IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Roberts v. Colbourne,*
2024 BCSC 1720

Date: 20240917
Docket: M145935
Registry: Vancouver

Between:

Jennifer Georgina Roberts

Plaintiff

And

Joel Kenneth Colbourne

Defendant

- and -

Docket: M187550
Registry: Vancouver

Between:

Jennifer Georgina Roberts

Plaintiff

And

The Minister of Public Safety and Solicitor General

Defendant

Before: The Honourable Justice S. Ramsay

Reasons for Judgment

Counsel for Plaintiff:	S.T. Cope
Counsel for Joel Colbourne:	R.G. Dempsey M.D. Beharry
Counsel for The Minister of Justice:	E.C. Watson
Place and Date of Trial:	Vancouver, B.C. June 10-14, 17-20 and 24-28, 2024
Place and Date of Judgment:	Vancouver, B.C. September 17, 2024

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INTRODUCTION

[1] The plaintiff was a passenger in a vehicle that was rear-ended by the defendant Joel Kenneth Colbourne ("Mr. Colbourne") on September 17, 2012 (the "First Accident"). She was twenty years old at the time. The plaintiff had not recovered from injuries suffered in the First Accident when, on August 18, 2017, she was in car accident involving a vehicle driven by an RCMP Constable (the "Second Accident").

[2] Liability is admitted for both accidents (together, the "Accidents"). The plaintiff seeks damages for her non-pecuniary loss, loss of past and future earning capacity, loss of housekeeping capacity, cost of future care, and special damages.

[3] The defendants acknowledge that the plaintiff has a chronic injury caused by the First Accident. They disagree on the effect of the Second Accident. The defendant Minister of Public Safety and Solicitor General (the "Minister") says the Second Accident did not cause any injury or, in the alternative, says that any injury caused by the Second Accident is divisible from the First Accident injuries. Mr. Colbourne says the Second Accident caused some injuries that are divisible and some that are indivisible from those caused by the First Accident. Both defendants dispute the severity and functional impact of the plaintiff's injuries.

[4] The plaintiff's credibility and reliability are in issue, as is her alleged failure to mitigate her losses by not pursuing treatment for her injuries. Further complicating the assessment of damages is the plaintiff's diagnosis with Rheumatoid Arthritis ("RA") in 2018, which was not treated until 2022.

FACTS

Plaintiff's pre-accident condition

[5] The plaintiff graduated from high school in 2010. By all accounts she was an active person both in and outside of school. She went to the gym and enjoyed a variety of activities, including hiking, reading, and hanging out with her friends. She was always on the go and liked being a busy person. She was healthy and had no

physical restrictions in her body or activities. She contributed to household work such as cleaning and cooking, and would sometimes help with her mother's paid housecleaning work.

[6] As a student the plaintiff was interested in vocational pursuits and not academics. She testified that she was "more artistically inclined" and "artistically minded", "not math minded". She developed a keen interest in cooking as a teenager and took a culinary program for high school credit. During high school and continuing after graduation the plaintiff worked in several restaurant kitchens, ranging from pub food to fine dining. She considered pursuing a career as a chef, but ultimately decided it was not a good fit because she experienced it to be a very male-dominated profession.

[7] At the time of the First Accident the plaintiff was working part time as an assistant at a hair salon called Studio Rouge. She was thinking about her future and considering potential career options. She had looked into the qualification requirements to become a dental assistant or hygienist, but had not taken any further steps in that regard. She was planning a move to Newfoundland to join her fiancé, Joshua Roberts, who lived there and worked in his family's signage business.

First Accident – September 17, 2012

[8] The First Accident occurred just after the plaintiff's twentieth birthday, a month or so before she was due to leave for Newfoundland. The plaintiff, her sister, and her mother were driving through Abbotsford; their vehicle was stopped and waiting to merge into traffic when it was rear-ended by Mr. Colbourne. The impact was unexpected and pushed their vehicle forward quite a bit. The plaintiff was seated in the right rear passenger seat and was wearing her lap and shoulder belt. Her head was flung forward and then came back. She was initially in shock, and then immediately in a lot of pain.

[9] After the collision both vehicles pulled into a nearby parking lot to exchange information. The plaintiff's mother then drove them home, stopping on the way to pick up the plaintiff's other sister from school. At home that evening the plaintiff

recalls experiencing pain in her neck, shoulders, and chest. She took over the counter pain medication and went to bed very early. The next day she woke up feeling very stiff and in pain. She was able to attend work as scheduled after the First Accident, but cannot recall what day that was; she recalls being in a lot of pain and asking for permission to leave early.

[10] The plaintiff first received medical treatment on September 24, 2012, when she attended at her family doctor's office. Her complaints at the time included neck pain, difficulty sleeping due to pain, and a sore upper and lower back. Her doctor prescribed over the counter pain medication and recommended physiotherapy, light duties for two weeks, and a follow-up in two weeks. She was also sent for x-rays but says she did not review the results with her doctor; instead, she purchased a CD of the results with a plan to follow up with a chiropractor upon arrival in Newfoundland. The plaintiff saw her doctor again on October 10, 2012, still complaining of neck and back pain. During that visit the plaintiff asked if there was any issue with her planned travel to Newfoundland; her doctor expressed no concerns.

[11] The plaintiff did not attend physiotherapy as recommended by her family doctor. She does not remember receiving the physiotherapy referral. She did complete intake forms with a chiropractor in BC before leaving for Newfoundland, but did not receive any treatment.

Newfoundland – Fall 2012 to Summer 2016

[12] The plaintiff moved from BC to Newfoundland around October 15, 2012. At the time she was still experiencing pain in her neck, upper back, lower back, shoulders, both ankles, left arm, and chest, as well as headaches. The plaintiff described the long flight to Newfoundland, which included a layover, as miserable. She was uncomfortable and it was very difficult to sit through the flight.

[13] After arriving in Newfoundland, the plaintiff was in significant pain. Her shoulders, neck, and the top part of her arms were so stiff and painful that she required assistance to change her clothes.

[14] On October 19, 2012, the plaintiff saw a chiropractor for treatment. The plaintiff says the chiropractor was very concerned when he reviewed the x-rays she had brought from BC. He refused to treat the plaintiff and said she should go directly to the hospital to be assessed. The plaintiff's mother-in-law, who had driven the plaintiff to the appointment and was waiting in the parking lot, immediately drove the plaintiff to the hospital. At some point Mr. Roberts also arrived at the hospital.

[15] The plaintiff had new x-rays taken at the hospital. The clinical records indicate that the emergency room doctor reviewed the plaintiff's x-rays with radiology and there were no concerns. The only note under the plaintiff's discharge instructions is for a physiotherapy referral, which the plaintiff says she has no memory of receiving.

[16] Despite this, the plaintiff and Mr. Roberts each testified that the attending emergency room doctor showed them the new x-ray film, pointed out an area of the plaintiff's neck on the film, and said there was a fracture. The plaintiff testified that when she asked what could be done, the doctor said her only option was a very painful surgery with a long recovery process. She testified that the doctor used the words "ticking time bomb" and told her that she would have to be wary for the rest of her life. She has no memory of the doctor prescribing any treatment. Her evidence is that the doctor told her to go about her daily activities but cautioned her to be very careful. The plaintiff and Mr. Roberts recall that it was a short conversation—Mr. Roberts estimated five minutes. Their evidence is that they left the hospital under the impression that the plaintiff had a neck fracture and there was nothing that could be done about it.

[17] The plaintiff testified that she experienced neck, shoulder, and upper back pain every day over the next few years, with no change in her symptoms over time. She had frequent throbbing headaches, which she felt were brought on by the pain in her neck. She had difficulty sleeping because of the pain. She took various over the counter medications to manage her pain, but did not find them to be very effective.

[18] The plaintiff did not pursue any further medical assessment or rehabilitative treatment for her injuries. She believed that treatment was not possible because of her neck fracture. She focused on learning how to adjust her physical movements to minimize her pain. She planned her days based upon the extent of her pain, and could only handle one or two responsibilities each day. She was not active, and she undertook no recreational pursuits other than going for short walks.

[19] The clinical records from this time period reveal that the plaintiff engaged with the medical system very infrequently. She found a local family doctor, Dr. Pittman, but only saw her on a few occasions for reasons unrelated to her injuries from the First Accident. The plaintiff says she told Dr. Pittman about her injuries during the "meet and greet" conversation at their first appointment on February 11, 2013, but this is not recorded in Dr. Pittman's notes. The plaintiff attended the hospital emergency room on two further occasions—once for suspected strep throat, and once after she suffered an avulsion fracture to her ankle after a slip and fall on ice. The plaintiff says the fall did not aggravate her injuries from the First Accident.

[20] The plaintiff and Mr. Roberts married on May 25, 2013. She recalls the wedding day being difficult because she was tired and in a lot of pain. The plaintiff and Mr. Roberts moved in together after the wedding. The plaintiff's ongoing pain meant that Mr. Roberts assumed responsibility for much of the housework, with the plaintiff performing only light tasks such as wiping down surfaces and pulling up the bedsheets. Cooking was difficult; the plaintiff relied on easy, prepared foods. She testified that her pain was so bad that some days she could not even use a manual can opener.

[21] The plaintiff did not pursue any schooling or workplace certification in Newfoundland. She testified that she had to adjust her career plans because she was in pain every day and could not handle a hands-on, demanding job. She looked for something that could accommodate her injuries and tried different jobs, working part time as a cashier in a café, as a care facility aide, and at a call centre. She also

worked on occasion for Mr. Roberts' family business, where she would help with organizing and cleaning the signage letters.

[22] In 2015 the plaintiff started a new job as a receptionist at a physiotherapy clinic. The plaintiff could not recall how many hours or days per week the job required, but agreed that she worked the hours that were offered to her. She liked this job because her employer was accommodating of her ongoing symptoms. The plaintiff worked at the physiotherapy clinic until summer 2016, when she and Mr. Roberts decided to move to Kamloops, BC to join her older sister who had relocated there with her husband.

Kamloops – Summer 2016 to Second Accident

[23] The plaintiff's pain symptoms, headaches, and sleep disruption continued after moving to Kamloops. She avoided any physical activity that she knew would cause aggravation and increase her pain. The plaintiff testified that she was adjusting to being in daily pain and still learning how to work around the issues in her body. The baseline pain level was six out of ten, increasing to eight if extremely aggravated. She continued to use over the counter pain medication, as well as muscle rubs, to treat her symptoms.

[24] Upon arriving in Kamloops, the plaintiff and Mr. Roberts stayed with the plaintiff's sister and her husband for around a year, possibly longer. The men were responsible for household cleaning and the women were responsible for meals. While the plaintiff helped, her sister took the lead with meal planning and grocery shopping. The plaintiff could not provide much assistance because she did not want to aggravate her pain symptoms. Eventually, the plaintiff and Mr. Roberts moved into their own residence. She continued to rely heavily on both her sister and Mr. Roberts to complete household chores, including heavy cleaning, grocery shopping, and cooking.

[25] The plaintiff took some time out of the workforce to settle into life in Kamloops. In November 2016 she took an on-call position assisting with meals at a retirement home. Her evidence is that she took the job because it was what she was

able to find, not because it was a job she wanted. The position was casual; she worked approximately ten hours a week. She was offered more regular part-time hours, but she declined because she felt her body pain would not allow it.

[26] The plaintiff experienced difficulty finding a family doctor after moving to Kamloops. She finally found a doctor accepting new patients in nearby Logan Lake, Dr. Wahbi. The plaintiff's first medical appointment after returning to BC was her initial "meet and greet" appointment with Dr. Wahbi on March 20, 2017. At that appointment the plaintiff told Dr. Wahbi about her ongoing pain, but there is no evidence that they discussed any further medical assessment or treatment for those symptoms.

[27] In May 2017 the plaintiff said she learned that there was in fact no indication of a neck fracture in her medical records. She said it was only then that she realized that she could pursue treatment for her ongoing pain symptoms. The plaintiff thought chiropractic care would be too much for her level of pain. She instead contemplated pursuing physiotherapy or acupuncture. Her evidence is that she started to look into physiotherapy clinics, but had not yet decided on one before the Second Accident in August 2017.

Second Accident – August 18, 2017

[28] The plaintiff described the impact of the Second Accident as "a lot bigger" than the First Accident. The constable's vehicle struck the plaintiff's car on the driver's side; Mr. Roberts was driving and the plaintiff was in the front passenger seat. The impact was hard enough to spin the plaintiff's car 180 degrees.

[29] Immediately after impact the plaintiff experienced incredible amounts of pain in her neck, shoulders, back, hips, left arm (which had struck the centre console), and ankles. She was taken by ambulance to the hospital, where she was diagnosed with soft tissue injuries and discharged with instructions to follow up with her family doctor.

[30] The plaintiff says that the Second Accident aggravated the pain associated with her First Accident injuries. She experienced level eight pain more often. She also had what she describes as new pain symptoms in her lower back, which, over time, settled into her hips.

[31] Despite the aggravation of her pain symptoms, the plaintiff sought relatively little treatment for her injuries in the months and years following the Second Accident. She attended one acupuncture appointment in August 2017. She had a number of massage therapy sessions in fall 2017, and another four sessions in summer 2019. She has attended physiotherapy intermittently since December 2021. She tried a Pilates session in January 2023.

[32] The plaintiff stopped working at the retirement home after the Second Accident. She had missed shifts because of her pain symptoms and decided that she could not do the job any longer. She received Employment Insurance for about 15 weeks, and when that was no longer available, she looked for a new job.

[33] In November 2017 the plaintiff began working full time, five days a week, as a receptionist at a car dealership, Smith Chevrolet. It was not a demanding job; her duties were very light. She could stand and walk around as needed to manage her pain symptoms. In March 2018 the plaintiff accepted a position as a dental clinic receptionist. She understood that the expectations, duties, and hours would be similar to those at Smith Chevrolet but with higher pay. The dental clinic was not as accommodating; she had to remain stationary all day, which was physically uncomfortable for her. The position did not work out.

[34] The plaintiff was out of work until November 2018, when she was hired as a full-time receptionist at law firm, Morelli Chertkow, to cover a leave. She did well in the position and was kept on permanently to do office administration work. She enjoyed the job and only left in late 2019 because she went on maternity leave. The plaintiff gave birth to her daughter in November 2019. Morelli Chertkow wanted the plaintiff to return to work after her maternity leave, but she declined because the in-office, full-time position did not work around life with her daughter.

Rheumatoid arthritis diagnosis

[35] Independent of both Accidents, the plaintiff developed RA. She first reported symptoms of joint pain and swelling in her hands to Dr. Wahbi in April 2017. She also started to notice that her feet would hurt badly in the morning and it took time to feel comfortable walking around. These symptoms progressed and in late September 2017 Dr. Wahbi referred the plaintiff to a rheumatologist. By that point the plaintiff was experiencing joint pain in her hands and feet that would last all day.

[36] The plaintiff saw a rheumatologist, Dr. Navratil, on January 2, 2018. By then, the plaintiff's symptoms were becoming more apparent. Dr. Navratil confirmed a diagnosis of RA and prescribed Plaquenil, which the plaintiff did not start because she first wanted to research the drug. At a subsequent visit on January 31, 2018, Dr. Navratil asked the plaintiff to start on Plaquenil and also added methotrexate, but the plaintiff did not want to take it because she was concerned about the impact on any future pregnancy.

[37] The plaintiff says she had a bad experience with Dr. Navratil. She felt he was flippant about her medication concerns. She decided to ask her family doctor for a referral to a new rheumatologist. However, she did not do so until September 2021. By then, Dr. Wahbi had left the Logan Lake medical clinic and the plaintiff was seeing a new family doctor at the clinic.

[38] The plaintiff testified that it took some time to find another rheumatologist, because there was no one else practicing in Kamloops. In the meantime, her RA symptoms continued to worsen to the point where she was eventually experiencing serious joint pain in her hands, feet, and elbows. The plaintiff described these symptoms as being quite bad from late 2019 to 2022.

[39] In February 2022 the plaintiff met with a new rheumatologist in Kelowna, BC, Dr. Van Stolk. The plaintiff was opposed to combination drug therapy, and asked to start by trying a single medication. Dr. Van Stolk prescribed hydroxychloroquine, which the plaintiff took but did not tolerate well. As the plaintiff remained resistant to taking methotrexate, Dr. Van Stolk next prescribed sulfasalazine in June 2022,

which proved to be effective. By October 2022 the plaintiff's joint pain had decreased. By May 2023 she could bear weight without pain, but still had persistent pain, stiffness, and swelling in her right elbow.

[40] The plaintiff's evidence is that, with medication and diet adjustments, she had been free of RA joint pain for almost a year as of the date of trial.

Plaintiff's current circumstances

[41] The plaintiff continues to experience chronic pain in her neck, shoulders, upper back, and lower back/hips. She says that she has learned to adjust, because this is now her life. Her daily pain baseline remains at six out of ten. Her ability to manage pain aggravation has improved with physiotherapy and she now experiences aggravated level eight pain less frequently—once every two or three weeks. She continues to take over the counter medication to manage pain symptoms. She started using a muscle rub containing CBD about two years ago and has found that it helps. She tried injections to treat her neck pain and experienced some improved movement and reduced frequency of level eight pain, but she finds the treatments themselves to be quite painful.

[42] Mr. Roberts continues to do most of the family's household cleaning, especially heavier duties like vacuuming and cleaning the bathrooms. The family continues to eat prepared meals that are easy for the plaintiff to prepare or that Mr. Roberts can prepare quickly when he returns home from work.

[43] The plaintiff's chronic pain and associated physical limitations impact how she interacts with her daughter. She testified that she would love to provide her daughter with a sibling, but does not think that is possible given her current condition.

[44] In March 2021 the plaintiff started a new job as a part-time administrative assistant for a bridal hair and makeup business, Cassidy Watt Artistry Collective ("CWAC"). It is a remote position with flexible hours. For the first five months she worked two to four hours per day. Her duties originally included responding to potential client inquiries and managing email traffic. The plaintiff's hours,

responsibilities, and hourly wage have increased over the years, and at the time of trial she was in negotiations to assume a salaried, managerial role with CWAC. She enjoys her work—she says it fulfills a need for creativity and she finds it rewarding to be in a professional setting where people ask for her opinion. Her workday and schedule are flexible and accommodate her childcare responsibilities.

[45] The plaintiff has never obtained her driver's licence. Even before the First Accident, she was anxious about driving and had never progressed beyond a learner's permit. Her anxiety around driving increased after each of the Accidents and in particular after the Second Accident, which was a scary and traumatic experience for her. She is very aware and nervous about the possibility of being in another accident, which extends to anxiety around using public transit. She relies on Mr. Roberts and her sister to drive her places. She would like to try cognitive behavioural therapy to address this but has not yet done so; she is on a waitlist for psychological services.

EXPERT MEDICAL EVIDENCE

[46] The plaintiff tendered evidence from three medical experts: Dr. Maziar Badii, a rheumatologist; Dr. Carlos Nunez, a psychiatrist; and Dr. Aaron MacInnes, a pain management specialist and anesthesiologist.

[47] The defendants did not tender any responsive expert medical evidence.

Dr. Maziar Badii – rheumatologist

[48] Dr. Badii is a rheumatologist with a special interest in spine medicine. He was qualified to give opinion evidence regarding the interplay between physical and soft tissue injuries, arthritis, and associated psychological factors, together with the assessment, treatment, and prognosis thereof. Dr. Badii assessed the plaintiff in person on June 30, 2021. His report is dated August 23, 2021. He has not since seen the plaintiff for further assessment or treatment.

[49] Dr. Badii opines that the plaintiff likely sustained whiplash-associated soft tissue injuries to her neck, shoulders, and back in the First Accident, causing

myofascial pain that had become chronic by March 2017. He opines that the plaintiff likely sustained similar injuries in the Second Accident. He believes the plaintiff's RA diagnosis is likely independent of the Accidents.

[50] In his report Dr. Badii describes the plaintiff as a very complicated case due to the constellation of the two different kinds of pain she was experiencing: mechanical pain symptoms related to the Accidents, and inflammatory pain related to her RA (which was untreated at the time of his assessment). At the time of his report, he diagnosed the plaintiff with central sensitization, chronic pain, and fibromyalgia. He also suggested that the plaintiff may be depressed, and suggested she see a mental health specialist.

[51] Dr. Badii felt the fibromyalgia was predominantly responsible for the diffuse pain that the plaintiff reported in her entire body, and for the plaintiff's low energy, fatigue, and sleep disruptions. He recommended aggressive treatment of the plaintiff's RA, as the condition is known to progress rapidly and would continue to damage joints and potentially cause internal organ damage if left untreated.

[52] Dr. Badii does not believe that the absence of rehabilitative care in Newfoundland changed the plaintiff's long-term prognosis dramatically. He opines that the plaintiff may have experienced better pain control at the time if she had pursued treatments after the First Accident, but that she more likely than not would still have gone on to develop central sensitization and fibromyalgia.

[53] At the time of his report Dr. Badii was unable to opine on the degree to which the Accidents had limited the plaintiff's overall activities, given the significant deficits attributable to her RA symptoms. He felt there was a reasonable chance that if the plaintiff's RA was successfully treated her fibromyalgia could improve, leaving the plaintiff with neck and back pain from her whiplash soft tissue injuries, as well as some residual fatigue, low energy, and low mood symptoms. He states in his report:

> For the fibromyalgia, it is more difficult to predict how well symptoms can improve or not. In my opinion, a portion of her fibromyalgia is secondary to her underlying RA and, therefore, unrelated to the accidents. However, a portion of the fibromyalgia is likely related to the car accidents and to the

> whiplash soft tissue injuries in the neck and back. The only way to know how much of all of her symptoms are due to RA and potentially treatable is to actually initiate treatment (for at least 6-12 months). Once she has been stabilized with her inflammatory rheumatological condition, then any residual symptoms can be reassessed.
>
> [Emphasis added.]

[54] The plaintiff was not reassessed by Dr. Badii after starting treatment for RA.

Dr. Carlos Nunez – psychiatrist

[55] Dr. Nunez was qualified to give expert evidence in the field of psychiatry. He conducted a virtual examination of the plaintiff on March 8, 2022. His report is dated March 30, 2022.

[56] Dr. Nunez diagnoses the plaintiff with:

a) anxiety due to another medical condition;

b) mild, intermittent depression due to another medical condition;

c) specific phobia to driving, caused by the First Accident and exacerbated by the Second Accident; and

d) unspecified trauma and stressor related disorder, caused by the Second Accident.

[57] In Dr. Nunez's opinion the plaintiff's psychiatric symptoms are secondary to her physical injuries and RA, and do not independently impact her occupational capacity as long as her employment does not involve driving. He opines that if the plaintiff's primary medical concerns are not effectively treated, or if they progress with additional impairment, her current psychiatric conditions would more likely than not further impact her function.

[58] Dr. Nunez suggests that the plaintiff would likely benefit from cognitive behavioural therapy to address her anxiety and mood symptoms. He suggests that treatment with an antidepressant may be of additional benefit. In his opinion the

plaintiff's prognosis is moderate to good, contingent on her response to the suggested psychiatric interventions and treatment for her chronic pain symptoms.

Dr. Aaron MacInnes – pain management specialist and anesthesiologist

[59] Dr. MacInnes is a pain management specialist and anesthesiologist. He was qualified to give opinion evidence regarding the assessment and treatment of chronic pain. Dr. MacInnes conducted an in-person assessment of the plaintiff on August 25, 2023. His report is dated September 20, 2023.

[60] Notably, the plaintiff had been undergoing RA treatment for over a year at the time of Dr. MacInnes' assessment. Dr. MacInnes does not diagnose the plaintiff with fibromyalgia or central sensitization; he confirmed in cross-examination that he is qualified to diagnose those conditions.

[61] In Dr. MacInnes' opinion the plaintiff suffers from chronic whiplash-associated disorder affecting the neck and back, with secondary chronic mechanical spine pain, all of which causes pain symptoms in the head, neck, bilateral shoulder girdles, bilateral arms, mid back, and lower back. He also diagnoses chronic myofascial pain syndrome, which contributes to the plaintiff's pain symptoms. Finally, he diagnoses cervicogenic headaches. In his opinion all of these conditions and symptoms are caused by the First Accident and exacerbated by the Second Accident.

[62] Dr. MacInnes also observed mood and anxiety symptoms in the plaintiff. He recommends monitoring and proper management of these symptoms to maintain optimal function and quality of life, but defers further comment to a psychologist or psychiatrist.

[63] Dr. MacInnes recommends a combination of active and passive treatment modalities to manage the plaintiff's symptoms and maximize her function, employment capacity, and quality of life. He suggests that she may benefit from participation in as many recreational, physical, and social activities as possible, even in a modified reduced capacity. He believes that she may need to consider reduced

work hours in the future so that she is able to optimally manage her chronic pain symptoms.

[64] Dr. MacInnes opines that regardless of treatment, the plaintiff's chronic pain symptoms are most likely permanent. He states that she will be prone to flares of her chronic pain symptoms, which will likely impact her ability to function in her daily activities and will limit her ability to participate in caring for her home. He believes the plaintiff will likely require assistance with heavier housework tasks and he recommends support at home so that the plaintiff can instead focus her efforts and energy on tasks that will directly benefit her, such as going to the gym or yoga to maintain her physical conditioning.

CREDIBILITY AND RELIABILITY

[65] In chronic pain cases the court must always be concerned with the reality of the plaintiff's complaints and must carefully assess the evidence of injury where, as here, the medical evidence is reliant on the plaintiff's self-report: *Gee v. Bock*, 2019 BCSC 1348 at para. 36; *Harry v. Powar*, 2018 BCSC 845 at para. 63.

[66] Mr. Colbourne says the plaintiff's evidence is not credible or reliable. Mr. Colbourne emphasizes inconsistences and inaccuracies in the evidence about, among other things, the plaintiff's understanding about the neck fracture, her pain symptoms and physical limitations, events that have occurred since the First Accident, and the plaintiff's career aspirations and interactions with her employers.

[67] The Minister does not question the plaintiff's credibility, but has concerns about the reliability of her evidence.

[68] I have considered the principles relevant to assessing credibility that are discussed in the frequently cited passages of Justice O'Halloran in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357 and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392.

[69] Credibility refers to the veracity of the witness; on the other hand, reliability relates to the accuracy of the testimony and "involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue": *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[70] I found the plaintiff to be a forthright, honest witness who did her best to answer the questions she was asked. She appeared genuinely sad when speaking about her condition and its effect on her life and teared up on several occasions during her testimony. I did not have the impression that she overstated or exaggerated her symptoms.

[71] I do not agree with the Minister's description of the plaintiff as argumentative and evasive throughout her cross-examination. She did have some issues with recall during her direct and cross-examination evidence. However, I do not find that this was the result of any deliberate attempt to deceive or mislead. I find that any inconsistencies in the evidence are most likely a function of the passage of time and the complexity of the plaintiff's medical condition and the overlapping RA diagnosis.

[72] I do not agree with Mr. Colbourne that the plaintiff's and Mr. Roberts' testimony regarding the neck fracture diagnosis is not credible. The plaintiff and Mr. Roberts both presented as unsophisticated in relation to medical matters, but I nonetheless found them to be very sincere in giving their evidence about the neck fracture diagnosis. Nor am I persuaded by Mr. Colbourne's argument that the plaintiff's failure to pursue further medical evaluation or treatment is inconsistent with her believing she had a serious neck fracture. While her inaction may not have been reasonable, something that I will address in my discussion of mitigation, it is consistent with the plaintiff's generally avoidant approach to medical treatment. The evidence shows that she is not someone who frequently seeks medical care, even for more serious medical issues. She declined to take medication and sought no treatment for several years after her RA diagnosis, despite very serious and worsening symptoms. She also did not attend the recommended follow-up with her family doctor after her ankle fracture.

[73] However, I find that the plaintiff's and Mr. Roberts' testimony about the neck fracture diagnosis, while credible, is not reliable. As observed in *Faryna*, "a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken": at 357.

[74] I conclude that the plaintiff and Mr. Roberts are more likely than not mistaken in their memory that the emergency room doctor communicated a neck fracture diagnosis to them. There is no mention of a neck fracture, or even a concern about a possible neck fracture that requires further medical assessment, in the hospital clinical records. Quite the opposite—the clinical records state there are "no concerns" with the plaintiff's x-rays. In my view, it is simply not consistent with the preponderance of probabilities that a doctor told the plaintiff she had a neck fracture and then discharged her without any further assessment or treatment recommendations, and without any record of the diagnosis in the clinical records.

[75] I accept that the plaintiff and Mr. Roberts somehow formed the mistaken but honestly held belief that the plaintiff had a neck fracture. Exactly how that happened is not clear on the evidence before me. However, having concluded that the plaintiff honestly believes she was told she had a neck fracture, I have no concerns about the reliability of her evidence about how that mistaken belief informed her choices and behaviour in the months and years that followed.

[76] I do, however, find that the evidence of the plaintiff and other lay witnesses is not reliable in some other respects.

[77] Mr. Roberts and the plaintiff's sister, mother, and father testified at trial. They presented as credible witnesses who care deeply about the plaintiff and are truly distressed by what she has gone through. However, their testimony very often lacked detail, description, and precision, particularly regarding their observations of the plaintiff's physical condition over time. With the exception of their evidence about the plaintiff's wedding, most of their testimony did not clearly distinguish between the impact of the Accidents and the impact of the plaintiff's RA on her physical condition.

I find that their evidence does not provide a reliable basis for factual findings about the plaintiff's injuries and ongoing symptoms.

[78] Both Mr. Colbourne and the Minister say the plaintiff downplayed her job duties and hours, her functional abilities in the workplace, and the extent to which she is her daughter's primary caregiver and the impact that has on her employment. I agree with that assessment of the plaintiff's evidence on these topics. I find that in general the plaintiff was not the most reliable historian in relation to the details of her past and current employment. I prefer the testimony of her previous and current employers and the records relating to her employment as more reliable sources of information about the plaintiff's employment history and present work capacity.

[79] I also find that the plaintiff's testimony tended to significantly downplay the impact that RA has had on her life. Her testimony about her physical condition focused heavily on her soft tissue injuries and associated symptoms. She gave the impression in her testimony that her RA symptoms were a secondary concern—so much so that she often seemed to treat the diagnosis as inconsequential. This cannot be reconciled with Dr. Badii's observations and opinion as set out in his report. I prefer Dr. Badii's report as more reliable evidence of the role that RA has played in the plaintiff's physical condition.

FINDINGS REGARDING INJURIES AND CAUSATION

Injuries

[80] While I accept the opinions of both Dr. Badii and Dr. MacInnes, I find that Dr. MacInnes' report best describes the plaintiff's physical injuries and chronic symptoms that are attributable to the Accidents. Unlike Dr. Badii, Dr. MacInnes had the benefit of assessing the plaintiff after she had started and had success with RA treatment.

[81] I find that the plaintiff suffered a whiplash-associated soft tissue injury to her neck, shoulders, and back in the First Accident, which resulted in pain symptoms and associated headaches that had become chronic by the date of the Second

Accident and—as the defendants acknowledge—remain chronic today. I find that her condition is permanent, and that treatment will help the plaintiff manage her symptoms but will not significantly improve them.

[82] While the plaintiff does not claim to suffer from a compensable psychiatric condition, I accept Dr. Nunez's evidence that the plaintiff experiences depressive mood symptoms related to her chronic pain, as well as increased anxiety around driving caused by the Accidents.

[83] I find that the plaintiff also suffered from central sensitization and fibromyalgia for a period of time starting sometime after the Second Accident and before she was assessed by Dr. Badii on June 30, 2021 (the exact date is not clear from the evidence), and ending before Dr. MacInnes assessed the plaintiff on August 25, 2023. I find that these conditions were caused by a constellation of pain symptoms attributable to both the Accidents and the plaintiff's untreated RA. These conditions resolved with the plaintiff's successful treatment of her RA symptoms.

Causation and divisibility – the Second Accident

[84] I find that the Second Accident caused an aggravation to the soft tissue injury suffered by the plaintiff in the First Accident. The Minister argues that any increased pain symptoms experienced by the plaintiff were caused by her RA and not by the Second Accident. While I accept that at some point after the Second Accident the plaintiff's RA symptoms became so significant that they impacted the plaintiff's overall pain experience, the evidence does not support a finding that they were that advanced at the date of the Second Accident. I accept the plaintiff's evidence that after the Second Accident she experienced an immediate and dramatic increase to the soft tissue pain associated with her First Accident injuries. This is distinct from symptoms associated with the plaintiff's RA diagnosis.

[85] The Minister alternatively argues that any aggravation of the plaintiff's First Accident injuries has since resolved. The difficulty with this argument is that the plaintiff says that the frequency of her whiplash injury pain reaching level eight remains increased since the Second Accident, and I accept that evidence. I find that

the plaintiff's condition has not returned to the baseline it was at immediately prior to the Second Accident. The aggravation caused by the Second Accident is ongoing. I find that this aggravation is incapable of being separated out and assessed independently. I therefore find that the injuries suffered in the First Accident and the Second Accident are indivisible.

[86] The plaintiff and Mr. Colbourne suggest that the plaintiff's chronic lower back pain is a new injury caused by the Second Accident, and is therefore divisible from the First Accident injuries. I am unable to make that finding on the little evidence before me regarding this symptom.

[87] While the plaintiff testified that lower back pain (which eventually settled into her hips) was new after the Second Accident, there is no basis in the evidence for me to conclude that this was caused by a new, distinct injury rather than an aggravation the plaintiff's pre-existing whiplash injury. It is clear from the clinical records that the plaintiff did experience lower back pain immediately after the First Accident. There is no clear evidence about how that particular symptom progressed and if or when it fully resolved. The plaintiff reported to Dr. MacInnes that she experienced occasional lower back pain prior to the Second Accident. There is no medical evidence that the Second Accident caused a new injury to the plaintiff's lower back or hips. To the contrary, the expert medical evidence is that the plaintiff's lower back pain was caused by the First Accident and aggravated by the Second Accident.

[88] Even if the plaintiff's lower back and hip pain were due to a new injury, it would not be possible to separate that injury out and assess it independently of the plaintiff's overall chronic pain condition on the evidence before me. It is obvious from the overall tenor of the plaintiff's testimony and from the clinical records that her chronic pain has always been and remains most acute in her upper body. Her testimony almost exclusively focused on her neck and shoulder pain and on her headaches, with very little reference to her lower back or hips. Other than in the initial weeks after the First Accident, there is no mention of lower back or hip issues

in the clinical records. The plaintiff's upper body and headaches have been the focus of her medical treatment.

[89] I find that the plaintiff's chronic pain in her lower back is more likely than not part of the array of whiplash-associated symptoms caused by the First Accident and aggravated by the Second Accident. The impact of the lower back pain is secondary to the more significant pain symptoms in the plaintiff's upper body and headaches.

Prognosis

[90] I accept Dr. MacInnes' prognosis for the plaintiff's physical injuries caused by the Accidents. I prefer it to Dr. Badii's prognosis, again because Dr. MacInnes had the benefit of assessing the plaintiff after RA treatment. I find it is more likely than not that the plaintiff's chronic pain will never resolve and she will experience ongoing symptoms from this time forward.

[91] Based on the expert medical evidence, I find that the plaintiff will likely be able to better manage her pain and achieve some improvement to her mood with treatment. I find that the plaintiff's permanent chronic pain impairs her ability to perform heavy household tasks and forecloses certain career paths. The nature and degree of these impacts are difficult to assess on the evidence, which I will address under my discussion of damages.

ASSESSMENT OF DAMAGES

[92] The plaintiff seeks damages for non-pecuniary loss, loss of past and future income earning capacity, cost of future care, loss of housekeeping capacity, and special damages. The defendants say damages should be significantly lower than the plaintiff proposes and should be reduced due to the plaintiff's failure to mitigate.

Non-pecuniary damages

[93] The purpose of non-pecuniary damages is to compensate the plaintiff to the date of trial and into the future for pain, suffering, loss of enjoyment of life, and loss of amenities. Comparable cases are helpful, but each case depends on its own unique facts. In assessing the plaintiff's loss, I have considered the factors set out in

Stapley v. Hejslet, 2006 BCCA 34 at paras. 45–46, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 100.

[94] The plaintiff is in chronic pain that never goes below a baseline of six out of ten. When aggravated the pain reaches eight out of ten. The pain negatively impacts her sleep. She limits her physical activity for fear of aggravating her pain symptoms. She no longer participates in recreational activities, other than going for short walks. She took great pleasure in cooking before the First Accident and is no longer able to pursue that passion. She cannot prepare the types of meals she previously enjoyed. She cannot contribute to the care and maintenance of her home to the degree she would like. She has restrictions in how she can physically engage with her child.

[95] The plaintiff had just turned 20 when the injuries suffered in the First Accident permanently changed her life. She was about to turn 26 when the Second Accident aggravated the chronic pain symptoms she had lived with since the First Accident. While treatment should assist with managing the plaintiff's condition, she will suffer from chronic pain and headaches caused by the Accidents for the rest of her life. She is very aware and nervous about the possibility of being in another accident and what that would mean for her current condition. She has heightened anxiety around driving and experiences low mood due to her chronic pain. She worries it will not be possible to have another child given her current condition.

[96] The plaintiff says the appropriate quantum for non-pecuniary damages is $160,000 and relies on the following cases: *Mac v. Liao*, 2024 BCSC 609; *Tale Ramazan v. Hilderbrand*, 2024 BCSC 638; *Mattson v. Spady*, 2019 BCSC 1144; *Hauk v. Shatzko*, 2020 BCSC 344*; Reaume v. Rossetto*, 2024 BCSC 61*.*

[97] The defendants rely on the following cases and propose an award of $90,000: *Kim v. Baldonero*, 2022 BCSC 167; *Matei v. Wu*, 2022 BCSC 107; *L'Heureux v. Deegan*, 2022 BCSC 382, rev'd in part 2023 BCCA 159.

[98] While no two cases are identical, I find that the circumstances in the cases relied on by the plaintiff more closely approximate the situation in this case. Taking

into consideration the circumstances summarized above, and in particular the plaintiff's age at the time she was injured and the chronic and permanent nature of her condition, I find that $140,000 for non-pecuniary damages is a fair and reasonable award to compensate the plaintiff for pain and suffering caused by the Accidents.

[99] In assessing this award, I am mindful that the defendants are not required to compensate the plaintiff for pain and suffering attributable to RA, as opposed to the Accidents. I have also weighed the positive and negative contingencies associated with the plaintiff's RA diagnosis in my assessment of non-pecuniary damages. I have taken into consideration the plaintiff's decision not to undertake RA treatment for many years and how that contributed to her overall experience of pain and suffering during the period of non-treatment. I have also considered that, because of her chronic pain caused by the Accidents, the plaintiff is at increased risk of developing central sensitization and fibromyalgia again in the future if her RA condition progresses and is no longer responsive to treatment.

Loss of earning capacity

Earnings vs capital asset approach

[100] There are two possible approaches to assessing lost earning capacity: the earnings approach, or the capital asset approach: *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 68. As the Court of Appeal noted in *Kringhaug v. Men*, 2022 BCCA 186, determining which approach to use depends on the facts:

> [43] … The earnings approach is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history. The capital asset approach is typically used when that is not the case and the court makes an award for the plaintiff's loss of opportunity, for example, with a young plaintiff whose career path is uncertain.

[101] The defendants propose that the capital asset approach is appropriate in this case. The plaintiff submits that neither established approach is appropriate because no one knows what her income might have been. She submits that I should depart

from the accepted methods of quantification and proposes a “blend” of the earnings and capital asset approaches.

[102] I do not agree that this case requires a departure from accepted quantification approaches. The capital asset approach is intended to quantify loss in these very circumstances—where the plaintiff is young with an uncertain career path. As I understand them, the plaintiff’s submissions on this issue conflate the applicable *approach* (earnings or capital asset) with the *method* used for assigning a dollar value to the loss under the capital asset approach: see *Deegan* at para. 84.

[103] Given the plaintiff’s life stage and circumstances at the time of the First Accident, as well as the state of the evidence before me, I find the capital asset approach is the appropriate quantification method for both past and future loss of income earning capacity in this case.

Expert evidence

[104] Both the plaintiff and Mr. Colbourne tendered expert economist reports. The plaintiff’s expert, Peter Sheldon, and Mr. Colbourne’s response expert, Mark Gosling, project past and future earnings for the plaintiff assuming earnings of a grade 12 graduate employed in an office-type environment.

[105] I note that despite relying on Mr. Sheldon’s report, the plaintiff argued that the occupation assumed by both experts for the purpose of their calculations does not reflect the reality of the plaintiff’s likely career path but for the Accidents. I agree with that critique; none of the evidence about the plaintiff’s occupational interests prior to the First Accident suggests that her likely career path would have been as an office worker. I find that the evidence of Mr. Sheldon and Mr. Gosling is not helpful or relevant to the capital asset approach analysis in this case. I do not rely on either expert’s opinion, and I will therefore not further review the differences in their approaches and conclusions.

Loss of past earning capacity

[106] 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. The burden of proof of actual past events is a balance of probabilities. 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. The future or hypothetical possibility 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, 1996 CanLII 183 at para. 27.

[107] An award for past loss of earning capacity must be fair and reasonable taking into account all of the evidence: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. The measure of the loss may vary where the circumstances require and is not limited to actual lost income—"it is not the actual lost income which is compensable but the lost capacity": *Ibbitson* at para 19.

[108] The plaintiff submits that $145,000 is an appropriate award for past income loss. She says this figure approximates what she would have earned but for the First Accident. She arrives at this figure by making various calculations that reference her actual income after the First Accident, the expert economist evidence, and assumptions about what the plaintiff would have achieved given her natural talents. I reject this analysis because (1) as I have found, the experts assume a career path not established by the evidence, and which I conclude would not have been a real and substantial possibility in the absence of the Accidents, and (2) the plaintiff's analysis does not adequately account for the degree to which her income earning capacity was impaired by causes other than the Accidents.

[109] The defendants' submissions distinguish between income loss caused by only the First Accident, and income loss that post-dates the Second Accident; the plaintiff does not make this distinction. I prefer the defendants' approach, given that the Minister cannot be found to have caused any loss of earning capacity that pre-

dates the Second Accident. I will therefore address the plaintiff's lost income earning capacity claim in two separate time periods: prior to and after the Second Accident.

First Accident to Second Accident

[110] Mr. Colbourne submits that the plaintiff has not established an income loss that would have been earned but for the First Accident and before the Second Accident. He says there is no medical evidence that the plaintiff's injuries from the First Accident prevented her from working and submits that any income loss was due to choice and limited employment opportunities in Newfoundland. He submits that the plaintiff's total past wage loss for this period is under $5,000, calculated as approximately ten days of missed work a year at her average wage of $14 per hour.

[111] The difficulty with Mr. Colbourne's position is that it holds the plaintiff to a higher than required burden of proof for hypothetical events and ignores that compensation is for the loss of earning capacity.

[112] I accept that the plaintiff's injuries did not render her entirely unemployable in this time period. She was able to earn some income after the First Accident, although she mostly worked at a reduced capacity. However, I find that the First Accident injuries impaired her income earning potential and more likely than not caused her to earn less money in this time period than she would have but for the injuries. I find that but for her injuries, within a few months of arriving in Newfoundland she most likely would have secured full-time employment in a position that aligned with her previous work experience and interests, either in the restaurant industry or in a retail environment. These types of employment, which can be physically demanding, were no longer suitable for the plaintiff given her injuries.

[113] The plaintiff's injuries also foreclosed other career paths. They rendered the plaintiff unable to perform many types of jobs she might otherwise have decided to pursue. She is entitled to compensation for this loss.

[114] The challenge is that the plaintiff's loss is not easily quantifiable. I have considered the guidance provided by the Court of Appeal in assessing damages

using the capital asset approach in *Villing v. Husseni*, 2016 BCCA 422 at paras. 17–19. I find that the plaintiff is an ambitious person who has always been motivated to work and enjoys working despite her physical limitations. It is clear from the evidence that the plaintiff has many qualities that are attractive to employers. She is a hardworking, creative, organized, and dependable employee. I find that these attributes would likely have led to increased responsibility and remuneration and better job opportunities over time as she proved herself in the workplace, similar to the experience she has had with her current position with CWAC.

[115] However, various relevant negative contingencies unrelated to the First Accident must be considered in valuing the plaintiff's past loss of capacity. Her planned move to Newfoundland would have necessarily taken her out of the workforce for a period of time, and I find she would most likely have taken some additional time to continue thinking about her options and possibly pursue further education or certification before embarking on her eventual career. Job opportunities in Newfoundland were somewhat limited due to where she lived and her lack of a driver's licence. When she moved back to BC she again voluntarily chose to remain out of the workforce for a period of time.

[116] Ultimately, there is very little in the evidence to guide my valuation of the plaintiff's loss of earning capacity in this time period. There is no evidence of what the plaintiff could have earned as an annual income if she had been able to follow a career path that aligned with her previous experience and interests. There is very little in the way of documentary evidence regarding the plaintiff's employment in this time period. Taking all of the circumstances into account, I conclude that a fair and reasonable assessment of the plaintiff's past loss of capacity in this period is $36,000. This represents approximately two years of the plaintiff's best annual reported income in this period, which I consider the best method to value the plaintiff's loss given the state of the evidence.

After Second Accident

[117] The plaintiff was in much the same position after the Second Accident regarding her earning capacity. I find that her injuries continued to impair her income earning potential and more likely than not caused her to earn less money in this time period than she would have but for the Accidents. She remained unable to pursue certain career paths and was unable to perform certain jobs. I do not agree with the defendants' submission that the plaintiff's past wage loss is nominal for this period. She is entitled to compensation for the loss of capacity to work to her full potential due to her injuries. Again, the difficulty is with valuing this loss.

[118] I agree with the defendants that the Accidents are not the only cause of the plaintiff's impaired earning potential in this period. There are two significant negative contingencies to consider. First, even if the plaintiff had not been injured, I find that she would only have considered work-from-home employment with flexible part-time hours after the birth of her child in 2019, so that she could be her daughter's primary caregiver. This would have significantly reduced the types of employment and potential remuneration available to her. Second, the plaintiff's non-treatment of her RA and associated worsening symptoms would also have negatively impacted the plaintiff's capacity to earn income in this period.

[119] Given these negative contingencies, I conclude that an amount that approximates one year of the plaintiff's best annual reported income in this period as agreed to by the parties is a fair and reasonable assessment of the plaintiff's past loss of capacity. I therefore award the plaintiff $24,000 for her past income loss in this period.

Loss of future earning capacity

[120] The approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421. The three-step

process for considering claims for loss of future income earning capacity is as follows:

a) Does the evidence disclose a potential future event that could lead to a loss of capacity?

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

c) If there is such a real and substantial possibility, what is the value of the possible future loss?

See *Rab* at para. 47.

[121] The defendants do not dispute that steps 1 and 2 of the test are made out. I agree that the plaintiff has established a potential future event that could lead to a loss of capacity, and there is a real and substantial possibility that the future event will cause a pecuniary loss.

[122] The plaintiff says that $350,000 is the value of the possible future loss under step 3. The defendants say an appropriate award using the capital asset approach is $30,000, which is one year of the plaintiff's current earnings at CWAC.

[123] My findings regarding the plaintiff's employment prospects but for the Accidents apply equally to her claim for loss of future income earning capacity. I have again applied the guidance in *Villing* in assessing the plaintiff's damages using the capital asset approach.

[124] While the plaintiff has been very successful in her position at CWAC, this does not change the fact that even if her ability to manage her pain symptoms improves, as Dr. MacInnes says is possible, the plaintiff's chronic condition limits the types of employment open to her. She is less marketable as an employee to potential employers, and she has lost the ability to take advantage of all job opportunities that might otherwise have been open to her. One year of her current CWAC income is not a fair and reasonable valuation of this loss. The defendants'

position does not reflect the degree to which the plaintiff's condition has caused a real and substantial possibility of loss of earning capacity in the future, a risk that is even more significant given her relatively young age.

[125] However, the difficulty with the plaintiff's position is that it does not reflect my finding that the plaintiff would not consider a job that interferes with her ability to be her daughter's primary caregiver when her husband is not available, even if she was not injured. This is a significant negative contingency. She will presumably have more capacity to work as her daughter reaches school age, but I find she will still want to be available as the primary caregiver outside of school hours. Given these findings, an award for future loss of income earning capacity must recognize that the plaintiff's employment opportunities would have been limited even absent her injuries.

[126] I have considered the methods for assigning a dollar value to the plaintiff's loss of capacity to earn income: see *Deegan* at para. 84, citing *Pallos v. Insurance Company of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 43. As in *Deegan*, I conclude that I cannot calculate the present value of a postulated minimum annual income loss for the plaintiff on the evidence before me. I find the best approach given the evidence is to award the plaintiff a multiple of her pre-trial annual income.

[127] In the circumstances, I find that a reasonable award for future loss of income earning capacity is an amount that approximates three times the plaintiff's income from the last reported tax year, which is her best annual reported income since the Accidents. Three years fairly reflects the plaintiff's loss, the contingencies discussed above, and other usual contingencies relevant to loss of future earning capacity. I therefore award the plaintiff $73,000 as damages for future loss of income earning capacity.

[128] I have considered whether a percentage reduction to this award is appropriate to reflect contingencies related to the plaintiff's RA. While the plaintiff's RA is currently well-controlled by medication, there is a risk that it will again become

symptomatic. The plaintiff's resistance to certain treatment options increases this risk. On the other hand, I infer from the plaintiff's past experience that recurrence of RA pain would most likely lead to a recurrence of central sensitization and fibromyalgia due to the existing chronic pain caused by the Accidents. I find that those conditions would not develop absent the Accidents, and that they will impair the plaintiff's income earning capacity to a greater degree than RA on its own. Even without RA pain recurring, there is the real and substantial possibility that, as time goes on, it will become increasingly difficult for the plaintiff to maintain employment in addition to managing her pain, something that Dr. MacInnes indicates is a risk in chronic pain cases. In the circumstances, I find the negative and positive contingencies are offset and I decline to make a separate contingency reduction for RA.

Loss of housekeeping capacity

[129] The plaintiff seeks an award of $100,000 for loss of housekeeping capacity. The defendants say any such loss should be compensated as part of her non-pecuniary damages award.

[130] An award for loss of housekeeping capacity may be compensated by a pecuniary damages award where the plaintiff's injuries leave them unable to perform usual and necessary household work—that is, where they have suffered a true loss of capacity as opposed to increased pain and suffering: *Kim v. Lin*, 2018 BCCA 77 at para. 33.

[131] I find that the plaintiff's chronic pain and the need to avoid aggravating her symptoms means that she cannot perform anything beyond light housework. She must rely on her husband to complete all heavier household tasks, with additional assistance provided by her sister from time to time. I accept Dr. MacInnes' opinion that the plaintiff may be able to increase her household activities over time in relation to lighter tasks, but will likely continue to require assistance with heavier housework. I conclude that the plaintiff has suffered a true loss of capacity, and a separate award is appropriate: *Kim* at para. 33.

[132] However, I find the plaintiff's proposed award has no basis in the evidence and is not a reasonable and fair assessment of her loss. The case relied on by the plaintiff, *Malhi v. Dhaliwal*, 2024 BCSC 535, is not helpful as a comparator because the Court in that case had the benefit of opinion evidence regarding the scope and value of the required housekeeping support. There is no such evidence before me.

[133] In my view, an award of $10,000 is fair and reasonable compensation to the plaintiff for her loss of capacity in relation to performing heavy housework.

Cost of future care

[134] The test for assessing future care costs is whether the costs are reasonable and whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.), aff'd (1987) 49 B.C.L.R. (2d) 99, 1987 Carswell BC 450 (C.A.). The court must also be satisfied that the plaintiff would make use of the care item, that the plaintiff would not have incurred the expense in any event of the injuries, and that there is no significant overlap in the care items being sought: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 57. 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.

[135] The plaintiff seeks future care costs of $57,569, consisting of the following:

Treatment		
	Every other week a visit to one the of the following: physiotherapy, massage, kinesiology, or acupuncture at $100 per visit to age 50	$31,655
	Psychological care: 24 visits at $235 per visit	$5,640
	Yoga for one year	$1,560
	Pilates for one year	$3,720
	Occupational therapist	$2,100
	Gym/swim fees at $600 per year to age 50	$7,914

Equipment		
	Chair	$800
	Desk	$900
	Document holder	$120
	Monitor arm	$150
	Dragon speak	$500
	Headset	$350
	Bolster	$190
	Core pillow	$170
	Robot vacuum	$1,800
Total		**$57,569**

Treatment

[136] The defendants do not appear to take issue with the medical necessity of the plaintiff receiving some future treatment. Rather, they dispute the likelihood of the plaintiff actually using the care items.

[137] I am satisfied based on Dr. MacInnes' opinion that some combination of physiotherapy, massage, kinesiology, and acupuncture treatment is medically necessary to manage the plaintiff's injuries. However, there is no medical evidence that the plaintiff requires this type of treatment every other week. Dr. MacInnes recommends that the plaintiff work with a physiotherapist or kinesiologist to initiate a graded exercise program that she can complete independently, with four sessions per year for monitoring and adjustments to the program. He also recommends massage, acupuncture, and chiropractic treatment "on an ongoing basis", but does not specify frequency other than to say access to such therapies should be "intermittent".

[138] I find it is unlikely the plaintiff will attend the treatments described by Dr. MacInnes every other week to age 50, given her demonstrated disinclination to medical treatment and her inconsistent record of attending treatments to date. A more realistic expectation is that the plaintiff's use of medical treatments will remain inconsistent in the future, with attendance being more frequent in some time periods and less frequent in others, averaging over time to one treatment per month. On that

basis, I conclude that $22,000 is a fair and reasonable amount for these types of treatments.

[139] Dr. MacInnes recommends that the plaintiff be given access to a fitness facility with a pool, and that she attend Pilates. He also suggests she may benefit from yoga. I accept that physical conditioning is medically necessary; however, I am not satisfied that the plaintiff will regularly attend a fitness centre, Pilates, or yoga. Based on her actions to date, attendance will be irregular and inconsistent. The defendants suggest $2,500 is an appropriate amount for these activities. I consider that to be somewhat low given the per class cost of Pilates and yoga. I conclude that $3,500 is a fair and reasonable award for occasional attendance at some Pilates and yoga classes for the year sought by the plaintiff, and drop-in attendance at community recreation centre fitness facilities to age 50.

[140] Dr. MacInnes recommends that the plaintiff undergo an ergonomic assessment with an occupational therapist. The cost required for this assessment is not established in the evidence; at best, there is some evidence as to the hourly rates charged for occupational therapy assessments. There is no evidence establishing how many hours are required for an ergonomic assessment, nor is there any evidence on which to base even a rough estimate of the number of hours required. I also find it unlikely that the plaintiff will actually obtain an ergonomic assessment. She has worked from home for several years now and there is no evidence that she has taken steps toward any type of ergonomic or other occupational therapy assessment. For these reasons I decline to make any award for this treatment.

[141] I am satisfied based on the evidence of Dr. Nunez and Dr. MacInnes that some degree of psychological care is medically necessary. However, the plaintiff has not established that she requires treatment to the extent sought. Dr. MacInnes recommends that the plaintiff work with a pain psychologist, but does not make any specific recommendation regarding the scope of that treatment other than to say that psychological approaches will likely be of ongoing benefit. Dr. Nunez recommends

eight to twelve sessions of cognitive behavioural therapy, with the option of reassessment and additional treatment as needed. I find the plaintiff is likely to attend psychological treatment once it is available—she is currently on a waitlist. However, given her general approach to treatment, I find it unlikely she will attend more than eight sessions. I award $1,880 for psychological treatment.

Equipment

[142] The difficulty with the plaintiff's claim for equipment costs is that there is no evidence that any of the items sought by the plaintiff are medically necessary. The plaintiff acknowledges that there is no expert evidence that she needs these items. There is no evidence that the plaintiff's treating medical professionals have recommended that she requires the equipment. The plaintiff says she needs the items, but that does not establish that they are medically necessary.

[143] Ultimately, the onus is on the plaintiff to establish a medical need for this equipment, and I am not satisfied that she has done so on the evidence before me.

Summary

[144] To summarize, I award the plaintiff $27,380 for cost of future care, consisting of:

Physiotherapy, massage, kinesiology, and acupuncture treatment	$22,000
Physical conditioning (fitness classes and drop-in fees)	$3,500
Psychological treatment (8 sessions)	$1,880

Special damages

[145] The defendants do not dispute the validity of the plaintiff's claim for special damages in the amount of $3,834.57. I therefore award special damages in that amount.

MITIGATION

[146] Mr. Colbourne argues that the plaintiff's award for non-pecuniary damages, past wage loss, and future loss of earning capacity should be reduced by 30–50% for failing to take reasonable or appropriate steps to seek medical advice and for ignoring the medical advice she did receive.

[147] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. This includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing her accident-related injuries. The defendant has the burden of proving two elements: (1) the plaintiff acted unreasonably in not taking the steps that the defendant says ought to have been taken; and (2) the extent to which plaintiff's loss would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

[148] There is no question that the plaintiff did not receive treatment for her injuries until 2017. While the plaintiff says she has no memory of it, the clinical records show that the plaintiff received a physiotherapy referral when she saw her family doctor soon after the First Accident. The plaintiff decided to pursue chiropractic treatment, but was only assessed and never treated in BC. As described above, her attempt at chiropractic treatment soon after arriving in Newfoundland resulted in a referral to hospital for further assessment.

[149] Records from the plaintiff's hospital visit indicate that she was again advised to seek physiotherapy treatment, although she has also no memory of that recommendation. Rather, the plaintiff's memory is that the emergency room doctor told her she had no treatment options other than a very painful surgery, which she did not want to pursue. She understood that she had a permanent neck fracture and would have to be careful for the rest of her life.

[150] In my view, a reasonable person in the plaintiff's circumstances would not simply accept this state of affairs. A reasonable person would seek further clarification or medical advice regarding their diagnosis, prognosis, and treatment

options from a specialist or, at minimum, their family physician. Had the plaintiff done so, I find that her mistaken belief in the neck fracture diagnosis would have been corrected and she would have received treatment recommendations appropriate for her actual injuries. There is no reasonable explanation for the plaintiff failing to pursue further medical evaluation and treatment following the emergency room visit.

[151] The plaintiff learned she did not have a neck fracture in 2017. Since then, she has not been consistent in attending treatment. She received some massage therapy in fall 2017 and early 2018, and again in June and July 2019. There is no evidence of any other rehabilitative treatment after that until December 6, 2021, when the plaintiff attended her first physiotherapy session. The plaintiff has tried other treatment modalities from time to time, but not with any degree of consistency.

[152] The plaintiff offered little in the way of explanation for not attending treatment on a more regular basis since 2017. The explanations she did provide relate to life events such as starting a new job and housing disruptions, which I do not find reasonable. A reasonable person in the plaintiff's circumstances would have done more to seek out and attend regular treatment, especially when they found the treatment to be beneficial on those occasions when they did receive it, as the plaintiff testifies she did.

[153] The more difficult question is the extent to which the plaintiff's loss would have been reduced had she acted reasonably in seeking out medical advice and following the treatment recommendations she did receive. I find the comments of Justice Voith in *Liu v. Bipinchandra*, 2016 BCSC 283 instructive in that regard:

> [102] The legal question of whether a plaintiff would have been assisted by a procedure or course of treatment is to be determined on a subjective basis. Nevertheless, a defendant need not lead direct evidence that the particular plaintiff at issue would have benefitted from a specific treatment. The outcomes of many treatments, or therapies, or procedures are uncertain. A plaintiff who acts unreasonably in the face of the medical advice they are given cannot take refuge in that uncertainty.
>
> [103] Instead, it is open to a defendant to establish the second aspect or branch of the mitigation test indirectly. Thus, if most persons are assisted by a particular treatment the Court can, as a matter of inference, determine that

> it is probable that a particular plaintiff would have benefitted from that treatment.

[154] The medical experts opine only that earlier treatment *might* or *could* have provided some assistance to the plaintiff, which does not meet the threshold for reducing an award for failure to mitigate: *Gregory* at para. 58. However, I accept Dr. Badii's evidence that rehabilitative care typically helps a patient with pain control and function. He agreed on cross-examination that improvement with eventual treatment is a good indicator that similar results could be expected from such treatment at an earlier date.

[155] I also acknowledge Dr. MacInnes' opinion that the plaintiff will at best achieve modest functional gains with treatment, but is unlikely to significantly improve her overall pain symptoms or functional tolerance. I find that the plaintiff's experience with rehabilitative treatment to date reflects Dr. MacInnes' opinion on this point—she sees modest improvement in her ability to manage her symptoms, in that she is better able to bring her pain level back to a six out of ten when it is aggravated above that level. However, treatment has not improved her functional limitations or her overall experience of chronic pain, which never improves beyond a baseline pain level of six out of ten.

[156] I find as a matter of inference that it is probable the plaintiff would have experienced similar benefits had she received treatment before 2017. She would have been better able to avoid aggravated level eight pain—which would certainly have been beneficial—but it would not have made a difference to her baseline pain or to her functional limitations. Given these findings, I conclude a modest 5% reduction to the plaintiff's non-pecuniary damages award is warranted to account for her failure to mitigate. I decline to apply a reduction to any other head of damages, given my finding that treatment would not have resulted in any functional improvements.

[157] Mr. Colbourne points to the plaintiff's postponed treatment of her RA as also relevant to the issue of mitigation. However, I have already accounted for the impact

of the plaintiff's RA and her failure to commence treatment in a timely manner in my assessment of the various heads of damages. It would therefore not be appropriate to consider a further reduction for failure to mitigate due to non-treatment of the plaintiff's RA, and I decline to do so.

[158] The plaintiff's total non-pecuniary damages award, in light of her failure to mitigate by seeking earlier treatment for her accident injuries, is $133,000.

SUMMARY

[159] In summary, I assess the plaintiff's damages as follows:

Non-pecuniary damages ($140,000, reduced by 5%)	$133,000.00
Past loss of earning capacity	
i. First Accident to Second Accident	$36,000.00
ii. After Second Accident	$24,000.00
Loss of future earning capacity	$73,000.00
Loss of housekeeping capacity	$10,000.00
Cost of future care	$27,380.00
Special damages	$3,834.57

[160] Given my findings regarding indivisibility, the defendants agree that non-pecuniary damages and damages for loss of future earning capacity, loss of housekeeping capacity, and cost of future care should be apportioned equally.

[161] Mr. Colbourne is solely responsible for damages for past loss of earning capacity for the period from the First Accident to the Second Accident. I do not accept Mr. Colbourne's argument that a portion of past loss of earning capacity after the Second Accident is apportionable to the Second Accident alone. The plaintiff's past loss of earning capacity in that period was caused by both Accidents. Damages for past loss of earning capacity after the Second Accident should be apportioned equally between the defendants.

[162] The defendants agree that Mr. Colbourne is solely responsible for special damages that pre-date the Second Accident. With the exception of any special damages that were incurred due to the plaintiff's hospital attendance after the Second Accident, such as the ambulance fee, special costs that post-date the Second Accident are apportioned equally between the defendants.

[163] I leave it to counsel to do the necessary calculations to apportion damages as set out above.

[164] As the successful party, the plaintiff is presumptively entitled to her costs from the defendants, at Scale B. If any party seeks an alternative costs order, they have leave to request a further hearing before me within 30 days of the date of this judgment. In those circumstances, each party must provide a written argument to the other parties and to the Court at least seven days before the hearing date.

"Ramsay J."