposed.

2. Prognosis

[258] I begin my analysis by considering the expert evidence regarding Ms. Rathwell's likely prognosis.

[259] Dr. Webber opines that Ms. Rathwell's main barrier to work is her subjective headache pain. She diagnosed multi-factorial headaches and recommends more aggressive treatment of them. Dr. Sexton noted that Ms. Rathwell is currently taking no preventative headache medications, which she said can be effective in reducing pain and nausea.

[260] In Dr. Mian's opinion, given the recalcitrant nature of her symptoms, despite medically appropriate treatment, the chronicity of her symptoms, and the complex interplay between her pain, sleep, and mood dysfunction, Ms. Rathwell will continue to have dysfunction due to post-concussive syndrome and chronic musculoskeletal pain for the rest of her life. He does not expect further treatments to be curative but agrees that they could reduce pain and improve function. He noted that Ms. Rathwell has not yet tried medial branch blocks or had a diagnostic injection to determine whether or not this treatment will be effective. He said that this treatment could provide up to two years of partial or significant improvement in Ms. Rathwell's neck and headache pain. It is unclear why Ms. Rathwell has not pursued this treatment.

[261] In Dr. Lu's view, Ms. Rathwell can expect to have fluctuating anxiety and mood symptoms, as long as her pain persists. In his opinion, pain that persists for

more than two years rarely remits and Ms. Rathwell's central sensitization process is a negative prognostic factor. On his evidence, somatic symptom disorder incorporates central sensitization, a term which includes the emotional and psychological impact of pain. He said that somatic symptom disorder collapses multiple conditions into one overarching condition which encompasses both a medical condition, an emotional pre-occupation with pain, and anxiety about pain. Dr. Lu considers Ms. Rathwell's prognosis to be guarded.

[262] While Dr. Riar opines that Ms. Rathwell's anxiety and depression will improve further with the treatment he recommends, he too views her overall prognosis as guarded. He concludes that her psychiatric condition will likely continue to fluctuate, with or without medication. In his opinion, improvement in her headache and myofascial pain symptoms will likely result in an improvement in her somatic symptom disorder and allow her to better manage her residual symptoms. He admitted somatic symptom disorder is likely to be associated with increased disability when comorbidities are present; here they include Ms. Rathwell's post-traumatic headache, chronic myofascial pain, anxiety, and depression.

[263] On Ms. Rathwell's own evidence, stress aggravates her symptoms. In my view, better mental health would improve her overall condition. To date, the counselling Ms. Rathwell has received has not focused on cognitive behavioural therapy. I concur with Drs. Mian and Riar that she would benefit from this kind of treatment to help her change the way she thinks about her symptoms.

[264] On all the evidence, I conclude that there is a significant real and substantial possibility that Ms. Rathwell can improve her current condition with different treatment, targeted to address her most disabling issues: namely, her headache pain and her mental health problems.

3. Residual Earning Capacity

[265] The parties have a substantially different view of Ms. Rathwell's residual earning capacity.

[266] In Dr. Pullyblank's opinion, the accident has reduced Ms. Rathwell's employment options by:

a) Making it unlikely that she will complete a doctoral degree and access the earnings and options this degree would offer;

b) Requiring her to work reduced hours in any job;

c) Causing her to experience symptom flares and lose time from work; and

d) Reducing her chance of obtaining and maintaining employment given her reduced level of functioning.

[267] Dr. Pullyblank opines that Ms. Rathwell remains employable, with appropriate accommodations and assistance.

[268] On Ms. Rathwell's uncorroborated evidence, VCH has, to date, been unable to identify any positions which incorporate all of her requested accommodations. No one from VCH testified about how Ms. Rathwell performed in her previous positions, what kind of accommodated work would be available to her now, when it might become available, whether she would be a suitable candidate for it, and what she could reasonably expect to earn performing this work. In my view, those evidentiary gaps are significant.

[269] Mr. Benning's supplemental report references Ms. Rathwell's private practice earnings of $18,691 in 2023, and $8,682 in 2024, after the deduction of office rental expenses. Ms. Rathwell said that she does not have an ergonomic workspace at home and that she therefore rents office space in order to have a quiet environment to meet clients. In 2024, her office rental costs totalled $1,037.38. Mr. Benning estimates her gross billings in 2024 (up to March 22) to be about $9,700.

[270] Based on the invoices in evidence, the private practice rate for supervising students ranges from $100 to $140; Ms. Rathwell and Sam Kaplan testified that the private practice hourly rate for individuals at Expressive Wellness is $150. Using a blended rate of $125, plaintiff's counsel assumes that Ms. Rathwell was able to bill about 77 hours to clients in just under three months. On Ms. Rathwell's evidence, she currently charges about $100/hour for her private counselling services.

[271] Based on an assumed rate of earnings (of 77 client hours in about three months), plaintiff's counsel extrapolates this rate for year one by dividing $8,682 by the number of days from January 1 to March 22, 2024 (80 days) and multiplying the per diem rate by 365. This equates to gross annual billings of $44,256.25 (or $39,611, after office rental expenses).

[272] Ms. Rathwell's goal is to continue doing private counselling work four days a week; on her evidence, she currently sees clients only two to three days a week due to ongoing pain, headaches, migraines, dizziness, and cognitive fatigue. In her view, this pace is unsustainable and returning to her VCH position is unrealistic. Plaintiff's counsel submits that she can reliably earn only $25,000 per year, or present value lifetime earnings of about $500,000.

4. Male Labour Market Contingencies

[273] Ms. Rathwell bases her future loss calculations on male labour market contingencies. Although defence counsel argued that female labour market contingencies would be more appropriate, they provided none. I accept that male labour market contingencies are not a default position; the analysis is instead context-specific: *McColl v. Sullivan*, 2021 BCCA 181 at paras. 43–45.

[274] Ms. Rathwell had a limited and varied pre-accident work history. She was young, wanted two children, and had a number of health issues. She also had a brother with special needs and a father with significant health issues. In my view, male labour market contingencies (which assume a strong attachment to the workforce) are not the best reflection of Ms. Rathwell's likely without-accident work trajectory. While female labour market contingencies would have been useful in this case, none were provided.

5. Analysis and Conclusion

[275] I have found that Ms. Rathwell has chronic neck and back pain, multi-factorial post-accident headaches, somatic symptom disorder, and an adjustment disorder as a result of the accident. In my view, the evidence discloses a potential future event

that could lead to a loss of capacity, and there is a real and substantial possibility of an event giving rise to a future loss. I conclude that the first two steps in *Rab* are met. The challenge here is to value the loss. The parties' extreme positions were of limited assistance.

[276] There is no objective evidence that Ms. Rathwell has any cognitive deficits as a result of the accident. Ms. Rathwell is obviously an intelligent individual; she was an articulate witness who testified with no apparent difficulty over several days at trial. She did well in her master's courses after the accident, completed her program, and became a registered clinical counsellor. She now works in that capacity through Expressive Wellness, a private counselling cooperative.

[277] In *Abraha v. Suri*, 2019 BCSC 1855 at para. 62, the court declined to award damages for future income loss because the plaintiff's cognitive complaints were limited to her own perception. The plaintiff perceived herself to be cognitively impaired but she worked full-time in the three years before trial and there was no specific evidence that her job either was, or would be, at risk. The court declined to make an award, finding that the plaintiff's concerns about losing income in the future were largely a product of her own perception. An award for the loss of earning capacity requires more than a plaintiff's own perception that she is less valuable in the market place: *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[278] I have found that the accident did not cause a mild traumatic brain injury. On all the evidence, I conclude that Ms. Rathwell's perceived post-accident cognitive changes are best explained by mental health difficulties, in combination with pain.

[279] Plaintiff's counsel relies on *Steinlauf,* where the Court of Appeal upheld a trial judge's decision not to apply a general contingency deduction to the plaintiff's award for future loss of earning capacity, having accepted that his without-accident career path would have been one of outstanding professional success. In my view, *Steinlauf* is distinguishable on its facts. I do not share the same confidence, based on a clear and strong body of evidence, as the trial judge apparently did in *Steinlauf*, about Ms. Rathwell's likely without-accident future earnings. In the absence of a

proven earnings history, no level of earnings can be treated as a certainty: *Reilly* at para. 117.

[280] The modification of duties and discomfort while working is recognised in a non-pecuniary award and is insufficient to support finding a real and substantial possibility of a future loss: *Jefferson v. Virk*, 2020 BCSC 306 at para. 164; *Fontaine v. Van Kampen*, 2013 BCSC 1702 at para. 200.

[281] Doing my best on the available evidence, and recognizing that this award is an assessment and not a precise mathematical calculation, I award $260,000 for the loss of future earning capacity.

[282] This figure is roughly based on an estimated present value of Ms. Rathwell's full-time VCH income to age 60 (the practical effect of assuming male labour market contingencies, based on Mr. Benning's evidence) in the amount of about $2.3 million. Mr. Benning conceded that public sector workers tend to retire earlier than other workers, usually at about age 62 on average. It is discounted by about $175,000 for two maternity leaves, representing an approximate median figure of about 1.5 years in total, and by about 35% (to about $1.3 million) to reflect what I conclude is the significant real and substantial possibility that Ms. Rathwell would have missed time from work due to her pre-existing mental health issues, unrelated medical conditions, and corresponding vulnerabilities, absent the accident. As noted by Dr. Mian, Ms. Rathwell has significant degenerative changes in her spine, including a cervical spine disc herniation which could become neurologically significant, particularly if she suffers further neck trauma. On my findings, she faced that risk, absent the accident.

[283] This award reflects a residual, accident-related, loss of earning capacity in the range of 15–25%. In my view, Ms. Rathwell is capable of earning substantially more than $25,000/year (which represents less than full-time minimum wage earnings) and what she now earns.

[284] This award recognizes Ms. Rathwell's pre-accident decision to take an extended medical leave from her Nexus job before quitting and repositioning herself in the workplace, and thereafter limiting the kind of work she did. In my view, the evidence supports the conclusion that Ms. Rathwell was already less marketable than other comparably qualified workers due to her inherent vulnerabilities and corresponding self-imposed workplace limitations, before the accident.

[285] In awarding damages in this amount, I have considered that, on the expert evidence I accept, Ms. Rathwell has multiple promising treatment options available to her which she has not yet pursued, including, in particular, focused cognitive behavioural therapy, education to address her kinesiophobia, and different pharmacological options (including preventative medications, reduced over-the-counter analgesics, and a trial of the long-acting form of Ubrelvy, a prescription headache medication). On her own evidence, Ms. Rathwell has enjoyed good success on the short-acting form of Ubrelvy; I therefore conclude there is reason to be optimistic that she will benefit from the long-acting version of this drug. Ms. Rathwell has not pursued the medial branch blocks that Dr. Mian recommends.

[286] I have not assessed the loss of future earning capacity based on private counselling work; in my view, doing so is unduly speculative. While there was some uncorroborated trial evidence about Sam Kaplan's anticipated 2023 earnings doing private counselling work, particulars of corresponding expenses are not available. The hourly rate of $175 that Mr. Benning was asked to assume is substantially higher than the highest hourly rates Dr. Pullyblank references in his report for other mental health workers' incomes. They also substantially exceed the National Occupational Classification ("NOC") hourly rates Dr. Pullyblank cites for psychologists, qualifications Ms. Rathwell does not have.

[287] In my view, there is a real and substantial possibility that, absent the accident, Ms. Rathwell might have worked less than full-time, taken time away from work for various reasons, and earned less than $115,753 per year, as estimated by Mr. Benning. This conclusion is supported by the NOC hourly rates for other health care

workers' positions in Dr. Pullyblank's report. I conclude that these hypothetical high-end (i.e., lucrative private counselling) and low-end (i.e., less than full-time work) scenarios effective cancel each other.

[288] The projected annual VCH income of $115,753 assumes that Ms. Rathwell's earnings would have increased every year, effective April 2022, pursuant to the Health Science Professionals Provincial Agreement pay grid, and that Ms. Rathwell would have received an allowance equal to 4.54% of base earnings for non-statutory non-wage benefits, as estimated by Mr. Benning. I conclude that there is also a real and substantial possibility that Ms. Rathwell would have been subject to the usual contingencies of life, including sickness, lay-offs, and labour market fluctuations.

[289] Ms. Rathwell admits she is an insured person within the meaning of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, entitled to LTD and disability benefits through her employment with the VCH Boundaries Program. I have not discounted this award to reflect those benefits and leave it to counsel to do so, as necessary.

[290] In my view, this award is reasonable and fair to both parties.

XI. FUTURE CARE COSTS

[291] The total present value of the future care costs Ms. Abdel-Barr outlines in her report is $1,020,792. At trial, Ms. Rathwell sought $636,773 in future care costs. Despite this substantial claim, plaintiff's counsel denies there is any realistic chance that this treatment will materially improve Ms. Rathwell's condition or prognosis. The defendant denies Ms. Rathwell is entitled to any future care costs.

[292] I adopt Justice N. Smith's recent summary of the law governing awards of future care costs in *Cohen*:

> [143] The authorities governing an award for cost of future care are summarized in *Dabu v. Schwab*, 2016 BCSC 613 at para. 89, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, at 83-84, 1985 CanLII 179 (S.C.). The award is intended to provide physical arrangements for assistance, equipment and facilities directly related to a plaintiff's injuries. To the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person, it may properly form part

> of a claim for future care. There must be medical justification, and the claim must be reasonable and fair to both parties.
>
> [144] Because consideration of the future is inherently uncertain, the award is not based on precise mathematical calculation. It requires an assessment based on judgment to arrive at a reasonable amount: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-33.

[293] I have applied those principles here.

A. Pain Management Program

[294] Ms. Rathwell claims $20,042 to cover the cost of a pain management program. Ms. Rathwell has already received substantial treatment at a concussion clinic. In my view, she would benefit from more targeted treatment in the future, focused on addressing her most disabling headache pain and psychological issues. I award no costs for a pain management program. I accept that Ms. Rathwell would benefit from pain education and have provided funding for that kind of treatment.

B. Neuropsychological Testing

[295] Ms. Rathwell claims $3,959, the present cost of neuropsychological testing, if she is found to have sustained a concussion in the accident. I have found that the accident did not cause a concussion. Accordingly, there is no basis for this award.

C. Kinesiology

[296] Ms. Rathwell claims a total of $39,548, representing the present value of future kinesiology treatments ($5,674 in year one; $33,874 from year two and thereafter at an annual cost of $1,147). Ms. Abdel-Barr assumed that Ms. Rathwell would require 60 kinesiology sessions in year one (focused on education), followed thereafter by once monthly sessions.

[297] Dr. Mian recommends that Ms. Rathwell be active as possible, noting that activity can reduce central nervous system sensitivity and improve mood. I accept his evidence regarding Ms. Rathwell’s catastrophization and kinesiophobia and conclude that they reinforce, distort, and perpetuate her perception of chronic pain.

[298] I conclude that Ms. Rathwell would benefit from targeted education and time-limited assistance to facilitate her transition to a more active lifestyle. I award a contingency fund of $6,500 to cover the cost of approximately two years of additional kinesiology support.

D. Occupational Therapy

[299] Ms. Rathwell claims $53,744 for total future occupational therapy costs ($9,169 in years one and two, and $44,575 in years three and thereafter).

[300] In Dr. Pullyblank's opinion, Ms. Rathwell requires the ongoing services of an occupational therapist to assist her with case management, an ergonomic review, and optimizing work flow. He provides no specific recommendations regarding the frequency or duration of this assistance.

[301] Ms. Rathwell admitted she was given excellent tools as part of the extensive treatment that she received at the concussion clinic, including occupational therapy. She acknowledged gaining useful skills from past occupational therapy sessions, including those focused on increasing her capacity to do home tasks, making home modifications, and using memory and concentration aids.

[302] In my view, Ms. Rathwell has had adequate occupational therapy support and can apply what she has already learned. I conclude that less treatment going forward than Ms. Rathwell has had in the past would be to her benefit. I make no award for this cost.

E. Passive Therapy

[303] Ms. Rathwell claims a total of $38,752 for passive therapies (including $3,029 for physiotherapy, plus $35,723 for either massage therapy or acupuncture).

[304] Ms. Rathwell would like to continue with physiotherapy and said she has found it to be beneficial; in her view, massage therapy would be helpful for "maintenance". In my view, Ms. Rathwell's wish to continue passive therapy does not warrant the costs she claims.

[305] Dr. Mian does not see a role for ongoing physical therapy indefinitely; he agreed that patients who are more active tend to do better than those who are heavily reliant on passive therapies. Dr. Riar similarly discourages ongoing passive therapy and instead recommends that Ms. Rathwell be encouraged to engage in regular independent active exercise.

[306] In Dr. Mian's view, there is strong evidence for short-duration physical therapy focused on pain neuroscience education (which Ms. Rathwell has not yet had). He opines that Ms. Rathwell needs to better understand the difference between hurt versus harm, and that pain is not associated with any structural damage to her spine (or elsewhere). The focus of this education would be to counter negative beliefs about movement and to reinforce the benefits of exercise and the difference between chronic and acute pain. Dr. Mian recommends that Ms. Rathwell see a specialised physiotherapist for this kind of education about once a week for six months. In his view, it could reduce her pain and improve her function.

[307] Dr. Mian recommends approximately ten sessions per year of manual therapy (such as massage therapy), for episodic flares of neck and back pain. He admitted Ms. Rathwell was accessing a form of massage therapy before the accident (albeit not for the treatment of a chronic pain condition). I prefer Dr. Mian's evidence on this matter to the recommendations of Dr. Chung in her January 27, 2020 report.

[308] I award a contingency fund of $5,500. This figure roughly equals 24 educational sessions over six months, as recommended by Dr. Mian (at a mid-range cost based on the report of Ms. Abdel-Barr), plus the cost of about 10 physiotherapy sessions per year for two years.

F. Psychological Therapy

[309] Ms. Rathwell claims $43,437 for the cost of future psychological therapy ($10,570 in year one and $32,867 thereafter for future lifetime costs).

[310] Dr. Riar recommends that Ms. Rathwell be referred to a psychiatrist for psychotherapy and management of her psychotropic medications to optimize her

dosage. He recommends cognitive behavioural therapy to address her anxiety, depression, personality traits, and expectations; he agrees ongoing psychological factors contribute to potentiating Ms. Rathwell's symptoms. In his view, she would benefit from education regarding her symptomatology and group therapy for her anxiety and depression.

[311] Dr. Mian shares Dr. Riar's view that Ms. Rathwell would benefit from cognitive behavioural therapy to address pain, pain reprocessing therapy, mindfulness-based stress reduction, and potentially insomnia. In his view, she would likely need about one year of treatment once a week.

[312] In Dr. Lu's view, there is a high likelihood that Ms. Rathwell will need indefinite psychiatric treatment. He conceded that Ms. Rathwell had pursued counselling before the accident.

[313] Dr. Pullyblank recommends an initial 15–20 sessions (at a rate of $250/hour) with a registered psychologist to address Ms. Rathwell's somatic symptom disorder, anxiety, and depression, with a likely need for a further unspecified number of sessions thereafter. He noted that Ms. Rathwell has not yet had psychotherapy, evidence she corroborated.

[314] I conclude that Ms. Rathwell would benefit from the kind of cognitive behavioural therapy Drs. Riar and Mian recommend to provide pain education and to change how Ms. Rathwell thinks about her symptoms. I award $10,680 to fund this cost, based on 48 sessions for one year at an average cost of $222.50/hour, as set out in the report of Ms. Abdel-Barr.

G. Medications

[315] Ms. Rathwell claims a total of $220,720 for future lifetime medication costs. This amount is broken down as follows:

a) Current medications (Naltrexone, Venlafaxine, Aleve, Advil, Magnesium Citrate, and Voltaren) - $36,238

b) Lifetime cost for CGRP inhibitors - $144,000

c) A trial of Botox - $1,482

d) Lifetime Botox costs - $39,000

1. Current Medications

[316] Drs. Mian and Lu agreed that Ms. Rathwell had been prescribed Venlafaxine (an anti-depressant medication), one other anti-depressant medication, and Lorazepam (an anti-anxiety medication) before the accident.

[317] In Dr. Chung's view, Ms. Rathwell should continue to use over-the-counter analgesics when needed. I prefer the evidence of Dr. Webber on this point: in her view, Ms. Rathwell (who endorses using Advil, Aleve, and Tylenol most days) meets the IHS criteria for medication overuse headaches. I therefore conclude that Ms. Rathwell would benefit from reducing her use of over-the-counter analgesics.

[318] Dr. Mian recommends a trial of Duloxetine, a pain-modulating anti-depressant that can reduce pain and anxiety levels, improve sleep, and elevate mood. He notes that Nortriptyline is another option which Ms. Rathwell has not yet tried to reduce headaches and optimize sleep. In his view, she would benefit from the indefinite use of an anti-inflammatory for breakthrough pain flares.

[319] The evidence does not permit me to assess Ms. Rathwell's accident-related lifetime medication costs with precision. There is a real and substantial possibility that she will not require all of these medications for the rest of her life. As noted, she would benefit from a review of her medications; on the expert evidence I accept, some are likely contributing to her current symptoms. On Ms. Rathwell's own evidence, she would have incurred some medication costs absent the accident.

[320] Doing my best on the available evidence, and recognising that this is an assessment and not a calculation, I award a contingency fund of $7,500 to off-set Ms. Rathwell's accident-related medication costs. This represents about 20% of Ms. Rathwell's estimate of the lifetime costs of her current medications.

2. CGRP Inhibitors

[321] Dr. Mian notes that Ms. Rathwell has not tried much in the way of standard pharmacotherapy for her migraine headaches. In his report, he outlines first-line, second-line, and third-line medication options, in addition to CGRP modulators, such as Ajovy, which she could try.

[322] Dr. Sexton identifies multiple medications that Ms. Rathwell has not yet tried which could improve her headaches. She notes that Ms. Rathwell's light and sound sensitivity could be reduced, and her screen time increased, with better headache-pain management. Dr. Sexton states that if Ms. Rathwell's disequilibrium and vertigo are secondary to vestibular migraine, the medications she recommends could reduce the number or intensity of episodes, or increase the threshold for symptoms. She says that a reduction in Ms. Rathwell's pain, vertigo, and disequilibrium could result in corresponding improvements in cognition. She opines that Ms. Rathwell's headaches might remit with menopause.

[323] Dr. Sexton admitted Ms. Rathwell has not been trialed on any of the CGRP or other preventative headache medications. She said that, with special authorization, MSP will cover the cost of CGRP medications, if a patient has failed two oral medications; one such oral medication is Propanolol, which Dr. Sexton noted costs "pennies a day".

[324] Dr. Webber recommends different and more aggressive treatment of Ms. Rathwell's headaches than she has trialed to date. She testified that there are highly effective pharmacological treatment options for headache which Ms. Rathwell has not tried. On Ms. Rathwell's own evidence, she has had substantial improvement in her headaches with Ubrelvy, a short-acting abortive agent, but she has not tried the long-acting equivalent. In my view, Ms. Rathwell would benefit from a referral to a headache specialist for a review of her current medications.

[325] If Ms. Rathwell is a candidate for CGRP inhibitors, after she has tried and failed the other available medical options, I accept Dr. Sexton's evidence that she

can apply for MSP funding of this cost. I make no award for the lifetime cost of CGRP inhibitors.

3. Botox

[326] Ms. Rathwell has not tried Botox for her headaches, saying the cost is prohibitive. Dr. Sexton confirmed that Botox is not covered in BC. She testified that, based on evidence from a past trial, if 200 patients are given Botox, 100 will likely not respond and about 50 of the remaining 100 will experience a decrease in the intensity and frequency of their headaches. A second trial (with different injection sites) demonstrated improved outcomes.

[327] Dr. Sexton agreed that Botox could be tried, if the other medications she suggested failed. As noted by Dr. Sexton, there are many other treatment options for her headaches that Ms. Rathwell has not yet exhausted.

[328] In my view, funding for the lifetime cost of Botox is wholly speculative. I make no award for this cost.

H. Ergonomic Equipment

[329] Ms. Rathwell claims $12,614 to cover the cost of ergonomic equipment:

a) A height-adjustable desk - $1,091

b) An ergonomic chair (with back and neck support) - $1,240

c) A kneeling chair - $216

d) A zero-gravity chair - $3,768

e) An anti-glare monitor - $834

f) An ergonomic computer set-up - $539

g) An anti-fatigue mat - $120

h) Tinted contact lenses (differential cost of regular and tinted lenses) - $4,806

[330] Apart from the tinted contact lenses, Ms. Abdel-Barr described these items as the costs of a general ergonomic set-up.

[331] Ms. Rathwell testified that she could work from home, either once her daughter is in daycare or she has childcare, with an ergonomic set-up**.** On Sam Kaplan's evidence, Ms. Rathwell will soon have access to a quiet and comfortable new Expressive Wellness private counselling office with adjustable lighting and chairs, within easy walking distance of her home. Access to this office space will eliminate the need for Ms. Rathwell to work from home.

[332] I am not persuaded on the trial evidence that the accident necessitated all of these costs. In my view, there is a significant real and substantial possibility that Ms. Rathwell would have incurred the costs of an ergonomic home office if she had pursued private counselling work, absent the accident.

[333] Doing my best on the available evidence I award $3,000, representing approximately 25% of the total costs of an ergonomic home office to cover the estimated differential cost of customizing equipment to her address her accident-related chronic pain.

I. Childcare Costs

[334] Ms. Rathwell claims $42,926 for childcare costs ($17,704 in year one and $25,222 for years two to four).

[335] Ms. Rathwell admitted she cares for her daughter independently, albeit with some limitations and restrictions due to her ongoing symptoms. She said that she would take advantage of childcare if it was available to her, saying it would reduce pressure on her partner and be a "game changer" for their relationship.

[336] Ms. Rathwell is able to care for her child. I have considered her limitations in doing so due to her ongoing symptoms in my assessment of non-pecuniary damages. In my view, fostering dependence by awarding childcare costs is unlikely to be of benefit. I conclude that with better medical management of her pain,

improved mental health (with intensive cognitive behavioural therapy, for which I have awarded funding), and the kind of education the experts recommend, Ms. Rathwell will be able to resume a more active lifestyle. In my view, absent the accident, there is a real and substantial possibility that she would have incurred daycare costs.

[337] I make no award for childcare costs

J. Fitness Pass

[338] Ms. Rathwell claims $14,625 to cover the ongoing annual cost of a membership to a fitness facility with a pool, plus $3,151 to cover the ongoing annual cost of a fitness pass for a kinesiologist (for a total present value cost of $17,776). I award $930 which roughly equals the present value of a two-year fitness pass to assist Ms. Rathwell while she transitions to a more active lifestyle.

K. Summary

[339] In summary, I award future care costs as follows:

a) Kinesiology - $6,500

b) Physiotherapy - $5,500

c) Psychological therapy - $10,680

d) Medications - $7,500

e) Fitness pass - $930

f) Ergonomic equipment - $3,000

TOTAL: $34,110

XII. DISPOSITION

[340] I award damages as follows:

a) Non-pecuniary damages - $125,000

b) Special damages - $70,000

c) Gross loss of past earning capacity - $55,000

d) Loss of future earning capacity - $260,000

e) Future care costs - $34,110

TOTAL: $544,110

[341] Absent information of which I am unaware that might alter this view, Ms. Rathwell is entitled to costs on the ordinary scale. If there are any issues related to costs arising from these reasons, the parties are at liberty to apply to Supreme Court Scheduling to speak to them within 30 days.

"Douglas J."