IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacDonald v. Sadri,*
2025 BCSC 2083

Date: 20251022
Docket: M193494
Registry: Vancouver

Between:

Shayna Elizabeth MacDonald

Plaintiff

And:

Armin Mostofi Sadri

Defendant

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

Counsel for the Plaintiff:	N. Hartney A. Moniuszko, A/S
Counsel for the Defendant:	N. Aram M. MacNeil
Place and Date of Trial:	Vancouver, B.C. January 13-21, 2025
Place and Date of Judgment:	Vancouver, B.C. October 22, 2025

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Introduction

[1] This action arises out of a motor vehicle accident that occurred in Kelowna, British Columbia on February 25, 2018 (the "Accident"), when the plaintiff, Shayna Elizabeth MacDonald, was 26 years old. Ms. MacDonald was stopped in a parking lot waiting to turn right onto a highway. The defendant, Armin Mostofi Sadri, was driving along that highway. He swerved to avoid another vehicle and in doing so, his vehicle collided with the driver-side door of the plaintiff's vehicle. The defendant admits liability for the Accident, and accepts the plaintiff suffered some injuries and damages, but disputes the extent and duration of the alleged injuries, as well as the amounts and types of damages the plaintiff claims.

[2] The defendant says some of the plaintiff's alleged symptoms and current and future limitations are or may be the result of one or more of the following events: a subsequent motor vehicle accident on October 13, 2020 in Newfoundland which was not caused by the plaintiff (the "2020 MVA"); an unrelated ankle fracture the plaintiff suffered while hiking on July 1, 2023; and a further motor vehicle accident in Newfoundland on November 19, 2024, for which the plaintiff was at fault (the "2024 MVA"). At the time of trial, there were no legal proceedings in respect of either the 2020 MVA or the 2024 MVA, and the plaintiff says she did not suffer any injuries from the 2024 MVA. The parties disagree about the impact of these intervening events on the plaintiff's ability to work and her entitlement to damages. The defendant also says the plaintiff failed to adequately mitigate her damages.

[3] On the morning of the fourth day of trial, after having cross-examined the plaintiff and other witnesses about the 2024 MVA, the defendant raised concerns that the plaintiff had failed to disclose the fact of the 2024 MVA until the eve of trial. Defendant's counsel advised they would proceed with the trial but might apply to reopen the trial after its conclusion. After a discussion with the Court, defendant's counsel sought further instructions and confirmed the defendant wished to apply for an adjournment.

[4] To manage the matter efficiently, I set the defendant's adjournment application for day six of the trial and continued to hear the remaining evidence on days four and five. I heard the adjournment application on January 20, 2025 and delivered oral reasons denying the adjournment on January 21, 2025 (indexed at 2025 BCSC 158). Counsel delivered their closing submissions at trial immediately following my ruling.

Background

[5] Ms. MacDonald was born in Newfoundland in October 1991. At the time of trial, she was 33 years old. Ms. MacDonald and her two older brothers were raised by their mother after their parents divorced when Ms. MacDonald was four years old. Ms. MacDonald was described as a happy, outgoing child who had a passion for helping others even from a young age.

[6] Ms. MacDonald graduated from high school in 2009 but admits she did not excel academically. After taking a year off to work, Ms. MacDonald began attending Memorial University of Newfoundland in 2010 with a view to becoming a registered nurse. In 2011, when she was 20 years old, Ms. MacDonald was diagnosed with depression and anxiety. Except for one brief hiatus in or around 2016, Ms. MacDonald has been taking medication consistently since 2013 to help manage her symptoms. In 2014, Ms. MacDonald discontinued her university studies without completing a degree. She admits her mental health challenges played a role in her decision to leave, but she was also struggling academically and uncertain of her future career path. During her time at university, Ms. MacDonald worked as personal care aide at a nursing home.

[7] In 2014, Ms. MacDonald moved to Kelowna, British Columbia so that she could enroll in an online psychiatric nursing program at Stenberg College. The program required that she reside in British Columbia. She found full-time work as a care aide at another nursing home. However, Ms. MacDonald quickly determined the nursing program was not the right fit for her; she also could not manage the

academic demands while working full-time. She withdrew from the program after two months and subsequently obtained a second job as a cleaner.

[8] In 2016, Ms. MacDonald enrolled in a one-year social services diploma at Vancouver Career College, which she completed without difficulty. During her diploma, Ms. MacDonald did a co-operative work placement as a youth care worker with Arc Communications in Kelowna, which staffed government-operated residential homes for youths aged 10 to 16. After completing her diploma, she started full-time with Arc Communications, working 40 or more hours a week and often on overnight shifts. Ms. MacDonald found the work emotionally challenging, including because many of the children had significant behavioural difficulties. Ms. MacDonald was employed by Arc Communications on the day of the Accident.

[9] The basic facts of the Accident are largely agreed. On February 25, 2018, Ms. MacDonald was stopped at the exit of a mall parking lot in Kelowna, waiting to turn right onto a highway. As the defendant was travelling down the highway, he attempted to avoid the vehicle in front of him and his vehicle collided with the driver-side door area of the plaintiff's vehicle, which had been stationary. The plaintiff says she was caught off guard and the impact was forceful enough to shift her vehicle several inches. The air bags did not deploy. She got out and exchanged information with the defendant before driving her vehicle home. The estimate for the repair of the plaintiff's vehicle, a 2007 Chevrolet Aveo, was $3,149.49. The vehicle was subsequently written off as it was not economical to repair it. The defendant admits his negligence caused the Accident.

[10] Ms. MacDonald attended Kelowna General Hospital the day after the Accident complaining of neck and lower back pain. There is no evidence the plaintiff suffered from any pre-existing physical conditions in relation to her neck or back. She was discharged from hospital the same day. Ms. MacDonald says she missed about a week of work following the Accident; the defendant suggests there is another explanation for her absence. However, it is common ground Ms. MacDonald

continued working at Arc Communications until she left that position on June 28, 2018.

[11] In March and April 2018, Ms. MacDonald attended a medical clinic in Kelowna complaining of continuing neck and back pain. She was referred for various therapies, including massage, physiotherapy and chiropractic treatment. She attended for massage and chiropractic treatments on multiple occasions until she moved back to St. John's, Newfoundland in July 2018. She says the Accident "sped up" her decision to return to Newfoundland, where most of her family lived.

[12] In August 2018, Ms. MacDonald began working at Milestones Early Learning Centre in Torbay, Newfoundland. Her continued employment there was contingent on completion of an Early Childhood Education ("ECE") Program. Ms. MacDonald earned her ECE certificate from the College of the North Atlantic in June 2022, becoming a Level 1 ECE. At the time of trial, she was still employed with Milestones and was working towards her ECE diploma, so that she could obtain her Level 2 ECE credentials.

[13] On October 13, 2020, Ms. MacDonald was driving in the right-hand lane in St. John's, Newfoundland when she was involved in the 2020 MVA. A vehicle driving in the left-hand lane changed lanes and struck the front of Ms. MacDonald's vehicle. The cost of the repair to the plaintiff's 2013 Mazda3 was $3,565.49. Ms. MacDonald testified the other driver was at fault, but she did not make a claim.

[14] On July 1, 2023, Ms. MacDonald was hiking with a friend and fractured her left ankle. It was surgically repaired on July 10, 2023. The parties agree this injury is unrelated to the Accident but disagree about its continuing impact on the plaintiff and therefore on the damages claimed in this action.

[15] On November 19, 2024, Ms. MacDonald was involved in the 2024 MVA. She was attempting to turn left out of a parking lot and an oncoming vehicle collided with the back end of Ms. MacDonald's vehicle. The air bags deployed. Police and an ambulance attended the scene. Ms. MacDonald's friend took her to the hospital. She

was seen by a nurse but left before being seen by a doctor. Ms. MacDonald was at fault and her car was written off. There is no evidence of any claim in relation to the 2024 MVA.

[16] I address Ms. MacDonald's injuries from the Accident and the subsequent events further below.

Credibility and Reliability

[17] The defendant raises concerns about the plaintiff's reliability, and to a lesser extent her credibility, and urges the Court to reject her evidence about her injuries, or at the very least, treat it with caution. Plaintiff's counsel accepts there were some inconsistencies between the plaintiff's answers on discovery and her evidence at trial but says there is objective evidence regarding the plaintiff's injuries on which the Court can rely if it has concerns.

[18] The law respecting credibility and reliability is well-settled. In general terms, credibility "involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides": *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392.

[19] Reliability is a distinct but related concept. Rather than focusing on a witness' honesty or truthfulness, reliability is concerned with the accuracy of the witness' testimony for reasons other than honesty, such as faulty powers of observation, recall or narrative skills: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack,* 2020 BCSC 793 at para. 109. When addressing credibility, this Court frequently cites the guidance in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), where the Court stated "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[20] To assess credibility and reliability, the Court must consider factors such as the witness' ability to observe events, the firmness of their memory, their objectivity, any inconsistencies between pre-trial evidence and testimony at trial or between direct and cross-examination or with other independent evidence accepted at trial, the plausibility of the testimony and the witness' demeanour generally: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Laces Canada Ltd.*, 2019 BCSC 739 at paras. 90–92, aff'd 2020 BCCA 130, leave to appeal to SCC ref'd [2020] S.C.C.A. No. 218. In *Bradshaw*, at para. 187, the Court suggested a witness' testimony should first be assessed on a stand-alone basis, and if inherently believable, it should be assessed in the context of the other evidence at trial.

[21] A court assessing credibility must also be mindful of certain uncontroversial realities that can impact memory. Testifying and participating in a trial is an inherently stressful experience. The passage of time can distort memories such that a witness genuinely believes the truth of their "version" of an event, despite being objectively mistaken. Further, not all people have the same focus for recall; some people naturally retain dates and details from written documents while others do not.

[22] In a personal injury case, there may be reliability concerns especially when the evidence regarding injuries is based predominantly on the plaintiff's subjective reports of pain and limitation. As Justice Abrioux (as he then was) stated in *Buttar v. Brennan*, 2012 BCSC 531 at para. 24:

> the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397 (S.C.)

[23] That said, credibility and reliability are not "all or nothing" propositions. It is open to the Court to accept all, part, or none of a witness' evidence, and to attach different weight to different parts of that evidence: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96, citing *R. v. R. (D.)*, [1996] 2 S.C.R. 291, 1996 CanLII 207 at para. 93, per L'Heureux-Dubé J. (in dissent in the result).

[24] The defendant framed his concerns as more about reliability than credibility. The defendant accepts the plaintiff was not deliberately trying to be untruthful, noting she gave evidence in a straightforward manner, made admissions against interest and gave truthful evidence in some respects (although, unsurprisingly, the portions of the plaintiff's evidence that the defendant considers truthful all support his position in this trial). However, the defendant maintains the inconsistencies in the plaintiff's evidence make it difficult for the Court to have confidence in what she said, particularly in relation to her injuries and their impacts.

[25] In this regard, the defendant pointed to what he characterized as significant inconsistencies between the plaintiff's answers at her two examinations for discovery (November 29, 2023 and December 17, 2024) and her evidence at trial. In summary form, the defendant contends the plaintiff gave inconsistent answers to questions about: whether her neck injuries had resolved before she returned to Newfoundland in July 2018; her motivation for returning to Newfoundland (including if her pain was a factor in addition to her family); how often she was experiencing low back pain and the extent to which it affects her work, recreational activities and ability to do housework; her reasons for attending physiotherapy in Newfoundland; and the extent to which she engages socially.

[26] The defendant says the plaintiff's explanations for why her answers were different at trial than on discovery were not persuasive, reinforcing the reliability concerns. In some cases, the plaintiff agreed her discovery evidence was not accurate; in other instances, the plaintiff suggested she meant something different from what she said. In one case, the plaintiff suggested her anxiety and aversion to testing and exams impacted the accuracy of her answers on discovery. The defendant contends testifying at trial is inherently more stressful than attending a remote discovery.

[27] As noted, plaintiff's counsel admits it would be reasonable for the Court to have some reliability concerns based on the plaintiff's inconsistent answers between discovery and trial. By way of potential explanation, plaintiff's counsel suggests the

evidence regarding the plaintiff's personality shows she is resilient and not a person who complains or is prone to exaggeration. As a result, her counsel suggests she may have simply been minimizing her injuries at discovery, consistent with the evidence of her inherent nature.

[28] More importantly, plaintiff's counsel says the main points of inconsistency that are relevant to this claim are the extent to which the plaintiff's injuries had improved or resolved before she returned to Newfoundland and the extent to which the injuries prevent her from doing recreational activities or housework. On these points, the plaintiff says the three medical professionals who provided reports to the Court all conducted physical examinations and testing of the plaintiff. Accepting that those professionals relied to some extent on the plaintiff's subjective reporting, plaintiff's counsel contends their reports also reflect independent physiological observations and testing results that the plaintiff's subjective reports could not have influenced. As a result, plaintiff's counsel says there is objective medical evidence regarding the plaintiff's injuries on which the Court can rely if the Court lacks confidence in the plaintiff's own testimony.

[29] In my view, the plaintiff generally presented as a thoughtful and measured witness who sincerely attempted to tell the truth. I do not find Ms. MacDonald to have been intentionally or deliberately dishonest. She made appropriate concessions at various points in her testimony, acknowledging when she was unsure or could not remember specific details, and admitting certain inconsistencies put to her in cross-examination. I generally did not find her defensive or evasive.

[30] I do not agree that the plaintiff failed to provide any plausible explanations for the inconsistencies in her testimony. For example, at the first discovery in November 2023, the plaintiff was asked if, other than the 2020 MVA, she had had any "other injuries or accidents". The plaintiff responded "no". On cross-examination, the plaintiff admitted she had broken her ankle in July 2023 and the inconsistency of her negative response at discovery was put to her. I accept the plaintiff's explanation at trial that she did not understand the discovery question and had assumed

defendant's counsel was asking about further motor vehicle accidents. The plaintiff's mother made the same omission in her cross-examination. In both cases, defendant's counsel had asked specific questions about the Accident before posing the question about subsequent injuries or accidents. In my view, the responses of the plaintiff at discovery and her mother at trial reflect a genuine misunderstanding about the nature of the question that was asked because of the preceding context.

[31] Similarly, I accept the plaintiff's explanation that she struggles with her anxiety when she is questioned. I observed this during the plaintiff's testimony, and not only in cross-examination. At times, Ms. MacDonald was visibly flustered or upset and had difficulty following even simple questions. In my view, these are not issues of credibility.

[32] Nor do I consider it unusual, particularly when so much time has passed between the Accident and trial, for there to be some variability in the way the plaintiff described her ongoing symptoms at specific times to different medical people or on different occasions: *Edmonson v. Payer*, 2011 BCSC 118 at paras. 34-36, aff'd 2012 BCCA 114. Further, I agree with plaintiff's counsel that the broader evidentiary record, including the testimony of Ms. MacDonald's family, friends and workplace colleagues, supports a conclusion that the plaintiff is not generally a person who complains. In fact, in closing submissions, defendant's counsel fairly acknowledged that the plaintiff is a "tough" person, who "muscles through" her challenges. In my view, the preponderance of evidence supports that the plaintiff is more likely to minimize the extent of her injuries and limitations than she is to exaggerate them. On the whole, I find the plaintiff generally credible.

[33] That said, I agree there are concerns with the reliability of some of the plaintiff's evidence. Of note, the plaintiff is not a reliable historian with respect to the dates of specific events, such as when she attended certain appointments. She was not always clear on the sequence of events, nor was she adept at placing events into chronological timelines. The inability to recall specific dates appears to be a trait

she shares with her mother and brother, who each also struggled to place events accurately on a timeline during their testimony.

[34] The plaintiff was also, for example, unable to recall what information she had shared with various medical personnel, and in some instances, her evidence was vague or lacking in detail. Many of her answers, both at discovery and at trial, were more tentative than definitive, including language such as “I guess so”, and “I don’t think so, no”. This was not limited to evidence that could have been unhelpful to her case. My genuine impression was that the plaintiff is not a person who focuses on and retains specific details and information. I conclude the hesitation in some of her responses stemmed not from a desire to be difficult, but rather an inability to recall with certainty. Where I have concerns about the reliability of some of the plaintiff’s evidence, I have approached that portion of her evidence with caution and have considered the extent to which there is independent evidence that can assist me.

[35] With respect to the plaintiff’s evidence of her own injuries, I disagree with the defendant that this is a case where there is an absence of objective medical findings or where the findings are disproportionate to the symptoms claimed. The plaintiff complains of ongoing lower back pain, and to a much lesser extent, ongoing neck pain, both of which she attributes to the Accident. As addressed in further detail below, the parties provided independent evidence from two physiatrists and one registered occupational therapist. Each professional conducted physical examinations and testing of the plaintiff, in addition to taking her reported medical history and reviewing at least some of her clinical records.

[36] The two physiatrists’ reports indicate they observed physiological symptoms consistent with ongoing posterior neck and lower back pain, including when palpating the relevant muscle groups. In administering various tests, the occupational therapist observed low back functional limitations with respect to lifting, crouching and stooping that were consistent with Ms. MacDonald’s self-reported abilities and limitations. None of the experts suggested the plaintiff was exaggerating her symptoms when examined or tested.

[37] While the medical examinations would have been informed by the plaintiff's self-reported medical history, there is no suggestion of inconsistencies between that medical history on the one hand, and the independent observations and the results of testing and hands-on manipulations of the plaintiff's neck and low back on the other. I accept there are live questions about the degree to which the plaintiff's conditions currently impair her functioning and may continue to do so in the future. I will again be cautious and look to other evidence where there are reliability concerns with the plaintiff's own evidence. But I reject the defendant's suggestion that those reliability concerns mean the expert medical evidence should be given less weight because it relies, in part, on the plaintiff's subjective reporting.

[38] In my view, the family, friends and work colleagues who testified for the plaintiff were all credible and generally reliable. They answered questions directly and to the best of their ability, and I did not have concerns that they were attempting craft their answers to "assist" the plaintiff. As noted above, Ms. MacDonald's mother and brother had difficulty at times remembering specific dates and sequential time periods, but for the most part, the dates and times they were asked about are either not controversial or are not material to the issues I must decide. I do not give their evidence less weight as a result.

Injuries, Causation and Divisibility

[39] Given the defendant's arguments about Ms. MacDonald's injuries, I will begin by outlining the legal principles that govern causation and divisibility.

Legal principles

[40] The purpose of tort law is to restore the plaintiff to the position she would have been in but for the negligence of the defendant. While the defendant has admitted liability for his negligence, the plaintiff must still prove, on a balance of probabilities, that "but for" the defendant's negligence, she would not have suffered the damage or loss she is claiming: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 13; *Clements v. Clements*, 2012 SCC 32 at para. 8.

[41] Put another way, the plaintiff must show the defendant's negligence was necessary to bring about the damage or loss: *Dhaliwal v. Stang*, 2025 BCCA 128 at para. 69, citing *Athey* at para. 14. In *Dhaliwal*, the Court of Appeal confirmed the "causation test is not to be applied too rigidly or with scientific precision; in some circumstances, an inference of causation may be drawn from the evidence without positive scientific proof": *Dhaliwal* at para. 69, citing *Athey* at para. 16; see also *Clements* at para. 10.

[42] The defendant's negligent conduct does not need to be the sole or predominant cause of the injury; it is sufficient if the tortious conduct is part of the cause beyond the *de minimus* range: *Athey* at paras. 13-17. Further, as the Supreme Court of Canada confirmed in *Blackwater v. Plint,* 2005 SCC 58, there is a distinction to be drawn between causation and the assessment of damages in tort:

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

[43] Where, as here, there is a suggestion of multiple constituent causes for the plaintiff's injuries (whether tortious or not), the Court must consider if the injuries are divisible or indivisible. Justice Bantourakis summarized the principles governing divisibility concisely as follows in *Bhardwaj v. Wang*, 2025 BCSC 213:

> [30] Where injury cannot be separated as between multiple constituent causes, the injury is indivisible and any defendant found to have negligently caused or contributed to the injury will be fully liable for it: *Athey* at paras. 24-25; *Bradley v. Groves*, 2010 BCCA 361 at paras. 20-21, 32-37. Tortfeasors can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them: *Bradley* at para. 32; *Khudabux v. McClary*, 2018 BCCA 234, at para. 33.

> [31] However, it is equally true that a defendant will not be liable for divisible injuries their negligence did not cause or contribute to: *Athey* at para. 24. Divisible injuries are injuries that can be separated out from the harm caused by a defendant's negligence, for example, injuries to different body parts: *Bradley* at paras. 20, 37; see also *Athey* at paras. 22-25; *Estable v. New*, 2011 BCSC 1556 at paras. 53-56.

[44] In *Bradley v. Groves*, 2010 BCCA 361, the Court of Appeal rejected the notion that "aggravation" and "indivisibility" of injuries are qualitatively different and require different legal approaches, stating:

> [37] …If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.
>
> [Emphasis added.]

[45] Whether injuries are divisible or indivisible is a finding of fact based on the evidence. The bulk of authorities indicate that where an initial injury has not resolved by the time of a second event, an aggravation or worsening of that specific injury will frequently be considered indivisible from the initial injury: *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at paras. 68-69. That said, if the evidence shows a plaintiff's injuries have plateaued or become chronic before a subsequent accident, it may be possible for the Court to conclude that injuries suffered in an earlier accident are divisible from those suffered in a subsequent accident: *Lundgren v. Taylor*, 2023 BCSC 612 at para. 68.

[46] If the Court finds divisible intervening injuries (including non-tortious causes of injury), the Court must then determine if the intervening event would likely have affected the plaintiff's original position adversely in any event. If yes, the independent intervening event becomes relevant to the assessment of damages and should be given weight based on its relevant likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 36, 48.

The plaintiff's injuries and current condition

[47] The plaintiff's claim is limited to ongoing pain symptoms related to her lower back and to a lesser extent, her neck (and upper back). There is no serious dispute about causation of the plaintiff's initial injuries. The disputed issues are: did either or both of the plaintiff's initial injuries fully resolve before the 2020 MVA; does the plaintiff continue to suffer Accident-related neck pain; and is the lower back injury divisible between the Accident and 2020 MVA?

[48] As alluded to above and discussed in more detail below, the parties tendered three expert reports at trial: Dr. Lawrence Kei, retained by the plaintiff, provided a physiatry report; Mr. Nicholas Altieri, a registered occupational therapist retained by the plaintiff, provided a functional capacity assessment and costs of future care report; and Dr. William Craig, retained by the defendant, also provided a physiatry report. Dr. Kei and Mr. Altieri attended trial, gave brief evidence in relation to their reports and were cross-examined. Dr. Craig was originally requested to attend for cross-examination but suffered a medical issue on the day he was scheduled to testify. To avoid further delay of the defendant's pending adjournment application and potentially the trial, the plaintiff waived the right to cross-examine Dr. Craig. As a result, Dr. Craig's report was admitted at trial as stand-alone evidence.

Initial neck and back injuries

[49] With respect to the initial injuries, there is no evidence Ms. MacDonald had any physical limitations prior to the Accident. The parties largely agree the plaintiff suffered soft tissue injuries to her neck (and upper back) and her lower back as a result of the Accident. This is supported by contemporaneous medical records

following the Accident and by the subsequent expert reports tendered at trial. I accept the plaintiff's evidence that she also experienced headaches after the Accident, but the medical reports suggest those symptoms resolved fairly quickly, and they do not form part of the plaintiff's current claim.

[50] There is a dispute about the extent to which the plaintiff missed a week of work at Arc Communications after the Accident, which I will address below in relation to her claim for past income loss. With the exception of that one week, there is no dispute the plaintiff continued her employment with Arc Communications until the end of June 2018, after which time she moved back to Newfoundland.

[51] It is agreed Ms. MacDonald went to a walk-in medical clinic on March 7, 2018 with continuing complaints of neck and lower back pain and she was referred to massage therapy. She had two massage therapy appointments before re-attending the same clinic on April 23, 2018, again complaining of lower back pain. The clinic notes indicate the plaintiff reported she had attended massage therapy but felt the relief, if any, was "short lived". She was referred for an assessment and course of treatment from "Physiotherapy/Chiro". Between that visit and end of June 2018, when she moved back to Newfoundland, the parties agree Ms. MacDonald attended four further massage therapy appointments (for a total of six) and eight chiropractic appointments.

[52] In written and oral submissions, the defendant attempted to characterize the plaintiff as having suffered only "*mild to* moderate" soft tissue injuries. The basis on which the defendant asserts the plaintiff's injuries were less than moderate is not clear. The defendant may rely on the plaintiff's description at trial that her car moved "a little bit", or on the fact that the airbags did not deploy during the Accident or on a suggestion that the impact was not enough to spill a drink in the vehicle's cup holder. If those are the bases for the defendant's assertion, they are not persuasive. I agree with the plaintiff that damage to a vehicle does not necessarily equate with impacts on a person, and the evidence about how much the vehicle moved and whether the drink spilled was not conclusive. In any event, the assertion that the plaintiff's injuries

were less than moderate is inconsistent with the report from the defendant's own expert physiatrist, Dr. Craig. Dr. Craig opined the plaintiff likely had *moderate* soft tissue injuries to both her neck and lower back. No other medical personnel provided a diagnosis of "mild" injuries. I accept Dr. Craig's assessment and find the plaintiff's initial neck and lower back injuries are both properly characterized as moderate.

[53] In his expert physiatrist report, tendered by the plaintiff, Dr. Kei used slightly different terms than Dr. Craig to describe the plaintiff's initial injuries, but I do not understand their conclusions to be materially different. Dr. Kei noted the medical records dating from around the time of the Accident referred to "sprain / strain" injuries to the cervical and lumbar spine areas, and subsequent records referred to soft tissue injuries. He diagnosed the plaintiff as currently suffering from two things: a "cervical spine sprain-strain injury resulting in chronic lower left neck and upper back myofascial pain" and a "lumbar spine sprain-strain injury resulting in chronic left lower back pain with possible irritation of the left lumbar facet joints." I accept the consistent medical evidence about the nature of the initial injuries and find the plaintiff suffered an initial sprain / strain injury, also known as a soft tissue injury, to her neck and lower back, which was caused by the Accident.

Developments in the plaintiff's condition

[54] While the plaintiff admits her back pain improved to some extent, including after physiotherapy in Newfoundland following the 2020 MVA, she maintains she continues to suffer daily lower back pain that sometimes radiates to her lower left buttock and upper posterior thigh. She acknowledges that her current work as an ECE requires her to perform activities that aggravate her back pain, such as kneeling, stooping, carrying children and changing them. The plaintiff testified that her back pain usually increases over the course of the workday and is much worse at the end of a work week, requiring her to rest in the evenings and on weekends so that she can return to work the next day and the following week.

[55] During her testimony, Ms. MacDonald described her back pain variously as "discomfort", "mild pain", "tension", "really bad" and "significant pain". I accept the

variation in her descriptions to reflect that her degree of pain is not static but rather changes based on activity. The plaintiff also reports continuing issues with her neck, but she described those more as discomfort and stiffness that sometimes acts up as pain. It is clear the plaintiff's complaint of neck pain is of much less significance than that of her lower back pain.

[56] Based on their examinations of the plaintiff on separate days in September 2024, both physiatrists agree the plaintiff continues to suffer from lower back pain. The reports from both Dr. Kei and Dr. Craig confirm that their respective physical examinations and testing produced pain and muscle tenderness in the plaintiff's lower lumbar region, with some radiation to her left gluteal area. Mr. Altieri also observed functional limitations from the plaintiff's lower back associated with activities like lifting, stooping, crouching and extension. I accept the consistent evidence from all three medical experts and find the plaintiff continues to suffer lower back pain that is now chronic. I discuss the defendant's divisibility argument below.

[57] Dr. Kei and Dr. Craig's opinions diverge with respect to the plaintiff's neck injury and, to a lesser extent, her future prognosis. With respect to her neck injury, based largely on his physical examination, Dr. Kei opines that the plaintiff continues to suffer from chronic lower left neck and upper back myofascial pain. In contrast, Dr. Craig opines that the plaintiff's neck injury resolved as a result of chiropractic treatment. There is no dispute she received those treatments in British Columbia, prior to July 2018. This divergence of expert opinions fuels the defendant's argument, addressed below, that the plaintiff no longer suffers from neck pain.

[58] With respect to future prognosis, Dr. Kei says, given the passage of more than six years since the Accident, the plaintiff's "prognosis for return to her pre-accident pain level is poor" and her ability to manage normal pain from aging is decreased. However, he hopes his treatment recommendations will help the plaintiff "manage and control her symptoms", including by providing periods of relief from pain. Dr. Craig is of the view that the plaintiff has not yet reached her "point of maximum medical improvement" given the treatment options available to her and the

fact that her symptoms are episodic. However, like Dr. Kei, Dr. Craig accepts that since the symptoms have been "present for over six years", in the long term, the plaintiff will likely continue to have low back pain "with prolonged awkward postures or heavier physical tasks." As my conclusions about future prognosis depend in part on my findings about the plaintiff's current condition, I address them below as well.

Alleged resolution, divisibility and conclusions on causation

[59] The defendant urges the Court to find, based on Dr. Craig's report and the plaintiff's evidence at the November 2023 discovery, that the plaintiff's neck symptoms had fully resolved before she returned to Newfoundland. The defendant says the plaintiff gave inconsistent testimony at discovery and at trial about her neck pain, as well as reporting inconsistent symptoms to Dr. Kei and Dr. Craig. To the extent the plaintiff suggested in cross-examination that her neck pain returned after she completed the chiropractic treatments, the defendant says, like the rest of her testimony, the plaintiff's subjective accounts are unreliable and unhelpful in assessing the extent and duration of her injuries.

[60] The defendant says Dr. Craig's report and the plaintiff's treatment history (or lack thereof post June 2018) provide independent support for a finding that the plaintiff's neck injury had fully resolved by the end of June 2018. If accepted, that position might support a further finding that any current neck pain is the result of a divisible injury from the 2020 MVA. The defendant did not expressly argue this point; instead, the defendant suggested there is no reliable evidence the plaintiff continued to suffer neck pain after June 2018 at all.

[61] The defendant also asks the Court to draw an inference that the plaintiff's lower back injury had entirely or largely resolved before the 2020 MVA. In this regard, the defendant relies primarily on evidence that, other than one massage therapy appointment in Newfoundland on an unspecified date, the plaintiff did not access further treatment when she returned to Newfoundland in July 2018. The defendant says the plaintiff only began attending treatment again in November 2020, when she commenced physiotherapy after the 2020 MVA. The defendant also points

to the plaintiff's handwritten description on the intake form for the physiotherapy clinic, where she identified her "area of injury" as "left ankle /shin + lower back".

[62] Taken as a whole, the defendant says this evidence supports an inference that the plaintiff's back injury had fully resolved before the 2020 MVA, and any current symptoms of back pain are the result of the plaintiff having re-injured her back in the 2020 MVA. The defendant contends the current back pain represents a second, divisible injury from the 2020 MVA, and as a result, the defendant should not be responsible for damages from it. If the Court finds the back pain had not fully resolved before the 2020 MVA, the defendant accepts that the plaintiff's back injury is likely indivisible but maintains it has still "significantly improved". In the latter case, the degree of any improvement goes to damages, not causation.

The plaintiff's neck injury

[63] Dealing first with the plaintiff's neck injury, I acknowledge the inconsistencies in the plaintiff's testimony regarding whether her neck symptoms had resolved by the end of June 2018. As the defendant fairly notes, at the November 2023 discovery, the plaintiff gave evidence that when she moved back to Newfoundland in July 2018, she was no longer experiencing neck pain from the Accident. Ms. MacDonald reported to Dr. Craig in September 2024 that her neck pain resolved over a number of months with chiropractic treatment. However, she reported to Dr. Kei that she had "ongoing aching neck pain" in the lower posterior area that was aggravated by looking up and down for prolonged periods (such as when changing diapers). At trial, the plaintiff testified she continues to experience discomfort and stiffness in her neck, which occasionally causes pain.

[64] Although plaintiff's counsel put medical records to the plaintiff in re-direct from 2018 and 2019 showing that the plaintiff reported neck pain to various providers in Newfoundland after June 2018, I agree with the defendant that the plaintiff's reported subjective statements as set out in those records are not admissible for the truth of the plaintiff's reported statements: see, for example, *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 35-45.

[65] However, despite these inconsistencies in the plaintiff's testimony, there is some objective evidence that the plaintiff was still suffering neck pain after June 2018 and that she continues to suffer a degree of neck pain. First, Dr. Kei was cross-examined on portions of his report pertaining to the plaintiff's post-Accident history. He was specifically asked about the plaintiff's reported statement that she felt short-term relief from chiropractic therapy "but her pain often returned". Dr. Kei confirmed the plaintiff had reported her neck pain returning after chiropractic therapy, but Dr. Kei then went on to explain that her reporting in that regard was consistent with clinical records from Newfoundland that he had reviewed, including one from August 2018. While there was some concern that Dr. Kei may have received subsequent medical reports that were not identified in his report, the August 2018 record to which he referred in answering this question was among the documents listed in the appendices to his expert report.

[66] On the next page of his report (page 5 of 11), Dr. Kei discussed the August 3, 2018 clinical record in greater detail. He noted that in addition to the plaintiff's self-report of ongoing left neck pain, the notes from the physical examination conducted that day reflect that the plaintiff had "tenderness in the left neck, upper trapezius and left paraspinous muscles and the range of motion of the cervical spine was decreased in all directions." The plaintiff was diagnosed with a soft tissue injury of the neck and advised to continue massage therapy. While Dr. Kei reviewed several other clinical records dating from September 2018 to September 2019, I accept that it is less clear from his review of those records, and from the records themselves, if the recorded symptoms are from physical examinations or the plaintiff's subjective self-reporting.

[67] The August 2018 clinical record itself is in evidence before me. No party sought to challenge the accuracy of the diagnosis flowing from the physical examination, nor was Dr. Kei challenged on his interpretation that it objectively supported what the plaintiff had told him. I note that Dr. Craig also referenced the same August 2018 clinical record in his report, also specifically identifying that the examination revealed ongoing pain in the plaintiff's neck and upper back area (page

4 of 10). In my view, the clinical record in question contains an independent medical observation or diagnosis of the plaintiff's ongoing neck pain in August 2018 that was made by a disinterested party at a time before the litigation had commenced (the notice of civil claim was first filed March 19, 2019). Unlike the plaintiff's subjective statements that are also contained within that clinical record, I find the recorded observations and diagnosis flowing from the August 3, 2018 physical examination are admissible under s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124: see *Edmonson v. Payer*, 2011 BCSC 118 at paras. 24-29, citing *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 at 311-312 (S.C.), 1997 CanLII 4372 (B.C.S.C.).

[68] Further, the results of Dr. Kei's physical examination in September 2024 demonstrate the plaintiff reported posterior cervical spine (i.e. neck) pain and mid-line pain near the cervicothoracic junction (i.e. lower neck and upper back junction) with two different types of active cervical spine flexion. The plaintiff also reported pain with palpation of the left levator scapulae muscle region "near the upper medial border of the scapulae and into the left neck and upper back". Dr. Kei notes further reports of pain with palpation of the left paracervical (neck) muscles and left parathoracic (upper back) muscles. It was not put to Dr. Kei, nor did he suggest, that the plaintiff's self-reporting of pain during his examination was exaggerated or inconsistent with his physical observations during testing.

[69] While Dr. Craig opined that the plaintiff's neck pain had resolved, this opinion appears based solely on the plaintiff's self-reporting; Dr. Craig did not offer any other basis for that opinion. More importantly, Dr. Craig's physical examination of the plaintiff's neck yielded results that are inconsistent with his opinion in this regard. Instead, similar to Dr. Kei's results, Dr. Craig reported that, on examination, the plaintiff had "full neck flexion and extension *with posterior neck pain*." Dr. Craig also reported tension and tenderness from palpation of the plaintiff's left levator scapulae, as well as tightness and increased muscle tone in certain areas of her upper trapezius (i.e. muscles around the neck). Dr. Craig noted there were "multiple tender areas and increased tone" on examination and he "could provoke symptoms with

pressure over these areas". His report did not limit that comment to the plaintiff's lower back alone.

[70] I take from the reports of Dr. Kei and Dr. Craig that, on examination of the plaintiff in September 2024, both physiatrists noted physiological symptoms in the lower posterior left neck and upper left back area that are consistent with a degree of ongoing neck pain.

[71] In addition, a co-worker who had worked as an ECE alongside the plaintiff for approximately six months as of the date of the trial testified that while the plaintiff does not explicitly complain about her pain, the co-worker often sees the plaintiff in "visible pain", rubbing her neck and stretching out her back. Although not medical evidence, this is independent evidence that the plaintiff continues to display symptoms of neck pain at work.

[72] While the defendant asserts the plaintiff's "own testimony and statements are extremely unreliable", the defendant nevertheless asks the Court to accept the plaintiff's testimony from the November 2023 discovery that her neck injury had fully resolved as the most accurate and reliable account of her injuries. The defendant's position in this regard is hard to reconcile. Further, to the extent there is a suggestion that any current neck pain is a divisible injury, Dr. Kei and Dr. Craig are consistent in their opinions that the 2020 MVA did not contribute to (Dr. Kei) or significantly aggravate (Dr. Craig) the plaintiff's symptoms.

[73] There is no other medical evidence before me that could support a finding of a divisible, second injury to the plaintiff's neck as a result of the 2020 MVA. Even if there was a subsequent aggravation or worsening of the plaintiff's neck injury as a result of the 2020 MVA, there is nothing in the evidence before me that would allow me to separate out the initial injury from any subsequent injury. The ongoing neck pain is in the same area of the body and of a similar nature as the initial injury, and in my view, would be indivisible.

[74] Based on the above, I find that while the plaintiff's neck pain had resolved to some degree because of the chiropractic treatments she accessed up to the end of June 2018, her neck pain subsequently returned. I find the plaintiff continues to suffer ongoing occasional neck pain caused by the Accident, but that it is much less frequent and significant than her lower back pain.

The plaintiff's lower back injury

[75] Turning to the plaintiff's lower back injury, the defendant contends the plaintiff's initial lower back injury had fully or largely resolved before the 2020 MVA, such that any current pain is a divisible injury. This position stands in sharp contrast to the evidence of both physiatrists. Dr. Kei and Dr. Craig both opined that the plaintiff's lower back injury had not resolved and she had not fully recovered from the Accident before the 2020 MVA. As noted, each expert opined that the 2020 MVA did not contribute to or significantly aggravate the plaintiff's ongoing symptoms. While Mr. Altieri also stated in his report that the plaintiff was not injured in the 2020 MVA, he confirmed in cross-examination that his statement was based on the plaintiff's own self-reporting, so I do not give it significant weight.

[76] In cross-examination of Dr. Kei and Mr. Altieri, defendant's counsel established that neither expert had the plaintiff's records from the physiotherapy clinic she attended in Newfoundland after the 2020 MVA. The defendant argued in oral closing submissions that if the two experts had had those physiotherapy records, they might have reached different conclusions about whether the plaintiff re-injured her back in the 2020 MVA. However, the defendant did not put that proposition to either Dr. Kei or Mr. Altieri directly, so the defendant's suggestion is speculative at best. Further, Dr. Craig had the plaintiff's physiotherapy records from after the 2020 MVA when he conducted his physical examination and wrote his report. Despite having those records, Dr. Craig is categorical in his opinion that the plaintiff did not suffer a significant aggravation of her symptoms from the Accident because of the 2020 MVA.

[77] As noted above, the defendant also emphasized the plaintiff's failure to access treatment for her back after returning to Newfoundland and before the 2020 MVA, despite having received a recommendation and funding for physiotherapy. The defendant says this treatment history is inconsistent with the plaintiff's evidence at trial that her lower back pain was ongoing throughout that period. Instead, the defendant says the Court should infer the plaintiff did not seek treatment because her lower back pain had resolved and she did not require further treatment until it was re-injured in the 2020 MVA. Defendant's counsel asked Dr. Kei on cross-examination if he would agree that the plaintiff's failure to access treatment between June 2018 and November 2020 suggested the plaintiff did not have any reason for further therapy. Dr. Kei did not agree that was a necessary conclusion, noting there are many reasons a patient may not access therapy, even if they need it.

[78] I do not find the lack of treatment proves Ms. MacDonald's lower back injury had resolved. Nor do I consider the plaintiff's inclusion of the words "lower back" when describing her injuries on the November 2020 physiotherapy intake form to constitute reliable evidence that her previous injury had resolved and she therefore must have suffered a re-injury or further injury to her back in the 2020 MVA.

[79] There is no other medical evidence that suggests Ms. MacDonald's lower back injury had resolved before the 2020 MVA, nor is there other medical evidence that documents injuries to her back specifically arising from the 2020 MVA – either in the sense of new injuries or an aggravation of the pre-existing lower back injury that I have found was caused by the Accident. In the circumstances, I accept Dr. Craig's independent, objective opinion that the plaintiff did not suffer a significant aggravation of her existing symptoms in the 2020 MVA. As a result, I do not find there to have been a subsequent injury to the plaintiff's back that requires me to determine divisibility. Instead, I find the plaintiff suffered a single back injury in the Accident that persists.

[80] In the event I am wrong and the plaintiff did re-injure her back in the 2020 MVA, I note that the nature and location of the plaintiff's initial lower back injury and

her ongoing lower back pain are the same. I would therefore find any aggravation of the plaintiff's lower back injury that might have arisen from the 2020 MVA to be the worsening of a single injury and thus indivisible in any event.

[81] Finally, with respect to future prognosis, in my view, while there may be some uncertainty about the degree of possible improvement or symptom management the plaintiff could obtain by following the various treatment recommendations of Dr. Kei and Dr. Craig, the evidence before me is clear that the plaintiff will likely have ongoing symptoms relating to her lower back at least on an indefinite basis. There is no suggestion in any of the expert medical evidence that Ms. MacDonald will make a full recovery from her lower back injury. I have also found that Ms. MacDonald continues to suffer from occasional Accident-related neck pain. I accept Dr. Kei's opinion that this pain has also now become chronic, and the plaintiff will therefore have to continue to manage it for the rest of her life. However, as I will address below, in my view, it has a much less significant impact on the plaintiff.

Intervening Events

[82] An independent intervening event is treated similarly to a pre-existing condition, in that if such an event "would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately": *T.W.N.A.* at para. 36; see also *Athey* at para. 32. The defendant does not need to prove the intervening event would inevitably have led to the plaintiff's current condition; it is sufficient if the intervening event might realistically cause or contribute to the loss claimed *regardless of* the negligence of the defendant: *T.W.N.A.* at para. 48.

[83] The defendant says the Court must consider the impact of the following three intervening events, all of which post-date the Accident, when assessing the nature and extent of damages Ms. MacDonald should receive:

a) the 2020 MVA;

b) the non-tortious left ankle fracture that the plaintiff suffered on July 1, 2023 while hiking; and

c) the 2024 MVA.

I will address the two subsequent motor vehicle accidents first.

[84] I have already rejected the defendant's contention that the 2020 MVA caused divisible neck and lower back injuries to the plaintiff. It is, however, common ground that the plaintiff suffered injuries to her left shin and to the soft tissue of her left ankle in the 2020 MVA. These are clearly divisible injuries, but the plaintiff's uncontradicted evidence is that those injuries resolved very quickly (i.e. in less than a week). There is no suggestion that those divisible injuries contributed to any of the losses for which the plaintiff presently claims compensation. In fact, the defendant accepts the shin and ankle injuries from the 2020 MVA were "inconsequential". Accordingly, I do not find the 2020 MVA to be an intervening event that necessitates any reduction in the plaintiff's damages.

[85] With respect to the 2024 MVA, the plaintiff's evidence at trial was that she did not suffer any injuries from the 2024 MVA and she did not miss any work as a result. The plaintiff testified that she attended the hospital on the advice of a friend but left after only seeing a nurse because she was fine. There was no suggestion that her ongoing pain changed – for better or for worse – because of the 2024 MVA. As noted, the plaintiff admits she was at fault, but there is no evidence of any claim having been filed in relation to 2024 MVA.

[86] The 2024 MVA was the subject of the defendant's unsuccessful adjournment application on the sixth day of trial. Despite the defendant discovering the plaintiff for a second time in December 2024, the fact of the 2024 MVA (which occurred November 19, 2024) did not come to light until the day before trial. After having cross-examined the plaintiff and other witnesses on the 2024 MVA, the defendant sought to adjourn the trial to obtain records relating to the 2024 MVA. Depending on the content of the records, the defendant indicated he may need to conduct further

discoveries and / or update the existing expert reports. While the defendant admitted the plaintiff's non-pecuniary damages had crystallized, the defendant maintained the 2024 MVA could have an impact on the costs of future care and future loss of income if the 2024 MVA had rendered the plaintiff less able to work full-time or until age 65, or less able to engage in other activities.

[87] In denying the defendant's adjournment request, I held the plaintiff's claims for future losses and costs of care were rooted in the expert evidence about her future prognosis and needs. I noted that expert evidence crystallized in October 2024, before the 2024 MVA had occurred, and the defendant remained free to argue about the scope and extent of the plaintiff's future limitations based on those reports and the other evidence led at trial.

[88] As I determined the interests of justice did not require an adjournment, there is no evidence before the Court on which I could conclude the 2024 MVA would have adversely affected the plaintiff's original position regardless of the Accident. In fact, the only evidence (i.e. that the plaintiff was not injured) is to the contrary. Further, there is no suggestion the plaintiff suffered any new types of injuries or injuries to a different region of her body.

[89] As a result, even if there had been an aggravation of her existing neck and lower back injuries, on the same reasoning set out above in relation to the 2020 MVA, such injuries would have been indivisible and not an independent intervening event: *Bhardwaj* at paras. 63-66. On the evidence before me, I do not find the 2024 MVA to be an independent intervening event that warrants a reduction of damages.

[90] I turn now to the plaintiff's 2023 left ankle fracture. In my view, the left ankle fracture is different than the 2020 MVA and 2024 MVA. There is no real dispute that the ankle fracture is a non-tortious divisible injury, nor is there any dispute that, despite having been surgically repaired, the ankle fracture has created some ongoing limitations for the plaintiff. The dispute between the parties is about the degree of present and future limitation the ankle fracture creates, and therefore what reduction of damages is appropriate.

[91] The parties did not enter medical records in relation to the ankle fracture in evidence at trial. The plaintiff testified that she suffered the fracture while hiking on July 1, 2023. She testified the surgical repair involved an open reduction and internal fixation. This same description of the surgical repair appears in Dr. Craig's report under "Past Medical History". It is agreed the plaintiff was off work from July 2 to October 9, 2023 because of the ankle fracture, but that absence from work does not form part of the plaintiff's current claim.

[92] The defendant seeks to characterize the ankle fracture as creating significant physical limitations for the plaintiff in respect of her job and her ability to do housework, in contrast to the more minimal impacts the plaintiff suggested. In this regard, the defendant alleged the plaintiff gave inconsistent evidence at trial when asked about the ankle injury. In direct, the plaintiff testified that, because of the surgical hardware, her ankle causes her "more discomfort" than pain, calling it "itchy". However, in cross-examination, the plaintiff testified that due to the difficulty with her left ankle, she sometimes compensates by leaning more on her right ankle. The defendant also suggested the plaintiff's evidence in direct was inconsistent with evidence from both her co-worker (who testified to seeing the plaintiff rub her ankle at work) and Mr. Altieri (who observed limitations in the plaintiff's ability to crouch).

[93] I do not consider the plaintiff's description of "discomfort" and "itchiness" to be inconsistent with the evidence of her co-worker or Mr. Altieri, or with her evidence that she sometimes favours (my words) her left ankle. In my view, it is consistent with the idea that the left ankle still bothers the plaintiff and causes her "discomfort" that she would avoid stressing it or would rub it when tender.

[94] With respect to evidence about the impact of the ankle fracture on the plaintiff, Dr. Kei testified he was not aware of the ankle fracture until after he prepared his report. However, Dr. Kei was not asked about the possible impact of the ankle fracture. Dr. Craig and Mr. Altieri were aware of the left ankle fracture when they prepared their reports. Dr. Craig did not offer any opinion or observations about the impact of the ankle injury on the plaintiff generally or her future prospects.

Dr. Craig simply noted, under “Review of Systems”, that the plaintiff has some “tenderness” in her left ankle due to the orthopaedic hardware. Under prognosis, Dr. Craig did not identify the ankle fracture as creating any challenges for the plaintiff in her work; he only referenced the plaintiff’s lower back symptoms.

[95] The only independent evidence of “functional limitations” from the ankle fracture is found in Mr. Altieri’s report. Based on his testing and observations, Mr. Altieri identified some limitations with the plaintiff’s ability to crouch because of the ankle fracture, noting Ms. MacDonald prefers to kneel rather than crouch for low-level activities. Mr. Altieri did not agree with the suggestion from defendant’s counsel that the plaintiff’s ankle fracture also limited her ability to stoop and kneel. I accept Mr. Altieri’s evidence that the plaintiff does not have difficulty with kneeling (and in fact, it better allows her to keep a neutral spine position) and that the limitations on stooping are solely related to the plaintiff’s lower back injury. Mr. Altieri also resisted any suggestion the plaintiff’s ankle fracture contributes to her functional limitations for snow removal. Mr. Altieri was clear, and I accept, that the limiting factor for the plaintiff in terms of even light snow removal is her lower back.

[96] Mr. Altieri drew one connection between the two injuries. He testified in cross-examination that because the ankle fracture effectively takes away crouching as one of the possible body positions for low-level activities, the plaintiff has fewer options when involved in low-level activities, which may make them harder. I understand low-level activities to encompass activities that require a body position lower to the ground. I accept that some of Ms. MacDonald’s job and certain housework activities, such as scrubbing the bathtub, involve low-level activities, so the ankle fracture may make those activities harder for the plaintiff.

[97] Plaintiff’s counsel suggested the plaintiff had suffered a 20% loss of working capacity, accounting for both her neck and lower back injuries and the impacts of the ankle fracture; the impact of the ankle fracture alone would obviously be lower. However, plaintiff’s counsel allowed that if the Court is persuaded there is a measurable risk the ankle fracture would have put the plaintiff off working as an ECE

regardless of her neck and back injuries, then a 20% reduction in future loss of earning capacity could be appropriate. The defendant proposed a 30-40% case specific reduction for the ankle injury alone (to which additional negative contingencies would be added), relying on the approach taken in *Wagner v. Cooper*, 2024 BCSC 986.

[98] In *Wagner,* Justice Shergill found Mr. Wagner's significant pre-existing physical and psychological conditions and injuries from intervening events warranted a case specific negative contingency of 30%, to which she then added a further 20% general negative contingency. I do not find the plaintiff's ankle fracture to be anywhere near as limiting as the pre-existing conditions and intervening injuries at play in *Wagner.*

[99] Instead, I accept Mr. Altieri's characterization that the ankle injury creates an "added limitation" that Ms. MacDonald must work around when engaging in low-level activities. I accept that both her job as an ECE and some of the usual housework demands require the plaintiff to engage in low-level activities, with the result that, post-July 2023, the ankle fracture has and will likely continue to have an independent negative impact on the plaintiff's ability to engage in those activities. However, I am not persuaded there is a measurable risk that the plaintiff's ankle fracture alone would have put the plaintiff off working as an ECE, absent her other injuries. In my view, the evidence demonstrates the plaintiff is a tough person who works through difficulties without complaints, and the ankle fracture, while creating some challenges, is not that significant compared to the plaintiff's Accident-related limitations. In the circumstances, I consider a 5% reduction of both non-pecuniary damages and future loss of income capacity to be appropriate in light of the impact of the ankle fracture.

Mitigation

[100] The defendant argues the plaintiff's failure to mitigate her injuries by following recommended treatment options warrants a 20-25% reduction in non-pecuniary damages and should also be applied to reduce any awards for future loss of earning

capacity, costs of future care and loss of housekeeping capacity. The defendant says the plaintiff failed to "proactively and exhaustively" discuss all treatment recommendations with her treating doctors and try such treatments in earnest. Instead, the defendant contends Ms. MacDonald took a passive approach to treating her injuries, which cannot be reconciled with her claims of chronic and debilitating pain. The plaintiff denies any failure to mitigate.

[101] The Court of Appeal recently addressed the test where a defendant seeks to reduce damages based on an alleged failure to mitigate in *Padgam v. Ram*, 2025 BCCA 100:

> [13] The test for a reduction in a damages award as a result of a plaintiff's failure to mitigate is well established. A defendant must prove: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had they acted reasonably (*Chiu v. Chiu*, 2002 BCCA 618 at para. 57). The evidentiary burden at the second stage of the test was recently clarified in *Haug v. Funk*, 2023 BCCA 110:
>
> > [61] […] [T]he second branch of the *Chiu* test […] require[s] the defendant to prove on a balance of probabilities that the plaintiff's injuries *would have* been reduced to some degree had they acted reasonably. Only once this is established does the Court go on to assess the reduction to the damages award based on *the extent* to which the injuries would have been avoided, which is the true hypothetical. [Italics in original.]

Did the plaintiff unreasonably eschew recommended treatments?

[102] In terms of the first branch of what is called the "*Chiu* test", the defendant says Ms. MacDonald acted unreasonably in two ways: first, she did not actively pursue all early treatment options recommended to her in the months after the Accident; second, she did not take sufficiently explore the more recent expert recommendations that would have provided greater certainty about her prospects for future improvement.

[103] Specifically, the defendant says Ms. MacDonald only attended six massage therapy sessions and eight chiropractic appointments between the Accident and the end of June 2018. She attended one massage therapy session upon returning to Newfoundland, the date of which is unknown. She then did not seek any further

treatment until after the 2020 MVA, despite having received a recommendation for physiotherapy and funding approval from the Insurance Corporation of British Columbia (ICBC). After undertaking physiotherapy following the 2020 MVA, the plaintiff did not seek further treatment between May 2021 and trial. Equally importantly, the defendant says the plaintiff did not inform herself about the recommendations in the expert reports prepared for trial in October 2024 until after her second discovery in December 2024. As a result, in the three months before trial, the plaintiff took no steps to explore those recommendations, despite it being within her control to do so.

[104] I do not agree Ms. MacDonald unreasonably failed to follow treatment recommendations made in the months after the Accident. The initial treatment recommendation provided to the plaintiff in March 2018 was for “massage therapy”, rest, ice and pain relievers. When the plaintiff re-attended the clinic in April 2018, the evidence indicates she advised the attending physician that her relief from massage therapy was “short-lived” and only “helps for a day”. That physician provided the plaintiff a further recommendation for “an assessment and course of treatment from Physiotherapy / Chiro”.

[105] While the physician’s clinical notes suggest she discussed the difference between physiotherapy and chiropractic treatment with the plaintiff, there was no specific recommendation that the plaintiff should attend physiotherapy rather than, or in addition to, chiropractic, let alone that she should attend a particular number of sessions. Instead, it appears to have been left to the plaintiff to choose which course of treatment to access. The plaintiff chose to access chiropractic treatment. She attended eight sessions and was then discharged before she moved back to Newfoundland in July 2018.

[106] A failure to follow *every* recommendation from every doctor is not a failure to mitigate; a failure to follow *any* recommendation is: *Haug v. Funk*, 2023 BCCA 110 at paras. 42 and 44. Having attended both massage therapy and chiropractic as recommended, there were no other specific treatment recommendations the plaintiff

failed to follow. I am not persuaded Ms. MacDonald failed to follow the initial treatment recommendations made in March and April 2018.

[107] I accept that, but for one massage therapy session, the plaintiff did not access further rehabilitative treatment for her injuries (i.e. physiotherapy, massage or chiropractic treatments) after moving back to Newfoundland and before the 2020 MVA. However, the medical records indicate the plaintiff attended the same medical clinic on multiple occasions during that two-year period to address, among other things, her reported complaints of ongoing neck and lower back pain. It is not clear on the evidence before me, nor was the plaintiff asked, if the treatment recommendations and funding approval she received in British Columbia were transferrable after she moved back to Newfoundland. Further, the evidence confirms the plaintiff was discharged from physiotherapy in May 2021; there is no evidence that further treatments were recommended to the plaintiff and not pursued.

[108] With respect to the plaintiff's alleged failure to explore the treatment recommendations of experts, in my view, the present case is distinguishable from the situation in *Padgam*. In *Padgam*, the plaintiff was examined by three different medical experts who prepared expert reports for litigation purposes in each of 2019, 2021 and 2023. As the Court of Appeal noted at para. 14 of *Padgam*, in "almost every report", the medical experts recommended various pharmaceutical treatments to the plaintiff that were aligned with the advice of her treating physicians. The plaintiff did not explore any of the experts' recommendations in the more than four years between the preparation of the first set of expert reports and trial.

[109] In the present case, the recommendations of Dr. Kei, Dr. Craig and Mr. Altieri were finalized in their reports in October 2024, about three months before the trial. In closing submissions, the defendant invited me to follow the approach of the trial judge in *Padgam* and deem Ms. MacDonald to have had knowledge of the experts' recommendations when received by counsel. However, the Court of Appeal in *Padgam* expressly did not endorse the trial judge's reliance on the law of agency to attribute knowledge of the expert recommendations to the plaintiff based on when the reports were received by the law firm (paras. 15-16). In this case, unlike in

Padgam, plaintiff's counsel has not conceded that Ms. MacDonald was aware of the contents of the experts' reports when received in October 2024. In fact, at her second discovery on December 17, 2024, the plaintiff gave evidence that she was not aware of the experts' recommendations at that point, only a month before trial. At trial, the plaintiff was aware of what the experts had recommended but confirmed she had not explored or discussed any of the recommendations with her treating medical personnel.

[110] While the defendant conceded the failure to mitigate in this case was not as serious as in *Padgam*, the defendant maintained the plaintiff's failure to explore the expert recommendations in the lead up to trial satisfied the first stage of the *Chiu* test. I disagree.

[111] The evidence indicates the plaintiff did not have actual knowledge of the experts' recommendations until after December 17, 2024. In the circumstances, it was not unreasonable for the plaintiff not to spend the slightly less than a month before trial focused on exploring or acting on the experts' recommendations, particularly when that timeframe included the late December-early January holiday period when many professional offices shut down for holidays. Even if the plaintiff could properly be attributed knowledge of the experts' recommendations at some point between October 2024 and December 17, 2024, there would not have been sufficient time for the plaintiff to explore more than initial steps towards the recommendations, some of which were envisioned to be sequential in any event.

[112] Even more importantly, as the defendant's written submissions concede, the potential pain relief benefits of Dr. Kei's treatment recommendations (particularly corticosteroid injections and radiofrequency ablation) were not included in Dr. Kei's report itself; they were only discussed in his trial testimony. In my view, Dr. Kei's report did not provide the plaintiff sufficient information to assess the treatment recommendations. Accordingly, I am not persuaded the plaintiff unreasonably eschewed recommended treatment options after returning to Newfoundland or after

the expert reports were completed in October 2024. However, in the event I am wrong, I will briefly consider the second branch of the *Chiu* test.

Would the recommended treatments have reduced the plaintiff's symptoms?

[113] As noted above, in *Haug*, the Court of Appeal clarified that the second branch of the *Chiu* test requires the defendant to prove, on a balance of probabilities, that the recommended treatment *would have* reduced the plaintiff's symptoms and therefore the plaintiff's damages. The threshold for reducing an award at the second stage of the *Chiu* test is not met where the expert evidence only establishes that a particular course of treatment is "a reasonable treatment to try, and it might afford some relief": *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at paras. 57-58, cited with approval in *Rhodes v. Surrey (City)*, 2018 BCCA 281 at paras. 66 and 70.

[114] In his written submissions, the defendant relied on Dr. Kei's evidence to assert that if the plaintiff had explored physiotherapy earlier on and had generally taken a more proactive and diligent approach to her treatment, she "could" have been treated more effectively and "could" have had less pain. In my view, Dr. Kei's evidence did not go far enough to establish, on a balance of probabilities, that if the plaintiff had pursued physiotherapy earlier or had been more "diligent", that *would have* reduced her symptoms and therefore her damages.

[115] In cross-examination, Dr. Kei was asked directly if the plaintiff's trajectory would have changed if she had explored physiotherapy or his other recommended treatments earlier. His response was that he did not think so, given that most improvements with neck and back pain come within the first three months. He allowed that it might have been possible to manage her pain better and agreed he would typically expect to see some improvement in the first three months, especially in a younger patient. However, Dr. Kei was not prepared to agree that attendance at physiotherapy in the first three months, or the other courses of treatment he spoke to, would necessarily have improved Ms. MacDonald's symptoms, given the significant variability in each patient.

[116] Given the defendant's focus on physiotherapy, it is relevant that Dr. Kei was not asked if the plaintiff's pain would more likely have been reduced by attending physiotherapy in the first three months, rather than by attending the recommended massage and chiropractic treatments, as she did. In the circumstances, I am not persuaded the defendant has met the second step of the *Chiu* test either.

[117] The defendant has not shown that a reduction in damages is warranted based on the plaintiff's alleged failure to mitigate by not following treatment recommendations, including those made by experts.

[118] The defendant suggested the plaintiff could have reduced her ongoing pain by changing to a different job. I address this suggestion below in analysing the plaintiff's claim for damages from loss of future earning capacity.

Damages

[119] Ms. MacDonald seeks damages for past and future loss of housekeeping capacity, non-pecuniary damages, loss of earning capacity (past and future), costs of future care and special damages.

[120] The defendant agrees that non-pecuniary damages, costs of future care and special damages are appropriate, but disputes the specific amounts claimed by Ms. MacDonald. The defendant says Ms. MacDonald has not established a sufficient basis for any award of past or future loss of earning capacity, or past and future loss of housekeeping capacity, particularly in light of treatment options that were not pursued and may yet provide considerable benefits.

[121] I will deal with each head of damages in turn.

Past and future loss of housekeeping capacity

[122] The plaintiff seeks an award for $6,500 for past loss of housekeeping capacity from the date of the Accident to trial and a second award of $68,233 for future loss of housekeeping capacity. The plaintiff's past loss claim is based solely on interior cleaning and housework; the future loss claim is designed to address interior cleaning and housework, as well as yard maintenance and snow removal. The

plaintiff says, based on the Court of Appeal's recent clarification of the applicable test in *McKee v. Hicks*, 2023 BCCA 109, the Court should grant separate pecuniary awards, rather than augmenting the award for non-pecuniary damages.

[123] The defendant disputes that any award should be made for loss of housekeeping capacity, including because the plaintiff is capable of and does perform cleaning tasks at the daycare, and because some of her difficulty with certain cleaning tasks stems from her ankle fracture. However, if the Court determines there is a compensable loss of capacity, the defendant says that loss should be included as part of the non-pecuniary damages award.

[124] It is well-established that a plaintiff is entitled to be compensated when their ability to perform housekeeping tasks has been diminished in whole or in part. That compensation will usually take one of two forms: pecuniary or non-pecuniary damages, based on the Court's discretionary assessment of the nature of the loss and how it should be best be compensated: *Ali v. Stacey*, 2020 BCSC 465 at para. 67. In *McKee*, the Court of Appeal summarized the governing legal principles as follows:

> [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.

See also *Haug* at paras. 98-107.

[125] In other words, if a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work, such that the plaintiff must pay for housekeeping services or rely on family and friends to do the work gratuitously, the loss is a true loss of capacity, which will usually justify a pecuniary award: *Kim v. Lin*, 2018 BCCA 77 at para. 33. However, if the plaintiff remains capable of performing the household work, even if they require more time, have

challenges or pain, or manage to get by without doing the work, then the loss is more akin to a loss of amenities or increased pain and suffering, which should be addressed through non-pecuniary damages. In the latter case, the compensation is meant to reflect the plaintiff's pain in persevering with housework, or their loss of satisfaction because they cannot contribute to the home's upkeep or must settle for a less orderly or less functional home: *Kim* at para. 30. Recognizing that the line between these two forms of loss may be a fine one, the Court's assessment is discretionary.

[126] At trial, the plaintiff testified that due to the pain from her injuries, which gets worse as the work week wears on, she is unable to help with the housework in the basement unit she shares with her mother. When the plaintiff first moved back to Newfoundland, she shared a townhouse with her mother, but the family subsequently purchased a larger home. At present, Ms. MacDonald's brother and his family live upstairs and Ms. MacDonald and her mother live downstairs. Ms. MacDonald's brother takes care of the more physically demanding yard work at the home (including snow removal). Despite the plaintiff's mother having age-related arthritis, the plaintiff testified that her mother cleans and maintains their shared basement suite as she is unable to do so.

[127] The members of the plaintiff's family who testified at trial all gave evidence that the plaintiff has varying degrees of difficulty with household chores. The plaintiff's mother testified that, after working all day, the plaintiff is unable to do anything but rest her back on the couch. Other than the plaintiff occasionally making her own bed, the plaintiff's mother testified the rest of the cooking, cleaning and laundry falls to her. The plaintiff's mother was clear that the plaintiff also cannot do chores like vacuuming or shovelling snow.

[128] The plaintiff's brother gave similar evidence about his sister being unable to lift anything or do anything outside. He confirmed that his mother does all the housework, as his sister is unable to help as much as she would like to. He testified the plaintiff will try to help but does not get very far. The plaintiff's sister-in-law who

lives upstairs testified the plaintiff is less independent since moving back from British Columbia, and will ask for help with any heavy lifting or similar tasks. She similarly confirmed the plaintiff's mother does all the household chores.

[129] However, the plaintiff's evidence at trial about her inability to do any housekeeping is inconsistent with her evidence on discovery in November 2023. When asked if there were any housekeeping tasks that she could not do because of the Accident, the plaintiff responded "I don't think so, no." The plaintiff's evidence at trial is also inconsistent with what she told Dr. Kei and Dr. Craig in September 2024. Dr. Kei reports that the plaintiff advised him she "shares household tasks such as cleaning and cooking" with her mother, while her brother helps with more physically demanding household tasks. The plaintiff provided similar information to Dr. Craig, whose report notes that the plaintiff "split[s] the housework and meal preparation" with her mother, but can have difficulty with "heavier cleaning tasks like mopping and doing the laundry," and occasionally with cooking when her back pain flares.

[130] Based on his examination as a whole, Dr. Kei assessed the plaintiff as being "independent with household tasks". He allowed the plaintiff would continue to have pain while performing household tasks, but opined she would be able to manage them by pacing herself as appropriate. Dr. Craig's prognosis was that the plaintiff would be better able to tolerate domestic tasks with further treatment, but he accepted she could have difficulty with yard work or household maintenance and repairs if living in a house.

[131] In his report, Mr. Altieri identified the plaintiff as having "functional limitations" with respect to housekeeping. Mr. Altieri stated that because of the plaintiff's limited tolerance for stooping and limitations on her ability to lift, she will continue to require assistance for more physically demanding chores and tasks involving heavier items. Consistent with his report, Mr. Altieri confirmed in cross-examination that the plaintiff demonstrates the physical abilities to perform most household chores, but has more limited capacity for chores that require low-level postures or prolonged stooping. He agreed that the physical limitations with chores that require crouching are related, at

least in part, to the plaintiff's ankle fracture. Mr. Altieri testified that based on his functional capacity assessment, the plaintiff's lower back pain will not allow her to engage in any snow removal activities. As noted previously, he firmly resisted any suggestion the plaintiff's ankle fracture is a limiting factor for snow removal.

[132] To begin, I disagree with the defendant's contention that because the plaintiff does some cleaning in her job, she cannot establish a compensable loss of housekeeping capacity. The Court of Appeal rejected a similar suggestion in *Haug*. At para. 104 of *Haug*, the Court held the fact that Ms. Haug provided cleaning services for her paid employment was "not determinative of her capacity to the same in her own home". The Court confirmed that if Ms. Haug was less able to perform household chores at the end of a workday after the accident than she had been before, that represented a compensable loss of an asset.

[133] On the evidence before me, I am satisfied the plaintiff suffered a loss of housekeeping capacity because of the Accident and will continue to do so. However, the nature of that loss is not clear cut. I find there are certain housekeeping tasks, including snow removal and lifting heavy items, that the plaintiff is unable to perform due to her ongoing neck and lower back issues. It is also clear that, as a matter of fact, and with the most minimal exceptions (like making her bed), the plaintiff currently relies on her family to do all necessary household chores, both inside and outside the home. However, all three medical experts share the view that the plaintiff is *capable* of doing at least some household tasks, even if she will experience pain or difficulty in performing them. All three medical experts are also hopeful that the plaintiff will achieve greater management of her pain symptoms with further treatment. There is also the added complication that at least some of the plaintiff's limitations with housework after July 2023 are attributable to her ankle fracture.

[134] While there are certain factors that suggest a pecuniary award for past and future loss of housekeeping capacity could be appropriate, in my view, given the complicating factors identified above, it is more appropriate for me to exercise my

discretion to address this aspect of the plaintiff's loss by augmenting the award of non-pecuniary damages.

Non-pecuniary damages

[135] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[136] In *Stapley v. Hejslet,* 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when determining the appropriate quantum. That list includes: the age of plaintiff; the nature of the injury; the severity and duration of the pain; any disability; emotional suffering; impairment of physical and mental abilities; and impacts on lifestyle and impairment of personal relationships. In addition, to the extent the plaintiff is stoic, that factor should not penalize the plaintiff. The Court of Appeal emphasized that when assessing non-pecuniary damages, the gravity (or not) of the injury is not determinative; rather the key is to appreciate the specific individual's sense of loss, which will not necessarily correlate with the seriousness of their injuries: *Stapley* at para. 45.

[137] The plaintiff was 26 years old at the time of the Accident and had just begun to work full-time in a career connected to her formal education about four months prior. By all accounts, the plaintiff was an outgoing, social and independent person before the Accident. Despite her small stature, the plaintiff's brother described her as always having had an "I can do it myself" attitude. She did not suffer from any physical limitations that impacted her personal life or her ability to perform the demands of her position as a youth care worker. I accept her testimony and that of her family members that she had built a life and a social network in British Columbia. On the evidence before me, I find that at the time of the Accident, her anxiety and depression were successfully managed through medication.

[138] I accept the plaintiff's evidence that she experienced significant pain in her neck and lower back after the Accident. Although she did not miss much work, she sought assistance from various medical professionals to address her ongoing pain. While the plaintiff's symptoms have improved to some degree (with greater improvements to her neck than her lower back), as stated above, I have found the plaintiff continues to suffer from chronic pain on a daily basis.

[139] I accept the consistent medical evidence that the plaintiff's pain, particularly in her lower back, is aggravated by activity, and because of the Accident, Ms. MacDonald now suffers limitations with lifting, stooping and certain postural demands that she did not experience before. Those limitations affect her ability to work as an ECE without pain and discomfort. That said, I accept the plaintiff has not sought formal accommodations at work, preferring instead to rely on informal arrangements with her co-workers to assist with certain tasks or to schedule certain responsibilities earlier in the day when she has less pain.

[140] I accept the plaintiff's evidence that by the end of her workday, she is physically spent and needs to rest her back, and that her pain gets worse towards the end of the work week. This is consistent with what the plaintiff reported to Dr. Kei and Mr. Altieri; this evidence was also corroborated by the plaintiff's family members who see her on a daily basis. The plaintiff gave evidence that she experiences a significant pain flare-up about once a month or once every two months, but she is still able to work on those days. This is borne out by the evidence of her work colleagues, who confirmed Ms. MacDonald rarely takes sick days. The expert evidence satisfies me that while the plaintiff may be able to achieve better pain management, her prognosis is guarded; she is not expected to ever fully recover.

[141] In addition to the plaintiff, I heard from members of the plaintiff's family who had experience with the plaintiff before and after the Accident. I also heard from post-Accident friends and work colleagues. That evidence satisfies me that that prior to the Accident, Ms. MacDonald was hard-working, independent and social; her mother described her as a "go-getter".

[142] After the Accident, I find the plaintiff's world has gotten smaller. She still works hard, pouring her energy into her work, but as a result, does not have much left over for herself. At times, the defendant appeared to suggest that because Ms. MacDonald loves her job, is good at it and continues to work full-time, the impact of her injuries must not be as significant. I do not agree. In my view, the evidence instead supports a conclusion that Ms. MacDonald bears some of the hallmarks of stoicism, including a reticence to complain and a resilience when encountering difficult circumstances: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 54. In fact, in cross-examinations of multiple witnesses, defendant's counsel repeatedly sought and obtained agreement with the suggestion that Ms. MacDonald is a resilient person. This characteristic cannot be held against the plaintiff in assessing non-pecuniary damages.

[143] Ms. MacDonald is fortunate to have a caring and supportive family, but their consistent evidence, which I accept, is that she has changed since the Accident. She sees her family regularly, including because of her current living arrangements, but is limited in her ability to physically interact with her nieces and nephews. While she will sometimes attend an occasional social function at her workplace (like a Christmas party or ordered-in lunch), I find the plaintiff does not have an active social life anymore. One friend and former co-worker testified that while she attempts to encourage the plaintiff to go out occasionally for a drive or dinner, it can be a real struggle to convince Ms. MacDonald to leave her home.

[144] Overall, the evidence satisfies me that the plaintiff's pain and limitations have negatively impacted her mood. To be clear, there is no medical evidence that the Accident had a diagnosed psychological impact on the plaintiff, in the sense of exacerbating her existing mental health or creating new issues. Rather, in my view, the demonstrated emotional impacts are consistent with what any reasonable individual might experience in the face of a loss of independence and relationships. I accept that Ms. MacDonald's whole family experienced a significant tragedy in the fall of 2023 when her eldest brother passed away in an accident, and they are all

understandably still grieving. I am satisfied the emotional impacts of the Accident were manifest before that tragic event.

[145] The plaintiff submits that an award of $140,000 in non-pecuniary damages is warranted to compensate Ms. MacDonald. Plaintiff's counsel cited the following cases with awards ranging from approximately $126,000 to $160,000 (as adjusted for inflation) as comparable: *Clayton v. Barefoot*, 2018 BCSC 239 ($160,000 adjusted); *Lock v. Floreani*, 2017 BCSC 1313 ($145,000 adjusted); *Beaton* ($141,000 adjusted); *Teunissen v. Hulstra*, 2017 BCSC 1569 ($139,000 adjusted); *Lanigan v. Kandola* (18 November 2020), Vancouver M189186 (BC SC) ($126,000 adjusted); and *Lee v. MacLean*, 2022 BCSC 312 ($140,000). Although all of these cases concern plaintiffs who suffered soft tissue injuries that had become chronic and were not expected to resolve, in several cases, the plaintiffs were considerably older than Ms. MacDonald at the time of their accidents; in other cases, the nature of the work and non-work limitations were much less significant.

[146] The defendant says the appropriate range for non-pecuniary damages in this case is $50,000 to $70,000, although I note the defendant's range is based on awards in comparable cases that have not been adjusted for inflation. The defendant relies on: *Jacobi v. Monteith*, 2020 BCSC 218 ($50,000 unadjusted); *Callow v. Van Hoek-Patterson*, 2021 BCSC 1423, overturned in part, 2023 BCCA 92 ($55,000 unadjusted); *Dhami v. Madden*, 2020 BCSC 573 ($60,000 unadjusted); *Lin v. Yim*, 2019 BCSC 1071 ($60,000 unadjusted); and *York v. Svensson*, 2021 BCSC 341 ($70,000 unadjusted). When the awards in the defendant's cases are adjusted for inflation, the range goes from about $57,000 to $81,000. The defendant's cases also generally involve plaintiffs with chronic soft tissue injuries, although several of the plaintiffs were younger than Ms. MacDonald at the time of their accidents, and for some, the impacts of their injuries were considerably less significant (both at work and recreationally) or the future prognosis was more positive.

[147] Of the cases provided to me, and recognizing that no two cases are identical, I find the circumstances in *Clayton* to be the most closely analogous to the factors

before me. In *Clayton*, the plaintiff was 26 at the time of the accident and she suffered soft tissue injuries to her neck, shoulder and lower back. At trial five years later, she continued to suffer from daily lower back pain; the pain also interrupted her sleep. The plaintiff's injuries precluded her from continuing to work in the labouring jobs she loved and limited what she could do in her work as a personal support worker. Prior to the accident, she enjoyed various physical recreational activities and excelled in sports. Afterwards, she was limited to short walks on flat surfaces. Her injuries were not expected to resolve. The Court awarded Ms. Clayton $130,000 in non-pecuniary damages, and made an additional award of $40,000 under costs of future care to address loss of housekeeping capacity. Adjusted for inflation, those awards would be approximately $160,000 and $49,000 today.

[148] While the award in *Clayton* provides some guidance, I accept there are differences. Ms. MacDonald has not been precluded from continuing in the career she loves, and her level of pre-Accident activity has not been as significantly impacted as was the case for Ms. Clayton. In *Clayton*, the Court also had medical evidence Ms. Clayton suffered significant sleep disturbance because of her injuries. Further, the evidence regarding Ms. Clayton's loss of housekeeping capacity was clearer, and she had sought and been granted accommodations in relation to her housekeeping tasks at work.

[149] Considering the cases to which I was referred, the factors set out in *Stapley*, and the individual impacts on Ms. MacDonald, I find the appropriate award for non-pecuniary damages, including loss of housekeeping capacity, is $150,000. In accordance with my conclusions about the impact of the plaintiff's ankle fracture, that award must be reduced by 5%, resulting in a total award of $142,500 for non-pecuniary damages.

Loss of earning capacity

[150] In *Bhardwaj*, the Court provided the following succinct summary of the principles that govern claims for loss of earning capacity:

> [91] Claims for both past and future loss of earning capacity are for the loss of the value of the work the plaintiff was or will be unable to perform as a result of the accident: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45.
>
> [92] The plaintiff must demonstrate that the injuries and symptoms caused by the accident have impaired his capacity to earn income, resulting in a pecuniary loss. Past events must be proven on a balance of probabilities. Hypothetical events, including what would have happened in the past but for the accident and what would have and will occur in the future, will be considered where there is a real and substantial possibility the events would occur. A hypothetical event is then given weight according to its relative likelihood: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. Compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44-48.

[151] The plaintiff advances two claims in relation to past loss of earning capacity: a claim for past wage loss based on one missed week of work at Arc Communications after the Accident; and a claim for loss of earning capacity on the basis that the Accident accelerated her return to Newfoundland by about a year. The plaintiff also advances a claim for loss of future earning capacity. I will deal with each in turn.

Past loss of income / earning capacity

[152] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Clayton* at para. 119, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[153] The Court assesses damages for past loss of earning capacity instead of calculating them mathematically. While in many cases the actual lost income will be the most reliable measure of the loss, it is not the actual lost income but the lost capacity that is compensable: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. Ultimately, the award must be fair and reasonable taking into account all of the circumstances: *Sangha v. Read*, 2019 BCSC 1761 at para. 113.

Claim for past wage loss

[154] At trial, the plaintiff testified in direct that she missed one week of work at Arc Communications following the Accident. To corroborate her testimony, the plaintiff relies on an ICBC "Certificate of Earnings" completed and signed by the payroll clerk for Arc Communications on October 22, 2018, which states as follows:

> Based on correspondence with Program Coordinators who were offering [Ms. MacDonald] casual / relief shifts after the car accident, it appears that she had to refuse approximately a week of shifts – 40 hrs. @ $21.50/hr.

The pre-printed form contains a "certification" that is to be read before the form is signed, advising that the information is provided to ICBC in connection with an insurance claim, attesting to the truth and completeness of the information provided and confirming that the person completing the form understands it is an offence to provide false information. Based on the information provided on the form, the plaintiff claims a gross loss of $860.00 as a result of one-week of missed work.

[155] Despite the existence of that document, the defendant disputes the plaintiff missed any work due to the Accident. The defendant relies on the plaintiff's response to a question about missed time from work at discovery in November 2023, which she confirmed on cross-examination to have been a truthful answer. The defendant also contends it is equally possible that the plaintiff did not miss a week of shifts after the Accident, but instead missed those shifts in April 2018, when the plaintiff admits she went back to Newfoundland for a vacation. The plaintiff resisted that suggestion in cross-examination.

[156] I do not agree with the defendant's characterization of the plaintiff's evidence on this point. The exchange from the November 2023 discovery, which was put to the plaintiff in cross-examination, is as follows:

> 289 Q Okay. After the accident, did you miss any time from work?
>
> A Not that I –
>
> 290 Q Because of your accident-related injuries. I should be more specific.
>
> A Yeah. Not that I can recall.

[157] The plaintiff's answer was not as definitive as the defendant suggested in his written submissions. Further, when the plaintiff was asked to confirm the accuracy of the above exchange in cross-examination, she qualified her response, indicating that her answer at discovery was true because, in that moment, she did not remember having missed any time from work.

[158] I acknowledge the "Certificate of Earnings" form does not refer to a specific timeframe when it states the plaintiff missed work "after the car accident". However, given that the form indicates the information is being requested in relation to an ICBC claim, and given the October 2018 date on the form, I am not persuaded the payroll clerk would have documented missed shifts in April 2018 as being connected to an accident that occurred on February 25, 2018.

[159] I find the plaintiff has proven on a balance of probabilities that she missed one week of work following the Accident, the gross value of which I accept to be $860. As ss. 95 and 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 require deductions from all past income awards, I will address the net amount of the award below.

Claim for past loss of earning capacity

[160] The plaintiff claims $24,000 for past loss of earning capacity on the basis that the Accident accelerated her return to Newfoundland by about a year. She relies on the difference between her earnings at Arc Communications in British Columbia and her earnings at Milestones in Newfoundland to ground her assessment of the likely loss of earning capacity due to her earlier return.

[161] The plaintiff admits, and I accept, that she did not intend to continue working as a youth care worker indefinitely and that she would have eventually moved back to Newfoundland to be closer to her family in any event. The plaintiff was candid at trial that her job as a youth care worker was emotionally challenging and could also be physically challenging if a youth became violent. There is no question the plaintiff is close to her family and missed them. However, Ms. MacDonald maintained at trial that she had no immediate plans to move as of February 2018, and but for the

Accident, she would have continued working at Arc Communications in British Columbia for another year after June 2018.

[162] The plaintiff's 2018 T4 slip from Arc Communications indicates that from January to June 2018, the plaintiff earned $24,324 in employment income. The plaintiff began working at Milestones on August 21, 2018. Her 2018 T4 slip from Milestones, which logically would reflect earnings during the remaining 17 or so weeks in 2018, shows employment income of $8,104. The plaintiff testified at trial that her starting hourly rate was approximately $12.75. She admitted her hourly rate increased as she obtained her ECE qualifications. The plaintiff's 2019 T4 slip shows she earned $24,552 working full-time at Milestones for the year, which was about half of her previous earnings at Arc Communications. As a result, the plaintiff says the Court should find she suffered a past loss of earning capacity roughly equivalent to the difference between one year of further earnings in British Columbia versus the plaintiff's initial earnings in Newfoundland.

[163] The defendant says this aspect of the plaintiff's claim must fail for three reasons: the plaintiff's estimate that she would have stayed working at Arc Communications for another year past June 2018 is speculative; the plaintiff decided to return to Newfoundland because she did not like her job and missed her family (not because of the Accident); and in any event, the plaintiff failed to disclose documents to corroborate her starting hourly wage at Milestones that is the basis for her claim. With respect to her motivations for moving back, the defendant says the Court should prefer the plaintiff's evidence from discovery, which did not refer to the Accident or her injuries as motivating factors for her move.

[164] I do not accept the scope of the losses claimed by Ms. MacDonald, but I do accept that the Accident accelerated her decision to leave British Columbia. The evidence demonstrates the plaintiff was independent before the Accident, and made a deliberate choice to move to British Columbia in 2014 to pursue educational and career opportunities, despite not having any family nearby. I accept that between

2014 and 2018, the plaintiff built a life in British Columbia. There is no evidence she had any immediate plans to leave when the Accident occurred in February 2018.

[165] While she no doubt missed her family, the plaintiff only secured her job at Arc Communications about four months before the Accident, after completing her diploma program. She returned to Newfoundland about four months after the Accident. I am not persuaded Ms. Macdonald would have given up on her career and life in British Columbia as quickly as she did had the Accident not occurred.

[166] That said, I agree with defendant that it is speculative, at best, for the plaintiff to suggest she would have continued working at Arc Communications for at least another year beyond June 2018. Given the plaintiff's admitted dissatisfaction with her job and the fact that she missed her family, I find it is equally likely that she would have changed jobs or left British Columbia sooner than a full year. Since I consider there to be a 50% likelihood the plaintiff would not have remained in British Columbia for another full year beyond June 2018, I find that an adequate approximation of the plaintiff's past loss of earning capacity is the difference between six months of additional employment at Arc Communications and six months of the plaintiff's starting wage at Milestones, both in 2018.

[167] In my view, it is misguided for the defendant to focus on the lack of a document to corroborate the $12.75/hour starting wage to which the plaintiff testified. The jurisprudence is clear that assessing damages for a past loss of earning capacity is not a mathematical calculation, and in any event, it is the loss of earning capacity, not any actual lost income, that is compensable. I am satisfied that the plaintiff's T4 slips from 2018 and 2019 provide a sufficient baseline from which to assess damages in a fair and reasonable manner. I find that $12,000 is an appropriate assessment of the past loss of earning capacity the plaintiff suffered because the Accident accelerated her return to Newfoundland.

[168] I therefore find the plaintiff entitled to $12,860 in "gross" damages for past loss of income / earning capacity, which amount is subject to the necessary deductions required by the *Insurance (Vehicle) Act*. The plaintiff suggested an 18%

tax rate, based on the rate applied in several earlier cases. The defendant suggested a 20% deduction to account for tax, employment insurance and Canada Pension Plan contributions. Although the defendant did not cite any, there are cases that use 20%. In the absence of submissions as to why one rate should be preferred, I will apply the 18% tax rate. Accordingly, I award the plaintiff a total net past income loss award of $10,545.20.

Loss of future earning capacity

Legal principles

[169] At para. 47 of *Rab v. Prescott*, 2021 BCCA 345, the Court of Appeal set out a three-step analysis to guide the consideration of claims for loss of future earning capacity:

a) Does the evidence disclose a *potential* future event that could lead to a loss of capacity (e.g. chronic injury, future surgery, risk of arthritis);

b) On the evidence, is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

c) If a real and substantial possibility of loss exists, what is the value of that possible future loss, taking into account the relative likelihood of the possibility occurring?

[170] The first two steps address the plaintiff's entitlement to an award for loss of future earning capacity. The plaintiff bears the burden, but as noted, the plaintiff only needs to prove the hypothetical future event is a real and substantial possibility. The general factors relevant to the Court's consideration of whether there has been an impairment of earning capacity were set out at para. 8 of *Brown v. Golaiy*, 1985 CanLII 149 (B.C.S.C.), 26 B.C.L.R. (3d) 353:

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 incoming in a competitive labour market.

[171] The Court's objective is to determine what a particular plaintiff would realistically have done in the future had the injuries not occurred. The ability to earn income is an asset, and to the extent there is a "real and substantial possibility" that asset has been taken away or impaired by the injuries, the plaintiff is entitled to fair and reasonable compensation for that loss.

[172] If the plaintiff establishes their entitlement to an award, then at the third step of the *Rab* test, the Court must assess, rather than calculate, the value of the possible future loss by comparing the likely future of a plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25; *Gregory* at para. 32. As a final step, the Court must also review the overall fairness and reasonableness of any award: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[173] There are two possible approaches to assessing the value of a possible loss of future earning capacity: the earnings approach and the capital asset approach. The earnings approach is generally more useful when the loss is easily measurable (although, it remains the loss of *capacity* that is being compensated). Where the loss, though proven, is not easily measurable in a pecuniary way – such as where the plaintiff's income at trial is at or near their pre-accident earnings – the capital asset approach is more appropriate: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32. In either case, the approach taken to the assessment of loss must be based on the evidence: *Rab* at paras. 74-75.

Discussion

[174] The defendant says Ms. MacDonald is not entitled to an award for loss of future earning capacity as the evidence does not disclose a real and substantial possibility of a potential future event that could impair her capacity and lead to a pecuniary loss.

[175] First, the defendant says the evidence does not support a finding of a potential future event that could impair the plaintiff's capacity. In this regard, the defendant emphasizes that the plaintiff has not missed work as a result of her Accident-related injuries; in fact, the plaintiff gave evidence that she is able to work even on days when she is experiencing a significant pain flare-up. Further, the plaintiff's manager confirmed she rarely takes sick days. The defendant says the consistent evidence is that the plaintiff loves her job, is dedicated to it, and intends to continue working full-time despite Dr. Kei's recommendation that she reduce her working hours to four days a week. The defendant says, by all accounts, the plaintiff is a model employee; there is no suggestion that she is unable to perform her job.

[176] I accept that the plaintiff has continued to work full-time, but I do not accept this as evidence that her injuries have or will continue to have a minimal impact on her capacity. The expert medical evidence is consistent that the plaintiff's injuries from the Accident have become chronic and are exacerbated by her current work. Dr. Kei considered the plaintiff's prognosis to sustain work at her current hours to be "guarded"; Dr. Craig is slightly more optimistic, but both physiatrists agree Ms. MacDonald will likely continue to suffer pain in the long term, and that her pain will be increased through her work.

[177] Although it is possible the various treatment plans recommended by the experts may assist Ms. MacDonald with controlling and managing her pain symptoms, Dr. Kei and Dr. Craig both agree the plaintiff is not expected to make a full recovery. Dr. Kei also opined that the plaintiff's ability to manage pain from normal aging in the future is now decreased. In *Rab*, the Court of Appeal recognized at para. 47 that the presence of a chronic injury could give rise to potential future event that impairs capacity.

[178] In my view, the evidence confirms the plaintiff works through her pain because of her dedication to her job and because there are no other options, but doing so comes at the expense of her home life. The plaintiff's manager and supervisor confirmed, and I accept, that employee absences create problems for Milestones and that, given the demands of the childcare centre, working part-time is

not a realistic option if Ms. MacDonald wishes to continue with her current employment. Further, the evidence confirms that even if Ms. MacDonald was to become interested in, and could develop the necessary skills for, an administrative role (and neither precondition is a certainty), such a position still requires considerable time “on the floor” of the childcare centre. The plaintiff’s manager confirmed that administrators still spending the bulk of their hours each day performing the same kinds of physical tasks Ms. MacDonald must currently do.

[179] The plaintiff has made some informal modifications through arrangements with her co-workers to try to avoid her injuries impacting her job performance. However, Mr. Altieri concluded, and I accept, that the plaintiff’s chronic pain affects her ability to perform some of the physical tasks required for her work, such as stooping, lifting, carrying and various low-level activities associated with childcare. I am satisfied these physical limitations render Ms. MacDonald less capable overall of earning income from all types of employment and less marketable or attractive as a potential employee.

[180] I find the evidence of plaintiff’s chronic pain, which is not expected to resolve, is sufficient to establish the potential of a future event that may lead to a loss of capacity as the plaintiff ages. Dr. Kei was of the view that the plaintiff was already working beyond her actual physical capacity, and would not be able to continue doing so. This is not speculative. I am satisfied there is a real and substantial possibility that her chronic injuries will negatively affect her ability to function at work in the future, and therefore the first stage of the *Rab* test is satisfied.

[181] Turning to the second stage, I am also satisfied there is a real and substantial possibility the potential future event will cause Ms. MacDonald a pecuniary loss. In my view, there is a realistic possibility that the plaintiff’s chronic pain, which the evidence indicates is and will continue to be exacerbated by her work, may in future require her to take time off from work. The evidence indicates that sick days are not paid for employees at Milestones, which would result in a pecuniary loss. Given her relatively young age and the number of working years she has left, there is also a

real and substantial possibility that Ms. MacDonald's chronic pain will require her to: transition to a childcare employer that is able to accommodate employees that must work less than full-time hours; take an earlier retirement; or abandon her career as an ECE in favour of a job that would be less physically demanding. In my view, any of these are realistic possibilities that could result in pecuniary loss.

[182] While the defendant argued the plaintiff's ankle fracture and history of mental health challenges pose more significant risks of impacting the plaintiff's working capacity in a manner than could cause a pecuniary loss, I do not agree. As I have already concluded above, the evidence does not support the contention that the ankle fracture has, or will in future have, an impact on the plaintiff's functional capacity that is as significant as her lower back injuries. The very minimal evidence before me in respect of the plaintiff's mental health does not support a conclusion that anxiety or depression create limitations for her future working capacity. In fact, as another portion of the defendant's written submissions concede, the minimal evidence available suggests the plaintiff's conditions are adequately managed with medication.

[183] Defendant's counsel also suggested the risk of the plaintiff suffering a pecuniary loss in future is attenuated if not eliminated by the possibility that she could move into a more administrative, and therefore less physically demanding, role. I do not agree. As indicated above, the evidence at trial confirmed that the plaintiff's manager still spends a considerable portion of her day directly engaged with children; I am not satisfied this would make a measurable difference in terms of what exacerbates the plaintiff's chronic pain. Further, there was evidence from the plaintiff's manager and supervisor that the plaintiff would likely struggle with being sufficiently assertive and dealing with confrontation, which are necessary skills for obtaining a managerial or administrative position in that field.

[184] Having found the plaintiff entitled to an award for loss of future earning capacity, I turn to the assessment of the value of her loss under the third stage of the *Rab* test. The parties agree the Court should apply the capital asset approach in this case because Ms. MacDonald's income at the time of trial was at or near the level of

her earnings at the time of the Accident. The Court of Appeal has endorsed the capital asset approach in these types of circumstances on multiple occasions: *Rab* at para. 72; *Davies* at para. 49. I agree it is the appropriate approach here.

[185] In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) (C.A.), 1995 CanLII 2871 (B.C.C.A.), the Court of Appeal identified three possible methods for assessing loss under the capital asset approach:

a) postulate a minimum annual income loss for the plaintiff's total remaining years of work and calculate a present value of that sum;

b) award the plaintiff the value of their entire annual income for one or more years; or

c) award the present value of a nominal percentage loss of income per year.

[186] In written submissions, the plaintiff suggested calculating the present value of the plaintiff's loss of income over her remaining 31.5 working years, assuming a 20% loss of capacity (based on Dr. Kei's opinion that she should only be working 4 days a week). Accounting for negative contingencies, the plaintiff suggested an award of $221,814 would be fair and just. However, in oral submissions, the plaintiff allowed the Court might assess Ms. MacDonald's loss of capacity differently, and might also consider it appropriate to apply a further negative contingency to account for the impact of the ankle fracture. For his part, the defendant suggested this is a case where the Court should instead use the second method of assessing a capital asset loss and award the plaintiff one or two years of her annual income. Based on her current earnings of approximately $48,000, the defendant suggested a fair and reasonable award would be between $48,000 and $96,000.

[187] The parties did not tender any expert economic evidence in this case that would assist me in grounding an assessment of loss based on a present value calculation of a likely future scenario. I accept that the Court *can* still perform such an assessment in the absence of expert economic evidence, but in my view, this is not an appropriate case in which to do so. While the evidence supports my

conclusion that the plaintiff will continue to suffer from chronic pain for the rest of her life, there is some uncertainty about the extent to which her pain may be able to be better managed; that uncertainty may mean any future loss of capacity would be variable. In the circumstances, I consider it appropriate to use the second method of assessing the plaintiff's loss of capacity. In my view, that method of assessment fairly balances the evidence that the plaintiff suffers from chronic pain which is exacerbated by work against the reality that the plaintiff has not missed work to this point due to her injuries, and intends to continue working full-time as an ECE as long as she is able. A similar approach was endorsed for similar reasons in *Davies.*

[188] The evidence indicates that Ms. MacDonald anticipated completing her level 2 ECE certification in mid-2025, and would be entitled to a small raise as a result. I accept the plaintiff's submission that an appropriate annual income figure is therefore $50,000, rather than the $48,000 referenced by the defendant. Overall, I am of the view that an award of $100,000, representing approximately two years of the plaintiff's annual income, provides a fair approximation of Ms. MacDonald's loss of future earning capacity on a capital asset basis. Recognizing that some of the plaintiff's limitations are attributable to her ankle fracture, I consider it appropriate to reduce that award by 5%, as indicated above. I therefore award Ms. MacDonald $95,000 for loss of future earning capacity.

Costs of future care

[189] An award for the costs of future care is based on the principle of restitution and is meant to reflect what is reasonably necessary, on medical evidence, to promote the mental and physical health of the plaintiff: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-69. The test for an award of future care is whether a reasonably-minded person of sufficient means would be ready to incur the expense: see *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124.

[190] To establish a claim for future care, the plaintiff must show that there is medical justification for the claim, the claim is reasonable and the expense is one the plaintiff is likely to incur: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113-115; *Lo v.*

Matsumoto, 2015 BCCA 84 at para. 20. Medical justification does not require evidence of medical necessity, but there must be an evidentiary link between the medical assessment of injury and recommended treatment on the one hand, and the care recommended by a qualified health professional on the other: *Gregory* at para. 39. Awards for costs of future care are subject to a 2% discount rate: *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56.

[191] The plaintiff's claim for costs of future care is based on the recommendations and cost estimates in Mr. Altieri's report, with some modifications. The plaintiff seeks $17,800 in total compensation for the costs of future care, broken down as follows:

a) active rehabilitation ($2,400 initial treatment course, plus $1,200 for future sessions = $3,600);

b) occupational therapy ($3,000 one-time cost);

c) physiotherapy or massage ($1,000/year for ten years = $10,000); and

d) home exercise equipment ($300 every five years for 20 years = $1,200).

[192] The defendant concedes the plaintiff will require some ongoing treatment to address her injuries, and accepts the plaintiff's testimony that she is prepared to engage with the experts' recommendation for treatment. The defendant suggests the following costs of future care identified in Mr. Altieri's report (totalling $3,940 to $4,630) are necessary, reasonable and justified on the evidence:

a) active rehabilitation ($2,400 initial treatment course);

b) physiotherapy ($960-$1,600);

c) TENS machine ($280 – machine purchase and initial set of pads); and

d) home exercise equipment ($300-350 one-time purchase).

[193] The defendant takes issue with Mr. Altieri's cost estimates where they are based on costs in British Columbia, rather than Newfoundland, and to the extent

they include amounts for treatment providers to travel to the plaintiff. The defendant also says some of Mr. Altieri's recommendations, such as for occupational therapy and future courses of treatment, exceed those made by the medical experts.

[194] I accept there are likely cost differences between British Columbia and Newfoundland. However, Mr. Altieri was cross-examined on his use of British Columbia cost estimates for various professional services. He testified, and I accept, that based on his experience (which includes working in British Columbia and Ontario), the hourly rates for professional, non-private treatment providers, such as kinesiologists, are fairly competitive across Canada. In addition, as a comparator, there is some evidence about the costs of the physiotherapy treatments the plaintiff accessed in Newfoundland after the 2020 MVA.

[195] In respect of travel time, I agree with the defendant that awards for costs of future care must be fair to both parties and based on claims that are necessary and reasonable. In a particular case, there may be a medical justification for a treatment provider travelling to a plaintiff, such that it would be reasonable to include the costs of travel time as part of a costs of future care award. But there is no such medical justification here. Mr. Altieri admitted he included the costs of travel time for providers because it would be more convenient for the plaintiff. I agree with the defendant that the costs for travel time should not be included.

[196] Turning to the specific claims for costs of future care, I will start with the areas of agreement. All three medical experts recommended a course of active rehabilitation with a kinesiologist, albeit of varying durations. The parties accept this is an appropriate cost of future care, but as noted above, differ on whether there should be something beyond the initial course of treatment. Both Dr. Craig and Mr. Altieri recommended a longer course of treatment with some follow-up. I am satisfied an initial course of treatment of 24 sessions, with a further six sessions in the following six to 12 months, is both medically justified and reasonable.

[197] Mr. Altieri estimated $100/hour inclusive of travel time and mileage, which the defendant suggested was too high. However, the evidence before me confirms the

cost of the plaintiff's physiotherapy treatments in 2020 and 2021 ranged from $25 to $100, with half of her treatments costing approximately $70 or more. Accordingly, I find that $100/hour is a reasonable estimate of the cost for active rehabilitation, and I award the plaintiff $3,000 for the 30 sessions I consider appropriate.

[198] The parties also agree there should be some provision for physiotherapy or massage to manage symptom flare-ups. Neither Dr. Kei nor Dr. Craig specifically recommended physiotherapy or massage in their reports, but at trial, Dr. Kei testified he supports the ongoing use of passive treatments, like physiotherapy and massage, even in the longer term, if those treatments help the patient to manage their pain so they can have a better quality of life. Mr. Altieri estimated the upper range to be $100/hour and recommended 12-16 sessions annually while the plaintiff continues to work. I note that when the plaintiff attended massage in British Columbia in 2018, the cost for each treatment was $85.

[199] The plaintiff proposes ten years of treatment at $1,000 a year. The defendant accepts the estimate of up to $1,600 for a single year, but does not accept additional years as the plaintiff has not yet tried the other interventional pain treatments.

[200] The plaintiff's work is the primary aggravator for her pain. As she likely has many years of working life ahead of her, I do not consider an award for one year to be sufficient. Based on Dr. Kei's testimony, one year is also unlikely to be long enough for the plaintiff to explore the other treatments he and Dr. Craig recommended. In my view, an award for three years of physiotherapy or massage is justified, at $1,600 per year. Using the current value multiplier of 2.8839, I therefore award $4,614.24 for physiotherapy or massage to treat symptom flare-ups.

[201] The parties also agree an award for home exercise equipment is justified and the defendant accepts Mr. Altieri's initial estimate of $300-350. I note that Dr. Craig recommended the plaintiff increase her level of physical activity. However, the defendant says it is not appropriate to claim a future budget for unspecified equipment that may not be medically justified or reasonable: *Brown v. Gill*, 2021 BCSC 1734 at para. 75. I agree and will award $350 for home exercise equipment.

[202] Dr. Kei recommended the plaintiff try a TENS machine to assist with her neck and back. While the plaintiff did not include a claim for a TENS machine in her written submissions, the defendant accepts the initial purchase of the machine and a set of leads and pads to be medically justified and reasonable. I agree. Mr. Altieri estimated the combined cost for the initial purchase of the machine and a set of pads and leads to be $280.00. I award the plaintiff $280 in this regard.

[203] Finally, the plaintiff claims a one-time amount of $3,000 for occupational therapy. Only Mr. Altieri recommended occupational therapy. Consistent with his report, he testified there are indications the demands of the plaintiff's job exceed her physical capabilities, which has impacts for her work life and her home life. In his view, it would benefit the plaintiff and assist her to maintain her current work participation to have an occupational therapist assess her at work and at home to provide recommendations and education, including about "hurt vs. harm" and optimizing symptom management and activity tolerances. He testified there may be educational, occupational or behavioural changes that would improve the plaintiff's overall participation in work and life. In my view, Mr. Altieri's recommendation for occupational therapy has a sufficient evidentiary link with the assessments of pain and disability at work and home that were made by Dr. Kei and Dr. Craig. I find the recommendation medically justified.

[204] Mr. Altieri recommended 10-15 hours for 10 sessions, at a cost of $120-130/hour, which I consider reasonable. Mr. Altieri's cost estimate also included an additional hour of travel time for each session plus two to three hours for communications in total. I find the travel costs for the occupational therapist to conduct the home and work assessments to be reasonable and necessary, but the other travel costs are not. I accept that some time for communications is reasonable and necessary. I find that $2,000 is a reasonable estimate of the cost for 10-15 hours of occupational therapy, travel costs for the site-specific assessments and communications. I will make that award.

[205] In sum, the plaintiff is awarded $10,244.24 for costs of future care.

Special damages

[206] In keeping with the principles of restitution, an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred because of an accident: *X. v. Y.,* 2011 BCSC 944 at para. 281. Special damages claims must be reasonable in light of the nature of injury; medical justification for a particular expense may bear on reasonableness but is not a prerequisite. The Court may also consider subjective factors, such as the plaintiff's belief the treatment is necessary: *Manhas v. Jaswal*, 2020 BCSC 586 at para. 86.

[207] In closing submissions, the plaintiff withdrew her nominal claims for two prescriptions and two miscellaneous items. As a result, the plaintiff's special damages claim is limited to the costs of attending massage therapy in British Columbia in 2018, physiotherapy in Newfoundland in 2020-2021, and mileage to attend those treatments, as well as her chiropractic appointments in British Columbia and the medical clinic she attended in Newfoundland. Her total claim is therefore $1,400.04.

[208] The defendant accepts the costs for massage therapy in the amount of $510 but disputes the costs of physiotherapy based on the defendant's position that those treatments were necessitated by the 2020 MVA because the plaintiff's neck and back injuries had already resolved. The defendant says the plaintiff's mileage claims were not properly established in evidence, and, based on *Rajan v. Budrugeac*, 2020 BCSC 1056 at para. 112, mileage is not payable for treatments within the same urban area.

[209] As I have rejected the defendant's theory that the neck and lower back injuries had fully resolved before the 2020 MVA, I am satisfied the plaintiff may properly claim the costs of physiotherapy as special damages. While the costs of mileage were not found to be reasonable in *Rajan*, I agree with the plaintiff that mileage claims, including within urban areas, are still regularly allowed: see, for example, *Kalsey v. Byra*, 2021 BCSC 2170 at paras. 152-155; *Manhas* at paras. 86-87; *Brown v. Gill* at paras. 60 and 67. There was documentary evidence before me,

in the form of online maps, to establish distances and other than one correction provided as a result of the plaintiff's cross-examination, it was not suggested the distances were inaccurate. I find the plaintiff's mileage claim of $248.04, claimed at $0.60 / km, is reasonable.

[210] Accordingly, I award the plaintiff $1,400.04 in special damages.

Conclusion and Costs

[211] In summary, I award the plaintiff damages as follows:

a)	Non-pecuniary damages (including loss of housekeeping capacity):	$142,500.00
b)	Past loss of income / earning capacity:	$10,545.20
c)	Future loss of earning capacity:	$95,000.00
d)	Costs of future care:	$10,244.24
e)	Special damages:	$1,400.04
	TOTAL:	**$259,689.48**

[212] With respect to costs of the trial, the plaintiff is presumptively entitled to her costs, which I would order be paid at Scale B. She is also entitled to her reasonable disbursements, and I understand the parties had agreed to exempt certain items from the applicable limits on disbursements.

[213] If either party wishes to make further submissions on costs, they may do so in writing by filing a maximum of five written pages, on a schedule to be agreed between counsel, with the first submission to be filed Supreme Court Registry within 30 days of the release of these reasons. If further costs submissions will be made, the parties must inform Supreme Court Scheduling no later than 14 days after

release of these reasons, setting out the agreed schedule for the exchange of costs submissions.

“K. Wolfe J. “