

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Omerovic v. Merced*,
2023 BCSC 727

Date: 20230502
Docket: M175699
Registry: Vancouver

Between:

Azemina Omerovic

Plaintiff

And

Gerardo Ramos Merced and Gerard Merced

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

T. O'Mahony
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Place and Dates of Trial:

Vancouver, B.C.
March 20-24, 2023

Place and Date of Judgment:

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Introduction

[1] Azemina Omerovic was injured when the vehicle she was driving was struck from behind by the defendants' vehicle in June 2016. She claims damages for personal injury. The defendants admit liability.

[2] Ms. Omerovic suffered soft tissue injuries in the neck, upper and lower back. Almost seven years after the accident, she continues to experience pain that substantially limits her activities and enjoyment of life. However, to this point, her injuries have not prevented her from pursuing a career as an office worker to the satisfaction of successive employers. Ms. Omerovic has displayed a commendable determination and ability to push through the pain, at some personal cost.

[3] Ms. Omerovic's determination has been tested by circumstances that have obstructed her access to resources and treatments that would have helped her. She has not had access to a family physician since her former doctor retired in early 2020. Her attempts to obtain access to a primary health care provider have not borne fruit because the physicians and clinics she has applied to were unwilling to take on a patient with an open personal injury claim. Lacking access to a family physician has impaired her access to medical interventions recommended by the independent experts who examined her for this case. Indeed, although liability has not been in dispute since at least July 2019, the defendants' insurer was unwilling to pay for ergonomic accommodations recommended by its own expert from which she would undoubtedly benefit. The defendants' position finally changed in closing argument. The policy of Ms. Omerovic's present employer is not to provide accommodations such as a sit-stand desk without a doctor's note that she is unable to obtain.

[4] My task is to assess the damages Ms. Omerovic is entitled to recover as a result of the defendants' negligence. She claims damages totalling \$801,666 under the following heads:

- a) General damages for non-pecuniary loss;

- b) Special damages;
- c) Past economic loss;
- d) Future economic loss;
- e) Loss of housekeeping capacity; and
- f) Cost of future care.

[5] In closing argument, special damages were agreed at \$9,162.12.

[6] Apart from special damages, the defendants dispute the amounts claimed and submit that there should be a 10% deduction for a failure to mitigate. Taking that deduction into account, they propose an award of less than \$100,000.

Background

[7] Ms. Omerovic was 28 years old at the time of the accident and is now 35. She is single and lives in an apartment she rents in the basement of her parents' home in Coquitlam, British Columbia.

[8] Ms. Omerovic grew up in Kelowna. She attended the University of British Columbia at its Okanagan campus and graduated with a B.A. with a minor in English in 2009. Prior to, during, and after university she worked for Save-on-Foods in Kelowna, where she began working in the bakery and at the deli counter and progressed to work as a payroll clerk. She left that job when she moved to her present apartment in Coquitlam. At that time, she was off work for a time receiving workers' compensation in connection with a knee injury. This was in 2012.

[9] Ms. Omerovic's knee injury at work aggravated a sports injury she had suffered in 2007. It ultimately required surgeries for the replacement of a ligament. These surgeries were the reason for her move to Coquitlam in 2012. The surgeries were successful and she was left with peripheral nerve damage and a slight loss of sensation in her left leg. Otherwise, by early 2016, she was in good health. Her residual symptoms from the knee injury are unrelated to the injuries that are the

subject of this action, and I have disregarded them in my assessment of her damages.

[10] In 2014, Ms. Omerovic started work with Stemcell Technologies Canada Inc. as an equipment coordinator. She was able to parlay her experience with payroll into a different position with Stemcell as a payroll administrator in 2015. She held that position with Stemcell in June 2016, at the time of the accident.

[11] Ms. Omerovic continued working for Stemcell as a payroll administrator until November 2018, when she took a position with the British Columbia Automobile Association (“BCAA”), again as a payroll administrator. In the fall of 2021, she applied for and obtained a promotion to a position as an associate sales force administrator.

History of the litigation

[12] Ms. Omerovic commenced this action by filing a notice of civil claim on July 6, 2017. In their response to civil claim filed on November 21, 2017, the defendants denied negligence. However, they amended their response to admit negligence on July 11, 2019. They maintained a formal allegation of contributory negligence which appears to have been entirely without substance and was not pursued at trial.

[13] The action was initially set for trial in June 2020, and the parties obtained and exchanged expert reports with a view to that trial date. Unfortunately, the trial could not proceed due to the COVID-19 pandemic, and the result was a most regrettable delay of 21 months.

Credibility and reliability of the witnesses

[14] The lay witnesses for the plaintiff were Ms. Omerovic, her mother, Fadila Omerovic, and several of her friends, all of whom are present or former co-workers: Asha Nooh, Carla Gilligan, Jack Lowe, and Andrea Wesley. The defence did not call any lay witnesses.

[15] I view Ms. Omerovic as an honest witness whose recollections of the frequencies, severity of her symptoms, and challenges posed by her symptoms attributable to the accident, are sometimes unreliable.

[16] Ms. Nooh, Ms. Gilligan, Mr. Lowe and Ms. Wesley are all honest, straight-forward witnesses. Ms. Nooh is the only one of the four who knew Ms. Omerovic well before the accident. She has remained in contact with Ms. Omerovic since the accident, albeit at a distance since Ms. Nooh left Canada in January 2021. Ms. Nooh is in a good position to comment on the effects of Ms. Omerovic's injuries on her activities, demeanor, and mood. Mr. Lowe was acquainted with Ms. Omerovic before the accident in that they were co-workers on different floors who would sometimes chat together. He only really got to know her after the accident. While he gave evidence as to effects of the accident on Ms. Omerovic, I think that he bases his comparison on her reports to him of her earlier condition. His evidence in this regard is therefore founded on hearsay rather than direct observation. Ms. Gilligan and Ms. Wesley got to know Ms. Omerovic as co-workers at BCAA, more than two years after the accident.

[17] While Fadila Omerovic has known Ms. Omerovic all her life and has seen her often since the accident in June 2016, I found her prone to overgeneralization in her testimony and approach her evidence with some caution.

[18] Six expert witnesses testified, four for Ms. Omerovic and two for the defence. All of them clearly understood that the task of an expert witness is to assist the court without partisanship.

[19] Johanne Beattie is an occupational therapist who performed a functional capacity evaluation with recommendations as to the cost of future care. Ms. Beattie assessed Ms. Omerovic in January 2020, and performed a follow-up interview on October 26, 2022. She was called by the plaintiff and both parties rely on her functional capacity evaluation.

[20] Three physicians testified as independent experts: Dr. Gurdeep Parhar, a general practitioner; and Drs. Joshua Muhlstock and Anthony Giantomaso, both psychiatrists. Dr. Muhlstock examined Ms. Omerovic on October 22, 2019 and again on November 21, 2022. Dr. Giantomaso assessed her on February 20, 2020. Dr. Parhar assessed her on November 25, 2022. To a large extent, they agree as to Ms. Omerovic's diagnosis and prognosis. To the extent that they disagree, I place the most weight on Dr. Muhlstock's evidence and the least on Dr. Parhar's. Dr. Giantomaso was impressively even-handed in his testimony on the stand, but did not address, either way, all of Ms. Omerovic's complaints. Dr. Parhar's report assumes symptoms that are not in evidence, such as a maximum sitting tolerance of 30 minutes. Ms. Omerovic is able to concentrate and work in a sitting position for much longer than that. She sat while testifying for up to 75 minutes at a time without manifesting any apparent distress. Ms. Beattie observed a longer period of static sitting during the functional capacity evaluation.

[21] Two forensic economists testified: Nicholas Coleman, for the plaintiff, and Thomas Steigervald, for the defence. The differences in their opinions are modest and focused, and I will address them in the course of these reasons.

The accident

[22] The accident occurred at about 7:45 a.m. on June 17, 2016. Ms. Omerovic was driving her car, a 2014 Hyundai sports utility vehicle, to work. She was in Vancouver, proceeding west on Broadway towards a signalled intersection with Lakewood Street. The light was red and Ms. Omerovic stopped behind two other cars already waiting for the light to change. She had her left hand on the steering wheel and was reaching for a cardboard coffee cup with her right when her car was struck by the defendants' vehicle, a BMW sedan. Both vehicles sustained minor damage and coffee went everywhere. Ms. Omerovic was thrown forward against the seatbelt, then back against the seat, and her head struck the headrest. The airbags in her car did not deploy.

[23] Following an exchange of information with the driver of the defendants' vehicle, Ms. Omerovic continued to work. She was beginning to feel a burning sensation down her spine, tightness across her shoulder blades, stiffness in her neck, and the beginnings of a headache. She was also experiencing a ringing in her ears that started when the accident occurred.

The injuries

[24] In the weeks following the accident, Ms. Omerovic suffered pain in her neck, shoulders, upper, middle, and lower back, and left hip. She experienced frequent headaches. The ringing in her ears lasted for weeks and eventually became intermittent and then faded away.

[25] Ms. Omerovic's other symptoms have persisted, though sometimes they ebb, and sometimes they flare-up. They are aggravated by her work activities and Ms. Omerovic attributes the flare-ups to longer work hours and more stressful work activities.

[26] Almost seven years have passed since the accident. Allowing for terminological differences, the physician witnesses agree that Ms. Omerovic still suffers from the following chronic physical injuries resulting from the accident:

- Soft tissue pain in her cervical, thoracic and lumbar spine;
- Pain and dysfunction in her left sacroiliac joint.

They agree, as well, that there is no cure for these injuries and she is likely to have to contend with them for the rest of her life. There are things that can be done to alleviate and manage her symptoms and improve her quality of life.

[27] While not addressed in the evidence of Dr. Giantomaso, based on the evidence of Dr. Muhlstock and Dr. Parhar, I would add the following to the list of injuries resulting from the accident:

- Soft tissue pain in the shoulder girdle;

- Chronic post-traumatic headaches; and
- Chronic sleep difficulty and fatigue, as well as emotional symptoms including but not limited to depression and anxiety.

I find that, as with her back and left hip injuries, Ms. Omerovic is not likely to find a cure for her shoulder pain and her headaches.

[28] Ms. Omerovic's injuries have not prevented her from working full time at sedentary but demanding employment, except for two periods when she has taken short term disability leave to deal with flare-ups of her symptoms. Her recent performance reviews from BCAA have been good. She is meeting or exceeding expectations in all respects. On occasion, she is called upon to work overtime hours and has been able to do so, at some personal cost.

[29] During the functional capacity evaluation in January 2020, Ms. Beattie observed Ms. Omerovic sitting statically for one hour and 45 minutes at a time, and for a total of three hours and 45 minutes over the course of the evaluation. At the time of the initial evaluation in January 2020, Ms. Omerovic was employed by BCAA as a payroll administrator. Ms. Beattie concluded:

Payroll and Benefits Administrator: Based on the data and observations documented during the assessment, it is this writer's opinion that Ms. Omerovic is currently able to competitively meet the physical demands of her current role as a payroll and benefits administrator. In this case, being competitively employable is defined as successfully meeting the physical demands, without accommodation or adaptation. Ms. Omerovic demonstrated increased signs of discomfort following longer periods of static sitting and awkward neck postures; therefore, it is this writer's opinion that she would benefit from a more ergonomic setup of her office to enable her to increase her hours to full-time with decreased symptom aggravation. ...

General work capacity: Ms. Omerovic is best suited for work in the sedentary to light ranges of strength (handling up to 15 pounds occasionally). She is capable of work that involves sitting on a frequent basis and standing on an occasional to frequent basis. She would benefit from opportunities to alternate between sitting and standing, in order to best manage pain. She is capable of work involving gross and fine dexterity between chest and waist level on a frequent to constant basis. She should avoid work that involves prolonged period of awkward or repetitive movements of the cervical spine and/or reaching at or above shoulder level, as these were noted to increase neck and shoulder pain.

[Emphasis added.]

[30] By the time of a follow-up interview in January 2022, Ms. Omerovic had progressed to the position of associate sales force administrator. Based on the interview, Ms. Beattie viewed the physical demands of the new position as equivalent to those of the former position and found that Ms. Omerovic's capacities were largely unchanged. She noted that her recommendations for ergonomic adjustments of Ms. Omerovic's workstation at work had not yet been approved, and reiterated her recommendations.

[31] While I accept that Ms. Omerovic has suffered fatigue, difficulty sleeping, depression and anxiety as a result of the accident, I need to address these complaints at greater length.

[32] Ms. Omerovic has not slept well since the accident. Her mother confirms that she often hears Ms. Omerovic moving about in her apartment in the middle of the night. Mr. Lowe, who dated Ms. Omerovic and sometimes shared a bed with her for about six months in 2018, testifies that he had to change mattresses several times to find one on which she would be comfortable. Ms. Omerovic testifies that she gets only three to four hours of sleep a night, and I think that this is probably an unintentional exaggeration. She functions at a high level at work, and I do not think this would be the case if she were sleeping that little.

[33] Ms. Omerovic testifies that she has suffered a dramatic change in her mood and enjoyment of life due to the pain she has suffered since the accident. She says that she has become anxious around driving, social events, and the prospect of going out and doing things. She says that, prior to the COVID-19 pandemic, she had become a kind of recluse, and the pandemic made things worse. She complains that she is often depressed and irritable.

[34] These complaints find some support in the evidence of the other witnesses called by the plaintiff, particularly Fadila Omerovic, but they must not be overstated. Ms. Omerovic has not become a recluse.

[35] Ms. Omerovic made friends with Ms. Gilligan after they met at work in 2019. They shared a small personal bubble through the pandemic and were spending time together almost every weekend and after work as well. Ms. Gilligan describes Ms. Omerovic as charismatic, friendly, and a very social person.

[36] Similarly, Ms. Omerovic made friends with Ms. Wesley at work in 2018 and have continued to see each other every few weeks since Ms. Wesley left BCAA in June 2022. Ms. Wesley describes Ms. Omerovic as a social person who enjoys going out for dinner, coffee, or for walks. She says that, when Ms. Omerovic is feeling good, she is funny, witty, has an upbeat personality, and is generally a great person to be around. But sometimes it is apparent that she is exhausted, and just trying to get through the day, and sometimes she cancels important social engagements, such as a 40th birthday party.

[37] Ms. Nooh offers a balanced assessment from the point of view of someone who knew Ms. Omerovic before and since the accident. They worked together for about a year at Stemcell and established a close friendship that endured after Ms. Nooh left the company in August 2015. Prior to the accident, Ms. Nooh describes Ms. Omerovic as extroverted, personable, loud, and funny. Since the accident, she is much less outgoing and less likely to propose activities. In Ms. Nooh's words, now she feeds off other peoples' energy and has to be encouraged to go out and do things socially.

[38] It is not that Ms. Omerovic cannot be persuaded to go out. She flew to Mexico with Ms. Nooh to celebrate her 30th birthday. She flew to Scotland to celebrate Ms. Nooh's graduation from a Masters programme in Edinburgh in the spring of 2022. Ms. Omerovic describes the eight-hour flight to the U.K. as horrible, but I think it is significant that she was willing to undertake the trip at all. While she was in Scotland, she took a day-long bus tour of the highlands, though it was uncomfortable to the point of making her sick. Ms. Nooh says that, during the trip to Scotland, they both did a lot of walking and exploring around Edinburgh and Stirling.

[39] Ms. Omerovic experiences anxiety while driving since the accident and does not drive as much as she used to, though she has not given it up entirely.

[40] In short, Ms. Omerovic has suffered sleep difficulties, fatigue, and emotional symptoms since the accident as I have described. While distressing, they have not been debilitating. In contrast to her physical injuries, it is not clear that they will continue to trouble her indefinitely. To this point, they have not really been treated.

Analysis

Failure to mitigate

[41] The defendants claim that Ms. Omerovic has failed to mitigate her loss by taking steps recommended by Dr. Muhlstock in his first report dated November 29, 2019. The defence does not suggest that she failed to seek out medical care or follow the recommendations of her caregivers. Indeed, as already noted, I find that Ms. Omerovic diligently sought medical attention after her family doctor, Dr. Haines, retired in March 2020, and has been unable to obtain anything more than occasional, episodic primary care, even from clinics, ever since.

[42] The law in this regard is uncomplicated. The onus of proof that a plaintiff failed to take reasonable steps to avoid or mitigate her loss lies on the defendant. The defendant must prove both that Ms. Omerovic acted unreasonably and the extent to which her damages would have been reduced had she acted reasonably; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Haug v. Funk*, 2023 BCCA 110 at para. 61. The court may address a failure to mitigate by discounting the damages that would otherwise be awarded by an appropriate percentage; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 70–80.

[43] Dr. Muhlstock made 11 recommendations in his report dated November 29, 2019. Five of the recommendations (numbered 2, 3, 8, 9 and 10 in Dr. Muhlstock's report) propose diagnostic investigations that would be a matter for Ms. Omerovic's treating physicians. The remaining recommendations are:

- a) Referral to a chronic interdisciplinary pain clinic (#1 in the report);

- b) Referral to an interventional pain clinic (#4);
- c) Attend ongoing physiotherapy, massage therapy, or chiropractic treatment on an as-needed symptomatic basis, and implement a focused program with regard to the left sacroiliac joint dysfunction (#5);
- d) Obtain a gym membership with pool access and be provided with counselling by a kinesiologist (#6);
- e) Obtain an in-home occupational therapy assessment (#7); and
- f) Obtain a work station ergonomic assessment (#11).

[44] At some point Ms. Omerovic saw Dr. Muhlstock's report and became aware of his recommendations. For the most part she did not implement them. I find that she acted reasonably in the circumstances.

[45] Recommendations (a) and (b) required a referral from a physician. Ms. Omerovic believes that she took the recommendations to Dr. Haines, although she is not certain of this. It is clear that Dr. Haines did not make the necessary referrals, or send Ms. Omerovic to another physician who might make them. This would have been in the final months of Dr. Haines' career as Ms. Omerovic's family physician. I do not think that it was unreasonable for Ms. Omerovic not to press Dr. Haines for a referral in this brief period, and afterwards, there was no reasonable avenue available to Ms. Omerovic to pursue these recommendations.

[46] Concerning recommendation (c), Ms. Omerovic sought out physiotherapy and acupuncture for symptomatic relief in 2016 and 2017. In 2018, she turned to chiropractic treatments through the end of 2019. She was not pursuing symptomatic treatment in 2020. She sought out physiotherapy again briefly in May 2021 and resumed acupuncture and chiropractic treatments in the fall of 2022. The gap in symptomatic treatment undoubtedly had multiple causes. The COVID-19 pandemic limited access to in-person treatment for a time. Ms. Omerovic testifies that she had a lighter workload and experienced fewer symptoms in the period after she started

work at the BCAA in November 2018. I do not think that Ms. Omerovic can be faulted for failing to pursue symptomatic treatments in the circumstances.

[47] Recommendation (d) is a gym membership and counselling from a kinesiologist. Ms. Omerovic told Ms. Beattie that she has access to a gym at work. She has free weights and a stationary bicycle at home and testifies that she did various exercises given to her by therapists at home. The gym that is closest to her house was often closed. In my view, her response to this recommendation was reasonable in the circumstances.

[48] Recommendations (e) and (f) required the assistance of an occupational therapist, and Ms. Omerovic had a report from Ms. Beattie that covered most if not all of this ground. She implemented Ms. Beattie's recommendations for ergonomic adjustments at her home work station, which was her only work station from March 2020 until April 2022, when BCAA brought her back into the office three days a week. As already noted, she has been unable to access ergonomic accommodations at the office without a doctor's note that she cannot obtain.

[49] I conclude that Ms. Omerovic's damages should not be discounted on the basis of a failure to mitigate.

Loss of housekeeping capacity

[50] Ms. Omerovic seeks an award of \$10,470 for loss of housekeeping capacity. The defence submits that a pecuniary award for loss of housekeeping capacity is not warranted.

Legal framework

[51] The legal framework for consideration of a claim for loss of housekeeping capacity was restated in *McKee v. Hicks*, 2023 BCCA 109 at paras. 94-112. Speaking for the Court, Justice Marchand addressed and reconciled *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37 and *Riley v. Ritsco*, 2018 BCCA 366. *Kim* was a case in which the plaintiff's injuries made it unreasonable for her to perform household tasks; such claims are typically addressed through an award of pecuniary

damages assessed with a view to the cost of obtaining replacement services on the open market. However, a trial judge retains a discretion to assess the damages as non-pecuniary, taking the inability to perform household tasks into account in the award of general, non-pecuniary damages. On the other hand, *Riley* establishes that, where the plaintiff can perform usual and necessary household work, a pecuniary award is not appropriate and the judge must assess the damages as non-pecuniary.

[52] Provided that the case passes the threshold of an injury making it unreasonable for the plaintiff to perform household tasks, the following summary of principles from *Ali v. Stacey*, 2020 BCSC 465 at para. 67 is accurate:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

Analysis

[53] Applying the law stated in *McKee*, I find that a pecuniary award for loss of housekeeping capacity is not appropriate. While Ms. Omerovic's injuries make housework painful and more difficult than it used to be, they have not made it unreasonable for her to perform ordinary household tasks such as vacuuming, food preparation, and washing up. She has not hired anyone to perform these tasks. Her mother sometimes comes into her apartment when she is not there and cleans up, but I do not think that her help is equivalent to a service that Ms. Omerovic would otherwise obtain from a paid housekeeper.

[54] Ms. Omerovic kept house to a very high standard before the accident. She is frustrated that she no longer has the energy and willingness to do as much as she used to. This frustration, and the challenges Ms. Omerovic now faces in performing housework that she used to take for granted, contribute to her non-pecuniary loss to be taken into account in an award of general damages.

Non-pecuniary damage

[55] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal to SCC ref'd, 31373 (19 October 2006). In *Stapley*, at para. 46, the Court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

[56] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts; *Trites v. Penner*, 2010 BCSC 882 at para. 189.

Positions of the parties

[57] Ms. Omerovic seeks an award of \$160,000. The defendants submit that there should be an award of \$60,000 to \$70,000.

Stapley considerations

[58] At 35 years old – 28 at the time of the accident – Ms. Omerovic is a relatively young woman. She will be coping with the pain of inconvenience of her injuries for a long time. While they are not disabling, nor are they at all trivial.

[59] I have already described the injuries at some length, but there is more to be said about their effect on Ms. Omerovic's life. She is, by all accounts, an ambitious person who takes her career seriously. She describes herself as "driven". While Ms. Omerovic's injuries have not prevented her from working, to her co-workers it is often obvious that she is uncomfortable. She rubs and massages her neck or lower back, stretches, fidgets, and can regularly be seen taking over the counter painkillers such as Tylenol and Advil. Her demeanor changes and she becomes quiet and withdrawn. There are bags under her eyes. Four of the independent witnesses and Ms. Omerovic herself used the same expression to describe her response to the pain she has experienced since 2016: as they all put it, she chooses to "push through the pain".

[60] In short, Ms. Omerovic has a stoic disposition and I must bear in mind the principle that her willingness and ability to push through the pain should not count against her, in the assessment of fair compensation for her injuries.

[61] Ms. Omerovic has not always found herself able to push through the pain. Flare-ups in her symptoms led her to go off work on short term disability leave for two months towards the end of her employment at Stemcell. In February 2023, another flare-up led her to go on short term disability leave from her work at BCAA, and she remained on leave at the time of trial. I deal with the economic significance of these absences later in these reasons.

[62] Before the accident, Ms. Omerovic was more active, physically and socially. She was an outgoing, extroverted person. She still has those qualities, but to a lesser extent. She has suffered a significant loss of lifestyle.

[63] Ms. Omerovic was single before the accident and she blames the accident for the fact that she is still single. She says that she hoped to marry and have children one day (though she always intended to maintain her career), and now she thinks that unlikely. I do not put a great deal of weight on this consideration because it is very hard to forecast what would have occurred, but for the accident. Ms. Omerovic has had one serious dating relationship since the accident. It was with Mr. Lowe,

and it came to an amicable end as both of them realized that they had different interests and would rather be friends. Ms. Omerovic's injuries may have contributed to this conclusion, but I doubt that they were decisive. Mr. Lowe is someone with a passion for activities such as motorcycle riding, competitive weightlifting, darts, fishing, and golf. Before the accident, Ms. Omerovic's favoured activities with Ms. Nooh were shopping, long walks in town, and going out to movies.

[64] Because of her injuries, Ms. Omerovic gets out less than she used to, and has less fun than she used to have. This has probably impaired her romantic prospects to some extent, but it did not prevent her from developing close friendships with Ms. Gilligan, Ms. Wesley and Mr. Lowe since the accident.

[65] As already noted, Ms. Omerovic's injuries leave her without the energy and willingness to maintain her housekeeping at home to the very high standard she expects of herself and maintained prior to the accident. This frustrates her.

Comparable cases

[66] Ms. Omerovic relies on *Harris v. Teo*, 2019 BCSC 1631, *Mattson v. Spady*, 2019 BCSC 1144, *Anderson v. Steffen*, 2021 BCSC 2248, *Ferguson v. Watt*, 2018 BCSC 1587, and *Moon v. Yaranon*, 2021 BCSC 818. I view *Harris* and *Ferguson* as unhelpful, because they involved plaintiffs who were more than 15 years older than Ms. Omerovic at the time of the accident and the age gap makes comparison very difficult.

[67] *Mattson* involved a plaintiff who was 30 years old at the time of the accident. She suffered somewhat similar injuries, but with a significantly greater effect on her work hours and participation in extracurricular activities. Her injuries limited her ability to care for her infant children. She was awarded \$150,000 (\$173,000 adjusted for inflation), which is suggestive of an upper bound on the award in this case.

[68] *Anderson* involved a plaintiff who was 34 years old at the time of the accident. He suffered similar injuries which led to the loss of a physically demanding career

that he loved. He was curtailed in the pursuit of his preferred recreational activities. Justice Skolrood awarded him \$130,000 (\$145,000 adjusted for inflation), inclusive of consideration of the effect of the injury on his housekeeping capacity.

[69] *Moon* involved a plaintiff who was 30 years old at the time of the accident and 36 at the time of trial. Her injuries were similar to those suffered by Ms. Omerovic, resulting in chronic, but not disabling pain. Prior to the accident, she had lived an athletic lifestyle, and her injuries limited her ability to compete in triathlons and go on difficult hikes, though she continued to cycle, hike, jog and swim. Her injuries resulted in marital stress and limited her activities with her young daughter. Justice Crerar awarded \$100,000 (\$111,000 adjusted for inflation).

[70] The defence cites *Manhas v. Jaswal*, 2020 BCSC 586, *Lowney v. Yung*, 2022 BCSC 1918, *Bischoff v. Gudaitis*, 2019 BCSC 2169, and *Thorson v. Vandop*, 2016 BCSC 221.

[71] *Manhas* involved a plaintiff who was injured in two accidents, the first when she was 16 years old, and the second when she was 19. She was 24 at the time of trial and experiencing low levels of daily neck pain, semi-monthly flare-ups of more severe neck pain, and headaches. Her flare-ups became manageable when treated with medication. Her condition was not expected to improve, and her friends and family said that she had become short-tempered and withdrawn. Justice Basran awarded \$60,000 (\$67,000 adjusted for inflation).

[72] In *Lowney*, the plaintiff was 38 years old at the time of the accident and 45 years old at the time of trial. She suffered injuries to her shoulder, neck and upper back with symptoms that would come and go. She had to curtail some recreational activities but remained an enthusiastic international traveller. Her injuries did not limit her social or familial relationships or significantly affect her ability to earn a living. Justice Francis awarded \$70,000 (\$74,000 adjusted for inflation).

[73] *Bischoff* involved a plaintiff who was 29 years old at the time of the accident and 33 at the time of trial. Prior to the accident, she was very physically active. Her

injuries were similar but, by the time of trial, she had returned to mountain biking, long hikes, ski touring, and downhill skiing on black runs. Justice Choi found that she had achieved close to a full recovery and awarded \$70,000 (\$80,000 adjusted for inflation).

[74] *Thorson* involved a plaintiff who was 35 years old at the time of the accident and 38 at the time of trial. She suffered similar soft tissue injuries and experienced pain in her neck, shoulders, and later in her lower back. She also experienced headaches. Her injuries prevented her from pursuing the high-level fitness regime she enjoyed prior to the accident, though she was able to replace it with a maintenance fitness regime of low impact exercises, walking and some cycling. By the time of trial, her symptoms had reduced in frequency and she described them as an inconvenience. Her prognosis for the long term was good. She was awarded \$50,000 (\$61,000 adjusted for inflation).

Assessment of non-pecuniary loss

[75] The cases cited by the defendant are unhelpful. *Lowney*, *Bischoff* and *Thorson* involved plaintiffs who suffered less consequential injuries. Notwithstanding her injuries, Ms. Lowney remained an enthusiastic international traveller. Ms. Bischoff had achieved close to a full recovery. Ms. Thorson described her injuries as an inconvenience and her long-term prognosis was good. By comparison to the other cases I have reviewed, the award in *Manhas* is an outlier.

[76] Turning to the plaintiff's cases, the injuries in *Mattson* were more consequential than those suffered by Ms. Omerovic. The effect of the injuries suffered in *Anderson* was more serious because, unlike Mr. Anderson, Ms. Omerovic has not lost a career that she loved. To a lesser degree, the same can be said of *Moon* because Ms. Omerovic has not suffered the marital and family consequences experienced by Ms. Moon.

[77] Taking everything into account, I award Ms. Omerovic \$100,000 in general damages to compensate her for her non-pecuniary loss.

Past income loss

[78] As already noted, Ms. Omerovic has been continuously employed since the accident. The parties agree that she has earned less income than she would have earned, if it were not for the accident. They disagree as to the amount of the loss.

Legal framework

[79] Assessing compensation for past economic loss requires a comparison between a hypothetical past state of affairs and what actually occurred. The damages are assessed, not calculated; *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. As with all hypotheses, the court must assess both what would most likely have occurred, and the existence of real and substantial contingencies that things might have turned out differently. Contingencies may be positive or negative. They may be general, that is, contingencies arising as a matter of human experience as generally applicable, or specific, that is, grounded in the evidence as particularly likely to arise in the circumstances of this case; *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 86-91.

[80] An award for past economic loss arising from a motor vehicle accident must be determined on an after-tax basis; *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, ss. 95, 98.

Positions of the parties

[81] Ms. Omerovic seeks an award of approximately \$52,000 on the basis that, but for the accident, she would have continued working at Stemcell and earned a higher salary than she has earned at BCAA. The argument presupposes that her income would have continued to increase at Stemcell as quickly as it increased subsequently at BCAA.

[82] The award sought by Ms. Omerovic is greater than that proposed by the economist she called, Mr. Coleman. He estimates that she has suffered a past loss of \$28,846 based on a comparison of her earnings at Stemcell with those at BCAA,

but without future increases apart from inflationary increases, together with a loss of \$10,812 in respect of time spent receiving sick pay and short-term disability benefits.

[83] The defence proposes an award of \$13,743 based on Mr. Steigervald's expert report. The \$13,743 is Mr. Steigervald's proposed correction of Mr. Coleman's \$28,846 amount, taking into account a technical criticism that I will discuss. Mr. Steigervald offers no opinion on the additional loss of \$10,812 proposed by Mr. Coleman. The defence submits that the proposed loss of \$10,812 in respect of time spent on sick leave and short-term disability leave is not supported on the evidence.

Analysis

[84] The parties' submissions give rise to two issues:

- a) Has Ms. Omerovic suffered a loss in respect of time spent on sick leave and short-term disability leave?
- b) Has Ms. Omerovic suffered a loss as contended by her or as calculated by Mr. Coleman, or on the basis of Mr. Steigervald's analysis?

a) *Has Ms. Omerovic suffered a loss in respect of time spent on sick leave and short-term disability leave?*

[85] Ms. Omerovic took four days of sick leave in June 2016, immediately after the accident, and another five days of sick leave scattered over the months of September, and October 2018, and March and May 2017. She also took sick days in 2018. Under Stemcell's sick leave policy, she was fully paid for all of this time off and I find that she did not suffer a loss in this regard.

[86] In 2018, Ms. Omerovic took two months on short term disability leave. I accept her evidence that she took this leave in consequence of a flare-up of her symptoms and would not have taken it but for the accident. She received 66.7% of her regular pay during the period on short term disability leave and therefore suffered a loss. The short-term disability benefits she received totalled \$5,577,

which is 67.7% of \$8,361. This is the amount she would have earned, but for the accident, and she therefore suffered a loss of \$2,784.

[87] Ms. Omerovic has taken sick days and a period of leave on short-term disability while at BCAA. She has received full pay in respect of all of this time away from the office and has not suffered a loss in this regard.

[88] Accordingly, I conclude that Ms. Omerovic has suffered loss of \$2,784 rather than \$10,812 in respect of sick days and time spent on short term disability leave.

b) *Has Ms. Omerovic suffered a loss as contended by her or as calculated by Mr. Coleman, or on the basis of Mr. Steigervald's analysis?*

[89] Ms. Omerovic earned \$50,999.84 from Stemcell in 2017 and \$71,338.81 in 2018. In her last year, her annual salary was \$75,000. When Ms. Omerovic moved to BCAA, it was to receive an annual salary of \$63,000. She testifies that she made the move in order to work shorter hours and shorten her commute to work, because long hours at work and driving to work were exacerbating her symptoms. The premise of her wage loss claim is that she would not have changed jobs, if it were not for the accident, and has earned less income overall, as a result of the change.

[90] I think that there is certainly a real and substantial possibility that Ms. Omerovic would not have changed jobs if it were not for the accident, though it is far from a certainty. In addition to a better location and less demanding hours, BCAA offered a more attractive benefits, in the form of paid and bankable overtime and more generous short-term disability benefits. She might have made this or an equivalent move anyway.

[91] The salary drop from Stemcell to BCAA was more apparent than real, because Ms. Omerovic's 2018 salary was augmented by a \$10,000 retention bonus paid in consequence of the departure of her manager. I infer from the description that this was a one-time payment that would not have been repeated in subsequent years. The real drop in income, going forward, was more in the order of \$2,000 than \$12,000. The inclusion of a one-time retention bonus in Ms. Omerovic's 2018

income from Stemcell was not incorporated into the analysis of either Mr. Coleman or Mr. Steigervald. Their calculations of the income Ms. Omerovic would have received from Stemcell after 2018 are therefore overstated.

[92] In that light, I reject as unfounded the calculation of a past wage loss of \$52,000. It assumes an increasing income at Stemcell from a \$75,000 base in 2018, and the evidence does not support that assumption.

[93] I accept Mr. Steigervald's critique of the inflationary component of Mr. Coleman's analysis. Mr. Steigervald argues that the index utilized by Mr. Coleman exaggerates wage inflation in 2020. This was a year in which low wage workers were relatively likely to lose their jobs due to the COVID-19 pandemic, and the average industrial wage increased due in part to the changing composition of the workforce. Mr. Steigervald replaces Mr. Coleman's inflationary increase of 8.4% in 2020 with a 4.8% estimated increase based on a wage study of the particular sector in which Ms. Omerovic is employed. I find that the 4.8% estimate is more appropriate.

[94] With that adjustment, Ms. Omerovic's income at BCAA rose faster than the rate of inflation to the extent that, even starting on the assumption of a \$12,000 rather than a \$2,000 difference between her income at Stemcell and her income at BCAA, Ms. Omerovic was earning a higher income at BCAA by the beginning of 2022. Beginning from a \$2,000 differential, her income at BCAA would have overtaken her assumed income at Stemcell much earlier.

[95] I conclude that Ms. Omerovic has not established that she suffered any past loss by reason of her change in jobs in November 2018. It is more likely than not that she has earned more at BCAA than she would have earned had she remained at Stemcell.

Conclusion

[96] For these reasons, I find that Ms. Omerovic has suffered a past wage loss of \$2,784.

Loss of future earning capacity

Legal framework

[97] An award for future economic loss requires the plaintiff to prove that there is a real and substantial possibility of a future event causing an income loss; *Rab v. Prescott*, 2021 BCCA 345 at paras. 47-49. The underlying question is whether, in the oft-quoted words of Justice Finch (as he then was) in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.), Mr. Gray's injuries make him "less valuable to himself as a person capable of earning income in a competitive labour market".

[98] A three-part test emerges from the recent appellate authorities; *Rab* at para. 47. First, the evidence must disclose a potential future event that could lead to a loss of capacity. Second, the court must be satisfied that there is a real and substantial possibility that the future event in question will cause a pecuniary loss. Third, if that possibility exists, the court must assess the value of that possibility, taking into account the likelihood that it will come to pass and the financial consequence if it does.

[99] As with past economic loss, the assessment is a matter of judgment, not mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[100] In some cases, such as *Brown*, *Letourneau v. Min*, 2003 BCCA 79, and *Kralik v. Mount Seymour Resorts Ltd.*, 2008 BCCA 97, courts have awarded damages for loss of future earning capacity in an amount equal to one or two years' earnings. In other cases, such as *Westbroek v. Brizuela*, 2014 BCCA 48, courts have adopted an earnings approach, forecasting potential earnings with allowances for contingencies.

[101] Under an earnings approach, future economic loss must be assessed based on a comparison of hypothesized events. There are hypotheses on both sides of the comparison. The court must evaluate the likely future for the plaintiff but for the accident, and compare it to the likely future taking the injuries suffered in the

accident into account, allowing for real and substantial positive and negative contingencies in both cases.

[102] The possible application of these principles in the context of a plaintiff who has suffered no past wage loss (or only an insignificant past loss) but whose injuries limit their ability to take on overtime work in the future is illustrated by *Bains v. Cheema*, 2022 BCCA 430 at paras. 63-72. aff'g on other grounds 2021 BCSC 1766 (*sub nom Cheema v. Bains*) In *Bains*, the plaintiff was a young truck driver whose injuries limited his ability to take on additional work. Speaking for the Court of Appeal, Justice Fitch concluded that, but for the accident, it was likely that he would have taken on additional remunerative work and he had therefore suffered a loss based on the real and substantial possibility that he would be less able to take on this extra work. He accepted as reasonable the trial judge's award equal to the approximate equivalent of one year's income.

[103] In recent cases, while not insisting on the use of an earnings approach in every case, the Court of Appeal has stressed that the assessment of future economic loss must be grounded in rigorous and evidence-based consideration of the contingencies; *Dornan v. Silva*, 2021 BCCA 228 at paras. 160-161; *Rab* at para. 47; *Lo v. Vos*, 2021 BCCA 421 at paras. 71-74. Consideration of the contingencies flows naturally from the comparison that is central to the earnings approach.

[104] In addressing contingencies, it is necessary to distinguish general from specific contingencies. General contingencies involve the ups and downs that may be encountered by anyone, as a matter of human experience, and are modest; *Dornan* at para. 92, citing *Graham v. Rourke*, 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.) and *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 93; *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91; *Dunn v. Heise*, 2022 BCCA 242 at para. 63; *Kringhaug v. Men*, 2022 BCCA 186 at para. 90. Specific contingencies pertain to the plaintiff in particular and must be grounded in evidence that establishes them as more than speculative possibilities; *Dornan* at para. 92.

[105] Notwithstanding repeated assertions in four very recent decisions of the Court of Appeal for British Columbia (*Dornan, Steinlauf, Dunn and Kringhaug*) that an adjustment to reflect general contingencies should be “modest”, there is a line of authority favouring a 20% general contingency deduction to reflect labour market contingencies; *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (S.C.); *Dunn v. Heise*, 2021 BCSC 754 at para. 202 [*Dunn BCSC*]; *Montazamipoor v. Park*, 2022 BCSC 140 at paras. 105-109; *Hann v. Lun*, 2022 BCSC 1839 at paras. 111-113. While these are all trial decisions, *Milina* in particular is a case of formidable persuasive authority, both because it is a judgment of McLachlin J., when she was a judge of this Court, and because it is acknowledged as a leading case, having been cited in reported reasons more than a thousand times. The reference in *Milina* to a practice of assessing a general negative contingency of 20% was approved, in *dicta*, in *York v. Johnston*, 37 B.C.L.R. (3d) 235, 1997 CanLII 4043 (C.A.).

[106] Having regard to the recent appellate caselaw, I doubt that a 20% adjustment for general labour market contingencies could now be justified as a general rule. The recent cases that have applied such an adjustment in this Court all involved young plaintiffs at or near the start of their working careers, and the risks of future disability or early retirement may loom larger in such a case; *Montazamipoor* at para. 108; *Dunn BCSC* at para. 206; *Hann* at paras. 10 and 111.

Positions of the parties

[107] Ms. Omerovic seeks an award of \$330,000 on the basis that she suffers an annual wage loss of \$11,657 by reason of her move from Stemcell to BCAA, and that will continue until she retires. Alternatively, she argues that her injuries have lowered the pace and intensity of work that she can tolerate, and this gives rise to a real and substantial possibility of a future income loss, by comparison to what she would have earned in the future, but for the accident.

[108] The defence submits that there should be no award for loss of future income earning capacity. They submit that Ms. Omerovic is not at present suffering an income loss and there is no real and substantial possibility of a future loss. In the alternative, if any award in respect of future loss is warranted, the defence submits

that it should be valued on a capital asset approach to equal one-half to one year's loss of Ms. Omerovic's current income.

Analysis

Real and substantial possibility of a future economic loss

[109] Ms. Omerovic's primary argument fails because I have already concluded that she is not suffering an annual wage loss by reason of her move from Stemcell to BCAA. There is more substance to her alternative submission that her injuries have lowered the pace and intensity of work that she can tolerate giving rise to a real and substantial possibility of a future income loss.

[110] Ms. Omerovic experiences flare-ups of her symptoms when she works overtime hours too often, or works too intensely. Judging from the expert evidence, this is to be expected.

[111] For some office workers this would not be an issue. Occasional flare-ups could be accommodated without economic consequence through sick days and occasional short-term disability leaves. This has been the case for Ms. Omerovic to this point.

[112] However, Ms. Omerovic is ambitious. She wants to advance within BCAA, and she fears that advancement will require extra hours of work and greater application of personal effort as she gains responsibility.

[113] At present, Ms. Omerovic is studying to obtain a professional certification that will qualify her for promotion and a higher position on BCAA's salary grid. The certification would qualify her for an immediate annual pay raise of \$6,000. The certification requires her to pass an exam that she has postponed twice, first in November 2022, and again on February 28, 2023. I accept her evidence that she postponed both sittings due to a flare-up. The second postponement was on the advice of her chiropractor and a doctor she was able to see at a clinic, at the same time as she went on short-term disability. She has rescheduled sitting the exam to May 2023.

[114] I find that there is a real and substantial possibility that future flare-ups of Ms. Omerovic's symptoms will delay or prevent her obtaining certifications, promotions, and pay increases that she would obtain, if it were not for her injuries.

[115] More generally, it is reasonable to expect that her prospects for advancement within BCAA, or any similar organization, will be impaired over the long run by her injuries. It is reasonably plausible that her employer will be wary of promoting to a senior level an employee who is at risk of illness when she presses herself too hard. This probably would not matter if she would not have advanced to senior levels in any event. Considering her interests and her drive, I think that she would have had a higher prospect of going further than she now has, and I would qualify the difference as real and substantial.

Quantification of Ms. Omerovic's claim

[116] Based on Mr. Coleman's evidence, the present value of the \$6,000 raise associated with the certification Ms. Omerovic is attempting to obtain, and has not yet obtained at least in part due to her injuries, is \$102,000. This takes into account the possibility that she will work to age 70 and contingencies reflecting the fact that most workers leave the workforce at a younger age.

[117] The only effect of Ms. Omerovic's injuries may be to delay her obtaining a \$6,000 raise for perhaps six months. On the other hand, the effect may be permanent, in that she will either find herself unable to obtain this certification or, more probably, will obtain subsequent certifications and raises more slowly than she would have, if it were not for her injuries. Under this scenario, the associated permanent loss is \$102,000 if the lasting effect is the effective loss of one certification and postponement of a \$6,000 pay raise at any given time, but it could be larger.

[118] In my opinion, considering that Ms. Omerovic has already been delayed twice in taking her exam, the risk that she will experience some persistent loss is very substantial. The contingencies that it will be less than or greater than \$100,000 would seem to balance out. Taking into account the case law cited at paragraphs

[105]-[106] above, I would make a deduction of 10% for general labour contingencies balancing Ms. Omerovic's youth against the direction that such adjustments should be modest. Applying such a 10% deduction suggests an award of \$90,000.

[119] The alternative approach of an award equivalent to one year's earnings, as in *Brown, Kralick and Bains*, also implies an award of \$90,000.

[120] Taking everything into account, I find that Ms. Omerovic is entitled to an award for the loss of future earning capacity in the amount of \$90,000.

Cost of future care

Legal framework

[121] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff 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, citing *Milina and Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[122] An award should only be made in respect of costs that may reasonably be expected to be incurred; *O'Connell v. Yung*, 2012 BCCA 57 at para. 70. If the evidence does not establish that it is reasonably likely that the plaintiff will incur an expense, she cannot be compensated for it. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[123] Each part of the claim must be supported by the medical evidence. At the end of the day, an award for the cost of future care is assessed, not calculated mathematically.

[124] If there is doubt as to whether future costs will be incurred, in principle the court should evaluate the possibility in the same way as it addresses all hypothetical

events for the purpose of assessing damages: first, by determining whether the event is a real and substantial possibility; and if it is, by assessing the likelihood of the event and discounting it accordingly; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49. This is the approach taken by the court in *O'Connell* at paras. 55-56 and 72.

Positions of the parties

[125] Ms. Omerovic claims \$240,042 for the cost of future care. The defence suggests that there should be an award in the range of \$14,965 to \$26,631.

[126] The following items totalling \$10,150 listed in Table 3 of Mr. Coleman's report dated December 23, 2022 are not in dispute:

- a) Medications recommended by Dr. Muhlstock and Giantomaso: \$5,107;
- b) Occupational therapy: \$613;
- c) 12 weeks of focused massage therapy: \$1,380;
- d) Active rehabilitation (kinesiology): \$1,413; and
- e) Counselling: \$1,637.

Analysis

[127] I turn to the disputed claims for the cost of future care.

Chronic pain program

[128] As already noted, Dr. Muhlstock recommends that Ms. Omerovic be recommended to a chronic interdisciplinary pain clinic where she could receive integrated and intensive treatments, including the trial of more appropriate medications than she has been taking for her pain and to help her sleep. The defence does not dispute this recommendation, in fact, it relies on it for the mitigation argument I have already addressed. The defence's objection to this item

of the cost of future care claim is that such a program can be accessed at no cost through British Columbia's Medical Services Plan.

[129] Ms. Beattie reports that there are both publicly funded and private chronic pain programs. The wait times to access the publicly funded programs can vary to upwards of one year. A privately funded program would cost \$13,775.

[130] Ms. Omerovic's need for this kind of a program has been known since Dr. Muhlstock delivered his first report in November 2019. With my judgment in this case, presumably Ms. Omerovic will finally be able to obtain a referral from a family doctor on her own. In the circumstances, I think that \$13,775 to facilitate early treatment at a private pain clinic is a reasonable expenditure. It is medically justified and I do not think Ms. Omerovic should be made to wait longer, for upwards of a further year, to receive treatment at a publicly funded pain clinic.

[131] Liability has not been in issue since 2019. If the defendants' insurer had taken timely steps to facilitate Ms. Omerovic's access to a publicly funded pain clinic, she would undoubtedly have made her way through the wait list and received treatment by now. The insurer chose to wait and everyone is worse off. The insurer is now faced with a larger claim. Ms. Omerovic has endured a period of suffering that might have been mitigated by earlier treatment.

Focused physiotherapy and chiropractic treatment

[132] Dr. Muhlstock recommends that "a focused physiotherapy and massage therapy program, in addition to manual therapy and/or chiropractic treatment, should be instituted with regard to the left SI joint sprain/dysfunction". Ms. Beattie interprets this as a recommendation for weekly sessions of each kind of therapy for 12 weeks.

[133] The defence objects that Ms. Omerovic has already attended numerous physiotherapy and chiropractic sessions and further focused physiotherapy and chiropractic sessions are unwarranted. As already noted, the defence accepts the recommendation of focused massage therapy.

[134] It is not clear that Ms. Omerovic has received focused physiotherapy and chiropractic therapy that is targeted to the left sacroiliac joint dysfunction, as recommended by Dr. Muhlstock. It would appear that this particular recommendation has been overlooked. I am satisfied that, on it being drawn to her attention, Ms. Omerovic is likely to pursue it. I find that the focused physiotherapy and chiropractic treatments recommended by Dr. Muhlstock are medically justified and likely to be pursued and allow \$1,583 in this regard.

Focused acupuncture

[135] Ms. Omerovic seeks an award of \$1,548 to \$3,096 for a course of focused acupuncture. This is not a course of treatment recommended by one of the physicians who testified or by Ms. Beattie. I find that it is not medically justified.

Ongoing physiotherapy, massage therapy, chiropractic therapy and acupuncture

[136] Ms. Omerovic has had recourse to physiotherapy, acupuncture, chiropractic treatments, and one session of massage therapy for symptomatic relief. Dr. Muhlstock recommends that she attend physiotherapy, massage therapy and chiropractic treatments (not mentioning acupuncture) on an as-needed symptomatic basis going forward. Dr. Giantomaso recommends that all of these passive therapies, including acupuncture, can be accessed on occasion and decrease the intensity and duration of a flare-up if one occurs.

[137] Ms. Beattie states that, in her experience, access to one to two treatments of passive therapy per month can assist with pain management and maintaining work durability. She estimates the cost of 12 to 24 treatments annually at \$696 to \$2,760. Ms. Omerovic proposes that acupuncture should be included in the mix and calculates that an average annual cost of 18 treatments including all four modalities would be \$1,683.

[138] The defence objects that this level of treatment lacks a medical foundation and proposes that treatments should be funded only to the extent that flare-ups are anticipated, assuming a flare-up every 3.5 years and 10 treatments per flare-up.

[139] I find that all four treatment modalities are medically justified for symptomatic relief. In my view, the best guide to the likely need for future symptomatic relief lies in the experience of the past six years, excluding the first 12 months following the accident. Ms. Omerovic's treatments may be summarized as follows:

- 2018 18 chiropractic appointments (all prior to her move to BCAA).
- 2019 2 chiropractic appointments.
- 2020 1 chiropractic appointment.
- 2021 3 physiotherapy appointments.
- 2022 9 acupuncture, 1 massage therapy, 9 chiropractic appointments.
- 2023 4 physiotherapy, 6 chiropractic appointments (January to March only).

[140] In 2018 and 2022, Ms. Omerovic attended 18 and 19 appointments respectively. In 2023, she is attending appointments at a faster rate. All this is consistent with her evidence describing the flare-ups that led her to go on short-term disability leave in late 2018 and again in early 2023.

[141] The defence estimate of a flare-up every 3.5 years is not far off the mark, but the number of treatments per flare-up estimated by the defence is too low. The defence calculation would average less than three treatments a year. Ms. Omerovic has attended 53 appointments over six years, for an average of almost nine a year.

[142] Assuming an equal mix of the four modalities of treatment, the average cost per session will be \$94 and the average annual cost, at nine sessions a year, will be \$846.

[143] The defence submits that an award in respect of this annual cost can only be justified until age 70 and not for the rest of Ms. Omerovic's life. The reasoning is that, after age 70, she would likely require these therapies in any event. I do not

accept that anyone over the age of 70 should expect to require these therapies as a matter of course.

[144] An annual cost of \$846 for life equates to a capital cost of \$26,538. Accordingly, I find that Ms. Omerovic is entitled to \$26,538 for the cost of future physiotherapy, massage therapy, chiropractic therapy and acupuncture treatment.

Restorative yoga

[145] Dr. Muhlstock recommends that Ms. Omerovic have access to yoga sessions for the foreseeable future. Ms. Beattie states that, in her experience, restorative yoga is an effective way to increase activity for individuals with chronic pain. She states that it is taught at a slower pace, with a focus on mindfulness and stretching. She estimates the cost at \$528 annually for weekly sessions. This equates to a capital award of \$17,391.

[146] The defence points to testimony of Ms. Omerovic that she learned to do yoga as a result of her knee injury, and has practiced it at home. However, it does not appear that she has been exposed to yoga instruction in the particular context of her neck and back injuries. I find that restorative yoga is medically justified and accept Ms. Omerovic's evidence that she is open to trying it.

[147] I do not think the evidence justifies a conclusion that Ms. Omerovic will probably pursue yoga lessons weekly for the rest of her life. I must take into account that she has not pursued this recommendation to date. I find that, while there is a real and substantial possibility that she will pursue restorative yoga indefinitely, it is more likely that she will not. I allow 25% of the amount claimed or \$4,348.

Gym pass

[148] Dr. Muhlstock recommends that Ms. Omerovic obtain a gym membership with access to a pool. As already noted, Ms. Omerovic owns free weights and a stationary bicycle, and has chosen to exercise at home. I do not think it likely that her decision will change. I allow nothing under this head.

Ergonomic equipment

[149] Dr. Muhlstock recommends a sit-stand workstation desk and Ms. Omerovic's claim includes an allowance of \$800 for this purchase. However, she has purchased one for her home office – it is an item, now accepted, of her special damages – and I do not think it would be reasonable for her to purchase one for her work office. Her employer will do that on being provided with a doctor's note. Her claim includes other ergonomic equipment such as a chair and a document holder for her workstation at the work office. Purchasing such equipment is her employer's responsibility. I decline these claims.

[150] There remain claims grounded in a home assessment performed by Ms. Beattie for a long-handled toilet brush, a long-handled scrub brush (to be purchased annually until death), and a cervical pillow. The defence accepts the cost of the cervical pillow and objects to the brushes on the ground that Ms. Omerovic did not establish that she has difficulties in this regard. In fact, Ms. Omerovic testifies that she experiences pain while cleaning generally. I am satisfied that these items are medically justified and likely to be purchased. The total amount allowed in respect of these three items is \$1,189.

Homemaking assistance

[151] In her first report, Ms. Beattie recommends that Ms. Omerovic receive six hours of homemaking assistance annually to help with heavy seasonal tasks. In her second report, she increases this recommendation based on her review of Dr. Parhar's recommendations, but in cross-examination, she conceded that, if Dr. Parhar had not performed a functional capacity evaluation (and he had not), she would rely more on her own assessment. Ms. Beattie's assessment was more securely grounded than Dr. Parhar's. She had spent two days in person with Ms. Omerovic, followed by a video interview, and Dr. Parhar had only a video interview. I prefer the view expressed in Ms. Beattie's first report.

[152] The defence submits that the award should be truncated at age 70. The reasoning is that Ms. Omerovic would require assistance with heavier seasonal

tasks at age 70 in any event. I accept the point, but would adjust the cut-off to age 75.

[153] Accordingly, I award \$235.80 annually to age 75 for the provision of homemaking assistance. The capital value is \$6,295 or \$6,610 inclusive of tax.

Summary of cost of future care items

[154] To summarize, I allow \$64,200 (rounded from \$64,193) for the cost of future care, broken down as follows:

- a) Undisputed items: \$10,150;
- b) Chronic pain program: \$13,775;
- c) Focused physiotherapy and chiropractic treatment: \$1,583;
- d) Ongoing physiotherapy, massage therapy, chiropractic therapy and acupuncture: \$26,538;
- e) Restorative yoga: \$4,348;
- f) Ergonomic equipment: \$1,189; and
- g) Homemaking assistance: \$6,610.

Disposition

[155] For these reasons, I award Ms. Omerovic damages totalling \$266,146.12 under the following heads:

- a) No pecuniary award for loss of housekeeping capacity;
- b) General damages of \$100,000;
- c) Special damages of \$9,162.12;
- d) Past economic loss of \$2,784;

- e) Future economic loss of \$90,000; and
- f) Cost of future care of \$64,200.

[156] If issues arise as to deductions required by s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, counsel may request a hearing to address them.

[157] Unless there are matters that must be brought to my attention, Ms. Omerovic is entitled to costs. If the parties wish to make submissions as to costs, they may do so in writing. Their submissions should not exceed five pages in length (excluding appendices) and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons under cover of a letter setting out the schedule to which counsel have agreed.

“Gomery J.”