IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Polak v. Perea,*
2024 BCSC 1601

Date: 20240830
Docket: M187618
Registry: Vancouver

Between:

Joanna Polak

Plaintiff

And

Monchito Perea and Transcold Distribution Ltd.

Defendants

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:	D.W. Kolb J. Cameron
Counsel for the Defendants:	T.J. Decker
Place and Date of Trial/Hearing:	Vancouver, B.C. December 4-8 and 11-12, 2023
Place and Date of Judgment:	Vancouver, B.C. August 30, 2024

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I. Introduction

[1] This action arises as the result of a motor vehicle accident (the “accident”) in which the vehicle being driven by the plaintiff, Joanna Polak was rear-ended by the vehicle driven by the defendant, Monchito Perea and owned by the defendant, Transcold Distribution Ltd. (together, the “defendants”).

[2] The defendants do not dispute that they are liable for the accident or that Ms. Polak sustained injuries in the accident. The issues to be determined at this trial are the nature and extent of those injuries and Ms. Polak’s entitlement, if any, to damages as a result.

II. The Accident and Post-Accident Injuries

A. The Day of the Accident

[3] On June 28, 2016, Ms. Polak was travelling from her workplace to her husband’s office in Richmond, BC. From there, the Polaks were going to go to the celebration for their son's graduation from elementary school. While stopped in traffic, Ms. Polak’s vehicle was hit from behind by a vehicle driven by the defendant.

[4] Ms. Polak testified that, on impact, her body moved forward and back and she hit her head on the headrest. At the time she didn’t know what had happened. She saw stars and said she was in shock.

[5] Immediately after the accident, she moved her vehicle to the side but said it was a little hard to remember what happened after she pulled over. Although Ms. Polak had no specific recall of doing so, the drivers exchanged information and examined the vehicles, after which she got back into her car and drove to her husband’s office. Saying she was “confused”, Ms. Polak was unable to recall the details of that drive, including how she got to her husband’s office, if there was traffic, or how long it took her to get there. At the time, she had a headache and the noise in her head sounded like a loud industrial fan.

[6] After arriving at her husband’s office, she struggled with her balance and had issues looking at the computer screen. Her husband was concerned enough to call a

walk-in clinic, but they were unable to fit her in. She was able to get an appointment for the next day.

[7] Despite her husband's concern, Ms. Polak said she was able to go to her son's graduation. Ms. Polak testified that she was unable to walk straight, was wobbly, had blurry vision, and felt dazed and confused. Once there, she struggled to remember the names of the kids she had known for eight years and called one of the mothers by the wrong name. The noise, lights and her headache were bothering her so badly she was unable to stay at the graduation. Once home, she complained of a headache, noise and light sensitivity, dizziness, blurry vision, and neck, mid and low-back pain.

B. Post-Accident Injuries and Treatments

[8] In the days and weeks after the accident, Ms. Polak continued to suffer from daily headaches, which were not alleviated by the medication that she had been prescribed. In the months after the accident, she continued to suffer from neck pain and experienced tingling and numbness into her arms. At times, she was very confused, she struggled with walking straight due to dizziness and balance issues, her vision was blurry, and she was not able to drive.

[9] Ms. Polak started receiving physiotherapy treatment for her neck, back, and a head injury within the first week of the accident. She was referred to and had her first appointment at a concussion clinic in August 2016.

[10] By December 2016, almost six months after the accident, Ms. Polak was still having daily headaches, constant neck pain, and tingling into her arms. She was also having cognitive symptoms including blurry vision and sensitivity to lights. She was still unable to go grocery shopping without her husband's assistance, her confusion made her unable to drive and was having trouble remembering things including, for example, if she had eaten for the day. She was unable to socialize as she found it to be too stimulating, and would cause nausea and dizziness.

[11] By the spring of 2017, her symptoms got a little better such that she was able to return to work on a gradual basis. However, in September 2017, Ms. Polak had an unrelated workplace accident in which she hurt her shoulder.

[12] By 2018, Ms. Polak reported that, while not resolved, her concussion injuries had improved. However, she continued to have issues while working on the computer screen. While her lower back pain was manageable, her neck pain was constant. By the end of 2018, she was still experiencing headaches three to four times a week but she was able to control them with gabapentin, Tylenol 3 and CBD oil.

[13] By the end of 2019, some three and a half years after the accident, she continued to attend physiotherapy and at the concussion clinic. However, she continued to have constant neck pain and her headaches had plateaued at two to three times a week. While the treatments at the concussion clinic were exhausting, she found them helpful. She was still taking gabapentin, an anti-depressant occasionally, Tylenol 3 and CBD oil.

[14] By 2020, the depression was alleviated such that Ms. Polak was able to decrease her anti-depressant medication. However, she continued to experience arm tingling and pain and her neck pain was not improving. She received two nerve injections to try to alleviate the pain, the first of which helped right away but the pain came back. The second set of injections did not work immediately but eventually resulted in a couple of months of no pain in the neck. At the time of trial, she was awaiting a nerve ablation.

[15] In 2021, Ms. Polak continued to suffer from headaches, dizziness, and neck pain, all of which contributed to her struggles at work, making numerous repeated mistakes and taking significant amounts of time off. By November 2021, she felt like she had no energy left for a home life after work and, together with her husband, decided to retire.

[16] In July 2022, Ms. Polak and her husband purchased a small house on Nimpo Lake away from the noise and lights of the city which she found to trigger her cognitive symptoms. By the time of trial, Ms. Polak has been able to significantly reduce her medications, but still continues to suffer from headaches, although less frequently and "much better" than before, and constant neck pain. Those issues remain her most limiting symptoms. In addition, she also struggles mentally when she goes on the computer and she gets confused sometimes when doing certain things, but her memory has improved. She continues to suffer from nausea and dizziness associated with her headaches.

[17] Despite those ongoing symptoms, she has been able to resume some physical activity including walking, swimming, kayaking, and snowshoeing. She continues to do the exercises recommended by the concussion clinic and other therapeutic remedies. In addition, she travels to Vancouver several times a year for massage therapy.

III. Credibility and Reliability

[18] In assessing credibility, I rely on the principles as set out in the often-cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[19] Related to, but distinct from, credibility is reliability. Credibility concerns the veracity of a witness; reliability involves the accuracy of the witness's testimony. Accuracy engages consideration of the ability of the witness to observe, recall and recount what occurred: *R. v. Khan*, 201 5 BCCA 320 at para. 44.

[20] In this case, the defendants concede that Ms. Polak was a generally credible witness; they do not question the honesty of her evidence. That view was shared by two of the medical experts who gave evidence at trial, Dr. Donald Cameron, on behalf of Ms. Polak and Dr. Meera Gupta, on behalf of the defendants. Regarding Ms. Polak's reports of her subjective cognitive symptoms, Dr. Gupta testified, "At no

point do I say I don't believe her – she is saying she has these problems and I believe her – at no point did I say she doesn't have those symptoms".

[21] Notwithstanding their position on credibility, the defendants argue that Ms. Polak is not an entirely reliable witness. In support of that position, they point to a number of instances in which her evidence is not consistent with documents or evidence provided by other witnesses. For example, her estimates of her hours worked prior to the accident and missed after the accident were not consistent with her work records:

a) She testified that "30 [hours per week] was the bare minimum" she worked prior to the accident. The employment records indicate she worked an average of 22.8 hours per week in the year prior to the accident;

b) Ms. Polak's direct evidence was that she was working 15 to 20 hours per week prior to an intervening workplace accident. The records indicate she was working 20 to 22 hours per week; and

c) Ms. Polak testified that prior to making the decision to leave the workforce, she was missing between 30 to 40 hours of work per month. Her supervisor said she was approaching 64 hours in a 12-month period.

[22] Other inconsistencies in Ms. Polak's evidence related to questions about her pre-accident health. In response to questions on that issue, she denied having any neck issues in the two years prior to the accident (she had been in an accident in September 2014 and complained of neck pain), using prescription medication in the year before the accident (she filled prescriptions for Tylenol and codeine #3 in the fall of 2015), or attending massage therapy in six months prior to the accident (she attended eight times).

[23] I agree that the inconsistencies between Ms. Polak's evidence and the records indicate that her memory with respect to those issues was less than ideal. However, it is notable that, with two exceptions, the defendants have challenged her reliability on the basis of her recall of events that occurred in the period 2014 to 2016

– some seven to nine years previously. Although all incidents were germane to the issues at this trial, it is difficult to make any definitive findings on the basis of recall that far in the past.

[24] The passage of time does not account for Ms. Polak's estimate that she had to miss 30 to 40 hours of work each month in 2021, when in fact she was only approaching 64 hours of missed work in a 12-month period. Other than perhaps the cognitive symptoms from which Ms. Polak continues to suffer, there is no reasonable explanation for that wholly inaccurate report. However, while that evidence was not reliable, I do not consider that one instance to be determinative of her reliability as a whole. However, given the period of time over which the relevant events occurred, where Ms. Polak's evidence conflicts with contemporaneous records, I accept the evidence contained in the record.

[25] Having said that, notwithstanding the inconsistencies that did exist, having observed Ms. Polak and having heard her evidence, I am satisfied that she presented her evidence in a truthful and forthright manner including, but not limited to, her report of injuries and symptoms and the impact of those symptoms and injuries on her. I accept her evidence as credible.

IV. Injuries

A. Physical Injuries

[26] Dr. Patrick Chin was the only expert to give opinion evidence with respect to Ms. Polak's physical injuries. He assessed Ms. Polak in April 2023, almost seven years after the accident.

[27] Dr. Chin diagnosed Ms. Polak with chronic neck pain with arm numbness and chronic mid and low-back pain. Assuming Ms. Polak's claim that she was 100% physically healthy before the accident, he opined that the accident "most probably" resulted in the onset of her neck, mid-back, and low-back pain.

[28] In reaching that conclusion, Dr. Chin noted that Ms. Polak probably had pre-existing arthritis in her neck and lower back, but that was mostly asymptomatic prior

to the accident and rendered symptomatic post-accident. He opined that absent the accident, Ms. Polak would not have had such significant pain symptoms that affected her ability to work and function with daily activities.

[29] By the date of Dr. Chin's assessment, some seven years after the accident, Ms. Polak's primary complaint was the constant neck pain that resulted in numbness down both arms", which by then had improved to about 70%.

[30] Her other physical complaints were mid-back pain, aggravated by bending or carrying heavy objects, which had only improved to about 55% and occasional low back pain, which had improved to 85%. By the time of trial, the lower back pain had improved even more.

[31] Regarding treatment, he recommended that Ms. Polak follow up with the neurosurgeon who had recommended a nerve block injection before undergoing radiofrequency ablation procedure. However, he did not provide any opinion with respect to the effect of any such additional treatment, instead deferring to that specialist to provide a further comment on treatment and prognosis.

[32] In addition, Dr. Chin diagnosed right shoulder pain which he attributed to the September 2017 workplace accident. By the date of his assessment, Ms. Polak had fully recovered and had regained close to 100% function in that shoulder.

[33] There being no evidence to the contrary, I accept that Ms. Polak suffered neck pain and associated arm numbness, together with the mid and low-back pain, as described in Dr. Chin's report and as she described in her evidence at trial.

[34] Regarding causation, the evidence discloses that Ms. Polak had a number of pre-accident health issues, including knee surgery, a right foot injury and tennis elbow, and had been involved in a motor vehicle accident in September 2014, less than two years before the accident. However, there was no evidence that any of those issues manifested in ongoing symptoms or injuries that existed at the time of the accident.

[35] Moreover, although Ms. Polak was attending regular massage therapy in the period prior to the accident, I accept, as she testified, that she did so for "maintenance therapy" given the physical nature of her job as a courier and as recommended by her employer.

[36] I accept that the physical injuries sustained by Ms. Polak were caused by the accident.

B. Mild Traumatic Brain Injury (MTBI)

1. Medical Evidence

a. Dr. Chin

[37] Although not contained in the diagnosis section of his written report, Dr. Chin opined that Ms. Polak sustained a MTBI (concussion) that resulted in post-concussive type symptoms that included headaches, cognitive, memory, and concentration issues. Ms. Polak reported to him that those symptoms had improved by 60 to 65% at the date of his assessment. Dr. Chin deferred further comment on that injury and prognosis to "more appropriate experts".

b. Dr. Cameron

[38] Dr. Donald A. Cameron is a neurologist who gave expert evidence on behalf of Ms. Polak with respect to the possibility that she suffered an MTBI. He opined that she did.

[39] In his report, Dr. Cameron referred to two main sources to set out the criteria for an MTBI diagnosis: a 2004 article by the World Health Organization and the 1994 Annals of Rehabilitative Medicine on MTBI. He explained that those criteria are: first, an event that could plausibly cause an injury to the brain such as a whiplash or a sports injury, and second, any one or more of the following: (a) confusion or disorientation, or (b) loss of consciousness less than 30 minutes, or (c) post-traumatic amnesia for less than 24 hours. Dr. Cameron clarified that 90% of concussed people do not have a loss of consciousness.

[40] In this case, relying on Ms. Polak's reports of confusion at the scene of the accident, seeing stars, vague post-accident recall, having to leave her son's graduation because of confusion, photophobia, irritability, and phonophobia, exhaustion, nausea, and poor sleep, Dr. Cameron was of the view that Ms. Polak "probably did suffer a brief altered state of consciousness or loss of consciousness" at the time of the accident.

[41] In reaching that conclusion, Dr. Cameron acknowledged that Ms. Polak was able to drive to her husband's office after the accident. However, he concluded her ability to do so did not mean she was not confused. It was more significant to him that she did not remember the drive and had other time losses following the accident. By way of analogy, he described a hockey player who, although concussed, is able to skate off the ice without assistance, but cannot remember doing so.

[42] Dr. Cameron opines that Ms. Polak "probably" does fulfill the criteria of an MTBI at the time of the accident.

[43] He is also of the view that she has developed and probably still continues to suffer from symptoms of post-traumatic brain injury syndrome, a syndrome that he described as a constellation of symptoms that a person may develop, days to weeks after an event transpiring. He listed depression anxiety, headaches, dizziness, blurry vision, concentration attention span problems, decreased self-esteem, decreased libido, irritability, decreased tolerance of stress, people easily being overwhelmed, sensitivity to light, sensitivity to noise, being easily overwhelmed, mood swings, and crying for no reason as the most distinguishable concussive symptoms. It was also his evidence that between 10% to 25% of concussed people continue to have long-term cognitive issues.

[44] Dr. Cameron also considered other possible causes of the cognitive symptoms including a possible childhood concussion, a previous accident in September 2014, the effect of the whiplash injuries sustained in the accident a September 2017 workplace accident, the possibility that dizziness and headaches

are a side effect of Tylenol 3s, and possible sleep apnea. He discounted all as contributors to Ms. Polack's ongoing cognitive symptomology.

c. Dr. Gupta

[45] Dr. Meera Gupta is a neurologist who gave expert evidence on behalf of the defendants. In her written report, Dr. Gupta does not appear to wholly discount Dr. Cameron's diagnosis, opining that "…it is possible but less than 50% likely that Ms. Polak suffered a concussion/mild traumatic brain injury as a result of the subject accident". Her oral evidence at trial was less equivocal in her rejection of the possibility of an MTBI.

[46] In her written report, Dr. Gupta states that "[c]oncussion is typically diagnosed when there is reported observed brief loss of consciousness and/or immediate transient neurological symptoms such as disorientation or amnesia at the time of a direct or transmitted force to the head". However, it was only for the first time at trial that she referred to the specific diagnostic criteria - that being the 2024 update to the 1994 paper on which Dr. Cameron's opinion was based – on which she based her opinion. That update was not cited in her written report nor was it put to Dr. Cameron.

[47] Dr. Gupta did not accept that Ms. Polak met the criteria for an MTBI. In particular, she did not accept that Ms. Polak's self-defined report of "confusion" at the time of the accident. She understood Ms. Polak's report to reference the fact that she heard glass breaking, which turned out to be a broken taillight and did not amount to confusion at all. Dr. Gupta testified that Ms. Polak did not tell her that she felt dazed, "saw stars", and did not remember driving to her husband's office.

[48] To the contrary, Dr. Gupta testified that Ms. Polak reported behaving "normally" at the accident scene, which she said was consistent with the objective evidence: Ms. Polak obtained and wrote down the other driver's information, she was not slow to respond to the situation, she did not report any agitated behaviour, and was able to drive to his husband's office immediately after the accident. In other

words, in Dr. Gupta's view, Ms. Polak did not meet the diagnostic criteria of "immediate transient" disorientation or amnesia.

[49] On cross-examination, Dr. Gupta conceded she would consider a report that Ms. Polak did not remember everything at the accident scene, that she did not remember driving to her husband's place of work, that her husband reported that she looked dazed and out of sorts just after the accident, and that Ms. Polak was not able to walk straight as factors that she would consider as possibly indicative of a concussion.

[50] With the information she had, Dr. Gupta attributed the cognitive disturbances reported by Ms. Polak to the ongoing headache pain and the soft tissue injury sustained in the accident. She attributes Ms. Polak's post-traumatic headaches to whiplash.

[51] Dr. Gupta was of the view that the headaches, in turn, were likely exacerbated in two ways: (a) "if she has untreated sleep apnea", and (b) by the overuse of medication. She suggested managing her headaches by "treating the sleep apnea" and avoiding the overuse of medication would "likely lead to less disability".

2. Analysis of Medical Evidence

[52] None of the medical experts dispute that Ms. Polak continues to suffer from the headaches and other cognitive issues she described including dizziness, nausea, sensitivity to light and noise, concentration and memory issues, and irritability. As noted in the credibility and reliability section, even Dr. Gupta did not question her reports of those ongoing issues.

[53] The difference is in the diagnosis: both Dr. Chin and Dr. Cameron attribute the ongoing symptoms to what they accept is an MTBI; Dr. Gupta attributes the symptoms to her soft tissue injury, headaches, and undefined psychological issues. Those diagnoses inform the prognosis. Specifically, Dr. Cameron testified that between 10 to 25% of concussed people have long-term cognitive issues. By

contrast, if the cognitive symptoms are referable to soft tissue injury and headaches, as Dr. Gupta opines, resolution of those underlying causes will presumably lead to resolution of the cognitive issues.

[54] Despite his assessment, Dr. Chin has deferred to “more appropriate experts” in respect of diagnosis. While I do not wholly discount his opinion, regarding diagnosis, I have primarily considered the reports of the neurologists, Drs. Cameron and Gupta.

[55] Before turning to their opinions, as one factor in assessing these witnesses’ opinions, I have considered the manner in which each gave their evidence. Like their diagnoses, that too was markedly different. While neither expert waivered from their opinion, Dr. Cameron gave his evidence in a neutral manner and made a deliberate effort to provide the Court with general information to assist it make a determination.

[56] By contrast, Dr. Gupta made little obvious effort to generally assist the Court or give her evidence in any balanced or neutral way. She seemed defensive in the manner in which she answered questions on cross-examination. While her demeanour may have reflected her impatience with the lengthy and repetitive cross-examination, the sometimes hostile manner in which she gave her evidence appeared to veer into advocacy. Her *ad hominem* attack on Dr. Cameron at the commencement of the cross-examination detracted from any suggestion of neutrality.

[57] Generally, Dr. Cameron was a more neutral, and therefore credible, witness.

[58] However, my assessment of the opinions is primarily based on the content of the reports and the basis on which the experts reached the conclusions they did.

[59] The difference in the diagnoses revolved primarily around the temporal relationship between the direct or indirect force to the head and the onset of the confusion or disorientation. Dr. Cameron’s criteria does not directly reference a specific timing for the onset of confusion; Dr. Gupta’s criteria expressly references “immediate transient” concussion as required element for a MTBI diagnosis.

[60] In that regard, it is worth noting that although Dr. Gupta set out the diagnostic criteria on which she relied directly in the body of her report, she did not include any reference to the more specific authority from which that criteria was drawn. That information was first disclosed during her cross-examination. While Dr. Gupta did not stray from the diagnostic criteria embodied in her report, her failure to reference the authority left Dr. Cameron with limited ability not only to respond to her analysis, but to defend his.

[61] Ultimately, however, the distinction is of no matter to Dr. Cameron's diagnosis. He was satisfied that Ms. Polak did suffer from immediate transient confusion both at the scene of the accident. In addition to her self-reported state of daze and confusion, Dr. Cameron emphasized the fact that she could not remember the drive to her husband's office after the accident as evidence of that "immediate transient" confusion.

[62] Although Dr. Gupta was able to point to several indicia that Ms. Polak was not confused / disoriented at the accident scene (e.g., she obtained information from the defendant driver and was able to drive to her husband's office), she was not aware of some of the other factors on which Dr. Cameron relied. Most notably, Dr. Gupta did not know that Ms. Polak's recall of the events at the scene and the drive to her husband's office was vague or that her husband described her as dazed and out of sorts on her arrival to his office. Dr. Gupta agreed, as Dr. Cameron opined, that both could possibly be indicative of a concussion.

[63] Based on my assessment that Ms. Polak was a credible witness, I am satisfied that the events transpired at the accident scene as she described. Even if I discount Ms. Polak's subjective assessment of "confusion", I am satisfied that her recall was vague as she describes and, moreover, that she felt dazed. It is significant that neither Dr. Cameron nor Dr. Gupta question Ms. Polak's credibility in describing those events.

[64] On that basis, I am satisfied that Ms. Polak met the diagnostic criteria for MTBI as described by both Drs. Cameron and Gupta.

[65] I am also satisfied that the MTBI was caused by the accident. In reaching that conclusion, I have considered that Ms. Polak had possibly suffered an MTBI as a child and had been involved in a previous motor vehicle accident in less than two years before the accident. However, when asked, Dr. Cameron discounted those events as possible causes for Ms. Polak's current diagnosis. He explained that although people with a pre-existing MTBI are more susceptible to further MTBIs, a child is able to recover more quickly. Having reviewed the medical records in respect of the previous motor vehicle accident, he noted that the symptoms were limited to transient neck pain.

[66] There being no evidence to the contrary, I accept that Ms. Polak suffered the MTBI as a result of the accident.

[67] However, even if Ms. Polak did not sustain an MTBI, according to Dr. Gupta, two of the other possible causes for Ms. Polak's ongoing cognitive symptoms – the soft tissue injuries and ongoing headaches – were sustained as a result of the accident. Although Dr. Gupta also listed sleep apnea as an exacerbating factor for the headaches, there is no evidence that Ms. Polak actually suffered from that condition.

[68] It follows that, whether attributable to a MTBI or not, Ms. Polak's ongoing cognitive symptoms are attributable to the accident. I accept that Ms. Polak continues to suffer from all of those symptoms.

V. Damages

A. Non-Pecuniary Damages

[69] As outlined in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal ref'd [2006] S.C.C.A. No. 100, in assessing non-pecuniary damages, courts must consider the effect of the injuries on the plaintiff's particular circumstances, using factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and

social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle.

[70] In this case, I have found that, as a result of the accident Ms. Polak has suffered from physical and cognitive injuries including primarily ongoing neck pain, weekly, sometimes debilitating, headaches, and cognitive difficulties including dizziness, nausea, concentration issues, memory issues, sensitivity to light and sounds, and irritability. Although there has been improvement in those conditions, she continues to suffer from those impairments, more than seven years after the accident. There is no definitive timeline as to when or if those issues will ever be fully resolved. I accept that is the case regardless of whether the cognitive symptoms are due to an MTBI or some other accident-related cause.

[71] To a lesser extent, Ms. Polak also continues to suffer from mild depression, occasional tingling and numbness in her arms, and intermittent mid and low-back pain.

[72] The injuries have impacted Ms. Polak in all aspects of her life, including at work, recreationally and at home.

[73] I describe the impact of her injuries on Ms. Polak's ability to work and her earning capacity in detail below. For the purposes of this assessment, it is significant that prior to the accident, Ms. Polak had enjoyed her job and took pride in her work as a courier for FedEx. I accept that her accident-related injuries, including both physical injuries and the confusion, negatively impacted her work and resulted in her losing confidence in her own abilities to do that work.

[74] In addition, prior to the accident, Ms. Polak was energetic, positive, hard-working and dedicated to her family. She had a loving and meaningful relationship with both her husband and son, for whom she was the primary caregiver. She was described by her husband as a go-getter and by her son as someone who always wanted to be heard in a room. Other lay witnesses described her as the driving force behind many of their friends' social events and always on the go.

[75] All of the lay witnesses painted a stark picture of Ms. Polak after the accident, who was then struggling, always seemed tired, complained of headaches, would forget conversations, and would constantly have to lie down. Ms. Polak explained that her headaches and sensitivity to noise and light made being in a social setting difficult.

[76] A particularly notable effect of the accident-related injuries was the impact it had on her relationship with her husband and her son, with whom she had previously spent a lot of time and participated in various activities such as going to the movies, travelling, skiing, fishing, biking, and hiking. In addition, she was a regular presence at her son's school and sporting events. She was unable to continue with many of those activities in the period after the accident, to the point where they barely did anything together and got into arguments more often.

[77] Most significant, however, was Ms. Polak's decision to move to Nimpo Lake, leaving not only her job but her husband and son, in order to avoid the overstimulation caused by the noise and lights in the city. While that move has resulted in improvement (but not the resolution) in her condition, it has come at a significant cost. In the first year and a half since moving, she has seen her son only three to four times and has given up her lifelong employment with FedEx.

[78] Ms. Polak refers to numerous decisions with similar injuries in which the court awarded non-pecuniary damages ranging from $135,000 to $175,000. Some of those decisions involve more serious injuries and outcomes than those in the case at bar. For example, in *Harrison v. Loblaws, Inc. (Real Canadian Superstore)*, 2018 BCSC 575, the plaintiff was deemed to be "competitively unemployable". Her prognosis was poor and further improvement was unlikely. The plaintiff in that case was awarded $175,000. Similarly, in *Erickson* v. *Saifi et al.*, 2019 BCSC 1120, the court found that the plaintiff was unlikely to work again. She was awarded $140,000.

[79] In this case, I accept that Ms. Polak left her employment as a result of the accident-related injuries. However, as I set out below, I am not satisfied that she is "unemployable". I have found that she has residual employment capacity.

[80] On the other hand, some of the cases relied on by the defendants involve less serious outcomes than those in the case at bar. For example, despite similar physical and cognitive injuries, not only was the plaintiff expected to be able to complete her studies as a nurse, it was contemplated that she may achieve her pre-accident ambition of becoming a medical doctor. That plaintiff was awarded $120,000 for non-pecuniary damages.

[81] While the plaintiff in *Mascarenhas* v. *Winter*, 2021 BCSC 474 also suffered similar injuries to those sustained by Ms. Polak, she did not miss any significant time from work. She was awarded $85,000 for non-pecuniary damages. As I discuss below, in this case, Ms. Polak was off work for 10 months as a result of the accident-related injuries and was eventually unable to maintain full-time work.

[82] In my view, while not identical of course, the decision in *Pelley* v. *Frederickson*, 2021 BCSC 82 (relied on by Ms. Polak) is most instructive. In that case, the 34-year plaintiff suffered similar injuries to those suffered by Ms. Polak with similar, but lesser, impact. However, to the date of trial, Ms. Pelley had only lost approximately 65 days of work to the accident. Notably, the accident-related injuries did not have the same impact socially and on Ms. Pelley's relationships with her family members. She was awarded $135,000 for non-pecuniary damages (plus $15,000 in non-pecuniary loss for loss of housekeeping capacity).

[83] In light of all of the above, I assess non-pecuniary damages at $145,000.

B. Past Loss of Earning Capacity

1. Relevant Facts and Evidence

a. Pre-accident work history

[84] After immigrating to Canada from Poland and moving to the Vancouver area in 1992, Ms. Polak obtained employment with FedEx, who remained her employer until her retirement in November 2021. After being employed in several other positions with FedEx, she started working as a courier in 1997. She worked in that position on a full-time basis until her son was born in February 2003. After her

maternity leave, Ms. Polak worked part-time, working five hours a day for a total of 30 hours per week.

[85] In 2013, Ms. Polak started a side job as a bookkeeper for a strata company managing money for the strata doing daily, monthly and yearly bookkeeping. During tax season she would prepare the documents for the accountants. She was paid $800 per month.

[86] Prior to the accident, Ms. Polak planned to continue to work part-time and return to full-time work when her son was 17 or 18 years old, in approximately 2020 or 2021. As she aged, she hoped to finish her career in the customs department, which was the highest-paying non-management job at FedEx and less physically demanding than being a courier. She planned to work at least until age 65.

b. Post-accident gradual return to work

[87] Following the accident in June 2016, Ms. Polak was off work for 10 months.

[88] In May 2017, she started seeing Jill Olson, an occupational therapist. Ms. Olson worked with Ms. Polak and FedEx to implement a gradual return-to-work program to ensure that Ms. Polak could safely and durably return to her pre-accident position as a courier driver. Having started back working two hours per day / two days a week, with Ms. Olson's guidance, by September 2017, Ms. Polak had gradually increased to working as a courier five to five and a half hours per day for four days a week.

[89] Throughout the return-to-work process, Fed-Ex worked with Ms. Oslon to accommodate Ms. Polak's return to work at a pace that suited her. In that way, Ms. Olson testified that the employer was "great" to work with and "really supported", something she said was "unusual" for an employer.

[90] Despite the graduated and supervised return to work, Ms. Polak testified that she struggled. At times, she would have to call her supervisor or husband, having been confused and gotten lost en route. The problem would be exacerbated each

time her route would change. During this time, Ms. Polak would return home stressed, mentally exhausted, and unable to complete any of her household functions. Both Mr. Polak and her son testified that she was irritable and not pleasant to be around.

c. The September 2017 workplace accident and return to work

[91] In September 2017, Ms. Polak had a workplace accident in which she damaged her shoulder. As a result of that injury, she was unable to return to her work driving as a courier. In late 2017, she was moved to a sedentary desk job.

[92] In January 2018, Ms. Olson noted that Ms. Polak "has less anxiety now that she is not driving for work, still feels exhausted after work, better than when she was driving and now able to perform [activities of daily living], finds it a relief to arrive home after work and be able to participate in activities (social and [activities of daily living]) my life feels improved, the comfort of my life has improved'". Unfortunately, by the summer of 2018, her shoulder injury had not improved and required surgery for which she was off work for six months.

[93] In February 2019, Ms. Polak returned to work at FedEx, earning the same pay she had previously, but in a part-time light duty job that had been created for her doing data entry. While working in that position, in the fall of 2019, Ms. Polak began an online introduction course for customs training. When the data entry job ended, she was offered, and accepted, a full-time position working as a customs clerk in Richmond, working in the Global Trade Services division of FedEx. She started that position in approximately March 2020.

[94] At the same time, Ms. Polak quit the bookkeeping business. She testified that she had been making mistakes and she did not feel able to work a full-time job with a one-hour commute to and from work and maintain bookkeeping as a side job.

[95] The customs clerk job was primarily desk work however Ms. Polak found being on the computer aggravated her dizziness and she became more confused and tired, sitting for long hours made her neck pain worse, she made repeated "silly"

mistakes, and was having to take time off work. After work, she could not function at home, she was tired and mentally exhausted. Given her level of exhaustion, she described not having a life at all.

[96] Nonetheless, she liked the people she worked with and the pay was good. With her supervisor's encouragement, she had started a course in September 2020 so that she could get her broker licence which would allow her to apply for a better-paying position. She completed that 10-month course in September 2021, all while continuing to work her full-time hours.

[97] However, in 2021, she started missing work. Ms. Morin's records indicated that in a 12-month period, Ms. Polak was absent for almost 64 hours. Ms. Polak recalled significantly more absences. However, Ms. Morin agreed that the absences were beyond what would normally be allowable by the FedEx policy.

d. Retirement

[98] In late November 2021, Ms. Polak retired from her employment with FedEx. She explained that she was unable to handle her life and work with the way her symptoms were affecting her. She would come exhausted and have to lie down and rest, leaving no time or energy for a life outside of work. As a result, she testified that her relationship at home had deteriorated such that work was no longer worth it. She retired in the hopes of being able to reconnect with her family and find some semblance of enjoyment of life.

[99] Although no part-time jobs were available in the customs department at the time, they did become available from time-to-time.

2. Legal Framework

[100] A claim for what is often described as past wage loss is really a claim for past loss of earning capacity. Compensation for past loss of earning capacity is determined 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] 2 S.C.R. 477, 2003 S.C.C. 53 (CanLII) at para. 49.

[101] The burden of proof of actual past events is a balance of probabilities. However, an assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. They will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

3. Discussion and Analysis

a. June 28, 2016 (date of accident) to April 30, 2017 (graduated return to work)

[102] The defendants concede that the 10 months Ms. Polak was off work from the date of the accident on June 28, 2016 to approximately May 1, 2017 was attributable to the accident-related injuries.

[103] Curtis Peever, an economist, prepared a wage loss report on behalf of the plaintiff. Based on Ms. Polak's previous earnings, he estimated that Ms. Polak's gross loss of earnings in that 10-month period is $29,928. The defendants accept that calculation.

May 1, 2017 (graduated return to work) to November 31, 2021 (retirement)

[104] Ms. Polak does not make any past wage loss claim for the period commencing with her graduated return to work on May 1, 2017 to her retirement in November 2021, including for the time missed due to her workplace accident on September 26, 2017 or for the fact that she gave up her bookkeeping job.

December 1, 2021 (retirement) to December 4, 2023 (date of trial)

[105] Ms. Polak testified that had it not been for the accident, she would have continued to work until the age of 65 in 2029. I accept that is the case. Instead, she retired in 2021.

[106] Arguing that the accident-related injuries forced her to retire when she did, Ms. Polak claims the full amount she would have earned as a customs clerk from the date of her retirement on December 1, 2021 to the date of trial. Adjusted for inflation, she claims $61,970 for 2022 and $59,359 for 2023 (January 1 to December 4), for a total past wage loss claim for that period of $121,329. Deducting the $319 she actually earned results in a claim of $121,010.

[107] As Ms. Polak argues, to succeed on her claim for post-retirement wage loss, she does not have to prove that she had to retire when she did; she only has to prove that her decision to retire was a reasonable one: *Riley v. Ritsco*, 2018 BCCA 366 at para. 83.

[108] The defendants concede that the accident-related injuries prevented Ms. Polak from working full-time as a customs clerk as she would have done had it not been for the accident. However, they argue that she has failed to prove that leaving the workforce altogether, rather than seeking part-time employment or some other form of accommodation from her employer, was reasonable. They say it was not.

[109] There is merit to the defendants' argument.

[110] It is significant that Ms. Polak's decision to retire was made without consultation with any medical professionals and without making any inquiries or exploring the possibility of other accommodations that her employer may have provided.

[111] Notably, having assessed Ms. Polak within 18 months of her retirement, Dr. Cameron did not conclude that she was permanently or totally disabled from

working. While he suggested that part-time work may be a source of stress for some people, on cross-examination, he agreed that he would have recommended that Ms. Polak consider taking part-time work instead of leaving her job.

[112] In fact, after her return from shoulder surgery in February 2019, Ms. Polak was able to work 20 to 22 hours per week in the sedentary position that was created for her. There is no medical evidence to suggest that was not sustainable. To the contrary, in addition to the part-time work, Ms. Polak took the initiative to commence an online training course in anticipation of obtaining work in the customs department. Having worked part-time for approximately one year, Ms. Polak applied for a full-time position.

[113] Given that history, and with no medical evidence to support a wholesale withdrawal from the workforce, I am unable to conclude that Ms. Polak's decision to retire without exploring the possibility of part-time work in November 2021 was reasonable. Notably, Ms. Morin confirmed that, although not available at the time, part-time positions are available in the customs department.

[114] Even if part-work was not available, Ms. Morin confirmed that other accommodations or adaptive aids were. Having been the recipient of her employer's supportive accommodation when she gradually returned to work after the accident, Ms. Polak should have known that would likely be the case. Nonetheless, she failed to make inquiries about the possibility of accommodation before deciding to leave the workforce altogether.

[115] Without having taken any steps to inquire about the possibility of part-time work or obtaining some other form of accommodation, both of which had previously assisted Ms. Polak return to work, Ms. Polak has failed to prove that her decision to leave the workforce in November 2021 was reasonable.

[116] Notwithstanding that conclusion, I accept, as Ms. Polak argues and as the defendants concede, that the negative effect that full-time work had on her home life, including the relationship with her husband and her son, made it reasonable to

forego full-time employment. However, given her sympathetic and accommodating employer, Ms. Polak's history of working part-time, and there being medical evidence regarding any total disability, it would be unfair to visit the whole of her decision to leave the workforce completely on the defendants.

[117] Based on the 20 to 22 hours per week that Ms. Polak was able to work prior to accepting the full-time position, I assess that 50% of the past post-retirement losses are attributable to the accident-related injuries. Based on Mr. Peever's estimate, that amounts to $60,505.

4. Summary of Past Wage Loss

[118] I find that Ms. Polak has suffered a total gross past income loss of $90,433 ($29,928 + $60,505).

[119] However, an award for that past wage loss is limited to the person's net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98. Deducting 25% for taxes and EI premiums results in a net past wage loss of $67,824, rounded to $70,000.

C. Future Loss of Earning Capacity

1. Legal Framework

[120] It has long been established that to prove entitlement for a loss of earning capacity, a plaintiff must demonstrate both (a) an impairment to their earning capacity, and (b) that there is a "real and substantial possibility", and not "mere speculation", that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 11, 31–32 [*Perren*].

[121] In the trilogy of *Dornan v. Silva*, 2021 BCCA 228, *Rab v*. *Prescott*, 2021 BCCA 345 [*Rab*], and *Lo v. Vos*, 2021 BCCA 421 [*Lo*], the Court of Appeal re-stated the approach to assessing claims for loss of future earning capacity by setting out a three-step analysis. In *Rattan v. Li*, 2022 BCSC 648 at para. 148, Justice Horsman, then of this Court, summarized that analysis as follows:

> (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?;
>
> (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?; and,
>
> (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[122] As the final step of the analysis, the court must consider whether the award of damages is "reasonable and fair": *Lo* at para. 117.

2. Discussion and Analysis

[123] Regarding the first step, the Court in *Rab* stated:

> [29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies…

[124] In my view, this is such a case. Although I have concluded that Ms. Polak has some residual capacity to work, I am satisfied that the injuries she sustained have resulted in a decrease in her capacity to work full-time. That decreased capacity has extended to the date of trial.

[125] I am also satisfied that her decreased work capacity creates a real and substantial possibility of a pecuniary loss. Had it not been for the accident, Ms. Polak would have been able to sustain her full-time hours working in the customs department. I have found that the accident-related injuries likely limit her to part-time work. The difference between the income she would have earned working full-time hours and the income she would earn working part-time hours has resulted, and will continue, to result in a pecuniary loss. As Ms. Polak has incurred that loss, the possibility is more than speculative. It is real and substantial.

[126] The second step of the analysis has been met.

[127] The only remaining issue is the value of that possible future loss.

[128] There are two possible approaches to assessing loss of future earning capacity: the "earnings approach" and the "capital asset approach": *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133, citing *Brown* and *Perren* at paras. 11–12.

[129] The earnings approach will generally be more useful when the loss is easily measurable, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate the plaintiff's future earning capacity: *Perren* at para. 32. By contrast, where the loss is not measurable in a pecuniary way, the "capital asset" approach is more appropriate: *Perren* at para. 32.

[130] In this case, Ms. Polak has an earnings history against which one can measure possible future losses. However, past earnings are only one part of the equation. In *Kim* v. *Baldonero*, 2022 BCSC 167 at para. 87, Justice Horsman set out the central task of the court in assessing future loss as follows:

> While the award [for future loss] is an assessment of damages, not a calculation, the award nevertheless involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: [*Dornan* at paras. 156–157].

[131] The issue in this case is the limited evidence regarding Ms. Polak's likely "with accident" earnings. Specifically, there is no evidence from a medical practitioner or an occupational therapist regarding how many hours would realistically be sustainable for Ms. Polak given her post-accident condition or the long-term prognosis of her injuries and their effect on her capacity. Without that evidence, it is difficult to quantify her likely "with accident" earnings so as to assess her future loss of earning capacity. However, it is not impossible.

[132] As noted, in the one year prior to taking the full-time position in the customs department, Ms. Polak worked 20 to 22 hours a week, or approximately half of the full-time hours, in a sedentary position. There is no evidence that she took any

significant amount of time off during that period. In fact, while working part-time, she also took an online class, for which she worked weekends to complete.

[133] In my view, that Ms. Polak maintained a half-time sedentary job for a year is some evidence on which to ground an assessment of her future wage loss.

[134] I have accepted there is a real and substantial possibility that, but for the accident, Ms. Polak would have worked full-time hours in the customs clerk position to age 65, earning approximately $62,000 a year. Assuming her “with accident” earnings would be half of the amount results in a yearly loss of $31,000 for almost six and a half years from the date of trial (December 4, 2023) to Ms. Polak’s 65th birthday (April 16, 2029). Using Mr. Peever’s income multipliers, the present value of that loss for that period is $157,976.[1]

[135] (I pause to note that although Ms. Morin testified that Ms. Polak was “absolutely” a good fit for the higher-paying customs broker position, there was no evidence that she would have obtained that position or when. In my view, there is no basis on which to conclude there is any real or substantial possibility that Ms. Polak would have become a customs broker in the absence of the accident.)

[136] Returning to the assessment, it is notable that Mr. Peever’s multipliers include a survivability contingency, but do not include any “risk” or “choice” contingencies to account for the possibility of labour force non-participation, unemployment, or part-time work (risk contingencies) or that Ms. Polak may have chosen to leave the work-force or work less than full-time (choice contingencies). Mr. Peever testified that in this case, the risk of forced labour-force non-participation and unemployment is approximately 7% (as I have contemplated that Ms. Polak would have worked on a part-time basis, there is no basis on which to include the contingency for part-time work). Adjusting Ms. Polak’s possible future loss for those contingencies results in a market risk-adjusted loss of approximately $146,917 ($157,976 x 93%).

[1] $31,000 x ($5,096 / $1,000) = $157,976

[137] Mr. Peever was not asked to provide the appropriate deductions for choice contingencies. However, since the course of future events is unknown, 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* at para. 29.

[138] In this case, I have made a number of assumptions, both in respect of Ms. Polak's possible "with accident" earnings and her "without accident" earnings. The following assumptions are of note:

a) Ms. Polak would have worked to the age of 65. However, given her son's graduation from high school in June 2021 and the sale of a rental property in January 2022, it is possible that she may have chosen to retire prior to her 65th birthday in 2029. In that case, the assessment may be too high;

b) But for the accident, Ms. Polak would have worked on a full-time basis. While she testified that it was her intention to do so once her son graduated from high school in 2021, she had not worked full-time since her son was born in 2003. I cannot discount the possibility that she may have chosen to continue working part-time even after her son's graduation;

c) But for the accident, Ms. Polak would have remained employed as a customs clerk. Although I am unable to conclude that the evidence discloses a real and substantial possibility that she would have obtained the higher-paying customs broker position, I cannot discount that possibility on this analysis. In that case, the assessment may be too low; and

d) There would be no change in Ms. Polak's "with accident" condition. Of course, it could improve or it may get worse. However, at the time of trial, Ms. Polak was waiting for a nerve ablation as a possible means to resolve or diminish her neck pain. Any abatement of that pain could increase her "with accident" capacity. Given the procedure, the assessment may be too high.

[139] Noting that Mr. Peever's multipliers do not incorporate statistical allowances for choice contingencies and weighing the above case-specific contingencies, in my view, the possible future wage loss should be discounted by 20%, resulting in an assessment of wage loss of $117,533 ($146,917 x 80%). Adding 12.5% for lost non-wage benefits results in a total loss of future wage loss of $ 132,224 [$117,533 + ($117,533 x 12.5%)], rounded to $135,000.

[140] Having taken into account both the positive and negative contingencies, I consider that outcome to be fair and reasonable in the circumstances.

D. Cost of Future Care

[141] To be entitled to an award for the cost of future care: (1) there must be a medical justification for the claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 (S.C.) at 84, 1985 CanLII 179, aff'd 49 B.C.L.R. (2d) 99 (C.A.), 1987 CarswellBC 450.

[142] The purpose of the award for costs of future care is to restore the injured party to the position they would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Pang v. Nowakowski*, 2021 BCCA 478, at para. 56 [*Pang*], citing *Quigly v. Cymbalisty*, 2021 BCCA 33 at paras. 43 [*Quigly*].

[143] An award for a future care cost must have medical justification and be reasonable, but it is not necessary for a physician to testify to the medical necessity of each individual item of care claimed: *Quigly* at para. 44. As set out in *Pang* at para. 57, the court must also be satisfied that:

a) the plaintiff would, in fact, make use of the particular care item;

b) the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and

c) there is no significant overlap in the various care items being sought.

[144] As the court also noted at para. 58 of *Pang*:

> Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: *Shapiro* at para. 51; *Krangle* at paras. 21–22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245–248, 1978 CanLII 1.

[145] The award should reflect a reasonable expectation of what is required to put the plaintiff in the position they would have been in but for the accident. The assessment is an objective one, based on the evidence, and must be fair to both parties: *Pang* at para. 58.

[146] Because damages for cost of future care are a matter of prediction, once the damages for future care are determined, an adjustment can be made for the contingency that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[147] In this case, Ms. Polak has claimed the cost of Botox injections and Tylenol 3s, both to manage her headaches as well as for massage therapy to alleviate her neck pain. The total claim is $14,915.

[148] The defendants argue that with the exception of Dr. Gupta's suggestion for alternative medications, there is no medical justification to support those claims. They oppose the full amount of the claim.

Botox

[149] As Ms. Polak suggests, Dr. Cameron does refer to Ms. Polak as a "candidate" for Botox injections to treat her continued headaches. However, he did so for the first time in his response report, without being responsive to anything contained in Dr. Gupta's report. His evidence is not admissible. In any event, he did not make any

specific recommendations, noting only that “most patients” require between 100 and 200 units on a “q.3” monthly schedule. He did not make any recommendation for the duration of that treatment or how many treatments Ms. Polak would require, deferring instead to a neurologist or physiatrist qualified in the therapy.

[150] In my view, there is insufficient medical evidence to justify this cost.

Tylenol 3

[151] Ms. Polak also claims $515 for the cost of Tylenol 3s, a medication that was prescribed immediately following the accident and that has consistently provided some relief to Ms. Polak. Given that Ms. Polak continues to suffer from the accident-related headaches, this claim is appropriate.

[152] Dividing this cost over the next 25 years, results in an annual cost of approximately $20, or $500 for 25 years. The present value of that amount is $390.46 [2], rounded to $400.

Massage Therapy

[153] Ms. Polak claims $10,400 as the cost for massage therapy eight to 10 times a year for 20 years at a cost of $65 per treatment. Like the Tylenol 3s, Ms. Polak has consistently engaged in this form of treatment which has provided some temporary relief for her neck pain. Although she had received massage therapy prior to the accident, I accept that she did so because the cost was covered by her employer. It is not a cost that she would have incurred on her own regardless of the accident.

[154] I am satisfied that Ms. Polak will continue to benefit from this form of treatment for 20 years, to age 79. It is an appropriate future care item. However, given the length of time for which this item is claimed, it is appropriate to make an adjustment for the contingency that it may note be used as frequently or for the duration claimed.

[2] I have used the prescribed discount rate of 2.0% *pursuant to s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253* [*LEA*] and the Present Value Tables in CIVJI: $20/year x 19.5235 = $390.47.

[155] In that regard, I firstly note that Ms. Polak is scheduled to receive nerve ablation in the hopes of relieving her neck pain. If that is successful, she may not require this modality of treatment as frequently or for the duration that this claim would provide. Secondly, Ms. Polak currently travels from Nimpo Lake to Vancouver for massage treatments. It is conceivable that she may not travel as much or at all, particularly as she gets older.

[156] In my view, an award for the future cost of massage treatments six times a year for 16 years – to age 75 – accounts for those contingencies. At $65 per session, that amounts to $6,240 (6 times a year x 16 years x $65), the present value of which is $5,295 [3], rounded to $5,300.

Summary of Future Care Costs

[157] To summarize, I award future care costs for Tylenol 3s ($400) and massage therapy ($5,300), for a total present value cost of $5,700.

E. Special Damages

[158] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* (S.C.) at 78.

[159] In this case, Ms. Polak has claimed special damages totalling $15,805. Of that amount, the defendants consent to pay $13,381.59. The remaining items in dispute are for: prescription CBD oil ($1,179.92), the amounts billed for massage therapy in excess of $80 per session ($750); and amounts Ms. Polak paid for extended health and dental coverage in the five months post-accident ($556.92).

[3] I have used the prescribed discount rate of 2.0% *pursuant to s. 56 of the LEA* and the Present Value Tables in CIVJI: $390/year x 13.5777 = $5,295.30.

CBD Oil

[160] Of those disputed items, the primary issue relates to the claim for the cost of CDB oil. While the defendants concede that this treatment resulted in some improvements to Ms. Polak's pain, they argue there is no medical evidence before the Court to suggest it was an appropriate treatment. Referring to the decision in *Sawires v. Paris*, 2021 BSCS 240 at paras. 129-130 [*Sawires*], they argue that such medical evidence is required to support this claim.

[161] In my view, the decision in *Sawires* is distinguishable. In that case, although the court accepted that cannabis had been helpful in providing the plaintiff with pain relief, it noted that the plaintiff's physicians had not recommended its use. Rather, cannabis appeared to be a self-help treatment undertaken on the instigation of the plaintiff himself without medical advice. Referring to the decision in *Jacobi v. Monteith*, 2020 BCSC 218 at para. 37, the court concluded that it would not be appropriate to take judicial notice of the medical benefits of a cannabinoid cream.

[162] This case is different. Here, the medical advisors at the concussion clinic recommended that Ms. Polak get a prescription for CBD oil from her family physician as a means to alleviate her concussion symptoms. Having received that prescription, she registered it with a company that was authorized by the federal government to dispense the oil. As noted, she testified that the CBD oil did provide some relief.

[163] In those circumstances, having received the recommendation from the concussion clinic and being prescribed the CBD oil by her family physician, I have no difficulty concluding that Ms. Polak's use of the CBD oil was medically justified and was reasonable. The full amount of that cost ($1,179.92) is compensable as a special expense.

Massage / Multidisciplinary Treatments

[164] While the defendants do not oppose covering the cost of massage provided by Claudia Lee, they argue that the amount claimed ($130 per session) is too high. They agree to pay $80 per session.

[165] However, Ms. Polak testified that the treatments she received from Ms. Lee were more than just massage, but included multiple disciplinary treatments including facia massage, traction, and acupuncture. Each treatment was over one and a half hours in duration. I accept that is the case. I am satisfied that the amount claimed comprised more than just massage for which the defendants are willing to pay $80 per session and, moreover, that the additional treatments assisted in Ms. Polak's pain management.

[166] The full amount of this claim ($750) is compensable as a special expense.

Extended Heath Payments

[167] Ms. Polak paid $556.92 for extended health and dental coverage in the five months that she was off work immediately after the accident. Had it not been for the accident, that amount would have been paid by her employer. This amount ($556.92) is compensable to restore Ms. Polak to the position she would have been in had the accident not occurred.

Summary of Special Expenses

[168] To summarize, in addition to the $13,318.59 the defendants agree to pay, I award special damages for out-of-pocket costs incurred by Ms. Polak as follows: CBD oil ($1,179.92), massage and multidisciplinary treatments ($750), and extended health payments ($556.92), for a total special damages award of $15,805.43.

VI. Summary of Damages

[169] To summarize, I award damages as follows:

Non-pecuniary damages	$145,000
Past loss of earning capacity	$70,000
Future loss of earning capacity	$135,000

Cost of future care	$5,700
Special damages	$15,805

[170] The amount of the judgment is subject to deductions for amounts that may have already been paid and for post-trial deductions pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.BC. 1996, c. 231.

VII. Costs

[171] If the parties wish to make submissions on costs, they may do so in writing within 30 days of these reasons.

[172] If I receive no submissions on costs, I award costs to Ms. Polak at Scale B.

Ahmad J.