

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Voong v. Valenzuela*,
2024 BCSC 1819

Date: 20241004
Docket: M211338
Registry: Vancouver

Between:

Lily Voong

Plaintiff

And

Andy Valenzuela

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:

S.N. Collins

Counsel for the Defendant:

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I.S. Gill

Place and Dates of Trial:

Vancouver, B.C.
August 19-22, and
26-27, 2024

Place and Date of Judgment:

Vancouver, B.C.
October 4, 2024

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Introduction

[1] The plaintiff, Lily Voong, sues for damages relating to injuries she sustained in a car accident on October 20, 2019. She was a passenger in a car driven by her husband, the defendant, Andy Valenzuela. They were travelling east on Highway 1 in heavy rainfall on their way to Abbotsford. As they passed through Surrey, the car hydroplaned and Mr. Valenzuela lost control. The car crossed three lanes of traffic and collided with a concrete barrier causing it to flip over. Ms. Voong sustained long-term injuries that have impaired her ability to work and significantly impacted her life. Liability for the accident is admitted on the part of Mr. Valenzuela.

Background

Before the Accident

[2] Ms. Voong is 52 years old. She was 48 at the time of the accident. She and her family came to Canada as refugees from Vietnam when she was 11 years old. She went to high school in East Vancouver and then took a medical office assistant program at Capilano College (now Capilano University). She worked in various office administration jobs from 1995 until 2002 when she took time off to care for her father who had been diagnosed with cancer and to be a stay-at-home mom for her daughter who was born in 2003.

[3] In 2006 Ms. Voong returned to the paid workforce, taking a job with Canada Bread Company at a retail commercial bakery outlet in East Vancouver operating under the name McGavin’s Bakery. There she was responsible for ordering, doing the banking, customer service, cashier work, and communications with head office. She initially worked part time but soon started full time and remained in that position until the company closed the store in May 2019. Two months later, she found full-time work with Whole Foods in North Vancouver where she worked in the bulk foods and dairy department.

[4] Ms. Voong loved her work at both McGavin’s and Whole Foods. She enjoys the interaction with customers and her colleagues. She finds the work environment friendly and cheerful and this matched her personality before the accident. She said

she was healthy and had little difficulty lifting objects such as four-litre milk jugs and bags of bulk food.

[5] In 2017 and 2018 Ms. Voong complained to her doctor about some back and neck pain as well as headaches and tiredness. She took some physiotherapy treatment which appears to have improved these issues. Her medical history indicates she experienced this pain and headaches on-and-off for a couple of years. Based on a review of the medical record, Dr. Lisa Caillier, a physical medicine specialist whose expert report was tendered by Ms. Voong, states these conditions appear to have been short-lived, lasting a day or so, and were not limiting or restricting. She opines that Ms. Voong has degenerative changes involving the cervical, thoracic, and lumbar spines that are unrelated to the accident. She testified there is no way of knowing whether or to what extent these conditions might have affected Ms. Voong had it not been for the accident but opines that Ms. Voong would likely not have experienced her current and ongoing level of pain and difficulties in every day life without the accident.

[6] Before the accident, Ms. Voong planned to work for as long as she was physically able, though she expected she might reduce her hours to part time “after retirement”. She also hoped for a promotion to the position of purchaser at Whole Foods. She said there have been several openings for that position in the dairy department since the accident and felt she would have been qualified for that position were it not for her accident injuries.

[7] Outside of work Ms. Voong enjoyed spending time with her husband and daughter, going for walks or hikes in North Vancouver, and getting together with her parents and siblings for dinners each week. Her sister, Annie Voong, testified that before the accident she and Ms. Voong, along with their mother and other sister, went on weekly outings to go shopping or do other activities. Ms. Voong’s daughter, Sara Valenzuela, also testified about these frequent shopping trips. By all accounts, Ms. Voong was a happy and outgoing person before the accident who uplifted those in her life by her companionship, energy, and kindness.

The Accident

[8] As dashcam video shows, the accident was substantial. Mr. Valenzuela and Ms. Voong were travelling east on Highway 1 near 192 Street passing through Surrey. The conditions were rainy and, from the dashcam video, it appears that Mr. Valenzuela was driving at a high rate of speed as he passed other cars, including the one with the dashcam. The video shows a large trail of spray coming from the back of the car which may suggest it hydroplaned as Mr. Valenzuela states in his evidence. The car veered quickly out of the HOV lane, crossed three other lanes of traffic, and collided at high speed into a concrete barrier at the side of the highway. That impact caused the car to flip.

[9] When the car came to a stop, Ms. Voong was suspended upside down, held in by her seatbelt. She recalls seeing smoke in the car that caused her to panic. She undid her seatbelt and dropped down to land in a fetal position on the ceiling of the upside down car. She was not able to move. She was later extracted from the car by emergency responders and taken to hospital. She felt nauseous in the ambulance and was feeling pain from her neck down through her back. She was released from the hospital later that day and went straight home to bed still feeling pain, mostly in her back.

After the Accident

[10] Ms. Voong took just over three months off work following the accident. She attended physiotherapy which improved her pain a little. She began a gradual return to work in February 2020 and worked her way back to full time by the end of March 2020. She has struggled with ongoing pain in her back and neck that has made it difficult for her to work and sustain full-time hours. Her employer has tried to accommodate her condition, including by moving her to the “Whole Body” department which stocks personal care products and supplements. These items are easier to lift than the dairy and bulk food products. A co-worker also assists by placing boxes on a raised cart for her so she does not have to bend down as much when stocking shelves.

[11] Since the accident, Ms. Voong has suffered from consistent pain in her neck that radiates from the base of her skull to the end of her shoulders on both sides and from pain across her lower back that can extend into her legs when it is particularly bad. She suffers from headaches that are severe at times, like someone is pounding a nail into her temple. She feels dizzy and nauseous when she gets these headaches which can happen two or three times a week. When she gets home from work she is exhausted and feels unable to cook or clean the house.

[12] She said her headaches have improved somewhat with medication. She presently takes Topiramate on a daily basis to try to prevent headaches, Cambia once or twice a week to treat an ordinary headache, and Gabapentin perhaps three or four times a week to treat the particularly severe headaches although she tries to avoid Gabapentin because of side effects. She also takes Advil for her headaches and other pain. Her doctor has recommended she try Botox injections for her headaches but to date she has not done so. She says she is too fatigued to arrange for those treatments but says she would try them if someone made the appointment for her.

[13] Her back pain is fairly constant but is worse when she has been working or standing for a longer period of time. She finds it difficult to reach over her head or squat down which she must do at work with some regularity. Her neck pain is constant and she says it feels tight, like someone is constantly pulling on the muscle. She said her sleep has been horrible since the accident. She has trouble falling asleep and wakes up during the night from the pain.

[14] In the months following the accident, her mood gradually deteriorated. She now finds herself very depressed, anxious, and exhausted. She lacks motivation to do anything outside of work. She has tried three different anti-depressants – Duloxetine, Levomilnacipran, and Fetzima – but the side effects of each was intolerable. Her husband and daughter both say she is “a bit of a zombie” or a “walking zombie” in stark contrast to her “bubbly” demeanor before the accident. They say she has trouble concentrating and forgets things.

[15] Ms. Voong no longer goes walking with her family because it hurts her back and she cannot get herself motivated to leave the house. She spends less time with her extended family and no longer has friends over because their home is always messy. She says she used to be a happy, outgoing, and cheerful person but now cannot bring herself to smile and is short with her family members. This has affected her relationship with Mr. Valenzuela whom she now argues with quite frequently. They are no longer intimate because of her neck and back pain. She also suffers from driving anxiety, especially when she is a passenger. She says she tenses up in a car and is anxious about everything for no good reason.

[16] Mr. Valenzuela largely confirmed much of this in his examination for discovery, the full transcript of which was marked as an exhibit and accepted in evidence as though read in. He said Ms. Voong is tired, forgetful, and not as sharp or on the ball as she was before the accident. He says she is withdrawn and they no longer talk like they used to. He cannot joke with her like he did before the accident. He said she is irrationally hypervigilant when riding as a passenger in the car and acts out her anxieties in unusual behaviours.

[17] Dr. Caillier and Dr. Catherine Paramonoff, both physical medicine specialists called by the plaintiff and defence respectively, opine that Ms. Voong suffered a soft tissue musculoligamentous injury in the accident involving her neck, upper back, shoulder girdles, and lower back regions which has resulted in chronic soft-tissue pain and post-traumatic headaches secondary to the neck pain. It is also caused her to have poor sleep, mental distress, and to become physically deconditioned. Based on medical records, Dr. Caillier reports that Ms. Voong suffered a right transverse process fracture at the T12 level and a compression wedge fracture involving the T-12 vertebral body. Dr. Paramonoff agrees the transverse fracture was caused by the accident. She is less certain of the cause of the wedge fracture but accepts that on a balance of probabilities it was likely caused by the accident.

[18] Dr. Caillier opines that Ms. Voong's fatigue and cognitive symptoms are likely secondary to her altered sleep, mental health, headaches, chronic pain, and

physical deconditioning. She opines that Ms. Voong’s chronic pain negatively impacts her mood and sleep both of which in turn impact her ability to cope and manage her pain daily. Dr. Paramonoff also opined that mood and lack of sleep – so-called “compounding factors” – contribute to Ms. Voong’s chronic pain and impairments.

[19] Dr. Caillier defers to psychiatric experts for mental health diagnoses but she opines that Ms. Voong’s mental health symptoms contribute to her pain being magnified and alter her perception of her disability to a level higher than it should be. She suggests it also lessens Ms. Voong’s interest and motivation to engage in activities that are needed to improve and better manage her pain. She opines that Ms. Voong is physically deconditioned and this likely perpetuates her pain and increases her susceptibility to worsening pain when she is more active, such as at work. She opines that the likelihood of Ms. Voong becoming pain free (including her soft-tissue pain and headaches) is poor given the amount of time that has passed since the accident. However, she can better manage her pain with physical conditioning and other treatments. Dr. Caillier states these treatments may make her pain less intense and perhaps more intermittent during the day but she will not be pain free. She is also more susceptible to worsening pain should she sustain some future trauma that impacts her already affected areas.

[20] Dr. Paramonoff opines that Ms. Voong’s physical deconditioning is a significant part of her presentation and an exercise and muscle strengthening program is a priority for her to improve. In her opinion, with a good conditioning program under the direction of a kinesiologist (at least initially) and treatment of the confounding factors (mood, mental health and sleep), there is good reason to expect moderate improvement in Ms. Voong’s pain and functioning, although she will always have some element of chronic pain. Dr. Paramonoff opines that Ms. Voong had pre-existing susceptibility to soft-tissue pain and the accident has “unmasked” pre-existing degenerative changes. She opines that Ms. Voong will have “a prolonged course of recovery, given the cumulative effect of superimposed soft tissue injuries” both pre-existing and accident-related injuries. Thus, she says

treatments and conditioning “will not eliminate the symptoms” and “Ms. Voong will likely have a residual baseline of symptoms above the pre-MVA baseline, due to the injuries from the MVA.”

[21] Dr. Nicholas Misri is a psychiatrist whose expert report was tendered by Ms. Voong. In his opinion, Ms. Voong suffers from major depressive disorder which developed in the months following the accident. He attributes this to the profound shift in her physical and mental functioning due of her chronic accident pain. He said this has caused her severe distress and forced her into a state of social isolation. The pressures to continue working at full capacity to support her family exacerbated her pain and led to feelings of distress, hopelessness, and helplessness. He said a “vicious cycle of pain and depressive symptoms evolved”. He suggests her home also became a stressful environment because of her own inability to maintain it and the stressors of supporting Mr. Valenzuela and Sara. He opines all these physical and mental stressors have led to a disordered sleep that has worsened her condition. Dr. Misri opines that because of this constellation of stressors and conditions, Ms. Voong developed major depressive disorder by 2022.

[22] Dr. Misri also opines that Ms. Voong suffers from general anxiety disorder that was likely caused by the accident and its ongoing impacts. She experiences daily intrusive and repetitive thoughts about her pain becoming chronic, her reduction in work hours and potential job loss, Mr. Valenzuela’s health, the family finances, and Sara’s ability to pursue post-secondary education in light of those finances. She has become socially isolated and this appears to have worsened between the two times he saw her. He also diagnosed her with somatic symptom disorder with disproportionate and persistent focus on her physical pain. He opines her mental health is unlikely to improve significantly, even with treatment, although I infer that there must be potential for some improvement given his recommended treatments.

[23] Dr. Misri testified that Ms. Voong’s mental health interferes with her ability to seek treatments that might help reduce or manage her physical pain and treat her

mental health. He said it is common for people with major depressive disorder to be unable to motivate themselves to arrange for treatments that will help. This opinion, which was not challenged in cross-examination, helps explain Ms. Voong's evidence that she wants to have treatments and would attend treatments if someone organized them for her but she is too exhausted to arrange them herself.

[24] That said, Ms. Voong has arranged some treatments for herself. Starting in 2022, she began attending a pain clinic called ChangePain. There she has received trigger point injection treatments that give her some very short-term relief and she has attended group therapy sessions that focus on how to live with and manage chronic pain.

[25] Ms. Voong was a credible and reliable witness and no issue was taken with the veracity of her testimony. She is undoubtedly a significantly changed person as a result of the accident with a life that is dramatically different to the one she once enjoyed.

Non-Pecuniary Damages

[26] Non-pecuniary damages are awarded to compensate a plaintiff for past and future pain, suffering, loss of enjoyment of life, and loss of amenities. Money awarded does not place a dollar value on the loss but rather is intended to provide a plaintiff with reasonable solace for injuries and substitute other enjoyments and pleasures for those that have been lost: *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 262; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 636. A common but non-exhaustive list of factors typically considered in assessing non-pecuniary damages include the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital, or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[27] The compensation should be fair to all parties. Fairness is measured against awards made in comparable cases, but these serve only as a rough guide since

each case depends on its own facts: *Howes v. Liu*, 2023 BCCA 316 at para. 26. The assessment of non-pecuniary damages is necessarily influenced by each plaintiff's own experiences in dealing with the injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[28] Overall, it is clear that Ms. Voong suffers from significant chronic neck and back pain and regular headaches that are frequently severe. Her physical condition limits her ability to work and deprives her of the life she led at home and with friends and family before the accident. It also has caused her to have disordered sleep. This pain is constant with some variation in the severity depending on her workload and activity.

[29] It is equally clear that she suffers acutely from depression and anxiety that contribute to her work limitations, exacerbate her physical pain and sleep disorder, and interfere with her social functioning and home life. Her depression has been particularly hard to address given the problems she has had with side effects from three different anti-depressant medications she has tried.

[30] By contrast, before the accident Ms. Voong had a fun and happy personality. She was active with her family, both immediate and extended, all of whom looked to her as a leader. She brought others up with her positive outlook. She was a dedicated worker and found happiness and fulfillment in the work that she did. She had some occasional back pain and headaches, which I consider in this assessment, bearing in mind that I am to award damages that are aimed at putting her back to her pre-accident position, not a better position: *Blackwater v. Plint*, 2005 SCC 5 at para. 78. However, these occasional flare-ups did not limit her work ability or her lifestyle.

[31] Ms. Voong seeks \$250,000 in non-pecuniary damages. She submits the following cases provide some guidance on the appropriate award: *Cumpf v. Barbuta*, 2014 BCSC 1898; *Sebaa v. Ricci*, 2015 BCSC 1492; and *Kallstrom v. Yip*, 2016 BCSC 829.

[32] In *Cumpf*, the 45-year-old plaintiff (49 at trial) suffered chronic neck and shoulder pain that radiated into her arms and legs and headaches. She also developed a depressive disorder and was much less happy and isolated after the accident. She continued working as a housekeeper and later as a building manager but she found heavier work difficult and it wore her out. The court found she was restricted to performing light duties after the accident. She regularly swam and used a stationary bike after the accident and attributed her ability to still function at work, but with limitations, to this regular conditioning. She was happy and energetic before the accident but much less social after. The court awarded \$150,000 or (\$194,000 when adjusted for inflation).

[33] In *Sebaa* the 33-year-old plaintiff was the passenger in a car that was involved in a dramatic head-on collision. Her husband was driving and was left unconscious and bleeding by the accident. The plaintiff was not sure if he was alive. Her own injuries were similar to Ms. Voong's in that she suffered from chronic neck and lower back pain and depressive disorder with chronic and severe anxiety and post-traumatic stress disorder. She also suffered nerve damage to her right knee and a broken finger. Other injuries included multiple contusions, chest injuries, and rib injuries but these did not have the lasting effects that the other injuries did. The court found that her psychological reaction to the accident and to the accident investigation was unusually acute. The accident also suspended plans for the plaintiff and her husband to have children through IVF treatment. The Court awarded \$180,000 (\$230,000 with inflation).

[34] In *Kallstrom* the 44-year-old plaintiff was in several different car accidents from which she suffered significant neck and back pain, related headaches, and depression, all of which were chronic. The court said she had been "converted from a happy, successful, active young single mother with a wide circle of friends into someone who suffers relentless pain and depression, is physically inactive, ... has gained considerable weight, has experienced a profound loss of self-esteem, [and] has few friends beyond family...". The court awarded \$180,000 (\$228,000 with an

inflation adjustment). Without diminishing the significant impact of Ms. Voong's injuries, I find the plaintiff's condition in *Kallstrom* was more severe.

[35] The defence argues \$120,000 is appropriate for non-pecuniary damages. It relies on *Taylor v. Porter* 2023 BCSC 777, *Rajan v. Hudon* 2014 BCSC 1678, and *Da Silva v. Pollard* 2019 BCSC 2249.

[36] In *Taylor*, the 49-year-old plaintiff suffered a concussion, soft-tissue injuries to her neck, shoulder, and upper back, headaches and chronic pain, and anxiety and depressed mood. Her psychiatric prognosis was "guarded" though it was unlikely she would return to her pre-accident state. As with Ms. Voong, the plaintiff lost the "bubbly personality" she had before the accident. However, she had returned to gardening, skiing, running, and socializing by the time of trial but experienced pain when doing physical activity. The court awarded \$120,000, including a non-pecuniary element for loss of housekeeping capacity.

[37] In *Rajan*, the 44-year-old plaintiff suffered from discomfort in her neck and upper back and chronic pain in her right shoulder and right hip after three different accidents. She walked with a mild limp when carrying heavy objects due to the hip injury. She had a reduced tolerance for stairs and sustained walking. She also had a depressed mood. She initially experienced headaches after each accident but those cleared up. She was a devoted nurse before the accident but had to reduce her hours after the accident to one shift a week. The court overserved, however, that the plaintiff's perception of her own disability as described in her evidence did not match her actual function and that she downplayed the significance of other contributors to depressed mood. She was also capable of performing most housekeeping chores by the time of trial. The court awarded \$90,000 in non-pecuniary damages. Adjusting for inflation, that award would be around \$116,000 in today's values. However, since the decision is more than a decade old, I must take into account Justice Abrioux's caution that simply adjusting for inflation in older cases "ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component": *Valdez v. Neron*, 2022 BCCA 301 at para. 58. I also find

that Ms. Voong's injuries and psychiatric condition are much worse than the plaintiff's in this case.

[38] In *Da Silva* the 36-year-old plaintiff was in two different accidents from which she suffered chronic low back and hip pain and significant anxiety and depression that affected her ability to concentrate and focus on work. She also had neck, shoulder, and mid-back pain that resolved by the time of trial. Her cognitive difficulties made it hard to perform at work and this impacted her self-esteem given the pride she placed on her work and self-sufficiency. This, together with the chronic pain, fueled a depression that became moderately severe. It too became chronic with some prospect for improvement but no real hope for a full recovery. The court awarded \$110,000 (about \$130,000 with an inflation adjustment). The plaintiff in that case sought an award of \$120,000 which seems low by today's standards for the injuries she had. This case appears to fall towards the lower end of the present range for the kinds of injuries and impacts Ms. Voong has experienced.

[39] Having regard to these authorities, the *Stapely* factors as they apply to Ms. Voong's circumstances, and considering her pre-existing occasional back pain and headaches, I find non-pecuniary award of **\$195,000** is appropriate in this case.

Loss of Earning Capacity

General

[40] An award for loss of earning capacity serves to restore the plaintiff to the position she would have been but for the tortious injury. The value of the loss is generally equivalent to the value of the earnings that the plaintiff would have received had the tort not been committed. The court's task is to compare what the plaintiff's working life would have been without the accident with the actual past and likely future working life after the accident: *McKee v. Hicks*, 2023 BCCA 109 at para. 76. Determining how a plaintiff's working life would have unfolded without the accident is a hypothetical exercise in which the court must consider reasonable and substantial possibilities and weigh the relative likelihood of those hypothetical events: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. The same is true of the

court's assessment of the likely future working life of the plaintiff with the accident: *Kallstrom* at paras. 389-390.

[41] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47 the court restated the analysis, at least for future loss of earning capacity, in a three-step process:

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

[42] In this case, the parties agree that Ms. Voong has met the first and second steps of the *Rab* analysis. On the third step, the parties disagree on Ms. Voong's likely without-accident working life and her residual capacity to work after the accident. I will deal with the first disagreement in a moment and the second when assessing future loss of earning capacity.

Past Loss of Earning Capacity

[43] Ms. Voong is presently working four days a week at Whole Foods. She remains assigned to light duties and continues to work in the “Whole Body” department that better accommodates her limitations on lifting heavy items. Before the accident she had steadily worked full time since 2006 at McGavin's Bakery and then Whole Foods.

[44] The defence agrees that in a without accident scenario, Ms. Voong would have continued working full time at Whole Foods. It also agrees it was reasonable for Ms. Voong to have taken the time off that she did between the accident and the trial, including reducing her work to four days a week and dropping down to three days a week when her doctor so advised. The parties also agree that full-time work should be calculated at 42.2 hours per week. This is more than the actual work week

but the parties agree this number captures overtime and holiday pay throughout the year.

[45] Based on Ms. Voong's actual working hours post-accident and the hypothetical full-time scenario to the date of the accident, Ms. Voong's base loss, which the defence accepts, is \$27,949.32. (Hypothetical full-time earnings of \$194,762.06 minus actual earnings of \$166,812.74.)

[46] However, Ms. Voong submits there is a real and substantial possibility with a high probability that she would have been promoted to the position of buyer at Whole Foods by January 2022 with a salary increase modestly estimated to be \$25 per hour. That is \$4.50 more than she is making now. The defence argues that scenario has not been established as a real and substantial possibility.

[47] I agree with Ms. Voong. She has a strong work ethic and a personal attachment to working generally. She genuinely liked working at McGavin's Bakery and Whole Foods. She enjoys the company of her co-workers and the interactions with customers. She finds it personally fulfilling to be in the full-time paid workforce. She also has a strong incentive to work since she is the primary income earner for the family and Mr. Valenzuela is not working. In my view, Ms. Voong would certainly have applied for a buyer position when opportunities arose, which they did several times in the dairy department since accident.

[48] Janet Weir is the buyer in the Whole Body department and works side-by-side with Ms. Voong. She has been with the Whole Foods organization for many years and currently earns \$30 per hour as a buyer. She said buyers earn between \$25 and \$30 per hour. She described Ms. Voong as a happy person before the accident who was always good to work with. In her view, Ms. Voong is very capable of doing the work of a buyer and noted that she does some of that work already in her existing job. I would add that she also did some of that type of work while at McGavin's.

[49] In my view, there is a strong likelihood that Ms. Voong would have been promoted to buyer by January 2022 were it not for the accident. Assuming a pay rate

of \$25 per hour, that would increase her total hypothetical without accident income up to the date of trial by \$62,413. Since I assess the relative likelihood of this to be high, I would award 85% of this amount which is \$53,051. Combining this with the base loss of \$27,949, the total pre-tax loss of past earning capacity is \$81,000 which I round to **\$80,000**.

[50] Pursuant to s. 95 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, past loss of earnings must be based on net earnings after taxes and Employment Insurance deductions. At counsel's request, I have not calculated the appropriate deduction as they expect to find agreement on that after receiving these reasons.

Loss of Future Earning Capacity

[51] Ms. Voong argues her future loss of earning capacity should be assessed against a likelihood that she would have worked full time as a buyer at Whole Foods to age 70. She argues she is now capable of working only three days a week at her present lighter-duty job. The defence argues the reasonable with-accident likelihood is that Ms. Voong is capable of sustaining an average four days a week in her current job. The defence acknowledges a risk that she will need to drop down to three days a week from time to time, as she has done occasionally since the accident, but argues there is also a real and substantial possibility that she will be capable of working five days a week after receiving some recommended treatments. The defence suggests these two possibilities cancel each other out such that the future loss should be based on a residual working capacity of four days a week.

[52] Ms. Voong is presently working four days a week. She is exhausted, sore, has no energy at the end of the work day. She has sustained full time hours for several months at two or three points since the accident but finds it causes her considerable pain and she is unable to do anything at the end of the work day. She has also had to drop to three days a week on two occasions since the accident on her doctor's recommendation. Now working four days a week, she still experiences pain and exhaustion at the end of the day but cannot drop her hours to three days a week without losing her benefits. The benefits are important to her family because

they cover a large portion of medications that Mr. Valenzuela takes for diabetes and anxiety.

[53] I find that Ms. Voong is a stoic person who makes a significant effort to go to work and work full time when she believes she can tolerate it. This effort is driven largely by her family's economic need and her role as the main income earner. Mr. Valenzuela has worked in the past as a professional driver but he is presently not working. He has some health issues of his own and says he has had trouble finding work as a driver because of the accident. The family recently had to move to a new basement suite and their rent almost tripled from \$700 to \$2,000 a month, even though the new suite is smaller. It is clearly a struggle to support the family in Vancouver on \$19 or \$20 an hour and I find this has been a significant factor in driving Ms. Voong to work more hours than she is reasonably capable of.

[54] Sara Valenzuela is 20 years old and had ambitions to enroll in business courses at Vancouver Community College after graduating high school in 2021. However, because of Ms. Voong's inability to work full time, the family decided it would be best for Sara to work full time after high school to help support the family. Ms. Voong recognizes this as a major sacrifice for Sara for which Ms. Voong is very regretful. That is not a burden Ms. Voong wants to place on Sara and trying to avoid that scenario is one factor that has driven her to work more hours than she is reasonably capable of in her condition.

[55] Dr. Caillier opines that Ms. Voong should only be working three days a week. She said managing the physical and psychological aspects of chronic pain is itself a part-time job. She said Ms. Voong will wake up with pain, go to work with pain, and come home with pain for the foreseeable future and she will need time to manage her physical and mental symptoms. She points out that Ms. Voong is now not able to balance a four-day work week with doing other activities outside of work that are necessary for pain management, such as physical conditioning and other treatments. She explained that the conditioning and other treatments are expected to help her manage her pain and potentially reduce its intensity throughout the day

but will not make it go away. She said she has never seen a patient “exercise their way back to full-time work”. She said some patients push themselves to work more than they should and hit a wall, causing them to go off work or reduce hours. This kind of “boom and bust” work activity, which seems to match Ms. Voong’s pattern since the accident, does not help a person manage their pain and mental health.

[56] Dr. Misri opines that Ms. Voong’s depression and anxiety impair her ability to cope with full-time work and even her current four-day week is too much. He observed a deterioration in her condition when he saw her on March 6, 2024 when she was working four days a week compared to when he first saw her on June 28, 2023 when she was working three days a week. He opines she would benefit from a reduction in her work days to at most three days a week.

[57] Stephen Epp is an occupational therapist and functional capacity evaluator who did a two-day assessment of Ms. Voong. Based on his assessment and his expertise, he opines that Ms. Voong should be confined to a 24-hour work week at her current job in the Whole Body department of Whole Foods. He opines she could work a 28-hour work week in a more sedentary job but Ms. Weir testified there are no sedentary jobs at Whole Foods.

[58] Dr. Paramonoff opines that it was reasonable for Ms. Voong to take the time off work that she has to date and to have worked reduced hours. In her opinion, though, Ms. Voong should be able to increase to full-time hours with the conditioning program she recommends.

[59] I find that Ms. Voong’s residual working capacity is limited to three days a week. I prefer the plaintiff’s experts on this point largely because Dr. Caillier and Mr. Epp work regularly with patients over a long period of time to help them manage chronic pain and improve their capacity for work. Further, Dr. Paramonoff’s opinion is focused on the physical aspects of Ms. Voong’s condition. The defence led no expert evidence with respect to the psychiatric elements and the cross-examination Dr. Misri did not reveal any real likelihood of Ms. Voong being able to sustain a four-day work week, even with treatment and conditioning.

[60] I am persuaded that Ms. Voong needs to reduce her working hours to three days a week so that she can take on the work of managing and potentially improving the physical and mental elements chronic pain and depression. I accept Dr. Caillier's opinion that this will not materially improve her capacity to work but it may enable to manage and alleviate her pain to a point where she can recapture some of her pre-accident enjoyment of life.

[61] To the extent there is some possibility that Ms. Voong might be able to work more than three days a week, I find this is roughly cancelled out by the risk that she might lose her current employment which is light-duty work with an accommodating employer. If she lost that job, she will be at a disadvantage in trying to find part-time work with another accommodating employer. In this sense, she is less capable overall from earning income from all types of employment opportunities that might reasonably be available to her: *Brown v. Golaiy*, 1985 CanLII 148 (BCSC). In my view, that loss of capacity offsets the possibility that she might be able to work more than three days a week.

[62] With respect to the age of retirement, I agree that Ms. Voong would likely have worked full time to around age 70 but for the accident. I base this on her strong work ethic, her enjoyment of work, her attachment to the workforce, and the need to earn the family's income. Even without the accident, I struggle to see how Ms. Voong could have been in a financial position to retire in Vancouver at age 65 as the defence suggests.

[63] I have considered whether Ms. Voong's pre-existing arthritis in her spine would have eventually forced her to retire earlier. Dr. Caillier said it is impossible to determine whether this condition would have impacted her in the future. I take this to mean there is a real and substantial possibility that the arthritis may give her some difficulty in the future but it is impossible to say whether it would have impacted her functioning. The defence concedes that "we do have the evidence to suggest a material risk that this would impair her ability to function in the future." I thus apply no contingency discount for this potential.

[64] I note also that Ms. Voong said in her evidence that she would likely continue working part time after retirement. Given her commitment to and enjoyment of working, and her family's financial need, I find there is a real and substantial possibility that she would continue working in some part-time capacity past 70 in a without-accident scenario. That contingency offsets any real and substantial possibility of an earlier retirement date. I therefore consider that age 70 is a reasonable hypothetical retirement age in a without-accident scenario

[65] The parties agree that if Ms. Voong's annual income would be \$45,106 if she were able to work full time in her current job (42.2-hour work week at \$20.50 an hour). A 40% reduction in this amount (from five days to three) generates an annual loss of \$18,042. If she were working as a buyer at \$25 per hour, her annual income would be \$55,007 with an annual loss of \$22,003. The difference in the annual loss for the current job and the buyer job is of \$3,961. Since I find the buyer job is more likely with an 85% relative likelihood, I would add 85% of the \$3,961 (\$3,367) to the base annual loss of \$55,007 to arrive at an assessed annual loss of \$21,409.

[66] A reduction to a three-day work week will mean that Ms. Voong will lose her benefits which presently cover 80% of the cost of Mr. Valenzuela's medications. Ms. Voong estimated the average cost of the medication at \$230 per month with the benefits covering \$184 of that. That generates an annual loss of \$2,208.

[67] Thus, the total annual loss in salary and benefits is \$23,617. Counsel agree that the CIVJI multiplier should be used to generate the present value of Ms. Voong's future loss of income. Using the multiplier of 14.9076 (to Ms. Voong's age 70) the present value of this loss is \$352,073.

[68] The CIVJI multiplier does not account for general labour market contingencies. Relying on my decision in *Michael v. Bergeron*, 2024 BCSC 715, Ms. Voong argues a deduction is unnecessary given her strong attachment to work. In *Michael*, I summarized the legal principles respecting the application of labour market contingencies as follows:

[98] Labour market contingencies are “general” contingencies because they are based not on the plaintiff’s specific circumstances but factors that apply generally to the population. A trial judge may apply them to a future pecuniary loss award but is not obligated to do so. In *Graham v Rourke* (1990), 74 D.L.R. (4th) 1 (Ont CA), [1990] OJ No. 2314, the court discussed general contingencies in the following passage that was quoted with approval by our Court of Appeal in *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 93 and *Dornan v. Silva*, 2021 BCCA 228 at para. 92:

[46] ...contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and “specific” contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone’s life has “ups” as well as “downs.” A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

[emphasis added in *Michael*]

[69] Ms. Voong submits the general negative labour market contingencies in this case are offset by positive contingencies, including the potential that Ms. Voong could earn up to \$30 per hour as a buyer (rather than the \$25 used in my assessment) and a risk that she may not be able to sustain three days a week, noting that Dr. Misri opined that she should work “up to” three days a week.

[70] The defence makes no proposal for a discount for general labour market contingencies, although it suggests a much lower amount for damages. There is no expert evidence on the calculation of labour market contingencies.

[71] Ms. Voong has a strong attachment to work and a solid work history since 2006. However, her circumstances without the accident were not as firm as the plaintiff in *Michael* who did skilled work in an area where the employer had trouble recruiting qualified staff. The plaintiff there was also especially well regarded and valued by her employer. Ms. Weir is Ms. Voong’s co-worker, not employer, but her evidence of Ms. Voong being a good and well-qualified worker goes some distance

to indicating a level of security but not to the degree comparable to *Michael*. I would apply a deduction of 15% to account for general labour market contingencies, resulting in a loss of \$299,261 which I round to **\$300,000**.

Loss of Household Capacity

[72] Ms. Voong claims damages for past loss of housekeeping capacity. She seeks a separate award for future housekeeping services which I will address under cost of future care.

[73] An injured plaintiff is entitled to an award for loss of housekeeping capacity if such a loss is established: *Kim v. Lin*, 2016 BCSC 2405, aff'd 2018 BCCA 77 [*Kim*]; *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178; *McTavish v. MacGillivray*, 2000 BCCA 164. An award may be made under one or more separate heads of damages, including pecuniary, non-pecuniary, and cost of future care.

[74] Whether a loss of household capacity should be assessed as pecuniary or non-pecuniary is in the discretion of the trial judge, but the main guiding principle is this: where the plaintiff is capable of performing the housekeeping tasks but with difficulty, a non-pecuniary award is usually appropriate; where the plaintiff must have others perform or assist in the housekeeping tasks, be it through a paid service provider or gratuitously by friends or family members, a pecuniary award may be appropriate: *Riley v. Ritsco*, 2018 BCCA 366 at para. 101; *Liu v. Bains*, 2016 BCCA 374 at para. 26.

[75] Prior to the accident Ms. Voong did around 90% of the household tasks. Since the accident she has been unable to do much of that work and has largely limited herself to cooking uncomplicated meals. The family now eats more pre-made meals. Sara and, to a lesser extent, Mr. Valenzuela have taken many of the tasks that Ms. Voong used to do and have taken on all the heavier tasks. Some of the work simply does not get done and the home is not as tidy as it used to be before the accident.

[76] I am satisfied that Ms. Voong is unable to do much of the housework she used to do and family members have had to step in to do that work in her place. That indicates a pecuniary award is appropriate.

[77] Mr. Epp recommends that Ms. Voong have 2.5 hours a week in professional home cleaning services on an ongoing basis. Ms. Voong submits that 3 hours a week is a good proxy for past loss of housekeeping because Ms. Voong likely required more help in the months after the accident. She also suggests this proxy addresses some help she received from her sister for laundry. Sara estimates that she did four to five hours a week of additional housework since the accident and Mr. Valenzuela does about one hour of additional work. Ms. Voong appropriately concedes that some account must be made the likelihood that Sara would have stepped up her own contribution to housework even without the accident as she grew older. In my view, the equivalent of 2.5 hours of professional time recommended by Mr. Epp is good proxy by which to value Ms. Voong's past loss of capacity.

[78] In *Broomfield v. Lof*, 2019 BCSC 1155 at para. 109, Justice Young found that \$25 per hour is a reasonable hourly rate by which to assess past loss of housekeeping capacity in the absence of evidence as to the actual cost. In *Steinlauf v. Deol*, 2022 BCCA 96 at para. 117, Grauer J.A. observed that the \$20 per hour used by the trial judge to assess housekeeping services "seems to be a conservative estimate." In *Michael v. Bergeron* at para. 124, I found that \$30 per hour was a reasonable proxy.

[79] Just under five years passed between the accident and trial (around 250 weeks). Two-and-a-half hours a week of housekeeping work valued at \$30 per hour for 250 weeks works out to \$18,750. I find a pecuniary award of **\$18,000** for past loss of housekeeping capacity is reasonable.

Cost of Future Care

Legal Principles

[80] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition to the extent that is possible. When full restoration cannot be achieved the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Pang v. Nowakowski*, 2021 BCCA 478 at paras. 55-56; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30. The award is an assessment based on a prediction of what will likely happen in the plaintiff's future: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang*, para. 58. A future hypothetical possibility will be considered as long as it is a real and substantial possibility and not speculation: *O'Connell v. Yung*, 2012 BCCA 57 at para. 56; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. Appropriate contingency adjustments should be made to account for the relative likelihood of possibilities: *Gignac*, para. 54.

[81] The test for determining the appropriate award is objective, based on medical evidence. There must be a medical justification for each item claimed, and the claim must be reasonable: *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Justification means that the cost is one made necessary by the injury and the plaintiff is likely to make use of the particular item: *Pang*, para. 57. If the plaintiff has not used a service in the past, it may be inappropriate to include it in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell* at paras. 60, 68-70.

Analysis

[82] Ms. Voong has not done all of the treatments recommended to her by medical professionals but she has shown an effort and a willingness to do so. She had regular visits with her family doctor, she has attempted several different medications

for her depression, she has taken medications for her headaches, and she has attended a pain clinic that includes needling treatments and counselling. She said she would like to try other treatments, such as the Botox recommended by Dr. Caillier and her own doctor, but finds herself unable to make the necessary appointments. As I discussed earlier, Dr. Misri's unchallenged opinion is that it is common for people with major depressive disorder have trouble motivating themselves to arrange for treatments even if they want them. I find that Ms. Voong is willing to pursue new and different treatment options but her depressive disorder has impeded her from arranging those.

[83] Ms. Voong has tendered a report from Mr. Epp, who has done a functional capacity evaluation of Ms. Voong and prepared a cost of care report based on recommendations in Dr. Caillier and Dr. Misri's reports, as well as his own expertise as an occupational therapist. The defence has not tendered a responding report, though some aspects of Dr. Paramonoff's report speak to Ms. Voong's future care needs. I propose to follow the items recommended in Mr. Epp's report.

[84] Ms. Voong has also tendered a report of Kevin Turnball, an economist who has provided tables to calculate the present value of future care items. The defence agrees that Mr. Turnball's tables reflect the appropriate present-day value multipliers for future care items. They disagree, however, on the extent of the items claimed by Ms. Voong.

Botox Treatments

[85] Ms. Voong seeks \$3,525 for a trial of Botox for her neck pain and headaches as recommended by Dr. Caillier and her own doctor. If the trial proves successful, Dr. Caillier recommends injections of 200 units every three to four months. The present value of that ongoing cost is \$107,884.

[86] The defence accepts the **\$3,525** for a Botox trial and I award that amount. However, the defence submits no amount should be awarded for ongoing treatment.

[87] I struggle to understand the defence's rationale. It seems to imply that the Botox trial will not succeed and so Ms. Voong will not pursue continued treatment. However, if it is reasonable to support a trial of Botox, which the defence concedes, it must follow that there is at least some potential for success.

[88] Based on her own clinical experience, Dr. Caillier opined that there is a "good likelihood of some benefit" from Botox treatment but she could not say what that might be. She said it is likely to give Ms. Voong some relief but she will not be headache free.

[89] Having regard to the relative likelihood that Botox treatments will be beneficial, I would award 75% of the present value for ongoing treatments which I round to **\$80,000**.

RTMS Trial

[90] Dr. Misri recommends that Ms. Voong try a treatment of Repetitive Transcranial Magnetic Stimulation (RTMS) for her depression. This is a relatively new medical treatment that Dr. Misri uses in his practice with some success. It stimulates areas of the brain that have anxiety pathways. He suggests it is a good option for Ms. Voong because of the trouble she has had in finding an anti-depressant medication without intolerable side effects. He states there are other anti-depressants she should try but the likelihood of her being able to tolerate those diminishes after having tried three others without success.

[91] Ms. Voong seeks **\$2,900** for the cost of the RTMS treatment. This is lower than the conventional cost of the treatment but Dr. Misri testified that his clinic is able to offer it at a lower rate than most. The defence agrees to this amount and I therefore award it.

[92] Unlike Botox treatment, Ms. Voong does not seek an amount for ongoing RTMS treatments. However, she does seek an amount for ongoing anti-depressant medication on the basis that there is still some prospect of finding one that will not give her side effects. Since the RTMS treatment is proposed as a potential

alternative to anti-depressants, awarding an amount for both would be duplicative. Thus, for the purposes of this future care cost assessment, I will address ongoing medical treatment for depression under medications.

Medications

[93] Ms. Voong claims \$34,774 as the present value of the cost of her current medications (Topiramate, Gabapentin, Cambia, and Ibuprofen) to the end of her life expectancy. The defence accepts this but proposes a 50% contingency discount “to reflect the likelihood that [Ms. Voong] may recover and no longer need the medications or as many of the medications going into the future.”

[94] These medications are primarily for Ms. Voong’s headaches but also for chronic pain. The evidence is she may find some measure of relief through Botox but not recovery. There is no expert medical evidence to suggest she can reasonably expect a full recovery and I can find no evidentiary basis to support a 50% discount. Dr. Caillier was specifically asked whether this combination of medications is reasonable for Ms. Voong’s condition and she confirmed that it is since each treats a different type of headache that she experiences. I accept that if the Botox treatment is successful there is a real and substantial possibility that Ms. Voong may require these medications less frequently but she is unlikely to be free of them. I would apply a 15% contingency discount for that possibility and award **\$30,000** for these medications.

Medication Trials

[95] Dr. Caillier recommends that Ms. Voong trial a “CGRP monoclonal antibody such as Ajovy, Aimovig or Emgality” if Botox treatments provide only partial benefit. She also recommends “Ubrelyv” to “assist with aborting the [more severe] headache complaints”. The CGRP medication is a monthly injection and has a present value of \$181,715 to Ms. Voong’s life expectancy. Ubrelyv, at 1.5 treatments a week, has a present-value lifetime cost of \$39,950. Ms. Voong seeks \$110,000 for these medications which is about 50% of these costs. She suggests this is an appropriate discount to account for the contingency that the Botox treatment will be sufficient.

[96] I am not persuaded that a 50% discount adequately addresses the contingencies. First, I do not consider that it reflects the level of optimism Dr. Caillier holds out for the Botox treatment. Further, these additional headache and pain medications appear to be duplicative of other headache medications which I have included as cost of care items earlier. Recognizing that there is a real and substantial possibility that Botox will provide relief and addressing the potential duplication in medications, I would award approximately 15% of the estimated cost and round it to **\$35,000** for the two medications.

[97] Dr. Caillier also recommends that Ms. Voong try magnesium citrate and riboflavin as a preventative management for headaches. She has already tried magnesium citrate but stopped because she had too much magnesium in her blood. She has not tried riboflavin. She seeks \$2,000 for this which is a little less than half the present value of the recommended dose for her lifetime (\$4,493). I gather the discount is to account for the risk that it will not help or that it will cause some side effect or complication like the magnesium citrate. Given that she tried the magnesium citrate I am persuaded that she is likely to try other alternatives as a preventative measure for headaches so I award the **\$2,000** she seeks for this item.

[98] Dr. Misri recommends various anti-depressants that may be effective for Ms. Voong without the side effects she has experienced with the three she has tried. The present value of the five suggested medications range from \$2,906 to \$30,808. No cost estimate is given for one of them (Duloxetine) but since that is in fairly common use I infer its cost is likely at the low end. I accept that some amount should be awarded for anti-depressant medication even though there is a significant chance of prohibitive side effects for Ms. Voong. As I have said earlier, if the side effects cannot be avoided it is likely she would continue a course of the RTMS treatment if the trial proved beneficial. Considering all but one of the five suggested medications fall at the lower end of the scale, I would award **\$5,000** as a future care costs for anti-depressant medications or other treatments.

[99] Dr. Caillier recommends four potential medications to assist Ms. Voong with her sleep disruption. The lifetime present value of one of these is \$6,843. Specific amounts are not provided for the other three but together they average \$9,668. The weighted average of all four is close to \$9,000 but it is not known if one of the options is particularly expensive and the other two less so or if they are all close together in cost. I find Ms. Voong is likely to use a sleep medication if given the opportunity. Further, since restoring a more normal sleep pattern is crucial to assist her depression and chronic pain, I consider this item is medically justified. I award **\$7,500**.

Physical Condition/Kinesiology

[100] Both parties agree that physical conditioning is critical for Ms. Voong. Dr. Caillier recommends she engage in a regular exercise program three to four times a week and that she work with a kinesiologist in 18-20 sessions in a pool-based program followed by 18-20 session in a gym. She recommends an additional six to eight sessions with a kinesiologist for the next three years after that and one or two sessions a year thereafter to keep her motivated in doing physical activity. Mr. Epp has assessed the cost of this based on 12 sessions per year for five years (total present value of \$5,568) followed by six sessions a year thereafter to age 75 (present value \$7,439). I accept that 60 sessions over five years fits with Dr. Caillier's recommendation but the six sessions per year thereafter is more than triple the amount she recommends. I acknowledge that Mr. Epp brings his own expertise as an occupational therapist to assessing this need but there is a significant gap between his recommendation and Dr. Caillier's.

[101] Dr. Paramonoff recommends Ms. Voong have 36 sessions with a kinesiologist or physiotherapist for guidance in an independent strengthening program, including to check in on decreasing frequency over time. She makes no recommendation for ongoing kinesiology after that. The present value of that is \$3,363.

[102] Given the critical importance of improved conditioning for Ms. Voong as agreed by all parties, I find that ongoing kinesiology assistance will be necessary for Ms. Voong's long-term care but not to the full extent recommended by Mr. Epp. I award **\$8,500** for this item which provides the full amount proposed for the first five years and just under half the claimed amount thereafter. That is in keeping with Dr. Caillier's recommendation.

Fitness Pass

[103] The parties agree that provision should be made for a fitness pass for Ms. Voong. Her small basement suite is unsuited to the significant conditioning and exercise program that all experts agree is necessary for her. Ms. Voong claims \$9,283 for the present value of fitness passes identified by Mr. Epp. This includes an add-on to the basic fitness pass for appointments with a kinesiologist but that seems to duplicate the awarded I just made for kinesiology.

[104] The defence submits that the basic fitness pass for three years at an annual cost of \$517.97 is reasonable for a total of \$1,553.91. I do not understand the rationale for a three-year cap on this pass as all experts agree that Ms. Voong's need for physical conditioning will require a lifetime commitment.

[105] The cost of a basic fitness pass to age 75 is \$8,269. I award **\$8,000** for this item.

Massage Therapy and Physiotherapy

[106] Dr. Caillier recommends Ms. Voong attend physiotherapy or massage therapy at least once a month to assist with flares in her pain. She emphasizes this is not a substitute for active exercise. Dr. Parmonoff says passive treatments are not recommended given the time that has elapsed since the accident but says "adjunctive treatments" up to 6 per year for two or three years to manage flare ups is recommended.

[107] Ms. Voong claims the present value of this at \$28,013. The defence accepts the present value of monthly sessions for three years for a present value of \$3,510.

[108] Given that Dr. Paramonoff agrees that Ms. Voong is unlikely to ever be pain free, I struggle to understand the rationale to terminate this treatment after three years. However, given all the other treatments and therapies that are proposed, I accept that the need for massage or physio treatments to manage flare-ups should diminish over time. I would therefore award the full amount claimed for the first three years and half the amount claimed after that, rounded to **\$15,000**.

Acupuncture

[109] Dr. Misri opines that Ms. Voong may get some benefit for her depression from acupuncture. He also suggests it will assist with chronic pain, although I note that Dr. Caillier has not indicated this. Ms. Voong has had some acupuncture treatments in the past and she might use them in the future but I find there is likely some overlap between this and the Botox treatment for which provision has already been made. I would not make an additional award for acupuncture.

Counselling

[110] Dr. Caillier opines that Ms. Voong's ability to perform at her best capability and lessen the impact of her pain requires a significant improvement in her mental health. She says this is necessary in part so that Ms. Voong becomes interested and motivated to engage in activities that would improve her management and tolerance of her chronic pain. She recommends that Ms. Voong work with a psychologist to learn strategies and techniques to assist in pain management and to help with her depression and anxiety. Dr. Misri recommends counselling with a psychologist to treat her depression and anxiety. He recommends one session per week for two to three years followed by one session every two weeks for another two years and a reassessment of need after that but likely not less than an additional 24 sessions. Taking the mid-point of the weekly sessions (2.5 years), that totals 196 sessions.

[111] The defence does not accept an amount for counselling but makes no submissions as to why and did not cross-examine either Dr. Caillier or Dr. Misri on these recommendations. Given the tenacity of Ms. Voong's depression and anxiety and its overwhelming contribution to her current condition, I accept without

reservation the need for this counselling. I observe that Ms. Voong has already attended counselling sessions through the pain clinic so I am persuaded she will take advantage of it in the future.

[112] Ms. Voong claims a total of \$27,729 for the present value of 156 counselling sessions. That is about 80% of the number of sessions recommended by Dr. Misri. I gather the 20% discount is to account for a contingency that the full amount recommended by Dr. Misri will not be required. I accept that is reasonable and I award the amount claimed which I will round to **\$28,000**.

Occupational Therapy

[113] The parties agree that Ms. Voong should have three years of support from an occupational therapist to assist her in coordinating and attending all the recommended treatments helping her on a path to better managing her pain, exercise, and function. They agree on 20 sessions per year for three years for a present value of \$7,603.

[114] Mr. Epp recommends ongoing occupational therapy with an average of two sessions a year at three hours each for Ms. Voong's expected lifetime (present value of \$16,538). Mr. Epp opines this is necessary for "top-up" therapy given that Ms. Voong is expected to have ongoing pain and mental health issues. The defence does not agree to this, presumably on the assumption that her condition will improve, but otherwise makes no submission on it and did not cross-examine Mr. Epp specifically on this recommendation. I am not persuaded that the full level of assistance for Ms. Voong's lifetime can be attributable to the accident as most persons require some assistance as they age. I would award a total of **\$20,000** for all occupational therapy support.

Household Assistance

[115] Mr. Epp opines that that Ms. Voong current circumstances suggest 2.5 hours a week in housekeeping support is reasonably necessary. Mr. Epp conducted part of his functional capacity evaluation in Ms. Voong's home. He saw the size and layout

of the home and observed her performing or attempting to perform household tasks in that environment. (The assessment was in her previous suite but the new suite is not substantially smaller.) Based on these direct observations and his own expertise, Mr. Epp is best positioned to provide that assessment.

[116] However, it is also reasonable to expect some reduction in the volume of work once Sara moves out. Sara is 20 years old and it seems likely she will move out in the next five or so years as she builds her own life as an adult. In light of that, I find it reasonable to assess the need based on two hours a week.

[117] While I find there is some prospect for Ms. Voong to be better able to manage her chronic pain in the future, there is little prospect for recovery. I consider a reasonable assessment of her future need for housekeeping capacity, arising from her accident injuries, is to assess the loss to age 80.

[118] At an average cost of 36.50 per hour, the present value of two hours of housekeeping assistance per week to age 80 is \$72,341 which I round to **\$70,000**.

Aids for Independent Living

[119] Dr. Caillier recommends Ms. Voong have a cushioned mat to stand on when cooking, extension poles for cleaning, a lighter weight vacuum, and electric scrubber. Mr. Epp recommends orthopaedic pillows, a pole extender, and an electric scrubber. He suggests these items will allow Ms. Voong to do some of the lighter household work, thus limiting her need for housekeeping assistance to 2.5 hours per week. He does not recommend an amount for a lightweight vacuum because that kind of equipment is now standardly available. Ms. Voong claims the cost of the pillows, pole extender, and electric scrubber, replaceable every five years, for a present value of \$3,294. I award **\$3,000** for this item.

Summary of Future Care Items

[120] In summary, I make the following awards for future cost of care items:

Botox Trial	\$3,525
Botox Ongoing	\$80,000
TRMS Trial	\$2,900
Current Medications	\$30,000
Trial Headache Medications	\$35,000
Riboflavin	\$2,000
Anti-depressant	\$5,000
Sleep Medications	\$7,500
Kinesiology	\$8,500
Fitness Pass	\$8,000
Massage/Physio	\$15,000
Acupuncture	\$0
Counselling	\$28,000
Occupational Therapy	\$20,000
Household Assistance	\$70,000
Aids for Independent Living	\$3,000
Total	\$318,425

Other Damages and Adjustments

[121] The parties agree to special damages in the amount of **\$6,544.18**. Counsel agree that they can work out between them any tax gross-up and, as noted earlier, deduction for tax and EI premiums on past earning losses. They have liberty to apply to resolve those matters if they cannot agree.

Summary and Conclusion

[122] In summary, I award the following damages to Ms. Voong.

Item	Damages
Non-Pecuniary	\$195,000
Past Earning Capacity	\$80,000
Future Earning Capacity	\$300,000
Past Household Capacity	\$18,000
Future Care	\$318,425
Special Damages	\$6,544.18
Total	\$917,969.18

[123] If the parties wish to make submissions respecting costs and any relevant settlement offers, they may provide written submissions not exceeding five pages (plus any appended settlement offers) within 30 days of this judgment through Supreme Court Scheduling. If they wish to appear to address the issue, they should make that request when filing their submissions. Absent any such submissions, I would order that Ms. Voong receive her costs at scale B.

“Kirchner J.”