

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Federico v. Viveros*,  
2024 BCSC 1689

Date: 20240911  
Docket: M1913176  
Registry: Vancouver

Between:

**Ida Federico**

Plaintiff

And:

**Carlos Riascos Viveros and John Doe**

Defendants

Before: The Honourable Madam Justice D. MacDonald

## Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.  
May 6-10, 13-16 and 21, 2024

Place and Date of Judgment:

Vancouver, B.C.  
September 11, 2024

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**Overview**

[1] This action relates to a motor vehicle accident that occurred on the evening of January 2, 2018, involving the defendant, Carlos Viveros, and the plaintiff, Ida Federico. Mr. Viveros' vehicle collided with the vehicle Ms. Federico was driving.

[2] The collision happened at the intersection of Windermere Street and 1<sup>st</sup> Avenue, in the City of Vancouver, British Columbia (the "Accident"). An Amended Response to Civil Claim was filed on April 29, 2024 to reflect that liability was admitted by the defendant.

[3] Ms. Federico is advancing personal injury claims under the following heads of damages:

- (a) non-pecuniary damages;
- (b) past loss of earning capacity;
- (c) future loss of earning capacity;
- (d) loss of housekeeping and domestic capacity;
- (e) future costs of care and rehabilitation;
- (f) in-trust claims for the plaintiff's husband (Sandro Federico) and mother-in-law (Leonor Federico); and
- (g) special damages.

[4] These Reasons relate to an assessment of Ms. Federico's injuries, whether her injuries were caused by the Accident, and, if so, what damages flow from the Accident.

**Evidence**

**The Plaintiff's Lay Witnesses**

[5] In addition to Ms. Federico's evidence, the following lay witnesses gave evidence on Ms. Federico's behalf: Mr. Sandro Federico, Ms. Federico's husband; Mr. Franco Federico, Ms. Federico's brother-in-law; and Ms. Carrie Wertheim, Ms. Federico's colleague.

[6] In the following sections, I summarize the evidence of the parties and witnesses in a general way, but leave many details for discussion under the issues I address. Although I do not refer to all aspects of the evidence, I have considered the totality of the evidence in reaching my conclusions.

**Pre-Accident**

[7] Ms. Federico was born in 1979 and was 38 years of age at the time of the Accident. At the time of trial, Ms. Federico was 44 years of age.

[8] Ms. Federico was born in Canada but moved to Italy when she was young. Her first language is Italian. Ms. Federico grew up in a traditional household of fairly strict Italian parents who instilled a strong work ethic in their children. Family is very important to Ms. Federico.

[9] Ms. Federico and her family returned to Canada when she was approximately 10 years-old. She attended elementary school in Burnaby, BC. Ms. Federico was a good student. She was able to learn English quickly thanks to the support of a dedicated ESL teacher. Ms. Federico enrolled in a summer school course following her grade six year to improve her English. The following school year she was placed in the same grade seven class as her age-related peers rather than spending another year in ESL.

[10] Ms. Federico made friends quickly. Her elementary and high school education experiences were positive. Ms. Federico worked several part-time jobs in high school; she enjoyed being busy and active. Ms. Federico was involved in school sports, such as running and volleyball, and was also involved in school social clubs.

Ms. Federico was elected to Student Council in her grade twelve year. She had an active social life and did well academically.

[11] After graduating from high school in 1997, Ms. Federico took a year off. Ms. Federico was unsure what career to pursue. She considered marketing to be a possible option and enrolled in a couple of marketing courses. During that time Ms. Federico was working for Staples Office Superstore as a customer service representative. Ms. Federico also worked as a host with Orca Bay Arena Corporation.

[12] Ms. Federico liked the marketing courses. At age 19 she enrolled at the British Columbia Institute of Technology's ("BCIT") marketing program to obtain a two-year Marketing Diploma. She received her Diploma in 2001.

[13] While studying and attending BCIT, Ms. Federico met her future husband, Mr. Sandro Federico, who was from a similar family of Italian immigrants (together, the "Federicos"). The couple met in October 1999 and married in 2005.

[14] In 2007, the couple took an extended holiday to Italy for an adventure vacation. In the fall of 2007, Ms. Federico obtained a sales position with the employer E. & J. Gallo Winery ("Gallo Wines"). Ms. Federico had a number of accounts, generally restaurants, in the lower mainland and would drive to them to do wine tastings in an attempt to have the venues sell wines from Gallo Wines. She did well in this job. Her compensation from Gallo Wines was a combination of salary and performance bonuses.

[15] The Federicos have been married for nearly 20 years. They are currently raising their two young children, C (age eight) and S (age six), in their "dream home" in Burnaby, which they finished building in 2016.

[16] In summary, at the time of the Accident Ms. Federico was a healthy, physically fit, and active 38-year-old mother of two young children. According to the witnesses, she enjoyed a full and rewarding family and social life. She participated in numerous activities including physical fitness, travel, and being active with her young

children. Ms. Federico was warm, genuine, and outgoing with a strong work ethic. Prior to the Accident, Ms. Federico had a stable and rewarding work-life balance. She enjoyed her sales position with Gallo Wines, where she worked for over a decade. She was a successful and experienced sales person.

[17] Ms. Federico was a happy individual prior to the Accident. She and her husband were in “a very good place” and she felt secure and fulfilled with her life.

### **The Accident**

[18] On the evening of January 2, 2018, Ms. Federico was operating her vehicle, a minivan. Her husband, Mr. Federico, was in the front passenger seat and their two young children, C and S, were in the rear seats. The family was driving to their home in Burnaby after a family dinner.

[19] Ms. Federico was driving east on 1<sup>st</sup> Avenue at approximately 50 km per hour. The defendant was attempting to cross the two lanes of eastbound traffic. He failed to stop at the meridian to give the right-of-way to Ms. Federico's vehicle. Mr. Federico yelled that the defendant was not stopping. Ms. Federico slammed on the breaks and locked her arms on the steering wheel. The defendant hit the front of Ms. Federico's vehicle.

[20] The defendant was expected to give evidence. He was not called as a witness because it is not disputed that the Accident was caused by his negligent actions in failing to yield to Ms. Federico.

[21] The force of the impact of the Accident was not insignificant. Ms. Federico lurched forward upon impact. She felt her seatbelt “lockup”, which caused her head to fling forward and bring her chin close to her chest. Her arms locked on the steering wheel.

[22] Ms. Federico was initially confused with what had happened and she was overcome with concern about the well-being of her children. Ms. Federico's eight-year-old daughter screamed upon impact and she immediately began to cry.

[23] Ms. Federico's recollection of time right after the Accident is fragmented. She experienced a sense of being "unable to move, scared and petrified" and she became "frozen" with shock. Ms. Federico was terrified that her children were seriously injured.

[24] In his discovery evidence, the defendant stated the impact of the collision was a "strong one" and that Ms. Federico was nervous at the scene of the Accident. When he asked her how she was doing, she did not answer him. She appeared emotionally distressed.

[25] After assessing the status of his wife and two children, Mr. Federico exited the vehicle to approach the defendant's vehicle to check on his well-being.

[26] The Vancouver Fire Department arrived at the scene to assess the occupants of the two vehicles. Ms. Federico had difficulty recalling what was happening around her at the Accident scene. No one was taken away in an ambulance.

[27] Ms. Federico was in no state to drive following the Accident. Mr. Federico drove the family home.

[28] The damage to both Ms. Federico's and Mr. Viveros' respective vehicles from the Accident was extensive. Both vehicles were "written off" by ICBC following the Accident.

### **Post-Accident**

[29] When Ms. Federico arrived at home following the Accident she had a headache. She experienced feelings of "shock" and an elevated concern for the well-being of her family. By the evening, Ms. Federico was very stiff in her neck, shoulder, and back. She had a headache and she was dizzy. She was also light-headed and nauseous. These symptoms got progressively worse over time and interfered with her sleep. She had nightmares in the first year following the Accident about the children's safety.



[30] The children slept with their parents for about a week after the Accident. Ms. Federico was in pain and she could not concentrate. Ms. Federico took three days off work as well as the weekend. She returned to full-time hours after the weekend and worked until she was laid off in August 2020 due to the COVID pandemic.

[31] Following the Accident, Ms. Federico found it painful to lift an arm. She was nervous driving and decreased the amount she had to drive. She was hypervigilant when driving and was a nervous passenger following the Accident.

[32] In direct examination, Ms. Federico testified that Mr. Federico took on more household chores after the Accident and that she did chores less frequently. I accept that this occurred. In 2019, however, Mr. Federico became disabled from a significant snowboarding accident. He stayed at his parents' home for approximately four months to be cared for by his parents. The defendant emphasizes that she successfully assumed all household and childcare duties during this period. Although Ms. Federico managed these duties, I accept that it was more difficult for her than it would have been pre-Accident.

[33] Ms. Federico now often feels guilt for not being able to protect her children from the Accident. She feels corresponding guilt based on the Accident's impact on her, causing her to be less engaged in her children's lives. She is also concerned that she can sometimes negatively interact with those close to her, especially when she is feeling overwhelmed. She worries about the negative impact that her symptoms have on her husband and her two young children.

[34] Ms. Federico's Accident-related injuries have had a significant impact on her and she continues to have headaches. Fortunately, however, over time, Ms. Federico's physical pain has lessened and she is learning to cope with it.

[35] Both Ms. Federico's husband, Mr. Federico, and her brother-in-law, Franco Federico, testified about how the Accident affected her. It is obvious that her husband loves her deeply and both he and his brother testified that she is an

amazing woman. Her husband reinforced that post-Accident, Ms. Federico had anxiety regarding the children and she developed sleep issues. Her brother-in-law testified that she has always been a cautious person. However, their relationship foundered after the Accident because she was not herself. He became emotional when speaking about these events and it is obvious that he was really concerned. He testified that Ms. Federico's mental health improved once she began to attend counselling. She encouraged him to do the same.

[36] In 2021, Ms. Federico began counselling which has helped with her mental health. She now has coping strategies such as breathing, meditation, and affirmations.

[37] Ms. Federico is now employed in a new career which she commenced following the Accident. In September 2021, she became a licensed realtor in BC working with Oakwyn Realty. She continues to work with this company today. Although she was initially excited to move into real estate, a career that she believed would accommodate her post-Accident limitations, she has struggled in finding her stride. The testimony established that the Accident's impact on her real estate career is due to her mental health challenges as opposed to her physical injuries.

### **Summary of the Accepted Evidence**

[38] Ms. Federico's evidence establishes that the Accident caused her to suffer from impaired memory, fatigue, lack of motivation, problems with her organizational skills, and headaches. She is particularly anxious about her children's well-being and she has become an overprotective mother since the Accident. She has been told she is the "no-fun mum".

[39] Following the Accident, Ms. Federico struggled with tasks and responsibilities that she previously excelled at and took for granted. Relatively simple tasks became overwhelming for Ms. Federico. Although much improved, today she tends to procrastinate doing tasks that she perceives will be symptom provoking.

[40] Ms. Federico has become anxious and depressed since the Accident. She is less organized, less focussed, and can be sad and somewhat socially withdrawn.

[41] Ms. Federico's Accident-related injuries include headaches, neck pain, back stiffness and pain; anxiety and mood symptoms; social withdrawal; and difficulty initiating work tasks. Ms. Federico also experiences reduced motivation, attention span, and focus.

[42] Ms. Federico demonstrated a high level of stoicism following the Accident. She has struggled with discussing the circumstances of the Accident and how the Accident has impacted her life, her career, and her mental health.

### **The Plaintiff's Expert Witnesses**

[43] The plaintiff tendered evidence from a number of experts. The following professionals were qualified as experts at trial:

- (a) Dr. Heather Underwood, Psychiatrist;
- (b) Dr. Sheila Patton, Psychiatrist;
- (c) Ms. Natalie Hull, Occupational Therapist; and
- (d) Mr. Darren Benning, Economist.

### ***Dr. Underwood***

[44] Dr. Underwood conducted an independent medical examination (“IME”) of Ms. Federico on January 11, 2022. In her report, Dr. Underwood noted that Ms. Federico had no significant medical issues prior to her Accident. When discussing the Accident during the interview Ms. Federico became tearful. Ms. Federico also became tearful when talking about her daughter screaming and being scared right after the Accident. Post-Accident Ms. Federico would wake up frequently during the night and often had only four hours sleep. Dr. Underwood placed Ms. Federico in the moderate severity insomnia category.

[45] Dr. Underwood reported that Ms. Federico had participated in kickboxing prior to the Accident but largely stopped after the Accident. She did participate in yoga and walked daily following the Accident.

[46] Dr. Underwood diagnosed Ms. Federico with myofascial pain in the neck and shoulder. Ms. Federico also had decreased lower back range following the Accident. In Dr. Underwood's opinion, Ms. Federico's injuries, including her neck pain, headaches, and upper and lower back pain, are a direct result of the Accident.

[47] Dr. Underwood reported that Ms. Federico has headaches two to three times per month in the occipital and frontal regions. They can be seven to eight out of ten in severity. She also reported pain in her neck, shoulder, upper back, mid back and lower back. Her neck and head pain occur with forward flexion and extension. She has relief with acupuncture and heat. Her lower back pain increases with sitting, vacuuming, doing laundry, washing floors, washing dishes, and standing for 20 to 30 minutes. However, Ms. Federico continues with these chores. She has intermittent pain in her thoracic region.

[48] Dr. Underwood reported that Ms. Federico described having difficulty with concentrating for long periods of time whether it be at work, school, or when composing emails. Tasks take her longer. She takes no prescription medications, but occasionally takes Advil for her headaches. Ms. Federico attempts to work through activities despite her ongoing pain. Her strength is normal. On palpitation of her lower back, she had pain at the L5-S1 and L4-L5 regions.

[49] Dr. Underwood diagnosed Ms. Federico with myofascial pain in the paracervical and scapular regions. Additionally, she has: headaches secondary to her neck trauma; myofascial pain to the lumbosacral region with peripelvic involvement; reduced range of motion in the left hip with internal rotation; and reduced mood with intermittent nightmares. Dr. Underwood suspects post-traumatic stress disorder ("PTSD"), but leaves this diagnosis to the experts in that area.

[50] Dr. Underwood suspects some facet irritation in her mid-cervical region. Braking for the Accident likely led to the injury. Ms. Federico has myofascial pain in her low back but no neurological abnormalities. Peripelvic asymmetry was noted. Lastly, Ms. Federico had poor core strength.

[51] In Dr. Underwood's opinion, Ms. Federico's prognosis for full recovery is poor given that her Accident was in 2018 and, when assessed in 2022, she had improved but plateaued. Dr. Underwood notes that Ms. Federico is stoic with her symptoms. She will likely be at increased risk for injury if she is involved in a subsequent accident.

***Dr. Patton***

[52] Dr. Patton testified on behalf of Ms. Federico. She was qualified as a specialist in psychiatry. She assessed Ms. Federico on November 24, 2022, almost five years post-Accident. Dr. Patton opined that prior to the Accident, Ms. Federico met the criteria for: social anxiety disorder, performance only; specific phobia, natural environment/situational; adjustment disorder, acute, with depressed mood; other specified trauma-related disorder; and adjustment-like disorder with prolonged durations of more than six months.

[53] Ms. Federico's social anxiety disorder manifested in high school and she did not suffer from it again until she switched careers post-Accident in 2020. The specific phobia disorder, Dr. Patton testified, is normal in young people. This disorder resolved after her teen years. Ms. Federico's adjustment disorder and depressed mood occurred in her late 20s when she did not obtain a job as quickly as she expected upon returning to the workforce after taking time off to travel. Her symptoms resolved within two months of obtaining a new job. This is because the specific stressor that triggered the disorder was removed.

[54] In terms of the other specified trauma-related disorder, this occurred in 2013 when Ms. Federico fell down the stairs at work. For approximately one year thereafter she remained distressed about her fall and she avoided using the stairs on which she fell.

[55] Dr. Patton opined that post-Accident, Ms. Federico meets the criteria for PTSD which has manifested in her being overly fearful about the safety of her children. This is the foundational disorder – and the most impairing – from which the other diagnoses flow. Ms. Federico feels personally guilty and blames herself for the Accident because she believes it was her responsibility to keep her children safe.

[56] Dr. Patton opined that Ms. Federico has also developed mild-to-moderate somatic symptom disorder (“SSD”), although it did not persist in the moderate stage for very long. SSD is an excessive reaction to an Accident such as a significant focus on pain or other physical symptoms. Ms. Federico became persistently anxious about injuring herself and avoided physical activities after the Accident. While this disorder remained active at the time of the assessment, Dr. Patton opined that Ms. Federico was able to perform professionally with external support and direction.

[57] Dr. Patton further opined that post-Accident, Ms. Federico suffered from major depressive disorder, with anxious distress. Depression causes difficulties focusing and making decisions. It can also result in cognitive impairment. Ms. Federico also suffered from panic attacks after the Accident and she had some mild symptoms of social anxiety disorder when she switched jobs after 2020.

[58] Dr. Patton testified that Ms. Federico’s psychological traits were risk factors pre-Accident. There was no change, according to Dr. Patton, to Ms. Federico’s personality traits after the Accident but before the Accident her personality trait of perfectionism was assistive. It made her a very good worker. Unfortunately, post-Accident it became a burden. Ms. Federico no longer had the ability to meet the high expectations she placed on herself, causing her to negatively evaluate herself. Dr. Patton concluded that certain of Ms. Federico’s ‘dormant’ pre-Accident disorders were perpetuated by the Accident. This perpetuation negatively impacted “Ms. Federico’s ability to manage her home responsibilities, engage in and enjoy relationships as she had done and engage in and enjoy her leisure activities...”

[59] Dr. Patton acknowledged that the psychological treatment Ms. Federico received starting in November 2021 helped her and was a positive development. Both her mood and motivation improved. Dr. Patton deferred coming to a final prognosis until Ms. Federico had a chance to engage in recommended treatment.

***Ms. Hull***

[60] Ms. Hull, an occupational therapist, opined that Ms. Federico “is managing her current work volume well, noting that her children are her priority. She appreciates having a job with flexibility and that allows her to move around during the day when she needs a break from sitting”.

[61] Ms. Federico was tested by being made to engage in activities she does not normally do and she reported pain and mild discomfort thereafter. During testing, Ms. Hull opined Ms. Federico could lift up to 30 pounds from floor to waist on an occasional basis, yet her occupation as a realtor only requires her to lift up to 11 pounds.

[62] Ms. Hull noted in her report that:

Ms. Federico demonstrated the ability to sit for prolonged intervals (up to 1 hour and 17 minutes) with frequent repositioning, stretching, and the ability to sit upright. .... She is limited for activities (both seating and standing positions) that require sustained neck flexion .... An ergonomic setup to optimize her neck and shoulder positioning is important to support her durability with computer and paperwork, as is opportunity to take frequent breaks and/or avoid extensive static non-neutral neck positioning.

[63] Ms. Hall further opined that: “Ms. Federico is capable of working full-time in her pre-Accident role as a sales representative, provided that workstyle adjustments and accommodations are made” (e.g., modification of lifting of wine boxes). Based on the results of this functional capacity evaluation (“FCE”), she opined that “Ms. Federico meets the full essential job demands of a real estate agent”. However, she qualified this opinion by stating:

Her capacity for full-time employment in this vocation [real estate agent] has not yet been tested, and absent improvements to both her physical and emotional functioning, full-time durable work in her job as a realtor likely reflects an optimistic scenario.

[64] The defendant emphasizes that the FCE is a snapshot taken on April 26, 2023. This is true of all FCEs and independent medical examinations.

[65] While Ms. Hull comments on Ms. Federico's emotional functioning, Ms. Hull did no cognitive testing, no memory testing, nor any emotional testing/evaluation of Ms. Federico. This is of note because Ms. Hull is qualified to conduct such testing.

***Mr. Benning***

[66] Mr. Benning prepared an expert economic report in relation to Ms. Federico's future earning opportunities, as well as her future cost of care, owing to the Accident. I say more about his findings when I discuss loss of earning capacity and costs of future care below.

**The Defendant's Experts**

***Dr. Simonett***

[67] Dr. Gillian Simonett conducted an independent medical examination of Ms. Federico on September 26, 2023. She diagnosed chronic myofascial pain in Ms. Federico's neck and shoulder girdle and found this diagnosis to be the result of the Accident. She also noted that the neck pain was likely an aggravation of an earlier motor vehicle accident; given the close timelines, she was unable to specifically tease out contorting factors between the two accidents. Ms. Federico reported to her that her pain can increase at times of stress. Dr. Simonett reported no focal findings of low back pain and opined that Ms. Federico likely had initial myofascial pain. To the extent she still has pain, Dr. Simonett says this is most likely related to deconditioning.

[68] Dr. Simonett anticipates that mood is a significant component to Ms. Federico's presentation. Dr. Simonett opined that Ms. Federico meets the diagnostic criteria for headache attributed to the whiplash mechanism. At the time of the exam, Ms. Federico reported having two to four headaches a month. Stress is a trigger for these headaches and Ms. Federico takes Advil as needed.



[69] In terms of her mental and physical health, Dr. Simonett opined that Ms. Federico likely has a somatic relationship, i.e. her physical symptoms are related to her ongoing mood and stress levels. Ms. Federico reported improvements with counselling.

[70] Lastly, Dr. Simonett noted that Ms. Federico reported to her that she is currently working reduced hours to allow her to be present with her children. She did not report any specific limitations with respect to her job as a realtor. Ms. Federico also reported no limitations with her home function although some tasks may be done less frequently. Ms. Federico's plan is to increase her work, depending on her children's schedules and needs. In her testimony, Dr. Simonett reported that work-life balance is important to Ms. Federico.

[71] Dr. Simonett concluded that Ms. Federico is not physically disabled from working either as a full-time sales representative or as a real estate agent based on her demonstrated function.

**Mr. Mark Szekley, Economist**

[72] Mr. Mark Szekley prepared a critical analysis of the report of Mr. Benning. In his report, Mr. Szekley suggested that the long-term earnings that Mr. Benning projected for realtors were much higher than for a typical realtor. Mr. Benning used a figure at the high end of the range: \$125,000 per year to age 65. Conversely, Mr. Szekley calculated that between 2010 and 2023, gross commissions for real estate agents averaged at \$93,979 per year, excluding business expenses.

[73] Mr. Szekley additionally disagreed with certain assumptions made by Mr. Benning in his application of labour market contingencies. Specifically, Mr. Benning accounted only for disability and not for other chances of leaving the labour market; the decision to exclude unemployment, in Mr. Szekley's estimate, was not proper. Mr. Szekley indicated that accounting for average labour market contingencies would significantly reduce Mr. Benning's estimate of Ms. Federico's future earnings, and provided a chart of economic multipliers reflecting such reductions.

## Credibility

### Legal Principles

[74] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296,

Justice Dillon summarized the key elements of a credibility analysis:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] v. *Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[75] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, the Court stated:

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the

likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[Emphasis added.]

[76] Minor inconsistencies relating to entries in clinical records are expected: *Edmondson v. Payer*, 2011 BCSC 118 at paras. 31–36, aff'd 2012 BCCA 114.

[77] The validity of the evidence at trial depends on the overall consistency of the evidence with the probabilities affecting the case as a whole: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, [1952] 4 W.W.R. 171 (B.C.C.A.).

### Analysis

[78] There are live issues regarding the reliability and credibility of the plaintiff's evidence in this matter because the assessment of the extent of her injuries relies heavily on Ms. Federico's subjective self-reporting. The majority of the evidence came from Ms. Federico herself, or what she reported to her various health care providers and medical experts.

[79] Given the subjective nature of the claims, I am instructed to be cautious: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 44. I must also proceed cautiously because some of Ms. Federico's complaints have persisted beyond the anticipated recovery time: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.).

[80] In addition, a large portion of Ms. Federico's claim is based on her emotional and psychological injuries. Psychological symptoms are inherently subjective; there is little objective evidence to support them.

[81] The defendant accepts that Ms. Federico is overall, credible. The defendant notes, however, that in both direct and cross examination, Ms. Federico gave evidence that, post-Accident, she worked less than full-time hours at Gallo Wines. I agree with the defendant that there were some inconsistencies in the evidence of Ms. Federico. The defendant provides the following examples:

- a. Ms. Federico reported working full-time hours in 2018 to her kinesiologist Melissa Dahn;
- b. Ms. Federico admitted she was employed working full-time hours to four different experts in 2022 and 2023;
- c. Ms. Federico's earnings at Gallo Wines pre- and post-Accident show her earnings increased post-Accident; and
- d. No witness corroborated Ms. Federico's allegation that she worked fewer hours from the date of the Accident to August of 2020, when she was laid off, compared to the hours she worked pre-Accident.

[82] The defendant submits that Ms. Federico's testimony about working less than full-time hours undermines her credibility. I find that Ms. Federico's work was not as significantly affected as she made it out to be in her testimony. I do not accept, however, that Ms. Federico was attempting to mislead the Court.

[83] The defendant also points out that Ms. Federico testified in direct examination that it took three to six months to convert a lead into a sale at Gallo Wines. Ms. Federico said this again at the beginning of her cross examination. However, when Ms. Federico was questioned in cross examination regarding her increased post-Accident earnings at Gallo Wines, she qualified her answer. She testified that the increase in 2018 was, she assumed, based on the preparation work in 2017. She also explained that converting a lead into a sale could take a couple of years. When she referred to her 2019 earnings increase, she suggested that it could be due to her efforts in 2017 or 2016.

[84] Despite these examples, Ms. Federico's evidence was consistent with the history she shared with the experts. Moreover, her evidence as a whole harmonizes with the evidence that I have accepted from Ms. Federico, the lay witnesses, and the experts. In cross examination, she was neither argumentative nor prone to exaggeration. I also find the opinions of the experts were forthright, objective, and reliable, as is expected from independent experts before the court.

[85] Overall I found Ms. Federico to be a candid, honest, and credible witness, but will approach her evidence with caution given the subjective nature of her claims.

**My Findings**

[86] The expert evidence that I have accepted establishes that Ms. Federico suffers from:

- Myofascial pain in the paracervical and periscapular regions;
- Intermittent headaches secondary to trauma to her neck;
- Post-Traumatic Stress Disorder;
- Somatic Symptom Disorder;
- Major Depressive Disorder, with anxious distress; and
- Panic attacks.

[87] Ms. Federico therefore has ongoing minor physical pain and functional deficits. She has emotional impairments as a result of the Accident that are more problematic. Moreover, Ms. Federico’s physical pain can be triggered by anxiety and low mood.

**Prognosis**

[88] Ms. Federico argues that despite her treatments, she continues to suffer from chronic physical and emotional symptoms. Ms. Federico argues that her poor medical prognosis, as discussed in the medical-legal evidence, is well established. Ms. Federico says while she has enjoyed some improvement from the acute phase of her symptoms following the Accident – and her symptoms have tended to wax and wane over time – many of her Accident-related symptoms and conditions have taken a chronic course. Chronic pain is, by its nature, a condition that persists for years. It impacts on activities of daily living, relationships, and durability to perform

job duties. Based upon the medical-legal opinions, Ms. Federico has likely plateaued and her current state is expected to continue into the foreseeable future.

[89] Ms. Federico relies on the opinions of Dr. Patton, Dr. Underwood, and Ms. Hull. Dr. Underwood opined that Ms. Federico’s prognosis for full recovery is poor given that her Accident was in 2018 and when assessed in 2022 she had improved but plateaued. She noted that Ms. Federico is stoic with her symptoms. She will likely be at increased risk for injury if she is involved in the subsequent accident.

[90] Ms. Federico emphasizes Dr. Patton’s comment on her prognosis:

[50] ... Ms. Federico's prognosis would be expected to be negatively affected by the complexity of her psychiatric presentation after the accident in 2018, the length of time she has suffered from symptoms of her disorders, the severity of her persisting symptoms, her loss of valued productive activities, her negative self-assessment arising from her pre-existing perfectionistic traits, the unpredictable nature of her physical symptoms (for example, headaches) in someone with a high need for order and control and (until recently) her lack of adequate skills to cope with her emotional distress.

[51] In particular, [persons] who continue to display primary symptoms of a Post-traumatic Stress Disorder more than 4 years after the diagnosis are at a high risk of not achieving resolution of the same. Maintaining residual symptoms of any disorder increases your risk of suffering a full relapse of the disorder in the face of future stressors that would be expected to precipitate the same. If Ms. Federico achieves a resolution of any of her first episodes of her currently active disorders she will be at an increased risk for future relapses of the same in the context of future stressors that would be expected to precipitate such a relapse.

[91] Dr. Patton and the other experts do not suggest Ms. Federico cannot work full-time due to mental health or emotional issues. Rather, while the prognosis for further durable improvement of her persistent symptoms is guarded, they acknowledge she has been working since the accident and that it is expected Ms. Federico will continue working as a real estate agent in the future. While Ms. Federico is currently not working full-time, that is a choice to spend more time with her children and not a direct result of the Accident.

[92] I accept that six years after the Accident Ms. Federico’s symptoms continue to have an impact on her quality of life, and her chronic symptoms have plateaued.

Nevertheless, time has resulted in significant improvements and Ms. Federico's progress indicates that she is much better than in the initial year or two following the Accident.

[93] For example, Ms. Federico did not report any meaningful work limitations to Dr. Simonett, the physiatrist she saw at the request of the defendant. She did not report limitations that would prevent her from working to Dr. Underwood, the physiatrist who conducted an IME on her behalf. Dr. Underwood did not opine that Ms. Federico is currently disabled from work.

[94] Ms. Federico testified that she now gets headaches only two to four times per month. She advised Melissa Dahn, a kinesiologist, approximately one year after the Accident, that she had a 70 percent improvement in her level of pain intensity and an 80 percent improvement in her level of participation in daily activities. She is now working with a kinesiologist on strengthening her core muscles, which should help to improve some of her physical symptoms.

[95] Ms. Federico reported to Ms. Hull, the occupational therapist, that she is managing her current work volume well, and that her children are her current priority. She reported she anticipates increasing her realtor work hours once her kids are older and more independent. Her complaints about work are primarily about a lack of drive and motivation, a lack of efficiency in work tasks, and a lessened desire to do things well. She continues to experience neck pain with computer work.

[96] Ms. Federico's prognosis has a risk of deterioration in the future. As set out in *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166, as a matter of ordinary human experience and common sense, a person's ability to tolerate chronic pain diminishes with age.

[97] I find that Ms. Federico has experienced a significant improvement in her Accident-related symptoms. Moreover, Ms. Federico successfully completed her real estate course in 2021. Although she has not had as smooth a transition into the real estate business as she anticipated, this is not unusual with a new and demanding

job. Nevertheless, I accept Dr. Patton's view that Ms. Federico experienced mild symptoms of social anxiety disorder when she switched jobs from wine sales to real estate sales.

[98] Importantly, Ms. Federico has recently participated in psychological counselling. Since commencing counselling, she has reported consistent improvements in her mood and anxiety, as well as her motivation and function at work. Although of limited value,<sup>1</sup> her anxiety screening scores support that she is improving. Ms. Federico no longer takes cannabidiol to assist with sleeping and, on March 30, 2023, she advised her psychologist that her sleeping had improved. She has stopped having nightmares. In addition, her depression is now partially resolved. With that said, I accept Dr. Patton's finding that significant life stressors could result in a relapse of Ms. Federico's psychological injuries.

[99] Lastly, Ms. Federico testified that her physical symptoms often mirror her mental health and stress. As with many individuals who have had injuries following a traumatic event, a mutually perpetuating and exacerbating cycle arises, making the condition more difficult to treat. Ms. Federico has suffered from such cycles which complicates her recovery. If she continues to have improvements with respect to mental health, however, her physical health should likewise improve.

[100] Based on the above, I do not agree Ms. Federico's prognosis is dire. Nevertheless, she has a risk of relapse. Ms. Federico's Accident-related injuries and symptoms are in the milder category but there is a real prospect that they will be permanent. Her prognosis is generally positive, but guarded.

## **Causation**

### **Legal Principles**

[101] The generally accepted test for causation is the "but for" test: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21–22. The plaintiff bears the onus of proving on a

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<sup>1</sup> Dr. Patton, the psychiatrist, testified that these questionnaires simply show the plaintiff's responses indicate a need for further investigation.



balance of probabilities that but for the defendant's negligent act or omission the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-14; *Blackwater v. Plint*, 2005 SCC 58 at para. 78. Causation is made out if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8.

[102] In *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 323-324, 72 D.L.R. (4th) 289, the Supreme Court of Canada explained that a causation analysis involves "a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion". The test for causation does not demand scientific precision and should not be applied too rigidly: *Snell* at 327-328. While proof of causation will often require expert evidence, common sense applies: *Athey* at para. 16; *Clements* at para. 9.

[103] The plaintiff must establish a connection between the tortious conduct and the injury, beyond the *de minimus* level: *Farrant v. Laktin*, 2011 BCCA 336 at para. 11.

[104] It is well accepted that tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person: *Athey* at 473-474. If the plaintiff is injured to a greater degree than was foreseeable at the time of the breach, the defendant is still liable for the resulting injuries. If the defendant caused harm beyond the *de minimus* range, the extent of the harm is irrelevant. The but for test will be satisfied.

[105] In *Blackwater*, the Supreme Court of Canada discussed the issues arising from multiple causes of harm as follows:

[74] ...Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been had the tort not been committed ...

...

[78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether “but for” the defendant’s acts, the plaintiff’s damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant’s act is a cause of the plaintiff’s damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway....

...

[80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the “crumbling skull” scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.

[81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position [they] would have been in but for the tort for which the defendant is liable.

### **Analysis**

[106] Ms. Federico suffered both physical and emotional injuries from the Accident. There are no significant issues with respect to causation of any of Ms. Federico’s Accident-related injuries and their connection to her current ongoing and persistent symptoms. The defendant does not contest that the majority of the plaintiff’s injuries were caused by the Accident.

[107] The defendant challenged only two injuries. The first relates to the extent and resolution of Ms. Federico’s low back and knee pain. Based on Dr. Simonett’s evidence he suggests the low back and knee pain have resolved. The defendant also argues Ms. Federico’s reduced hip range is not linked to the Accident.

[108] I find that Ms. Federico has established on a balance of probabilities that the defendant caused or contributed to her injuries apart from her hip pain: *Athey* at para. 34. The question is the extent of the injuries.

[109] Dr. Underwood opined that Ms. Federico's neck pain, headaches, and upper and lower back pain are a direct result of the Accident. Dr. Patton opined: "it is my medical opinion, but for the accident in January 2018 Ms. Federico would not have gone on to develop a Post-Traumatic Stress Disorder, Somatic Symptom Disorder, Major Depressive Disorder with marked anxiety, and panic attacks".

[110] A robust and pragmatic approach to the "but for" test allows for there to be more than one cause of an injury. So long as I am satisfied that the defendant's actions were a cause of Ms. Federico's injuries, the defendant is fully liable for that damage: *Blackwater* at para. 78. Given the closeness in time between the Accident and the onset of Ms. Federico's physical and psychological symptoms, I find that the Accident caused the injuries (apart from the hip injury as noted above).

[111] I find the following injuries arose from the Accident: myofascial pain in the paracervical and scapular regions; headaches secondary to her neck trauma; myofascial pain to the lumbosacral region (now resolved); PTSD; SSD; intermittent major depressive disorder; and anxiety that is subsumed in the other diagnoses.

[112] But for the Accident, Ms. Federico would not be suffering from these physical and emotional injuries: *Clements* at paras. 9-10. Causation has been established and it is beyond the *de minimus* threshold.

### **Non-Pecuniary Damages**

#### **Legal Principles**

[113] The first issue I must address with respect to compensation is general damages. Non-pecuniary or general damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair and reasonable to both parties. When assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. While the authorities are helpful, all cases are factually specific in terms of the impact the injuries have had on the particular plaintiff and their prognosis going forward. As a result, the authorities serve only as a rough guide.

Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[114] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006), Justice Kirkpatrick described some of the factors to be considered when assessing general damages:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p.373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p.284 of S.C.R.).

[Emphasis in original.]

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life.

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[Emphasis in original.]

[115] The more significant the juxtaposition between the plaintiff's pre- and post-Accident lifestyle and quality of life, the more significant the damages award will be to fairly compensate the plaintiff for their losses.

### **Analysis**

[116] Ms. Federico testified that pre-Accident she was a healthy mother of two children. She was able to easily juggle a myriad of responsibilities of being a "working mother". She valued both her family life and her career. Ms. Federico was a successful salesperson in her position with Gallo Wines. Ms. Federico testified she was fit, energetic, and had a fulfilling social life. Ms. Federico enjoyed kick-boxing, gym workouts, cardiovascular fitness, and travelling. The lay witnesses testified that Ms. Federico had an outgoing personality with a strong work ethic. She had a good network of family and friends.

[117] I find that prior to the Accident, Ms. Federico was a happy, energetic, hard working individual who was outgoing and social. She participated in numerous activities and valued physical fitness, travel, and being active with her young children. Ms. Federico was very involved with her children's sports and activities as well as with her extended family.

[118] At the time of the Accident, Ms. Federico had been working full-time in her sales position with Gallo Wines where she had worked since 2007. As the lay witnesses testified, she was confident, social, and well liked.

[119] Prior to the Accident, Ms. Federico had no functional or physical deficits. She was healthy and easily balanced her work life with her family responsibilities and her children's activities.

[120] Leading up to the Accident, Ms. Federico's emotional and psychological health was stable. She had had some mental health issues in the past but they had resolved well before the Accident and were context-specific. In the lead up to the Accident, Ms. Federico did not suffer from any ongoing or chronic anxiety or depression, panic attacks, or driving anxiety. She was a happy and well-adjusted individual, who enjoyed a fulfilling family life and her relationship with her husband.

[121] The evidence demonstrated that Ms. Federico and her family were significantly altered by the injuries she suffered as a result of the Accident. Ms. Federico testified that her injuries weakened and transformed her. She testified she now has less energy and is not the positive person she was prior to the Accident. She does not feel that she is the role model she would like to be for her children. Ms. Federico became an overly cautious mother and was labelled the "no fun mom".

[122] The testimony revealed that Ms. Federico's injuries had an impact on her relationships with her friends and extended family. She tried to adapt to her limitations, but she has struggled emotionally. She had anxiety when driving which was worse when she was a passenger in a motor vehicle. She experienced anxiety attacks in the first year following the Accident, had nightmares, and had difficulty sleeping.

[123] After the Accident, Ms. Federico experienced pain. Initially, many simple tasks of everyday living that Ms. Federico previously took for granted became a challenge. Stress exacerbates her symptoms. The various medical-legal assessments established she had diminished ranges of motion, consistent with chronic strain and myofascial injuries. Ms. Federico has lost much of her former energy and enthusiasm for many things that previously brought her joy. Her social circles have diminished.

[124] Her resilience, self-confidence, and self-image have been undermined. She now worries about her work and business future. She has not been able to just work

harder to overcome challenges as she had in the past. This has added to her frustration over time.

[125] Ms. Federico's Accident-related physical and cognitive injuries, pain symptoms, and functional limitations continue to affect her everyday life. Despite attending hundreds of treatment sessions over the span of over six years since the Accident, Ms. Federico continues to be frustrated. Ms. Federico's optimistic personality has been replaced with a less enthusiastic individual who worries about the safety of her family and especially her children. As Dr. Patton stated in her report:

...it is my medical opinion, more likely than not, her psychiatric disorders would have been clinically expected to have, on their own, impaired her ability to engage as usual in all the roles she maintained at the time of the accident in 2018 and to have limited her ability to enjoyment in those roles and activities expected to confer the same.

[126] Ms. Federico's emotional injuries have caused her to sometimes feel detached from her family and friends. Initially, Ms. Federico did not want to go out with family or friends, as she did not want to leave her children, or have them leave her, for fear that they will no longer be safe. This has created increasing levels of conflict within the family as her children are growing up and exerting their independence. This has improved with counselling but it persists.

[127] Despite her injuries, Ms. Federico continued to work and do well with her career. She was laid off in 2020, but this was a result of the pandemic, not her injuries.

[128] Although it has been over six years since the Accident, Ms. Federico continues to suffer from mild chronic pain, minor functional limitations, occasional headaches and sleep disruption, PTSD, mild SSD, intermittent depression, and fatigue. In addition, Ms. Federico's comorbid psychiatric disorders negatively interact with her physical symptoms. All these factors have had and continue to have a significant impact on Ms. Federico's life as a whole. This was confirmed by the

evidence of her husband and brother-in-law who both became tearful when testifying about the effect the Accident had on Ms. Federico.

[129] I accept that despite her stoicism, Ms. Federico's injuries have had a life-altering effect on her everyday life. While now mild, her physical injuries have taken a toll on Ms. Federico and have had a significant impact on her marriage, family, and social life.

[130] The physical and emotional impact of the Accident have combined to undermine Ms. Federico's overall quality of life and impacts on her self-image and her professional aspirations. Ms. Federico is relatively young and has many years ahead of her. She continues to struggle with mental health challenges, but counselling has given her strategies to cope with her recurrent anxieties and PTSD. She also continues to experience some physical pain, especially when she is experiencing more mental health challenges. Again, counselling has been of great benefit to Ms. Federico; she has seen significant improvement since commencing counselling sessions with Dr. Vadrevu, a registered psychologist. The stress around her children has improved and she became less vigilant with them. Her mood and anxiety have also improved but she continues to require treatment.

[131] I have reviewed the authorities provided by the plaintiff and find the injuries in these authorities generally to be more serious or more debilitating than those suffered by Ms. Federico. The most helpful cases were *Ranahan v. Ocegüera*, 2019 BCSC 228; *Sebaa v. Ricci*, 2015 BCSC 1492; and *Danks v. Middleveen*, 2024 BCSC 174.

[132] The authorities generally involve previously active plaintiffs with chronic pain and associated emotional symptoms with a similar (guarded) prognosis.

[133] They include important parallels to Ms. Federico's unique circumstances. Specifically, the chronic physical and emotional pain which she endured.

[134] I find that \$190,000 is an appropriate award for non-pecuniary damages in the circumstances. I find this amount is appropriate to compensate Ms. Federico for her



myofascial injuries and the psychological difficulties she has experienced since the Accident. This quantum of damages takes into account Ms. Federico's relatively young age, the evidence that her physical injuries, while now mild, are considered chronic, that she suffers from PTSD, SSD, intermittent depression, and occasional headaches. These injuries will affect Ms. Federico's future pursuits and the prognosis is guarded. This award also reflects the toll the Accident has had on Ms. Federico's family relationships, and her social life.

[135] Included in this amount is loss of housekeeping capacity, as well as the toll on Ms. Federico as she continued to work full-time in the first few years following the Accident. I recognize Ms. Federico's stoicism for which she should not be penalized.

### **Past Loss of Earning Capacity**

#### **Legal Principles**

[136] Claims for past and future loss of earning capacity – loss of the value of the work that would have been performed but for the Accident – are subject to the same legal test. The plaintiff must demonstrate that the injuries suffered in the Accident, and the resulting symptoms and limitations, have impaired their ability to earn income. They must establish there is a “real and substantial possibility” this impairment has resulted, or will result, in a pecuniary loss: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. The plaintiff need not prove a hypothetical event would have occurred on a balance of probabilities. Rather, they must establish that the hypothetical event is a real and substantial possibility and not based on mere speculation. The onus is not a heavy one, but must be met in order to justify a pecuniary award: *Perren v. Lalari*, 2010 BCCA 140 at paras. 21, 32 and 33.

[137] Damages are assessed, not calculated: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. Such assessment is not a precise or mechanical exercise.

[138] Assessing compensation for past loss of earning capacity requires a comparison between a hypothetical past state of affairs and what actually occurred. Since we cannot know what would have happened had the plaintiff not

been injured, the Court must assess what would most likely have occurred, and the existence of real and substantial contingencies that events might have turned out differently.

[139] Contingencies may be positive or negative. They may be general in that they arise as a matter of human experience or they may be specific in that they are grounded in the evidence as likely to arise in the circumstances of this case: *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 86-91.

[140] An award for past economic loss of earning capacity arising from a motor vehicle accident is determined on an after-tax basis: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, ss. 95, 98.

**Analysis**

[141] The defendant argues that Ms. Federico was just as effective and successful at her job post-Accident as she was before the Accident. Ms. Federico disagrees.

[142] To determine Ms. Federico’s past loss of earning capacity it is important to examine her pre-Accident income. Pre-Accident her income from Gallo Wines was:

2013 – \$22,367

2014 – \$76,783

2015 – \$86,320

2016 – \$84,949

2017 – \$80,142

2018 – \$94,028

[143] Ms. Federico’s post-Accident income was:

2019 – \$98,105 (Gallo Wines)

2020 – \$87,357 (Gallo Wines)

---- \$9,376 (EI/CERB)

2021 – \$21,744 (EI/CERB)

2022 – \$37,402

2023 – \$29,649

[144] For two and a half years after the Accident, Ms. Federico was able to work full-time in her sales job at Gallo Wines. This involved driving, client interaction, and little supervision – all without a reduction in her earnings. During that time her earnings increased despite the fact that Ms. Federico’s physical symptoms were worse than they are presently and her emotional symptoms were untreated. She also managed her household responsibilities without undue difficulties. She worked full-time while attending the many treatments she received post-Accident. Ms. Federico lost her job in mid-2020 due to the COVID pandemic, not the Accident. She decided to pursue real estate sales rather than continuing in wine sales. Ms. Federico took the real estate course and successfully completed it within the regular time frame. She obtained her real estate license in September 2021 and began working with Oakwyn Realty. She earned commissions on three sales in 2022, two sales in 2023, and, as of the applicable evidence, one sale in 2024.

[145] Despite the above, I accept that work took more out of Ms. Federico post-Accident than it did pre-Accident. She testified about mental health challenges, the symptoms of which were a lack of motivation, focus, and energy.

[146] It is particularly difficult to assess the value of a loss of earning capacity in circumstances where the plaintiff has continued to earn income near or above their pre-Accident level as Ms. Federico has done. Here, I find her past income earning capacity was minimally affected by the Accident. Ms. Federico provided evidence of symptoms in the first few years following the Accident but, as set out above, she continued to work. I appreciate that this is largely because Ms. Federico is stoic and

pushed through her pain and mental health challenges. She did lose income (but not capacity) when she was laid off in 2020. She also lost income because she took time off work to study for her real estate licence. Her income as a real estate agent has not been stellar. Nevertheless, it takes time to build a real estate practice so her lower salary in 2022 and 2023 is not surprising. The average salary for real estate agents in their first few years is statistically low.

[147] I find the physical pain and her psychological challenges during this period are reflected in her non-pecuniary award. I am not persuaded that she would have earned more income between 2019 and 2021 absent the Accident. By 2022, I am satisfied that there is a real and substantial possibility that her income was affected by her lack of motivation, energy, focus, and the reoccurrence of her social anxiety disorder. However, it would also have been reduced by starting a new career. Consequently, I award \$20,000 for loss of earning capacity in 2022 and 2023 (\$10,000 each year) and \$7,500 for 2024 (up to her birthday) based roughly on the calculations set out in paragraph 188 of these Reasons.

[148] I leave it to the parties to calculate any interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

### **Future Loss of Earning Capacity**

#### **Legal Principles**

[149] An award for future economic loss of earning capacity requires the plaintiff to prove that there is a real and substantial possibility of a future event causing an income loss: *Rab v. Prescott*, 2021 BCCA 345 at paras. 47-49. The underlying question is whether the plaintiff's injuries make them "less valuable to [them self] as a person capable of earning income in a competitive labour market": *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.).

[150] Recent appellate authorities set out a three-part test to determine loss of future earning capacity. As summarized in the recent case *Tigas v. Close*, 2024 BCCA 223:

[22] ... principles involved in assessing past and future hypothetical events relevant to both past and future loss of earning capacity claims are the same. In the context of loss of future earning capacity claims, the Court in *Rab* ... set out the following approach, identifying the pathway to a determination of whether a loss of earning capacity has been caused by an accident and its quantification:

- a. assess whether the evidence discloses a potential future event that could lead to a loss of capacity;
- b. if so, assess whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss;
- c. if so, assess the value of that possible future loss, including assessing the relative likelihood of the possibility occurring.

[151] The Court must also assess whether in all the circumstances the award is fair and reasonable to both parties: *Lo v. Vos*, 2021 BCCA 421 at paras. 71-74. As with past economic loss, the assessment is a matter of judgment rather than a mathematical calculation: *Ibbitson* at para. 19; *Jurczak v. Mauro*, 2013 BCCA 507 at para. 37.

[152] In some cases, courts have awarded damages for loss of future earning capacity in an amount equal to one- or two-years' earnings. This is known as the capital asset approach. In other cases, courts have adopted an earnings approach, forecasting potential earnings. Damages for loss of future earning capacity in cases where the loss is difficult to quantify tend to be assessed using the capital asset approach: *Kim v. Baldonero*, 2022 BCSC 167 at para. 92, citing *Rab* at para. 30. The capital asset approach is more appropriate when the loss is not easily measurable in a pecuniary way: *Perren* at para. 12.

[153] With that said, recent Court of Appeal decisions have directed trial judges to ensure the assessment of future economic loss be grounded in a rigorous and evidence-based consideration of the contingencies: *Dornan v. Silva*, 2021 BCCA 228 at paras. 160-161; *Rab* at para. 47; *Lo* at paras. 71-74.

[154] When using an earnings approach, future economic loss is to be assessed using a comparison of hypothesized events. The Court must evaluate the plaintiff's likely future but for the Accident and compare it to their likely future post-Accident.

Under this approach, real and substantial positive and negative contingencies must be considered.

[155] In addressing contingencies, it is necessary to distinguish general from specific contingencies. General contingencies involve the potential for improvement in health, opportunities for advancement, and the “usual chances and hazards of life” that may be encountered by anyone as a matter of human experience: *Djukic v. Hahn*, 2006 BCSC 154 at para. 105, aff’d 2007 BCCA 203. They are typically modest. Although the Court of Appeal has asserted that an adjustment to reflect general contingencies should be modest, there is a line of authority favouring a 20 percent deduction to reflect labour market general contingencies: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (S.C.); *Dunn v. Heise*, 2021 BCSC 754 at para. 202; *Montazamipoor v. Park*, 2022 BCSC 140 at paras. 105-109; *Hann v. Lun*, 2022 BCSC 1839 at paras. 111-113.

[156] Specific contingencies pertain to the particular plaintiff. They must be grounded in evidence that establishes them as more than speculative possibilities: *Dornan* at para. 92.

[157] The Court “must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence”: *Parypa v. Wickware*, 1999 BCCA 88 at para. 67. Ultimately, the award must be assessed for its overall fairness and reasonableness: *Miscisco v. Small*, 2001 BCCA 576 at para. 2.

## Analysis

### ***a. Whether the evidence discloses a potential future event that could lead to a loss of capacity.***

[158] The lay witnesses and expert evidence indicates that the nature and extent of Ms. Federico’s physical injuries were moderate. While she has seen much improvement, Ms. Federico’s symptoms have plateaued and she continues to face some challenges.

[159] Ms. Federico continues to experience pain with overhead movements, prolonged sitting, and looking upwards (which causes dizziness). Moreover, Ms. Federico continues to report pain and mild discomfort at the end of the work day and still experiences minor fatigue, some sleep disruption, and occasional headaches. However, Ms. Federico reported no physical limitations with respect to working as a realtor.

[160] Ms. Hull, the occupational therapist, opined that Ms. Federico meets the physical requirements to do her job at Gallo Wines, with modest adjustments. She meets all the physical requirements to be a realtor. Realty allows her to “move around during the day when she needs a break from sitting.” Dr. Underwood did not indicate that Ms. Federico is disabled from work or that she needs accommodations to function at work. This is consistent with Dr. Simonett’s opinion that although a full recovery is unlikely, Ms. Federico is not physically disabled from work. She has some functional limitations, but these do not impact her work as a real estate agent.

[161] I find that Ms. Federico is not physically prevented from working in the future. Her modest pain from overhead movements, prolonged sitting, and looking up quickly, are addressed by working in real estate. The most concerning disability going forward is due to her mental health.

[162] Ms. Federico’s mental health is not as positive. Post-Accident, Ms. Federico developed mild SSD and became persistently anxious about injuring herself. Post-Accident she avoided many physical activities. Ms. Federico suffered from major depressive disorder, with anxious distress. Most importantly, Ms. Federico meets the criteria for PTSD, which has manifested in her being overly fearful about the safety of her children.

[163] These mental health challenges – some of which were present, but dormant, prior to the Accident – have affected Ms. Federico’s real estate career. They have impaired her ability to work to her full potential as a real estate agent. Ms. Federico has been rendered less valuable to herself as well as to her current and future employers. She now has less energy and confidence. Although relatively minor,

Ms. Federico is less efficient, less resilient, and less motivated as a direct result of the injuries she sustained in the Accident. Moreover, there is a real and substantial possibility these impairments will result in a future pecuniary loss.

[164] There is a concern regarding the extent to which Ms. Federico will be able to build her real estate clientele and career. There is evidence that her mental health challenges may continue to have an impact on her career trajectory, durability, and longevity.

[165] Ms. Hull had some concerns about Ms. Federico being a full-time realtor given her “emotion”. Unfortunately, she did not test Ms. Federico’s cognition, memory, or emotion so this comment has little weight. In addition, Ms. Hull indicated that Ms. Federico “is managing her current work volume well.” She noted that Ms. Federico’s children are her current priority and she appreciates having a job with flexibility.

[166] Applying the factors from *Brown*, I find that as a result of the Accident, Ms. Federico may be rendered less capable overall from earning income from all types of employment, may be less marketable or attractive as an employee to potential employers, may have lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured, and may be less valuable to herself as a person capable of earning income in a competitive labour market.

[167] I find that while not high, there is a real prospect of further deterioration of Ms. Federico’s physical and mental health in the future. This is particularly the case if she is further injured or has major stressors in her life. The evidence establishes that Ms. Federico’s physical, and especially psychological, injuries sustained in the Accident could well lead to a loss of future income earning capacity. Ms. Federico has satisfied the first aspect of the *Rab* test.



***b. Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss.***

[168] The question at this stage is whether the plaintiff has established a real and substantial possibility of a future income loss as a result of her mild but ongoing neck pain, occasional headaches, intermittent depression, anxiety, SSD, and PTSD. I conclude that she has.

[169] Ms. Federico testified regarding the toll that her chronic pain, headaches, and depression have taken on her ability to work long hours and to sit for extended periods of time. Ms. Federico has pushed through her pain and headaches in order to perform as highly as she has post-Accident. Ms. Federico has improved with respect to her physical health, but her mental health challenges, particularly intermittent depression, SSD, and PTSD, have affected her ability to network and initiate connections with prospective real estate clients. While she has had some success, she has not excelled in this profession to the same extent as she did at Gallo Wines.

[170] With respect to her work as a realtor, Dr. Patton opined:

When let go from this company [Gallo Wines] based on company financials and not her performance, she transitioned to becoming a realtor. As would be expected, starting a new job re-activated her performance anxiety, although less intensely than she expected. However, it is my medical opinion, more likely than not, Ms. Federico's ongoing symptoms of her other psychiatric disorders that onset after the accident in 2018, and their clinically expected impact on her cognitive clarity, energy and drive, has negatively impaired her ability to function as she would otherwise be able to in her new position.

[171] While there are other causes than just the Accident (i.e., her current focus on her children; the stress of having a family member die and a close family member being diagnosed with dementia), there is a real and substantial possibility that her ongoing physical pain – and especially her depressed mood, anxiety, PTSD, and SSD – will result in Ms. Federico's real estate career being impacted going forward. There is a real and substantial possibility that she will, in the future, suffer a pecuniary loss. Ms. Federico has satisfied the second part of the *Rab* test.

***c. If there is a real and substantial possibility of a pecuniary loss, assess its value and the relative likelihood of the possibility occurring.***

[172] Turning to the third test set out in *Rab*: what is the value of that possible future loss, having regard to the relative likelihood of it occurring? The task of the Court is to compare the likely future of Ms. Federico's working life if the Accident had not happened with her likely future working life post-Accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.

[173] As noted above, the two approaches that the Court may take in assessing the plaintiff's loss under this head of damages are either the "earnings approach" or the "capital asset approach". Different factors apply with respect to which approach may be the most appropriate in the circumstances of each case; however, the underlying analysis in terms of the relevant factors to be considered in assessing the plaintiff's loss remains the same.

[174] The rationale for awarding Ms. Federico damages for future loss of earning capacity is the same as her claim for loss of past earning capacity – the impairment of her capacity to earn income. It is the loss of a capital asset that attracts compensation.

[175] Utilizing an earnings approach, quantification of the loss may be assisted with mathematical calculations. This is done by extrapolating the present value of the lost future income. However, the assessment is not derived from a precise mathematical calculation and it should not be a mechanical exercise. As stated in *Parypa*:

[36] Awards for loss of earning capacity based on a strictly mathematical calculation have not met with approval in this Court. In *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.), Hollinrake J.A. said at para. 43: "...the law is clear that in these cases the task of the court is to assess damages, not to calculate them on some mathematical formula". In *Morris v. Rose Estate*, *supra*, Donald J.A. observed, at 263:

Assessing damages in this area involves an estimate based on prophecies. Mathematical certainty is impossible in virtually all cases. While a comparative scenario approach will often be useful, the judge must step back and look at all the relevant factors, especially general incapacity, before fixing an amount. ...

[Emphasis added.]

[176] Ms. Federico is stoic and resilient. She continued to drive post-Accident despite her PTSD although she was anxious and nervous both as a driver and as a passenger. Ms. Federico has continued to work since the Accident. Nevertheless, the medical evidence establishes that she may be compromised in her future work.

[177] I note that at Gallo Wines, Ms. Federico's sales had declined between 2015 and 2017 and then rose after the Accident. It is normal to have ebbs and flows in sales and I do not read too much into these numbers. However, there was no evidence to support that Ms. Federico was a top performer at Gallo Wines or that her income would always have an upwards trajectory. There was evidence that she was a valued employee, with a strong work commitment.

[178] Ms. Federico's friend, Carrie Wertheim, testified that Ms. Federico is energetic, motivated, and a good realtor. Ms. Wertheim also testified that to be successful she has had to re-organize her whole life around her business. All her social engagements are networking events, and she works between 50 and 80 hours a week. Ms. Federico by contrast is, understandably, very focussed on her children. She is not prepared to work between 50 and 80 hours a week due to her family responsibilities.

[179] Mr. Benning is an expert specializing in the field of economics. He quantifies pecuniary damages and losses. He prepared an expert report opining on Ms. Federico's income loss flowing from the Accident, based upon a number of provided assumptions and the application of limited labour market contingencies.

[180] Mr. Benning's estimation in Table 3 of his Report is based on the following assumptions:

- (a) In absence of the Accident, Ms. Federico would have otherwise obtained a full-time sales position as of October 1, 2021, earning \$75,000 per year to October 30, 2021 and \$95,000 per year thereafter to the reference date.
- (b) In addition, Ms. Federico would have also worked part-time as a realtor from October 1, 2021 to the reference date, earning \$40,000 per year.

(c) In the future period, Ms. Federico would have worked solely as a realtor, earning \$125,000 per year to age 65 years and \$62,500 per year between age 65 and age 70.

(d) As a result of the Accident, Ms. Federico will now continue to work part-time as a realtor to age 60, earning \$40,000 per year.

[181] The only contingencies Mr. Benning applies are for disability and for survival. He assumes Ms. Federico will not voluntarily withdraw from the workforce. I believe this is a fair assumption because Ms. Federico has a strong work ethic and commitment. It is reasonable to assume she will not depart from the labour force voluntarily. Mr. Benning's calculation assumes Ms. Federico will struggle with mood, focus, and energy going forward. It does not consider the contingency that she may improve with treatment. As well, Mr. Benning's calculation does not consider the potential for Ms. Federico to earn more once she builds her real estate contacts and sales. Mr. Benning assumes that Ms. Federico's mental health will not improve, and her ability to work and grow her real estate business will likewise not improve.

[182] Mr. Benning calculates damages resulting from Ms. Federico's future loss of earning capacity and they are a good starting point. This calculation provides a helpful mathematical anchor but I must assess – not calculate – damages under this head: *Parypa* at para. 36. I have ignored his calculations after age 65 as in my view, pre-Accident, Ms. Federico was likely to retire at or slightly before age 65. In other words, the evidence did not support Ms. Federico's argument that she would have worked beyond this retirement age.

[183] Dr. Patton opines that although Ms. Federico can work full-time, there is a real and substantial possibility that in the future Ms. Federico may suffer a relapse. Moreover, those who display primary symptoms of PTSD more than four years after the diagnosis, according to Dr. Patton, are at "high risk" of that PTSD not resolving. Continued residual symptoms can increase the risk of relapse in the face of relevant stressors. Dr. Patton assessed Ms. Federico to be at risk of such a relapse, even if she is able to resolve instances of her currently active disorders.

[184] I do not find many of Mr. Benning's assumptions about Ms. Federico's future income but for the Accident to be persuasive. Ms. Federico works as a real estate agent and there is a broad range of incomes for real estate agents. Mr. Szekley provided the distribution of low, high, and median incomes for full-time females for 2015 and 2020. Mr. Szekley explained that using median incomes is more accurate because very high earners skew the average incomes. Both 2015 and 2020 had average or stronger than average real estate sales.

[185] Table 3 shows the gross commissions earned per realtor in Greater Vancouver between 2010 and 2023. The average is \$93,939, but this number does not address business expenses. Based on both these Tables, an income of \$125,000 would be a top earner.

[186] Based on my rejection of Mr. Benning's proposed income but for the Accident, I have used the calculations set out in Table 5 of Mr. Benning's Report. Table 5 applies an economic multiplier.

[187] I have given Ms. Federico the benefit of the doubt with respect to the future. I have used the amount between the median and high incomes because while there was no evidence that Ms. Federico was a top earner, she was successful in her work pre-Accident.

[188] I need to determine Ms. Federico's anticipated income as a real estate agent, but for the Accident. My calculation is based loosely on Table 2 of the real estate incomes provided by Mr. Szekley. I then assumed Ms. Federico would make between the median income of real estate agents in her age category and the higher category based on Table 2 of Mr. Szekley's Report. This would be \$75,000. Between ages 45 and 49 this calculation is 33 percent of \$75,000, which is \$24,750, to account for her part-time work. I then assume that Ms. Federico's productivity is reduced by 30 percent as a result of the Accident which would lower her income by \$17,325 in the years between 45 and 49. Using the multiplier of 6.548 (to age 50) equals \$113,444 (17,325 times 6.548).

[189] Rounding up, I find Ms. Federico's loss of earning capacity to be \$115,000 between ages 45 and 49. I have come to this figure owing to Ms. Federico's part-time work and given Ms. Federico's chronic physical injuries, as well as the risk of relapse of her psychological injuries.

[190] After five years, I assume Ms. Federico will be in a position to work full-time and will work until age 65. I have put Ms. Federico in the higher category of earnings five years before she reaches age 55 because she is such a good worker.

[191] Using the mid-point between median and high incomes for 55- to 64-year-olds, I find Ms. Federico's income would, but for the Accident, have been \$90,000 per year. Thirty percent of \$90,000 is \$27,000, which is the amount Ms. Federico will be out of pocket each year. I have used the economic multiplier of 10.970, cumulative for the years 51-65 (inclusive)<sup>2</sup> and find that Ms. Federico's loss of income capacity for this age range is \$296,190, which I round to \$300,000.

[192] Based on the foregoing, the total loss of income earning capacity suffered by Ms. Federico is \$415,000.

[193] In consideration of the overall fairness and reasonableness of the award, I consider that a deduction of 5 percent going forward is appropriate to account for the possibility that after further treatment, Ms. Federico's mental health will improve, which will reduce her physical symptoms. Accordingly, I assess Ms. Federico's damages under this head to be \$394,250, which I round up to \$400,000.

[194] The total award for future loss of earning capacity between ages 44 and 65 is \$400,000.

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<sup>2</sup> I have removed the annual multiplier figures for ages 44-50 from the multiplier for the ages 51-65. That is,  $17,518 - 6,548 = 10.970$ , with 6.548 being the multiplier for ages 44-50.

## Mitigation

### Legal Principles

[195] The principles underlying the duty to mitigate were articulated many years ago by Chief Justice Laskin in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 330–331, 57 D.L.R. (3d) 386:

The primary [compensatory] rule . . . is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages . . . The extent of [recoverable losses] may depend on whether [the plaintiff] has taken reasonable steps to avoid their unreasonable accumulation.

[196] A plaintiff thus has an obligation to mitigate their loss by pursuing re-training or another occupation which are realistic given any lingering injuries or limitations. The Court must take into account all substantial possibilities and give them weight according to their likelihood, in light of all the evidence when assessing future loss of earning capacity, and mitigation is a part of this accounting: *Parypa v. Wickware*, 1999 BCCA 88 at para. 67.

[197] Where the defendant asserts that a plaintiff has not mitigated their damages by failing to pursue a recommended course of treatment, the defendant must prove: (i) that the plaintiff acted unreasonably in eschewing the recommended treatment; and (ii) the extent to which the plaintiff's damages would have been reduced had they pursued the treatment: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

[198] The onus is on the defendant to prove that Ms. Federico could have avoided all or a portion of her loss.

### Analysis

[199] The law is clear that Ms. Federico is not entitled to recover damages that she reasonably could have avoided. She has a positive duty to take reasonable steps to minimize her losses brought about by the Accident: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1; *Chiu*; *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 233.

[200] Ms. Federico has been open to the various treatment recommendations suggested to her. She devoted significant time to her treatment regime following the Accident. This was the case even during COVID, when in-person treatment was challenging.

[201] To date, Ms. Federico has attended 12 visits with a registered massage therapist, 26 visits with active rehabilitation/physiotherapy, six visits with a chiropractor, approximately 138 visits with a Traditional Chinese Medical Doctor for acupuncture, 43 visits with a psychologist, and 19 visits with an occupational therapist.

[202] Ms. Federico has also tried many forms of self-release treatments such as over the counter medication (Advil), heating pads, hot showers, magic bags, initial use of a Theragun (which she found too painful), and a TENS machine which she can utilize at her leisure to “release” areas of muscle tightness to her body. Moreover, Ms. Federico stretches regularly to manage her ongoing pain.

[203] Ms. Federico has taken time out of her work day to attend to passive and active forms of treatment that helps her maintain her current level of functioning. Both the frequency and modality of her various recommended treatments have lessened over the six-year period following the Accident as her symptoms have improved.

[204] More recently, Ms. Federico has been participating in psychological counselling. It has been so successful that she wishes she had started counselling earlier. She has learned to implement coping strategies to reduce and handle her anxiety and she has stopped having nightmares. The defendant suggests she should have tried counselling earlier. I find that she enrolled in counselling as soon as she became aware that it may be necessary for her recovery.

[205] Ms. Federico has also continued working since the Accident, apart from taking three days off work in its immediate aftermath. There is no evidence to suggest that Ms. Federico has failed to mitigate her losses.



## Cost of Future Care

### Legal Principles

[206] In *Paur v. Providence*, 2017 BCCA 161, Justice Newbury stated the test for recovery of future care costs:

[109] The law is clear that in order to be included in an award of damages, an item of future care must be medically necessary. In *Tsalamandris v. McLeod* 2012 BCCA 239, this court reviewed the applicable principles:

The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. [At paras. 62-3.]

While there must be some evidentiary link between a medical expert's assessment of disability and the care recommended, it is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Gregory v. Insurance Corporation of British Columbia* 2011 BCCA 144 at para. 39; *Aberdeen v. Zanatta* 2008 BCCA 420 at paras. 43, 63.

[207] While expert evidence is generally needed to support a future care claim, it is not determinative of whether the costs claimed are reasonably necessary. It is appropriate for the court to apply common sense in assessing whether the costs claimed properly fall within the purpose of a future cost of care award: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

[208] The plaintiff must be likely to incur the future care costs. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested

services: see *Shongu v. Jing*, 2016 BCSC 901 at para. 210 (citing *Lo v. Matsumoto*, 2015 BCCA 84 at para. 20 and *O'Connell v. Yung*, 2012 BCCA 57 at para. 68).

### Analysis

[209] The defendant submits that an award for future care is subject to s. 83 of the *Insurance (Vehicle) Act*, particularly subsections 4 and 5. He asks that the Court nonetheless particularize its award for cost of future care, setting out how much it is awarding for each future care item.

[210] Dr. Patton recommends cognitive behavioural therapy for insomnia, a number of supplements, and that Ms. Federico continue with her current registered psychologist who can provide cognitive behavioural therapy treatment as well as counselling. She recommends 16 sessions for PTSD, 12 to 14 sessions for SSD and depression, and six to eight sessions for the panic attacks. She anticipates Ms. Federico attending these appointments at a rate of once per week. The declining level of sessions for each condition is due to there being some overlap in the skills that need to be learned to treat the various disorders. After these initial treatments, she should have access to sessions with her psychologist once a month to transition her skills learned in therapy to the management of everyday life stressors. Lastly, given her SSD, her psychological treatment should be augmented with a directed rehabilitation program under the supervision of a kinesiologist.

[211] Dr. Underwood recommended kinesiology to improve her core strength, which in turn should assist with her back and neck pain. Dr. Underwood recommends at least ten sessions with a kinesiologist to assist with Ms. Federico's poor core strength.

[212] Dr. Simonett recommends yoga, focusing on a strengthening component. She also recommended trialing different size massage balls with her vibration gun and different surfaces as force on some may be more easily adjusted. She also noted the need to ensure Ms. Federico has proper sleep and hydration to assist with the stress reduction.

[213] The defendant agrees that Ms. Federico would benefit from further treatment in the form of core strengthening and counselling.

[214] One of the criteria for a future care award is evidence of an intention to attend the treatment in question. Unfortunately, the plaintiff gave no evidence that she was aware of some of the recommendations made by the experts who testified at trial. In particular, I note she did not indicate whether she would take supplements to reduce her stress.

[215] The defendant notes that the frequency of her acupuncture visits have declined in the last year – about once a month and are a cost of approximately \$100 a visit. He suggests the following is appropriate:

- a. For acupuncture: \$10,000 (the rounded present value of \$1,000 annually to age 56);
- b. For psychological counselling: \$9,000;
- c. For active rehabilitation: \$998;
- d. For Advil: \$0 as the annual cost of two to four Advil a month is minimal;  
and
- e. No award for supplements as there was no evidence of any likelihood of using this in the future.

[216] The plaintiff suggests the following for costs of future care:

**APPENDIX C – SUMMARY OF COSTS**

ITEM	COST	REPLACEMENT TIME
<b>I. MEDICAL INTERVENTIONS</b>		
1. X-Ray and MRI	\$0 (covered by MSP)	N/A
2. Facet block	\$500	Deferred
<b>II. REHABILITATIVE TREATMENT SERVICES</b>		
3. Psychological treatment	\$18,000 - \$20,700	N/A – One time budget
4. Occupational therapy -exposure therapy	\$3,120 - \$4,160	N/A – One time budget
5. Active rehabilitation	\$950	N/A – One time budget
6. Acupuncture	\$1,920	Yearly – during working years, as symptoms persist
<b>III. SUPPLIES</b>		
7. Medical grade light box	\$78	N/A – one time budget
8. Recommended supplements		
-inositol	\$145 - \$657	Yearly – medically indicated
-glycine	\$241-\$403	Yearly – medically indicated
-magnesium	\$18-\$37	Yearly – medically indicated
-omega-3	\$66	Yearly – medically indicated
-vitamin D-3	\$22	Yearly – medically indicated
-vitamin K2	\$55	Yearly – medically indicated
9. Recommended medication	Unknown/deferred	Unknown/deferred

[217] I agree that Ms. Federico should continue with psychological treatment. I also agree that Ms. Federico should be receiving active rehabilitation, which I assume includes kinesiology. Occupational therapy, as well, is reasonable. I accept the above recommendations regarding the frequency and duration, apart from the acupuncture. The acupuncture should be reduced to \$1,200 per year during Ms. Federico’s working years. A medical grade lightbox at \$78 is a reasonable expense.

[218] Given that the vitamins are regularly taken by many people, and that Ms. Federico did not indicate whether she is interested in taking vitamins, I decline to include these supplements in the cost of future care award.

[219] The amount awarded for costs of future care are to be assessed following these Reasons. Should the parties be unable to come to an agreement on the amount, or the application of s. 83 of the *Insurance (Vehicle) Act*, counsel have leave to apply to this Court for further directions.

## Loss of Housekeeping Capacity

### Legal Principles

[220] Loss of housekeeping capacity may be considered as a pecuniary or non-pecuniary loss: *Kim v. Lin*, 2018 BCCA 77 at para. 30; *Ker v. Sidhu*, 2023 BCCA 158 at para. 23, leave to appeal to SCC ref'd, 40816 (11 January 2024). This Court retains ultimate discretion to address housekeeping claims under either type of loss, but in general a non-pecuniary damages award is more appropriate when there is a loss of amenities or increased pain and suffering: *Kim* at para. 33.

[221] The principles to be considered when valuing loss of housekeeping capacity are set out in *Kim*. The Court of Appeal held that the loss may be compensable even if an injured party has the support of family members to conduct the household tasks:

[52]... [T]he appellants argue that the fact that Ms. Kim has not incurred any out-of-pocket expenses for housekeeping services should justify caution in granting such a large award, and indeed they submit that in such situations loss of housekeeping capacity should only be addressed by a non-pecuniary award. Yet, as was held in *Liu*, "it has been well established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members": at para 25. Huddart J.A. explained the reasons behind this approach in *McTavish*:

[63] As we have seen, it is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of her family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the Court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

[64] This approach to valuation of the plaintiff's loss has the advantage of encouraging family benevolence, without providing a windfall to the wrongdoer. It discourages the hiring of less satisfactory and perhaps more expensive substitute services. It allows a court to

determine what services are reasonably necessary by reference to what services family members were prepared to provide.

[Emphasis in original]

### **Analysis**

[222] I accept that damages may be awarded for loss of housekeeping capacity even if the plaintiff has not incurred any actual expenses for hired services: *Kroeker v. Jansen*, 1995 CanLII 761 at para. 9, 123 D.L.R. (4th) 652, leave to appeal to SCC ref'd, [1995] S.C.C.A. No. 263. I am not persuaded, however, that Ms. Federico is entitled to compensation for a loss of housekeeping capacity. Following the Accident, although her ability to do household chores was somewhat hampered, she was able to do most everyday tasks with extra time and breaks. Further, Ms. Federico has not had to enlist paid or unpaid housekeeping services, although her husband and children have had to assist with various tasks. It is not unreasonable for a spouse or other relatives to provide some assistance with various chores: *Doberstein v. Zhao*, 2020 BCSC 1788. Here, I do not believe the level of assistance provided by family members raises to the level that compensation should be awarded.

[223] In these circumstances, a pecuniary award is more appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101; *Doberstein* at paras. 104-114. The loss of household capacity is reflected in my award for non-pecuniary damages rather than as a discrete head of damages.

### **In Trust-Claim**

#### **Legal Principles**

[224] The legal principles regarding claims for in-trust care were helpfully summarized in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship...;

- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

**Analysis**

[225] Ms. Federico makes an in-trust claim for two individuals: Ms. Leonora Federico, Sandro Federico’s mother; and her husband, Mr. Federico.

[226] With respect to Sandro Federico’s claim, household domestic duties were shared before the Accident. He now does more of the heavier tasks but this can be offset by the amount of time he spent before on lighter tasks. In my view, Ms. Federico can moderate her duties without a significant change in the breakdown in family labour as to justify an in-trust claim.

[227] With respect to Leonara Federico, she was retired from the workforce prior to the Accident. Mr. Federico testified she brought some meals to the family post-Accident. Again, this does not go over and above what is expected from the close family relationship.

[228] I decline to grant the two in-trust claims.

**Special Damages**

[229] By agreement, Ms. Federico is entitled to \$4,235.33 for special damages. I leave it to the parties to calculate any prejudgment interest for the purposes of the final order.

**Summary of Award**

[230] In summary, I award damages to Ms. Federico as follows:

- a) \$190,000 for non-pecuniary damages;
- b) \$27,500 for past loss of earning capacity;
- c) \$400,000 for future loss of earning capacity between ages 44 and 65;
- d) Costs of future care, excluding supplements, to be determined; and
- e) \$4,235.33 for special damages.

**Miscellaneous**

[231] In the event I have made a calculation error, or there are issues with respect to implementation of any order, the parties have leave to apply for further directions. The parties also have leave to make submissions on any tax gross-up flowing from this award. Arrangements to speak to either may be made, within 45 days of these Reasons, through Supreme Court Scheduling.

**Costs**

[232] Ms. Federico is entitled to costs at Scale B barring reasons to the contrary of which I am unaware. If there are issues related to costs arising from this award, the parties may, within 45 days of these Reasons, apply to Supreme Court Scheduling to speak to them.

“D. MacDonald J.”