

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Campbell v. Leslie*,
2024 BCSC 2351

Date: 20241223
Docket: M203323
Registry: New Westminster

Between:

Lisa Marie Campbell

Plaintiff

And

Glenn Bruce Leslie, Chaiti Chowdhury and Shoibal Chowdhury

Defendants

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.
November 27-30, 2023
December 1, 2023
July 29-31, 2024
August 1, 2024

Place and Date of Judgment:

New Westminster, B.C.
December 23, 2024

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INTRODUCTION

[1] The plaintiff, Lisa Marie Campbell, makes a claim for damages arising out of a motor vehicle accident that took place on September 17, 2016, at or near the intersection of Dewdney Trunk Road and Lougheed Highway in Coquitlam, British Columbia (the “Accident”).

[2] Ms. Campbell was a front seat passenger in a 2006 GMC Sierra (the “GMC”) which was being driven by the defendant Glenn Leslie. At the time of the collision, a 2014 Honda Civic (the “Honda”) being driven by the defendant Chaiti Chowdhury was travelling eastbound on Dewdney Trunk Road. Both vehicles entered into the intersection and collided, resulting in damage to the front passenger side of the GMC, where Ms. Campbell was sitting, and the rear driver’s side of the Honda.

[3] Liability with respect to the Accident was admitted by the defendant Glenn Bruce Leslie.

ISSUES

[4] The issues at trial were:

1. Whether Ms. Campbell’s alleged injuries were caused by the Accident; and, if so
2. Whether Ms. Campbell is entitled to damages under the following categories:
 - a. non-pecuniary damages;
 - b. past income loss;
 - c. loss of future earning capacity;
 - d. loss of housekeeping capacity;
 - e. costs of future care; and
 - f. special damages.

BACKGROUND

Pre-Accident History

[5] Ms. Campbell was born in British Columbia, and is 57 years old. She currently lives in Abbotsford with her common law partner, the defendant Mr. Leslie, with whom she has cohabited since 2010. She has three children from her previous marriage, ages 34, 32, and 30.

[6] Ms. Campbell testified that she completed high school at Centennial Secondary and then attended an accounting program at Douglas College for which she received a diploma in 1986. For years, Ms. Campbell worked at various companies in administrative roles until she attended Stenberg College and received her Special Education Assistant Diploma on December 7, 2007.

[7] Ms. Campbell testified that she was hired by School District #43 (Coquitlam) as a Teacher’s Assistant in 2006 and then in 2007 as a Special Education Assistant (“SEA”) following the completion of her diploma. As a SEA, Ms. Campbell worked with children who had various physical and developmental special needs.

[8] At the time of the Accident, Ms. Campbell was working as a SEA at Gleneagle Secondary School where she had been employed since 2013. Following the Accident in 2016, and a period of medical leave, Ms. Campbell returned to work at Gleneagle Secondary School. In 2019, she changed schools and moved to Terry Fox Secondary School, where she continued to work as a SEA until she went on disability on November 27, 2019. Ms. Campbell has not worked since that time and has remained on disability.

[9] Ms. Campbell’s SEA job was a union position under a collective agreement with a pension and benefits. Annually, she would work as a SEA ten months during the school year and then apply for and receive Employment Insurance benefits every July and August during the summer holidays. About a year before the Accident, she also started working after school as a tutor with autistic students, for which she was paid \$30/hour.

Pre-Existing Conditions and Injuries

[10] Ms. Campbell had various health conditions and injuries prior to the Accident. She had been off work a number of times relating to injuries prior to the Accident but was able in each instance to return to work.

[11] Ms. Campbell testified that her job as a SEA can be a “very hands on job”. In 2009, Ms. Campbell was punched in the right side of the head by a student with whom she was working. Ms. Campbell testified that she sustained a concussion from this incident but no long-term effects.

[12] In 2010, Ms. Campbell injured her right shoulder in an attempt to keep a student from falling and then later experienced increased right shoulder symptoms when a student shoved her. Ms. Campbell testified that she was off work for a month or two recovering from her shoulder injury and received a work accommodation thereafter that excluded her from activities that involved lifting greater than 10 to 15 kgs or reaching above her head.

[13] Ms. Campbell injured her right hip on November 25, 2013 while pushing a wheelchair, which required her to take time off work. She had surgery for a torn labrum in the groin area on June 9, 2015. Ms. Campbell testified that she was off work for quite some time due to her hip injury but returned to work in January 2016, which was about nine months prior to the Accident.

[14] In addition to the injuries described above, Ms. Campbell admitted in her testimony that she had the following pre-Accident conditions and/or injuries:

- Migraines, generally experienced one week per month in relation to her menstrual cycle. She had experienced these for a lengthy time prior to the Accident and was experiencing them at the time of the Accident;
- She was in a 1998 motor vehicle collision, resulting in left shoulder, neck, and back issues. She testified that the symptoms from this accident resolved after a couple of years;

- Plantar fasciitis in her right foot, which developed about seven years before the Accident and resolved within a year;
- Chronic neck pain for many years;
- Depression, initially post-partum and then related to her divorce in 2004. The depression was managed with Celexa, which she was taking up to the date of the Accident; and
- Sleep and snoring issues, for which she uses a CPAP machine.

[15] Despite this history of health issues, Ms. Campbell testified that in the months prior to the Accident in 2016 her mood was good, she was doing well recovering from hip surgery and was getting healthy with her diet and exercise. She testified that she had no other health issues that were restricting her from doing her job at that time other than the shoulder, which required accommodation.

The Accident

[16] The Accident occurred on September 17, 2016. Ms. Campbell testified that, immediately prior to the collision, Mr. Leslie told her to “hold on” as he slammed on the brakes and swerved to the left, which caused her to hit her head and right shoulder on the passenger door window. When Mr. Leslie’s GMC hit the Honda Ms. Campbell recalled she “went all floppy in the air” and her heels then came down and hit a metal bar that was located underneath her seat. She testified that at the time of the Accident she was wearing open backed shoes.

[17] Ms. Campbell testified that following the Accident she got out of the truck and felt “a little disoriented”. She went back to sit in the truck because she “wasn’t feeling very good”. Ms. Campbell stated that she was dizzy, that her cheek really hurt from banging the window, that her body felt bruised, that she had a headache, and that her neck was feeling awkward and sore.

[18] She testified that when she got home, she was not feeling very good at all. She felt nauseous and wanted to go to bed. She took Tylenol and applied a heating

pad and then retired to bed. That night her lower and middle back were really starting to tighten and tense up.

[19] Ms. Campbell testified that the next day she felt like the backs of her feet were bruised and she really noticed the tenderness when she tried to put shoes on. She iced her feet to keep the swelling down. That day she stayed at home and “laid low” on the couch and in her bed due to the pain and discomfort.

[20] As a result of the Accident, the damage to the GMC was estimated to be \$9,331.89 and damage to the Honda was estimated to be \$15,460.42. The Honda was written off as a total loss.

Post-Accident Health History

[21] Two days after the Accident, Ms. Campbell visited her family physician, Dr. Clutterham. Ms. Campbell testified that she reported symptoms to Dr. Clutterham of headaches, severe neck pain, back pain, bruising on her legs and feet and hip, as well as right leg and hip pain. She recalled her shoulder was sore from hitting the window, and her thumbs painful from hanging on during the Accident. She did not report foot pain, other than the bruising.

[22] Ms. Campbell testified that she visited Dr. Clutterham again a week later and reported that her feet were really bothering her and that she couldn't wear running shoes because the back of her foot where the Achilles attaches to the bone was so painful. She told Dr. Clutterham that the pain was getting worse, that it “sent knives into her foot”, and that she felt like she was “stepping on little pins”.

[23] Ms. Campbell also testified that she attended massage at Bodhi Tree Wellness and physiotherapy at Glover Physio & Wellness soon after the Accident and reported symptoms in her neck, back, and feet during the course of those treatments. She received massages at Bodhi Tree Wellness for her feet and back. She received treatment at Glover Physiotherapy for her feet, neck, and back. Ms. Campbell also attended the Langley Sports Medicine Clinic for shock wave treatment on her shoulder and Achilles to break up the calcium deposit, which she

described as very painful but ineffective. She also received massages on her heel at that clinic.

[24] Ms. Campbell testified that during a vacation in Mexico in March 2017, her feet became so painful that she attended Peace Arch Hospital upon her return home and was put into a walking cast. She testified that she was referred to the orthopaedic surgeon Dr. Kwee who first saw her in April 2017. Ms. Campbell reported her foot pain as well as the pain in her right shoulder to Dr. Kwee. Ms. Campbell testified that she saw Dr. Kwee for around a year and that she was given a walking boot with a heel lift that she wore off and on for eight months as well as a cortisone injection into her right shoulder.

[25] Ms. Campbell was referred to orthopaedic surgeon Dr. Roberts by Dr. Clutterham. Ms. Campbell reported to Dr. Roberts about the difficulties she was having with her feet. She testified that she told Dr. Roberts that she was in constant pain, could not wear normal shoes, that she “lived in flip flops”, which were inappropriate shoes for work, and was having difficulty participating in everyday activities, including work.

[26] Ms. Campbell testified that Dr. Roberts recommended surgery and that surgery was performed on her right foot at Burnaby General on March 2, 2021. Ms. Campbell testified that the recovery from surgery was very painful, necessitating crutches, braces, and a mobility scooter for her foot. She had a cast on her foot for around two-and-a-half months before being put in a boot cast.

[27] Ms. Campbell testified that she did physiotherapy after surgery but it felt like “2 steps forward and 3 steps back”. She can now walk on her own but has not tried running yet. Ms. Campbell testified that she has only recently plateaued from the surgery but it has been emotional. She “did not do well” with the pain, which has been “24/7 since 2016, day and night”.

[28] With respect to the feet and ankles, she testified that she still has pain on both sides but the pain in the left foot is worse. She is still wearing backless shoes. If

she wears full shoes she has to put on a sock booty, which is like a second skin on both sides.

[29] Ms. Campbell testified that activities that aggravate the pain include walking, stairs and hills. The activity that has the least amount of pain she described as “sitting on her butt”. She has also had issues with her balance, which she stated has resulted in a number of falls.

[30] Ms. Campbell testified that she was supposed to have surgery on her left foot but Dr. Roberts took a leave of absence from April to November of 2023. Ms. Campbell testified that she is very nervous about having more pain brought on again with the second surgery and her ability to handle the pain.

[31] Ms. Campbell testified that she is currently receiving counselling from Dr. Jackson, a psychologist. Ms. Campbell testified that she reported to him how she was feeling with her depression and anxiety including suicidal thoughts, her difficulties dealing with her pain, her recent irritability and short temper (she had never been like that before), and her difficulties sleeping. She testified that Dr. Jackson has shown her different techniques, such as grounding, to regain her composure and how to handle different situations.

[32] Ms. Campbell testified that, among other treatments for her various injuries, she has also attended for shockwave treatment, physiotherapy, and massage at Langley Sports Medicine; physiotherapy and massage at Allied Coast Therapy; chiropractic treatment with Dr. Paterson; kinesiology with Kevin Mitchell; occupational therapy with Kim Gibson; physiotherapy and massage at Back in Motion; and aquatic rehab with Aaron from Symmetry Injury Rehabilitation. Among others, Ms. Campbell testified that she has received the following treatment for the injuries she sustained in the Accident:

Treatment Provider	Number of Visits	Date Range
Dr. Clutterham (family physician)	34	September 19, 2016 to February 27, 2023
Bodhi Tree Wellness Centre (massage)	12	September 26, 2016 to July 20, 2017
Glover Physio & Wellness (physiotherapy)	19	October 3, 2016 to January 19, 2017
Dr. Kwee (orthopaedic surgeon)	7	April 24, 2017 to September 21, 2018
Langley Sports Medicine (physiotherapy and massage)	20	August 9, 2017 to August 18, 2020
Allied Coast Therapy (physiotherapy and massage)	19	November 8, 2017 to May 22, 2018
Dr. Paterson (chiropractor)	16	March 6, 2018 to September 13, 2018
Dr. Jackson (psychologist)	82	December 6, 2019 to November 3, 2023
Dr. Roberts (orthopaedic surgeon)	9	February 20, 2020 to October 6, 2022
Kim Gibson (occupational therapist)	11	February 16, 2021 to February 28, 2023
Back in Motion (physiotherapy, massage, active rehabilitation)	73	April 13, 2021 to June 7, 2023

[33] Ms. Campbell testified that her current treatment regime consists of attending Back in Motion for physiotherapy once per week and for massage therapy once per week; attending with Dr. Jackson twice per month; and attending for active rehabilitation in the pool with Aaron from Symmetry Injury Rehabilitation twice per week. She testified that she is currently on a break from the pool rehabilitation sessions due to a cancerous lesion being removed from her left ankle but testified that she plans to continue with these sessions once she is cleared to return to the pool.

[34] Ms. Campbell testified that she currently continues to see Dr. Clutterham and remains under that doctor's care to the present day. In recent visits she has complained about her neck, lower back, feet, headaches, and hands.

[35] Ms. Campbell testified that she takes various prescription medications, including Venlafaxine for depression, Topiramate for migraines, Zopiclone for sleep,

Lorazepam for anxiety, and Pantoprazole for acid reflux caused by her other medications. She also testified that she uses various non-prescription medications such as Magnesium for sleep, Tylenol, Advil, Excedrin, and Voltaren.

Post-Accident Work History

[36] Following the Accident, Ms. Campbell was off work for a month and then returned to work gradually over a six-week period.

[37] She testified that she found returning to work very difficult and very painful. She had pain in both her right and left feet due to having to wear shoes with backs, issues with sitting due to her lower back pain, and issues with looking at school chalkboards due to her neck pain.

[38] Ms. Campbell was given accommodations including no longer pushing wheelchairs, no heavy lifting, no toilet lifting, and not working with students who run or bolt. She was also confined to the lower level of the school building because climbing stairs was painful.

[39] Ms. Campbell ceased working altogether on November 27, 2019 and began receiving disability benefits.

[40] She explained that she felt she was physically not strong enough to continue in her SEA job. She stated that it was demanding work, requiring her to be on her feet for long periods of time but the pain in her feet, lower back, and neck did not permit her to last a full day. Her feet were in bad shape, and she had to break the backs of the shoes down due to swelling.

[41] Ms. Campbell also explained that she was mentally in poor shape. She had become irritable and lacked her former patience. She was exhausted, tired of dealing with pain, and burned out. She also explained that she had interpersonal issues with certain co-workers in 2019 that she was not capable of dealing with due to her ongoing health and psychological issues. She testified that, before the Accident, she believed she would have been able to handle the interpersonal issues.

[42] Ms. Campbell has been off work continuously since 2019.

Post-Accident Injuries and Conditions

[43] Ms. Campbell testified that she had three occasions following the Accident where she had a fall resulting in further injury:

- On December 13, 2016, she slipped on the ice in the parking lot at work and fell backwards onto her bottom and elbow on the right side. She stated that the injury was “just bruises” and that it took about a week to recover. She missed one day of work as a result.
- On September 5, 2017, she slipped and fell on liquid in the hallway at work. She fell backwards onto her right buttock, twisted her right knee and left ankle, and also injured her right elbow and shoulder. She did not miss work at the time but later had complications with the knee, which required her to take two months off work. She had recovered by February 2018.
- On January 22, 2022, she lost her balance at the top of the stairs, fell backwards, and landed sideways on the steps below. She was concussed, lost consciousness, and was unable to get up. She was treated for a concussion at the Abbotsford hospital, was dizzy, disoriented, had a headache and body aches, and generally had symptoms quite similar to the Accident. She also hurt her neck but this returned to baseline within a couple of weeks. It took about six months to recover fully from the concussion.

[44] Ms. Campbell testified that she did not have a history of falls prior to the Accident and believed that these falls were related to her health issues caused by the Accident.

[45] Ms. Campbell testified that in 2023 she underwent a surgical procedure to remove a cancerous lesion from her ankle, requiring two months to heal.

ANALYSIS

1. Causation

[46] Ms. Campbell alleges that, as a result of the Accident, she incurred a range of injuries (the “Alleged Injuries”) including:

- a worsening of her right shoulder injury, resulting in chronic shoulder pain;
- a worsening of headaches with a combination of musculoskeletal headaches and more frequent migraines;
- a possible concussion;
- bilateral heel pain, especially in the left heel, that was diagnosed as insertional Achilles tendonitis;
- right trochanteric type hip and leg pain;
- chronic myofascial pain of the neck and shoulder girdle;
- myofascial thoracic outlet syndrome;
- chronic low back pain;
- elevated body mass index;
- exacerbation of depression and anxiety to a major depressive disorder of moderate severity;
- somatic symptom disorder;
- posttraumatic stress disorder of mild to moderate severity;
- a panic disorder with agoraphobia; and
- generalized anxiety disorder of moderate severity.

[47] The defence admits that certain of the Alleged Injuries were indeed caused by the Accident (specifically, the cervical facet joint pain with cervicogenic headache, lumbar myofascial pain, thoracic strain, right shoulder strain, and an adjustment disorder with mixed depressed mood and anxiety), although taking the position that some of these conditions have resolved or have returned to baseline. However, the defence also took the position that most of the Alleged Injuries were not caused by the Accident, and that certain of the symptoms experienced by Ms. Campbell are attributable to pre-existing conditions or subsequent intervening events.

Applicable Law on Causation

[48] The onus is on Ms. Campbell to prove on a balance of probabilities that (1) she did in fact suffer the Alleged Injuries; and (2) that the Accident caused the Alleged Injuries. To establish causation, Ms. Campbell must demonstrate that “but for” the Accident she would not have suffered the Alleged Injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8 [*Clements*]. Inherent in the “but for” test is a requirement that the Accident was necessary to bring about the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17; *Clements* at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[49] Ms. Campbell need only establish a “substantial connection between the injury and the defendant’s conduct”, beyond the *de minimis* range, in order to establish causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11. The “but for” test must be applied in a “robust common sense fashion” with no requirement for scientific evidence of the precise contribution the defendant’s negligence made to the injury: *Welder v. Lee*, 2019 BCSC 1328 at para. 76 [*Welder*]; *Clements* at para. 9.

[50] With regard to the law to be applied in relation to causation in cases involving a pre-existing condition or intervening later events, Justice Chan helpfully summarized the analysis in *Lundgren v. Taylor*, 2023 BCSC 612:

[62] The law regarding causation of damages and pre-existing conditions was summarized by Madam Justice Fisher in *Chappell v. Loyie*, 2016 BCSC 1722 as follows:

Causation of damage and pre-existing conditions

[10] As the court said in *Blackwater* [v. *Plint*, 2005 SCC 58], a plaintiff is only to be restored to his original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and 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, this is to be taken into account in reducing the overall award: *Athey*, at para. 35; *Moore v. Kyba*, 2012 BCCA 361 at para. 43. In addition, damages caused by other non-tortious causes that occur after the defendant's wrongful act must be taken into account: *Blackwater*, at para. 80. This is referred to as the "crumbling skull" doctrine. It is important to note that any reduction made to take these factors into account does not reduce the damages; it simply awards the damages which the law allows: see *Blackwater*, at para. 84.

[11] In addition, a tortfeasor is liable for a plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. As the court said in *Athey*, at para. 34, the tortfeasor must take the victim as he finds him, and is liable even though the plaintiff's losses are more dramatic than they would be for the average person. This is known as the "thin skull rule".

[12] There has been some confusion in the law with respect to these labels. In *A. (T.W.N.A.) v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, the court clarified this at para. 30 by stating that the "simple idea" expressed in *Athey*, was clear and direct and "both latent and active pre-existing conditions must be considered in assessing the plaintiff's original position." At para. 48:

...Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[13] Hypothetical and future events – how the plaintiff's life would have gone without the tortious injury – need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, or the probability of their occurrence. A future or hypothetical possibility is to be taken into account "as long as it is a real and substantial possibility and not mere speculation": *Athey*, at para. 27.

[63] These principles were recently reiterated by our Court of Appeal in *Dornan v. Silva*, 2021 BCCA 228 [Dornan]:

[39] ...the appellant fails to distinguish between the legal concepts of causation and compensation. This distinction was the focus of the excerpt the trial judge quoted at para 66 of his reasons from the judgment of then-Chief Justice McLachlin in *Blackwater v Plint*, 2005 SCC 58, which I repeat for convenience:

[78] ... 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*. ...

[40] As the trial judge explained in para 67, referring to the discussion in *Athey* ... at paras 32–35, tortfeasors must take their victims as they find them even if the injuries are more severe than would be expected for a normal person (the “thin skull” rule), but need not compensate the plaintiff for the consequences of a pre-existing condition that the plaintiff would have experienced anyway (the “crumbling skull” rule).

[41] As this Court explained in *TWNA v Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para 22, in discussing *Athey*, a defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes. Once causation has been proven, the tortfeasor is fully liable for the damage caused by his or her wrongful conduct. But when it comes to the assessment of damages, different considerations apply, as the notion of the crumbling skull plaintiff illustrates.

[64] As I understand it, this Court must determine which injuries, if any, were materially caused or substantially contributed to by the 2016 Accident and the 2018 Accident. Even where there are other potential non-tortious causes of an injury, such as psychiatric illness, the defendant will still be found liable if the plaintiff can prove that the accident materially caused or substantially contributed to the injury. However, in assessing damages, 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.

[65] In assessment of damages, the Court must consider the plaintiff's pre-existing condition. Here, the Court must consider whether there was a measurable risk that the plaintiff's current symptoms would have manifested without the 2016 Accident and the 2018 Accident. This measurable risk is

understood as a real and substantial possibility, and if the Court so finds, it must assess the relative likelihood of it occurring.

The Evidence on Causation

[51] I note at the outset that the defence did not take issue with the credibility or reliability of Ms. Campbell as a witness. Despite this fact, I have nonetheless weighed her testimony, and also the testimony of her corroborating witnesses, in light of the principles most recently summarized by Justice Mayer in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 87–93. I found Ms. Campbell’s evidence, and the evidence of her family members, to be generally honest and internally and externally consistent and therefore credible. I also found her evidence to be reasonably reliable, particularly as it relates to the symptoms she has experienced and the impact of these symptoms on her life.

[52] However, despite the credibility and reliability of Ms. Campbell’s testimony, this was a case in which the expert evidence played a significant role and where the causal connection between the Accident and some of Ms. Campbell’s more serious symptoms was very much in dispute in the expert reports. Accordingly, I will next address the expert evidence adduced by both the plaintiff and defence, outline the key differences of opinion and then set out my resulting conclusions on the causation analysis.

The Plaintiff’s Expert Evidence

[53] The plaintiff adduced expert evidence from three medical doctors in support of the claim: Dr. Purtzki, Dr. Anderson, and Dr. Younger.

Dr. Purtzki

[54] Dr. Purtzki was qualified without objection as a psychiatrist. Dr. Purtzki received her certification as a psychiatrist in 2004. From 2006 to present, Dr. Purtzki has been working at the B.C. Children’s Hospital in the Spinal Cord Clinic where she is currently the Medical Director and also at the GF Strong Rehabilitation Centre

where she is the Medical Director of the Adolescent/Young Adult Program and the Adolescent Complex Concussion Clinic.

[55] Dr. Purtzki conducted an independent medical examination of Ms. Campbell on September 26, 2018. In her report dated March 7, 2019, Dr. Purtzki opined that the Accident likely caused Ms. Campbell to develop:

- chronic right shoulder pain;
- a worsening of headaches with a combination of musculoskeletal headaches and more frequent migraines;
- a possible concussion;
- bilateral heel pain especially in the left heel that was diagnosed as insertional Achilles tendonitis;
- right trochanteric type hip and leg pain;
- exacerbation of depression and anxiety; and
- somatic symptom disorder - predominately pain.

[56] Dr. Purtzki noted that Ms. Campbell had a pre-existing right shoulder injury dating back to 2010. Ms. Campbell went through WorkSafe BC rehabilitation and returned to work but thereafter had recurrent shoulder symptoms, including muscle-related numbness and tingling investigated by Dr. Lee in 2014. Dr. Purtzki opined that Ms. Campbell hit her shoulder against the side of the car in the Accident and that this caused a flare up of the pain and limitation in range of motion. Dr. Purtzki also noted that she had a slip and fall on the ice in December, 2016, which likely reagravated the right shoulder. Dr. Purtzki opined that Ms. Campbell was vulnerable to injury in this area and now has persistent pain due to rotator cuff degenerative changes.

[57] Dr. Purtzki noted that Ms. Campbell had episodic headaches prior to the Accident and saw Dr. Lee regarding headaches diagnosed as migraines. She

subsequently had an MRI brain scan in 2012 and 2014 and a CT angiogram in 2014. Dr. Purtzki opined that the Accident caused a flare up of headaches after she hit her head on the side of the car, and that the nature of the headaches is likely cervicogenic/soft tissue and secondarily migraines. Dr. Purtzki opined that Ms. Campbell was vulnerable to developing a more severe headache disorder related to the Accident.

[58] Dr. Purtzki noted that Ms. Campbell had suffered from chronic neck pain for many years and had an MRI on her neck in 2014. Dr. Purtzki opined that an acute traumatic event would increase her neck pain and likely lead to more headaches.

[59] Dr. Purtzki noted that Ms. Campbell reported symptoms compatible with a concussion after the Accident but stated that the symptoms resolved and there are no significant sequelae related to this.

[60] Dr. Purtzki noted that Ms. Campbell developed left Achilles tendonitis, diagnosed by Dr. Kwee, after the Accident. Dr. Purtzki stated that “[i]t is unclear how this developed” noting that Ms. Campbell presented with superficial hyperalgesic pain and the MRI of the left ankle did not show any abnormality related to the tendon or its insertion. At some point, Dr. Purtzki noted that Ms. Campbell developed right heel pain as a result of the Accident, and the right heel pain has “waxed and waned” since then.

[61] Dr. Purtzki observed that Ms. Campbell had a labral tear in her right hip resulting from pushing a wheel chair up a hill in 2014. Despite arthroscopic repair in 2015 by Dr. Gilbert, she developed further pain related to her SI joint by October 2015 post-operatively and continues to have intermittent right hip pain. Dr. Purtzki opined that the injury from contacting her hip against the car door was of a soft tissue nature and different than the prior injury to her hip joint.

[62] Dr. Purtzki noted that Ms. Campbell had pre-existing low back pain, which likely flared up with the Accident and thereafter due to activity. Dr. Purtzki observed that the low back was particularly tender during assessment and that the Accident likely contributed to a flare-up of symptoms that naturally wax and wane.

[63] Dr. Purtzki observed that Ms. Campbell had been suffering from chronic depression for many years, controlled with Celexa. After the Accident, Ms. Campbell reported increased anxiety and depression and Dr. Purtzki opined that the depression and anxiety make the development of a somatic symptom disorder “more likely”.

[64] Finally Dr. Purtzki noted that Ms. Campbell fell in September 2017 and injured her right knee.

[65] Dr. Purtzki opined that the prognosis for resolution of symptoms is “quite guarded” given Ms. Campbell’s age and the chronicity of her symptoms as well as her weight. Dr. Purtzki observed that Ms. Campbell had done a lot of treatments and has become more functional but doubted that she would become symptom free. Dr. Purtzki stated:

I believe that she was vulnerable to develop chronic headaches because of her pre-existing history of migraines and that this will continue to be the case. Her neck and shoulder may improve with exercise. Her left heel continues to be a bit of an enigma because we usually expect a degenerative process to be the cause rather than traumatic process to trigger heel pain. This is especially the case since we don’t see the typical vascular changes and soft tissue thickening we expect with chronic Achilles tendonitis. Due to these reasons I am doubtful her heel pain will completely resolve...

Overall, I believe she has become more functional than she used to be in regards to injuries sustained during the motor vehicle accident. I do agree that she seems to have plateaued and I believe she will have ongoing residual limitations, particularly as they pertain to her heels, the right shoulder and headaches.

[66] Dr. Purtzki saw Ms. Campbell again on April 5, 2023, for the purpose of an updated independent medical examination. In her report dated May 26, 2023, Dr. Purtzki opined that many of Ms. Campbell’s Accident-related injuries remained the same. However, Dr. Purtzki added the following diagnoses:

- chronic myofascial pain of the neck and shoulder girdle;
- myofascial thoracic outlet syndrome;
- chronic low back pain; and

- elevated body mass index.

[67] With respect to the chronic myofascial pain of the neck and shoulder girdle, Dr. Purtzki noted that the pain severity was much worse than it was in 2018, with Ms. Campbell now reporting symptoms of pain, numbness, and tingling going down her left arm. Dr. Purtzki opined that the myofascial neck pain was due to the whiplash type mechanism of injury and further opined that the relatively later onset of left shoulder pain is “most likely due to overuse of the left arm for activities and related to persistently poor postural control of the shoulder girdle”.

[68] Dr. Purtzki also diagnosed Ms. Campbell with post-concussion symptoms. She opines that Ms. Campbell sustained a mild concussion during the Accident and then a second concussion from her January 2022 fall. Dr. Purtzki observed that Ms. Campbell’s headaches were less frequent before the 2022 fall (once every two weeks) but since the fall she has two migraines per week. These recurrent post-traumatic headaches are, in Dr. Purtzki’s opinion a “chronic, lifelong condition that needs to be continually controlled”.

[69] Dr. Purtzki diagnosed Ms. Campbell with thoracic outlet syndrome in her left arm, with loss of pulse and tingling in her left hand, noting that the most common reason for a thoracic outlet syndrome is persistent tension and spasm of the shoulder girdle and neck muscles – a common by-product of a whiplash-type soft tissue injury.

[70] With respect to the right Achilles tendinopathy, Dr. Purtzki observed that Ms. Campbell had surgery for the right calcaneus and debridement of the Achilles tendinopathy by Dr. Roberts and, after a long recovery period, is reporting a lot less pain in the right heel. She continues to have Achilles tendinopathy in the left Achilles.

[71] Dr. Purtzki found that Ms. Campbell continues to have somatic symptom disorder, which has worsened.

[72] With respect to prognosis, Dr. Purtzki opined:

Ms. Campbell is not competitively employable because of her multiple musculoskeletal diagnoses, chronic pain, fatigue, poor walking tolerance, cognitive symptoms and headaches, all of which prevent her from working effectively with special needs children. In addition, she has significant depression and anxiety that interfere with optimal function at work.

[73] Dr. Purtzki opined that it is very questionable whether Ms. Campbell will be able to return to the workforce in the future.

Dr. Anderson

[74] Dr. Anderson was qualified without objection as an expert in psychiatric medicine. Dr. Anderson received his certification as a psychiatrist in 1989. Since 1992, Dr. Anderson has worked as a consultation liaison psychiatrist at Vancouver General Hospital. Dr. Anderson testified that, since 1989, he has given expert evidence in the Supreme Court of British Columbia on approximately 200 occasions.

[75] Dr. Anderson conducted an independent psychiatric assessment of Ms. Campbell on October 28, 2022. In his report dated November 1, 2022, Dr. Anderson opined that Ms. Campbell has a persistent somatic symptom disorder with predominant pain of moderate severity, and a possible concussion injury as a result of the Accident. Dr. Anderson noted that Ms. Campbell has had cognitive difficulties since the Accident and opined that her cognitive difficulties are likely due to a number of Accident-related factors including pain, insomnia, fatigue, anxiety, and depression.

[76] Dr. Anderson also opined that Ms. Campbell has developed a posttraumatic stress disorder of mild to moderate severity, a panic disorder with agoraphobia, a generalized anxiety disorder of moderate severity, and a major depressive disorder of moderate severity. He wrote that Ms. Campbell's psychiatric diagnoses "are likely due to the MVA of September 17, 2016 superimposed on her premorbid level of physical and emotional functioning" and that "Ms. Campbell would not have likely developed her present constellation of physical, cognitive and emotional difficulties if she had not been injured in the September 17, 2016 MVA".

[77] Dr. Anderson noted Ms. Campbell’s history of pre-Accident depression but observed that she was “doing well emotionally on the antidepressant medication” leading up to the Accident and that she did not have a past history of posttraumatic stress disorder, generalized anxiety disorder, somatic symptom disorder or panic attacks. Dr. Anderson also noted that Ms. Campbell experienced an exacerbation of symptoms following the 2022 concussion.

[78] Dr. Anderson opined that Ms. Campbell’s long-term psychiatric prognosis is poor:

psychiatric prognosis is poor for patients who have more than one psychiatric disorder (i.e. comorbidity) and for patients who have had disorders lasting for several years despite standard treatment ... In Ms. Campbell’s case she presently has five psychiatric disorders (SSD, MDD, GAD, PTSD and panic disorder with agoraphobia) that have lasted for over six years in duration despite appropriate treatment with psychotherapy and antidepressant medication.

[79] Dr. Anderson opined that Ms. Campbell likely has a permanent disability as a result of the Accident. Dr. Anderson also opined that Ms. Campbell is not likely competitively employable due to the nature of her ongoing physical, cognitive, and emotional difficulties.

Dr. Younger

[80] Dr. Younger was qualified as an expert physician with a specialization in orthopedic surgery and a sub-speciality in foot and ankle surgery. Dr. Younger is currently a full-time physician at St. Paul’s Hospital and he dedicates his elective practice to foot and ankle conditions in addition to providing orthopaedic trauma coverage. In 2002, Dr. Younger became a founding member of the Canadian Orthopaedic Foot and Ankle Society, and he founded the BC Foot and Ankle Clinic at St. Paul’s Hospital and served as the Director of the program until 2007. He estimates that he performs around 400 foot and ankle surgeries a year.

[81] Dr. Younger met with Ms. Campbell on March 11, 2020 and November 8, 2022, for the purpose of an independent evaluation. In his report dated December 9, 2022, Dr. Younger opined that Ms. Campbell has bilateral, insertional Achilles

tendinopathy. Dr. Younger further opined that “[t]he insertional Achilles tendinopathy was caused by the collision”, noting that Ms. Campbell’s reports of bilateral foot and ankle pain started at the time of the Accident and that there were no previous complaints. He opines that “the left side is most likely related to the accident, and the right side is likely related”.

[82] Dr. Younger noted that Ms. Campbell reported heel pain on September 27, 2016. He also noted that an MRI was performed on March 28, 2017 on the left ankle and that, although no abnormality was noted in the Achilles tendon at that time by the radiologist, he stated: “I have reviewed these images and I do think there was damage here...”. He also opined with respect to the MRI images:

I have reviewed the images, and these do show that she has bilateral, insertional Achilles tendinopathy. The original imaging also performed does show insertional Achilles tendinopathy on my review of the images. Her MRI most recently was performed on left and right sides, on October 10, 2019, and review of these images does show insertional Achilles tendinopathy, right at the insertion of her Achilles in to the bone on the posterior side of the heel, and this is present on both the left and right side, and possibly slightly worse on the left side compared with the right side.

[83] Dr. Younger further opined that Ms. Campbell’s neck, back, and right shoulder pain were caused by the Accident and that her hip pain was aggravated by the Accident.

[84] Dr. Younger opined that Ms. Campbell’s ankle pain is “quite disabling” and that it limits her walking and standing tolerance and her ability to take part in household work. He opined that Ms. Campbell’s right ankle pain could be considered a temporary partial disability as it improved with surgery and that the left side, if it improves with surgery, could also be considered temporary; however, he notes that a “result similar to the right side cannot be guaranteed”. He opined that Ms. Campbell’s neck and back pain are likely permanent and cause a partial disability. Dr. Younger opined that “the time off work to date is appropriate, considering her neck pain, back pain, heel pain and work duties. I think that this has been materially contributed to by the injuries in the motor vehicle accident”.

The Defence's Expert Evidence

[85] The defence relied upon the expert evidence of Dr. Best, Dr. Hummel, and Dr. Okorie.

Dr. Best

[86] Dr. Best was qualified as an expert in physical and rehabilitation medicine. Dr. Best is board certified in physical medicine and rehabilitation and currently has a clinical practice at the Canadian Pain & Regenerative Institute in Vancouver, which includes interventional spine/pain management and sports and musculoskeletal medicine.

[87] Dr. Best prepared a report dated August 30, 2023 following an assessment of Ms. Campbell on August 10, 2023.

[88] In the report, Dr. Best opined that Ms. Campbell did indeed sustain the following injuries as a result of the Accident:

- cervical facet joint pain with cervicogenic headache;
- lumbar myofascial pain;
- thoracic strain; and
- right shoulder strain.

[89] With respect to the cervical facet joint pain with cervicogenic headache, Dr. Best noted that Ms. Campbell did not have a significant history of cervical spine pain pre-Accident, and opined that “it is likely that at least a component of her persistent neck pain and headache is the result of the [Accident]” although noting that Ms. Campbell suffered a significant fall with presumed concussion in January 2022 which also contributed to neck pain and headache.

[90] With respect to prognosis, Dr. Best opined that it is likely that the cervical spine issue is permanent in nature. However, assuming she is willing to undergo the

recommended testing and treatment, “it is likely that she could derive fair-to-good improvement in her neck pain and occipital headache”.

[91] With respect to the lumbar myofascial pain, Dr. Best observed that Ms. Campbell did not have any significant lumbosacral spine issues prior to the Accident and opined that “it appears that there was a component of low back pain that would be temporarily associated with the subject MVA”. Despite this, he cautioned:

However, it must also be noted that the examinee suffered work-related injuries that appeared to contribute to her low back pain later in 2016 as well as a significant fall down the stairs in January 2022 that elicited low back pain. As such there are likely multiple incidents that have contributed to the examinee’s persistent lumbosacral spine pain.

[92] With respect to prognosis, Dr. Best opined that given the chronicity of Ms. Campbell’s low back pain, it is likely the lumbosacral spine issue is permanent in nature. However, assuming she will undergo the recommended treatment, it is likely she could derive “fair improvement in her lumbosacral spine pain”.

[93] With respect to the right shoulder, Dr. Best opined that Ms. Campbell had longstanding right shoulder pain dating back to 2010, but that she suffered an exacerbation of that injury as a result of the Accident which returned to baseline severity by February 2018 after a corticosteroid injection. Dr. Best therefore concluded that the exacerbation of that injury has resolved.

[94] With respect to the thoracic strain, Dr. Best opined that it is likely that Ms. Campbell sustained a thoracic spine strain due to the Accident that eventually resolved with conservative measures but which was exacerbated once again in January 2022. Dr. Best opined that this had resolved by late 2019 before she suffered the fall in January 2022. Dr. Best noted that this issue was not identified by Ms. Campbell as an ongoing issue as of the time of his examination in 2023.

[95] With respect to the bilateral heel pain, Dr. Best opined that he did not believe it was related to the Accident, noting that it was not until MRIs in 2019 that evidence

of Achilles tendinopathy was noted and also that Ms. Campbell had failed to identify this issue with her family physician two days after the Accident.

[96] Dr. Best stated that he would defer any psychological/psychiatric issues to the psychologists and psychiatrists involved in the case.

[97] With respect to prognosis, Dr. Best opined that “[i]n terms of the physical injuries I would relate to the September 2016 MVA, I would not anticipate that any of them would require significant periods of time off work nor impair her ability to return to pre-MVA work status.”

[98] He opined that due to ongoing neck pain and cervicogenic headaches, it would be reasonable for Ms. Campbell to expect assistance for housekeeping and meal preparation tasks but otherwise he would not anticipate her requiring any additional assistance.

Dr. Hummel

[99] Dr. Hummel was qualified without objection as an orthopedic surgeon with expertise in diagnosing and treating the musculoskeletal system including hips, knees, and feet. Dr. Hummel is a qualified orthopaedic surgeon and is currently Chief of the orthopaedic surgical program in the Rouge Valley Health System. He has been recognized as an expert witness in the British Columbia Supreme Court and in Ontario.

[100] Dr. Hummel examined Ms. Campbell on June 13, 2023 and prepared a report dated August 28, 2023.

[101] Dr. Hummel opined in his report that his diagnosis with respect to Ms. Campbell’s leg, foot, and ankle injuries is an insertional tendinopathy of the Achilles tendon to the left and right heel. Dr. Hummel further opined that the condition is degenerative and related to her prior complaints of plantar fasciitis. He concluded:

it is my opinion that while she did sustain some complaint of tendinitis in the back of her heel, the current complaint that she has is a degenerative insertional tendinopathy and it is unclear whether it is directly related to the

accident and whether she would have had this absent the motor vehicle accident itself.

[102] Dr. Hummel opined that the left side “appears to have improved to the point where it is not bothering her significantly”. The right side surgery “appears to have been of benefit to her and the course forward would be conservative management unless her symptoms worsen.”

[103] Dr. Hummel opined that Ms. Campbell “should be encouraged to return to work as her foot and ankle complaints appeared to have improved and she should continue with her previous employment of educational assistant”. He also opined that there was no medical reason to preclude Ms. Campbell from participating in all recreational, domestic, and household activities “as tolerated”.

Dr. Okorie

[104] Dr. Okorie was qualified without objection as an expert in psychiatry. Dr. Okorie is a Faculty Member with the Department of Psychiatry at the University of British Columbia in Kelowna. He is also a Clinical Trials Investigator with OCT Research ULC.

[105] Ms. Campbell was assessed by Dr. Okorie on February 24, 2023. In his report dated June 9, 2023, Dr. Okorie opined that Ms. Campbell has an adjustment disorder with mixed depressed mood and anxiety which he opined adequately explains her pain-related dysphoria, driving and passenger anxiety and avoidance, crowd-related anxiety, jumpiness, and cued recollections of the Accident.

[106] Dr. Okorie opined that Ms. Campbell developed an adjustment disorder caused by the Accident with mixed depressed mood and anxiety which in his view adequately explains her pain-related dysphoria, driving and passenger anxiety and avoidance, crowd-related anxiety, jumpiness, and cued recollections of the Accident.

[107] However, Dr. Okorie disagreed with the diagnosis of Dr. Anderson that Ms. Campbell has also developed a somatic symptom disorder, post-traumatic stress disorder, or a major depressive disorder. Dr. Okorie opined that Ms. Campbell does not have somatic symptom disorder due to her “lack of disproportionate and

persistent thoughts about the seriousness of the pain, persistently high level of anxiety about her pain, or excessive devotion of her time and energy to pain”.

[108] Dr. Okorie also declined to diagnose Ms. Campbell with PTSD as he noted that this “requires exposure to actual or threatened death or severe injury”. He observed that Ms. Campbell reportedly did not believe that her Accident-related injuries were serious after the Accident and did not seek hospital treatment, indicating that the Accident did “not satisfy exposure criterion”.

[109] Dr. Okorie also rejected the theory that Ms. Campbell’s depressive relapse and ongoing medical leave were attributable to the Accident, opining instead that these were precipitated by conflicts with her co-workers at Gleneagle Secondary School and Terry Fox Secondary School, apparently related to her reporting the use of marijuana by another staff member. He noted that Ms. Campbell took time off work during her acute phase and then sporadically missed work when her pain flared up, but otherwise continued working full-time on modified job duties “which would have likely continued if conflicts with her coworkers did not occur.”

[110] With respect to employability, Dr. Okorie stated that in his report that he agreed with Dr. Anderson that Ms. Campbell’s “pain, physical problems, easy fatigability, anxiety, and depression are incompatible with returning to her job as an educational assistant.” He further opined that successful surgical intervention on her right ankle/foot combined with treatment for the adjustment and depressive disorders, “could help her return to the workforce in some capacity”, although she would need functional capacity and vocational assessments to determine the jobs that would be suited to her when her mental status is better.

[111] Dr. Okorie also acknowledged that “Ms. Campbell’s adjustment and depressive disorders have limited the scope and extent of her driving and access to the community and reduced her quality and enjoyment of life.” He observed that “an effective management of her pain and physical problems will impact the prognosis for her adjustment and depressive disorders”.

Conclusions on Causation

The Soft Tissue Injuries, Headaches and Depression

[112] In my view the expert evidence indisputably supports the conclusion that Ms. Campbell’s spine, neck, and lower back injuries and associated headaches were caused or exacerbated by the Accident. This was the opinion of both physiatrists, Dr. Purtzki and Dr. Best, and Dr. Younger opined to the same effect (although this opinion was admittedly outside the core area of his expertise relating to the foot and ankle).

[113] Dr. Best, a defence expert, observed that Ms. Campbell did not have a significant history of cervical spine pain with cervicogenic headache or lumbar myofascial pain pre-Accident, that this pain was likely caused by the Accident, and concluded that both conditions are likely permanent in nature. In reaching this conclusion on permanent injury, Dr. Best referenced the “chronicity of Ms. Campbell’s low back pain”.

[114] Dr. Purtzki also diagnosed Ms. Campbell with chronic myofascial pain of the neck and shoulder girdle, opining that this was due to the whiplash type mechanism of injury in the Accident. Dr. Purtzki further diagnosed Ms. Campbell with a thoracic outlet syndrome in her left arm, noting that the most common reason for a thoracic outlet syndrome is persistent tension and spasm of the shoulder girdle and neck muscles – a common by-product of a whiplash-type soft tissue injury.

[115] Dr. Purtzki noted that Ms. Campbell had pre-existing low back pain, which likely flared up with the Accident and thereafter due to activity. However, Dr. Purtzki also opined that the flare-up was temporal in nature and that the symptoms now “naturally wax and wane”, which in my view amounts to a return to baseline.

[116] Dr. Purtzki further opined that the Accident caused a flare up of headaches after Ms. Campbell hit her head on the side of the car, sustaining a concussion, and that the nature of the headaches is likely cervicogenic/soft tissue and secondarily migraines. Dr. Purtzki opined that Ms. Campbell was vulnerable to developing a

more severe headache disorder related to the Accident. In my view this was consistent with the evidence of Dr. Best.

[117] That said, I note that Dr Purtzki and Dr. Best also identified that Ms. Campbell sustained a second probable concussion from her January 2022 fall. Dr. Purtzki observed that Ms. Campbell's headaches were less frequent before the 2022 fall (once every two weeks) but since the fall she has two migraines per week. Dr. Best opined that the presumed concussing contributed to neck pain and headache. This is a post-Accident intervening event, not causally related to the Accident, which I will take into account in my damages analysis.

[118] The evidence also clearly supports the conclusion that Ms. Campbell's symptoms of depression as caused or exacerbated by the Accident are sufficiently serious to preclude her from returning to work and have significantly reduced her quality of life. Dr. Okorie, a defence expert, opined that Ms. Campbell's adjustment disorder with mixed depressed mood and anxiety was caused by the Accident and also opined that her "pain, physical problems, easy fatiguability, anxiety, and depression are incompatible with returning to her job as an educational assistant." Dr. Anderson also opined that Ms. Campbell is not likely competitively employable due to the nature of her ongoing physical, cognitive and emotional difficulties caused by the Accident.

[119] That said, there were also substantial areas of disagreement between the experts, principally as it related to the cause of the foot and ankle pain and the extent of the psychological injuries. I will address these each in turn below.

The Hip Injury and Weight Gain

[120] There was no compelling expert evidence adduced at trial that the Accident caused lasting damage to Ms. Campbell's hip. The hip condition was pre-existing arising from a workplace injury. Dr. Purtzki opined that the Accident did not cause a worsening of Ms. Campbell's hip condition, as it was in a different location. No other expert opined that a causal connection existed between the hip pain and the Accident. I concluded that there was therefore no causal connection.

[121] There was also no clear medical evidence on the causal connection between the Accident and weight gain. Although it is a reasonable inference that her reduction in activity after the Accident was a causal contributor, I am not persuaded this was proved on the evidence.

Foot and Achilles Pain

[122] With respect to the foot and ankle pain, Dr. Younger opined that Ms. Campbell has bilateral, insertional Achilles tendinopathy and that “[t]he insertional Achilles tendinopathy was caused by the collision”, stating that “the left side is most likely related to the accident, and the right side is likely related”. In reaching that conclusion, Dr. Younger further observed that Ms. Campbell’s reports of bilateral foot and ankle pain were reported to her family doctor only two days after the Accident and that there were no previous complaints. Dr. Younger also stated that he had personally reviewed the original MRI imaging, which in his opinion showed insertional Achilles tendinopathy which he described as “damage”.

[123] Dr. Hummel disagreed with Dr. Younger, opining that that Ms. Campbell’s leg, foot, and ankle injuries are a degenerative insertional tendinopathy of the Achilles tendon to the left and right heel, and further opining that it is “unclear” whether it is related to the Accident:

it is my opinion that while she did sustain some complaint of tendinitis in the back of her heel, the current complaint that she has is a degenerative insertional tendinopathy and it is unclear whether it is directly related to the accident and whether she would have had this absent the motor vehicle accident itself.

[124] The defence argues that Dr. Hummel’s opinion is to be preferred to that of Dr. Younger for the following reasons:

- Dr. Best also opined that he did not believe that the Achilles tendinopathy was related to the Accident, noting that it was not until MRIs in 2019 that evidence of Achilles tendinopathy was observed and also that Ms. Campbell had failed to identify this issue with her family physician two days after the Accident;

- The original radiologist report in 2017 reported that the Achilles tendon looked “pristine” on MRI;
- Dr. Purtzki referred to Dr. Kwee’s orthopedic surgeon consult report of April 24, 2017, in which the mechanism for the injury to her left heel at the time of the Accident was not entirely clear to him, as the tendon on MRI looked intact;
- Dr. Purtzki commented that the plaintiff’s left heel pain continues to be “a bit of an enigma” because it is usually expected that a degenerative process would be the cause rather than a traumatic process to trigger heel pain; and
- Dr. Younger did not dispute the fact that the plaintiff had degenerative change at the Achilles insertion.

[125] The defence further took the position that the primary connection between Ms. Campbell’s ankle injuries and the Accident is temporal and argued, following *White v. Stonestreet*, 2006 BCSC 801 at para. 74, that an inference from a temporal sequence to a causal connection is not always reliable and is a logical fallacy: *post hoc ergo propter hoc* (“after this therefore because of this”).

[126] While the arguments raised by the defence have merit, my conclusion is that the evidence of Dr. Younger is nonetheless to be preferred on this issue for four reasons. First, it is not true, as the defence argued, that Dr. Younger’s conclusion was based solely upon observing a temporal connection between the Accident and the development of Achilles tendinopathy. While Dr. Younger clearly did consider the temporal connection to be an important consideration, there was other evidence that Dr. Younger took into account in reaching his conclusion, including his own review of the 2017 and 2019 MRI imaging and Ms. Campbell’s account that she actually struck her heels on a metal bar under the seat during the course of the Accident, which I found credible.

[127] Second, to the extent that Dr. Hummel and Dr. Purtzki relied upon the original report of the 2017 radiologist that the tendon was “pristine”, rather than reviewing the MRI result themselves, there was a significant hearsay component underlying their

opinions because the radiologist did not testify at trial. In this respect, I find it significant that Dr. Younger was the only one of the experts who actually reviewed the MRI imaging, rather than merely relying upon historical medical records, which made his opinion more reliable in my view. The defence argues that Dr. Younger failed to explain in detail how the 2017 MRI revealed damage (as opposed to merely stating that it did) but I am not convinced that his opinion that there was damage was flawed for that reason alone – not every conclusion in an expert report needs to be explained in minute detail for it to carry weight. I also note that the defence had the opportunity to cross-examine him on this point and failed to do so.

[128] Third, the defence’s reliance upon the fact that Dr. Younger had stated that the insertional Achilles tendinopathy was “degenerative” is in my view an incomplete characterization of what he said. More specifically, Dr. Younger explained that insertional Achilles tendinopathy is a degenerative condition in all human beings, and not Ms. Campbell alone. The significant fact in Ms. Campbell’s case, in the opinion of Dr. Younger, was the sudden and severe manifestation of these symptoms in close temporal proximity to the Accident, in a context where there had been no prior medical manifestation of those symptoms and where there was a 2017 MRI revealing damage and evidence that Ms. Campbell’s feet had contacted a metal bar during the Accident. This was not a situation, for example, where there had been an identification by any doctor prior to the Accident that Ms. Campbell had any issue at all with insertional Achilles tendinopathy as a pre-existing condition.

[129] Fourth, I have reviewed Dr. Younger’s impressive qualifications and extensive record of publication in this area of expertise (Dr. Hummel affirmed during his testimony that Dr. Younger has an excellent reputation), including the fact that he has testified over 200 times in Supreme Court, and find his opinion in this area of his sub-speciality to be more reliable than Dr. Hummel’s, with all due respect to Dr. Hummel. Dr. Younger testified that he performs about 400 surgeries a year. By contrast, Dr. Hummel gave evidence that he stopped performing surgeries in January 2020, has no clinical practice in British Columbia, and that he currently only performs independent medical assessments, of which 90-95% are prepared on behalf of defence clients. I also give the opinions of Dr. Best and Dr. Purtzki less

weight on this issue as they are not orthopaedic surgeons and have no specific expertise in the foot and ankle sub-speciality.

[130] I therefore conclude that Ms. Campbell’s insertional Achilles tendinopathy, and related symptoms and pain, was an injury that was caused by the Accident.

[131] That said, I also note Dr. Younger’s opinion that, although Ms. Campbell’s ankle pain is currently “quite disabling”, Ms. Campbell’s right ankle pain could be considered a temporary partial disability as it did improve with surgery and that the left side, if it improves with surgery, could also be considered temporary (although cautioning that a “result similar to the right side cannot be guaranteed”).

[132] Along similar lines, I note Dr. Hummel’s opinion that the left side “appears to have improved to the point where it is not bothering her significantly”, and the right side surgery “appears to have been of benefit to her and the course forward would be conservative management unless her symptoms worsen.”

[133] Thus, while Ms. Campbell’s ankle pain has been quite disabling, my view on the evidence is that the prognosis for a reasonably full, or at a minimum partial, recovery is quite good. I do not accept that this is a permanent disability and will take this into account in my damages analysis.

The Psychological Injuries

[134] Dr. Anderson opined that Ms. Campbell has developed a posttraumatic stress disorder of mild to moderate severity, a panic disorder with agoraphobia, a generalized anxiety disorder of moderate severity, and a major depressive disorder of moderate severity, all attributable to the Accident.

[135] Dr. Okorie took issue with this diagnosis and diagnosed Ms. Campbell only with an adjustment disorder and depression, rejecting Dr. Anderson’s other diagnoses.

[136] Taking into account all the evidence, I prefer the opinion of Dr. Anderson to that of Dr. Okorie on balance for four reasons.

[137] First, Dr. Okorie's conclusion is not consistent with the testimony of Ms. Campbell, which I found credible. Dr. Okorie opined that Ms. Campbell does not have somatic symptom disorder due to her "lack of disproportionate and persistent thoughts about the seriousness of the pain, persistently high level of anxiety about her pain, or excessive devotion of her time and energy to pain". However her testimony, and the testimony of her family members, revealed exactly the opposite, as it is apparent that she is preoccupied with her pain and does indeed devote a lot of thought and energy to addressing that pain. In this respect, I note the opinion of Dr. Purtzki, the physiatrist, who opined that Ms. Campbell continues to have somatic symptom disorder, which was originally diagnosed in 2018 and has worsened:

Ms. Campbell continues to have significant fear of pain and movement. I diagnosed her in 2018 with a somatic symptom disorder, which persists and has worsened. Her symptom scores on the Pain Catastrophizing Scale (PCS), the Generalized Anxiety Disorder 7-Item Scale (GAD-7) and the Patient Health Questionnaire scale have all increased... In Ms. Campbell's case, there is a combination of true physical abnormalities, such as the Achilles Tendinopathy, but the emotional impact and functional limitations are in excess of what one would expect. Once acute pain transforms into a chronic pain pattern, the nature of the pain mechanism changes neurophysiologically. Secondly, emotional distress exacerbates the pain experience, creating an additive effect.

[138] Second, Dr. Okorie's opinion on somatic symptom disorder is set forth as a bald conclusion, without supporting testing results or adequate narrative explanation. In this respect I note that Dr. Okorie in his report failed to address the significance of the testing he conducted on Ms. Campbell, which indicated 9/21 on GAD-7 scale, 17/27 on PHQ-9 (depression scale), 57/80 on PCL-5 (PTSD Checklist), and 33/52 on Pain Catastrophizing Scale. Dr. Anderson in his responsive report opined that Ms. Campbell scored "highly" on Dr. Okorie's own testing, including in the "moderately severe range" for depression, and "highly" on the PTSD inventory and pain catastrophizing scale. Dr. Anderson further questioned: "It is unclear why Dr. Okorie did not comment on the significance of Ms. Campbell's high scores on testing." I also found Dr. Okorie's silence on this issue in the report to be puzzling.

[139] Under cross-examination, Dr. Okorie admitted that these scores were indeed "high" but took the position that these tests are "not diagnostic". This testimony was

difficult to accept because both Dr. Anderson and Dr. Purtzki administered these tests and did in fact consider them relevant in their analyses. Further, if they were indeed “not diagnostic” as Dr. Okorie claimed, Dr. Okorie failed completely in his testimony to explain why he administered the tests in the first place and also why he included the results in his report without explanation as to their significance or use.

[140] Third, Dr. Okorie’s opinion failed to adequately address the relevance of Ms. Campbell’s pre and post Accident condition. Dr. Okorie admitted under cross examination that he had not reviewed Ms. Campbell’s medical file before he met with her and, even in his report, his description of her medical history and its relevance was cursory at best. For example, Dr. Okorie failed to address the relevance of the fact that, prior to the Accident, although Ms. Campbell had experienced depression, there was no evidence that Ms. Campbell had suffered the symptoms she experienced after the Accident such as panic attacks, nightmares and flashbacks, hypervigilance, insomnia, increased startle response, and irritability. All of these were identified by Dr. Anderson in his report. There was also no evidence that Ms. Campbell had a history of generalized anxiety disorder, which she developed after the Accident.

[141] Dr. Okorie appeared to have developed the theory, largely based upon his interview with Ms. Campbell, that the bulk of her anxiety symptoms were caused by a workplace conflict in 2019 with co-workers. While Ms. Campbell did acknowledge at trial that these conflicts occurred and caused her difficulty (particularly in light of the magnified depression she was experiencing post-Accident), Dr. Okorie’s fixation on these conflicts as a single causal explanation for her anxiety was in my view overly reductionist and inconsistent with the bulk of the evidence at trial.

[142] For example, the evidence from the medical files was that Ms. Campbell developed panic attacks shortly after the 2016 Accident and well before the 2019 conflict in her workplace. This is not consistent with Dr. Okorie’s theory. Further, the evidence was also that Ms. Campbell reported increased anxiety to Dr. Clutterham in a clinical note dated April 2019, which was before she changed schools to Gleneagle Secondary School (where the workplace conflict subsequently

developed) but Dr. Okorie failed to address this fact in his report. Dr. Okorie's theory further failed to address the fact, again as evidenced in the medical records, that Ms. Campbell became increasingly depressed after the Accident in 2016 to a point where serial monitoring of her mood was instituted as early as September 2018 – again, well before the workplace conflict commenced.

[143] Dr. Okorie's theory was further undermined under cross-examination, where he agreed that:

- Ms. Campbell had pain and anxiety from her Accident-related injuries prior to the workplace incident of October 2019, including pain-related dysphoria, driving and passenger anxiety and avoidance, crowd-related anxiety, jumpiness, and cued recollections of the Accident;
- There were no reports in the clinical records relating to Ms. Campbell's anxiety relating to workplace conflicts prior to October, 2019;
- Ms. Campbell has continued to experience pain and anxiety from her Accident-related injuries since the October 2019 workplace incident even though she is no longer experiencing any stressors related to her work due to being off work since November 2019; and
- Ms. Campbell's ongoing adjustment disorder made her more vulnerable to the reaction she had to the October 2019 workplace incident.

[144] Fourth, in his report Dr. Okorie appeared to dismiss the diagnosis of PTSD because Ms. Campbell reported immediately after the Collision that she did not believe that her Collision-related injuries were serious and did not seek hospital treatment following the Collision. However, this line of reasoning did not make sense on its face. Under cross-examination, Dr. Okorie admitted that what is relevant is what the patient felt at the time of the Accident, not after the Accident, and Dr. Okorie also admitted that it is the threat of serious injury and not actual serious injury that can meet the exposure criterion. Yet in reaching his conclusion on PTSD, Dr. Okorie failed to consider whether Ms. Campbell felt threatened by death or

severe injury at the time of the Accident. He also failed to consider the evidence of symptoms that Ms. Campbell was experiencing that were consistent with PTSD (which were considered by Dr. Anderson in his report), including nightmares and flashbacks, and failed to address the significance of her high 57/80 score on his PTSD testing (and the 64/80 in Dr. Anderson's testing).

[145] For all the above reasons, I accept Dr. Anderson's conclusion that, although Ms. Campbell had a pre-existing condition of depression, Ms. Campbell did develop the various additional conditions identified by Dr. Anderson as a result of the Accident.

2. Damages

a. Non-Pecuniary Damages

[146] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Welder* at para. 82. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal set out an inexhaustive list of factors to consider when assessing non-pecuniary damages:

- . . .
- (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;
- . . .
- (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. . .

[Citation omitted.]

[147] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[148] The amount of the non-pecuniary award should compensate for more than direct injuries. As explained by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260:

[95] The underlying purpose of non-pecuniary damages is to “make life more endurable” and should be seen as compensating for more than just a plaintiff’s direct injuries: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 129 D.L.R. (3d) 263; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, 263 D.L.R. (4th) 19, leave to appeal ref’d [2006] S.C.C.A. No. 100; *Lee v. Dawson*, 2006 BCCA 159 at paras. 76-79, 267 D.L.R. (4th) 138, leave to appeal ref’d [2006] S.C.C.A. No. 192. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

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”. 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”.

[Internal citations omitted]

[149] Ms. Campbell is currently 57 years old. Prior to the Accident, Ms. Campbell had a number of significant health challenges that I have described above but was nonetheless able to live a reasonably active life. Ms. Campbell was able to maintain steady employment as a SEA (albeit with time off to recover from injuries that predated the Accident and workplace accommodations to manage the symptoms) and was able to participate in a range of household and recreational activities without restrictions.

[150] Ms. Campbell testified that, prior to the Accident, she engaged in activities such as hiking, biking, kayaking, tennis, and swimming. Many of the activities took place at the family vacation trailer at Birch Bay, which had a big beach, a park, and

lots of activities. She also recalled participating in other activities such as dancing and games, walking to the candy store, and taking part in the events put on by the leisure park.

[151] Following the Accident, Ms. Campbell's capacity for many activities has been reduced even though she has diligently undertaken many treatments to address her injuries. She ceased working altogether in 2019, giving up a career she enjoyed. Her ability to go on walks is limited due to her bilateral heel pain as well as her back pain and she has experienced weight gain as a result. Ms. Campbell testified that since the Accident she no longer rides her bike because of her feet, she does not go kayaking anymore, and she only went down to the beach for the first time in the summer of 2023 but required help to make it down. She testified that she does not swim anymore and that her kinesiologist does not want her in the pool alone until he feels that she will be safe by herself.

[152] Ms. Campbell testified that she now experiences, among other things, constant chronic pain, headaches, anxiety, and depression. Ms. Campbell has become more withdrawn from social settings and conversations due to her pain and symptoms. She has experienced cognitive issues and is more irritable. Her intimate relationship with her husband has been negatively impacted. She has experienced anxiety with driving, leaving her house, and being around a lot of people.

[153] Ms. Campbell's testimony was supported by corroborating witnesses.

[154] For example, Sean Campbell, her son, described his mother before the Accident as a typical 50-year-old lady with minor health problems, who was outgoing, adventurous, and overall healthy. He testified that she was pretty active and would go for walks, go to water aerobic classes, and would kayak in Birch Bay. He did not recall her suffering from headaches more than the typical cold headache and did not recall complaints about her feet.

[155] Mr. Campbell testified that Ms. Campbell talked with him on the phone the day after the Accident and told him that she was suffering from headaches, soreness, typical seatbelt pressure along the chest, and "how her feet were really

bugging her”. He testified that Ms. Campbell’s activities have changed since the Accident. He explained that at Birch Bay they no longer go on walks in the mornings and do not walk to the beach. Now, if Ms. Campbell goes to the candy shop, she will drive and meet the rest of the family who walked there. She no longer rides a bike. He testified that Ms. Campbell tried walking on the beach once this past summer and was “laid up” for a couple of days after that.

[156] Mr. Campbell testified that, since the Accident, family dinners have moved away from being hosted by Ms. Campbell because she now gets overwhelmed. He testified that Ms. Campbell is now more withdrawn from her grandchildren and her children and will get overwhelmed by noise in a room and will pull herself out into another room. Mr. Campbell also testified that he has witnessed Ms. Campbell suffer anxiety about driving on many occasions.

[157] Similar corroborating testimony with respect to the physical and emotional impact of the injuries caused by the Accident on Ms. Campbell’s quality of life was given by Ms. Thompson (Ms. Campbell’s daughter), Ms. Leslie (Ms. Campbell’s stepdaughter), and Mr. Leslie (Ms. Campbell’s husband). I found all this evidence to be factually consistent and credible.

[158] The impact of the Accident on Ms. Campbell’s life is also reflected in the medical evidence. For example, Dr. Purtzki opined that the prognosis for resolution of symptoms is “quite guarded” given Ms. Campbell’s age and the chronicity of her symptoms as well as her weight. Dr. Purtzki observed that Ms. Campbell had done a lot of treatments and has become more functional but doubted that she would become symptom-free.

[159] Dr. Anderson opined that Ms. Campbell likely has a permanent psychological disability as a result of the Accident. Dr. Anderson also opined that Ms. Campbell is not likely competitively employable due to the nature of her ongoing physical, cognitive, and emotional difficulties.

[160] With respect to employability, Dr. Okorie stated that in his report that he agreed with Dr. Anderson that Ms. Campbell’s “pain, physical problems, easy

fatiguability, anxiety, and depression are incompatible with returning to her job as an educational assistant.” He further opined that successful surgical intervention on her right ankle/foot combined with treatment for the adjustment and depressive disorders, “could help her return to the workforce in some capacity”, although she would need functional capacity and vocational assessments to determine the jobs that would be suited to her when her mental status is better.

[161] That said, the medical evidence also reflects some hope for future improvement. Dr. Younger opined that Ms. Campbell’s ankle pain is “quite disabling” and that it limits her walking and standing tolerance and her ability to take part in household work. However, he also opined that Ms. Campbell’s right ankle pain could be considered a temporary partial disability as it improved with surgery and that the left side, if it improves with surgery, could also be considered temporary (although he cautions that a “result similar to the right side cannot be guaranteed”). There is therefore a real and substantial possibility of a future recovery from the foot pain, which has been a significant limiting physical condition for Ms. Campbell.

[162] Ms. Campbell’s psychological condition appears on the evidence to be potentially more permanently disabling on balance than her physical injuries. That said, as opined by Dr. Okorie, Ms. Campbell has not undertaken functional capacity and vocational assessments to assess whether and to what extent she could be employable in some capacity, despite her condition.

[163] Ms. Campbell submits that an appropriate award for her non-pecuniary damages is \$150,000. The defence submits that the range of an award should be between \$57,000 to \$78,600, taking into account a 40% reduction to account for pre-existing conditions and vulnerabilities and unrelated post-accident injuries that significantly mitigated the causative impact of the Accident on the plaintiff’s health and work capacity.

Reduction of pre-existing conditions and post-Accident events

[164] In support of this argument, the defence relies upon *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 [T.W.N.A], where the Court of Appeal

confirmed that a pre-existing condition, whether manifest or not, is to be considered as part of the plaintiff's original position. Mr. Justice Smith summarized the relevance of pre-existing conditions, and subsequent intervening events, in the determination of a plaintiff's original position as it pertains to damages (at paras. 28 and 48):

[28] Accordingly, a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.

...

[48] The trial judge's misunderstanding of the thin skull and crumbling skull rules led him into further error in paragraph 301, quoted above. It was not correct to say that the alleged non-tortious causal factors were irrelevant unless they had already become manifest in a disabling condition and unless the defendants could prove that they would have inevitably led to the plaintiffs' present conditions. Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[165] A similar approach was adopted by the Court of Appeal with respect to intervening events in *Khudabux v. McClary*, 2018 BCCA 234 [*Khudabux*]:

[40] In this case, the judge clearly identified the extent to which the 2011 accident aggravated Ms. Khudabux's pre-existing injuries and he found that she was entitled to compensation for that additional loss. He also found that the intervening, unrelated events that occurred after the 2011 accident led to some of the same types of injuries. Thus, while Ms. Khudabux's condition was made worse by the 2011 accident, some of that loss would have occurred due to the subsequent events. In this way, I find that this case is distinguishable from *Sangha* and *Bouchard*.

[41] Considering first principles of tort law, a plaintiff is entitled to be put in the same position he or she would have been absent the defendant's negligence: *Athey* at para. 35. This entails determination of his or her original position, and the effects of pre-existing conditions and intervening events, to ensure the tortfeasor compensates only for the injury he or she caused and the plaintiff is not left in a better position than he or she otherwise would have been. This is discussed in depth in *T.W.N.A.* starting at para. 21.

[42] McLachlin C.J.C. noted in *Blackwater*:

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. [Emphasis added.]

[43] Here the judge determined that by the time of the trial Ms. Khudabux's condition was worse than it would have been had the 2011 accident and all the subsequent accidents never happened. He assessed a damage amount for her injuries globally at \$75,000. This took into account her pre-existing conditions. He then found that Mr. McClary was not responsible for all of the additional injuries as some were caused or overtaken by later tortious and non-tortious accidents. Therefore, as he explained, he reduced the damages award to reflect this. His finding is entitled to deference.

...

[46] In this case the judge “tried his best” to fairly assess damages, which was a complex task in the circumstances. The appellant's disagreement with the approach of the judge lies not with the principles he applied but with his factual conclusions about what Ms. Khudabux's position would have been in any event of the accident with Mr. McClary. The judge was unpersuaded that there was a great disparity, given her “original position” and the number of other intervening traumas. For that reason he concluded there was a “a high probability that Ms. Khudabux would be nearly as substantially incapacitated and affected as is now the case”: at para. 206. As a result, he reduced the global amount of damages he had assessed to account for the intervening events (and her contributory negligence). That was one approach to assessing damages. There may have been other methods he could have chosen, but I cannot conclude that he was wrong in his approach. Absent palpable and overriding error the judge's findings of fact will not be overturned.

[166] As noted in *Jandric v. Janzen*, 2023 BCSC 470 at para. 136, where a defendant argues that a plaintiff's damages are to be reduced to account for any measurable risk that the pre-existing condition would have detrimentally affected the plaintiff even absent the tortious event, the burden of proof lies with the defendant and “measurable risk” must rise above mere speculation to a real and substantial possibility and be based upon the accepted evidence.

[167] In my view, there was significant expert and other evidence to support the conclusion that Ms. Campbell did have significant pre-existing conditions which were either manifest at the time of the Accident or susceptible to aggravation by unrelated intervening events after the Accident (and were indeed so aggravated). For example:

- Dr. Purtzki opined that Ms. Campbell had a pre-existing history of right shoulder injury dating back to 2010 that was susceptible to flare up. This injury was sufficiently disabling and chronic that Ms. Campbell had received workplace accommodations prior to the Accident to help manage the symptoms;
- Dr. Purtzki opined that Ms. Campbell was vulnerable to injury in the shoulder area and now has persistent pain due to rotator cuff degenerative changes. Dr. Purtzki opined that the Accident caused a flare up of the pain and limitation in range of motion but, significantly, in my view, also opined that Ms. Campbell had a slip and fall on the ice in December 2016 (after the Accident), that also likely reaggravated the right shoulder. Thus it was not only a measurable risk that her shoulder could be aggravated by subsequent events after the Accident but there was in fact evidence that this actually occurred;
- Dr. Purtzki noted that Ms. Campbell had episodic headaches prior to the Accident. Dr. Purtzki opined that Ms. Campbell was vulnerable to developing a more severe headache disorder and that the Accident in fact caused the disorder to manifest. Again, however, there was not only a measurable risk that this pre-existing vulnerability could have been triggered by intervening events after the Accident but also evidence at trial that this actually occurred. In 2022, Ms. Campbell fell down the stairs and suffered a concussion. Dr. Best opined that this event, unrelated to the Accident, was a presumed concussion and contributed to her neck pain and headaches;
- Dr. Best also opined that there were multiple instances in the medical records of complaints of headaches that were attributed to various potential etymologies other than the Accident. For example, the plaintiff was non-compliant with the use of CPAP for the management of sleep apnea which could have contributed to headache pain;

- Dr. Purtzki noted that Ms. Campbell had suffered from chronic neck pain for many years and had an MRI on her neck in 2014. Dr. Purtzki opined that an acute traumatic event would increase her neck pain and likely lead to more headaches and is therefore compensable. While it is true that the Accident was such a traumatic event and did increase her neck pain and lead to more headaches, there was also in my view a measurable risk that other traumatic events (such as her subsequent falls) could have had the same effect absent the Accident;
- Dr. Purtzki noted that Ms. Campbell had a labral tear in her right hip resulting from pushing a wheel chair up a hill in 2014. Despite arthroscopic repair in 2015 by Dr. Gilbert, she developed further pain related to her SI joint by October 2015 post-operatively and continued to have intermittent right hip pain right up to the date of the Accident. Dr. Purtzki opined that this injury was not caused by the Accident, and it is clear there was a measurable risk that her hip pain would have continued even without the Accident;
- Dr. Purtzki noted that Ms. Campbell had pre-existing low back pain, which likely flared up with the Accident but that would “naturally wax and wane”, which indicates in my view that the flare-up after the Accident was short-term and there was a measurable risk of future flare-ups due to other causal factors;
- Dr. Purtzki observed that Ms. Campbell had been suffering from chronic depression for many years, controlled with Celexa. After the Accident, Ms. Campbell reported increased anxiety and depression and Dr. Purtzki opined that the depression and anxiety made the development of a somatic symptom disorder “more likely”. Thus, it is clear that Ms. Campbell was in a “thin skull” position with respect to vulnerability to somatic symptom disorder, as she did not have symptoms of that prior to the Accident. At the same time, however, it is also clear that there is a real and substantial possibility Ms. Campbell would have continued to suffer from chronic depression even

absent the Accident, although likely not as severe as the symptoms that were caused by the Accident; and

- Ms. Campbell admitted that she developed a cancerous lesion on her ankle in 2023, which required surgery and recovery time. There was no evidence this was causally related to the Accident.

[168] Ms. Campbell posited that her subsequent falls may have been caused by a lack of balance or dizziness attributable to the Accident, but this causal hypothesis was not persuasively supported in the medical evidence and did not rise above speculation. In my view, the proven facts necessary to permit the drawing of an inference required for a finding of causation is absent: *Murphy v. Morgan*, 2024 BCSC 859 at para. 162.

[169] Thus, it is clear in my view that Ms. Campbell had significant pre-existing weaknesses, both manifest and latent, that created a measurable risk that she would have suffered at least some of the injuries or worsening of health independent of the Accident. It is also clear in my view that some of the injuries suffered by Ms. Campbell as a result of the Accident resolved or returned to baseline and some of those injuries were caused or overtaken by later tortious and non-tortious accidents and injuries after the Accident.

[170] As noted in *Khudabux* at para. 41, I must ensure that the plaintiff is not left in a better position than she would otherwise have been in by determining the plaintiff's original position and the effects of pre-existing conditions and intervening events.

[171] In this respect, it is relevant in my view that Ms. Campbell did in fact return to work after the Accident and, with accommodation, was able to work for a period of close to two years before going on permanent disability. This is evidence that the effects of the Accident were not immediately disabling, and supports the inferential likelihood that some of the post-Accident events did in fact contribute to the worsening of her condition which ultimately prompted her to leave work.

[172] While Ms. Campbell is to be credited for all the effort she put into mitigating her injuries by engaging in an extensive regime of treatment, I also note that there was no evidence at trial that Ms. Campbell's permanent departure from work was medically recommended at the time nor was there evidence to explain why Ms. Campbell did not or could not have requested or obtained further accommodations at work to address her health concerns. There was also no report from a functional capacity expert to support the conclusion that Ms. Campbell has been and is unable to work in any capacity even if she could not longer continue in the role of a SEA. I note in this regard that Ms. Campbell had extensive expertise working in office environments prior to taking on the SEA role, which are clearly more sedentary and less physically demanding than a SEA role.

[173] Following *T.W.N.A.*, all the foregoing evidence and considerations are relevant to the assessment of damages and must be accounted for in the award.

[174] There was insufficient medical evidence adduced at trial to enable me to scientifically attribute an exact ratio to the extent of the pre and post-Accident injuries not causally attributable to the Accident. Taking into account all the evidence, my assessment is that the impact of the Accident on Ms. Campbell (in terms of new injuries and the aggravation of pre-existing conditions) was approximately twice as significant as the impact of pre and post-Accident conditions and events.

[175] As a result, it is fair in my view to apply a global reduction of 30% to the damages award to account for the measurable risk that Ms. Campbell's manifest and latent weaknesses would have manifested absent the Accident and indeed, on the evidence, did in some respects actually manifest after that time.

Relevant Authorities

[176] Ms. Campbell relies upon the following authorities: *Neil v. Martin*, 2021 BCSC 1727 (award of \$115,000, or approximately \$131,200 in 2024 dollars), *Gurung v. Trampleasure*, 2020 BCSC 1643 (award of \$130,000 in non-pecuniary damages or approximately \$152,900 in 2024 dollars) and *Gill v. Borutski*, 2021 BCSC 554

[*Borutski*] (\$140,000 in non-pecuniary damages, or approximately \$159,800 in 2024 dollars).

[177] The defence relies upon the following authorities: *Cunningham v. Greer*, 2019 BCSC 1208 (\$80,000 or \$95,000 in 2024 dollars after it was reduced by 50%); *Brown v. Bevan*, 2013 BCSC 2136 (award \$100,000 in general damages, or \$131,000 in 2024 dollars).

[178] There are parallels between this case and in *Borutski*. In that case the plaintiff was 47-years-old at the time of the collision. She had a pre-existing history of fibromyalgia but she was considered to be high functioning. The Court found that, as a result of the collision, the plaintiff suffered soft tissue injuries to her back and shoulder which gave rise to headaches and back and shoulder pain. Further, she became focused on her symptoms and treatments and developed somatic symptom disorder and other psychological injury, which was disabling. The Court found that the plaintiff's illness and symptoms had dramatically changed her life: "she no longer cooks, cleans, and organizes family life as she used to do. She was no longer a fun loving, extroverted, sociable, and energetic person. Rather, she was often bed-ridden, her social life is extremely limited, and she is often mad or upset" (para. 74). The Court awarded the plaintiff \$140,000 in non-pecuniary damages which is approximately \$159,800 in 2024 dollars. However, no reduction was made for pre-existing conditions or post-accident events.

[179] There are also parallels with *Gurung*. In that case, the plaintiff was a 49-year-old woman who had a history of an ongoing work-related back injury. As a result of the collision, she sustained ongoing physical limitations and chronic pain to her neck and right shoulder as well as mood issues including depression, general anxiety, and driving anxiety. The Court accepted that that her chronic pain and bouts of depression prevented her from working for two years and prevented her from returning to a profession she greatly enjoyed, that her interactions with her husband and children have been reduced, and that she has been more isolated socially since the collision. The Court awarded the plaintiff \$130,000 in non-pecuniary damages

which is approximately \$152,900 in 2024 dollars. Again, there was no reduction for pre-existing conditions or post-accident events.

[180] In *Cunningham*, a case cited by the defence, the plaintiff was a 65 year old male. Prior to the accident he had suffered from a myriad of conditions, ailments, and injuries, including a recent heart attack, arthritis, carpal tunnel in both hands, left and right shoulder dislocations, rheumatoid arthritis, a compacted disc in the lower back and neck, and intermittent depression. At trial, Mr. Cunningham testified that he recovered sufficiently from these physical problems such that he was able to resume his regular work duties two years prior to the accident and was independent in his activities of daily living and gainfully employed at the time of the first collision. That said, I note here that these pre-existing conditions were nonetheless more serious than Ms. Campbell's.

[181] The plaintiff in *Cunningham* claimed as a result of the accident that he suffered soft tissue injuries to his neck, back, and ribs, rib fractures, injury to his right ankle, knee, and foot, chronic pain; nausea and insomnia; and depression. The injuries had a significant impact on his work and personal life. The Court found a fair and reasonable assessment of the plaintiff's damages was a global award of \$160,000 but, given the plaintiff's pre-existing condition and subsequent intervening events, reduced this award by 50% to \$80,000. In my view, for the reasons stated above, a reduction of this magnitude is not merited in this case.

[182] After considering all the *Stapley* factors, the relevant authorities and the impact of inflation with respect to the quantum of prior comparable awards, I conclude that an appropriate award of non-pecuniary damages in this case is \$160,000, reduced by 30% to account for pre-existing conditions and intervening post-Accident events. I assess the award at \$112,000.

b. Past Income Loss

[183] Ms. Campbell seeks an award of \$167,000 for past income loss, which includes \$152,275.19 for lost wages, \$13,192 for lost Employment Insurance

benefits, and \$28,800 for lost consulting work as a behavioural interventionist, subject to a deduction of 14% to account for taxes.

[184] In *Singh v. Paquette*, 2022 BCSC 1579, Justice Walker helpfully summarized the legal analysis to be applied with respect to a past income loss claim:

[162] Past income loss is a component of loss of earning capacity. The award is meant to compensate an injured plaintiff for the loss of the value of the work that the plaintiff would have performed but was unable to because of the injury caused by the tortfeasor's negligence: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28–30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45; *X. v. Y.*, 2011 BCSC 944 at para. 185; *M.B. v. British Columbia*, 2003 SCC 53 at paras. 47, 49; *Wainwright* at para. 171. Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 130.

[163] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2020 BCCA 398; *Wainwright* at para. 172.

[164] While the standard of proof for proving a past event is on a balance of probabilities, any hypothetical events, past or future, will be taken into consideration as long as it is a real and substantial possibility and not mere speculation, and will be given weight according to its relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 27-28; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 27–29; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14, 27-28.

[165] In *Falati*, Justice Saunders summarized the principles governing the assessment of pre-trial lost earning capacity caused by the tortfeasor:

[39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. “past loss of income” or “past wage loss”, it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity – *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative “real possibility” and “capital asset” approaches to assessment are reviewed and discussed.

[40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies – what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from

something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: "The only difference is that knowledge of events occurring before trial takes the place of prediction" – Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable – Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

"What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

[41] Those general principles involved in the process of assessment include the following:

- The task of a court is to assess damages, rather than to calculate them mathematically – *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;
- The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood – *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;
- Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong – *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.);
- Any assessment is to be evaluated in view of its overall fairness and reasonableness – *Rosvold*, at para. 11.

[42] A trial decision of Finch J., as he then was, *Brown v. Golaiy*, 1985 CanLII 149, 26 B.C.L.R. (3d) 353, which has been frequently cited, sets out a list of further specific considerations which may be taken into account in making an assessment:

“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.”

[43] Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the basis of the balance of probabilities – *Steenblok v. Funk*, [1990] 5 W.W.R. 365, 46 B.C.L.R. (2d) 133 (B.C.C.A.); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss or earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the potential value of each of these opportunities, adjusted for various contingencies, may be weighed in determining the value of the plaintiff’s lost earnings capacity, both past and future.

[185] As stated above, I am satisfied on a balance of probabilities that the Accident caused or aggravated a significant portion of the Alleged Injuries, with certain exceptions as set out in the causation portion of these reasons.

[186] I am also satisfied based on all the evidence that, as a result of the Alleged Injuries, all four of the *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) considerations were operative with respect to Ms. Campbell during the period between the Accident and the trial. In this respect, I note that although Ms. Campbell did return to work for the period between 2017 and 2019, she testified that she dealt

with considerable pain and discomfort after she returned to work as a result of her injuries, ultimately causing her to cease work altogether in 2019. Dr. Anderson and Dr. Purtzki both opined at trial that Ms. Campbell is not likely competitively employable in any capacity due to her psychological condition and Dr. Okorie opined that Ms. Campbell is not competitively employable as a SEA, although posited that she might in future theoretically be able to find alternative employment in a different role. Either way, Ms. Campbell clearly incurred a loss of earning capacity as a result of the Accident.

[187] Having found a loss of earning capacity, the next issue to be addressed is how the value of Ms. Campbell's loss prior to the date of trial should be assessed. In valuing the loss, I must next decide between an earnings-based and capital asset approach. In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court explained the difference as follows:

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.

[17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[188] In the context of this case I find that the earnings approach is more appropriate, as there was an identifiable loss of income at the time of trial, and Ms. Campbell had an established work history as a SEA and a clear career trajectory.

[189] Mr. Pivnenko, the economist qualified as an expert in this case, provided an opinion as to Ms. Campbell's estimated earnings as an SEA absent the Accident as compared to Ms. Campbell's actual earnings from paid work:

Year	Absent-Collision Estimate	Actual Earnings from T4
2017	\$31,834	\$27,804.70
2018	\$33,099	\$29,906.95
2019	\$34,702	\$29,996.21
2020	\$35,591	\$5,863.96
2021	\$36,305	\$786.56
2022	\$37,419	\$0
2023	\$34,626	--
Total	\$243,576	\$94,358.38
Total Loss from January 1, 2017 to Trial		\$149,217.62

[190] Ms. Campbell submits that her gross past wage loss following the Accident, taking into account the additional period between the preparation of Mr. Pivnenko's report and the date of trial, is therefore equal to \$152,275.19 [\$3,057.57 + \$149,217.62].

[191] Ms. Campbell further submits that she is entitled to an award for past loss of EI benefits. In *McKenzie v. Lloyd*, 2016 BCSC 1745, the Court considered the past wage loss of a SEA employed by School District No. 43. The plaintiff claimed that, in addition to his actual wage loss, he had lost his ability to earn EI benefits during the periods of time he was laid off from his employment and that this should be factored into his income for the purposes of assessing his past wage loss. Ultimately, Justice Russell factored the EI benefits the plaintiff would have received into the calculations of both past and future income loss. In my view this is also appropriate in this case.

[192] Mr. Pivnenko provides an estimate of the EI benefits Ms. Campbell would have received from January 1, 2017 to the date of trial (there would be no loss of EI benefits in 2016 due to the Collision occurring after the 2016 summer holiday) and compared those to actual EI benefits received:

Year	Absent-Collision Estimate	Actual Regular EI Benefits Received
2017	\$2,932	\$3,378
2018	\$3,045	\$3,274
2019	\$3,193	\$2,994
2020	\$3,271	--
2021	\$3,341	--
2022	\$3,445	--
2023	\$3,611	--
Total	\$22,838	\$9,646
Total Loss from January 1, 2017 to Trial		\$13,192

[193] Ms. Campbell further claims for past loss of behavioural interventionist earnings. She submits that she would have continued her work as a behavioural interventionist past March 2017 if she had not been injured in the Collision. Ms. Campbell testified that her pupil was in middle school. Therefore, Ms. Campbell submits that she likely would have worked with him for another five years at which time he would have been finishing high school. Ms. Campbell gave evidence that she was earning \$30 per hour for this work.

[194] The invoices to the Autism Funding Unit show that for the period of August 10, 2016 to November 30, 2016, Ms. Campbell earned a total of \$1,920 which averages out to \$480 per month [$\$1,920/4$]. Ms. Campbell submits that she would have likely continued to provide behavioural interventionist services at the same rate that she was from August 10, 2016 to November 30, 2016, and therefore claims the sum of \$28,800 [$\$480 \times 12 \text{ months} \times 5 \text{ years}$] as her past loss of behavioural interventionist earnings.

[195] Ms. Campbell conceded that her gross past income loss must be reduced to net past income loss after taking into account the income tax and employment insurance premiums that would have been payable on the gross past income loss. Mr. Pivnenko's opined in his report that 14% is an appropriate deduction for income taxes and employment insurance contributions on amounts awarded and I accept this as a reasonable deduction.

[196] The defendants did not dispute at trial the past wage loss calculations in the economic report of Mr. Pivnenko with the exception of the claim of \$28,800 for behavioural interventionist earnings.

[197] In my view the objection of the defence with respect to the alleged lost behavioural interventionist earnings is well founded. As noted by the defence, the plaintiff only worked with this client for three months from August to November 2016 and there was no corroborating evidence at trial from the client, his parents or the school that this was a long-term relationship. In my view, an assumption that this limited engagement with one client for a short period of time would have translated into a steady stream of earnings for eight years is purely speculative and

unsupported by the evidence. I note for example that there was no testimony from this client or his family to support the plaintiff's claims.

[198] Therefore, excluding the behavioural interventionist earnings, the plaintiff's past wage loss would be \$152,275 (wages) plus \$13,192 (EI), which equals \$165,467 less 14% for taxes. The total past wage loss is therefore \$142,300.

[199] I must also address applicable contingencies. While Mr. Pivnenko in his report addressed generalized contingencies on a statistical basis, his analysis was based on a broad cohort group, which included women from diverse backgrounds and circumstances, and was not specifically focusing on those in B.C. in the position of Ms. Campbell, namely, with pre-existing health issues working part-time approaching retirement. Moreover, during cross-examination, Mr. Pivnenko admitted that these negative contingencies could indeed impact Ms. Campbell and others in her part-time cohort.

[200] With respect to contingencies, the defence emphasizes the following:

- The evidence indicates that Ms. Campbell went off work on her own volition in 2019 and did not make any significant attempts to return to work. Notably, the employer had a duty to accommodate her injuries and disabilities, and in fact did so prior to 2019, but despite these accommodations being in place, she chose not to re-engage with her employment.
- Ms. Campbell has demonstrated a residual capacity to work. She was able to work through 2016, the year of the accident and worked in 2017, 2018 and 2019. This suggests that her current condition does not entirely preclude her from gainful employment.
- The defence submits that the Ms. Campbell's decision to quit her job was primarily based on her own subjective perception. There was no corroborating evidence that her job was in jeopardy. In the past her employer had allowed her to modify her work pursuant to a duty to accommodate. There was no

evidence that the plaintiff's treating physician advised her to quit her job permanently as a result of the Accident.

- Ms. Campbell did not undergo a functional capacity evaluation. The absence of objective functional testing limits the court's ability to assess whether she has suffered a loss of functional capacity that may justify an award under this head of damages: *Fuchser v. Wilson*, 2012 BCSC 176 at para. 199.
- Ms. Campbell failed to call any collateral employment witnesses to corroborate her testimony regarding her job duties.
- Ms. Campbell's work history was marked by numerous periods of absence prior to the Accident, attributable to various health issues and there was in my view a real and substantial possibility that this pattern would have continued with the onset of advancing age. Post-Accident, the plaintiff continued to experience injuries and conditions (most recently cancer) unrelated to the Accident that further impacted, or could likely have impacted, her ability to maintain consistent employment.
- Ms. Campbell's medical history reveals multiple pre-accident and post-accident incidents that have significantly contributed to her current physical and psychological state. For instance, Ms. Campbell's depression, which predated the Accident, appears to have been influenced at least in part by various factors unrelated to the Accident, such as personal and workplace stressors. Additionally, Ms. Campbell had longstanding complaints of right shoulder pain, right hip pain, and low back pain, which were documented prior to the Accident and would have likely continued to affect her regardless of the Accident.

[201] In my view, the points raised by the defence with respect to contingencies are reasonable and fair and should be taken into account in the analysis. In my analysis on non-pecuniary damages I addressed many of the above contingencies and decided that a discount of 30% was appropriate to address them. In my view the same discount is appropriate under this head of damage. These contingencies

address Ms. Campbell's specific circumstances, as distinct from more general demographic contingencies, and should therefore be taken into account in addition to the general contingencies already addressed in Mr. Pivnenko's report.

[202] With respect to contingencies that favour the plaintiff, there are in my view none because Ms. Campbell's calculations are already based upon the worst-case scenario, namely a permanent disability resulting in an inability to work in any capacity after 2019.

[203] Therefore, to account for these contingencies, and to ensure that the award is fair and reasonable and does not put Ms. Campbell in a better position than she would have been in but for the Accident, a 30% discount should be applied to the total past wage loss of \$142,300. This results in an award of \$99,610.

c. Future Loss of Earning Capacity

[204] Ms. Campbell submits that her future loss of earning capacity is equal to \$316,800.

[205] In *Rattan v. Li*, 2022 BCSC 648, the Court helpfully set out the applicable analysis:

[145] An award for future loss of earning capacity represents compensation for a pecuniary loss. While the award is an assessment of damages, not a calculation, the award nevertheless involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157 [*Dornan*].

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[148] At para. 47 of *Rab*, Grauer J.A., writing for the Court, sets out a three-step process for considering claims for loss of future earning capacity:

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

[149] As a final step in the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117 [*Lo*].

[150] The relevant jurisprudence identifies two approaches to the assessment of damages for loss of earning capacity: an earnings approach and a capital asset approach. In cases using the earnings approach, valuation of the future loss—the third step of the process—typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Lo* at para. 109; *Dorman* at paras. 155–156. In cases using the capital asset approach, such as cases where the plaintiff continues to earn income at or near pre-accident levels, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 43; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[206] As noted in my analysis concerning past wage loss, Ms. Campbell has not worked since 2019 and continues to be on disability. I have found that the injuries she suffered as a result of the Accident have causally contributed to her departure from work and the medical evidence supports the conclusion that she is unlikely to return to work as a SEA or in comparable employment into the future. There is therefore a loss of capacity on the part of Ms. Campbell that will extend into the

future and a real and substantial possibility that this loss of capacity will cause a pecuniary loss, thereby satisfying the first two steps of the *Rab* test.

[207] That said, as explained in the analysis on non-pecuniary damages and past income loss, the evidence in my view also does not support the definitive conclusion that Ms. Campbell is fully disabled for life and will never be able to rejoin the workforce again in some capacity. Dr. Younger's report allows considerable room for optimism regarding her potential recovery from the Achilles tendinopathy (the most painful injury she has suffered) and Ms. Campbell's ability to work after the Accident until 2019 strongly indicates a residual capacity to work.

[208] Turning to the third step of the *Rab* analysis, the valuation of the possible future loss, I must next decide between an earnings-based and capital asset approach. As I explained in my analysis on past income loss, an earnings-based approach is more appropriate in this case because Ms. Campbell had a settled career path with a stable union job before going on disability.

[209] Ms. Campbell submits that, absent the Accident, she would have remained working as a SEA and would have continued to collect EI benefits during the summers when she was laid off. Ms. Campbell testified that she would have continued working as a SEA until she reached the age of 65 because she "quite enjoyed it". Ms. Campbell testified she likely would have continued working for approximately two months after her 65th birthday, to the end of June, as that would allowed her to finish out the school year.

[210] Mr. Pivnenko opined that the present value of Ms. Campbell's future earnings had she continued to work as a SEA working 30 hours per week to age 65 is \$289,333. The present value of the EI benefits Ms. Campbell could be expected to receive during this timeframe is \$27,493.

[211] Mr. Pivnenko also opined that this calculation excludes the value of employer contributions to non-wage benefit plans (including pension), which would have added about 15% to the value of Ms. Campbell's future earnings compensation if Ms. Campbell at some point no longer qualifies for her long-term disability. He

opined that, if Ms. Campbell remains on long term disability until her age 65, the estimated value of employer funded benefits (excluding pension) would be about 7% of the absent-Accident future earnings.

[212] Mr. Pivnenko also accounted for labour market contingencies. Mr. Pivnenko opined that, among women in B.C. with college diplomas or certificates, aged 57 to 65, risk to employment status reduces earnings by about 11.5%. Mr. Pivnenko opined that risks of unemployment are below average among unionized public sector workers and therefore that labour market risks for unionized employees would likely be below the average estimate of 11.5%. On this basis, Ms. Campbell argued that 6% is a reasonable discount to account for labour market contingencies after taking into account the specific nature of Ms. Campbell's employment that would mitigate some of the labour market risks.

[213] Taking into account Mr. Pivnenko's analysis, Ms. Campbell submits that her future loss of earning capacity is equal to \$316,800 (rounded). This sum consists of the present value of her likely absent-Accident future earnings (\$289,333) increased by 7% for employer-funded non-wage benefits and the present value of Ms. Campbell's absent-Accident future EI benefits (\$27,493) less a 6% discount for labour market contingencies. Ms. Campbell submits that, if she does not return to work, she would likely continue to receive long-term disability and therefore the figure of 7% for non-wage employer-funded benefits excluding pension is applicable.

[214] The defence does not dispute the future wage loss calculations in Ms. Campbell's closing submissions as based on the report of Mr. Pivnenko, which they calculate at \$337,079. However, the defence submits that a discount of 50% should be applied to account for contingencies, resulting in a future income loss of \$168,359, citing *Randhawa v. Hwang*, 2008 BCSC 435, *Radacina v. Aquino*, 2020 BCSC 1143, and *Cunningham*.

[215] I have addressed the issue of contingencies in my analysis on non-pecuniary damages and past income loss and will not repeat it here. These contingencies apply equally in my view with respect to future income loss, resulting in a discount of

30% (applied to \$337,079). This results in an award for future income loss of \$235,955.30.

[216] Pursuant to s. 56(2)(a) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and s. 1(a) of the *Law and Equity Regulation*, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate used to calculate the present value of a future income loss is 1.5%. This discount rate was expressly incorporated into the multipliers used in the economist report and I therefore make no further adjustments.

d. Loss of Housekeeping Capacity

[217] The plaintiff submits that an award of \$25,000 is appropriate for loss of housekeeping capacity, separate from her non-pecuniary damages award, in addition to claiming \$33,303.51 for housekeeping as a future cost of care. The defence agrees that a pecuniary award for loss of housekeeping capacity is appropriate but takes the position that the award should be set at \$15,000.

[218] The applicable analysis was set out in *McKee v. Hicks*, 2023 BCCA 109 at paras. 106, citing with approval the decision of Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 at para. 67:

[...]

a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.

b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.

c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.

d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[...]

[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.

[219] Ms. Campbell argues that she has been rendered unable to perform usual and necessary housekeeping activities, relying upon the following evidence:

- Dr. Purtzki opined that, if Ms. Campbell's husband "was unavailable to do household chores, she would not be able to complete them independently";
- Ms. Campbell gave evidence that prior to the Accident, she split housekeeping duties with Mr. Leslie on a 50-50 basis. She testified that now, since the Accident, she is no longer able to do her share of the housecleaning and Mr. Leslie has had to do about 90% of the housework;
- Ms. Campbell also testified that a housekeeper comes every three weeks but Mr. Leslie does all the cleaning in between these visits. She also testified that Mr. Leslie does the majority of shopping and all the preparation of dinners; and
- In the read in evidence from Mr. Leslie's examination for discovery, he agreed that prior to the Accident he and Ms. Campbell split the household duties on a 50-50 basis. He testified that he now does 80–90% of the housecleaning and that he does mostly a surface clean because he hates it and then the housekeeper comes in every third week and does a better job.

[220] In my view, taking into account all the evidence, a pecuniary award is appropriate in this case because the evidence demonstrates that Ms. Campbell has been rendered largely incapable of performing most housekeeping tasks, is paying for services provided by a housekeeper, and is relying on Mr. Leslie to provide equivalent services gratuitously.

[221] The next question that must be addressed is how to assess the loss. The Court of Appeal has made it clear that damages for loss of housekeeping capacity, even as pecuniary damages, are an assessment and not a rigid mathematical calculation, although noting that it is acceptable to utilize labour force information regarding the value of replacement services in making that assessment: *Liu v. Bains*, 2016 BCCA 374 at para. 28. In *Liu* the Court of Appeal urged “caution” in assessing awards for loss of housekeeping capacity while at the same time noting that awards need not provide less than full compensation for a proven loss.

[222] In this case there is evidence that, prior to trial, Ms. Campbell has had a housekeeper attend every three weeks for three hours at a cost of \$30 per hour whose services she testified she plans to continue using into the future, as recommended by Dr. Purtzki.

[223] Assuming a period of seven years from the date of the Accident up to the date of trial, this amounts to an estimated cost of \$1,620 per year and \$11,340 in total. Moving forward from the date of this decision up to the age of 75, and using the multiplier in the economist’s report to determine the present value of Ms. Campbell’s future costs for housecleaning assistance care, the plaintiff estimates an additional \$33,303.51, resulting in a total amount of \$44,643.51.

[224] Of course these past and future expenditures do not capture the full extent of her loss of capacity, as they do not reflect the gratuitous contributions made by Mr. Leslie’s housekeeping contributions and the value of Ms. Campbell’s prior household contributions to the family unit, which clearly exceeded the value of a housekeeper’s visit every three weeks. As noted by Justice Girn in *Chau v. Farshid*, 2023 BCSC 1004:

[277] Ms. Chau submits that she has lost her ability to perform household tasks that would have been of value to herself as well as others in the family unit but for the Accident.

[278] She relies on *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 74, wherein the Court held that this is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff, rather than by the plaintiff.

[279] In *Westbroek* at para. 76, the Court further noted that “damages for loss of capacity to complete homemaking tasks are not dependent upon

whether replacement costs are actually incurred because what is being compensated is the loss of capacity itself.”

[225] Taking into account the foregoing considerations, which merit an upward adjustment, I would assess the value of Ms. Campbell’s loss of housekeeping capacity at \$60,000. However, I must also consider contingencies and other necessary adjustments.

[226] The defence argued with reason that the extent of the housekeeping assistance was not clearly defined or grounded in the evidence, nor did Ms. Campbell undergo a functional capacity evaluation. The defence also submitted that Ms. Campbell’s pre-and post injuries and her long-term knee, hip, and shoulder problems would all have impacted her ability to do housework in any event, suggesting that a 40% reduction should be applied to the amount claimed by Ms. Campbell. I also note that there is a real and substantial possibility that, given her pre-existing health conditions, Ms. Campbell likely would have required housekeeping assistance before the age of 75 years, even absent the Accident.

[227] Taking all the foregoing into account, in my view a 30% reduction in the amount claimed is appropriate. Accordingly, I assess the award for loss of past and future housekeeping capacity at \$45,000.

e. Costs of Future Care

[228] Ms. Campbell seeks an award for costs of future care in the amount of \$477,800. The defence concedes that Ms. Campbell is entitled to some reasonable treatments but disputes some of the specific expense items claimed by Ms. Campbell. The defence takes the position that an award of \$61,214 is appropriate.

[229] The courts have made it clear that an award for the cost of future care should have medical justification and should be reasonable. In *Chavez-Salinas v. Tower*, 2022 BCCA 43, Justice Abrioux set out the legal framework for future care awards:

[83] The judge set out the applicable legal principles: Reasons at paras. 490–502. These were recently summarized by Justice Voith in *Pang v. Nowakowski*, 2021 BCCA 478:

[56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:

[43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

[44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable.

[57] Several additional principles are relevant:

- i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item;
- ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred;
- iii) The court must be satisfied that there is no significant overlap in the various care items being sought.

[58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss.

[Citations omitted.]

[230] While medical evidence for each item of care is not strictly required, the award must be based upon the medical evidence as a whole. In *Langille v. Nguyen*, 2013 BCSC 1460 at paras. 231–235, aff'd on appeal, 2014 BCCA 430, Justice Fitzpatrick summarized the applicable approach:

[231] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.

[232] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.

[233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[234] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required: *Tsalamandris* at paras. 64-72. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.

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

[Emphasis added.]

[231] In *Warick v. Diwell*, 2017 BCSC 68, aff'd on appeal, 2018 BCCA 53, Justice Schultes, in reviewing the applicable principles for a cost of future care claim, noted at para. 202:

[202] With respect to the standard of proof to be met, "[a] plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities...that she will require future care because of the wrong done to her. If the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation..." *Graham v Rourke* (1990), 74 DLR (4th) 1 (Ont CA).

[232] Justice Schultes further noted:

[204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly

related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact”: *Harrington v Sangha*, 2011 BCSC 1035, at para 151.

[233] In her report dated May 26, 2023, Dr. Purtzki recommended the following with respect to Ms. Campbell’s future care:

- referral to a physiatrist or neurologist for Botox injections;
- consideration of a trial of medication, such as Concerta or Dexedrine, to improve daytime alertness;
- referral to a complex pain clinic;
- trial of an abdominal binder to support her lower abdominal muscles;
- continuing with physiotherapy with a focus on active core strengthening and postural re-education;
- ongoing psychological counselling;
- sessions with an aquatic therapist on a one-to-one basis for six months;
- driving lessons for driving anxiety;
- installation of bathroom safety features such as grab bars and non-slip mats; and personal assistance after the second heel surgery; and
- a motorized scooter or other form of power mobility for community access and longer distances.

[234] Dr. Younger, in his report dated December 9, 2022, recommended that Ms. Campbell have four to six weeks of support after surgery along with 12 physiotherapy visits. He also recommended approximately 10 physiotherapy sessions per year for the feet and ankles.

[235] In his report dated November 1, 2022, Dr. Anderson recommended:

- long-term supportive therapy with a psychologist;
- a referral to a neurologist for treatment of headaches and possible Botox injections;
- a referral to a multidisciplinary pain clinic;
- a supervised exercise program under the direction of a kinesiologist; and
- continued involvement of an occupational therapist.

[236] In his report dated June 9, 2023, Dr. Okorie recommended medications, psychological treatment, and driving lessons for driving anxiety.

[237] Dr. Best, in his report dated August 30, 2023, recommended further courses of physical therapy, chiropractic, and/or active rehabilitation and trigger point or Botox injections. He further stated that it would be reasonable for Ms. Campbell to accept assistance for housekeeping and meal preparation tasks.

[238] Although Dr. Hummel was of the opinion that Ms. Campbell should be encouraged to return to work as a SEA, as her foot and ankle complaints have appeared to improve, in my view this opinion was of limited assistance on the issue of future care because Dr. Hummel did not address the totality of Ms. Campbell's symptoms, including the fact that her inability to work is not just due to her feet and ankles but additionally due to her psychiatric conditions, headaches, and chronic pain.

[239] Ms. Campbell testified that her current treatment regime consists of physiotherapy, massage therapy, aquatic therapy, and psychological counselling along with various prescription and non-prescription medications. She testified in particular that:

- she attends physiotherapy once per week at a cost of \$85 per session;
- she has just started to attend massage therapy once per week for hour-long sessions and that this will cost \$126 per session;

- she is attending psychological counselling once every two weeks at a cost of \$245 per session;
- she is currently on a break from her aquatic therapy due to having an open wound on her ankle but she intends to continue with this therapy on a twice per week basis at a cost of \$120 per session; and
- she has found all of these treatments to be helpful, finds that they help to maintain her function and wants to continue with them.

[240] Ms. Campbell testified that she takes the following prescription medication:

- 225mg of the anti-depressant Venlafaxine once per day. The cost of Venlafaxine is \$49.50 (3-month supply);
- two Topiramate pills once per day for migraines. The cost of Topiramate is \$51.70 (3-month supply);
- one Pantoprazole once per day for acid reflux caused by her other medications. The cost of Pantoprazole is \$15.38 (4-month supply);
- Zopiclone as needed with a 60-tablet bottle lasting around six months for sleep. The cost of Zopiclone is \$8.54 (6-month supply); and
- Lorazepam as needed around once per month for anxiety attacks. The cost of Lorazepam is \$5.38 (7-month supply).

[241] Ms. Campbell testified that, with respect to non-prescription medication, she spends:

- \$30 on a bottle of Extra Strength Tylenol that will last four months;
- \$29.99 on Excedrin for migraines which lasts six months;
- \$19.98 on a back muscle relaxer that lasts six months;
- \$35 for magnesium which lasts two months; and

- \$17 for creams such as Voltaren that last two months.

[242] Ms. Campbell testified that she is currently on the waitlist for surgery on her left ankle. She testified that she would be interested in and open to a trial of Botox, attending a complex pain clinic, using bathroom safety features recommended by Dr. Purtzki, a motorized scooter, and driving lessons for anxiety.

[243] On the basis of all the foregoing, the plaintiff claims for the following one-time expenses totalling \$45,760.00:

1. \$5,760.00 for six months of twice weekly one-on-one aquatic rehabilitation at \$120 per session as recommended by Dr. Purtzki; and
2. A \$40,000 fund for access to a trial of Botox, a complex pain clinic, driving lessons for anxiety, bathroom safety modifications, a mobility scooter, ongoing occupational therapy involvement, and personal care following the second heel surgery as recommended by Drs. Purtzki, Anderson, Younger, Okorie, and Best.

[244] The plaintiff also claims for the following present values of future costs of care items for life totalling \$432,100.63:

1. \$10,388.08 for Ms. Campbell's current prescription medication regime as prescribed by her doctors at \$477.24 annually broken down as \$17.08 per year for Zopiclone; \$9.22 per year for Lorazepam; \$198 per year for Venlafaxine; \$206.80 per year for Topiramate; and \$46.14 per year for Pantoprazole;
2. \$10,925.73 for Ms. Campbell's current non-prescription medication regime at \$501.94 annually broken down as \$90 per year for Tylenol Extra Strength; \$59.98 per year for Excedrin for migraines; \$39.96 for back muscle relaxer; \$210 per year for Magnesium; and \$102 per year for Voltaren;
3. \$138,655.79 for ongoing psychological treatment by Dr. Jackson as recommended by Dr. Purtzki and Dr. Anderson at Ms. Campbell's current

- frequency of once every two weeks (26 sessions per year for a cost of \$6,370 annually);
4. \$96,210.14 for ongoing physiotherapy treatment at Ms. Campbell's current frequency of once per week (52 sessions per year for a cost of \$4,420 annually);
 5. \$142,617.38 for ongoing massage therapy treatment at Ms. Campbell's current frequency of once per week (52 sessions per year for a cost of \$6,552 annually); and
 6. \$33,303.51 for housekeeping assistance.

[245] Ms. Campbell submits that the Cost of Care Multiplier Table located in Mr. Pivnenko's report should be used to determine the present value of Ms. Campbell's future care. Taking into account this multiplier, the total claim by Ms. Campbell for her cost of future care and assistance set out above amounts to \$477,800 (rounded).

[246] The defence concedes that Ms. Campbell is entitled to the costs of future care as set in the following expert reports:

- antidepressant Venlafaxine (recommended by Dr. Okorie);
- psychological Counseling 8-12 sessions (recommended by Dr. Okorie);
- driving lessons 8-12 sessions (recommended by Dr. Okorie);
- antidepressant Cymbalta and Nortriptyline (recommended by Dr. Anderson);
- pain clinic (recommended by Dr. Anderson);
- supervised exercise program (recommended by Dr. Anderson);
- cervical medial branch block injections (recommended by Dr. Best);
- radiofrequency ablation if necessary (recommended by Dr. Best);
- lumbar nonsteroidal anti-inflammatory drugs (recommended by Dr. Best);

- muscle relaxants Chiropractic and/or kinesiology (recommended by Dr. Best); and
- Botox injections if necessary (recommended by Dr. Best).

[247] The defence also took the following position with regard to the recommendations in Dr. Purtzki's report:

- agree to the cost of facet block injections as this was recommended by Dr. Best;
- agree to the cost of Botox treatment as recommended by Dr. Best;
- agree to the cost of Venlafaxine as recommended by Dr. Okorie;
- agree to the cost of Concerta or Dexedrine;
- disagree to the cost of the pain clinic as this has been initiated already;
- agree to a Tens machine;
- agree to an abdominal binder;
- agree to a Theragun for self massage;
- agree to Silicone sleeves for shoes if the Court finds that the ankle injury was caused by the Accident;
- agree to physiotherapy although not to the unlimited number of sessions claimed;
- agree to the cost of aquatic exercise for six months at \$5,760;
- disagree with occupational therapy assessment for home adaptations as not necessary if getting household assistance;
- agree to psychological counseling as recommended by Dr. Okorie but only for 8-12 sessions;

- disagree with a motorized scooter, noting that Ms. Campbell had mobility issues prior the Accident and there is no medical evidence that the plaintiff is incapacitated to the point that she needs a scooter. Under cross examination Ms. Campbell stated that she could walk up to 45 minutes on a flat surface;
- agree to driving instruction as recommended by Dr. Okorie;
- disagree with bathroom modifications. The plaintiff has managed to date without these devices. There was no functional capacity evaluation or occupational therapy assessment done to determine if these are necessary therefore no basis for this recommendation; and
- disagree with the costs of occupational therapy following a second surgery as it is not certain plaintiff will get surgery on her left ankle. There was no corroborating evidence from Dr. Roberts the treating orthopedic surgeon and Dr. Younger said only that the left ankle may potentially require surgery.

[248] With respect to Ms. Campbell's claim for the one-time expenses totalling \$45,760.00, as described above, the defence takes the position that only the \$5,760.00 for aquatic rehabilitation should be allowed. The defence opposes the claim for a one-time payment of a \$40,000 "fund" for access to a variety of care items, emphasizing that there is no breakdown in the evidence for the cost of individual items. The defence also disagreed with the claim for bathroom modifications, the mobility scooter, and the occupational therapy involvement following a second surgery for the reasons I have set out above.

[249] I agree with the defence that the failure to itemize the cost of each individual item (and also to support these cost amounts with expert evidence) is problematic. I also agree that there was no expert medical evidence supporting the claim for the bathroom modifications and the occupational therapy following a hypothetical second surgery that may or may not take place.

[250] That said, there was expert evidence from Dr. Best supporting the Botox treatment and evidence from Dr. Okorie supporting the driving lessons. There was

also evidence from Dr. Purtzki in her report supporting the complex pain clinic, and a mobility scooter or other form of power mobility for community access and longer distances. Under cross-examination, Dr. Purtzki clarified her recommendation of a mobility scooter by explaining that Ms. Campbell has a loss of balance and stability, a fear of falling and additional pain, back pain, and some residual foot pain following surgery and that a motorized scooter will likely give her the greatest integration and access to the community. Dr. Purtzki also stated that she did not require a functional capacity evaluation to make this recommendation, as with her over 20 years of experience she could make a pretty good determination as to whether someone needs a mobility device.

[251] Although the Botox treatment and the mobility scooter were not costed in the evidence, in my view they are medically recommended and would assist in ameliorating the impact of the Accident on Ms. Campbell. Further, I note that there were a number of items to which the defence agreed in their closing (such as the Tens machine, the abdominal binder; the Theragun for self massage; and the silicone sleeves for shoes) that Ms. Campbell did not specifically include in the \$40,000 fund but in my view should be included.

[252] In my view, it is therefore fair and reasonable that Ms. Campbell be awarded some amount for these items but at a considerably lower level than that requested. I therefore award the amount of \$15,000 for the one-time amounts plus the \$5,760.00 for aquatic rehabilitation, for a total of \$20,760.

[253] With regard to the present value of future costs of care items for life totalling \$432,100.63 claimed by Ms. Campbell, the defence position was that only \$55,454 should be awarded for the following reasons:

1. The defence agreed with the medication cost of \$10,388.08, subject to claiming that there should be a discount of 40% to account for Ms. Campbell's pre-existing physical and psychological issues, which amounts to \$6,232.85;

2. The defence disagreed that there was any medical evidence that the non-prescription medications are medically necessary and also argued that they duplicate the prescription medications;
3. The defence disagreed that ongoing psychological treatment at the frequency of once every two weeks for life is merited. The defence noted that Ms. Campbell had pre-existing depression, and that her post-Accident depression is multifactorial and only partially caused by the Accident. The defence also argued that there was no evidence that Ms. Campbell would need this level of psychological treatment for life, noting that Dr. Okorie recommended that the plaintiff get 8-12 sessions of therapy and then be reassessed. If calculating for 12 sessions at \$245 per session this amounts to \$2,940 and, allowing for five years, this amounts to \$14,700;
4. The defence disagreed that ongoing physiotherapy treatment at Ms. Campbell's current frequency of once per week for life is merited or supported by the expert evidence. To the contrary, the defence emphasized that Dr. Purtzki, in her first report, recommended that the plaintiff slowly cut down on chiropractic, physiotherapy, and massage because she has spent much time on passive treatment and should instead focus on active strengthening. The defendants submit that a 25% allowance should be allowed, amounting to \$34,522; and
5. The defence disagreed that there was any medical evidence supporting a lifetime of massage therapy at once per week, noting that Dr. Purtzki recommended only a Theragun for self massage.

[254] With respect to each of the above points raised by the defence, my conclusions are as follows:

1. The defence agreed to the medication amount sought by the plaintiff subject to a discount of 40%. For the reasons already cited above, my view is a 30% discount is appropriate. Therefore, the amount awarded is \$7,791;

2. I agree with the defence that there was no medical evidence supporting the medical necessity of the non-prescription medications and also that they are likely duplicative of the prescription medications. I therefore make no award under this category;
3. The ongoing psychological treatment was recommended by Dr. Purtzki and Dr. Anderson (although not specifically at the frequency sought by the plaintiff), but I agree with the defence that the amount of \$138,655.79 sought by the plaintiff is unreasonable because it does not take into account Ms. Campbell's pre-existing depression condition (which likely would have necessitated some cost for psychological counselling even absent the Accident), and also does not take into account any positive contingency that her psychological condition could improve, which in my view is a reasonable possibility given all the evidence. That said, the recommendation of Dr. Okorie that counselling should be limited to 8-12 sessions is also not reasonable given the multifaceted challenges presented by her current condition. Accounting for these factors I award the amount of \$65,000;
4. With respect to the \$96,210.14 sought for ongoing physiotherapy treatment at the current frequency of once per week, I find persuasive the defence's emphasis on Dr. Purtzki's recommendation that the plaintiff slowly cut down on chiropractic, physiotherapy, and massage because she has spent much of her time on passive treatment and should instead focus on active strengthening. As noted above, the plaintiff's claim also does not account for Ms. Campbell's many pre-existing and post-Accident injuries, for which some physiotherapy might have been necessary in any event, and the possibility that Ms. Campbell's conditions would improve, reducing the need for passive therapy. The defendants suggest a 75% discount is appropriate. In my view a 50% discount is merited, resulting in an amount of \$48,105.07;
5. The defence correctly notes that there was no medical evidence in support of continued massage therapy, although I note that Ms. Campbell has engaged extensively in massage therapy since the Accident (as acknowledged by

Dr. Purtzki in her report) and clearly Ms. Campbell derives significant benefit from it. In my view, three years of massage is appropriate at a cost of \$6,552 annually, on the assumption as recommended by Dr. Purtzki that the massage treatments will be phased out in favour of active strengthening. I therefore award \$19,656; and

6. I have addressed the issue of housekeeping costs as a separate head of damage above. In *Kim v. Lin*, 2016 BCSC 2405, aff'd 2018 BCCA 77, the court cautioned that care should be taken not to duplicate awards under different heads of damages.

[255] The sum of the above awards for future costs of care items amounts to \$140,552.07.

[256] Taking into account all the above, the total award for costs of future care is assessed at \$161,312.07 (\$20,760 for one-time costs and \$140,552.07 for future costs).

[257] With respect to the above calculation, pursuant to s. 56(2)(b) of the *Law and Equity Act* and s. 1(b) of the *Law and Equity Regulation*, the discount rate used to calculate the present value of future losses (other than income) is 2.0%. However, the multiplier in Mr. Pivnenko's economist report already expressly incorporates this discount rate so I make no further adjustment.

f. Special Damages

[258] The plaintiff and the defendant have agreed on special damages in the amount of \$17,652.79.

[259] In addition to the agreed upon special damages, Ms. Campbell testified that she incurred more recent expenses related to the Accident for prescription medication, massage therapy, psychological counselling, and housekeeping and provided invoices, bringing the total to \$17,921 (rounded). This was not opposed by the defence.

ORDER

[260] I conclude that Ms. Campbell is entitled to the following award of damages against the defendant:

Head of Damage	Award
a. Non-pecuniary damages	\$112,000
b. Damages for Loss of Past Income	\$99,610
c. Damages for Loss of Future Income	\$235,955.30
d. Housekeeping Costs	\$45,000
e. Costs of Future Care	\$161,312.07
f. Special Damages	\$17,921
TOTAL	\$671,798.37

[261] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

“M. Taylor J.”