IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Parvanta v. Zhang,*
2024 BCSC 2227

Date: 20241209
Docket: M095598
Registry: Vancouver

Between:

Baymisal Naoto Parvanta

Plaintiff

And

Yan Fang Zhang and Mei M. Huang

Defendants

- and -

Docket: M106381
Registry: Vancouver

Between:

Baymisal Naoto Parvanta

Plaintiff

And

James Keenan, Star Limousine Service Ltd.,
Brown Bros. Motor Lease Canada Ltd. and Sharon Dernovshek

Defendants

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff: R.N. Bisbicis
P.R. Bisbicis
E. To, Articled Student

Counsel for the Defendants: C.V. Morcom
J.T. Belding

Place and Dates of Trial:	Vancouver, B.C. January 29-31, February 1-2, 5-9, 12-16, 20-21 and March 1, 2024
Place and Date of Judgment:	Vancouver, B.C. December 9, 2024

Table of Contents

Introduction

[1] The claims in this action relate to two motor vehicle accidents – the first on December 27, 2007 (the "2007 MVA"), and the second on December 28, 2008 (the "2008 MVA", with the 2007 MVA and 2008 MVA being collectively referred to as the "subject accidents"). The plaintiff, who was 30 and 31 years old at the time of the subject accidents, and 46 at the time of trial, says she continues to be impacted by the injuries suffered in them. Those impacts are both physical and psychological.

[2] The defendants in each action have admitted liability, but contest causation as well as the nature and extent of the injuries underlying the plaintiff's claim. Assessment of damages with respect to these claims is complicated by the length of time that has passed since the subject accidents, the waxing and waning of symptoms over the years, other circumstances impacting the plaintiff's psychological well-being, and times at which the plaintiff has chosen not to take prescribed or recommended medications and therapies.

Facts

The Plaintiff's Background

[3] The plaintiff was born in Japan in 1977. Her father was a pilot from Germany. Her mother, who was from Japan, died when she was about three years old. By the time she began elementary school, she was living in Afghanistan with her father and his then-girlfriend (Laila). She recalled being taken by her father to her first day of school, but shortly thereafter she recalls Laila being told that her father would not be coming back home and that they could not find the body.

[4] Ms. Parvanta continued for a period of time to live with Laila. Eventually, she was informally adopted by a relatively wealthy neighbour, Mr. Homar Parvanta. Her given name at birth had been Naoto. Mr. Parvanta "gave" her the name Baymisal, and arranged for her to adopt his surname. However, she continues to go on a day-to-day basis by the name Naoto.

[5] There was little direct evidence of the plaintiff's childhood years. Various notes of medical doctors and psychologists reflected additional information provided to them, although those notes were all from when the plaintiff was in her thirties or forties, many years after the fact. It is clear that there were some difficult times. There were issues as to whether she would adopt the Muslim religion. There were issues as to whether she would stay with her adoptive father or go back to Laila. There were suggestions that attempts were made to marry her away for money, or to involve her in the sex trade while still a child. She gave evidence of having seen Laila give birth, and of having seen a woman who had at times taken care of her die in hospital. It is clear that during her formative years, the plaintiff experienced some difficult times.

[6] As some point during her teen years, the plaintiff moved from Afghanistan to Pakistan. In early 1995, at the age of 17 and while living in Karachi, she became a mother and began raising her son Kamiar.

[7] When the plaintiff was 18, she moved to India. She found work as a sales person in a children's clothing store, as a greeter for a catering company, as a manager in a hair and spa salon, and doing administrative work for a consulting company.

[8] In July 2000, the plaintiff was involved in a motor vehicle accident in India. Her evidence was that she was a passenger in the vehicle, that something went wrong with the tire and the driver lost control. She said in her direct examination that she suffered injuries including to her left hand as well as some scratches on her face.

[9] On cross-examination, the plaintiff was taken to notes recorded by her then-new family doctor, Dr. Koorjee, in August 2003. Those notes include the following:

> While in India 3 yrs ago was involved in MVA x unconscious for 6+ hours.
> Chronic back pain – lower back. Headaches worse since MVA.

[10] The plaintiff on her cross-examination said that she told Dr. Koorjee about the accident, but did not recall the specifics of what she had said. Her recollection in a general sense was that she told him they were away from the city and had to wait a long time for medical attention. She denied that she had told Dr. Koorjee that she was unconscious for six hours. With respect to back pain, she said that she occasionally had back pain but it was because she used to work long hours in high heels, then go dancing in the evening.

[11] In August 2000 (just a month after the accident in India), the plaintiff and her son moved to Canada. They initially lived in Windsor, Ontario, with a family from the church that had sponsored them. With respect to what she may have told Dr. Koorjee about headaches, the plaintiff said that she experienced headaches when she first moved to Canada, but that they were not severe enough to require medical attention. She said that the headaches would have related not only to the accident that had happened in India, but also to her major changes in lifestyle, including adapting to a new country.

[12] The plaintiff started learning the English language on her arrival in Canada. In about 2002, she was hired to work at an Old Navy store as a part-time sales person. She said she also worked part-time at Aldo and Gap stores in the same shopping mall (although Record of Employment data obtained from the federal government did not include information on employers other than Old Navy).

[13] The plaintiff's 2002 income included employment income of $3,946 and social assistance payments of $9,764,

[14] At around the end of 2002 or the beginning of 2003, the plaintiff and her son moved to British Columbia. This appears to have been at the instance of her adoptive father, Homar Parvanta. The plaintiff said that she initially worked at an Old Navy store in British Columbia, although this too is not reflected in Record of Employment data. At best, this work would have lasted two or three months.

[15] In the spring of 2003, Homar Parvanta purchased a hair salon and spa in downtown Vancouver known as Spa Rivage. The plaintiff began working as manager. Her evidence was that she worked long hours, generally being the first to arrive and the last to leave, and working six or seven days a week. She would schedule appointments, deal with clients, ensure that the business had all of the necessary supplies, as well as find ways to improve the business, and promote it in the community. When the business was short of staff, she would sometimes perform services like facials and hair colouring. The plaintiff was supposed to be paid $12 an hour, although it appears from the evidence that she was not paid for all of the time she actually spent in the business.

[16] While the plaintiff was working, Mr. Parvanta would take care of her son Kamiar as well as Mr. Parvanta's own son, Salman, who was close in age to Kamiar. The plaintiff would prepare food for them before leaving most mornings. Her time with Kamiar was primarily on the weekends. Mr. Parvanta took care of paperwork as well as paying payroll and business expenses for Spa Rivage.

[17] The first medical records in evidence with respect to the plaintiff are handwritten clinical records of Dr. Koorjee, a family doctor who saw the plaintiff from about August 2003 to August 2008. Dr. Koorjee did not testify at trial but his clinical records were put in evidence.

[18] The first two clinical notes in evidence are from August 14, 2003. As noted above, they include a reference to the accident in 2000 in India. Other notes include complaints of "headaches, recurrent for several years" and "was treated for depression". The plaintiff did not recall much about what was said on that date, but she believed that she had headaches when she got dehydrated from working long hours without drinking enough water, she recalled feeling sad and down about leaving friends in Ontario (but did not recall being treated for depression), and that she had back pain when she wore high heels all day at work and then sometimes went out dancing after work in those same heels.

[19] Later in 2003, the plaintiff began treatment with a chiropractor, Dr. Badial. Dr. Badial was a customer of Spa Rivage, had an office nearby, and the plaintiff's evidence was that he offered her a low fee as he worked to build his new practice. An initial consultation form dated October 10, 2003, notes "Chief Complaint – Chronic Headaches – bilateral suboccipital headaches, throbbing in nature", as well as various comments about tension in the cervical and thoracic spine. The plaintiff acknowledged having stiffness in her back when she was working long hours. She recalled that she would feel better after seeing Dr. Badial – his notes indicate about 25 treatments, several in the fall of 2003, a few in April 2004, and several more in the fall of 2004.

[20] A further clinical note of Dr. Koorjee dated January 22, 2004, includes further complaints of "recurrent headaches – always R sided – occipital pain – Chiropractor helps temporarily only". It also noted complaints about pain radiating down the right neck into the cervical spine with occasional weakness in the right hand, with full range of motion in the neck. At trial in 2024, the plaintiff did not recall having radiating pain in 2004.

[21] The next clinical note of Dr. Koorjee is dated April 26, 2004. It notes that the plaintiff had been seeing her chiropractor for recurring pain in the back of her neck and headaches, but that there was no improvement. It noted that she was running a family business 12 hours a day, six days a week, that her father was taking care of her nine-year-old son, and that she was in charge of cooking at home. There was a note that Dr. Koorjee provided counselling for anxiety and stress. With respect to this note, the plaintiff recalled that she had told Dr. Koorjee that she was seeing a chiropractor, but could not recall the details, and that she may have had anxiety and stress at the time – she recalled that they had recently moved to Port Coquitlam, that she had a long commute, and that she found it difficult to spend time with her son.

[22] There is a further note of Dr. Koorjee on October 20, 2004, in which he notes headaches, occipital, tension-type, as well as neck and shoulder pain, and pain in her right leg and hands. At trial, the plaintiff recalled having headaches around this

time because she was going through a lot, running the business and trying to spend time with her son. She recalled being stiff because she was on her feet a lot, but she did not recall having pain in her neck or shoulder.

[23] On October 23, 2004 (a few days after the appointment with Dr. Koorjee), the plaintiff was involved in a motor vehicle accident. She was a passenger in a vehicle that was stopped at an intersection when it was hit from behind. Her recollection is that she did not take any full days off work, but that there were days when she would start a little later in the day and miss some of her usual hours. As well, there was a room in at Spa Rivage in which she could rest so she would occasionally take breaks to lie down.

[24] As noted above, the plaintiff resumed chiropractic treatments in late October 2004, with nine treatments over the next month. Her evidence is that she recovered from injuries in this motor vehicle accident within the next few months.

[25] The plaintiff did not attend at her doctor's office after the October 2004 accident until December 8, 2004, when she was seen by a locum doctor. The clinical notes for that day reference the October accident, and that injuries included right knee and lower back pain as well as migraines. They also noted incidents in which the plaintiff had fallen twice in one day when her knee gave out, and an incident where her right arm went numb and was "frozen" for half an hour. The plaintiff, in her evidence at trial, recalled having some headaches after the October 2004 motor vehicle accident. She did recall falling while at work, but thought it was because she was not eating much and was feeling weak.

[26] The plaintiff had two appointments with Dr. Koorjee in February 2005. The February 7 clinical notes state that the plaintiff had chiropractic and physiotherapy treatments until December. They noted that the pain started again in January 2005, and that it had been recurrent – about once a week – and that she had returned to part-time work only in January 2005. Clinical notes from a further appointment on February 11 record issues with the right knee and lower back.

[27] On February 15, 2005, Dr. Koorjee wrote to ICBC. He listed the plaintiff's initial complaints in December 2004 as including pain in the lower back, pain in the right knee joint, recurring migraine-type headaches (of a couple of years' duration; however, occurring more frequently), one day on which the right arm felt numb and frozen, pain in the upper right back and neck, and anxiety regarding these problems. Dr. Koorjee reported that he had reassured the plaintiff that her pain may last for a period of time, but would likely resolve fully, and she was advised to get on with her life and with full-time work.

[28] The plaintiff's evidence was that the symptoms subsequently resolved, and that she was healthy for at least two years prior to the 2007 MVA. I note that, although she saw Dr. Koorjee from time to time between February 2005 and November 2007, there is nothing in the records reflecting any continuation of the symptoms that Dr. Koorjee reported on in February 2005.

[29] In the spring of 2005, the plaintiff's adoptive father (Homar Parvanta) decided to sell the Spa Rivage business and move to the United Kingdom. A contract of purchase and sale was signed on June 13, 2005, and completed on July 26, 2005. In the agreement, the purchaser agreed to hire all of the existing employees other than the plaintiff, and Mr. Parvanta agreed to provide the plaintiff's services for a period of time after the sale to train the new owner. In a subsequent interview with a government official, Mr. Parvanta advised that he had misunderstood the contract, and thought that the new owner was going to retain the plaintiff.

[30] However it happened, the plaintiff ended up continuing to work at Spa Rivage after completion of the sale, then eventually left when she learned that the new employer would not be paying her for that work. In late September 2005, she submitted an employment insurance claim stating that she had worked up to August 19, 2005. However, the new owner refused to issue her a record of employment, and asserted that any work she did after July 26, 2005 was the responsibility of Mr. Parvanta.

[31] Near the end of 2005, the plaintiff and a friend purchased a small café (Coka Moka) on Smithe Street in downtown Vancouver, not far from Spa Rivage. They divided responsibility, with the plaintiff doing cooking, cleaning and serving, and the friend doing shopping and paperwork. The plaintiff says that she invested about $12,000 into the business, for which she used money she had been saving for Kamiar. The evidence indicates that the plaintiff began working full-time in this business in about December 2005 and continued there until either the end of 2007 or early 2008.

[32] At some point in 2006, the plaintiff began dating an artist, Mr. Kal Gajoum. They had initially met while the plaintiff was working at Spa Rivage, but both were in other relationships. Mr. Gajoum was also a customer of the Coka Moka café.

[33] At some point in 2006 or 2007, the plaintiff began assisting Mr. Gajoum with management of his work as an artist. This was done later in the day, after her work at Coka Moka. Her evidence was that she initially provided some assistance without any sort of compensation. Two of Mr. Gajoum's friends testified at the trial, and both recalled seeing her at gallery shows as well as helping with dinners at Mr. Gajoum's place.

[34] On September 1, 2007, Mr. Gajoum incorporated a company for his work as an artist – Gajoum D'Art Studio Inc ("GDASI").

[35] The plaintiff's evidence is that when she began doing paid work for Mr. Gajoum, she was doing so on a part-time basis and earning $1,500 per month. The first cheque of several cheques in evidence from GDASI to the plaintiff is dated December 11, 2007, and shows a payment of $5,000 for "wage". It is the only cheque in evidence that predates the 2007 MVA. However, the plaintiff's evidence was that she had commenced working with Mr. Gajoum prior to GDASI being incorporated.

[36] Also in the fall of 2007, the plaintiff began working at an Italian café called Sciue. Her evidence was that she did this work in the afternoons, after having done

the morning and lunchtime shifts at Coka Moka, and that she did so because she wanted to improve her skills with Italian coffee and foods like panini. Mr. Gajoum, on the other hand, said that he understood it was because Coka Moka was not doing very well. A Record of Employment issued in respect of Sciue indicates that she worked a total of 295.5 hours between October 15 and December 24, 2007 – which amounts to nearly 30 hours a week, for which she was paid $12 an hour.

[37] The income tax information in evidence with respect to the plaintiff commences with her 2001 income tax return. The tax returns from 2001 to 2007 indicate:

a) total income in 2001 of $11,092, all by way of social assistance;

b) total income in 2002 of $13,710, made up of social assistance of $9,764 and T4 earnings of $3,946;

c) total income in 2003 of $14,215, made up of social assistance of $1,870 and T4 earnings of $12,345;

d) total income in 2004 of $11,539, all from T4 earnings;

e) total income in 2005 of $4,659.20, all from T4 earnings from Spa Rivage Salon;

f) total income in 2006 of $0; and

g) total income in 2007 of $15,842, made up of T4 income from Sciue Holdings Inc. of $3,402 and net business income of $12,440.

[38] It is clear from this summary that the plaintiff did not report any income from the Coka Moka café. Her evidence was somewhat vague on this. She said that every tax slip she received was provided to her accountant. She recalled being told that she did not need to report tips, and said that a big part of what she received from Coka Moka was in the form of tips. She also recalled that her business partner, who took care of all the administration, paid some rent on her behalf.

[39] The plaintiff's evidence is that the 2007 net business income of $12,440 all related to her work for Mr. Gajoum. When asked to explain why the only GDASI cheque produced was for $5,000 – less than half of the reported net business income – she explained that she had received other funds during the year, including before GDASI was incorporated. It is noteworthy in that regard that the 2007 income tax return was prepared on her behalf by an accounting firm that the plaintiff identified as Mr. Gajoum's accountants.

The 2007 MVA

[40] On December 27, 2007, the plaintiff worked at Coka Moka, then did some shopping on Robson Street to pick up items for an art exhibition in Whistler that she had been organizing. As she headed toward Mr. Gajoum's studio in Gastown, she crossed Alberni Street northbound at its intersection with Burrard Street. A Mazda 3 car driven by the defendant Zhang was turning left from Burrard Street onto Alberni Street. Neither noticed the other. The plaintiff was struck by the Zhang vehicle.

[41] The plaintiff says that she recalls that, as she was crossing the street, she saw a bright light coming toward her, then the next thing she remembers she was on the ground and people were holding her. Ms. Zhang's recollection is that she noticed the plaintiff, stopped, honked her car horn, then saw a hand on the hood of her car. She said she saw the plaintiff fall to the ground. Ms. Zhang recalls that when she got out of the car after about 10 seconds, the plaintiff was sitting on the ground. She recalls the plaintiff complaining about her lower back. Ms. Zhang told the plaintiff not to move and asked a bystander to call an ambulance.

[42] Ms. Zhang's evidence was that the light had turned yellow when she proceeded through the intersection, and that she had initially stopped to wait for oncoming traffic. At trial in 2024, she estimated that she was going under 10 km/hour, although she acknowledged that when examined for discovery in 2011, she said she did not remember what speed she was going.

[43] Various medical records with respect to the evening of December 27, 2007 were in evidence. They include a handwritten ambulance crew report, which notes

arrival at the scene as 2010 hrs and departure as 2025. Under “Chief Complaint”, the report notes “L hip/pelvic pain”. Under “Mechanism of Injury”, the note records:

> Pt struck by a vehicle at moderate speed. Up onto hood then slid off to pavement in a sitting position landing on L hip area. o/o L hip/pelvis and low back pain. Ø deficits, Ø neck pain, did not hit head, Ø LOC

[44] Under “Exam - state of consciousness”, the report notes “alert/oriented”, and under “H/N”, it notes “did not hit head Ø LOC”.

[45] The plaintiff was asked about this report. She did not recall being on the hood of the defendant’s vehicle. She recalls lying on the ground with people holding onto her. She does not recall having left-sided pain at the time – rather, she recalls that her left hand was under her hips on the left and she was feeling very cold. She says she does not recall whether she had lost consciousness.

[46] It is of course not known how much of the information in the ambulance crew summary came from the plaintiff and how much of it came from others at the scene.

[47] Three documents from the St. Paul’s Hospital Emergency Department are also in evidence. A nursing assessment conducted at 2040 hrs notes:

> Was crossing street & struck by car. Slid onto hood of care & fell onto street. ~~c/o L hip/pelvis pain~~. c/o pain to lower back Ø LOC. Ø numbness/tingling. Sensation present to all extremities.

[48] The source for this information is cited as “BCAS/PT”. I assume this means that some information came from the ambulance paramedics, and some from the patient. It is not clear which information came from which source, and it not clear why the reference to L hip/pelvis pain is crossed out.

[49] The records also contain an “Emergency Physician Assessment” form. On that form, it is noted that:

> Previously healthy 30 y/o F pedestrian on crosswalk hit by a car (sedan) travelling ~ 30-40 km/hr. Pt hit from behind & fell on ground. Unable to tell if a LOC.

[50] The notes record complaints of pain over low back. Observations include that the plaintiff was “conscious, coherent, alert, oriented”. They also record references to “tenderness L parental R frontal, neck tenderness C-spine. Tenderness R ant rib cage. Extremities – full ROM, hip tenderness.”

[51] The plaintiff was sent for urgent x-rays of her cervical and lumbar spine and pelvis. With respect to those, the physician assessment notes “no obvious fractures / dislocations”.

[52] The plaintiff was provided with Tylenol #3s and discharged at about 10:45 p.m. Mr. Gajoum picked her up and took her to her home by taxi. In the interim, arrangements had been made for a friend of the plaintiff’s (Ms. Kazimi, who had known her both in India and in Canada) to take care of Kamiar.

[53] The plaintiff’s evidence is that she initially felt pain in her back, her neck, her head and her shoulder. Then, after she was back at home, her right arm, her face and her knee all began to swell. Her recollection was that she was sore all over but particularly on her right side.

Events After the 2007 MVA

[54] Ms. Parvanta saw her family doctor, Dr. Koorjee, the next day (December 28, 2007). His notes include the following, after a brief description of the accident:

> Had neck & lower back xrays. Was told no #. Gave her analgesics for pain.
> c/o lower back pain R>L; R side of head & neck hurts; R shoulder is sore

[55] There follow several notes about Dr. Koorjee’s examination that day. Although difficult to read, it appears that he is examining the spine, the shoulder and the wrist at a minimum, and that he prescribed ice packs, physiotherapy and naproxen.

[56] The plaintiff recalls having issues with Dr. Koorjee being unwilling to extend the times of her appointments in 2008, as she often had a number of concerns, and that she had to prioritize the issues she would raise with him. She says that she

recalls at this first appointment, her face was swollen and her hips were sore as well, although she acknowledges that these matters do not appear in Dr. Koorjee's notes.

[57] Both Ms. Kazimi and the plaintiff's son, Kamiar, recalled that when they first saw the plaintiff a day or two after the 2007 MVA, she was noticeably swollen in the face. Kamiar also recalled her arm being noticeably swollen.

[58] The plaintiff testified that over the next few weeks, she started to notice that she would see blood when urinating and that she had pain in her knee and ankle as well as her hips. She recalled that her face was very sensitive, making it difficult to wash it, and that she had regular headaches. She had difficulty using her right hand due to soreness in the wrist. She also began to notice pain when she was eating.

[59] The plaintiff says that a friend stayed with her for a period of time and also helped with housework and groceries, that Kamiar did his best to help, and that when she and Kamiar moved downtown, Mr. Gajoum was also able to assist.

[60] The plaintiff's first physiotherapy appointment was on January 2, 2008.

[61] The plaintiff saw Dr. Koorjee again on January 3, 2008. The records of this visit include concerns about blood in urine as well as pain in the right lower abdomen. Dr. Koorjee also recorded concerns at this appointment about swelling in the right hand and forearm. At a further appointment on January 10, 2008, Dr. Koorjee recorded that the plaintiff had been to Vancouver General Hospital on January 4 due to concerns about abdominal pain which was ongoing. He also recorded complaints about pain in the lower back, right shoulder and neck. His notes of January 24, 2008, record issues with nightmares and sleeping, as well as ongoing right-side abdominal pain. His notes of January 30, 2008, record persistent right mid-lower back pain, as well as headaches.

[62] There is a further cheque, chq 06, from GDASI to the plaintiff dated January 14, 2008. It says that it is for $2,500 "re wage". After this, the next such cheque in the record is not until May 1, 2008. It is not clear whether the work reflected in the January 14 cheque was performed before or after the 2007 MVA.

[63] In addition to physiotherapy, the plaintiff obtained two acupuncture treatments in January 2008. As well, in February 2008, she obtained two chiropractic treatments.

[64] The plaintiff saw Dr. Koorjee twice in February 2008. On February 11, Dr. Koorjee noted complaints of recurrent right flank and right back pain. The notes for February 27, 2008, include ongoing complaints of right lower back and right abdominal pain. On February 27, Dr. Koorjee notes that the plaintiff had not yet returned to work as she continues to suffer from pain and her job involves heavy lifting, cooking, washing dishes and waitressing. The plaintiff says that these are the things that were focused on during those appointments, but that she was having generalized pain particularly on the right side of her body.

[65] At the end of February, Dr. Koorjee referred the plaintiff to a urologist, Dr. Hershfield, to investigate her abdominal issues.

[66] The plaintiff's evidence is that she never returned to Coka Moka, due to her inability to do the sort of physical work that was required, and that at some point in 2008, her boyfriend went to check the premises and found it was locked up.

[67] On March 14, 2008, an Employment Insurance ("EI") benefits application was submitted on the plaintiff's behalf. At trial, she did not recall having submitted this application, but given what the documents (obtained through document production from the government) showed, she did not deny that it had been made. Generally speaking, it appears that, from time to time, the plaintiff had assistance from others with respect to government forms. This includes income tax filings. Her evidence was that when she first came to Canada, her adoptive father took care of those filings. It appears that most of the tax returns after those initial years were filed on her behalf either by an accountant or by a tax preparer.

[68] The EI application that was filed in March 2008 records her most recent employer as Sciue Holdings Inc., and her last day worked as December 24, 2007. The last day worked is confirmed by a Record of Employment issued by Sciue. What

is not referenced in the application is any work at Coka Moka or any work for Mr. Gajoum. While it does appear that the plaintiff was not, prior to this time, on payroll at either of these employers, it seems clear that she was treated (at least for 2007 tax purposes) as an independent contractor for Mr. Gajoum and GDASI, and that she received compensation of some sort for her long hours worked at Coka Moka.

[69] The lack of recorded paid work other than with Sciue Holdings Inc. was problematic for the plaintiff, as she had only accumulated 296 hours of insurable work with that business in the prior year, which was insufficient to qualify for the benefits she was applying for. Thus, the lack of recorded employment hours elsewhere was to the plaintiff's detriment in this application.

[70] As noted, the plaintiff had no recollection of how the EI application came about. Given her lack of recollection, there is of course no evidence as to what sort of advice she may have received leading to the application.

[71] On March 13, 2008, Dr. Koorjee recorded that the plaintiff was finding that her abdominal and low back pain were better controlled on Voltaren. The notes of a March 26 visit are brief. Notes from an appointment on April 16, 2008, reflect that the plaintiff was "clinically much the same" and that "R sided pain" is persisting.

[72] On April 1, 2008, the plaintiff had the first of a number of massage therapy treatments.

[73] Dr. Koorjee's notes from May 1, 2008, indicate that he was awaiting a report from Dr. Hershfield, the urologist. He comments that the plaintiff "remains anxious", and that her abdominal and lower back pain persist and are worse at night. He also commented about her sleeping issues and her nightmares. The plaintiff's recollection was that, in the first couple of months after the 2007 MVA, she had nightmares regarding a car about to hit her, then the nightmares began to be more wide-ranging and she described this to Dr. Koorjee. In May 2008, Dr. Koorjee referred the plaintiff to see a psychologist.

[74] As noted above, the plaintiff began receiving funds from GDASI again in May 2008. The plaintiff's evidence was that, at some point in the spring of 2008, she began working again by making phone calls which included ensuring that payments that were due from the exhibition at the end of December 2007 came in. The GDASI cheques payable to the plaintiff that were in evidence from the balance of 2008 include:

a) May 1, 2008 – chq 20 for $700 re "part time work";

b) May 31, 2008 – chq 27 for $1,000 re "wage";

c) June 16, 2008 – chq 30 for $1,300 re "wage";

d) June 17, 2008 – chq 31 for $1,000 re "wage pouness";

e) July 29, 2008 – chq 44 for $1,500 re "wage"

f) September 28, 2008 – chq 55 for $5,000 re "wage + Bonus";

g) November 30, 2008 – chq 65 for $2,000 re "wage";

h) December 2, 2008 – chq 47 for $2,000 re "wage"; and

i) December 15, 2008 – chq 72 for $4,000 re "wage".

[75] The plaintiff had further appointments with Dr. Koorjee on May 16, 23 and 30, and on June 23, 2008. The notes from those appointments reflect ongoing right flank pain, and her ongoing dealings with Dr. Hershfield. Dr. Koorjee also noted that the plaintiff would be making an appointment with a psychologist shortly.

[76] The plaintiff had four appointments with Dr. Hearn, a registered psychologist. Dr. Hearn's notes of the four sessions were in evidence. The first was on July 28, 2008. The notes record some of the plaintiff's history, concerns about her difficulties sleeping since the 2007 MVA, and disturbing comments about things she was seeing. Dr. Hearn noted that he had faxed Dr. Koorjee recommending that the plaintiff begin taking antidepressants, and that he planned to begin using a

therapeutic technique known as EMDR (Eye Movement Desensitization and Reprocessing).

[77] Dr. Hearn's notes of the third session, on August 19, 2008, are lengthy and record several disturbing conversations during the session. Dr. Hearn noted as well that the plaintiff had started her antidepressant medication just two days before the appointment. The notes are framed in the form of a report to Dr. Koorjee, and raise the question of whether the plaintiff should be hospitalized for treatment.

[78] The plaintiff's evidence was that, on the final weekend of August 2008, she received a call from Dr. Koorjee while she was in Whistler for an exhibition. He asked her to go to Royal Columbian Hospital. She understood that it had something to do with treatment of her pain. The next day, she dropped off her son at a friend's house and went to Royal Columbian. It became clear that the reason for her being asked to attend the hospital was for psychiatric assessment. She ended up being held involuntarily in the psychiatric ward overnight. The next day, she was permitted to leave. The plaintiff said she was told by a doctor at the hospital that it was a mistake.

[79] It was clear from the evidence that this involuntary hospitalization in a psychiatric ward was traumatic for the patient. It was suggested that Dr. Koorjee had read more into Dr. Hearn's reports than was intended. The plaintiff terminated her doctor-patient relationship with both of them. She eventually retained counsel who commenced legal action in respect of this incident as well.

[80] The plaintiff began treatments with Dr. Wild, a psychologist, on September 15, 2008. She saw Dr. Wild a further 24 times between September 24, 2008 and November 29, 2010. Dr. Wild was also retained in 2017 to prepare an expert report, which was tendered in evidence. A limited portion of Dr. Wild's clinical notes was also in evidence, and Dr. Wild testified both as to her observations during treatment of the plaintiff and as to the opinions she expressed in her 2017 expert report.

[81] Dr. Wild explained that, at the initial meetings, there was a significant focus on building rapport, so that the plaintiff was able to trust that she would not face another situation like she had in August. She described the plaintiff as someone who had always prided herself in her resilience, and her ability in the past to get back up when she was knocked down; however, this time, it felt like "she had been knocked particularly hard and was struggling with bouncing back". She commented that during the sessions in the fall of 2008, the plaintiff:

> … described symptoms associated with PTSD and panic disorder such as experiencing very frightening nightmares, feeling detached and numb, not caring, lashing out at loved ones and wanting to control everything. She indicated that she was unable to cry because she was feeling so tight inside.

[82] Dr. Wild noted that the plaintiff had been prescribed antidepressant medication, but that she did not like taking the medications because of the side effects, and that eventually, she decided to stop taking them which reduced the instances of her lashing out at others. More generally, the evidence with respect to post-accident times as a whole indicated that, from time to time, the plaintiff took antidepressant medications upon doctors' recommendations, and at times she did not, based on how she was feeling and the extent of the side effects she was experiencing.

[83] Dr. Wild's evidence was that she worked with the plaintiff on strategies and techniques, and that the plaintiff expressed determination to use the tools and techniques that were provided to her.

[84] The plaintiff also found a new family doctor, Dr. Horricks, who she continued thereafter to see for nearly a decade. She also continued with both physiotherapy and massage therapy during the fall of 2008, and continued to take naproxen.

[85] A private investigator retained by the defendant's insurers conducted video surveillance of the plaintiff on three days in October 2008 (October 16, 18 and 27). The video on October 16 shows the plaintiff, just after 3:00 p.m., walking with Mr. Gajoum from Gastown to Yaletown. She is wearing boots that have a partial raised heel and has a purse that is mostly carried on her left shoulder. Her gait

initially seems somewhat awkward, but as they walk, the awkwardness becomes less noticeable, then later in the sequence, it is noticeable again. They maintain a steady pace – probably a good thing given that it was raining. The video on October 18 is similar, except that the walk starts just before 1:00 p.m., the plaintiff is wearing flat shoes and she is carrying a smaller purse (part of the time in her right hand, as Mr. Gajoum is holding her left hand). After they have lunch at a restaurant, the plaintiff appears to then walk up to Robson Street before returning to Gastown. The video on October 27 is also similar, as it shows the plaintiff and Mr. Gajoum leaving Gastown just after 1:00 p.m. and walking across to Yaletown. This time, the plaintiff is wearing shoes with a very slight heel and her gait seems somewhat awkward again. They have lunch with some people at a table outside a restaurant, then head back to Gastown.

[86] The plaintiff's 2008 income tax return showed total income comprised of $7,000 as employment income from GDASI, $131.56 as employment income from Sicue Holdings Inc., and interest income of $31.81. The return was prepared by an accounting firm. When asked why her income from GDASI was now showing as employment income, rather than business income, the plaintiff said that she did not know and that she left these questions to the accountants.

The 2008 MVA

[87] On December 29, 2008, the plaintiff attended an exhibition at the Plaza Galleries in Whistler, along with Mr. Gajoum and her son, Kamiar. They returned from Whistler on a snowy day in a limousine driven by the defendant, Mr. Keenan. The limousine struck another vehicle.

[88] Four witnesses gave evidence as to the accident.

[89] The plaintiff said that she did not see how the accident occurred – she was in the back of the limousine and just felt the collision. She saw the driver and Mr. Gajoum get out to speak with the other vehicle. She felt uncomfortable right away, and was unhappy with Mr. Keenan's attitude. She said she called the

limousine company and asked them to send another driver, but that they told her to remain calm and let Mr. Keenan drive them back to Vancouver.

[90] The plaintiff's son, Kamiar, who was called as a witness by the plaintiff, said that after the impact he checked on his mother and saw that she was rubbing her back and her neck and saying something did not feel right. He said that by the time they arrived back to their home in Gastown, she was in real pain and he and Mr. Gajoum had to assist her out of the car.

[91] Mr. Keenan gave evidence that he had put chains on the vehicle for the trip back from Whistler to Vancouver, but that by the time they got to Squamish, the road was fairly bare so he pulled into the McDonald's parking lot to remove the chains. As he pulled out of the parking lot, he was behind an SUV that stopped for no apparent reason, and although Mr. Keenan attempted to stop the limousine, it slid on the snow and ice into the back of the SUV. He said that by the time of the collision, the limousine was travelling very slowly, the impact was minor, and the air bags did not deploy. He said that he could definitely feel the impact, and that it jarred him forward, but he did not think it was significant. He said that he turned around, opened the portal to the rear of the limousine, and asked the passengers if they were okay. He said he "seemed to get an indication they were fine". Mr. Keenan did not say which of the passengers gave that indication. He said that when they returned to Gastown, he walked with the passengers to the door of their building, and that none of them seemed to be abnormal or requiring assistance.

[92] Mr. Gajoum was also called as a witness by the defence. He said he "wouldn't really call it an accident" – rather, it was just a case where the driver accidentally hit the car in front. He could not remember if it occurred on the way to or from Whistler. He said he never thought it was serious at all until he got a phone call in the last year or two, that he never heard anyone complain about the accident, and that he was surprised to learn that there was a lawsuit.

Events after the 2008 MVA

[93] The plaintiff saw Dr. Horricks on January 5, 2009. The 2008 MVA was a major subject of discussion. The handwriting is very difficult to read. Some of the words that appear legible are “para L pain > R side”, and “tender bilat ? R side tender over R SI joint” and “able to bend __ knee only”. There is also a notation that “Pain in her back was resolved by the end of Oct / 08”. The plaintiff was not sure of exactly what she had said – she thought she might have said that by late October, she was in less pain, and that the pain medications were helping. She did not agree that all of her back pain had previously been resolved. I note that, according to the documents in evidence, the plaintiff attended physiotherapy on November 4, 6, 18, 20 and 25 and on December 2, 11 and 18, 2008; she attended massage therapy on November 18, 22 and 23 and on December 11 and 14, 2008; and she saw Dr. Horricks on November 5, 17, 24 and December 2, 9 and 19, 2008.

[94] The plaintiff continued with regular physiotherapy, massage therapy and appointments with Dr. Horricks through the first half of 2009.

[95] In addition, she saw Dr. Wild on January 22, 2009, at which time Dr. Wild observed that she was very upset about the accident, being concerned that it was almost exactly a year after the previous accident, and that there appeared to be a pattern. Dr. Wild noted that:

> She was seen as upset and very distressed with a pronounced sense of foreshortened future, not feeling safe and always expecting bad things to happen. She appeared to by physically and emotionally overwhelmed, stressed, feeling suffocated and hurting in the chest. She described vivid nightmares with dreams of attacks, lots of symbolism and violence and when shouting for help, not being taken seriously, being laughed at and being made fun of, feeling terrorized.

[96] Dr. Wild suggested that this was in part related to the hospital incident in August 2008, and a sense that the plaintiff felt she was not being heard by medical professionals.

[97] The plaintiff continued to receive cheques from GDASI – the cheques dated in the first half of 2009 are:

a) February 17, 2009 – chq 96 for $4,000 re “wage”;

b) March 1, 2009 – chq 101 for $2,000 re “wage”;

c) March 29, 2009 – chq 106 for $2,000 re “wage”;

d) May 1, 2009 – chq 108 for $2,000 re “wage”;

e) June 1, 2009 – chq 109 for $2,000 re “wage”; and

f) June 29, 2009 – chq 114 for $2,000 re “salary”.

[98] The plaintiff’s recollection is that her pay from GDASI was decreased for a time after the 2008 MVA. It appears that she was receiving a steady $2,000 per month in the first half of 2009; however, given the lack of a stable pattern of the cheques in the fall of 2008, it is difficult to say whether there was an actual decrease.

[99] On June 16, 2009, the plaintiff was seen by a psychiatrist, Dr. O’Shaughnessy, for the purposes of an independent medical examination (“IME”) at the instance of a lawyer she had retained (Mr. Granger). Although Dr. O’Shaughnessy’s reports were not tendered in evidence, the plaintiff was cross-examined on some of what Dr. O’Shaughnessy said about what the plaintiff told him – and although Dr. O’Shaughnessy is a psychiatrist, those questions mostly focused on the history he took with respect to the plaintiff’s physical symptoms.

[100] The plaintiff was asked about a paragraph in the report in which Dr. O’Shaughnessy reported being told by the plaintiff that by June 2009 she had noted substantial improvement in her pain, but still had low back pain that was present most of the day, that stretching helped her pain, but that almost any physical activity exacerbated her pain. She also reported sleep disruption from the pain, as well as paresthesias in the right hip and thigh. In response to this description, the plaintiff at trial said that she was expressing how she was better on some days than on others.

[101] The plaintiff also agreed with a comment in the report that she would generally get up around 10 a.m. (although she said it was not always 10 a.m.), then often go for a coffee with Mr. Gajoum, and then do some light exercise such as walking, then return to bed for a nap, then in the afternoon do various office work for Mr. Gajoum's business. The plaintiff commented that before the 2007 MVA, she was an early morning person.

[102] The plaintiff was asked about a note that she was able to do grocery shopping and drive, although she disliked driving and would avoid it. She said that she tried to do things normally. With respect to a note that she had no difficulties with activities of daily living, the plaintiff recalled that she had difficulty with things like holding a blow dryer to dry her hair, but that she was trying to keep going.

[103] Finally, the plaintiff was asked about the following paragraph in the report:

> In approximately September 2008 she was referred to Dr. Wild, a psychologist. She enjoyed a good rapport and was able to talk openly. She also changed physicians to Dr. Horricks who prescribed antidepressant medications that she found to be quite helpful. In review of the symptoms, she tells me that the depression improved. Her nightmares stopped sometime in that area of time in the summer or fall of 2008. Later Dr. Horricks increased the medication to 40 mg per day estimated to be in January 2009 which again she found to be helpful insofar as it improved her sleep and decreased her depressed moods. Her appetite improved but her social interests, general interests and libido remained quite poor. By the time I saw her, she did note some significant improvement in her symptoms although had not yet fully returned to her pre-accident state.

[104] The plaintiff recalled that she kept trying hard to improve and have a normal life, and that at the time described, she was finding the antidepressant medication to be helpful.

[105] Moving into the second half of 2009, the plaintiff continued to regularly attend massage therapy and physiotherapy. This includes massage therapy in July 2009 in France, where she, Kamiar and Mr. Gajoum travelled for a period of time. The plaintiff also had seven further appointments with Dr. Wild. In September 2009, she began working out at Fitness World – she explained that her doctor had advised her to work with a personal trainer by way of active rehabilitation.

[106] In August 2009, there was more video surveillance of the plaintiff by private investigators retained by the defendants' insurers. On August 18, an investigator video-taped the plaintiff sitting with Mr. Gajoum outside a café in Gastown. At one point, she talked to a child, and then at some point, the child sat on her lap for a few minutes.

[107] On August 22, 2009, there was an exhibition at the Plaza Galleries in Whistler. The video shows the plaintiff standing in the gallery speaking with visitors. There is about a half-hour of video starting just after 8:00 p.m., then more video later on. At about 10:30 p.m., the plaintiff, Mr. Gajoum and some other people walk through Whistler Village to a restaurant. They left the restaurant at about 1:40 a.m. and walked to a hotel. The next day at about 3:30 p.m., the plaintiff is seen walking through the village wearing flip-flops.

[108] The plaintiff continued to receive cheques from GDASI in the second half of 2009. The cheques in evidence for that time are:

a) August 4, 2009 – chq 119 for $2,500 re "salary";

b) August 16, 2009 – chq 123 for $2,000 re "commission";

c) August 18, 2009 – chq 124 for $1,500 re "commission";

d) August 31, 2009 – chq 125 for $2,000 re "salary";

e) September 29, 2009 – chq 132 for $2,000 re "salary";

f) October 5, 2009 – chq 133 for $500 re "bonus extra";

g) October 29, 2009 – chq 136 for $2,000 re "salary";

h) November 14, 2009 – chq 139 for $5,000 re "buying a car"; and

i) November 30, 2009 – chq 142 for $5,000 re "salary + bonus".

[109] With respect to the car, the plaintiff explained that a friend had obtained the car for her so that she could travel to her various appointments, but that Mr. Gajoum had subsequently decided that GDASI would purchase the car and use it for its business as well.

[110] The plaintiff's explanation of the references on these cheques to "commission" and "bonus" related to commissions she earned on successful exhibitions and other sales of Mr. Gajoum's paintings. Mr. Gajoum's evidence was that he paid commissions only "very rarely".

[111] The plaintiff's income tax return for 2009 includes $12,000 of income, which is based on a T4 slip issued by GDASI. The plaintiff's evidence was that she simply passed on any tax slips given to her to whoever was preparing her income tax returns. She was unable to explain why the amount on the T4 slip appeared to be lower than the amount of the cheques she had received.

[112] On November 16, 2009, court action M095598 (one of the two actions tried at this trial) was commenced. It related to the 2007 MVA.

[113] The plaintiff's evidence was that her work with GDASI increased. She produced a number of emails beginning in early 2010 that appear to show her having a significant role in organizing exhibitions, photographing paintings so that they can be promoted by gallery owners, and organizing "Giclee" prints – high quality prints in limited editions that would include additional details by the artist. She also worked with a Ms. Wildman – who had been one of the owners of the Plaza Galleries in Whistler, but who moved to Florida in about early 2010. The plaintiff's evidence was that Ms. Wildman assisted with promoting Mr. Gajoum's artwork, particularly in the eastern United States. The plaintiff's evidence was that had she not been injured, she would have been able to do much of this work herself, but it required (among other things) getting up early in the morning to deal with differing time zones and also more extensive travel.

[114] The GDASI cheques to the plaintiff in evidence for the first half of 2010 are:

a) February 3, 2010 – chq 174 for $5,000 re “salary + commission”;

b) March 1, 2010 – chq 182 for $2,000 re “salary”;

c) March 15, 2010 – chq 186 for $2,000 re “salary”; and

d) March 15, 2010 – chq 188 for $1,500 re “commission”.

[115] The plaintiff also continued with both physiotherapy and massage therapy in the first few months of 2010. She also produced an invoice for €1,000 from a hospital in Venice in May 2010 – her evidence was that they were in Venice and she was in a lot of pain so required treatment.

[116] Although the plaintiff made two appointments with Dr. Wild in March 2010, both were cancelled – one because she was not feeling well, the other because she was busy with work. She did not see Dr. Wild in 2010 until August.

[117] The plaintiff, Mr. Gajoum and Kamiar travelled to Europe for three months in mid-2010.

[118] In her August 2010 appointment with Dr. Wild, the plaintiff reported that during their time in Europe, there had been issues with her relationship with Mr. Gajoum, all of which she found stressful, but that she had been applying the techniques she had worked on with Dr. Wild. Dr. Wild also recorded a note that “she wanted to work on trauma triggers and in particular the hospital experience following the trauma of the MVA”. It was put to Dr. Wild on cross-examination that the trauma of the August 2008 hospital incident continued to be a focus – Dr. Wild did not agree with the proposition, but suggested that it came up as a trigger when she had to deal with medical professionals, and that it “really intensified the original trauma of the accident”.

[119] The plaintiff had three further appointments with Dr. Wild – two in September 2010 and one on November 29, 2010. The November appointment was her last regular session with Dr. Wild.

[120] The plaintiff resumed regular physiotherapy and massage therapy appointments in August 2010.

[121] The plaintiff had an appointment with Dr. Horricks on September 27, 2010. The clinical notes from this appointment include the words “some TMJ”. The plaintiff said that she had complained to Dr. Horricks about jaw pain. This appears to be the first reference to jaw issues in the medical records, and is 33 months to the day after the 2007 MVA.

[122] The GDASI cheques to the plaintiff in evidence for the second half of 2010 are:

a) September 2, 2010 – chq 200 for $10,036 re “salarie [*sic*] + commission”;

b) September 30, 2010 – chq 203 for $4,000 re “salary”;

c) October 26, 2010 – chq 213 for $4,000 re “salary”;

d) November 30, 2010 – chq 221 for $20,816 re “salary + commission”; and

e) December 28, 2010 – chq 225 for $4,000 re “salary”.

[123] The plaintiff’s evidence was that by the fall of 2010, she was working full time and taking on more responsibility for the studio and dealings with various dealers. She said that the two higher payments that referenced “commission” would relate to exhibitions that she had organized. It appears that by the fall of 2010, her base salary was $4,000 per month.

[124] The plaintiff’s 2010 tax return shows total income of $53,801, all of which reflects T4 income from GDASI. The T4 slip showed that the income included commission income of $14,536. The plaintiff was unable to provide detailed explanations of these numbers – she said that the documents were all prepared by GDASI’s accountants and that she simply passed on the T4 slips provided to her.

[125] On December 24, 2010, action M106381 (the second of the two actions tried at this trial) was commenced. It related to the 2008 MVA.

[126] The plaintiff was referred to an ophthalmologist, Dr. Dubord, who she saw on December 29, 2010. Her recollection is that she had been waking up with discomfort in her right eye. In cross-examination, she was asked about a note made by Dr. Dubord that she reported no "episode of trauma". The plaintiff's recollection was that she had been experiencing issues with her eye beginning in the spring of 2010, and she understood she was being asked about trauma to her eye related to that time period.

[127] The plaintiff continued with regular physiotherapy through the first several months of 2011 (with a hiatus after June 2, 2011).

[128] On May 4 and 18, 2011, the plaintiff attended interviews with a psychiatrist, Dr. Riar, who had been retained to conduct an IME of the plaintiff. Dr. Riar ultimately prepared a report eight years later, and attended at the trial for cross-examination. His report will be discussed below.

[129] In terms of cheques from GDASI, the cheques in evidence from the first half of 2011 are:

a) January 31, 2011 – chq 234 for $4,000 re "salary";

b) February 1, 2011 – chq 273 for $462.50 re "office rent";

c) February 25, 2011 – chq 266 for $4,000 re "salary";

d) March 31, 2011 – chq 269 for $4,000 re "salary";

e) March 31, 2011 – chq 272 for $462.50 re "office rent";

f) April 1, 2011 – chq 274 for $462.50 re "office rent";

g) April 12, 2011 – chq 278 for $26,362 re "commission from Hawaii and Calgary show";

h) April 28, 2011 – chq 281 for $4,000 re “salary”;

i) May 1, 2011 – chq 294 for $462.50 re “office rent”;

j) May 27, 2011 – chq 286 for $4,000 re “salary”; and

k) Jun 1, 2011 – chq 295 for $462.50 re “office rent”.

[130] The February 1 cheque is the first in a series of cheques referencing “office rent”. The plaintiff’s evidence was she was performing many of her job functions from home, particularly on days when she was in pain. She set up an office area at home, and GDASI began to pay a rental contribution.

[131] There are very few documents in evidence from early June to early August of 2011. Although not specifically identified as such, this may be one of the times the plaintiff travelled to Europe with Mr. Gajoum and Kamiar.

[132] The GDASI cheques in evidence from the second half of 2011 are:

a) July 1, 2011 – chq 296 for $462.50 re “office rent”;

b) August 1, 2011 – chq 297 for $462.50 re “office rent”;

c) August 4, 2011 – chq 298 for $8,000 re “salary for June 2011 July 2011”;

d) August 4, 2011 – chq 299 for $22,876 re “commission for June Aut show”;

e) September 8, 2011 – chq 602 for $4,000 re “salary”;

f) September 8, 2011 – chq 604 for $462.50 re “office rent”;

g) October 3, 2011 – chq 607 for $4,000 re “salary”;

h) October 3, 2011 – chq 608 for $462.50 re “office rent”;

i) November 3, 2011 – chq 613 for $4,000 re “salary”;

j) November 3, 2011 – chq 614 for $462.50 re “office rent”;

k) December 2, 2011 – chq 617 for $4,000 re “salary”; and

l) December 2, 2011 – chq 618 for $462.50 re “office rent”.

[133] Among the documents in evidence is a document dated August 7, 2011, and titled “Kal Gajoum Limited Edition Giclee Print Proposal”. The plaintiff said that she worked on this proposal with Ms. Wildman. It arose in part from a concern that, while prints of Mr. Gajoum’s paintings were popular, steps could be taken to increase their value. Those steps included ensuring high quality printing, limiting the number of prints, and having either Mr. Gajoum or an artisan working under his guidance highlight, number and sign each of the prints. The various emails that were in evidence also demonstrate the plaintiff negotiating with the various galleries she dealt with in respect of these Giclee prints.

[134] The plaintiff resumed regular physiotherapy treatments on August 11, 2011, which continued through the fall of 2011.

[135] The plaintiff’s 2011 income tax return shows employment income of $79,000, which included commission income of $64,054. All of this income is contained in a T4 slip from GDASI. The return also showed net business income of $6,000. Thus, her total income was $85,000. The plaintiff did not recall what the business income related to, and said that the returns were all prepared by a tax preparer.

[136] Moving to 2012, the plaintiff’s cheques from GDASI in the first half of 2012 were:

a) January 5, 2012 – chq 624 for $21,463 re “commission for the show”;

b) January 5, 2012 – chq 625 for $462.50 re “office rent”;

c) January 5, 2012 – chq 626 for $4,000 re “salary”;

d) January 31, 2012 – chq 632 for $500 re “office rent”;

e) January 31, 2012 – chq 633 for $4,000 re “salary”;

f) February 29, 2012 – chq 648 for $4,000 re “salary”;

g) February 29, 2012 – chq 649 for $500 re “office rent”;

h) April 1, 2012 – chq 655 for $8,734 re “commission for Maui show”;

i) April 1, 2012 – chq 656 for $500 re “office rent”;

j) April 1, 2012 – chq 657 for $4,000 re “salary for March”;

k) April 30, 2012 – chq 662 for $4,000 re “salary”;

l) April 30, 2012 – chq 663 for $500 re “office rent”;

m) June 1, 2012 – chq 668 for $4,000 re “wages”;

n) June 1, 2012 – chq 669 for $500 re “office rent”;

o) June 26, 2012 – chq 672 for $6,992 re “commission Maui show Part 2”;

p) June 26, 2012 – chq 673 for $4,692 re “commission for New York show party”;

q) June 28, 2012 – chq 676 for $4,000 re “salary”; and

r) June 28, 2012 – chq 677 for $500 re “office rent”.

[137] The plaintiff said that the monthly amount for “office rent” was increased in response to her paying a higher rent for her home.

[138] With respect to the two cheques related to the Maui show, the plaintiff said that the Maui gallery did not initially pay the full amount, and that she received her commissions when funds came in.

[139] The New York show was an exhibit at an art expo. The plaintiff said that she and Ms. Wildman worked together on it, and that Ms. Wildman’s involvement was necessary because the plaintiff could not do things like hanging artwork and

standing for long periods of time to deal with clients. The plaintiff said that, had she been more physically able, she could have done that work by herself and not had to share the available commission.

[140] The plaintiff continued with physiotherapy in the first half of 2012, up to June 27, 2012. After that, there was a hiatus in physiotherapy – which restarted in May 2013.

[141] There is also a Visa card charge from a fitness facility in February 2012. The plaintiff said that she had a personal trainer at the recommendation of her doctor, and that this was connected to the subject accidents.

[142] The plaintiff had a second meeting with Dr. O'Shaughnessy on June 13, 2012. As noted above, Dr. O'Shaughnessy's report (which was issued in July 2012) was not itself in evidence, but the plaintiff was cross-examined with respect to some of what Dr. O'Shaughnessy reported with respect to his discussions with the plaintiff.

[143] The doctor said that, when they met in June 2012, the plaintiff reported that her relationship with Mr. Gajoum and her work patterns had been quite stable, and her son was doing well in school, but that her social network remained quite restrictive such that she spent virtually all her time with her boyfriend and her son. At trial, the plaintiff confirmed those statements.

[144] The doctor also said that the plaintiff reported that her symptoms had improved since he saw her in 2009, but that she still complained of ongoing and chronic pain. The plaintiff confirmed that, in her recollection, there had been improvement between 2009 and 2012, and that as of 2012, there were some days where she felt better and some days where she felt worse.

[145] The doctor commented that by the time he saw the plaintiff in 2012, she had little in the way of physical restrictions, although she avoided high heels, could no longer dance due to hip pain, and avoided certain sports like tennis. When asked about this, the plaintiff confirmed that she had previously played tennis, but she was

unable to confirm how she was feeling in 2012. Generally, her recollection was that she had some good days, and was helped by pain medication.

[146] The doctor commented that the plaintiff reported being able to manage her activities of daily living without limitations although she avoided washing dishes because of wrist pain, and that her son and boyfriend often cooked and assisted her in general. On cross-examination, the plaintiff said that she recalled that her partner and son did the physical jobs around the house, and that she would do light work like dusting.

[147] The doctor commented that the plaintiff reported her mood in 2012 to be overall better, denied symptoms of depression, and said she had good general interests and the ability to enjoy herself, other than occasionally running out of energy and having infrequent crying spells. He said that she reported being able to sleep relatively well with night-time sedation. On cross-examination, the plaintiff said that at this time she was taking antidepressants, and that she really did not want to let things stop her from going forward with her life, or get trapped in an emotional darkness.

[148] The plaintiff also had an MRI of her right knee at a private clinic in June 2012. She said that her doctor recommended this to her because of her pain and discomfort in the knee. The MRI was done at a private clinic because the wait times for public MRIs were long.

[149] There are very few documents in evidence from the second half of 2012. It may be that this was another of the times that the plaintiff, Mr. Gajoum and Kamiar spent in Europe.

[150] The GDASI cheques to the plaintiff in the record for the second half of 2012 are:

a) July 31, 2012 – chq 681 for $4,000 re “wages”;

b) August 1, 2012 – chq 687 for $22,182 re “commission from the Plaza Gallery show”;

c) August 30, 2012 – chq 682 for $4,000 re “wages”; and

d) August 30, 2012 – chq 683 for $1,000 re “office rent for 2 months”.

[151] This latter cheque was the last of the GDASI cheques that were placed in evidence. The exact reason for this was not explained; however, it does seem clear that GDASI continued to issue T4 slips to the plaintiff each year, so there does not seem to be any doubt that she continued to receive funds from GDASI.

[152] The plaintiff’s 2012 tax return reported employment income of $136,608, including $64,063 of commission income. These reflect the numbers from a T4 slip issued by GDASI. The plaintiff also reported gross rental income of $6,000, but net rental income of -$6,158, as well as net business income of -$12,630. The plaintiff was not certain of the source of the rental income, but agreed that it might well relate to the “office rent” cheques she was receiving each month from GDASI. She was unable to explain what expenses gave rise to the negative amounts for rental and business income, saying that the accountants would have figured that out.

[153] On January 25, 2013, the plaintiff was seen by two doctors – a physiatrist, Dr. Lau, and a psychiatrist, Dr. Dimov – at the Outpatient Chronic Pain Clinic at St. Paul’s Hospital. Each of them prepared consultation notes for Dr. Horricks, and each of those notes was canvassed in cross-examination of the plaintiff.

[154] Dr. Lau’s report noted that the plaintiff was being seen in regards to “chronic right-sided neck, shoulder and back pain”. He noted that she reports constant pain of aching characteristic over the right side of her body, which dates back to the subject accidents. He noted the following history taken from her:

> Her symptoms were getting worse for a while despite a number of treatment such as physiotherapy, traditional Chinese medicines including acupuncture and moxibustion. In the past year, things have improved quite significantly, at her estimation of approximately 50%.

> She continues with the physiotherapy, acupuncture, moxibustion and regular swimming (2-3 times per week), as well as daily stretching exercises on her own. She did have the help of a personal trainer for a while and is looking to get that restarted again. …
>
> She has resumed working, doing full-time work as an arts dealer doing a lot of travelling. She does much better in the heat, hot climates. Exertion, repetitive movements still aggravates her neck and shoulder, and prolonged sitting will aggravate her hip and back. …
>
> Sleep is much better lately, but she still gets the nightmares. She reports a mildly depressed mood, and has seen a psychologist/psychiatrist in the past. She still has some anxiety symptoms, and especially when in traffic. She also seems to worry a lot more than she used to before the accident. Appetite, weight, bowel/bladder functions are generally stable. She does have cognitive issues, particularly with short-term memory and attention. However, this has not significantly affected her ability to function at home or at work.

[155] Dr. Lau noted that the plaintiff finds that Tylenol and Advil still provide significant relief, as long as she does not use them on a regular basis.

[156] With respect to these notes, the plaintiff confirmed that she was working full time at the beginning of 2013, that she feels better in hot climates, and that she was using Tylenol and Advil periodically. She did not recall exactly how her sleep was going as of the beginning of 2013, but said that she was taking sleeping medications.

[157] The plaintiff was also taken to portions of the history taken by Dr. Dimov. After discussion of the plaintiff's symptoms in the first year or two after the subject accidents, and the fact that she had seen Dr. Wild for psychotherapy, Dr. Dimov recorded that the plaintiff reported having anxiety, including:

> … difficulty crossing the street, would tense up her muscles and become very anxious. She had difficulties sleeping with nightmares, which represent the same red car and the same accident that she sustained. She was also worried about her son and something bad happening to him. This has improved over the last year or so. She has now better mood. Her sleep is good with Remeron and her anxiety, although present, is much better and not limiting. She is working full time. She is seeing friends and enjoys her activities and she travels a lot. She is in a stable relationship that is very supportive. She goes swimming 3 times a week and she enjoys that.
>
> Her pain now is more in the right wrist. The pain is worse when she does more activity with the right hand and also the right shoulder and less of the flank pain that she used to have before. The pain is worse if she is sitting for

> a long time and improves with activity. The pain has been improved for the last year by about 50%.

[158] Dr. Dimov made various recommendations of potential changes to the plaintiff's antidepressant medication.

[159] With respect to the information recorded by Dr. Dimov, the plaintiff accepted that that would have been how she was feeling at the time, and that she would have mentioned the areas that she was feeling the most discomfort in at the time.

[160] The plaintiff was also seen in early February by a rheumatologist, Dr. Verdejo, who prepared a reporting letter to Dr. Horricks dated February 5, 2013. Although the letter was made an exhibit, there was little reference to it in the *viva voce* evidence, and it has little or no evidentiary significance. It does, however, seem to be clear that in late 2012 and early 2013, Dr. Horricks was seeking out insights from specialists with respect to treatment options for the plaintiff.

[161] The plaintiff had a further physiotherapy appointment in May 2013. There are receipts from two treatments in Nice, France, in the summer of 2013 (the exact nature of which is not clear from the receipts). Physiotherapy in Vancouver resumed on September 16, 2013, and appears to have continued somewhat regularly for a period of time thereafter.

[162] The plaintiff's son, Kamiar, graduated from high school in June 2013.

[163] I will deal briefly with some of Kamiar's evidence. He said that over the years that his mother was with Mr. Gajoum, he also developed a close relationship with Mr. Gajoum, that he expressed an interest early on in learning how to paint, and that he ended up working closely with Mr. Gajoum. Kamiar considered Mr. Gajoum to be a father figure and ultimately took on Mr. Gajoum's surname. [So as to avoid confusion in these reasons for judgment, I will refer to Kal Gajoum as Mr. Gajoum and Kamiar Gajoum as Kamiar, given that is how they were generally referred to in the *viva voce* evidence.]

[164] Kamiar's evidence was that, prior to his graduation in June 2013, they would travel to Europe each summer; then after his graduation, they would generally travel there twice a year – once in the summer and once in the winter. His evidence was that the trips were organized with a view to finding subjects for Mr. Gajoum's paintings, so that he could paint cities and locations that he had been to in real life. He said that while they were in Europe, he and Mr. Gajoum would get up in the mornings and go find places to do sketching, and that they would leave a note for the plaintiff as to where they could meet to have a meal together. This was because the plaintiff did not wake up in the mornings like she did prior to the 2007 MVA.

[165] As noted above, there were a number of emails in evidence exchanged between the plaintiff and the owners of various art galleries, which generally related to the details of upcoming exhibitions and the ongoing production of Giclee prints. As well, beginning in about the fall of 2013, several of the emails show the plaintiff dealing with the galleries and with Ms. Wildman in respect of paintings by Kamiar.

[166] There is another receipt from a clinic in Nice, France in December 2013. The plaintiff's recollection was that she sought out this treatment while in Europe because her leg was getting swollen.

[167] The plaintiff's 2013 income tax return shows T4 employment income of $111,047, of which $62,500 is commission income. It also showed gross rental income of $6,000, and net rental income of -$57. The total income was reported as $110,990. The plaintiff did not recall what expenses were claimed against the gross rental income – her evidence was that she gave receipts as requested to the person preparing her taxes, and relied on them to figure out how to complete the return.

[168] In about the spring of 2014, the plaintiff began attempting to work with other artists to help promote their works. Those efforts to broaden her customer base beyond Mr. Gajoum and Kamiar did not ultimately pan out, and do not appear to have led to the generation of any (or at least any significant) income for her.

[169] The plaintiff appears to have had only a few physiotherapy treatments in 2014 – the records indicate that there was one treatment in May, two in August, and one each in September and October. The evidence did, however, include an extensive email record with respect to the organization of exhibitions for Mr. Gajoum. As well, the plaintiff spent at least part of the year in Europe.

[170] During their time in Europe in the summer of 2014, the plaintiff, Mr. Gajoum and Kamiar went to Tunisia (which is where Mr. Gajoum was born). At a large group dinner, she met Mr. Saban, who (as will be discussed below) she reconnected with a few years later. Mr. Saban, who testified at trial, recalled that at some of the large dinners they were at, Mr. Gajoum, Kamiar and others would sit in a restaurant for a long time, but that the plaintiff would attend for a while but then take a taxi and leave.

[171] Also during this time in Tunisia, the plaintiff saw a medical doctor to deal with pain that she was experiencing.

[172] The plaintiff saw Dr. Horricks on October 30, 2014. He recorded in his clinical notes that:

> She is doing really pretty well. She has resolve of her depression. She attends physiotherapy, massage and works out with a personal trainer once a week and swims a couple of more times a week.
>
> Her right hand has improved and her neck is more comfortable.
>
> She has been booked for an MRI down the road. The MRI on her right knee is normal.
>
> She will use Celebrex for her muscular pain …
>
> They are off to France for the winter and she will be back in March. I can review things with her then.

[173] With respect to this note, the plaintiff confirmed that she reported these things to Dr. Horricks. She said she confirmed that she was doing the things he had recommended to her, including the working out and swimming, and that what she reported was how she was feeling at the time.

[174] The plaintiff's 2014 income tax return reported employment income of $88,000 (none of which was reported as commission income). There was no rental income reported on the 2014 return (or on any subsequent return).

[175] The plaintiff saw Dr. Horricks in March 2015. At that time, he recommended custom orthotics (due to a callous on her right foot), and noted that:

> She will carry on with Remeron 15 mg and Cipralex 30 mg. o.d. She feels well from an emotional point of view.

The plaintiff was asked about this note. She confirmed the issue she was having with discomfort when wearing shoes. It seems clear from this note that the plaintiff was continuing to take antidepressants at this time.

[176] The plaintiff saw Dr. Horricks again on May 22, 2015. At that point, he noted that:

> She has had depressive symptoms for the last month and chest wall pain in her last 4 days. She denies any concern apart from going over the medical legal situation that she has and the demand of that coincides with the onset of symptoms.

[177] The plaintiff did not recall whether the reference to litigation at this time related to the hospital litigation or the subject actions. She agreed, however, that it was stressful to think about medical-legal issues and that it affected her mood.

[178] At this appointment, the plaintiff and Dr. Horricks also discussed side effects the plaintiff was experiencing that Dr. Horricks thought might be connected to the Cipralex. As a result, he recommended that she commence taking another antidepressant, Wellbutrin, and that if she tolerates it, they could then gradually take the Cipralex down.

[179] At a further appointment on June 2, 2015, Dr. Horricks noted that the plaintiff had tolerated the initial low dose of Wellbutrin and would attempt to increase it.

[180] The plaintiff saw her dentist on July 23, 2015. She was not sure whether it was her initial dentist, Dr. Vincent, or Dr. Ho who took over the practice at some

point. In the clinical notes from this visit, the dentist recorded a report of jaw pain on the lower right side. The notes reference “cannot bite down hard” and “need monitor”. The plaintiff recalls that it was around this time that it was first recommended that she obtain a mouthguard.

[181] The plaintiff saw Dr. Horricks again on July 28, 2015. He noted that “she has temporomandibular joint syndrome, more in the last week” [I will refer to the temporomandibular joint as “TMJ”]. He provided her with some exercises and referred her for an x-ray of her TMJ areas (such x-ray was done in August 2015). When she saw Dr. Horricks again on August 13, 2015, he noted that:

> … she has improvement with her TMJ discomfort. She knows an MRI could give her a little better clarity on the situation which the jaw joint but since she is improving we will leave it be and her dentist is going to make a splint for her.
>
> She has parathoracic pain that is eased by lying on a Styrofoam post and that she may acquire but also meanwhile she will receive X-ray thoracic spine as this is a discomfort that has continued since her MVA.

[182] The plaintiff, when asked about this note, confirmed the visit and confirmed that her dentist made a mouthguard for her, and that she still wears a mouthguard (although the one from 2015 has since been replaced).

[183] The plaintiff recommenced regular physiotherapy in August 2015, although the physiotherapy did not continue into the fall. Some of the emails in evidence from the fall indicate that the plaintiff was back in France at the time (emails from October 2015, December 2015 and January 2016 reference her being in France).

[184] The plaintiff’s 2015 income tax return shows employment income of $72,000, none of which is shown as commission income.

[185] The plaintiff saw Dr. Horricks again on May 13, 2016. His note records that:

> She has been taking more involvement in physical fitness and is more active. She has continued discomfort in her right ankle, right knee and in the right hip “area” and her right paralumbar area. She has continued discomfort that is periodic in her right lower anterior chest. That is found when she rotates her thoracic spine to the right. She also has continued discomfort in the cervical

> area in the midline over the dorsal spines of her upper cervical vertebra. She continues to have right suprascapular area discomfort.
>
> In addition she sometimes notices pressure where her bra crosses her mid back and where the bra strap crosses her right shoulder.
>
> She may have gasping or choking during sleep and we will screen her for sleep apnea. I will refer her to Vital-Aire.
>
> She is not taking any medication at all at this point and she has no depressive symptoms. She has occasional anxiety.
>
> She has been told of TMJ symptoms. I have given her exercises for that. She will continue.
>
> I will see her again in follow-up. She will work with swimming and walking and increase that exercise program and she will follow up with physio on the areas of concern and massage therapy as well.

[186] The plaintiff confirmed in cross-examination that these items were discussed in her appointment that day. She explained that she had stopped taking the antidepressant medication at this point because it was causing stomach issues, and that she had been told by her doctor that it was okay to take breaks from medication.

[187] The plaintiff saw Dr. Horricks again on June 10, 2016. His notes confirm that he provided her with requisitions for both physiotherapy and massage therapy, relating to thoracic spine, lumbar spine, right ankle, cervical spine, right shoulder and right wrist. The plaintiff was asked about the lack of any records of her attending physiotherapy in 2016. She said that she did not recall what portions of the year she was away in France, and that sometimes she would see Dr. Horricks just before leaving in order to renew her prescriptions. She said that she also attended physiotherapy from time to time in France.

[188] The plaintiff saw Dr. Horricks again on July 13, 2016. At that time, she reported a return of her depressive symptoms. Dr. Horricks noted again “the pressure of ongoing discovery related to a lawsuit”. The plaintiff confirmed on cross-examination that she was not taking the antidepressant medication at the time of this appointment. There is also reference in this note to a psychiatrist, Dr. Hay, that the plaintiff had seen in 2014 and would be seeing again.

[189] The plaintiff was involved in two of Mr. Gajoum's exhibitions in Canada in the fall of 2016 – one at the Plaza Galleries in Whistler in August, the other at Galerie Beauchamp in Quebec in September.

[190] The plaintiff had another appointment with Dr. Horricks on September 29, 2016. Dr. Horricks noted that:

> She has increased fatigue for about a week. This followed her driving to Whistler, prolonged sitting, passing the scene of where she was involved in a MVA, going to a party and not being able to actually stay at the party because of increasing back pain related to probably stress and prolonged sitting. She has been feeling less well since.
>
> We discussed the issue of the injury and chronic pain. Also her very positive way of handling the issue these days in which she is swimming and attending aquafit class. She is really feeling good about that. We will have her carry on. She will see Dr. W Hay in December (psychiatrist).

[191] When cross-examined with respect to this note, the plaintiff confirmed she was doing exercise classes. She also believed she was seeing a physiotherapist around this time – she recalled that the physiotherapist she had been seeing at City Sport had moved to an independent practice, but she was not clear exactly what year and how often she was seeing him.

[192] The plaintiff's 2016 tax return reported employment income of $72,000, none of which was noted to be commission income.

[193] At some point in late 2016 or early 2017, the plaintiff separated from Mr. Gajoum. Mr. Gajoum recalled that it ended after a trip to New Orleans in late 2016. The plaintiff recalled that it ended at around the end of 2016. The plaintiff's view was that their relationship had changed after the 2007 MVA. She said that before that, they were out together all the time socializing. It appeared to be common ground that Mr. Gajoum liked to stay out late at night socializing. The plaintiff said she was unable to do this frequently after the 2007 MVA. She said that Mr. Gajoum was very patient and kind for several years, but that she could see that he was getting irritated and feeling lonely, while she herself was sometimes irritable

because of her pain. Both said that they had not been physically intimate for a period of years prior to their separation.

[194] The parties had different recollections as to when their work relationship ended. The plaintiff's evidence was that they initially agreed that she would spend time in France and continue doing the work she had been doing. Mr. Gajoum said that he decided not to let her come between him and the galleries anymore, and that he "stopped her work" during 2016.

[195] I note that the documentary record at trial contained regular emails between the plaintiff and the various art galleries up until February 2017. As well, Dr. Horricks' clinical notes for February 21, 2017, include a note that:

> She is going to Europe for a month. I will see her in follow-up … She and her partner of many years have separated but she seems to be alright about that.

[196] The plaintiff saw Dr. Horricks again on April 18, 2017. His clinical notes include the following:

> She is still complaining of pain in her TMJ areas bilaterally, in her right paracervical and right suprascapular area and in her lower back, mostly on the right hand side. She has continued discomfort in her right knee and right ankle. She also states that she has been improving. Her right wrist has also improved but still is a source of discomfort for her.
>
> She is separated from her husband of 15 years so that is trying for her and she has depressive symptoms in place. She is working out, swimming and gym, 4 exercise periods/week.

[197] In cross-examination with respect to this note, the plaintiff agreed it is normal to feel depressed after the break-up of a long-term relationship.

[198] Several of the expert reports that were in evidence in this matter were commissioned in 2017. While the reports will be discussed in more detail below, I note that:

a) the plaintiff attended an IME with Dr. John Fuller, an orthopaedic specialist, on May 24, 2017, at the instance of her own counsel, and Dr. Fuller prepared a report dated July 9, 2017;

b) the plaintiff's counsel also obtained a report in July 2017 from the urologist who had seen the plaintiff in 2008, Dr. Hershfield;

c) the plaintiff had a follow-up interview by Skype with Dr. Wild on August 10, 2017, who prepared a report at the request of the plaintiff's counsel dated August 15, 2017 [The interview was done by Skype because the plaintiff at the time was in Europe.]; and

d) the plaintiff attended an IME with Dr. Nairn Stewart, a physiatrist, on October 5, 2017, at the instance of her own counsel, and Dr. Stewart prepared a report dated November 22, 2017.

[199] Interestingly, Dr. Fuller in his report summarized the plaintiff's description of her relationship with Mr. Gajoum when he saw her on May 24, 2017 as that "she lived with her husband" and son but that "the relationship was under a degree of strain".

[200] Dr. Fuller summarized the plaintiff's chief complaints in May 2017 as follows:

> 1. Headache …
> 2. Neck pain …
> 3. A degree of compromise to the ligamentous structures of the right wrist
> 4. Mid-back pain at approximately T6/mid-thoracic/chest spine
> 5. Low back pain with evidence of sacroiliac dysfunction …
> 6. Right knee with residual symptoms suggesting a marginal degree of internal derangement
> 7. Right ankle with residual pain and instability

[201] The plaintiff saw Dr. Horricks again on September 8, 2017. His notes with respect to that appointment are:

> She has separated from her partner of many years. She is going through feelings regarding that course. I once again encouraged to write and follow cognitive therapy guidelines.
>
> She has broken sleeps and wakes with pain. I have given her Amitryiptyline, 1-3 at HS and Naprosyn, 500 mg, stomach coated BID. She is not taking any other medications at this time.

[202] She saw Dr. Horricks again on September 27, 2017 – his notes of this appointment are:

> She is swimming and attending the gym. The Naprosyn bothered her stomach so it has been stopped. Writing and following cognitive therapy guidelines is working for her as she has gone through a number of changes in her life.
>
> The Amitriptyline at 1 h.s. helps her some but is still not sleeping solidly. I asked her to increase the dose to 2 h.s.

[203] On cross-examination, the plaintiff generally confirmed what is set out in these two notes. She could not recall exactly when she was and was not taking medication to assist her with sleep, and could not recall exactly what medication was used for what purpose.

[204] As noted above, the plaintiff saw Dr. Stewart for an IME on October 5, 2017. Her notes of the plaintiff's complaints will be discussed below. For purposes of this narrative, however, I note that the plaintiff reported to Dr. Stewart that in the two years prior to this examination she had experienced tenderness and then pain in her right collarbone.

[205] There is no record of the plaintiff having attended physiotherapy in 2017. At trial, she was not sure whether she had.

[206] At some point in 2017, relations between the plaintiff and Mr. Gajoum degenerated. I understand that there were eventual proceedings as between them under the *Family Law Act*, S.B.C. 2011, c. 25. It was not clear when those proceedings were commenced or whether they were ever resolved. As well, in November 2017, the plaintiff filed a complaint against GDASI under the *Employment Standards Act*, R.S.B.C 1996, c. 113, alleging that she had not been paid for her final several months of work. The plaintiff explained that GDASI stopped paying her, and that Mr. Gajoum began to ignore her phone calls. The *Employment Standards Act* complaint was ultimately resolved in March 2018. By a written settlement agreement, GDASI agreed to pay the plaintiff $35,000 in settlement of the claims. The plaintiff says that this was 50% of the amount she had claimed.

[207] The plaintiff's 2017 income tax return reported employment income of $71,921, of which commission income was $47,468. The tax return was not assessed until December 2018, and Ms. Downing, who prepared the return, said there were real difficulties because Mr. Gajoum would not sign a declaration of employment conditions.

[208] The first notice of trial in either of these two actions was filed on April 26, 2018, scheduling the trial for September 23, 2019.

[209] There was very little evidence specific to 2018. It appears that the plaintiff spent portions of the year in Europe. As noted above, the *Employment Standards Act* claim was settled in March 2018, and the present litigation was advanced through scheduling of a trial. The plaintiff had two appointments with Dr. Horricks during the year – both in June 2018. Dr. Horricks retired later in the year.

[210] At the June 11, 2018 appointment, Dr. Horricks noted that he was referring the plaintiff to an otolaryngologist, Dr. Lee, to deal with nasal stuffiness. He noted that the plaintiff would review her TMJ with Dr. Lee as well. With respect to other issues, he noted that:

> She has had ongoing neck pain, shoulder pain and pain referred to her left hand middle three fingers along with numbness. She has a painful arc in her right shoulder at a point below the horizontal indicating supraspinatus tendon type pain.
>
> She will have re-do of cervical spine and shoulder X-ray imaging with AC joint as well as X-ray wrist and hand as she is dropping things and I will see her in follow-up.

[211] In cross-examination, the plaintiff could not recall whether this was the first medical note in which she had identified numbness in her fingers, but she did agree that it was the first discussion of nasal stuffiness.

[212] At the June 27, 2018 appointment, Dr. Horricks noted:

> She has degenerative arthritis in her neck. This is not noted on previous x-rays. …

> She does have depressive symptoms but she is working out and hopefully she can come to terms with her present stresses. She would like to not begin an anti-depressant at this time.

[213] On cross-examination, the plaintiff explained that she was "going through separation" at the time and wanted to deal with it naturally, to feel the pain of separation and cry about it, and not suppress it with pills, but that she was continuing to follow Dr. Horricks' recommendations with respect to exercise.

[214] The plaintiff saw Dr. Lee in July 2018. Dr. Lee's notes focus on laryngopharyngeal reflux, and do not deal with any TMJ issues. Dr. Lee noted that the plaintiff would be in Europe until October.

[215] The plaintiff's 2018 income reflects employment income of $38,000. The plaintiff's evidence was that $35,000 of this reflected the settlement of her claim with GDASI, and that the balance of the income came from income received from her son, Kamiar, in respect of her efforts to represent him as an artist.

[216] Kamiar's evidence was that, after his mother's separation from Mr. Gajoum, he wanted to have her act as his manager and pay her a regular salary. However, Kamiar's evidence was that he had also been injured in the 2008 MVA and that he was unable to work the hours necessary to produce the volume of artwork that Mr. Gajoum produced. He has not been able to replicate Mr. Gajoum's technique, in which he will work day and night to complete a painting before any of the paint has fully dried. Kamiar's evidence is that he typically generates sales of $30,000 to $40,000 a year which is enough for him to survive but not enough to support an additional person.

[217] The other evidence with respect to 2018 relates to the final two months of the year. The plaintiff spent time in Istanbul, and at that time renewed her acquaintance with Mr. Saban. After spending time together, the plaintiff and Mr. Saban decided to get married in early 2019. They spent January 2019 together in Istanbul, then the plaintiff returned to Vancouver while Mr. Saban looked for a place for them to live in Istanbul. Mr. Saban at the time was primarily resident in Tripoli, Libya, although he

travelled to Istanbul regularly for work. When in Vancouver, the plaintiff lived with Kamiar.

[218] In about April 2019, the plaintiff became a patient of Dr. Parhar. Unfortunately, Dr. Parhar was away at the time of the plaintiff's first appointment, and so she was seen by a locum physician, Dr. Trieu. At the appointment with Dr. Trieu, which was on April 9, 2019, the plaintiff reported constant neck pain in the right and midline regions, with pain and numbness travelling into her right arm and weakness of the right arm; constant mid-back pain in the right and midline regions; constant lower back pain in the right and midline regions with numbness travelling into her right leg and weakness of her right leg as well as pain in her right shoulder, right elbow, right wrist, right hand, right hip, right knee, right ankle and right foot, as well as throbbing headaches, bilateral jaw pain, lightheadedness, nausea, fatigue and decreased energy, decreased mood with sadness, decreased sleep, and anxiety issues. She reported difficulty with some self-care activities such as washing and styling her hair and putting on socks and shoes.

[219] On cross-examination, the plaintiff confirmed that these are the things she reported when she first attended Dr. Parhar's practice.

[220] The plaintiff also met with Dr. Fuller on April 10, 2019, for the purposes of obtaining an update report in respect of his July 2017 IME report. Dr. Fuller noted that, at this appointment, the plaintiff "continued to present with a complex of musculoskeletal symptoms that have not significantly changed" since his earlier report.

[221] The plaintiff also attended an IME on April 29, 2019, with Dr. Mehta, a dentist with specialized training in the United States on orofacial pain. This appointment focused on her jaw issues, and led to an MRI of the plaintiff's TMJ on May 2, 2019. Dr. Mehta's report will be discussed below.

[222] In addition, the plaintiff attended two further IMEs in July 2019 at the instance of the defendants. She was examined on July 12, 2019, by Dr. Kendall, an

orthopaedic surgeon, and had a further appointment on July 17, 2019, with Dr. Riar, the psychiatrist who had previously interviewed her in May 2011. Both of their reports will be discussed below.

[223] The September 2019 trial was adjourned on the basis that the time reserved for trial would not be sufficient.

[224] It appears that the plaintiff spent significant amounts of time in the latter part of 2019 in Istanbul. Her claim for special damages includes invoices in respect of massage therapy (31 treatments) and a gym membership in Istanbul. The plaintiff's evidence was that, when in Istanbul, she lived with Mr. Saban in a two-bedroom apartment.

[225] The plaintiff's 2019 income tax return reflected net business income of $5,043, which she said was from her continuing work to manage Kamiar's painting work.

[226] The plaintiff's evidence was that she spent the first few months of 2020 in either Istanbul or in Brazil, where she travelled with Kamiar with respect to a commission work. The plaintiff says that she was back in Vancouver by May or June of that year. During the Covid pandemic, physiotherapy and massage therapy were both difficult – particularly during those times she was in Turkey. She said that she believed she had some physiotherapy at a gym in Turkey in 2021, and some massage therapy in Turkey in 2022, but she did not have receipts for those sessions. In 2023, she began regular sessions of both massage therapy and physiotherapy.

[227] The plaintiff's 2020 tax return indicated a total of $12,000, which she said was from Canada Emergency Response Benefit payments.

[228] The plaintiff's evidence was that in 2021, her husband's uncle opened a factory in Istanbul. After briefly trying various roles with the business, which she found beyond her physical capacity, she began to work sourcing gemstones from India and Myanmar. She said that she was able to leverage a connection from the

days she used to live in India. Her evidence was that she gets paid a commission of US $1 per carat, but that she also has to cover some of the expenses related to the business. In her evidence, she said that if she was actually able to travel to India and Myanmar, and attend the auctions there, she could earn a much higher commission (more like US $5 per carat), but that because she is not physically capable of withstanding the rough travel that would be required, she has had to work through agents in India who do that part of the work and earn the balance of the available commission.

[229] The plaintiff said that she began doing this work in the latter part of 2021, but that the first deliveries of gemstones attributable to her work arrived in 2022.

[230] The plaintiff's 2021 income tax return showed gross business income of $6,350 and net business income of $6,192. Her 2022 income tax return showed gross business income of $36,000 and net business income of $6,562.

Current Symptoms

[231] The plaintiff says she is still suffering from headaches, which generally start in her temples. She finds they are often triggered by eating, or by concentrating on a computer, or by being in a noisy environment.

[232] The plaintiff says she has difficulty with her jaw, which impacts her ability to eat foods that require chewing and to talk for a long time. She eats soft food, and cannot eat steak anymore.

[233] The plaintiff says that she still has neck pain, which prevents her from being comfortable at night as she has to keep changing position.

[234] The plaintiff says she has ongoing right shoulder discomfort, which she finds exacerbated by use of her right arm. She says it is not as bad as the neck pain.

[235] The plaintiff says that her mid-back is a lot improved unless she is doing a lot of sitting, and that her lower back is painful when she is trying to sleep or to sit for a long time.

[236] She describes her elbow as not as bad as before, but with some residual discomfort and pain depending on what she is doing. She feels discomfort in her right hand, wrist and elbow if she is lifting things, and sometimes when she is sleeping.

[237] She says her hip bothers her when she sleeps, when she does a lot of walking, or when she sits for a long time.

[238] She says that her right leg has improved a lot, and that she generally only experiences leg pain when she is in the gym, or doing a lot of walking or climbing stairs.

[239] She says that her right ankle is painful all the time and gets swollen when she walks – it gets irritated at night, and she can hear and feel clicking in the ankle.

[240] She currently attends massage therapy and physiotherapy regularly, goes to the gym three times a week for exercise, and swims once a week (in summer, she does an extra swimming session and one less gym session).

[241] She says that she is unable to do heavier housework like mopping and vacuuming. When she is in Istanbul, a cleaner comes either three times a week (if she is there alone) or once a week (if either Kamiar or Mr. Saban are there).

[242] The plaintiff says that she also continues to feel depressed and anxious.

Collateral Witnesses

[243] Each party called a few collateral witnesses to give their impressions of the plaintiff's condition at various times.

[244] Kamiar testified. He recalled the long hours the plaintiff would work at Spa Rivage, and occasionally going downtown to visit her at work. He said that, even though his grandfather would be looking after him, the plaintiff would have prepared meals for them. When the plaintiff was working at Coka Moka, a friend who lived nearby would pick him up from school and drop him off to see his mom shortly

before closing. He said that during all of those years, his mom never seemed to struggle or complain.

[245] He recalled seeing his mother after the 2007 MVA. It was a big shock to him because her face and arm were swollen. He was not able to hug her because of her condition. He recalled Mr. Gajoum putting gel packs on her back. He described her being a lot more cautious after the 2007 MVA – not wanting him to spend time outside, and reluctant to allow him to have friends over. He tried to adjust his routines so as not to affect her headaches. He tried to take on more of the household tasks like cooking, laundry and cleaning.

[246] He recalled the 2008 MVA – in which he was also injured. He said that after the limousine dropped them off in Gastown, he and Mr. Gajoum had to assist the plaintiff out of the limousine. She ended up resting in bed for a few days.

[247] Kamiar described his current work as a painter. He is unable to paint for as long as Mr. Gajoum can, which limits the number of paintings he can produce. Although his goal had been to have the plaintiff manage his art career in return for a salary, he now realizes that he can only generate enough income for himself and cannot pay for a full-time manager.

[248] Ms. Kazimi, who knew the plaintiff in India and then reconnected with the plaintiff in 2003 when they had both begun living in British Columbia, recalled visiting Spa Rivage, where the plaintiff had coloured her hair, and recalled the plaintiff sometimes coming to extended family parties. She described the plaintiff as strong, active and tireless. She saw the plaintiff shortly after the 2007 MVA and recalled her looking quite swollen. She said the plaintiff rarely if ever came to family gatherings after the 2007 MVA.

[249] Mr. Cornett worked with the plaintiff at Spa Rivage. He described her during their time working together as young, vibrant, and extremely active, always being the first to work, dealing with all sorts of client issues, and attempting to network with other businesses and the community at large to build the brand. He described

visiting the plaintiff at Coka Moka, where she would cook and serve. He recalled seeing her about a week after the 2007 MVA, when he drove her to a doctor's appointment, and that her face was still swollen and she seemed to be in pain. Over the years, he has noticed her eating softer food. He describes her as less vibrant and more fatigued.

[250] Ms. Downing, whose experience encompasses construction, teaching, and tax preparation, gave evidence as to various dealings with the plaintiff over the years. The plaintiff's business partner in the Coka Moka café was a foster daughter of Ms. Downing, so she met the plaintiff from time to time in the days prior to the 2007 MVA. Ms. Downing described the plaintiff at this time as young, vigorous and hard-working.

[251] At some point around 2011 or 2012, Ms. Downing was involved in renovation work at Mr. Gajoum's studio. She later assisted the plaintiff with her annual tax returns. She would sometimes have difficulty getting hold of the plaintiff, and she recalled there being missed or cancelled appointments, with the plaintiff saying she just could not get out of bed, and she recalled that in some meetings, the plaintiff would look exhausted, drawn and harried. Her impression was that the plaintiff was soldiering on to do what she had to do, but was not at the top of her game.

[252] Mr. Saban, who married the plaintiff in 2019, testified about the plaintiff's headaches and difficulties sleeping and eating.

[253] The defendants called Mr. Gajoum as a witness. He said that initially as they began dating in 2006, he would invite the plaintiff to come to his art shows. Eventually, she began helping him with things. He had a previous assistant, who decided to move to Australia, and he ended up hiring the plaintiff to assist. As she learned the business, he gave her more responsibility which eventually became full-time work. He described the plaintiff as a good cook and a good hostess, and said that they started doing parties at his studio.

[254] Mr. Gajoum said that he only rarely paid the plaintiff a commission on top of her monthly salary – that he had three to four exhibitions a year, and she would sometimes get a commission in respect of those.

[255] He recalled picking up the plaintiff from St. Paul's Hospital after the 2007 MVA. He recalled the plaintiff complaining about kidney pain and pain in her hand and neck, and that she complained about her job (which I took to mean that she complained about problems doing her work). He said that he and the plaintiff continued their activities – like going for coffee and going for lunches.

[256] Mr. Gajoum was asked about his observations of the plaintiff. His evidence was not particularly clear – he talked about forgetting about the accident or the pain, but he also said that the complaints were always the same – her jaw, her hand, her legs, etc. He said that the complaints were more frequent when they were in Vancouver than when they were in France. He said that when they were in France, they would walk for hours.

[257] With respect to the 2008 MVA, Mr. Gajoum said he did not think it was a big deal, and that he did not realize that any injuries resulted until he was told by ICBC that he would be a witness at trial.

[258] Mr. Gajoum confirmed that after his separation from the plaintiff, which he said was in about 2016, there were various legal proceedings to do with property as well as with respect to payment of wages.

[259] The defendants also called a Mr. Guidobono, who was a long-time friend of Mr. Gajoum and met the plaintiff through him. He described having visited the studio and attended parties at which the plaintiff was the hostess. He said that he was aware of the plaintiff being in an accident, and heard that there were all kinds of allegations (that he described as "crazy") about her being in a hospital. He said that after the accident, he saw no sign of any problems in the plaintiff – that she was jovial, happy and normal.

[260] The third collateral witness called by the defendants was Mr. Enns, another friend of Mr. Gajoum's who met the plaintiff through Mr. Gajoum. He also reported attending parties that the plaintiff and Mr. Gajoum hosted, and that everything seemed to be very normal from what he could tell. He said that the plaintiff was cooking and welcoming everyone with hugs. He said he would also see Mr. Gajoum and the plaintiff at restaurants and clubs.

Medical Expert Evidence

Dr. Stewart – Physiatrist

[261] Dr. Nairn Stewart is a specialist in physical medicine and rehabilitation. She conducted an independent medical examination of Ms. Parvanta on October 5, 2017, at the request of counsel for the plaintiff, and issued her report on November 22, 2017. She did a further assessment of Ms. Parvanta by Zoom on October 26, 2023, and issued an update report on November 1, 2023.

[262] Dr. Stewart reviewed a significant volume of the plaintiff's past medical records, and also took a history from her. With respect to her physical examination, Dr. Stewart noted "a positive test for thoracic outlet syndrome on the right side". She found tenderness over the base of the skull on the right side, the paraspinal muscles in the right side of her neck, the right trapezius muscle, and the right low back. Range of motion in the neck was decreased by a few degrees in flexion and extension, but other neck movements were full. With respect to the plaintiff's jaw, Dr. Stewart noted a full range of motion on jaw opening but with palpable clicking in her jaw joints.

[263] Dr. Stewart explained that thoracic outlet syndrome is a symptom complex which entails numbness and sometimes pain in an arm, caused by some obstruction – usually to the nerves in the thoracic outlet, which is underneath the collarbone. When there are musculoskeletal injuries, it is often caused by spasms in the scalene muscle that causes impingement on the nerves.

[264] The opinion section of Dr. Stewart's report includes both her own conclusions and a summary of conclusions of other treating medical professionals. The ones that are expressed as being Dr. Stewart's opinions include:

a) that in the 2007 MVA, the plaintiff sustained soft tissue injuries to her neck and back;

b) that in the 2008 MVA, the plaintiff again sustained soft tissue injuries to her neck and low back, aggravating her symptoms from the 2007 MVA;

c) given the time that passed from the subject accidents to Dr. Stewart's 2017 report, it is likely that the plaintiff will continue to experience all of her current symptoms and limitations;

d) the plaintiff is unable to do physically demanding work, and for sedentary work, she will require the flexibility to change her work tasks and position periodically throughout her work day, as well as good ergonomics in her work station;

e) the plaintiff will continue to be limited with respect to heavier housekeeping tasks, and she should have assistance of two hours of housekeeping help every two weeks;

f) there is no indication for any further formal rehabilitation, but she should continue daily stretching exercises and her aquatic exercise program;

g) Dr. Stewart agreed with Dr. Wild's recommendation that the plaintiff have six psychological counselling sessions per year over the next 20 years; and

h) the plaintiff should have the nasal septal deviation surgery that has been discussed, but will not require other surgery in connection with the subject accidents.

[265] In her 2023 update report, Dr. Stewart provided an updated history. In it, she records the plaintiff as having reported ongoing problems including headaches, jaw discomfort, neck pain, pain in her right collarbone, soreness in her mid- and low back, right knee pain, soreness in her right ankle, and dizziness. Dr. Stewart recorded being advised that the right flank pain had resolved in 2020 or 2021, and that the headaches are less severe but more frequent. Back soreness and right knee pain are improved but not resolved. The plaintiff also reported finding sleep difficult.

[266] Dr. Stewart conducted a limited physical examination by Zoom. She noted that the plaintiff's range of jaw opening and neck flexion were both slightly reduced, while tilting the head was also more limited.

[267] Dr. Stewart concluded that her opinion in regard to the injuries suffered in the subject accidents had not changed. She noted that:

> Despite some, although limited, improvement in her pain symptoms, Ms. Parvanta's function has declined significantly, probably because of her ongoing emotional difficulties. Whereas she was working part time by telephone and computer, managing her former partner's and then her son's art career when I saw her in 2017, Ms. Parvanta now works marginally, only four or five hours per week …

[268] With respect to treatment, Dr. Stewart noted that the plaintiff reported having resumed both massage therapy and physiotherapy. She concluded:

> In my opinion, it would be reasonable for Ms. Parvanta to continue to receive massage therapy once a week, and to continue to attend physiotherapy, tapering to a frequency of every two weeks, in the future. These measures are recommended for symptom control. It is unlikely that any other rehabilitation for her injuries will result in a significant improvement in Ms. Parvanta's pain symptoms.

[269] She also concluded that it would be advisable for the plaintiff to continue her current approach to exercise, including working out at a gym three times a week and swimming once a week. With respect to employment:

> … in my opinion Ms. Parvanta is not competitively employable in any capacity because of the constellation of her physical symptoms resulting from the accidents, compounded by her emotional difficulties. She is likely only marginally employable on a very part time basis within a very limited number of jobs. In view of the decline in her function over the past six years, in my

> opinion it is highly likely that Ms. Parvanta will withdraw from the workforce altogether within the next few years.

[270] She recommended that the plaintiff have regular help with housekeeping and additional assistance with heavier seasonal cleaning, and that she will likely continue to require over-the-counter pain medications in the future.

[271] Dr. Stewart's review of past medical records was quite extensive and she was cross-examined at some length on them. Her conclusion generally was that the plaintiff's symptoms have fluctuated somewhat with her mood and what is going on with her life. She said that waxing and waning of symptoms is not unusual when chronic pain lasts for a period as long as 16 years.

[272] Dr. Stewart had noted in her review of those past records that the plaintiff had been diagnosed in the past with PTSD. She agreed that the plaintiff displayed PTSD symptoms, but said that because she is not a psychiatrist, she simply referred to the diagnoses of others as part of her review of the plaintiff's condition.

[273] Dr. Stewart was asked about the recommendation in her 2023 report that the plaintiff continue with physiotherapy and massage therapy, which was something that had not been recommended in 2017. She explained that the plaintiff's situation had changed, that her function had deteriorated, and that as of 2023, the treatments such as physiotherapy and massage therapy helped her to function.

[274] It was put to Dr. Stewart that the plaintiff's function had declined because of emotional difficulties. Dr. Stewart responded that, in her view, you cannot really separate the psychological from the physical in a case like this. She agreed that she had not recommended counselling in the 2023 report, while she had recommended it in her 2017 report. She said that although she had not made that recommendation in 2023, it would probably be a good idea.

[275] It was put to Dr. Stewart that if the plaintiff's emotional difficulties were treated, then her physical function would improve. Her answer was that, while

counselling would help, it was not a sufficient treatment for the plaintiff's physical issues.

[276] It was put to Dr. Stewart that the plaintiff's emotional issues arise from her separation from Mr. Gajoum, and she was asked what other possible causes there were for those ongoing difficulties. Her response was that 16 years of chronic pain is bound to cause difficulty both emotionally and physical.

Dr. Fuller – Orthopaedic Surgeon

[277] Dr. John Fuller is an orthopedic specialist. He conducted an independent medical examination of Ms. Parvanta on May 24, 2017, at the request of counsel for the plaintiff, and issued his report on July 9, 2017. He did a further assessment of Ms. Parvanta on April 10, 2019, and issued an update report on April 22, 2019.

[278] Dr. Fuller conducted a fairly thorough review of the plaintiff's past medical records. In his 2017 report, he made specific reference to Dr. Koorjee's clinical records in August 2003 and February 2005, and their references to low back pain. He noted that he was "given to understand that this was significantly of less concern prior to" the subject accidents. He commented that given the "infrequent" references to back pain prior to the subject accidents, it was reasonable to attribute the back pain suffered by the plaintiff after 2007 to the subject accidents.

[279] With respect to his 2017 physical examination of the plaintiff, Dr. Fuller noted a degree of pain and weakness on testing calf and quadriceps musculature. He identified a palpable spasm in the trapezius and other muscles surrounding the shoulder girdle and neck, with associated trigger points in that musculature. He found that range of motion of the neck was significantly restricted in several areas, and identified segmental dysfunction in the cervical and thoracic spine. There was some spasm in the low back area, affecting the right side more than the left. There was tenderness in the right knee and ankle.

[280] In his 2017 report, Dr. Fuller diagnosed:

a) constant headache varying in intensity, probably on the basis of residual trauma to the musculoligamentous structures supporting the cervical spine;

b) constant neck pain on the balance of probability due to the residua of the said trauma to the musculoligamentous structures supporting the cervical spine/neck;

c) marginal evidence of residual compromise to the ligamentous integrity of the right wrist;

d) evidence of segmental dysfunction involving the thoracic spine at approximately T8 (later clarified to be T6);

e) low back pain with evidence of residual sacroiliac dysfunction;

f) residual symptoms involving the right knee; no definitive diagnosis, probably on the basis of residual, more subtle trauma to the ligamentous structures supporting the knee; and

g) marginal evidence of a degree of compromise to anterior talofibular ligament of the right ankle which would lead to a degree of compromise to stability.

[281] Dr. Fuller concluded that, given the time that had passed since the subject accidents, there was likely no practical treatment that was likely to significantly improve or ameliorate the plaintiff's residual symptoms, the prognosis for significant improvement in those symptoms would be poor, and for practical purposes, she has reached maximum medical recovery.

[282] Dr. Fuller's 2019 report drew many of the same conclusions as did his 2017 report. On physical examination, Dr. Fuller found slight deterioration in the plaintiff's neck range of motion.

[283] The 2019 report included a more detailed discussion of the risk of future arthritic difficulties. In both reports, Dr. Fuller said that he did not anticipate further arthritic changes that would be associated with the subject accidents. In his 2019 report, he noted that there had been some reported mild degenerative change in the cervical spine, and issues with the sacroiliac joint, but that he did not consider either of these to be of clinical significance and did not relate these to the subject accidents.

[284] In his 2019 report, presumably having been made aware of Dr. Mehta's opinion, Dr. Fuller commented that TMJ dysfunction was not an area of his primary expertise, and that it was a complex subject well left to a dental specialist practicing in the area.

[285] Dr. Fuller was cross-examined at length on his two reports. He was asked about his comments about the likelihood of further significant improvement. He explained that, in his experience, a patient will often improve for two years after an accident, then one might see marginal improvements for a further two years, then the patient is unlikely to change any more. However, there is individual capacity for improvement, and a person can train their system to function more normally. Dr. Fuller confirmed that the plateau effect after four years works both ways – that is, a patient's condition does not usually get significantly worse after four years.

[286] Dr. Fuller was taken through a number of the clinical records from 2003 to 2005. He agreed that he specifically referred in the text of his report to the first and last of the ones that referenced headaches and back pain, but did not specifically reference some of the clinical notes in between. He did not agree that his report should have specifically referenced every clinical note from that time period. He explained that he does not make a habit of transcribing general practitioner records in the reports he prepares, but confirmed that he had reviewed all of the records in the process of preparing his reports.

[287] When asked whether it was likely that some of the symptoms noted from 2003 to 2005 might have continued in some degree to December 2007, Dr. Fuller

suggested that the concept of continuing is not an appropriate way to analyze this issue; rather, he noted similarities between the pattern of symptoms reported to Dr. Koorjee in 2003-2005 and those reported by the plaintiff after the subject accidents, and suggested that what doctors are not sure about is to what degree this sort of pattern, once established, possibly predisposes an injured person to a recurrence of that pattern with further injury.

[288] Dr. Fuller was asked about a 2015 MRI of the plaintiff's sacroiliac joints. He had commented on it in his 2019 report but not drawn any conclusions with respect to it. In cross-examination, he agreed that the finding was unusual. He said that while such changes to a person's sacroiliac joints are unusual, the clinical significance of such changes is a matter of considerable debate. He said that one cannot totally dismiss it as a clue that the patient's sacroiliac joints are "unhappy". He suggested that this was not an indication of degeneration due to age, but rather that the joints are reacting to something.

[289] Dr. Fuller was asked about how he checks for lack of effort during a physical exam. His response was that he is observing a patient the entire time, and that it is usually obvious to him when a patient is not performing the task to their ability.

Dr. Kendall – Orthopaedic Surgeon

[290] Dr. Richard Kendall is a specialist in orthopaedic surgery. He conducted an IME of Ms. Parvanta on July 12, 2019, at the request of counsel for the defendant, and issued his report on July 15, 2019. He issued a further report on November 3, 2023, based on a review of certain documents that had not previously been provided to him.

[291] Dr. Kendall described the plaintiff at the time of the examination as looking "tired and somewhat unkempt", but also as appearing "fit and healthy" with no evidence of muscle wasting. He commented that her range of neck motion was less when that was specifically tested than when she was distracted by other things. He reported that provocative tests for thoracic outlet were negative (which of course differs from Dr. Stewart's findings). He found tenderness to palpation along the

shoulders over the trapezius, even with light palpation. He also noted mild tenderness over the right trochanteric region which was present only with direct examination. He also noted mild tenderness in both the knee and the ankle, but found no other matters of concern in those areas.

[292] Dr. Kendall concluded that the plaintiff appeared to have suffered soft tissue injuries in the 2007 MVA.

[293] He commented that some of the symptoms reported by the plaintiff are poorly documented initially in Dr. Koorjee's notes, which initially appear to have focused on neck, back and right arm issues. He also noted that, to the extent Dr. Horricks' handwritten notes are legible, they do include more widespread descriptions of discomfort.

[294] He concluded that the plaintiff's upper extremity abnormality is soft tissue in nature, without any fracture, dislocation or major joint injury.

[295] He noted that examination of the plaintiff's lower extremities did not reveal any objective findings. With respect to the knee, he concluded that at best, the plaintiff has a mild soft tissue type of complaint. He said that her hip, knee and ankle pain do not appear to be from a significant structural source. He commented that:

> It becomes readily apparent that she demonstrated widespread nonorganic findings during my examination. This includes profound weakness with muscle testing against variable resistance, a sign of poor effort. This does not correlate with her normal strength seen with body weight exercises. I suspect there is a significant component of functional (non-organic) pain.

[296] He concluded that the plaintiff is capable of working "in her former capacity", and suggests that, while he had no explanation for what he sees as late-emerging symptoms in her knee, hip and ankle, he was confident that they were not caused by the subject accidents.

[297] He commented briefly on symptoms of depression, suggesting he will leave this to experts in the field, but noting that this condition "can have a negative impact on perception of pain and should be pursued and treated if necessary".

[298] He concluded that the plaintiff's prognosis for recovery remains guarded because of the complex nature of her presentation.

[299] Dr. Kendall's second report appears to be primarily a comment on a report from Dr. Horricks (which was not put in evidence at trial), with brief comments on the report of Dr. Parhar (which I discuss below). Dr. Kendall notes numerous times in this second report that Dr. Horricks' notes of the plaintiff's complaints are "poorly documented". Nothing in the new documents Dr. Kendall was provided change his opinions.

[300] Dr. Kendall was not required to attend at trial for cross-examination.

Dr. Parhar – Medical Doctor

[301] Dr. Gurdeep Parhar is a medical doctor with experience in the areas of family medicine, occupational medicine and disability medicine. He became the plaintiff's family doctor in April 2019. Unfortunately, Dr. Parhar was away when the plaintiff first attended his practice, and she was initially seen by his locum physician, Dr. Trieu. Dr. Parhar first saw the plaintiff on October 21, 2019, and has seen her 33 times since then.

[302] Dr. Parhar was asked on short notice in June 2019 to prepare a medical-legal report, and given a June 20 deadline (presumably related to the September 2019 trial date that ultimately did not proceed). Unfortunately, the plaintiff was out of the country at that time, so Dr. Parhar prepared his report based on the patient history and examination notes of Dr. Trieu. It appears that this was not communicated to the lawyers involved, and did not become known to them until Dr. Parhar was under cross-examination – after he had been qualified as an expert and his report had been marked as an exhibit. After a break to consider their position, the parties chose to proceed with completing Dr. Parhar's examination, and his report and cross-examination remained as part of the evidence.

[303] While the report and cross-examination are part of the evidence, the fact that Dr. Parhar was relying on a history and an examination done by another doctor is

certainly a matter going to weight, and although Dr. Parhar confirmed that he continues to hold the opinions expressed in the report (having been the plaintiff's doctor for over four years), I still approach the report with a great deal of caution.

[304] Dr. Parhar's report does contain a detailed review of the plaintiff's medical records, and much of his cross-examination focused on that review.

Dr. Hershfield – Urologist

[305] Dr. Melvyn Hershfield was qualified as a medical doctor with specific expertise in urology. He prepared a report dated July 17, 2017, which provided an opinion based on having seen the plaintiff on a referral from Dr. Koorjee in February 2008. Specifically, he reported on his impression that at the time the plaintiff was seen, she most likely had a very mild contusion of the right kidney producing blood in the urine, which was fleeting, and the general discomfort in the region of the right flank may have been "muscle in origin".

[306] Dr. Hershfield was not required to attend at trial for cross-examination.

Dr. Mehta – Dentist

[307] Dr. Sujay Mehta is a dentist with a special focus on acute and chronic orofacial pain. Dr. Mehta completed a residency in this area in Los Angeles. He advised that, although orofacial pain is a recognized specialty in the United States, it has not to this point been recognized as such in Canada.

[308] Dr. Mehta conducted an independent medical examination of Ms. Parvanta at the request of counsel for the plaintiff in April 2019, and requested an MRI of her TMJ, which was performed on May 2, 2019. He issued his report on July 22, 2019.

[309] Dr. Mehta explained in his report that the TMJ connects the lower jaw or mandible to the skull. Each joint (one on each side) is stabilized by muscles and ligaments in order to open or close the mouth.

[310] In Dr. Mehta's report, he states that the first dental notation of jaw and face pain is that of Dr. Ho in July 2015, but that Dr. Horricks had noted complaints of jaw

pain in October 2012. In fact, Dr. Horricks had noted “TMJ” issues as far back as September 2010. In any event, Dr. Mehta commented in his report that it is not uncommon for patients he sees with traumatic injuries to have a delay before realizing and recognizing jaw problems.

[311] In his report, he noted that on examination he found pain on palpation to the TMJ, masseter muscle and temporalis muscles, as well as clicking on the left TMJ and a limited opening. He said that the MRI confirmed right-sided disc displacement without recapture, and a probable tear of the posterior band on the right. He diagnosed the following:

a) localized TMJ arthralgia with myalgia;

b) disc displacement with reduction on left; and

c) limited opening from muscular restriction versus disc pathology on the right.

[312] He concluded, based on the patient history, that these issues were more likely than not a result of the 2007 MVA.

[313] With respect to treatment recommendations, he said:

> Treatment recommendations for [TMJ] mixed with muscular pains with limited opening, disc displacement is limited to conservative management strategies that include physical modalities with specific focus to the head and neck particularly the jaw region (jaw joint and associated muscles), medication management, trigger point injections, and oral appliance or mouth guard.

[314] He described the prognosis as “complicated” with multiple variables including the time since onset.

[315] On cross-examination, Dr. Mehta was asked about a consultation report in the medical records he had reviewed from Dr. Lee, an otolaryngologist, in July 2018. Dr. Lee noted that there was a history of bruxism and TMJ pain on the left. Dr. Lee diagnosed laryngopharyngeal reflux with laryngospasm. Dr. Mehta agreed that

Dr. Lee had not recorded any joint clicking. He disagreed that bruxism and TMJ pain go hand in hand.

[316] Dr. Mehta was asked about a jaw x-ray from August 2015. He agreed that the radiologist commented that the mandibular condyles were well formed, but said that in his view, the x-ray would look at the bone and not the cartilage. In his view, an x-ray (as opposed to an MRI) would only be useful if there is a suspected fracture.

[317] Dr. Mehta was asked whether a tear of the posterior band would give rise to an immediate onset of symptoms. His answer was that there can be a progression with tears, such that they can worsen over time – especially if not treated.

Dr. Wild – Psychologist

[318] Dr. Ursula Wild is a registered psychologist who treated Ms. Parvanta from 2009 to 2011, and was then asked by counsel for the plaintiff in 2017 to prepare an expert report for purposes of this litigation. She did so by conducting a Skype interview of the plaintiff on August 10, 2017. Dr. Wild issued her report on August 15, 2017.

[319] Dr. Wild's report is 93 paragraphs in length, of which the first 83 paragraphs include a lengthy discussion of the psychological symptoms reported to and treatment undertaken by Dr. Wild from 2009 to 2011. That said, the initial portion of the report also includes some of the preliminary diagnoses made during treatment – a good example of this is para. 37, which says:

> 37. During the following sessions she described symptoms associated with PTSD and panic disorder such as experiencing very frightening nightmares, feeling detached and numb, not caring, lashing out at loved ones and wanting to control everything. …

[320] Dr. Wild's diagnostic impression (i.e., her opinion) is that the plaintiff's presentation was consistent with a diagnosis of PTSD, symptoms of psychophysiological hyperarousal as well as problems with anxiety and depression, and that she also suffered from chronic pain.

[321] Dr. Wild concluded in her report that the plaintiff, due to events in her childhood, was at heightened vulnerability to develop PTSD at the time of the 2007 MVA. She was asked further about this on cross-examination. She noted that, although the plaintiff had an upbringing that was definitely not normal, she had shown herself to be amazingly resilient. Her conclusion was that there had been trauma, but that the plaintiff had not developed PTSD prior the 2007 MVA. That was why she had used the term “heightened vulnerability”.

[322] With respect to the hospital incident in August 2008, Dr. Wild suggested in her report that this was a factor that interfered with the plaintiff’s gradual recovery, while the 2008 MVA “reinforced the sense of a foreshortened future which is a hallmark of PTSD”, and that its emotional impact was particularly severe because it was almost exactly one year after the 2007 MVA. Again, this was the subject of cross-examination. In response to questions on cross-examination, Dr. Wild described the hospital incident as something that interfered with any progress that the plaintiff could have made in terms of the PTSD she suffered following the 2007 MVA. The hospital incident was traumatic because it threatened her independence, because it took her away from her son, and because she had been told she was going to be seen for her pain issues. Dr. Wild said that the plaintiff’s reaction to the hospital issue gradually settled down, but that it subsequently came up as a trigger when she had to deal with medical professionals.

[323] Dr. Wild noted that PTSD and chronic pain are often intrinsically connected and very difficult to treat, particularly when persisting over a long period of time. She also noted that research indicates that chronic pain patients also tend to be diagnosed with depression which leads to a high level of frustration and hopelessness.

[324] With respect to prognosis, Dr. Wild suggested that if a patient sees limited recovery in a three-year period, that will bode poorly for the future. She suggested that in light of this, long-term restrictions in level of function may become permanent. She stated:

> Overall, I consider it as likely that Ms. Parvanta will continue to significantly more vulnerable to any future injuries and would expect that involvement in any further MVA's or stressful life events would result in a more severe and persistent psychological reaction. Hence I would recommend that Ms. Parvanta have access to psychological treatment on an as needed basis for the foreseeable future. I would anticipate that six sessions per year over the next 20 years would suffice.

[325] Dr. Wild was asked about the symptoms that the plaintiff reported to Dr. O'Shaughnessy in 2012. Her comment was that, within the PTSD spectrum, it is not unusual for a patient to have times when their life is stable and settled, then have the symptoms triggered again. She noted that, in 2012, the plaintiff had very solid social and economic supports in place – conditions in which it is much easier to do well in terms of mental health.

Dr. Riar – Psychiatrist

[326] Dr. Kulwant Riar is a psychiatrist with expertise in both general and forensic psychiatry. He conducted an IME of the plaintiff on May 4 and 18, 2011, at the request of counsel for the defendant. At the time, he was asked to hold off preparing a report. He met with the plaintiff again on July 17, 2019, for purposes of IME. He issued his report on July 30, 2019.

[327] Dr. Riar's report includes a summary of the different psychological symptoms reported by the plaintiff over the years, the different diagnoses (including PTSD, anxiety and depression), and the different medications that she had taken over the years. He noted that the plaintiff had stopped taking antidepressant medications in 2016, and that since then, her sleep has not been good.

[328] Dr. Riar's opinion is detailed and complex. He noted the physical injuries suffered in the subject accidents, and that:

> She had extensive physical treatment over the years, but despite passage of time, which has been more than a decade and extensive physical treatment, she continues to claim of ongoing pains, mainly around the right side of her body, which she believes interferes with her activities of daily living. In my observation, her pain complaints have varied in intensity and location over the period of time and there has been evolution to her pain symptoms with passing time, where she had more complaints of pain in the latter years than

> to start with. In spite of her complaints, she has been able to maintain employment, especially after my interview of 2011. Although she has preoccupation with her somatic symptoms, from her functional point of view, I do not believe that she [has] somatic symptom disorder. If she has it, it is very mild and she manages it reasonably well.

[329] With respect to PTSD, anxiety and depression, he described her history as complicated, concluding that:

> … I believe that she likely had suffered a trauma and stress disorder, like acute stress disorder or posttraumatic stress disorder. However, it got better within a couple or so years and did not leave her with any significant symptoms afterwards. Following the accident, there certainly has been anxiety disorder, which I would characterize as generalized anxiety disorder. There has been a description of her having panic attacks, but this has not been the case for a long time. She also had low mood, which I would characterize as either adjustment disorder or unspecified depressive disorder or persistent low grade depressive disorder. Regardless, it has fluctuated in intensity from time to time.
>
> It has been quite clear from various psychiatric consultations and by her family doctor that there had been times when her depressive disorder and anxiety disorders were in remission, only to resurface again. That was true even when I saw her in 2011. Her anxiety was very mild or residual and her depression was that of moderate intensity. When seen by Dr. Dimov in January 2013, again, her PTSD symptoms were in partial remission and her anxiety and depression was very mild. Her family doctor also noted in October 2014 and then in March 2015 that she was doing well from an emotional point of view and she stopped taking medication in the early part of 2016. From there on, there has been low mood and anxiety in difficult situations, which was marked after the separation from her ex-partner in January 2017. Her symptoms were worse in 2017 and then around the time of my interview with her, I felt that her depression and anxiety was that of a mild intensity.

[330] Dr. Riar then considered causation, looking at different disorders separately:

> As far as causation of her pains and possible somatic symptom disorder, I believe that the accident in question was responsible for bringing it on, but with passing time, they have been maintained and perpetuated by her depression, anxiety, various stressors and her personality profile.
>
> Her trauma and stress related disorder was caused by the accident of December 27, 2007 and was likely aggravated by accident of December 29, 2008. Fortunately, it settled and has not been emotionally disturbing for years.
>
> As far as causation of her anxiety and depressive disorder, although she reported that she did not have any psychiatric problems prior to the accident; on the contrary, from the clinical records of her family doctor, it has been quite clear that she had emotional issues in the form of anxiety prior to the

> accident. I believe after the accident of December 2007, there was a relapse or aggravation of her anxiety and associated depression. In the absence of the accident in question she most likely would not have suffered the relapse or aggravation. These disorders had lingered on due to various stressors and circumstances unrelated the impact of accidents. I feel that the accident of December 2008 likely influenced her anxiety and depression negatively but by itself likely would not have caused the relapse or aggravation. There have been times when she was almost free of those symptoms and only came back after the stressors. Since after the early part of 2016, she has not been on any psychiatric treatment and even then, she was able to rebound back from significant anxiety and depression after the separation.

[331] With respect to treatment, Dr. Riar opined that, while it was up to other experts to comment on the need for physical treatment:

> … she should continue to do her active exercises rather than depending on passive treatments. As far as psychiatric interventions, I believe that she should see a psychiatrist and her ongoing low mood and anxiety should be treated with psychotropic medications, as well as psychotherapy. If psychiatric consultation Is not available, her family doctor should consider starting her on antidepressant medication and she should see a psychologist for twelve to fourteen one hour sessions of cognitive behavioural psychotherapy. It would be beneficial for her to do some group treatment programs to deal with her anxiety and low mood.

[332] With respect to disability, Dr. Riar said that he did not believe the plaintiff was disabled from the time of his 2011 interview onwards, although “some aspects of her life were limited from time to time”.

[333] With respect to long-term prognosis, Dr. Riar:

> … tends to believe that she would achieve remission from her present symptoms, but she remains at risk of relapse of her anxiety and depression in difficult situations, which has to do with her constitutional vulnerability rather than any effect of the accident in question.

[334] On cross-examination, Dr. Riar agreed that he had not seen Dr. Mehta’s report when he prepared his report. He agreed that anxiety may be connected to TMJ problems, and that in this case, TMJ problems could exacerbate depression as well. He agreed that, in a person with the plaintiff’s psychological profile, ongoing jaw pain could well have mental health impacts. However, he was adamant that such impacts are ultimately treatable with counselling and psychotropic medications.

Issues

[335] The issues before the Court are to determine the nature and extent of Ms. Parvanta's injuries arising from the subject accidents and to assess damages.

Credibility and Reliability

[336] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey*, [1995] O.J. No. 639, 22 O.R. (3d) 514 (C.A.) at para. 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[337] In considering credibility, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 at 357 (C.A.).

[338] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:

a) the ability and opportunity of the witness to observe events;

b) the firmness of their memory;

c) their ability to resist the influence of interest to modify their recollection;

d) whether their evidence harmonizes with independent evidence that has been accepted;

e) whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;

f) whether their evidence seems generally unreasonable, impossible or unlikely;

g) whether the witness has a motive to lie; and

h) the demeanour of the witness generally.

[339] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[340] In *Edmondson v. Payer*, 2011 BCSC 118 at paras. 31-34, Justice N. Smith dealt with a situation in which numerous minor issues with respect to clinical records were seized on to attack a plaintiff's credibility:

> [31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:
>
> > ... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.
>
> [32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.
>
> …

> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
>
> [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:
>
> > ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[341] To similar effect are the comments of N. Smith J. in *Carvalho v. Angotti*, 2007 BCSC 1760 at paras. 15-17:

> [15] The attack on the plaintiff's credibility is based, in part, on various contradictions and inconsistencies within her evidence at trial and between that evidence and her discovery evidence, documents she prepared for other purposes, or statements recorded in clinical records. It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.
>
> [16] The record created on many of those earlier occasions may consist of answers a plaintiff gave to questioners who were primarily interested in only part of what the plaintiff had to say. For example, a doctor treating a plaintiff for a specific injury may seek only very general information about aspects of the plaintiff's medical history unrelated to the injury that doctor is treating. The information recorded may only be a brief summary or paraphrase of what the plaintiff said. The plaintiff will usually have no specific recollection of what he or she said on that occasion, but, when confronted with the record on cross-examination, will usually agree with the suggestion: "That is what you told Dr. X, isn't it?" The danger of giving too much weight to such inconsistencies was noted by Parrett J. in *Burke-Pietramala v. Samad*, …
>
> [17] Although there are inconsistencies in the plaintiff's evidence, I am satisfied that she was attempting to tell the truth as she recalls it. Those inconsistencies may cause me to question the accuracy of her recollection on

> some points, but they come nowhere near to being a basis for a finding of outright and deliberate dishonesty.

[342] The evidence of Ms. Parvanta is key in this case. The plaintiff argues that her testimony was both credible and reliable. The plaintiff says that she responded carefully to numerous questions about events dating back as many as 24 years, that she admitted what she could and could not remember, and that she gave evidence that was consistent in both direct and cross-examination. It also largely harmonized with that of the various lay witnesses.

[343] The defendants argue that Ms. Parvanta was a poor historian whose evidence was unreliable, inconsistent, and ultimately lacked the ring of truth. They submit that the plaintiff's inability to recall some details, where the details would be detrimental to her case, is reason to doubt her credibility, and that the progression of the physical injuries as reported by the plaintiff is unnatural.

[344] The defendants say that because the plaintiff's claim is largely predicated on her subjective representations, both to the Court and to medical professionals, the credibility and reliability of her testimony is key to adjudicating her claims. They referenced the oft-cited comments of Chief Justice McEachern, then a trial judge, in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.). Those comments were recently considered by Justice Stromberg-Stein in *McGlue v. Girvan*, 2024 BCCA 208 at paras. 47-49:

> [47] At trial, it was demonstrated that Mr. Girvan's testimony could not be relied on, not only because he gave varying and inconsistent accounts of his pain, capabilities, and personal/medical history, but also because he demonstrated a willingness to lie and feign or exaggerate injury for financial benefit. The judge acknowledged credibility and reliability are not all or nothing propositions, but it is clear that she considered she required "corroborative objective evidence or findings", to support Mr. Girvan's evidence of injury caused by the accident.
>
> [48] The approach taken by the judge, in my view, was appropriate. In *Mariano v. Campbell*, 2010 BCCA 410 at para. 40, Justice Groberman cited *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131, 1993 CanLII 2465 (C.A.) for the "correct approach" to cases such as the present:
>
> > With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 1982 CanLII 36, 70 B.C.L.R. 397

> (S.C.), repeating his observations in *Butler v. Blaylock*, [1981] B.C.J. No. 31 (B.C.S.C.), put it thus [p. 399]:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrong-doer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence – which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.
>
> So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.
>
> [49] In *Koltai v. Wang*, 2017 BCCA 152, Bauman C.J.B.C. (as he then was) questioned whether the requirement that there be evidence of a "convicting nature" as discussed in *Marslen* was indicative of a higher, and thus erroneous, standard of proof. I do not see it that way. In *Koltai,* the Chief Justice also referred to *F.H. v. McDougall*, 2008 SCC 53, where the Supreme Court of Canada established "once and for all" that there is only one civil standard of proof, which is proof on a balance of probabilities, but also held that "in all cases, evidence must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": *F.H.* at paras. 40, 45-46. *Maslen* recognizes that in cases such as the present, evidence of a sufficiently convincing, clear and cogent nature takes on a different form than it would, for instance, in a case concerning broken limbs.

[345] Assessment of the plaintiff's reliability and credibility is difficult in this case. At trial in February 2023, she was asked to testify about her condition prior to the 2007 MVA (which was more than 16 years in the past) including her health and employment histories back to about 2000 (over 23 years in the past). Perhaps not surprisingly, she had general recollections as to what happened 16-23 years ago, but her recollection was not always complete, she was not always able to attach a particular date and time to specific events, and she did not always have a recollection as to the exact sequence. Particularly in cross-examination, she was taken to many of the available records from those times. For the most part, she accepted what was set out in those records – other than in some cases to suggest that the record did not contain a complete summary of all of the issues that may

have been raised at an appointment. In many cases, it was those records that allowed for a timeline to be developed.

[346] Many of the defendants' submissions with respect to the plaintiff's credibility focused on the times prior to the subject accidents, and her inability to recall the exact complaints she was making at particular points in time. For the most part, I thought that her evidence with respect to those times reflected a reasonably careful approach, acknowledging what she did and did not recall.

[347] The defendants argued that the plaintiff's evidence that she was not experiencing the ongoing symptoms from her first two motor vehicle accidents (in 2000 and 2004) after February 2005 is simply not believable. I do not agree. While I suspect there was likely not a sudden halt to these symptoms, it is my view that given the fact that the plaintiff had numerous medical appointments between March 2005 and December 2007, and given the way in which the plaintiff had both previously and subsequently shared her concerns about such things as headaches and back pain when they were bothering her, and also given the gruelling work schedule she maintained during that time period, I accept the plaintiff's evidence that those issues had largely resolved well in advance of the 2007 MVA.

[348] What I found more problematic was the conflict between the plaintiff's evidence as to the 2000 accident in India and what is recorded in Dr. Koorjee's notes – particularly, his note that she had been unconscious for six hours. The plaintiff suggested that she would have told him that the accident took place away from the city and that they had to wait a long time for medical attention. It is perhaps possible that Dr. Koorjee missed a word or two in his notes. He was not called to testify about any of this. This accident was only a month or so before the plaintiff moved to Canada, and it does seem somewhat unlikely that the plaintiff would have been in a position to undertake a move to a new country as far away as Canada so soon after an accident that left her unconscious for six hours.

[349] That said, I do accept that the plaintiff's presentation of her pre-February 2005 physical symptoms probably minimized those symptoms more than was

appropriate. Whether she was unconscious for six hours, or simply injured to the point that she had to wait six hours for medical attention, it is clear that when she saw Dr. Koorjee in August 2003, she was suffering from headaches and back pain that were likely attributable in significant part to the 2000 accident – although at the same time managing to maintain a gruelling work pace running the family business.

[350] My concern about minimization does not necessarily mean the plaintiff was not a credible witness – as distinct from an unreliable witness. Given that she was being asked to give evidence as to events 20 or more years in the past, and given the way her physical condition was overtaken by the subject accidents and the number of years she has been focused on the impacts of (not to mention potential claims in respect of) the subject accidents, it may well be that the plaintiff has honestly and sincerely come to the point of believing that her physical and mental health challenges are all attributable to the subject accidents. In a case like this, where so many years have passed between the accidents giving rise to the claim for personal injury and the trial, it is difficult to know how much all of the focus on the subject accidents has led to her thinking about what gave rise to her symptoms through a lens focused on those accidents.

[351] A fair bit of cross-examination was devoted to the plaintiff's work history prior to the subject accidents. The defendants argue that the fact that her income tax returns recorded no income from Coka Moka should weigh against her credibility, as should the fact that she said she had worked at some retail stores in 2002 and 2003 that are not reflected in the Record of Employment data. I do not accept these submissions. In my view, an absence of evidence as to how the Coka Moka business was structured does not impact on the plaintiff's credibility. The reality is that there are many struggling start-up small businesses whose owners work incredibly long hours in pursuit of their dreams without recovering an hourly, or even any, wage. With respect to the other retail work, there could be a variety of explanations why there is only the one Record of Employment for the relevant time period.

[352] With respect to the plaintiff's income both before and after the subject accidents, it is clear that all of her income tax returns were prepared by others – most of the returns themselves reflect that. So her lack of familiarity with the details is not surprising.

[353] The defendants, relying on the notes of the ambulance paramedics, argue that the plaintiff's evidence that she was not sure whether she lost consciousness at the time of the 2007 MVA was further evidence that she is not credible. As noted in the discussion above, it is not clear who the ambulance attendants obtained that information from (i.e., those who were assisting her or the plaintiff herself). The only medical note from that evening that one can say with confidence originated with the plaintiff is the note of the emergency room physician – whose note that "unable to tell if a LOC" is the same as the plaintiff's evidence at trial.

[354] The defendants argue that the plaintiff's inability to recall, without referring to documents, in which of the 16 years following the 2007 MVA she had attended particular types of treatments (physiotherapy, massage therapy, counselling) also impacts on her credibility. In my view, the plaintiff's inability to recall specific treatments over such a long course of time was not unusual.

[355] The defendants say that the video surveillance from October 2008 and August 2009 is contradictory to the plaintiff's evidence of her condition at those times, and as to what she is reporting to the various doctors at those times. I do not see the reports she was giving to doctors at the time as being substantially different from what is shown in the videos, and in my viewing of the videos, I thought there was some awkwardness to her walking style. The videos also tend to confirm her evidence that she rarely emerged from her apartment in the mornings.

[356] More concerning to me was the plaintiff's attempts to explain or rationalize what she reported to Dr. O'Shaughnessy. His reports indicated that there had been improvement but not a resolution of symptoms, which is consistent with what was being recorded by the plaintiff's own doctors at the time. It is consistent with the waxing and waning of symptoms that the majority of the medical experts recognized.

The plaintiff, whose symptoms seem to have largely worsened over the past several years, and who clearly views her history through the lens of her current symptom burden, clearly finds it difficult to fully accept and recall that there were times that she was doing better.

[357] Also of concern to me were the comments of Dr. Kendall, which suggested that when he conducted his examination of the plaintiff, she might not have been giving full effort to the various tests. Dr. Kendall was not cross-examined, and so was not challenged on these observations. At the same time, both Dr. Stewart and Dr. Fuller conducted similar tests and reported no such concerns. Dr. Stewart's assessment as to the same matters that Dr. Kendall expressed concern about were not challenged. Dr. Fuller was asked in cross-examination about the plaintiff's effort in the testing he undertook, and expressed confidence that in the course of testing, he was confident that any lack of effort would be exposed. He was not challenged further on that.

[358] Overall, I have no doubt that the plaintiff suffered significant injuries in the 2007 MVA, with exacerbation in the 2008 MVA. I accept that the plaintiff accurately reported her various symptoms to the various medical professionals she saw in the decade or so following the subject accidents. During that time, she was largely focused on raising her son, her relationship with Mr. Gajoum, and her work advancing Mr. Gajoum's business, and pushed through pain where necessary. This litigation appeared to be very much on the backburner for several years.

[359] It appears that efforts towards bringing to trial the claims arising from the subject accidents began in the summer of 2017. That was shortly after the plaintiff's separation from Mr. Gajoum, and at a time when she did not appear to be engaging in physical therapies to any significant degree and was not taking psychotropic medications she had previously taken. The first steps to schedule a trial were in April 2018, and her assessments by Dr. Kendall and Dr. Parhar were in 2019. At this point in time, this litigation became a significant focus. It is my view that the plaintiff's reports of her condition by 2019 should be viewed carefully.

[360] I will deal briefly with the other witnesses. For the most part, I found the collateral witnesses called by the plaintiff credible. I was somewhat uncomfortable that parts of Kamiar's evidence seemed to focus on specific matters in issue, in ways that left me with concern that he was a bit too aware of specific litigation matters. That said, I generally found him to be a credible witness with insight into his mother's condition.

[361] Mr. Gajoum's evidence was very brief given the length and nature of his relationship with the plaintiff. There was a certain awkwardness to his testimony, and it was clear that he was speaking cautiously. I recognize that Mr. Gajoum has had (and may continue to have) his own disputes with the plaintiff. I found his evidence that he was unaware of claims with respect to the 2008 MVA difficult to accept. He suggested that very few commissions were paid to the plaintiff, notwithstanding that the tax returns show that the T4 slips issued by GDASI recorded substantial amounts of commissions. He suggested that the commissions were paid because the plaintiff helped package up paintings for shipping, while the emails show the plaintiff played a significant role in dealing with the various galleries, and Mr. Gajoum himself said that part of the reason for their separation was that he no longer wanted the plaintiff to come between him and the galleries. In light of these inconsistencies, which arise notwithstanding only brief testimony from Mr. Gajoum, I approach his evidence with a fair bit of caution.

[362] I did not find the evidence of the two other friends of Mr. Gajoum, who were called by the defence, helpful. It was not clear the extent to which they would have observed any issues the plaintiff may have been having. In my view, their evidence has little, if any, weight.

Causation and Mitigation

Legal Principles

[363] The general test for causation, for which the leading case is *Athey v. Leonati*, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102, was concisely summarized by Justice Kent in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 318:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[Emphasis in original.]

[364] In *Athey* at paras. 32-35, Justice Major noted the following key legal principles:

> [32] …The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss….
>
> …
>
> [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage… Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account

> in reducing the overall award… This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Citations omitted.]

[365] These principles were further explained by Chief Justice McLachlin in *Blackwater v. Plint*, 2005 SCC 58 at paras. 78-81:

> [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: *Athey*. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.
>
> [79] At the same time, the defendant takes his victim as he finds him — the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
>
> [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 he or she would have been in but for the tort for which the defendant is liable.

Positions of the Parties

Plaintiff

[366] The plaintiff says that the plaintiff's ongoing injuries were caused by the 2007 MVA and exacerbated by the 2008 MVA. The plaintiff says that the Court should rely in particular on the reports of Dr. Stewart (with respect to physical injuries generally), Dr. Mehta (with respect to the jaw injury) and Dr. Wild (with respect to psychological injuries).

[367] The plaintiff says that there is no basis on the evidence to conclude that there is an intervening cause, or that the plaintiff was a "crumbling skull" victim. The plaintiff says that the expert evidence is consistent on the causation issue – where they differ is on questions of the extent of ongoing injuries and her prognosis for the future.

[368] The plaintiff says that, but for the subject accidents, she would not have suffered from the variety of physical ailments she suffered, which the plaintiff identifies as:

a) a mild contusion of the kidney, leading to blood in the urine and right-sided abdominal pain;

b) jaw issues, specifically (as diagnosed by Dr. Mehta) TMJ injury with right-sided disc displacement without recapture and probable tear of the posterior band;

c) neck pain and headaches;

d) low and mid-back pain;

e) right shoulder pain;

f) pain in the right elbow, wrist and fingers;

g) rib pain;

h) right hip pain; and

i) right knee and ankle pain.

In addition, the plaintiff says that she has suffered mental health issues as a result of the subject accidents, including (as diagnosed by Dr. Wild) PTSD with symptoms of hyperarousal, anxiety, depression and chronic pain.

Defendants

[369] The defendants say that the plaintiff had pre-existing chronic pain and a trauma-filled childhood with further anxiety and stress in the years leading up to the 2007 MVA. They say that her current symptoms are not related to the subject accidents in any manner and that she has a much higher level of function than she is currently reporting.

[370] The defendants say that the ambulance reports from the 2007 MVA reflect only limited symptoms being reported at the time. The defendants say that, while this was a car-on-pedestrian collision, the Court should recognize that the severity of a collision may not relate to the severity of the injuries.

[371] The defendants also say that the 2008 MVA was extremely minimal in nature, and the Court should infer from that that the resulting injuries were likely minimal if any.

[372] The defendants rely on Dr. Kendall's opinion with respect to the plaintiff's physical injuries, and say that given the "late onset" of those injuries, they should be considered not caused by the subject accidents.

[373] The defendants argue that, notwithstanding Dr. Mehta's opinion, due to the late onset of complaints of jaw and TMJ injuries, the Court should conclude that those injuries were not caused by the subject accidents.

[374] The defendants say that, based on Dr. Riar's opinion, any psychiatric injuries caused by the subject accidents had ceased to impact on the plaintiff by 2011.

[375] The defendants say that, if the plaintiff does have any ongoing injuries, her claims must be evaluated with respect to:

a) her pre-existing condition, both physical and psychological;

b) intervening events, such as the hospital incident in August 2008 and the end of her relationship with Mr. Gajoum in 2017; and

c) her duty to mitigate her loss.

Analysis

[376] In my view, this is not a crumbling skull situation. As discussed above, I accept that for at least two years prior to the 2007 MVA, the plaintiff was no longer suffering from pain arising from her two previous motor vehicles. The plaintiff may well have been vulnerable to further soft tissue injuries to her neck and back, but on my review of the evidence, I do not conclude that those symptoms would have reappeared absent something like the subject accidents.

[377] It is also my view that, although the plaintiff had experienced trauma in her upbringing, and had spoken to Dr. Koorjee about her anxiety, there is no basis in the evidence to conclude that she would have experienced mental health issues after 2007 absent the subject accidents. The plaintiff was at most in a position of vulnerability to psychological injury.

[378] I do not accept that the plaintiff's physical injuries arising from the 2007 MVA had resolved prior to the 2008 MVA. I accept that she had been actively seeking out treatment during that time, and had seen improvement in her condition. She did appear to be increasing her work with Mr. Gajoum in the fall of 2008; however, she was still obtaining regular treatment and using various medications that had been prescribed to her to control the symptoms. In my view, the symptoms had not fully resolved, and they were exacerbated by the 2008 MVA.

[379] Dealing with specific injuries, the plaintiff's complaints as to headaches, neck pain, and low and mid-back pain have been continuing complaints since the 2007 MVA. They were caused by the 2007 MVA and exacerbated by the 2008 MVA.

[380] The TMJ issues were first identified in September 2010. I accept Dr. Mehta's evidence that TMJ issues are often not immediately discovered in circumstances like this. It is my view that the plaintiff's TMJ issues were caused by the 2007 MVA.

[381] Complaints with respect to the plaintiff's right shoulder, hand and wrist have been regularly reported since the months following the 2007 MVA. Similarly, right hip and right knee pain have been a feature of her physical complaints since shortly after the 2007 MVA. I accept that those injuries were caused by the 2007 MVA and exacerbated by the 2008 MVA.

[382] I recognize that, when a plaintiff has suffered numerous injuries, not all of them will be reported right from day one. This is explained in the two judgments of N. Smith J. that I have cited above. However, it is my view that had the elbow and ankle issues complained of by the plaintiff been caused by either of the subject accidents, they would have appeared much earlier in the medical reports.

[383] As I assess the evidence, the 2008 MVA was a relatively minor contributor to the plaintiff's physical symptoms. However, the impact of the 2008 MVA on her psychological condition, and the resilience that she had demonstrated for so many years in the past, was significant.

[384] I accept that the plaintiff's psychological condition was impacted by both the hospital incident in 2008 and by her separation from Mr. Gajoum. Each of those events exacerbated her psychological issues to some degree. In my view, the impact of the hospital incident gradually reduced over time, as the plaintiff worked hard to move forward with her life. It was of great assistance that her life was in a position of relative stability, with challenging and rewarding work, as well as a supportive partner and son. The separation from Mr. Gajoum also exacerbated her psychological issues, and her own actions since that time – including her failure until

recently to continue with physical therapies and medications – have had their own impact.

[385] In my view, however, it would be speculative at best to suggest that the plaintiff would be in the same psychological condition now as a result of her separation from Mr. Gajoum even in the absence of the subject accidents. The plaintiff had displayed tremendous resilience prior to the subject accidents, and in my view, the evidence leads to the conclusion that it is only the cumulative impact of the years of accident-related chronic pain that has overcome that resilience. As well, I see merit to the view expressed by the plaintiff that her physical and psychological impairments resulting from the subject accidents played a substantial role in her separation from Mr. Gajoum.

[386] Thus, while these other matters subsequent to the subject accidents have exacerbated the plaintiff's psychological condition, it is my view that the subject accidents have continued to be significant causes of her psychological condition. The but for test is clearly met in the circumstances.

[387] The reports of Dr. Wild and Dr. Riar reflect different diagnoses of the plaintiff's condition. In my view, based on the evidence, the plaintiff has suffered ongoing depression. Whether that is an aspect of PTSD (as concluded by Dr. Wild) or one of the disorders referenced by Dr. Riar, it has clearly affected her enjoyment of life. Similarly, her anxiety has impacted her enjoyment of life, whether an aspect of PTSD or a distinct generalized anxiety disorder.

[388] I appreciate that one line in Dr. Riar's report seems to suggest that, in his view, the subject accidents at some point ceased to be a cause of her anxiety and depressive disorders – he suggested that they "lingered on due to various stressors and circumstances unrelated the impact of accidents". Exactly what stressors he is considering is not clear from the report. He notes later in his discussion of causation (which I quote above) that there were times when the plaintiff was "almost free of those symptoms", and seems to suggest that any waxing and waning of symptoms must have been due to other unidentified stressors. This of course differs from

Dr. Wild's opinion that psychological conditions like PTSD may wax and wane. It also ignores the reality, as noted by Dr. Stewart, that there is a cumulative psychological impact of years of chronic pain, as well as the fact that she continued to be prescribed psychotropic medications and, among other things, was referred to see Dr. Dimov in 2013.

[389] Having considered the evidence, including the various expert opinions, I conclude that the plaintiff's psychological condition has continued since the 2007 MVA to be caused by the subject accidents.

Mitigation

[390] The defendants argue that the plaintiff has failed to mitigate her loss by failing to seek out and attend appropriate treatment on a consistent basis since 2012, and that she has failed to follow up on recommendations with regard to treatment of the alleged psychological injuries. The defendants submit in particular that the plaintiff has had no counselling since 2010 and has not taken antidepressant medication since 2015. The defendants say that this either shows that the symptoms reported are not significant, or alternatively establishes a failure to mitigate loss. The defendants argue that Dr. Riar's evidence supports the beneficial effect that would have been obtained had the plaintiff attended psychological treatment and continued with her medication.

[391] The defendants thus submit that the plaintiff's damages should be reduced by 20% to account for her failure to mitigate.

[392] The plaintiff submits that she did not engage in any unreasonable or deliberate conduct against treatment recommendations, nor is there any evidence from expert witnesses that additional treatment would have reduced the plaintiff's injuries. The plaintiff also says that her actions are reasonable given her evidence as to the side effects she has experienced with respect to the various medications prescribed to her.

[393] The applicable law was summarized by Justice Voith (as he then was) in *Liu v. Bipinchandra*, 2016 BCSC 283, at paras. 67-70:

> [67] The general legal framework that pertains to issues of mitigation is well-established.
>
> [68] The leading case is *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, in which the Supreme Court of Canada determined that the question of whether a person has been reasonable in refusing recommended treatment is one for the trier of fact to decide, taking into account the degree of risk from the treatment, the gravity of the consequences of refusing that treatment, and the potential benefit to be derived from the treatment. The Court stated that mitigation is not so much a "duty" that a plaintiff owes to a defendant. Rather, a failure to mitigate is a defence which reduces the amount of damages that the defendant is obligated to pay.
>
> [69] In *Morgan v. Galbraith*, 2013 BCCA 305 at para. 78, the Court of Appeal recently affirmed *Chiu v. Chiu*, 2002 BCCA 618 as the "guiding authority" on the question of mitigation. In the latter case, the Court stated:
>
> > [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.
>
> [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, a case where the allegation of failing to mitigate involved a refusal to undergo cortisone injection treatment, the Court stated, that it:
>
> > [56] …would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment.
> >
> > [Emphasis in original.]

[394] In my view, this is a case where a failure to mitigate is established on the evidence. As I assess the evidence, the plaintiff's condition gradually improved up to about 2010, by which time she was working full time and in a relatively stable condition. She was in that condition because of significant efforts at therapy and ongoing use of medications recommended to her. Her reports to Dr. O'Shaughnessy in 2012, and to Drs. Lau and Dimov in 2013, all reflect a relatively stable condition in

which pain and psychological symptoms were a daily reality but being managed through treatment to the extent that she could move forward with her life.

[395] From 2015 to 2017, the plaintiff ceased taking the medications recommended to her and ceased most of the therapies that had been successful. She also separated from Mr. Gajoum. The evidence reflects a clear downward trend in her condition – both physical and psychological – from that point onward. As noted above, I am alive to the possibility that there has been exaggeration with respect to her condition since then. Whether or not there has been exaggeration, it is my view that the changes to her condition go far beyond the sort of waxing and waning that Dr. Stewart identified as not unusual in cases of chronic pain.

[396] In my view, the success the plaintiff had with her recommended treatments prior to 2015 is such that she should have continued with those treatments. And given the relatively stable condition she reported in the years leading up to 2015, in which she was able to manage her pain, depression and anxiety while continuing to maintain a substantial workload, it is my view that the inference is inescapable that, had she continued with those treatments, her condition would on the balance of probabilities have continued relatively in line with what it had been in the years leading up to 2015. I note in that regard Dr. Fuller's comments that the "plateau effect", by which after four years the impacts of an injury are unlikely to change substantially, works both ways. [Dr. Fuller had, of course, already opined that he did not anticipate further arthritic changes that would impact the plaintiff.]

[397] I appreciate that the usual remedy in a case in which mitigation has been found is to identify a percentage by which to reduce the damages awarded. In my view, this is not a usual case. The fundamental task, to use the language quoted above from *Chiu*, is to determine whether the plaintiff "could have avoided" a portion of their loss, and to assess the extent to which "damages would have been reduced" had the plaintiff taken the appropriate steps in mitigation.

[398] Given the number of years that have passed, and the findings I have made as to the plaintiff's condition over the years, it is my view that the appropriate way to

determine an award that is fair to both the plaintiff and the defendants, is to award damages on the assumption that the plaintiff's physical and psychological symptoms would have continued from 2015 onward in much the same manner as in the years from 2010 to 2015, had she taken the steps in mitigation that she had been taking and that had been recommended to her.

[399] A case like this would have ordinarily come to trial within eight years of the subject accidents. Had this case come to trial in 2015 or 2016, damages would have been awarded on the basis that the plaintiff's then-condition would have continued, and there would have been no deduction in any award for lack of mitigation. It would, in my view, be in accordance with the underlying principles of damages and fairness to the plaintiff that the award be no less than what it would have been had this case come to trial at that time – and to do so on the basis that the plaintiff's prognosis is that she will continue to suffer from chronic pain, depression and anxiety, the impacts of which can be somewhat managed through therapy and medication, but which will continue to impact the plaintiff's enjoyment of life indefinitely. Those impacts will permit her to work, although they will reduce her income-earning capacity in much the same way they did in the first eight or so years after the subject accidents.

Damages

Non-Pecuniary Damages

Legal Principles

[400] Both parties directed my attention to the judgment of Justice Kirkpatrick in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46:

> [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.).
>
> [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).

[401] *Stapley* reminds the court that, in assessing non-pecuniary damages, one must consider the particular plaintiff, in their particular circumstances, and make an award that accommodates those unique circumstances.

Positions of the Parties

[402] The plaintiff submits that an appropriate award in this case would be $260,000. The plaintiff bases its submission on two cases that it says are comparable:

a) *Felix v. Hearne*, 2011 BCSC 1236, in which non-pecuniary damages of $200,000 were awarded ($269,000 after adjustment for inflation from 2011 to 2024). This case involved a plaintiff who was 44 years old when injured in a motor vehicle accident. She suffered significant neck and back pain

as well as recurrent headaches, tinnitus and loss of equilibrium. She had tears to ligaments in her shoulder and ankle. She had wrist injuries which continued notwithstanding surgery, and was unable to continue working as a court reporter. She had ongoing depression and PTSD symptoms, as well as significant anxiety issues which she had gradually overcome. The prognosis for further recovery was poor. Justice Grist accepted that her future employability was significantly compromised.

b) *Tan v. Mintzler*, 2016 BCSC 1183, in which non-pecuniary damages of $210,00 were awarded ($262,000 in 2024 dollars). This case involved a woman who was 52 years old at the time of the accident and who suffered soft tissue injuries and had ongoing pain to the left side of her head, neck and shoulders, as well as back pain. She suffered a mild traumatic brain injury. Her psychological injuries included PTSD, depression, anxiety and associated sleep disturbances. There was a poor prognosis for further recovery.

[403] The plaintiff also references the comments of Justice Garson in *Rizzolo v. Brett*, 2010 BCCA 398 at para. 37, that “trial judges have assessed non-pecuniary damages at well over $100,000 where there is an element of significant ongoing pain and, particularly, where the plaintiff had previously enjoyed an active lifestyle or a physical vocation”.

[404] The defendants say that non-pecuniary damages should be assessed on the basis that the plaintiff’s only injuries were soft tissue injuries to her back and neck, from which she had mostly recovered by 2012, and that the plaintiff had also recovered from any psychiatric injuries by 2012 (with any ongoing symptoms arising from pre-accident constitutional vulnerabilities and post-accident life stressors).

[405] The defendants submit that an appropriate award is in the range of $35,000 to $45,000, and rely for that purpose on 10 cases said to reflect comparable circumstances:

a) *Tull v. Gillett*, 2021 BCSC 724, a case in which the trial judge concluded that the plaintiff had suffered mild to moderate injuries, no period of disabilities, limited evidence of emotional impact, and limited evidence of any ongoing physical impact – all of which led to an award for non-pecuniary losses of $45,000 [I note that, as noted at para. 100 of the judgment, the plaintiff in that case had sought an award of $135,000 based on reference cases including *Enns v. Corbett*, 2020 BCSC 1680 (award of $160,000 in 2020) and *Mattson v. Spady*, 2019 BCSC 1144 (award of $150,000 in 2019), which arguably bear some similarity to the present case, although with a different impact on the plaintiff's ability to continue working.];

b) *Sharma v. Bhullar*, 2020 BCSC 379, a case in which the plaintiff was found to have suffered a mild to moderate whiplash-type injury with associated intermittent headaches, which were not severe enough to require her to cease work or to impair her ability to function, for which the trial judge assessed non-pecuniary damages at $40,000;

c) *Stone v. Milev*, 2022 BCSC 319, in which the plaintiff was found to have suffered minor soft tissue injuries to the neck and upper back, all of which were significantly resolved within 27 months, and which did not prevent the plaintiff from establishing a career as a real estate agent; the award for non-pecuniary losses was $30,000;

d) *Winters v. Ma*, 2023 BCSC 1148, in which a 34-year-old plaintiff was injured when his electronic scooter collided with a vehicle, suffering myofascial tissue injuries to his left knee, shoulder, upper and lower back and ankle; some but not all of those injuries resolved, and the plaintiff continued to suffer from episodic, chronic pain in his lower back, neck and left ankle when those areas are stressed; the award for non-pecuniary losses was $30,000;

e) *Palmer v. Pozniak Estate*, 2021 BCSC 1703, in which a 35-year-old plaintiff had ongoing pain in his neck, lower back and hips, but his pain was described as “minor” and his injuries did not require him to take any time off work; the award for non-pecuniary damages was $35,000;

f) *Gorval v. Quan*, 2023 BCSC 1757, in which a 43-year-old highly active plaintiff suffered various mild soft tissue injuries and headaches that mostly resolved within months, other than some stiffness and mild pain when required to maintain the same position for a long period of time, or to engage in high impact, intense physical activities, and that while pre-existing depression had been temporarily exacerbated, the accident ceased to have any impact after a few months; non-pecuniary losses were assessed at $50,000;

g) *Cegielka v. Grace*, 2020 BCSC 115, in which a 32-year-old plaintiff suffered soft tissue injuries; at the time of trial he experienced “mild ongoing neck and back pain from time to time”, and he had been able to work extensive overtime in a construction-related position; non-pecuniary losses were assessed at $40,000;

h) *Harle v. Williams*, 2021 BCSC 107, in which a 21-year-old plaintiff suffered soft tissue injuries to the right side of her body, including her arms, shoulder, neck, back, and ankle, with resultant headaches, of which many resolved within two years, but she continued to suffer from headaches and pain in her neck and shoulder; that said, the judge was satisfied that the residual injuries would improve over time with appropriate therapies, although she might have flare-ups of symptoms from time to time; non-pecuniary damages were assessed at $55,000; and

i) *Burnett v. Granneman*, 2023 BCSC 1425, in which a 36-year-old plaintiff suffered soft tissue injuries to his neck, left trapezius, and back, which led him to move to a more sedentary employment – one that turned out to provide a higher income; the trial judge concluded that the plaintiff

continued to suffer from intermittent headaches and neck, trapezius, and back pain, and required accommodations to sustain full-time employment in a sedentary role, although he had returned to a number of his past recreational activities; non-pecuniary damages were assessed at $55,000.

[406] The defendants also relied on *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, in which the Court of Appeal varied an award upward. Justice Frankel summarized that plaintiff's condition at para. 22:

> A person in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood for future improvement is poor. With caution, can continue to participate in previous activities while monitoring physical exertion for pain.

He concluded at para. 23 that the present range for non-pecuniary damages in such case was $50,000 to $60,000, and varied the award from $35,000 to $55,000.

Analysis

[407] I turn to the various *Stapley* factors. The plaintiff was 30 at the time of the 2007 MVA, and 31 at the time of the 2008 MVA. The injuries suffered, and the severity and duration of pain, can be summarized as follows:

a) soft tissue injuries to the TMJ and disc displacement, giving rise to chronic pain in the jaw region and difficulties eating, with potential conservative management strategies including medication, use of a mouthguard, and possible injections, and no likelihood of further improvement;

b) soft tissue injuries to the neck, shoulders and back, giving rise to chronic pain and chronic headaches, which gradually improved after the subject accidents but reached a plateau involving significant ongoing pain and impacts on function – the conditions can be managed through physical therapies, including exercise, physiotherapy and massage therapy, as well as through medication (although with side effects), and there is little likelihood of further improvement;

c) additional pain in the right hand, wrist, hip and knee, which limit the plaintiff's physical abilities, and which also appear to be chronic; and

d) a mild contusion of the kidney with right flank pain – this was temporary and resolved within months, but was distressing to the plaintiff as it was investigated and she was aware of blood in the urine of unknown source.

[408] In addition to these physical conditions, the plaintiff suffered from anxiety and depression, either as standalone conditions or in conjunction with PTSD. Her depression in particular has given rise to challenges in the plaintiff's functioning. She has done better when taking antidepressants and when other aspects of her life have been positive. These conditions appear to be chronic as well, and will require ongoing management by the plaintiff going forward.

[409] As a result of these physical and psychological conditions, the plaintiff has seen major changes in lifestyle. Whereas before she would engage in sports like tennis and be out in the evenings, dancing or sitting in restaurants, she rarely goes out at night and when she does, she sees an increased symptom burden. She is unable to engage in work that involves physical exertion, and is limited to primarily sedentary work. Even with sedentary work, she has limitations in the duration of work on any given day. She has suffered from a lack of interest in physical intimacy. She is limited in some housekeeping activities, although is generally able to do light housework.

[410] As noted above, I am assessing damages on the basis of the plaintiff continuing in her physical and psychological state as it was in 2014 and 2015, at a time when her condition had plateaued but before conduct that, in my view, constitutes a failure to mitigate.

[411] As can be seen, the authorities said by each of the parties to be comparable are far apart, and reflect significantly different symptom burdens on the plaintiffs. The plaintiff's condition as I have identified it falls between the cases identified by the parties. I have given previous judgments in other cases that bear more similarity

to the present case, including *Rich v. Hamilton*, 2022 BCSC 1134, and *Holman v. Leung*, 2021 BCSC 1168.

[412] In my view, given the symptoms set out above, and given my comments below with respect to housekeeping capacity, an appropriate award for non-pecuniary damages in this case is $150,000.

Loss of Earning Capacity

[413] This case raises complex issues with respect to loss of earning capacity. At the time of the 2007 MVA, the plaintiff was 30 years of age, having moved to Canada only a few years earlier. While she had demonstrated a capacity to work long hours, her past employment had not been particularly remunerative. While she had commenced some work with Mr. Gajoum, that working relationship was at a very early stage. Her income grew substantially after the 2007 MVA, then tailed off dramatically after her relationship with Mr. Gajoum ended. Damages for loss of earning capacity are generally assessed based on the plaintiff's earning capacity, that is, what she could reasonably have earned had the injury not occurred. In this case, it is difficult to assess what her course of employment and related income would have been had she not been subject to limitations arising from the subject accidents.

Expert Evidence – Economists

Darren Benning

[414] Mr. Benning is an economist with specific expertise in economic assessment of pecuniary loss claims. He prepared a report dated November 6, 2023, that provided multipliers for both future loss of income and future cost of care claims, as well as a calculation of the present value of various cost of care items included in the report of Claudia Walker, which will be discussed below.

[415] With respect to the employment income multipliers, Mr. Benning provided both an "Actuarial Multiplier" calculation, which made provision only for the contingency of premature death, and an "Economic Multiplier" calculation, which

included allowances for negative labour market contingencies including non-participation in the labour force, unemployment, part-time work and part-year work. He relied in assessing those contingencies on labour participation rates for BC females with high school diploma or equivalent as found in data from the 2021 Census, as well as the 31st Actuarial Report on the Canada Pension Plan. The report also contains information on average annual earnings for BC females with high school diploma or equivalent.

Mark Gosling

[416] Mr. Gosling is an economist with specific expertise in economic assessment of pecuniary loss claims. He prepared a responding report dated December 13, 2023, which responded to Mr. Benning's report of November 6, 2023.

[417] Mr. Gosling's calculation of actuarial multipliers was very similar to Mr. Benning's. He cautioned, however, that actuarial multipliers should be applied to annual income figures that already account for contingencies such as unemployment, part-time work and non-participation in the labour force for other reasons (other than retirement).

[418] Mr. Gosling also calculated economic multipliers. His economic multipliers were lower than those of Mr. Benning. Whereas Mr. Benning relied on data from the 2021 Census, and from the Canada Pension Plan – which Mr. Gosling described as "cross-sectional data" – Mr. Gosling opined that it is more accurate to use what he described as "longitudinal data", which traces the employment status of individuals over several years. Given that there is no such recent Canadian data, Mr. Gosling used data from a 2012-2017 study of the U.S. labour market. He also adjusted that data with reference to information from the 2016 Canadian Census.

[419] As a result of these differences in approach, Mr. Gosling produced present value calculations that are approximately 12% less than those generated by Mr. Benning. For economic multipliers to represent a person of the plaintiff's age from the date of trial to age 70, Mr. Benning opined that the present value of $1,000

of income per year was $11,720, while Mr. Gosling opined that the present value was instead $10,301.

Positions of the Parties

Plaintiff

[420] The plaintiff submits that but for the subject accidents, the plaintiff would have continued to build her career as an artist agent. The plaintiff submits that, while she was able to pursue that career during her relationship with Mr. Gajoum due to his willingness to work around her limitations, she has been unable because of her ongoing injuries to do so after the relationship came to an end.

[421] The plaintiff advanced a theory of her claim for loss of earning capacity based on the assertion that her final seven years working with Mr. Gajoum represent her actual income-earning capacity (as opposed to the time prior to the first of the two subject accidents). Although there was evidence that, even during the final seven years, she was unable to work at full capacity – for example, she testified that, at times, others such as Ms. Wildman took on work that the plaintiff could have done, and as a result, the overall commissions had to be shared – the claim as advanced does not seek to quantify that. The plaintiff says that her actual income-earning capacity after 2016 should be based on the average of her final seven years working with Mr. Gajoum, which is $93,000.

[422] As part of this submission, the plaintiff submits that the long-term impact of her injuries from the subject accidents, including her chronic pain and her psychological issues, were a cause of her separation from Mr. Gajoum.

[423] In the alternative, the plaintiff argues that her income can be assessed based on data provided by Mr. Benning as to the average income of women living in BC with the plaintiff's level of education ($57,100 in 2023).

[424] The plaintiff submits that her past loss of earning capacity should be assessed at the difference between her actual income from 2018 to 2023 and those

numbers (i.e., either the $93,000 on her primary theory or the $57,100 from her alternative theory).

[425] She submits that future loss of earning capacity should be assessed on the same approach and on the basis that her with-accident future earning capacity (based on what she has been earning in recent years) is $10,000 per year.

Defendants

[426] The defendants say that the plaintiff has failed to prove that she has suffered an actual loss. They say that there is no evidence that her work at the Coka Moka café had any value. They say that there is no evidence, other than her own, that she could have made more money while working for Mr. Gajoum, and no basis on which to assess any such loss. The defendants rely on the lack of documentary records in evidence establishing that the plaintiff was actually working full-time hours at any point prior to the 2007 MVA.

[427] The plaintiff's claim for past loss of earning capacity is focused on the time after the plaintiff separated from Mr. Gajoum. With respect to that, the defendants submit that:

a) the relationship did not end for any reason related to the subject accidents;

b) any decrease in income after that separation is not related to the subject accidents; and

c) in any event, the numbers advanced by the plaintiff are unreasonable. The defendants say it is inappropriate to simply select the six highest-earning years. The defendants say that the plaintiff's real problem is that she has been unable to find an appropriate artist who requires her management skills, and that the evidence as to her attempts to do so post-separation are quite lacking. As well, the defendants say that it took the plaintiff four years to build her income in respect of managing Mr. Gajoum and that

there would be a similar timeframe even if she was able to find a new artist to manage.

[428] With respect to future income-earning capacity, the defendants say that no such loss has been proved in this case. The defendants say that, if the plaintiff is currently unable to work as a manager for an artist, it is for reasons unrelated to the subject accidents. They say that she demonstrated her ability to work in that capacity for 10 years following the subject accidents, and that she demonstrated her ability to earn income up to 10 times greater than her income from prior to the 2007 MVA. Thus, she has not established that she has sustained a lack of capacity.

[429] The defendants also say that the plaintiff has failed to demonstrate a real and substantial possibility of a pecuniary loss. She has produced no evidence of contracts or losses that she has sustained. The defendants say there is no functional capacity evaluation and no vocational expert report that would set out the plaintiff's limitations and how they impact on her employability.

[430] In any event, the defendants say that at best, the plaintiff's loss of capacity would have to be quantified by reference to her pre-accident earnings, as set out in her tax returns from 2007 and earlier. Her reported earnings at that time reflect part-time work earning minimum wage, which the defendants say she is currently capable of performing.

[431] Finally, the defendants say that there should be contingency deductions from any award, including deductions to reflect:

a) the possibility that the plaintiff's pain burden may improve over time, and with proper treatment of her psychiatric symptoms;

b) the plaintiff may not return to live in Vancouver;

c) the contingency that, based on her documented pre-accident employment record, she would have been limited to part-time work and periods of unemployment;

d) the lack of formal education and training prior to the subject accidents; and

e) the fact that she was able to complete all required work tasks for over nine years following the 2007 MVA.

[432] The defendants also argue that:

a) the plaintiff suffered from pre-existing physical and psychiatric conditions prior to the 2007 MVA, as reflected in Dr. Koorjee's notes;

b) the symptoms she reported in 2003 and 2004 included symptoms such as headaches that were consistent with chronic pain, and she was vulnerable based on "her psychiatric history prior to the subject accidents"; and

c) there is thus a real and substantial possibility that the plaintiff would have suffered from restrictions on her ability to work even without the subject accidents.

[433] The defendants thus seek a 40% deduction on account of the identified general contingencies and a further 25% deduction on account of the plaintiff's pre-existing conditions.

Legal Principles

[434] The task of assessing a claim for loss of earning capacity was described by Justice Dickson (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251, 1978 CanLII 1:

> We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings,* [[1966] S.C.R. 532]. A capital asset has been lost: What was its value?

[435] The fundamental goal is, to the extent possible, to put the plaintiff in the position they would have been in but for the injuries caused by the defendant's negligence: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[436] In this case, many years passed between the time of the subject accidents and the time of trial. Assessing what the course of the plaintiff's life would have been over the course of those 16 years, had the subject accidents not occurred, is very much a matter of crystal ball-gazing, particularly given the plaintiff's particular circumstances at the time of the 2007 MVA. For post-trial loss of earning capacity, the Court must also consider the uncertainties of the plaintiff's future life in light of the subject accidents.

[437] The earning capacity of a plaintiff may be affected in many different ways. A useful framework for considering loss of earning capacity is found in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 8, where the court set out four factors that may be considered:

> [8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[438] As noted in *Rab v. Prescott*, 2021 BCCA 345 at para. 36:

> [36] ... these considerations are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

Principles Specific to Past Earning Capacity

[439] Both pre-trial and post-trial earning loss claims are properly characterized as claims for loss of earning capacity. As explained in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30:

> [30] … a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[440] The facts of *Rowe* were summarized in *Ibbitson v. Cooper*, 2012 BCCA 249 at paras. 17-18, where Justice Garson noted that the issue in *Rowe* was:

> [17] … whether Mr. Rowe's inability to work resulted in a compensable loss of earning capacity. Mr. Rowe was a retired successful businessman who opened a seasonal guest ranch through a corporate entity. His children were the shareholders. At the time of the accident, he was heavily involved in running the business but was not an official employee. Mr. Rowe received an annual payment from the company, recorded as repayment of debt in the company's books, but the payments ceased when he was injured and the company was no longer able to pay. The defendants' submissions focused heavily on whether Mr. Rowe was the "alter ego" of the company such that the discretionary debt repayment amounts could qualify as lost income.
>
> [18] This Court concluded that the defendants' focus on the "alter ego" doctrine was misplaced and that the compensable loss was not the actual lost income but the loss of capacity to earn. It held that the loss was not the debt repayment amounts but that these amounts were evidence of the loss.

[441] Justice Garson cited from paras. 27-33 of *Rowe*, in which the Court first affirmed (at para. 30, quoted above) that the claim is for loss of earning capacity, as distinct from loss of income. The Court in *Rowe* then went on (para. 32) to adopt the remarks of Chief Justice Barwick in *Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649 at 658, [1968] H.C.A. 9:

> The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst

> other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[442] In *Ibbitson*, the plaintiff had been a heli-faller – a worker who fells logs to be lifted from the forest by helicopter. He was unable to continue that work post-accident, so became a heavy equipment operator. By working longer shifts in this new role at a lower hourly rate, he was able to earn the same amount. The trial judge had concluded at paras. 66-69 that:

> [66] Putting a value on Mr. Ibbitson's impairment is a difficult task because his ability to remain working in a different capacity and earn essentially the same income – while working longer hours – has to be taken into account. This is a case where the assessment really is at large and resembles an assessment of general damages. The figures I have discussed above cannot be plugged into a formula.
>
> [67] Further, the dividing line between past loss and future loss becomes somewhat artificial, both because the assessment is at large and, given the medical evidence I referred to above, the end-period for future loss must be no later than 2012.
>
> [68] I must factor into account the downturn in demand for hand fallers after the accident. I have found that Mr. Ibbitson would be likely to be employed but that does not mean for the same number of hours per year.
>
> [69] Considering all of the above factors, I consider the appropriate value for loss of income earning capacity to be $125,000: $105,000 of this for past and $20,000 for future earning capacity.

[443] On appeal, the defendant argued that the trial judge erred in giving an award for past loss of earning capacity where the plaintiff had been able to earn the same income in that manner. Justice Garson concluded at paras. 19-21 that:

> [19] While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for

> loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.
>
> [20] In this case, the respondent clearly suffered as a result of the accident; he can no longer perform the job he was engaged in prior to the accident. He has suffered a pecuniary disadvantage as he needs to work longer hours to maintain his approximate pre-accident level of income.
>
> [21] The trial judge considered pre-trial earnings both before and after the accident, explaining that calculating a precise value for the extra hours was a difficult task, and chose to assess the damages "at large". Had Mr. Ibbitson worked the same amount of hours post-injury as he had pre-injury, he surely would have been found to have suffered a compensable loss of earning capacity. His entitlement to such damages does not disappear due to his industrious efforts to maintain his level of income, exceeding his legal requirement to mitigate. I agree with the trial judge's conclusion and analysis.

[444] In order to assess past loss of earning capacity, it is necessary to consider what the plaintiff's earning capacity would have been absent the accident. This is, in effect, a past hypothetical event. Like all hypothetical events, it is based on an assessment of real and substantial possibilities and not mere speculation: *Smith v. Knudsen*, 2004 BCCA 613 at para. 24.

[445] The question of real and substantial possibilities in the context of past loss of earning capacity was explored in *Gao v. Dietrich*, 2018 BCCA 372, an appeal by the defendant of an award of $100,000 for past loss of earning capacity. The plaintiff had been successful in work as a Senior Financial Services Representative and had a pre-accident goal of becoming a Financial Advisor. After the accident, her work performance suffered and she ended up becoming a Mortgage Underwriter, a position that did not require her to interact with people. By the time of trial, she had been promoted to a managerial position and did not seek a claim for loss of earning capacity post-trial. As explained by Justice Savage in the Court of Appeal at para. 22:

> The trial judge awarded Ms. Gao $100,000 for past loss of earning capacity. The trial judge adopted the capital asset approach to assessing the award for loss of earning capacity. She did so on the basis that the earnings approach was not appropriate because the loss was not easily measurable. She did not otherwise explain the quantification of the award.

[446] As in both *Rowe* and *Ibbitson*, there was no obvious past income loss. Justice Savage explained the necessary analysis at paras. 33-38:

> [33] In this case, there was no transparent income loss: Ms. Gao missed only one day of work and she became a Mortgage Underwriter, a position which paid more than her position as a Senior Financial Services Representative. The finding that there was a loss of capacity entailing a real and substantial possibility of past income loss involved the proof of both past facts and past hypothetical events.
>
> [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.
>
> [35] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed "the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events" (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.
>
> [36] A hypothetical or future event will be taken into consideration "as long as it is a real and substantial possibility and not mere speculation" (*Athey* at para. 27; see also *Rousta v. MacKay*, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: *Graydon v. Harris*, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff's claim: *Morlan v. Barrett*, 2012 BCCA 66 at para. 59.
>
> [37] If the plaintiff establishes a real and substantial possibility, then the court must weigh the hypothetical or future event according to its relative likelihood: *Athey* at para. 27. For example, "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk" (*Athey* at para. 27). In determining a fair and reasonable damage award, a court should make an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.
>
> [38] In contrast, past events must be proved on the balance of probabilities, and once they are proved, they are treated as certainties: *Athey* at para. 28; *Rousta* at para. 17. A court's conclusion regarding past events cannot be weighted according to its likelihood or probability: *Athey* at para. 28.

[447] Justice Savage concluded at paras. 62 and 66 that:

> [62] The capital asset approach may be appropriate in circumstances where the loss is not easily quantified. However, in my view, the approach is

> not a panacea for situations where what could have been proven, or at least given some evidentiary foundation, was not proven or given an evidentiary foundation. …
>
> …
>
> [66] Considered as a whole, the evidence simply did not rise to the necessary threshold of a real and substantial possibility of past income loss. Whether there was such a loss was at best speculative. I would vary the order below to dismiss the loss of past earnings claim.

[448] An award is assessed, rather than calculated mathematically. It should make allowances for contingencies where appropriate. It must be fair and reasonable taking into account all of the circumstances: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 178.

[449] A plaintiff is only entitled to recover the net amount of lost income: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98. As a result, the final award will ordinarily deduct the amount of income tax payable from lost gross earnings.

Principles Specific to Future Earning Capacity

[450] Assessing a party's loss of future earning capacity involves comparing a plaintiff's likely future, had the accident not happened, to their future after the accident. This assessment depends on the type and severity of the plaintiff's injuries, and the nature of the anticipated employment in issue: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[451] The proper approach to assessing future loss of earning capacity was canvassed by the Court of Appeal in *Rab*, where at para. 47, Justice Grauer set out the following 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 *Dornan* at paras 93–95.

[452] The plaintiff is not entitled to an award for loss of earning capacity if there is not a real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla* at para. 14. In describing the “real and substantial possibility” threshold in *Rab*, Grauer J.A. stated at para. 28:

> [28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v. Naumann*, 2017 BCCA 158:
>
> > [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[453] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. concluded at para. 75 that:

> [75] … to support a contingency deduction, the law does not require that the “measurable risk” involved be wholly inherent in the plaintiff’s pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.

[454] He continued at paras. 92-95 to note that:

> [92] …The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):
>
> > 46 …[C]ontingencies 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.
>
> 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.
>
> [Emphasis added.]
>
> [93] The process, then, as discussed above at paras 63–64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.
>
> [94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities. …
>
> [95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[455] In *Lo v. Vos*, 2021 BCCA 421, the plaintiff had developed severe depressive symptoms after the motor vehicle accident. The trial judge reduced the award of damages based on a "real and substantial possibility" that the plaintiff would have developed depression after the collision anyway as a result of pre-existing back pain. The Court of Appeal concluded that nothing in the evidence in the case was capable of supporting that conclusion, commenting at paras. 71, 74-75 and 78-79:

> [71] I observe at the outset that no expert in this case suggested that, absent the accident, the appellant was at risk of developing a major depressive disorder, or any of the other psychological problems that the appellant experienced after the accident, and which were found to be the cause of her continuing disability. There was no evidence of a risk of a natural (i.e., without accident) progression from the pre-existing state to the relevant future hypothetical event.
>
> …
>
> [74] The existence of a specific contingency such as was found here must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as

> opposed to a speculative possibility: *Graham* at 15; *Hussack v Chilliwack School District No. 33*, 2011 BCCA 258.
>
> [75] In my respectful view, nothing in the evidence in this case is capable of supporting that conclusion. There was no indication that the appellant had any inherent vulnerability to mental health problems because of her without-accident state. Instead, on the evidence, it took a particular combination of factors that began with the appellant's pre-existing condition, but also required the impact of the injuries caused by the accident in the form of (1) soft tissue and acute injuries leading to (2) a condition of chronic pain that, (3) when combined with PTSD arising from the accident, resulted in (4) the development of generalized anxiety disorder and major depressive disorder.
>
> …
>
> [78] I should add that it is, of course, essential to consider a plaintiff's pre-existing state, such as the appellant's low back problems here, in the assessment of damages. That is part of her original state, and distinguishes her from someone whose original state was free of any physical problems. But whether her original state gave rise to a measurable risk of a future hypothetical event is a different question, requiring additional evidence.
>
> [79] In the circumstances before us, it is my respectful view that the evidence was not capable of establishing, as found by the judge, a measurable risk that the appellant "would have developed a major depressive disorder consequent on chronic lower back pain even without the accident". That is no more than speculation.

[456] Thus, the trial judge's reasons reflected a palpable and overriding error. The Court of Appeal substituted the trial judge's award of $225,000 for loss of earning capacity with an award of $810,000.

[457] The challenges involved in applying these principles were the subject of recent discussion in *Charters v. Jordan*, 2024 BCCA 351. The trial judge had not made an award for future loss of earning capacity. Justice Horsman, for the majority, commented at para. 100 that:

> [100] The central task for a court faced with a claim for future loss of earning capacity is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157. This is, as has often been observed, a "notoriously difficult task": *Davies v. Penner*, 2023 BCCA 300 at para. 3. Damages are only assessed once, and therefore the court must make findings about the pecuniary impact of the plaintiff's accident-related injuries over the remainder of their working life. …

[458] Justice Horsman summarized the proper approach to the second-stage inquiry, noting at para. 108 that:

> [108] … the court should take a common-sense approach to the evidence in assessing the effect of pain on a plaintiff's ability to work over time. It is, for example, open to a trial judge to find as a matter of common sense that constant and continuous pain may take its toll over time in terms of a plaintiff's ability to work: *Gill v. Davis*, 2023 BCCA 381 at para. 12, citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41; *Davies* at para. 40.

[459] At paras. 116-117, Horsman J. noted that the trial judge had concluded that the plaintiff:

> [116] … suffered a significant injury that has led to physical limitations and persistent pain when she uses her dominant right wrist, requires modifications when she works as a painter or server, and restricts her ability to perform certain other types of jobs (i.e., heavy strength work). As found by the trial judge, the appellant had reached maximal recovery within a few months of the accident, and therefore her condition is unlikely to improve. Accordingly, the evidence disclosed a potential future event that could lead to a loss of capacity; that is, a chronic injury "giving rise to the sort of considerations discussed in *Brown*": *Rab* at para. 47.
>
> [117] Having identified a potential future event that could lead to a loss of capacity, the second stage of the *Rab* process required the judge to assess whether there is a real and substantial possibility that the appellant will suffer a future loss of income as a result of her right wrist injury. This, in my view, is where the judge fell into error.

Earnings Approach and Capital Approach

[460] With respect to assessing loss of earning capacity, there are two established approaches: (1) the "earnings approach"; and (2) the "capital asset approach": *Rab* at paras. 66-68; *Grewal* at para. 48; and *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both approaches are correct, but apply in different situations.

[461] The earnings approach is more straightforward, and is applicable when the loss is easily measurable: *Perren* at para. 32. For example, when an accident results in injuries that render the plaintiff unable to work at the time of trial, and for the foreseeable future: *Ploskon-Ciesla* at para. 11.

[462] The capital asset approach is less clear-cut, and is more appropriate when the loss "is not measurable in a pecuniary way": *Perren* at para. 12. For example, in instances where the plaintiff's injuries have led to continuing deficits, but their

income at trial is similar to what it was at the time of the accident: *Ploskon-Ciesla* at para. 11.

[463] Under either approach, the assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation: *Pololos* at para. 133. The questions of reasonableness and fairness of an award should be reviewed at the end of the assessment, once the real and substantial possibilities that are identified have been assessed and a preliminary conclusion has been reached: *Lo* at para. 117.

[464] Returning to the recent judgment in *Charters*, Horsman J. acknowledged at para. 118 the challenges inherent in assessing loss of future earning capacity in a plaintiff who is young and without an established work trajectory when injured. She concluded at para. 131 that in that case, an appropriate award for future loss would be based on the capital approach and quantified at $80,000, based on the approximate amount to be earned in two years of employment.

Analysis

[465] I begin by noting that I put no weight on the failure of the plaintiff to tender more than the six expert reports she tendered at trial. Those reports, along with the two tendered by the defendants, provide a cross-section of perspectives as to the plaintiff's injuries. In light of the restrictions on expert reports, I put little weight on parties identifying additional reports that might have been obtained.

[466] I turn to consideration of the plaintiff's earning capacity at various material stages, beginning with a consideration of the plaintiff's work history prior to the subject accidents. That history demonstrates resilience, fortitude and a determination to advance. The plaintiff began her time in Canada on social assistance, found sales positions in the retail sector, then advanced to day-to-day management of staff in a small business. She then became an entrepreneur. She demonstrated an ability to work long hours, to engage in hard physical work including cooking, cleaning, and serving customers, and an ability to work with others.

[467] The cases make clear that the court is to consider earning capacity, rather than simply the actual demonstrated income that was earned. It is my view, on the evidence, that the amounts the plaintiff actually earned during her time at Spa Rivage are substantially less than her earning capacity. As noted, she was a family member of the owner, Mr. Parvanta, who was covering at least some of the costs of a home for the plaintiff and her son as well as groceries, and also providing care for Kamiar. I accept the evidence of the plaintiff and Mr. Cornett that she was working very long hours and generally more than five days a week. It is clear that she was not being fully compensated for her work. A significant focus on the earnings generated from her work for this business would be unfair to the plaintiff and not an accurate reflection of her earning capacity. That said, it is beyond doubt that during her time at Spa Rivage, the plaintiff demonstrated the capacity to work full time, and more, at a then-economic rate of $12 per hour, which, if one assumes an average of 2,000 hours worked per year, would equate to roughly $24,000 per annum. This has to be the absolute floor for any consideration of the plaintiff's earning capacity – with due account taken of the fact that from 2005 to 2024 the consumer price index increased by approximately 50%.

[468] Similarly, the documentary records that appear to indicate that the plaintiff earned no employment income from the Coka Moka business are also of little assistance in assessing her earning capacity during the time she devoted to building that business. It is not clear from the records how and if she was compensated. She clearly must have found some way to pay basic living expenses. As I noted above, the hard reality is that many entrepreneurs seeking to start their own business work many hours for little initial financial return, in the hope that they are building for the future. Sometimes that does not work out. Once again, it is my view that too great a focus on the actual employment income derived from Coka Moka would be unfair to the plaintiff and not an accurate reflection of her earning capacity.

[469] One of the complications of this case is that the plaintiff's earning capacity increased substantially in the years following the 2007 MVA. The plaintiff immersed herself in the art world, learning about different marketing mechanisms, and built

relationships with several art galleries. It seems clear that this process had begun prior to the 2007 MVA, as she had begun working with Mr. Gajoum at some time in 2007. That makes it challenging in this case to assess the likely progression of the plaintiff's earning capacity in the absence of the subject accidents.

[470] In considering this question, it is my view that I must take into account the determination to build a better life that the plaintiff had already demonstrated, her willingness to work hard and learn about the businesses she engaged with, and the managerial and relational skills she had been developing through her work in sales, at Spa Rivage, and at Coka Moka. I conclude that the work she ended up doing in relation to Mr. Gajoum's art business, in which she applied many of those same skills, was a natural progression from the work she had been doing prior to the 2007 MVA.

[471] That does not necessarily mean that the income the plaintiff earned from her work as an art agent represents her actual earning capacity. The evidence indicated that the plaintiff tried but did not succeed in expanding to represent other artists. While she has continued to assist Kamiar with his career, he has been unable to generate art sales of a sufficient magnitude to generate any substantial management income. To some degree, the opportunity to manage Mr. Gajoum's career was a unique opportunity given both his talent as an artist and his ability to generate a commercial volume of work. It is also of significance that the plaintiff's business relationship with Mr. Gajoum coincided with a romantic relationship with him. While there was no specific evidence of any income-splitting intent, it is appropriate to be alive to that possibility.

[472] The parties advanced different positions as to the impact of the plaintiff's injuries on her relationship with Mr. Gajoum. The plaintiff clearly sees the impacts of her physical and psychological injuries as playing a significant role in the loss of her relationship with Mr. Gajoum. Mr. Gajoum in his evidence referenced multiple issues, including not only a lack of physical intimacy but also differences over how to communicate with galleries.

[473] As I assess the evidence, the plaintiff's injuries should be considered a cause, but not the sole cause, of her separation from Mr. Gajoum. Thus, in assessing the impact of those injuries on her earning capacity absent the subject accidents, and applying the mode of analysis found in the cases discussed above, I consider that there is a real and substantial possibility that absent the subject accidents, the plaintiff's relationship (both romantic and business) with Mr. Gajoum would have continued indefinitely.

[474] With the above analysis in mind, I turn to a consideration of the plaintiff's earning capacity absent the accident. Three amounts are identifiable on the evidence. The first is $36,000, which is the $24,000 referenced above as the value of one year's full-time work at $12 per hour in 2005, increased to represent inflation since that time. The second is $93,000, representing the average annual income earned by the plaintiff in her final seven years working with Mr. Gajoum. The third is $57,100, representing Statistics Canada's calculation of the average income of women living in British Columbia with a high school diploma or equivalent (as identified in Mr. Benning's report).

[475] For the reasons set out above, it would not be appropriate to simply accept the $93,000 amount as the plaintiff's earning capacity. In my view, given the characteristics of the plaintiff as set out above, and in particular the characteristics she displayed in her work with Mr. Gajoum, the average amount of $57,100 is inappropriately low. I conclude that an appropriate amount to consider as the plaintiff's earning capacity, absent the subject accidents, for purposes of this claim is $65,000 per annum.

[476] I turn now to consideration of the plaintiff's earning capacity in light of the subject accidents.

[477] As detailed in my discussion of causation, I accept that the plaintiff has suffered since the 2007 MVA from chronic pain, anxiety and depression. The pain she has suffered has limited her to sedentary work. Her chronic pain over a period of years has taken its psychological toll as well. Her physical and psychological

conditions require ongoing management through medication and therapy. To the extent she manages those conditions properly, it is my view that she is able to work, although I accept that the conditions and the efforts required to manage those conditions restrict her ability to work full-time hours and limit her to primarily sedentary roles.

[478] For the reasons set out in my discussion of mitigation, it is my view that the plaintiff's losses should be assessed on the basis of her earning capacity as it existed in 2015 and 2016, before she withdrew from the various therapies and medications that had allowed her to work and earn the significant incomes that she earned in the first half of that decade.

[479] To use the language of the *Brown* factors (set out above), the plaintiff has been rendered less capable overall of earning income from any type of employment, and is thus less marketable as an employee to potential employers. Based on her condition in 2015 and 2016, she has a reduced ability to take advantage of job opportunities, including to further develop work as an art agent or to perform any other sort of work that would employ the skills she has developed from her various experiences over the years.

[480] I will deal first with the plaintiff's past loss of earning capacity.

[481] In my view, the evidence indicates that in the months following the 2007 MVA, the plaintiff was significantly impacted in her ability to work. She steadily improved over the course of 2008, suffered a setback at the time of the 2008 MVA, but by the second half of 2010 was receiving a salary of $4,000 per month. As I assess the evidence as to the plaintiff's physical condition, her injuries continued to require significant management, to limit her ability to work in the mornings, and also limit the duration of her overall work days. From 2010 to 2012, her condition gradually improved to the point where she was able to work through her pain and contribute significantly to Mr. Gajoum's art business, although she continued to be impaired to some degree. The plaintiff reached her maximal recovery by 2012, and her condition remained relatively stable until 2016, after which it deteriorated – but as noted

above, given my conclusions on mitigation, it is not appropriate to consider that deterioration.

[482] I am satisfied that there has been a past loss of earning capacity. The challenge in the particular circumstances of this case is to quantify that loss. From 2008 through 2010, the plaintiff's annual earnings as reported on her income tax returns were less than what I have identified above as her earning capacity. However, it is my view that in part, that amount represented her learning a new business and proving her ability to work as an art agent. Thus, it would not be appropriate to simply apply the difference between what she earned in those years and the $65,000 earning capacity I have identified.

[483] Then, from 2011 through 2017, the plaintiff's reported income exceeded the $65,000 earning capacity number I have identified.

[484] From 2018 to the time of trial, the plaintiff has earned minimal income. In my view, while a portion of the initial decrease would represent a transitional period from the conclusion of her long-standing work with Mr. Gajoum, a large part of it represents the impact of her failure to mitigate. I do not accept the plaintiff's assertion that the plaintiff's earning capacity is now only $10,000 per annum.

[485] In all of the circumstances, it is my conclusion that the facts of this case simply do not lend themselves to the application of the earnings approach in respect of the plaintiff's past loss of earning capacity. I will return below to the assessment of this loss.

[486] I turn now to the question of future loss of earning capacity. I accept that the chronic pain and psychological issues that have impacted the plaintiff will continue to impact her, which satisfies the first stage of the *Rab* analysis. I accept that there is not only a real and substantial likelihood, but a very high likelihood, that these conditions will continue to impact the plaintiff. These satisfy the second stage of the *Rab* analysis.

[487] The more challenging question in the circumstances of this case is to assess the value of the potential future loss. I will begin by considering the plaintiff's current earning capacity.

[488] The significant changes in the plaintiff's condition since 2016 make assessment of her current earning capacity difficult. For the reasons set out above, it is my view that the plaintiff's with-accident earning capacity should be assessed based on her earning capacity in 2015 and 2016. As such, I consider that the plaintiff has the capacity to generate income, but that her capacity to generate income is limited in the same ways as set out with respect to her past loss of income. As with past loss of earning capacity, however, it is my view that in the circumstances of this case, there is no appropriate means to apply the earnings approach to assess damages for future loss of earning capacity.

[489] I turn finally to questions of contingencies. The defendants advanced a number of contingencies in their submissions, for consideration in this context, which I have set out above. With respect to those:

a) In my view, the evidence does not support any reasonable prospect of the plaintiff's pain burden improving over time. Based on the evidence of the experts, while there will be waxing and waning of symptoms, the point of maximal recovery is generally reached no more than four years after an accident.

b) Given that the cases focus on the plaintiff's earning capacity, rather than simply tallying reported income amounts, the possibility that she may not return to live in Vancouver should have no impact on assessment of that capacity.

c) I do not accept that there is any basis to find that there is a real and substantial possibility that, absent the subject accidents, the plaintiff would have been limited to part-time work and periods of unemployment. This submission appears to me to be founded on an assumption that the Court

should look only to documented income receipts. I reject that assumption. I accept the evidence of the plaintiff, Mr. Cornett, and Kamiar, as to the plaintiff's long work hours prior to the 2007 MVA, and see no basis to consider a real and substantial possibility that she would not have continued to be ready, willing and able to work such long hours absent the subject accidents.

d) I accept that the plaintiff did not have a great degree of formal education and training prior to the subject accidents. However, given that her earning capacity is assessed based on her personal characteristics and overall work history, rather than based on any formal education or training, I do not accept that this would appropriately found a contingency.

e) The final contingency deduction sought by the defendants is based on the fact that the plaintiff completed all required work tasks for several years. I do not accept the foundation of this assertion. As noted above, it is my conclusion that the plaintiff was hampered in her work by the injuries arising from the accidents.

[490] The defendants also seek a separate contingency deduction based on the plaintiff's reports from 2003 to 2005 of physical and psychological issues. For the reasons set out above, I have concluded that these conditions did not impact the plaintiff in the two years preceding the 2007 MVA. As discussed in my analysis of the Causation issue (paras. 376-389 above), while the plaintiff was vulnerable to further physical and psychological injuries, she had also displayed great resilience in the past. I do not accept that either the 2008 hospital incident or the 2017 separation from Mr. Gajoum would have triggered any lasting psychological conditions were it not for the subject accidents, and no other event has been identified in the over 16 years since the 2007 MVA that would have led to a return to chronic pain.

[491] As noted in *Gao*, hypothetical events are to be considered where they are a real and substantial possibility, but not a possibility that is speculative. I struggle with concluding that there is a real and substantial possibility of a hypothetical event that

would have caused a recurrence of the plaintiff's prior symptoms even in the absence of the subject accidents. In my view, to the extent there is any such contingency, it should be given little weight.

[492] As should be clear from the above analysis, it is my view that this is a case in which damages should be assessed on the basis of the capital approach. It is my view that given the length of time that has passed since the subject accidents, the dividing line between past and future loss is artificial (to use the words of the trial judge in *Ibbitson*).

[493] The capital approach applies a multiplier to the plaintiff's annual earning capacity. In cases involving future earning capacity, that multiplier is often either one or two years, although some cases provide a broader range. In this case, I am mindful that the plaintiff was age 30 and 31 at the time of the subject accidents – with a lengthy working life ahead of her. She was 46 at the time of trial. During some of the pre-trial years, her actual earnings exceeded what I have considered to be her earning capacity. As discussed, there is also a real and substantial possibility that absent the subject accidents, the plaintiff would have continued to work with Mr. Gajoum and earned greater amounts than what I have found to be her earning capacity.

[494] In all of the circumstances, I am of the view that an overall award based on approximately 2.5 times the plaintiff's annual earning capacity is appropriate, of which 40% (i.e., one year) will be attributed to pre-trial or past loss of earning capacity and 60% (i.e., 1.5 years) will be attributed to post-trial or future loss of earning capacity (with a small amount of upward rounding, from $97,500 to $100,000, given that damages are assessed rather than calculated).

[495] I thus award:

a) $65,000 in respect of pre-trial loss of earning capacity – this is a gross number and will have to be adjusted to reflect a net number; and

b) $100,000 in respect of future loss of earning capacity.

In my view, this is a reasonable and fair award for the plaintiff's loss of earning capacity.

Cost of Future Care

Legal Principles

[496] The purpose of an award for the cost of future care is to restore the injured party to the position they would have been in, but for the accident. In *Gao*, the Court of Appeal summarized the applicable principles at paras. 68-70:

> [68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:
>
> > In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "*restitutio in integrum*" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.
>
> [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
>
> [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[497] Assessing damages for cost of future care is not a precise accounting exercise. As noted in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21:

> [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for

> all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[498] The test is whether a "reasonably minded person of ample means would be ready to incur the expense": *Brennan v. Singh*, [1999] B.C.J. No. 520, 1999 CarswellBC 484 at para. 78 (S.C.); *Cheema v. Khan*, 2017 BCSC 974. The court must be satisfied that the care item is one that the plaintiff would, in fact, use; that it was made necessary as a result of the accident; and it is not a care item that the plaintiff would have procured in any event: *Williams v. Sekhon*, 2019 BCSC 1511 at paras. 171-172.

[499] The plaintiff's claims in respect of cost of future care include costs related to assistance with housekeeping. For purposes of analysis, I will deal with those claims separately.

Expert Evidence – Cost of Future Care

[500] The plaintiff tendered a report dated November 5, 2023, prepared by Ms. Claudia Walker, a registered occupational therapist. In preparing her report, Ms. Walker reviewed a number of medical reports, identified the treatment recommendations in those reports, and then prepared cost estimates for each of those items. She did not interview the plaintiff – rather, her report was prepared based on her document review.

[501] As noted above, Mr. Benning's report provided present value calculations for the various items identified by Ms. Walker.

Positions of the Parties

[502] The plaintiff's claims are based on the amounts set out in Ms. Walker's report. The first item is a claim for oral appliances (day and night) to help with management of the plaintiff's jaw issues. These are based on Dr. Mehta's recommendation. Ms. Walker has estimated the cost at $500 to $1,000, with replacement

approximately every two years. Based on the midpoint of $750, Mr. Benning calculates a present value for this claim of $10,301.

[503] Ms. Walker has also identified various recommendations for physical therapy and exercise, based on recommendations of Dr. Stewart and Dr. Parhar. The specific recommendations, and associated periodic costs, are:

a) physiotherapy, with unit cost ranging from $110 to $142 and a frequency of 12 to 24 per year, for annual costs ranging from $1,320 to $3,408 – based on the midpoint, the present value is $49,643;

b) massage therapy, with a unit cost ranging from $94 to $115 and a frequency of 12 to 52 per year, for annual costs ranging from $1,128 to $5,980 – based on the midpoint, the present value is $78,364;

c) kinesiology, with a one-time set of 12-18 sessions at a unit cost of $105, for a present value based on 15 sessions of $1,636;

d) annual gym passes, with costs of $443 to age 64 and $310 from age 65, for a present value of $8,883; and

e) home exercise supplies of $200, with replacement every two years, for a present value of $2,342.

[504] Ms. Walker identified a recommendation that the plaintiff have counselling from a clinical psychologist. Based on six sessions per year for the next 20 years, and a rate of $235 per session, the present value of this is $22,779.

[505] Ms. Walker has identified a recommendation from Dr. Parhar that the plaintiff be assisted with sleep aids, including an appropriate cervical pillow, bed mattress, and mattress overlay. The estimated cost is $1,500, with replacement every seven years, for which the present value is $7,205.

[506] Ms. Walker has identified a recommendation from Dr. Parhar that the plaintiff be provided with ergonomic seating, at a once-only cost of $2,000 plus applicable tax, with a present value of $2,216.

[507] Finally, Ms. Walker has identified recommendations from Dr. Parhar that the plaintiff have:

a) an occupational therapy evaluation, which among other things could lead to appropriate guidance as to sleep aids and ergonomic seating, for which the recommendation is six hours at $130, with a present value of $772; and

b) vocational counselling, for which the recommendation is six hours at $150, with a present value of $935.

[508] The total present value of these recommendations is by my calculation $185,076.

[509] The defendants submit that the future care recommendations are all based on the plaintiff's subjective reporting. Given the issues with the plaintiff's reliability, the defendants submit that there is no proper foundation for any of the recommendations.

[510] The defendants further submit that, to the extent that the plaintiff has not to date put a recommendation into effect, the Court should be reluctant to make an award in respect thereof. They say that the plaintiff has attended treatment sporadically, and that in recent years treatment has been primarily outside of Canada. Although the plaintiff gave evidence, with respect to each of the recommended treatments underlying this claim, that she would attend that treatment, some of the treatments were recommended several years ago (for example, jaw physiotherapy) and she has not yet taken up that treatment.

[511] The defendants also argue that all of the cost estimates provided are for treatment in Vancouver, and that while the plaintiff has indicated an intention to return to Vancouver, she has been primarily living in Turkey in recent years.

[512] The defendants thus submit that the plaintiff is not truly in need of any of the recommended treatments, and as a result no award should be made for cost of future care.

Analysis

[513] It is somewhat troubling to me that the plaintiff's compliance with recommended treatments has been intermittent. I note that she has, in the year leading up to the trial, been more proactive at least with respect to the physical therapies. Fundamentally, however, the amounts that are being awarded to the plaintiff in respect of non-pecuniary losses and loss of earning capacity are significantly lower than sought on the basis that the plaintiff should have mitigated her losses by obtaining treatments of the nature that are the foundation of her claim for cost of future care. In my view, in fairness to the plaintiff, it is appropriate to accept her evidence that she will engage in the various recommended treatments and compensate her for the costs thereof.

[514] I note that I have not placed substantial reliance to this point on Dr. Parhar's report. I have concerns about the manner in which it was produced, which I have expressed above. I do, however, find that his recommendations as to the plaintiff's future care needs are grounded in common sense as well as a detailed review of past medical reports. His recommendations are also consistent with my findings as to the plaintiff's condition.

[515] I acknowledge the defendants' concern that the plaintiff has been spending the bulk of her time recently in Turkey. I accept that she and her husband wish to live in British Columbia, but I also recognize that there may be issues with bringing that to reality, and so there is uncertainty as to where she will be living at the time she is incurring these expenses. Fundamentally, however, I accept that all of the recommended future care items are appropriate and causally connected to the

plaintiff's injuries from the subject accidents. I have no information as to whether the costs would be more or less in Turkey or anywhere else the plaintiff might live.

[516] I accept that the cost estimates provided by Ms. Walker and her recommended frequencies of treatment (as listed above) are all appropriate, and award the plaintiff $185,076 in respect of cost of future care (excluding housekeeping issues).

Loss of Housekeeping Capacity

[517] The plaintiff has sought two different awards in respect of loss of housekeeping capacity. In submissions, the plaintiff proposed a segregated award of $35,000 in respect of non-pecuniary losses to reflect the plaintiff's loss of housekeeping capacity. In my view, this submission relies on authorities that have been superseded by more recent appellate authorities, which discourage segregated awards for non-pecuniary losses.

[518] The plaintiff has also included a claim for compensation for housekeeping assistance in her claim for cost of future care. The claim is based on Ms. Walker's report, which provides the following costs:

a) regular domestic assistance of two to four hours each week, for which the present value is calculated as $125,028; and

b) heavy seasonal cleaning assistance of 16 to 24 hours per year, for which the present value is calculated as $19,448.

Thus, the total pecuniary award sought for loss of housekeeping capacity is just under $145,000.

[519] The law related to loss of housekeeping capacity was summarized by Justice Basran in *Steinlauf v. Deol*, 2021 BCSC 1118 at para. 222, aff'd 2022 BCCA 96 at paras. 116-117:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.

- A plaintiff who has suffered an injury that would make a reasonable person in his circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

[520] The summary of legal principles set out by Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 at para. 67, is to similar effect, and was cited with approval in *McKee v. Hicks*, 2023 BCCA 109 at paras. 106-107. In *McKee*, the Court explained what some had thought was a difference between the approaches in *Kim v. Lin*, 2018 BCCA 77 and *Riley v. Ritsco*, 2018 BCCA 366. The Court in *McKee* noted at paras. 108–109 and 112:

> [108] It is important to recognize that *Kim* and *Riley* dealt with somewhat different issues. *Kim* considered a situation of genuine incapacity – one where the injuries made it unreasonable to expect the plaintiff to perform some household tasks. *Kim* established that such claims are typically to be dealt with by awarding pecuniary damages. Further it states that such damages should generally be assessed with a view to the cost of obtaining replacement services on the open market.
>
> [109] *Kim* recognizes, however, that the preference for awarding pecuniary damages in such cases is not absolute. A judge retains discretion to assess damages as non-pecuniary, where it is considered appropriate to do so. The case also suggests (citing *McIntyre v. Docherty*, 2009 ONCA 448) that, in some cases, full compensation for the loss of housekeeping capacity may require an award of both pecuniary and non-pecuniary damages.
>
> …
>
> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[521] The defendants argues that there is no evidence that the plaintiff was required to pay for a housekeeper prior to 2017, when she separated from Mr. Gajoum, and that while she gave evidence that her husband now pays for housekeeping services, her husband did not confirm that evidence nor did he provide any evidence as to the actual costs. The defendants also say that there is no functional capacity evaluation confirming the alleged restrictions on the plaintiff's housekeeping capacity. Thus, the defendants says that there should be no award made under this head of damage.

[522] The plaintiff's evidence was that, while she was with Mr. Gajoum and Kamiar was living with them, they assisted with heavier housework and she was required only to do lighter tasks. Her evidence was that she now has help with housework when she is in Istanbul, and the frequency of that help depends on whether either Mr. Saban or Kamiar are there at the time.

[523] The evidence seems to be clear that, even before the concerns I have identified with respect to mitigation, the plaintiff was being provided with the help of others – albeit on a voluntary basis – with respect to heavier housework, while continuing to perform some light housework herself. In my view, these are the sorts of circumstances that appropriately attract a pecuniary award as well as some consideration in respect of the non-pecuniary award. The award I have made of non-pecuniary damages reflects the "difficulty or frustration" the plaintiff would have experienced for the housework that she performed herself notwithstanding her injuries.

[524] I accept the plaintiff's evidence that there are some parts of regular housekeeping work that she has been unable to do as a result of her injuries from the subject accidents. I accept that others, such as Mr. Gajoum in the past, Kamiar when he has been living with her, and more recently Mr. Saban, have all contributed. I also accept the plaintiff's evidence that she now has housekeeping assistance – with the number of hours dependent on whether Mr. Saban is in town.

[525] In these circumstances, it is my view that a pecuniary award is appropriate. I accept that the pecuniary award relates to a significant number of years, given the plaintiff's age. However, I do see the claim of $145,000 as being somewhat excessive. In my view, an appropriate pecuniary award for loss of housekeeping capacity in the circumstances of this case is $75,000.

Special Damages

[526] The plaintiff tendered evidence of special damages by way of three notices to admit. The amounts claimed total $23,560.95. In respect of each notice to admit, the defendants admitted that the expenses were incurred but denied that the expenses were a result of either the 2007 MVA or the 2008 MVA.

[527] The expenses included in these notices to admit, which I understand to be net of any amounts already covered by Part 7 benefits, are organized by vendor and are summarized as follows:

a) chiropractic treatments in February 2008 totalling $90;

b) physiotherapy treatments from October 2008 to August 2015 totalling $9,035;

c) massage therapy from April 2008 to December 2009 totalling $2,481.97;

d) homeopathy treatments in January and May 2008 totalling $312.90;

e) counselling with Dr. Hearn from April to July 2008 totalling $640;

f) massage therapy in France in July 2009 for $267.51;

g) active rehabilitation beginning in September 2009 totalling $1,638;

h) active rehabilitation beginning in February 2012 for $873.60;

i) treatment at Cosmedica Institut in 2013 at a total cost of $1,001.42 – the plaintiff explained that this treatment was sought because her leg had become swollen, which caused her discomfort in swimming;

j) treatment at Azienda ULSS in Venice in May 2010 at a cost of $1,498.87 – the plaintiff explained that she was in Venice with Mr. Gajoum and was in a lot of pain and so had to visit the hospital;

k) a private MRI of her right knee in June 2012 for $895 (based on the recommendation of her family doctor);

l) additional massage therapy in July 2009 totalling $194.97;

m) physiotherapy in January and February 2009 totalling $88;

n) massage therapy from October 2009 to September 2010 totalling $1,090;

o) pharmaceutical costs from February to May 2008 totalling $105.68;

p) pharmaceutical costs from August to November 2008 totalling $105.83;

q) pharmaceutical costs from January 2009 to May 2014 totalling $1,478.34;

r) taxi expenses on December 27, 2007 and January 4, 2008, totalling $84.50;

s) physician fees in Tunisia in December 2014 totalling $22.10 – with respect to this, the plaintiff explained that she was in pain with respect to her injuries from the subject accidents and went to see a doctor;

t) physician fees in France in August 2013 totalling $44.87 – with respect to this, the plaintiff explained that she had some pain and there was a doctor below her apartment in France;

u) BC Ambulance Service fees totalling $80.00 in respect of December 27, 2007;

v) an MRI of the plaintiff's neck in Turkey in October 2023 at a cost of $223.37;

w) gym membership costs in Turkey from December 2018 to August 2019 totalling $261.61; and

x) massage therapy costs in Turkey in June and September 2019 totalling $145.35.

[528] The plaintiff submits that all of these expenses were reasonably incurred and were causally connected to the two subject accidents.

[529] In closing submissions, the defendants accepted a limited number of the claims – specifically, the ambulance charge, taxi fees, the pharmaceutical costs listed above, Dr. Hearn's fees, and certain physiotherapy expenses from 2008. The defendants continued to dispute all of the other expenses. Notwithstanding that the defendants had admitted in the notices to admit that these expenses were all incurred, the defendants in closing submissions raised objections that for some of the invoices in the notices to admit, the plaintiff had not also put payment receipts in evidence.

[530] The defendants also raised objections that:

a) there was no justification for undergoing a private MRI in June 2012, rather than waiting for one through the public system, given that this was more than four years after the 2007 MVA – the plaintiff's only explanation was that it was available and she could afford it;

b) there was similarly no justification or really any evidentiary foundation for the plaintiff obtaining a private MRI in Turkey in 2023;

c) there were no clinical records or other explanation for the doctor's treatments in France and Tunisia;

d) there was inadequate explanation in the documents with respect to the Cosmedica treatments; and

e) several of the invoices did not provide adequate detail of the specific services provided.

[531] I must express my disappointment that it took until the final day of trial for the defendants to accept even the costs of the ambulance that transported the plaintiff to hospital immediately following the 2007 MVA. There clearly appears to have been a failure to grapple with much, if any, of the special damage claims advanced.

[532] I am concerned at the lack of documentation of and specific explanation with respect to the doctors' and hospital visits in Europe and Tunisia. I am also concerned at the lack of explanation as to the need for private MRIs. I am also not convinced that the Cosmedica treatments have been adequately explained.

[533] I do, however, accept that the other treatments advanced – the bulk of which relate to physiotherapy and massage therapy – were all appropriately incurred and causally connected to the subject accidents.

[534] By my calculation, the total of those claims is $18,973.26.

Conclusion

[535] For the reasons set out above, I would award:

a) non-pecuniary damages of $150,000;

b) loss of past earning capacity of $65,000 (subject to adjustment to a net amount);

c) loss of future earning capacity of $100,000;

d) cost of future care of $185,076;

e) loss of housekeeping capacity of $75,000; and

f) special damages of $18,973.26.

[536] The plaintiff is entitled to applicable court order interest.

[537] Should either party seek costs other than the usual order, they should provide their submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate. If neither party makes a submission with respect to costs, then the plaintiff will have her costs on Scale B.

[538] If the parties identify any mathematical errors, or if there is any issue that I have failed to deal with that was properly before me or that arises from these reasons for judgment, then the parties may seek clarification or determination of those matters, with the same schedule for submissions as in respect of costs.

"Veenstra J."