

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taylor v. Porter*,  
2023 BCSC 777

Date: 20230509  
Docket: M189726  
Registry: Vancouver

Between:

**Sherrie Taylor**

Plaintiff

And

**Roger Porter, Shannon McDonald and  
Leanne Frances Nicholson**

Defendants

Before: The Honourable Justice Chan

## **Reasons for Judgment**

Counsel for the Plaintiff:

A.L. Murray, K.C.

Counsel for the Defendants:

R.L. LaGroix

Place and Date of Trial:

Vancouver, B.C.  
March 27-31, 2023

Place and Date of Judgment:

Vancouver, B.C.  
May 9, 2023

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**Overview**

[1] The plaintiff Sherrie Taylor (“Ms. Taylor”) was a front passenger in a 2017 Ford Escape (the “Ford Escape”) that was rear-ended in a significant impact in Kelowna, B.C. on May 19, 2017 (the “Accident”). The Ford Escape was stopped at a red light, waiting to turn left at the intersection of Highway 97 and Butt Road. Ms. Taylor estimates the vehicle driven by the defendant Roger Porter and registered to the defendant Shannon McDonald was travelling at approximately 70 km/h when the collision occurred. The collision blew out the back window of the Ford Escape, and rendered the new vehicle a write-off. Ms. Taylor’s sister, Leanne Nicholson, was driving the Ford Escape, and Ms. Nicholson’s daughter was in the back seat. Ms. Taylor brings this action for damages for personal injuries arising from the Accident. The action has been discontinued against Ms. Nicholson. Liability has been admitted by both remaining defendants.

[2] Ms. Taylor argues as a result of the Accident, she suffered injuries to her neck, shoulder and back. She continues to have headaches, panic attacks and anxiety. She could not continue her work as an administrative assistant at an insurance adjusting firm due to physical difficulties with prolonged sitting, and also the emotional toll of working on motor vehicle accident claims. She claims approximately \$700,000 in damages. The defendants argue the plaintiff has for the most part recovered from the injuries from the Accident, and argue damages ought to be approximately \$100,000.

**Background of the Plaintiff****Work History**

[3] Ms. Taylor grew up in the area of Midway, BC, and graduated from high school in 1991. She worked a variety of jobs while she was in high school, including tree planting in the summers. She completed a two-year program in 1994 at Douglas College to qualify as a legal assistant. Starting in October 1994, she worked full time in a number of legal assistant positions in litigation firms. In 1998, she decided to change direction and go back to school for a two-year program in forensic sciences at British Columbia Institute of Technology. Shortly before graduating in May 2000, she

was involved in a serious car accident as a pedestrian. She was crossing the street when she was hit by a vehicle. She flew off the vehicle's windshield and landed on the road.

[4] Ms. Taylor did not return to work after the accident until November 2000, when she returned as a legal assistant at a law firm in Vancouver. She worked full time at four different law firms from 2000 to 2004. She described her work as a legal assistant as fast-paced, as the litigation work involved court deadlines, and she often worked overtime.

[5] In 2004, Ms. Taylor again decided to change careers. She tried to develop a soap business. She also took a job at a wellness spa from December 2004 to July 2006, working as a guest service agent. She described her role as essentially running the spa. In July 2006 she changed direction again, and took a job at a management company which administered a number of co-operative housing. She started as the office coordinator, and later was promoted to executive assistant. In this role, she assisted the director of the co-operative housing society with staffing, office procedures, human resources, preparing minutes of meetings, bookkeeping and various other office tasks. She worked in this role until the birth of her daughter in July 2010.

[6] Ms. Taylor did not work for the next few years while her daughter was young. In the fall of 2014, Ms. Taylor worked part time assisting a personal chef, preparing meals for people with dietary restrictions. She found the work to be physically demanding, as she was required to stand and do a lot of chopping. Her shoulder had not healed completely from the 2000 accident, and she found this role to be too difficult for her. She left this job after a short time.

[7] In January 2015, she started work as the office manager at Mercury Adjusters Inc. ("Mercury Adjusters") in Vancouver. This is a firm of insurance adjusters who mostly investigates car accidents on behalf of ICBC. There were three adjusters when she started work, and Ms. Taylor was often the only person in the office, as the adjusters work on the road. Her work involved a lot of typing reports dictated by the

adjusters. She testified she was attracted to the job as it was close to home and offered flexible part time hours. It was important to her to be able to drop off and pickup her daughter from school, and to be able to get to the school quickly if needed. She was working approximately 5.5 hours a day, four days a week, from 9:15 am to 2:45 pm.

[8] In May 2017, her employer Mr. Paul Koivukoski discussed increasing her hours to full time. The firm was hiring a new adjuster, and Mr. Koivukoski testified there would be more work for Ms. Taylor, as there would be more accident reports to prepare. Ms. Taylor testified she was prepared to work full time, as her daughter was getting older and more independent. The plan was that Ms. Taylor would start full time hours shortly after the May long weekend.

#### **Health of the Plaintiff Before the Accident**

[9] Ms. Taylor was involved in a motor vehicle accident in 1991 in Kamloops, when the vehicle she was travelling in was T-boned on the highway. She was a passenger in the back seat, and hit her head on the window. She had headaches for four to five months afterwards. She was 18 years old at the time of this accident. She testified in her early 20s, she had migraine headaches for a short period of time.

[10] She was hit by a vehicle in May 2000, while she was walking across the street. She testified the vehicle that hit her was travelling at a high speed. She was hit in the legs, and her body flung up onto the windshield. She then flew on to the road. She suffered a broken shoulder, and had a charley horse down her leg. She had headaches, cuts and bruises over her body. Ms. Taylor testified she engaged in a lot of rehabilitation exercises in the first year. It took four or five years for her to recover, and for the headaches not to bother her. Her shoulder never healed properly. Her shoulder now has a permanent restriction with respect to range of motion and strength. She is not able to play basketball, or to do the front crawl very well when she swims. Ms. Taylor looked into shoulder surgery, but was advised as she does not have any regular pain in her shoulder, surgery was not the best option for her. She testified she experiences periodic pain in her bicep tendon area every few months, which wakes

her up from her sleep. The pain will subside usually in an hour. She attended massage therapy and acupressure sessions regularly, as she tried to use all her benefits available to her under extended health. Prior to the Accident, she was not taking any medications regularly.

[11] Ms. Taylor testified she has had concussions prior to the Accident. When she was a child, she fell off the monkey bars and split her head open. She required 25 stitches. In the 1991 motor vehicle accident, she hit her head on the window. In the 2000 motor vehicle accident, she testified she fell on her head when she flew off the windshield. Ms. Taylor testified she had headaches for so long after, she believes she must have suffered a concussion.

[12] In 2015, she hit her head on a loft bed. She attended at the hospital for treatment, and was advised to take a week off work. Ms. Taylor testified she believes she had a concussion, as she had headaches and was feeling dazed. She testified she recovered from this injury after about a week.

[13] Ms. Taylor testified her general health was good prior to the Accident. In May 2017, she was undergoing ultrasounds and other tests to see whether she could be a kidney donor for her father. She had no ongoing pain issues in her shoulder, back or neck. She was able to jog, do yoga, garden, ski, hike and bike. The only restriction was the injury in her right shoulder from the 2000 accident.

[14] In terms of her mental health, Ms. Taylor testified she briefly suffered anxiety attacks when she was in her early 20s. She attended at the hospital with the feeling that she could not breathe. These anxiety attacks subsided after a few weeks. She continues to have anxiety with dental visits.

### **The Accident**

[15] Ms. Taylor was visiting her sister and her family in Kelowna on the May long weekend. Her sister was having a celebration for her daughter's high school graduation. On Friday May 19, 2017, Ms. Taylor was riding in her sister's vehicle, with her sister driving and her niece in the back seat. Their vehicle was stopped at a red

light when they were rear ended by a vehicle travelling at a high rate of speed. Ms. Taylor testified she heard a loud bang, like an explosion, and saw smoke. Her eyeglasses that she had been wearing flew off her face, and she hit her head on the headrest. Ms. Taylor didn't know what happened, but knew she had to get out of the vehicle.

[16] Once outside the vehicle, Ms. Taylor testified that the drivers from the vehicle in front and the vehicle that hit her from behind came to check on her. She testified that both her and her sister were frantic and panicked. The back window of her sister's vehicle had blown out. Emergency responders arrived. Ms. Taylor and her sister were taken by ambulance to the Kelowna hospital. Ms. Taylor cannot recall if her niece also travelled by ambulance to the hospital, or if her mother came to the accident scene and drove her niece to the hospital. Ms. Taylor testified that she tried to answer the questions from the paramedics, but she did not know what year it was. Her sister's blood pressure was really high, and there was a concern that her sister may have a heart attack.

[17] Ms. Taylor, her sister and her niece left the hospital later that day. Ms. Taylor testified that her lower back became really sore over the course of the weekend. She drove back to Vancouver on the Victoria Day Monday. Ms. Taylor testified the drive was very difficult and uncomfortable; she had to make a lot of stops so she could get out and stretch. She testified she was too nervous for someone else to drive; she believed as the driver she was more in control.

[18] Back in Vancouver, Ms. Taylor had headaches, pain in her neck, shoulder and upper back. Within a few days, her headaches became very strong. She described them as feeling like her head was going to burst due to so much pressure. Lights started to bother her as well, and she felt nauseous. Ms. Taylor testified most of the time when she was not at work, she would lay in her bed in the dark. She was feeling scared that her head was not right, as she continued to feel so much pressure inside her head. She suffered panic attacks, where she felt as if she couldn't breathe and

was going to black out. Ms. Taylor testified the panic attacks became so frequent that it felt like the new normal.

### **After the Accident**

[19] Ms. Taylor went to see her family doctor, Dr. Andrew Birch, on May 26, 2017. She was prescribed medications for her pain and headaches, but she testified none of them were effective. She returned to work after the Accident. She testified she felt obliged to keep working, as she was the only person in the office and she was needed. On May 30, 2017, Ms. Taylor attended at the emergency room at St. Joseph's Hospital after work, as her headaches were so intense. She was very concerned as she felt so much pressure inside her head. She was prescribed Tylenol and told to take some time off work. Ms. Taylor took three days off work at this time. She continued to see Dr. Birch and was advised to take some more time off in June and July 2017.

[20] On June 20, 2017, Ms. Taylor attended at Vancouver General Hospital after work. She testified that she was looking for answers, as she could not deal with the headaches and nothing had helped. A CT scan of her head showed no abnormalities. Ms. Taylor took some more time off her job, working reduced hours. She continued to have pain in her head, neck and shoulders. She testified when she was not at work, she was laying in bed in the dark. She described always wanting to rest her head by laying down. She testified that for a year after the Accident, she had constant unrelenting headaches during her waking hours.

[21] Ms. Taylor suggested to her employer that another person should be hired, as she could not keep up with the work due to her health. She brought in another person to assist in July 2017, and Ms. Taylor worked reduced hours. From July 2017 to March 2018, she worked on average less than 10h a week, with four weeks where she was off work completely.

[22] In September 2017, she was referred to the early response concussion clinic at G.F. Strong, and she attended several sessions. In October 2017, she was referred to Dr. Alister Prout, a neurologist, for issues with her headaches and blackouts.

Ms. Taylor testified during this period of time, she was experiencing blackouts and panic attacks regularly. She was also referred to a physiatrist. Ms. Taylor attended physiotherapy, chiropractic treatments, massage therapy and acupuncture. Ms. Taylor testified none of the treatments helped much with her headaches and pain.

[23] In March 2018, Ms. Taylor testified she received craniosacral therapy, which she described as the only treatment which provided relief from her headaches. As I understand the evidence, craniosacral therapy uses gentle hands-on techniques on the body. She testified this treatment “felt like a miracle”, like “a cloud was lifted”. By the end of 2018, she testified she was feeling better, as her headaches were not as frequent or intense. Her neck and upper back were still bothering her, but her headaches were diminishing.

[24] She returned to work more hours at Mercury Adjusters in May 2018. She attended some active rehabilitation sessions, and began doing exercises in the pool. Ms. Taylor testified she was going to the pool almost daily while her daughter was in school, where Ms. Taylor would do stretching, swimming, and worked on her mental health by repeating positive statements to herself in her head.

[25] In May 2019, Ms. Taylor left her job at Mercury Adjusters. She testified the dicta-typing was difficult for her physically, and her headaches were increasing again. Further, the content of the work, detailing injuries from serious motor vehicle accidents, was triggering for Ms. Taylor the memories from her Accident. Ms. Taylor had started receiving counselling from a psychologist in April 2019 to assist with her panic attacks. Ms. Taylor testified the psychologist recommended that Ms. Taylor leave her work at Mercury Adjusters.

[26] Ms. Taylor testified that her symptoms improved after she left Mercury Adjusters. Her neck and back were still bothersome. She started jogging again, and worked on her mental health.

**Work at Vancouver School Board and Gladstone Secondary School**

[27] In October 2019, Ms. Taylor started employment with the Vancouver School Board (the “VSB”). She was first hired as a casual worker, attending at various schools to fill in as needed. She later obtained a job working in payroll at the VSB head office.

[28] In May 2021, Ms. Taylor obtained a permanent position in payroll with the VSB at Gladstone Secondary School. She is working at that position currently. She testified the position is a good fit for her, as she is close to home and can attend to her daughter’s school during the day if needed. The time off in the summers, spring break and winter break, also allow her more time to recuperate from her injuries. The position allows her to move around the office, as she has a variety of duties. She is not sitting in one position in front of the computer. She testified that she was tolerating the work well until May 2022, when the school lost a receptionist. As a result of being short staffed, Ms. Taylor testified the work became more intense, and she was no longer able to go outside and walk during her lunch hour as she was now the only first aid attendant. Her headaches started coming back, and her neck, shoulder and upper back became more painful.

**Head Injuries Since the Accident**

[29] In September 2019, Ms. Taylor slipped on gravel and fell on her back. She was near the end of a hike at the Chief in Squamish. She testified she felt stunned, and she could not get up immediately. Her niece ended up having to drive home. Ms. Taylor testified her headaches were intense for about three months after this incident.

[30] Another time Ms. Taylor bumped her head on a camper trailer, while she was camping with friends near Boston Bar. While she said it was a small bump, she felt very dazed by it. Her husband had to drive them home. She testified her headaches were intense for about three months after this incident.

[31] Ms. Taylor testified both of these incidents were minor, yet the effect on her lasted for three months. She is worried and scared that if she ever did have another accident, she will not recover.

**Current Symptoms**

[32] Ms. Taylor currently has a constant headache. She testified she feels nauseous. Her neck is painful along the sides and the back, with a stabbing feeling in the back in between the shoulder blades. She feels like she needs to put her head down to rest. When she gets home after work, she often needs to lay down for 30 minutes before she can start her dinner preparations. She cannot sit still for a lengthy period of time, and needs to get up and move around to try to get more comfortable.

[33] In terms of her mental health, she believes her anxiety level has increased; however, her panic attacks have decreased. She recently witnessed a car accident and she described herself as having a panic attack where she dropped to her knees on the ground in hysterics. She testified the panic attack lasted for at least 30 minutes. She described her mood now as down, as she feels frustrated and hopeless.

**The Medical Evidence**

**Dr. Donald Cameron**

[34] Dr. Cameron was qualified at trial as an expert in neurology. He assessed the plaintiff on September 30, 2019. His medical legal report was in evidence.

[35] Dr. Cameron’s opinion is Ms. Taylor sustained a mild traumatic brain injury as a result of the Accident. He explained this is another term for a concussion. His view is she suffered increased anxiety as a result of the Accident, which has led to her decreased memory and concentration. His opinion is she has ongoing post traumatic headaches and pain. His view is she is partially disabled due to chronic pain and discomfort and also due to the psychological impact of the Accident. In cross-examination, he agreed this was a mild degree of partial disability. In his view, while her symptoms have improved, as her pain and headaches have lasted for more than two years, the pain and headaches have likely become chronic.

**Dr. Stephen Anderson**

[36] Dr. Anderson was qualified at trial as an expert in psychiatry. He prepared a medical legal report in August 2019.

[37] Dr. Anderson's opinion is Ms. Taylor likely suffered a mild traumatic brain injury or a concussion as a result of the Accident. His view is most of her post concussion symptoms such as headaches, cognitive difficulties, dizziness, noise and light sensitivities have reduced significantly since the Accident. Any ongoing cognitive difficulties are likely not due to the concussion but other factors, such as pain, fatigue, anxiety or depression.

[38] His opinion is Ms. Taylor developed a post traumatic stress disorder (PTSD) after the Accident. His view is she has PTSD in partial remission, as well as anxiety, depressed mood and panic attacks. In Dr. Anderson's view, it is unlikely that Ms. Taylor will fully return to her pre-Accident mental state. Long term prognosis from a psychiatric standpoint is guarded, as her psychiatric symptoms have continued for a period of time after the Accident. Dr. Anderson's opinion is Ms. Taylor is at an increased risk of developing PTSD and chronic post-concussive symptoms if she is involved in another traumatic head injury.

**Dr. Rhonda Shuckett**

[39] Dr. Shuckett was qualified at trial as an expert in internal medicine and rheumatology. She completed a medical legal report in April 2021.

[40] Dr. Shuckett's opinion is Ms. Taylor suffered cervicogenic headaches as a result of the Accident, which improved with craniosacral therapy and acupuncture. These headaches are related to her neck injury from the Accident. Dr. Shuckett's opinion is Ms. Taylor sustained a whiplash injury to her neck from the Accident, which has led to neck pain. The Accident exacerbated her right shoulder injury from the 2000 accident. Ms. Taylor also suffers from pain in her upper back as a result of the Accident. Dr. Shuckett's opinion is the plaintiff probably has central sensitization.

[41] Her view is Ms. Taylor has likely reached maximum medical improvement and will have to live with her symptoms.

**Other Evidence**

**Dr. Quee-Newell**

[42] Dr. Quee-Newell is a vocational consultant. She assessed the plaintiff on December 8, 2022. Dr. Quee-Newell's opinion is without the Accident, the plaintiff could have continued working at Mercury Adjusters or returned to work as a legal assistant. Currently, the plaintiff would have difficulty returning to work in the legal field, due to the requirements of prolonged sitting and typing at a keyboard. While the majority of Ms. Taylor's work experience is in an administrative role, she is restricted from many of these positions due to the requirement for prolonged sitting and typing.

**Eva Lee**

[43] Eva Lee runs a recruiting company for legal assistants. Ms. Lee testified there is a current demand for legal assistants with intermediate level of experience, such as the plaintiff. The rate of pay for an intermediate legal assistant is between \$30 to \$36 an hour.

**Robert Gander**

[44] Mr. Gander was qualified at trial as an expert in the area of functional capacity evaluation. He was the only defence witness. He assessed the plaintiff on December 12, 2022.

[45] Mr. Gander's opinion is Ms. Taylor is capable of working at an office job, as most jobs allow for short breaks to get up and move around. In terms of working in a job such as a legal assistant, where she would need to sit in front of a computer for long periods to type, his view is she is capable of this work if she sits with a proper head and neck alignment. In his view, an ergonomic assessment will be useful to determine proper equipment and ways of performing the work while reducing strain. He believes Ms. Taylor is capable of performing housekeeping activities, though she

would benefit from consulting with an occupational therapist to incorporate optimal methods and tools.

### **Credibility and Reliability**

[46] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013):

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

[47] The defendants submit the plaintiff was not a reliable witness. They argue the plaintiff over-estimated her pre-Accident capabilities and under-estimated her post-Accident capacity. The defendants' position is due to her self-interest, the plaintiff is biased in her recollections. For example, the defendants argue the plaintiff exaggerated the length and severity of her headaches. The defendants point to medical records which indicate the plaintiff advised one of her treatment providers that she had some reprieve from her headaches at some point after the Accident. The defendants' position is there was no medical diagnosis of a concussion at the time or shortly after the Accident, and that the plaintiff was the first to suggest she had a concussion to her family doctor. In effect, the defendants argue the plaintiff was seeking a diagnosis of a concussion and made that happen. The defendants also argue the medical records show the plaintiff had a history of panic attacks and anxiety

before the Accident, and the plaintiff downplayed that history when she attributed her mental health concerns to the Accident.

[48] In my view, there is no concern about the credibility or reliability of the plaintiff's evidence. In assessing the plaintiff's evidence as a whole, and in combination with all the evidence, I find her evidence was consistent through both direct and cross-examination. I also find her evidence consistent with the medical experts and with the evidence of the other witnesses. The examples cited by the defendants do not detract from her reliability. The plaintiff acknowledged that sometimes when the intensity of her headaches decreased, she felt so much better but that did not mean the headaches were resolved. I also do not accept that the plaintiff was looking for a diagnosis of a concussion. She testified in a straight-forward manner that she believed she was told by the emergency room physician at St. Joseph's Hospital when she attended shortly after the Accident that she likely had a concussion. She in turn notified Dr. Birch of that the next time she saw him. In any event, I fail to see how a patient can manufacture a medical diagnosis if there is no medical basis for it. In terms of incidents of anxiety and panic attacks before the Accident, the plaintiff explained the circumstances behind each of those incidents – for e.g., she had gone to the dentist that date; she was worried about her brother's cancer diagnosis; and she was anxious about quitting her chef job.

[49] I find the plaintiff to be a credible and reliable witness. She provided a detailed account of her injuries from the Accident, the treatment she sought and what happened to her life since the Accident. Her recollection of events was for the most part corroborated by other witnesses, including her former employer, her husband and her current co-worker at Gladstone Secondary School. Her description of her symptoms was remarkably consistent throughout her evidence.

**Causation**

[50] The basic legal principles respecting causation are found in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [*Athey*]. The general test for causation is the "but for" test requiring the plaintiff to prove on a balance of probabilities that his injury

and loss would not have occurred but for the negligence of the defendant. This causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense: see *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328, 1990 CanLII 70.

[51] It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable. The contribution to the cause of the injury must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11.

### **Findings on Causation**

[52] Based on the totality of the evidence, I make the following findings with respect to the plaintiff's condition and causation:

1. The Accident caused a mild traumatic brain injury and soft tissue injuries to her neck, shoulders and upper back. Both Dr. Cameron and Dr. Anderson were of the view that the plaintiff suffered a mild traumatic brain injury as a result of the Accident.
2. The Accident caused headaches. The headaches were constant and severe in the first year following the Accident. They have improved with craniosacral therapy but she continues to have headaches.
3. The Accident also caused the plaintiff to have anxiety and panic attacks. These panic attacks are related to the trauma from the Accident.
4. The Accident exacerbated the plaintiff's pre-existing right shoulder injury, which she had sustained in the 2000 accident.
5. The plaintiff has ongoing pain and discomfort in her neck, shoulders and upper back, as a result of injuries from the Accident. She has difficulties with

prolonged sitting, and needs to be able to move around to get more comfortable.

### **Assessment of Damages**

#### **Non-Pecuniary Damages**

[53] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*], leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146 that influence an award of non-pecuniary damages includes:

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[54] The plaintiff seeks an award of \$130,000 to \$160,000 for her non-pecuniary damages. She relies on *Smith v. Law*, 2021 BCSC 1789 (\$160,000); *Vespaziani v. Lau*, 2021 BCSC 1361 (\$135,000); *Duncan v. Hanson*, 2021 BCSC 937 (\$130,000); *Lamont v. Prat*, 2021 BCSC 1294 (\$125,000); *Davidson v. 0969446 B.C. Ltd.*, 2021 BCSC 609 (\$125,000); *Mallier v. Falconer*, 2021 BCSC 1827 (\$120,000); *Martin v. Frederickson*, 2021 BCSC 1424 (\$120,000); *Stark v. Bartier*, 2021 BCSC 1347 (\$100,000); and *Moon v. Yaranon*, 2021 BCSC 818 (\$100,000).

[55] The defendants seek an award in the range of \$50,000 to \$65,000. They rely on *Grewal v. Chandi*, 2021 BCSC 1200 (\$70,000 reduced to \$56,000 for pre-existing injuries); *Sandhu v. Morris*, 2023 BCSC 35 (\$40,000); *Dhugga v. Poirier*, 2020 BCSC 914 (\$65,000); *Li v. Gill*, 2020 BCSC 1298 (\$120,000 reduced to \$85,000 for pre-existing injuries).

[56] While the cases cited are helpful, as noted in *Stapley* at para. 45:

Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, [[1981] 2 S.C.R. 629 at 637, 1981 CanLII 35] is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton [v. Board of School Trustees of School District No. 57 (Prince George)]*, [1978] 2 S.C.R. 267 at 284, 1978 CanLII 12]).

[Emphasis added in *Stapley*.]

[57] Ms. Taylor is currently 49 years old; she was 43 at the time of the Accident. This was a forceful rear end collision. Ms. Taylor has suffered headaches, which were severe and unrelenting in the first year following the Accident. Other than going to her job, she spent her time laying in bed in the dark. Ms. Taylor testified that her young daughter asked if Ms. Taylor was going to die. Her husband testified about the strain in their relationship, due to her increased irritability. The couple attended marriage counselling sessions. Her husband described Ms. Taylor as a different person now than before the Accident, as she has lost her positive attitude and sees the glass half-empty. Ms. Taylor's sister described the plaintiff as not being the bubbly personality she was before the Accident. The first two years following the Accident, Ms. Taylor

was not able to do activities with her family, garden, jog or socialize with friends. She was anxious about her headaches, as she could not find any relief.

[58] Her headaches improved after she started craniosacral therapy. While they are no longer as severe, she still has ongoing headaches. She is also likely to have ongoing pain and discomfort with her neck, shoulders and upper back. She has continuing psychological impact in the form of anxiety and panic attacks. She is nervous when she is a passenger in a vehicle, seeing dangers that others do not. She is worried what would happen to her if she has another head injury.

[59] She has been able to return somewhat to her life pre-Accident. She is able now to garden, ski with her daughter, jog, camp, travel and socialize with friends. However, she has to live with pain and discomfort while she engages in these activities.

[60] My understanding is that loss of housekeeping capacity can be included either as a separate head of damage or included as part of the non-pecuniary award. Where there is evidence the plaintiff is still able to perform household tasks but with difficulty, that loss may be compensated by a non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 at para. 33. It is at the discretion of the trial judge.

[61] The evidence is that Ms. Taylor is able to do some housekeeping tasks; however, she experiences pain when she performs the tasks, and she would rather not spend her time cleaning. The evidence of Mr. Gander, the functional capacity evaluator, is the plaintiff is capable of performing household chores. In the six years since the Accident, the plaintiff has only hired housecleaners once. In these circumstances, I find it more appropriate to include the loss of housekeeping capacity as part of the non-pecuniary award.

[62] I find the plaintiff's cases to be more analogous than the defendants' cases. None of the cases cited by the defendants involved continuing psychological impacts from the motor vehicle accident. I find the decisions cited by the plaintiff to be more similar, as they involve soft tissue injuries with continuing psychological impacts. In my view, a fair and reasonable award for non-pecuniary damages is \$120,000.

**Past Wage Loss**

[63] The plaintiff seeks an award for past loss of income, as she argues without the Accident, she would have started working full time at Mercury Adjusters after the May long weekend. Her employer Mr. Koivukoski testified and confirmed that there would be more work available to Ms. Taylor, as he was in the process of bringing on an additional adjuster in May 2017. The plaintiff argues that because of the Accident, she reduced her hours at Mercury Adjusters, and eventually had to leave the firm in May 2019, as she could not deal with the substantive content of the accident claims. She was off work completely for a few months before she started working at the VSB in October 2019. Ms. Taylor claims her loss from Mercury Adjusters is approximately \$84,000 to \$92,000, based on the loss of hours of work from the date of the Accident to when she commenced employment with the VSB.

[64] In addition to her income loss from Mercury Adjusters, the plaintiff also claims that she was not able to pursue work as a legal assistant during the summer months, when she was off work from her job at VSB. Ms. Taylor also claims due to the Accident, she did not pursue a return to full time work as a legal assistant, which pays more than she is currently earning at VSB. In total, Ms. Taylor claims \$100,000 in loss of past income.

[65] The defendants' position is the evidence was unclear whether there was a full-time opportunity at Mercury Adjusters after the May 2017 long weekend. The defendants argue there was no signed agreement setting out a move to full time hours, and at best it was simply a possibility to be discussed. As such, the defendants argue the plaintiff's loss of past income is restricted to loss of hours up to her usual 5.5 hours a day, from the date of the Accident to October 2019, when the plaintiff started work at the VSB. The defendants argue the plaintiff is entitled to approximately \$40,000 for past wage loss, based on 22 hours a week at Mercury Adjusters.

[66] In my view, the plaintiff has proven on a balance of probabilities that she would have worked full time hours at Mercury Adjusters starting after the May long weekend in 2017, if not for the Accident. Her evidence was clear on this point. Ms. Taylor

testified that the full-time hours were to start at some time after the May long weekend. She testified that she had discussed this with her husband, and as their daughter was getting more independent and her husband had the ability to accommodate a later start time to his shifts, working full time was something she felt able to do. Her employer also testified to the same effect. Mr. Koivukoski testified there would be more work for Ms. Taylor as he was taking on an additional adjuster, and he had discussed this with Ms. Taylor. Mr. Koivukoski's evidence was this additional adjuster had a reputation for generating a lot of work by writing long accident reports. I find the plaintiff lost income as she was not able to work full time hours at Mercury Adjusters after the Accident.

[67] The additional claims for past income loss based on working as a legal assistant are based on hypothetical events. These hypothetical events do not have to be proven on a balance of probabilities, but must be shown to be a real and substantial possibility.

[68] With respect to the plaintiff's argument that she lost additional income by not being able to work as a legal assistant in the summers, or instead of working at Mercury Adjusters, I find the evidence does not support there was a real and substantial possibility that the plaintiff would have pursued work as a legal assistant, if not for the Accident. As of May 2017, the plaintiff had not worked in the legal field for some 13 years. She had taken no steps that show she was planning a return to working as a legal assistant. There is no evidence that she called any of her old contacts, brushed up her resume, or applied for any job as a legal assistant. The evidence was she wanted a job that was close to her home, as that was important to her. She wanted a job where she could get to her daughter's school quickly if required. That was the main appeal of her job at Mercury Adjusters. She had the flexibility to set her hours to accommodate her daughter's needs, if required. As Mr. Koivukoski testified, it was the type of job where as long as the work was being done, he was fine with Ms. Taylor setting her hours to a certain extent.

[69] I find the award for loss of income to be \$92,000, based on her loss of full-time hours at Mercury Adjusters. From this amount, taxes need to be deducted.

### Loss of Future Earning Capacity

[70] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal recently restated the operative principles to determine loss of future earning capacity, which had previously been revisited in *Dornan*, in *Rab v. Prescott*, 2021 BCCA 345, and in *Lo v. Vos*, 2021 BCCA 421:

[7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

[8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab* ..., Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.

[9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55–56.

[10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:

[47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown [v. Golaiy]* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[71] The plaintiff seeks an award of \$200,000 to \$300,000 for loss of future earning capacity. She argues the evidence shows a potential future event that could lead to a loss of capacity. She argues this is so, as her chronic pain has a clear impact on her career potential. The second question is whether on the evidence, there is a real and substantial possibility that the future event will cause a pecuniary loss. She argues the answer to this question is yes, as her chronic pain limits her ability to pursue all career possibilities that were once open to her, before the Accident. The plaintiff argues the third step is for the court to assess the value of that loss, taking into account the relative likelihood of the real and substantial possibility occurring.

[72] The plaintiff presents several hypothetical events which she argues show the value of her loss. Due to the Accident, the plaintiff is no longer able to pursue work as a legal assistant. The plaintiff relies on the evidence of Eva Lee. Ms. Lee gave evidence there is a current demand for intermediate legal assistants in the personal injury field, and the salary is in the range of \$65,000 to \$75,000 a year. This represents an annual salary difference from her current income at VSB of approximately \$14,000 to \$24,000. The net present value of such a loss to age 65 is approximately \$198,000 to \$339,000.

[73] The plaintiff also puts forward a second hypothetical, where she argues because of the Accident, she is not able to pursue legal assistant work in the summers when she is off from her VSB job. The plaintiff values that loss in the range of \$68,000 to \$81,000, using the hourly rate for legal assistants of \$30 to \$36 per hour.

[74] The plaintiff argues due to the Accident, she did not remain working at Mercury Adjusters. She claims the difference in salary between her job at Mercury Adjusters and her current job at VSB to be approximately \$5,300 a year. She argues the net present value of such a loss to age 65 is \$74,000.

[75] The plaintiff argues due to the injuries from the Accident, she may not be able to continue working at VSB in the future, or that she may have to retire earlier than planned.

[76] The defendants argue there ought to be no award for loss of future earning capacity. They argue the evidence shows the plaintiff is now earning more income at her job at VSB than at Mercury Adjusters. At the VSB, her current rate of pay is about \$30 an hour; at Mercury Adjusters her rate of pay was \$23 an hour when she left in 2019, and Mr. Koivukoski testified it would be \$27 an hour now, as he gives a raise of one dollar a year. However, she would earn more at Mercury Adjusters than at VSB as there is no work during six weeks in the summers with the VSB. The defendants argue there is no evidence of any potential future event related to the Accident which would threaten her job at VSB.

[77] Further, the defendants argue Mr. Gander's evidence is the plaintiff is not precluded from working as a legal assistant. They argue there is no evidence the plaintiff has suffered any permanent impairment which will limit her ability to earn income.

[78] In my view, there is a potential for the plaintiff's chronic pain and anxiety to limit her future earning capacity. The evidence is that while she is a valued and hard worker, she has difficulties with sitting for prolonged periods and requires the ability to move around. She has difficulties working on personal injury claims, as the content of the work triggers her anxiety and panic attacks. There is a potential that any future employer may not be as accommodating as the VSB. I find there is a real and substantial possibility that the injuries from the Accident may affect her ability to earn income in the future.

[79] The plaintiff puts forward a number of hypothetical scenarios and argue each of these show a real and substantial possibility of loss of future income. The court has to assess the relative likelihood of each of these hypotheticals occurring.

[80] With respect to the hypothetical that the plaintiff would have returned to work as a legal assistant without the Accident, I find there is no evidence this would have occurred. As stated earlier under the discussion of loss of past income, there is simply no evidence the plaintiff would have returned to work as a legal assistant without the Accident. While I acknowledge the plaintiff testified that she was considering such a

return, and that she believed it would have been easy for her to get a job in the legal field, on the totality of the evidence, I do not find there was any likelihood Ms. Taylor would work as a legal assistant. She did not like the long hours and these jobs were not close to her home. She had not returned to this type of work since 2004. The evidence shows jobs as legal assistants in the personal injury area is a shrinking field, due to the change in law. As she has shown no interest in the 13 years before the Accident of going back to work as a legal assistant, it would be speculation to find she would have worked as a legal assistant without the Accident.

[81] I find the most likely scenario, if the Accident had not happened, is that the plaintiff would have continued working at Mercury Adjusters. I find an award of \$74,000 for loss of future earning capacity to be fair and reasonable.

#### **Cost of Future Care**

[82] When determining a cost of future care award, the Court should try to restore the plaintiff, as best as possible with a monetary award, to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[83] The plaintiff seeks an award of \$75,000 for cost of future care. She bases this amount on a yearly average of 13 massage sessions, six acupuncture treatments, and 12 craniosacral sessions, for a yearly cost of approximately \$3,650. The net present value of this amount to age 75 is \$62,000 and to age 85 is \$83,600. The plaintiff also seeks 6 to 10 further counselling sessions at a cost of \$1,350 to \$3,500.

[84] The defendants' position is the plaintiff has not proven entitlement to an award for cost of future care. They argue the plaintiff was attending massage and acupuncture therapy before the Accident, and her need for these sessions is not related to the Accident. The defendants argue the plaintiff has substantially recovered.

[85] In my view, the evidence supports the plaintiff continuing to have craniosacral therapy. Her evidence is that these sessions were the most effective in alleviating her headaches. However, there is no basis in the evidence that she requires these sessions to age 75 or 85. These sessions cost \$120 per hour. The annual cost is \$1,440. In my view, a fair and reasonable award for cost of future care is \$18,000, which would encompass approximately 10 years of craniosacral treatment and a further 6 to 10 psychological counselling sessions. I agree with the defendants there is no basis to award the massage and other therapies, as the plaintiff's evidence is they were minimally effective for her.

### **Special Damages**

[86] The plaintiff seeks special damages of \$24,887.68 based on out-of-pocket expenses of \$14,723; a subrogation claim of Pacific Blue Cross for recovery of \$7,902.93 for physiotherapy, chiropractic treatments, acupuncture and massage therapy from May 2017 to date of trial; and cost of mileage in amount of \$2,261.75.

[87] The defendants agree with the out-of-pocket expenses except for the cost of one session of housekeeping. The defendants agree on the amount of \$14,700. With respect to the subrogation claim of Pacific Blue Cross, the defendants dispute the amount, as they argue the plaintiff would have accessed at least half of the treatments without the Accident. The defendants agree to \$5,692.93 of the subrogation claim.

[88] In my view, the plaintiff is entitled to special damages of \$24,887.68. The evidence was the plaintiff hired housekeeping services one time. There is no basis on the evidence to find that the need for assistance with housekeeping is not related to the Accident. This Court has assessed the plaintiff's need for housekeeping services as part of the non-pecuniary award.

[89] With respect to the subrogation amount of Pacific Blue Cross, I find all the treatments already paid for from the time after the Accident to the date of trial to be related to the Accident. While the plaintiff has in the past before the Accident sought out massages and other therapies, the timing of these treatments show they were obtained by the plaintiff to seek relief from her injuries from the Accident. The evidence

is clear since the Accident, the plaintiff has been pursuing various treatments in hopes of improvement.

**Mitigation**

[90] The defendants argue the plaintiff has failed to mitigate the injuries to her mental health, as she failed to attend more psychological counselling sessions as recommended. The defendants argue the plaintiff prioritized marital counselling over psychological counselling. The defendants seek a reduction of 25% of any award made by the court for this failure to mitigate.

[91] In my view, there is no merit to this argument. The plaintiff’s evidence was she could not afford more psychological counselling sessions. This explains why she did not attend more sessions, and does not show she acted unreasonably. Further, there is no evidence that more psychological counselling sessions would have reduced the psychological impacts from the Accident.

**Conclusion**

[92] The Court awards the following:

Non-pecuniary damages:	\$120,000
Past loss of income:	\$ 92,000
Future loss of earning capacity:	\$ 74,000
Cost of future care:	\$ 18,000
Special damages:	\$ 24,887.68
<b>Total Award</b>	<b>\$328,887.86</b>

[93] Unless there are matters the court is not aware of, the plaintiff has been successful and ought to have her costs at scale B. If the parties wish to make further

submissions on costs, they are directed to do so in writing within 30 days of receipt of this ruling.

“Chan J.”