

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arvanitis v. Cleave*,
2023 BCSC 672

Date: 20230426
Docket: M169867
Registry: Vancouver

Between:

Afrodity Arvanitis

Plaintiff

And

Ryan Cleave, Nissan Canada Inc., Natasha Sonija Cleave, Dorothy Gerda Adam, Andromache Giassemis, Emanuel Giassemis, Cameron McCormack, Christian De Groot, and Joseph Gauthier

Defendants

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

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Nissan Canada Inc., Natasha Sonija
Cleave, Dorothy Gerda Adam, and
Cameron McCormack:

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Place and Dates of Trial:

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Plaintiff:

January 16 and 17, 2023

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Introduction

[1] The plaintiff, Afrodity Arvanitis, is a former liquor store clerk with the provincial Liquor Distribution Branch (“LDB”) who was involved in two motor vehicle accidents (“Accidents”) in December 2014 (“First Accident”) and September 2016 (“Second Accident”).

[2] The plaintiff suffered soft tissue injuries to her neck and upper back in the First Accident, but returned to work on modified duties. However, in the fall of 2015, she experienced a sudden onset of debilitating neck pain, as a result of which she ceased working. The plaintiff did not return to the workforce in any capacity thereafter.

[3] In September 2016, the plaintiff was in the Second Accident, where she was rear ended and suffered soft tissue injuries to her lower back and right hip, along with aggravation of the injuries from the First Accident. The plaintiff’s injuries from the Accidents have left her with ongoing pain, reduced functional capacity, and reduced ability to participate in recreational and other activities she enjoyed before the Accidents.

[4] The defendants have admitted liability for the Accidents. The plaintiff seeks compensation for the injuries she sustained as a result of the Accidents and the impact of those injuries on her life.

Background

[5] The plaintiff is a 50-year-old high-school graduate who was working at the LDB at the time of the First Accident. She also completed some post-secondary education, but did not obtain a degree.

[6] The plaintiff started working as a clerk with the LDB in an auxiliary role in 1997. After approximately 10 years in that position, the plaintiff obtained a permanent full-time clerk position in 2008. In 2011, the plaintiff began taking courses through the LDB, which she described as a sommelier program, to expand her product knowledge and to enable her to avail herself of opportunities to progress

within the liquor industry. She completed three of four levels of the program, and was looking into taking the fourth level prior to the First Accident.

[7] The plaintiff's job as a clerk with the LDB was physically demanding. She testified that she would be on her feet for the bulk of the day, including standing at the cashier counter; engaged in customer service tasks; restocked shelves; and broke down boxes of product. She was required to stand at the cashier counter. In the warehouse, the plaintiff regularly unpacked pallets of product and managed returns of empty beer bottles.

[8] The plaintiff testified that she did not have any difficulties or physical limitations affecting her ability to perform her job duties at the LDB. The plaintiff did, however, work on modified duties for at least two periods of time prior to the Accidents. In 2001, the plaintiff was off work for approximately two to three months following a hysterectomy. She then underwent a gradual return to work program in which she worked on modified duties that did not require her to perform any heavy lifting and permitted her to spend long periods of time doing individual tasks.

[9] The plaintiff was involved in a rear-end motor vehicle accident in 2003 ("2003 Accident"), not at issue in this litigation, in which she suffered injuries to her left arm and neck. The plaintiff missed approximately two months of work after this accident, and then returned on modified duties for a few months. Once her modified duties were lifted, she participated in a rehabilitation program. The plaintiff testified that she was fully recovered from the 2003 Accident by 2010, but may have reported to her physiotherapist in January 2015 that her left shoulder was "never the same" after the 2003 Accident.

[10] The plaintiff worked for the LDB as a clerk from 1997 to 2017, when she was terminated for non-culpable reasons, essentially because she had not returned to her position following the Accidents and had not provided a prognosis for her injuries or an expected return date. Over the course of her employment with the LDB, the plaintiff applied for promotions to assistant manager or supervisor positions five or

six times, but was not the successful candidate in any of those competitions. Nonetheless, she did work shifts in supervisory roles from time to time.

[11] Over the course of her employment with the LDB, the plaintiff reported three workplace injuries. She testified that she suffered an injury to her right hand in 2000, right hip and leg in 2004, and a twisted left ankle in 2006 (“2006 Workplace Injury”). Contemporaneous Workers’ Compensation Board documentation for the 2006 injury indicated that she also reported right-side neck pain and stiffness and a limited range of motion. The plaintiff testified that employees were required to file a claim for any workplace injury and that she did not miss work as a result of any of these injuries. However, a job accident investigation report completed approximately one week after the 2006 Workplace Injury notes an estimated ten days away from work.

[12] The plaintiff did not recall having any health concerns in the months prior to the First Accident. However, in her November 7, 2014, mid-year employee performance and development plan (“EPDP”), the plaintiff indicated that she had “[h]ad a bad year with illness” but was “[f]eeling very healthy now”. Her manager in turn noted that the plaintiff was “working on improving sick time. Tough with shoulder injury” and that the plaintiff would be given an occupational fitness assessment. The plaintiff did not recall what this referred to, but did not deny participating in the review or the contents of her EPDP.

[13] The plaintiff is married to Emanuel Giassemis. Prior to the Accidents, the marriage was a happy one. The plaintiff and Mr. Giassemis enjoyed many outdoor activities together, including hiking, biking, skiing, boating, and fishing on his boat. They also enjoyed spending time with family and friends. The plaintiff and Mr. Giassemis do not have any children, but were taking steps towards conceiving a child through surrogacy from 2014 to July 2017.

The Plaintiff's Credibility

Legal Framework

[14] The plaintiff's credibility is a key issue in this trial. As the Court noted in *Gee v. Bock*, 2019 BCSC 1348 at para. 36, "[t]his is not unusual in cases of chronic pain, where the court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints". This is the case as the absence of objective findings in chronic pain cases increases the opportunity for exaggeration, distortion, or even fabrication: *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.

[15] The applicable principles were summarized by Justice Abrioux (as he then was) in *Buttar v. Brennan*, 2012 BCSC 531 at para. 24:

- the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397 (S.C.);
- the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery (*Price* at 399);
- an injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury (*Price* at 399);
- the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential

duration of the injuries *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73;

- in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given *Tai v. De Busscher*, 2007 BCCA 371 at para. 41.

[16] I am also guided in my assessment of the plaintiff's credibility by the approach set out by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), and *Faryna v. Chorny*, 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). Additional factors that may be considered when assessing credibility include whether a witness's explanation defies logic or common sense, or if a witness is evasive, longwinded, or argumentative in their responses: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at para. 92.

[17] Credibility and reliability are separate but related concepts. Credibility pertains to a witness's veracity, while reliability has to do with the accuracy of their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109, citing *R. v. H.C.*, 2009 ONCA 56 at para. 41. Significant frailties in a witness's evidence—such as inconsistencies between their testimony and contemporaneous documentation or inconsistencies and contradictory explanations of key issues—may affect both credibility and reliability: see e.g. *Chao Yin Canada Group Inc. v. Xenova Property Development Ltd.*, 2021 BCSC 1445 at paras. 53–55, appeal to CA dismissed as abandoned, 2023 BCCA 39.

[18] The defendants challenge the credibility and reliability of the plaintiff's ongoing subjective complaints of pain and impairment, particularly as they relate to her current capacity to work. The defendants say that the plaintiff has demonstrated a tendency of exaggerating her pain symptoms and functional limitations—particularly when being assessed for the purpose of this litigation—and failed to be forthright when providing her medical history to the experts who opined in this case.

In the defendants' submission, the plaintiff catastrophizes her personal circumstances and limitations and attempts to blame the Accidents for all of her medical conditions, even those that have been shown to be unrelated.

[19] The defendants say that the plaintiff's reports of pain and disability do not harmonize with other objective evidence, principally her ongoing attempts to pursue surrogacy during the period of time she claims to have been suffering from debilitating pain that severely restricted in her functional abilities and prevented her from working in any capacity. The defendants take the position that the plaintiff's subjective reports of ongoing debilitating pain and impairment are the foundation of her case at trial and thus her lack of credibility significantly undermines her position.

Findings on the Plaintiff's Credibility

[20] While I accept that the plaintiff suffered injuries in the Accidents that have had a significant and ongoing impact on her life, I have regrettably concluded that I cannot accept her evidence at face value and must treat it and, in particular, her reports to physicians as to her medical history and functional limitations with caution. I am left with significant concerns about the credibility and reliability of the plaintiff's evidence regarding the severity of her injuries and resulting pain, and their ongoing impact on her ability to return to work in any capacity.

[21] There is, in my view, good reason on the evidence before me to question the reliability and credibility of the plaintiff's evidence. The plaintiff was not a reliable historian of her own condition or other events. Her evidence generally lacked details on key points. One example of this was the plaintiff's inability to recall much detail about the circumstances surrounding the sudden onset of allegedly debilitating neck pain in September and December 2015 that rendered her unable to work in any capacity, after months of gradual improvement. Nor could Mr. Giassemis recall anything about the December 2015 incident that led to the plaintiff stopping work. He did not recall what her condition was like after coming home from work that day, or discussing this with her. At best, Mr. Giassemis's evidence was that he recalled her

being in pain with a really stiff neck that she could barely turn, though he could not even say with any certainty when that occurred.

[22] The plaintiff also professed not to recall matters that were inconsistent with her evidence or that may be perceived to be unhelpful to her case. In this regard, the plaintiff repeatedly attempted to minimize any prior instances of neck pain. By way of example, the plaintiff:

- a) Testified that her neck was fully healed from the 2003 Accident as of 2010, but physiotherapy records from Avita Health and Massage Therapy Center suggest as of January 2015, she reported that her left side was “never the same again” after the 2003 Accident; and
- b) Initially testified that her 2006 Workplace Injury involved only her ankle. However, contemporaneous Workers’ Compensation Board documentation indicated that she also reported pain and stiffness on the right side of her neck and limited range of motion of at least 50% in all directions. The plaintiff’s response to this documentation was simply that she did not recall also injuring her neck.

[23] Similarly, the plaintiff was unable to recall the nature, dates, and frequency of her efforts to pursue surrogacy from 2015 through 2017—efforts she was making while contemporaneously asserting to her physicians and employer that her neck pain rendered her completely disabled from working in any capacity. I am cognizant of the importance to the plaintiff of her attempts to conceive a child. The plaintiff’s evidence that her ongoing pain from the Accidents rendered her too disabled and too unreliable to return to work in any capacity, whether on modified duties or part-time, or even to do volunteer work, is difficult to reconcile with her ongoing efforts to pursue surrogacy, which required her to undergo significant medical procedures, including hormone supplements and egg retrieval, and travel repeatedly from North Vancouver to Vancouver Island (either to Victoria where the fertility clinic was located or Nanaimo where her surrogate was located).

[24] The plaintiff's evidence that her neck pain was so debilitating that it prevented her from working in any capacity from December 2015 onwards is also difficult to reconcile with the demands of raising a young child, particularly the physical effort that raising an infant requires. The plaintiff was unable to provide any explanation for this, nor did Mr. Giassemis testify, for example, that he intended to take time away from his business to assist the plaintiff in caring for an infant.

[25] The plaintiff's self-perception of her pain and demonstrations of disability or functional limitations were also demonstrably inconsistent with the objective observations of other witnesses, including medical professionals who treated and assessed her. By way of example, in the context of appealing her denial of long-term disability benefits, the plaintiff attended a claims review hearing on February 7, 2017. The purpose of the review was to determine whether she was completely disabled from work as of March 14, 2016, following the alleged sudden onset of debilitating neck pain in December 2015. The hearing included the plaintiff being subjected to an assessment conducted by three physicians, one selected by each of her union and employer, and a third independent physician. The review panel took a history from the plaintiff, conducted a physical assessment, and then drafted a report dated February 1, 2017 ("CRC Report").

[26] The three physicians involved in the claims review hearing—Drs. Paul Winston, Paula Chalmers, and Shelley Perlman—testified as fact witnesses as to their recollection of the plaintiff's presentation during the February 2017 claims review hearing and recalled there being noticeable discrepancies in the plaintiff's presentation on assessment when compared to the pre-assessment interview and post-assessment. Dr. Chalmers was the designated physician for the plaintiff and her union. She testified that the plaintiff's right leg limp increased on assessment when compared to when she first entered the room; and that throughout the hearing and physical examination, her neck range of movement was decreased when formally tested but showed greater movement when being indirectly examined.

[27] Dr. Perlman likewise recalled that the plaintiff's assessment was "unique" in that it was hard to make medical sense of the inconsistent findings. She confirmed her recollection that, as stated in the CRC Report, the plaintiff's gait deteriorated markedly from when she entered the room to once the physical examination began. Dr. Perlman testified that she could not make medical sense of why there would be such a marked deterioration, and similarly could not make medical sense of observed variabilities in the plaintiff's neck's range of motion on assessment when compared to on distraction.

[28] The plaintiff denies amplifying her limp or that her gait deteriorated during the claims review hearing. When confronted with the CRC Report, she professed to not know why the physicians would make the observations they did, suggested perhaps they confused her with someone else, and even went so far as to say that to the extent that Drs. Winston, Chalmers, and Perlman's recollections of her presentation differed from hers, the physicians must have been lying.

[29] The plaintiff adopted the same approach in response to Dr. Tony Giantomaso's evidence. Dr. Giantomaso noted that the plaintiff's demeanor changed on examination, that she adopted a hiked shoulder position and would not move her shoulders, and that she could barely put any weight on her right leg—essentially hopping around on one leg. In his *viva voce* evidence, Dr. Giantomaso said that he remembered the plaintiff well as she demonstrated "a lot of amplification of pain" and that there were inconsistencies in her presentation.

[30] Dr. Giantomaso recalled being generally surprised at how different her comfort level appeared to be when sitting and providing him with her history (which would have been after sitting for a lengthy period of time in traffic driving to the assessment), compared to "the minute" she got up and the examination started. Dr. Giantomaso testified that the shoulder hiking and similar behaviours were not present when sitting, but became something obviously physically limiting during the examination. The plaintiff was unable to explain why Dr. Giantomaso would give that

evidence if he did not in fact observe those inconsistencies in her behaviour, other than to again suggest he was wrong, confused her with someone else, or was lying.

[31] Thus, in each instance where the physicians who assessed her reported inconsistencies in her presentation were suggestive of amplification of her pain and limitations on assessment, the plaintiff's response was to suggest that they either were wrong, mistook her for someone else, or were lying. While I accept that errors do occur, physicians see many patients, and memories can fade over time, it is improbable, in my view, that that is what occurred on multiple occasions with multiple different physicians. I reject the plaintiff's testimony in this regard and accept Drs. Chalmers, Winston, and Perlman's evidence as to what they observed when assessing the plaintiff in February 2017, and that the CRC Report accurately recorded those observations. Unlike the plaintiff, none of these physicians have any motivation to exaggerate or embellish their evidence; rather and to the contrary, doing so could bring their professional reputations into disrepute. I likewise accept Dr. Giantomaso's evidence that he observed behaviours consistent with amplification when conducting his physical assessment of the plaintiff.

[32] Further, two of the physicians who assessed the plaintiff recalled that she used a cane. First, in an outpatient clinic note dated September 12, 2019, a physiatrist with a fellowship in pain management, Dr. Kay Chawla, noted that he observed that the plaintiff "used a single point cane and walked with a limp". Dr. Chawla did not testify at trial, but pursuant to the parties' document agreement, his outpatient clinic note regarding his observations of the plaintiff is admissible for the truth of the observations recorded therein: see generally *Egan v. Andrychuk*, 2022 BCCA 110 at paras. 50–52; *Edmonson v. Payer*, 2011 BCSC 118 at paras. 23–26.

[33] Dr. Giantomaso testified that he believed the plaintiff used a cane when he assessed her in March 2022. The plaintiff's former colleague and friend, Mike Kramer, also testified that he recalled seeing a cane in the back seat of her vehicle on one occasion in 2019, though he did not recall the plaintiff actually using the cane.

[34] The plaintiff denies ever using or owning a cane and asserts that Drs. Chawla and Giantomaso were mistaken. Considering the evidence as a whole, I prefer Drs. Chawla and Giantomaso and Mr. Kramer's evidence to that of the plaintiff. None of these witnesses had any motivation to fabricate their evidence regarding the plaintiff's use of a cane; nor is there any explanation provided for why Mr. Kramer saw a cane in the plaintiff's vehicle in late 2019. The plaintiff's mother used a cane following hip surgery in 2015, which she kept by her bed. The plaintiff's mother was adamant that the plaintiff never used a cane, did not need or want to, and could not recall any instance where the plaintiff borrowed hers.

[35] Considering the preponderance of the evidence, I find that there is no other reasonable explanation for Mr. Kramer seeing a cane in the plaintiff's vehicle or Drs. Chawla and Giantomaso's evidence that they recalled her using a cane, other than that the plaintiff did in fact use a cane when she attended her assessments with Drs. Chawla and Giantomaso. I find that this is a further example of the plaintiff's tendency to amplify her pain and disability on assessment.

[36] Considering the evidence as a whole, I am compelled to conclude that the plaintiff tended to amplify her pain behaviours and functional limitations on assessment. This negatively impacts both the reliability and credibility of the whole of her evidence and requires me to treat it cautiously.

[37] In particular, I find that the plaintiff engaged in a pattern of conduct in which she failed to disclose or overstated matters in situations where doing so may prove beneficial to her. For example, in June 2015, the plaintiff sought religious accommodation from her employer so as not to have to work on Sundays so that she could practice her religion by attending church. However, Mr. Giassemis testified that while the plaintiff may have gone to church on a weekly basis when they first started dating approximately 20 years ago, that "petered out" by 2010 (though she may have still attended for special occasions such as Christmas or Easter) and she did not go to church on a weekly basis in the 2010–2016 period.

[38] Additionally, in the plaintiff's May 2016 application for long term disability ("LTD Application") benefits, she indicated that she had not previously suffered from neck pain or limited range of motion. However, she admitted in cross-examination that that statement was not accurate. This admission was consistent with the evidence adduced at trial establishing a history of neck pain and limited range of motion, including from the 2003 Accident and the 2006 Workplace Injury.

[39] The evidence before me demonstrates a pattern of exaggerations, gaps in the evidence, and internal and external inconsistencies in her evidence and reports to her treating physicians. I find that the plaintiff withheld key information from her treating practitioners and family members, embellished her evidence as to the severity of her injuries, and tended to attribute medical issues to the Accidents that were subsequently proven to be unrelated.

[40] The plaintiff was also very reluctant to disclose where she was going when the Second Accident occurred and had to be directed to do so by the Court. The defendants' submission that her reluctance to disclose this information stemmed from the incongruity of her being incapable of working because of neck pain but capable of driving from her home in North Vancouver to the west side of Vancouver for laser hair removal is, in my view, a reasonable one in the circumstances.

[41] The plaintiff also tended to attribute any and all of her medical issues post-Accidents to the Accidents and was reluctant to admit that some issues were unrelated, even when confronted with indisputable medical evidence to the contrary. The plaintiff testified that stomach problems she experienced in 2018 were on account of ulcers being caused by interactions between the various pain medications she took to treat the injuries suffered in the Accidents. Only when confronted with clinical records showing that the endoscopic colonoscopy and polypectomy she underwent by way of day surgery were in respect of a diagnosis and treatment on an entirely unrelated condition did she concede that she may have been mistaken in that regard.

[42] Considered as a whole, there is a pattern of exaggerations, gaps, and internal and external inconsistencies in the plaintiff's evidence and her reports to physicians and treatment providers. Her absence of memory and inability to recall significant matters that should have been memorable to her—e.g. the steps she took in furtherance of surrogacy and the circumstances precipitating the onset of debilitating neck pain in December 2015—render her evidence less reliable as a whole. While for the most part I accept that her testimony was well-intentioned, it is not entirely credible.

[43] Further, while I generally accept the plaintiff's evidence that she was injured in the Accidents and that she suffers some ongoing disability, pain, and detriment to her working ability and enjoyment of life, I do not accept that the degree of pain and the effects of her injuries on her ability to work is as severe as the plaintiff reported.

[44] In the result, I find that the plaintiff exaggerated the severity and frequency of her injuries arising out of both Accidents as well as the effect of those injuries on her ability to work and function more generally, both on assessment by her physicians and in her testimony before the Court. I recognize that minor inconsistencies in the plaintiff's evidence are to be expected in a case of this nature. However, in my view, the plaintiff's tendency to exaggerate went beyond the "natural and excusable tendency" to do so described by Justice Voith (as he then was) in *Sevinski v. Vance*, 2011 BCSC 892 at para. 42.

[45] By consequence, I conclude that I must treat the plaintiff's evidence and her reports to Robert Gander, an occupational therapist, and the physicians who assessed her with caution, especially where there is a lack of any corroborative objective evidence or findings. This is particularly the case where it is necessary to make factual findings as to the nature and extent of the plaintiff's injuries and ongoing sequelae thereof, solely based on the plaintiff's self-reports of impairment, and where the evidence of her treating physicians is predicated on the plaintiff's self-reported subjective symptoms absent objective medical findings.

The First Accident

[46] The First Accident in issue occurred on December 28, 2014. The plaintiff was a passenger in a vehicle being driven by her husband. They were driving on Thurlow Street in Vancouver and were struck from the right side. The plaintiff was jolted back and forth, but does not recall her body making contact with anything in the vehicle. The airbags did not deploy. The plaintiff was able to exit the vehicle without assistance and took photos of the scene. She did not require an ambulance or seek medical care after the First Accident.

[47] Afterwards, the plaintiff and her husband proceeded to the plaintiff's aunt's house, where they had dinner. Later in the evening, the plaintiff had a headache and began to feel unwell. Five days later, on January 2, 2015, the plaintiff saw her general practitioner, Dr. Peter Hayton, and reported headaches, and neck and back pain. She also recalled being quite stiff at the time. Dr. Hayton prescribed physiotherapy and Robaxial.

The Plaintiff's Circumstances After the First Accident

[48] The plaintiff returned to work following the First Accident, testifying that she did not recall missing much time other than perhaps taking a few sick days. She also recalled being on modified duties for a period of time after the First Accident, which did not require her to do any heavy lifting, principally cases of liquor in the storeroom or bottles of liquor when re-shelving stock.

[49] The plaintiff next saw Dr. Hayton on January 21, 2015, where his chart notes indicate that she was "slowly getting better" and was working on modified duties.

[50] In March 2015, Dr. Hayton noted that the plaintiff had good and bad days and noted her range of motion was "pretty limited" though he could not recall whether he simply accepted the plaintiff's description or assessed her range of motion himself.

[51] By April 1, 2015, Dr. Hayton again noted that the plaintiff was "slowly improving". Despite this improvement, Dr. Hayton completed a medical report in connection with this litigation on April 13, 2015, indicating that the plaintiff had

decreased range of motion in her neck and shoulders, a sore neck, and headaches. Shortly thereafter, in May 2015, Dr. Hayton noted that her range of motion was “much better”.

[52] In June 2015, the plaintiff reported ongoing neck soreness to Dr. Hayton. The plaintiff saw Dr. Hayton once in the summer of 2015, on July 16, where he noted that her neck range of motion was “still limited” and that she was having headaches.

Worsening Neck Pain and Cessation of Work in Fall 2015

[53] The plaintiff continued to work on modified duties for almost one year after the First Accident, albeit with some ongoing stiffness and pain in her neck and headaches. The plaintiff testified that at one point in September 2015, her neck seized up while she was at work. The plaintiff’s recollection of what she was doing when this occurred was vague and she could not recall any specific event that caused the onset of her neck pain at that time. She testified that she was at work at the start of the day, working in a supervisory role, when she started feeling neck pain, which progressed to the point that it became unbearable and she had to call in a replacement. She speculated that this may have been on account of being in the workplace for long hours, but such speculation is inconsistent with her evidence that the onset of pain occurred at the beginning of the work day, prior to store opening.

[54] The plaintiff saw Dr. Hayton on September 11, 2015, with complaints that her neck pain was “really bad”. However, his chart notes indicate that she reported she could continue working without heavy lifting.

[55] On September 14, 2015, the plaintiff went back to Dr. Hayton again complaining of a sore neck. Dr. Hayton considered the relatively sudden worsening of the plaintiff’s neck pain after periods of improvement surprising, noting in his chart that it was “kind of suspicious”, and he was concerned that the plaintiff may have meningitis. He also testified that in his experience as a family physician dealing with soft tissue injuries, what occurred with the plaintiff—sudden worsening of neck pain nine months after the First Accident—was uncommon. Dr. Hayton ordered an x-ray

of the plaintiff's neck and recommended she take some time off work, rest, and take medication.

[56] The plaintiff testified that she started feeling better and returned to work at the end of October 2015, still on modified duties. This is consistent with Dr. Hayton's chart notes, which indicate that she reported improvement with her neck and was intending to start a yoga class. On October 30, 2015, Dr. Hayton noted that while the plaintiff's neck was still sore and her range of motion limited, she was going back to work on partial duties and partial shifts. The plaintiff next saw Dr. Hayton on November 30, 2015, when he provided her with a note that she is not to do any lifting.

[57] The plaintiff testified that at some point in December 2015, she was at work when she suddenly felt extreme pain in her neck. The plaintiff could not recall specifically when this happened. When pressed on cross-examination to explain what she was doing at the time, the plaintiff testified that she could not recall the incident in December 2015 other than that the pain was worse than the September 2015 incident. She believed that she was working as a clerk on the floor, though she could not recall what task she was doing at the time when she said that the pain in her neck increased to the point that she was no longer able to do her duties.

[58] The plaintiff's evidence was that following the onset of neck pain in December 2015, she started wearing a neck brace that she borrowed from her mother. She did this on her own volition; this was not something that Dr. Hayton or any other physician recommended.

[59] The plaintiff saw Dr. Hayton on December 29, 2015. When asked about his recollection of this visit, Dr. Hayton testified that he was not aware of the plaintiff experiencing an incident at work where her neck seized up and her symptoms suddenly worsened. Dr. Hayton's chart notes for this visit simply indicate that "[h]er neck is really bad cant work uses neck brace she gets numb arms and her ROM is really bad. Will try some flexeril see what happens. Will use some Arthrotec as well".

[60] The plaintiff remained off work from December 2015 onwards. She saw Dr. Hayton on January 15, 2016 where he apparently recommended that she stop physiotherapy and noted that she was scheduled for an MRI and would stay off work until further notice. The plaintiff saw Dr. Hayton two weeks later where he provided her with a note for physiotherapy. She next saw him on February 18, 2016 for matters unrelated to the Accidents. Dr. Hayton's chart notes for this visit note that she is undergoing IVF with a surrogate in Nanaimo.

[61] The plaintiff's next visit with Dr. Hayton was on April 12, 2016, when she reported that her neck had both good and bad days. On that date, Dr. Hayton appears to have completed a British Columbia Public Service Agency form in furtherance of the LTD Application, in which he stated that the plaintiff's most disabling symptom was a "very sore neck"—the objective signs of which were decreased range of motion. Dr. Hayton also indicated that he had no expectations for the plaintiff to return to work at that time as she was awaiting an MRI. As to her current treatment, Dr. Hayton indicated "Pysio/NSAIDS/Time". He indicated that the plaintiff was unable to work because of her neck, but also indicating that her degree of limitation was "marked" for climbing, sitting, bending, lifting, and dexterity. Dr. Hayton could not recall if he relied solely on the plaintiff's self-reporting in completing this form, or if he assessed her himself. He also indicated that the plaintiff was unable to work because of her neck.

[62] The results of the plaintiff's MRI are reflected in Dr. Hayton's July 25, 2016, chart notes, where he stated:

MRI reviewed her MRI [sic] Isn't really bad at all. Her ROM is still [affected] In her neck and shoulders and arms . Advised to keep doing her own physio as much as she can and will unlikely be able to return to work. Form filled.

[63] On August 30, 2016, she reported to Dr. Hayton that she had been stiff the previous week but was a bit better that week, and that she was watering in the garden. She reported numbness, headaches, and that she could not enjoy her sports like fishing and golf.

[64] On September 12, 2016, Dr. Hayton provided the plaintiff with additional forms to the effect that her injuries from the First Accident were still preventing her from working. His evidence was that he relied on the plaintiff's assertions that this was the case in continuing to provide her with off-work notes.

The Second Accident

[65] The plaintiff was involved in a Second Accident on September 15, 2016. The plaintiff was driving over the Burrard Street bridge from her home in North Vancouver to a personal services appointment on Broadway in Vancouver when she was rear-ended. Her vehicle was pushed into the car in front of her; the airbags did not deploy. She was driving a 2007 Toyota Camry at the time, which was later determined to be a total write off.

[66] The plaintiff recalls being disoriented after the Second Accident. The plaintiff's mother picked her up from the site of the Second Accident, then took her back to her house. The plaintiff was feeling unwell, with pain in her right leg and hip, but did not require emergency medical care. The plaintiff testified that she hit her head on the steering wheel, which resulted in a bruise on her forehead.

The Plaintiff's Circumstances After the Second Accident

[67] The plaintiff testified that a limp in her right leg developed immediately after the Second Accident, along with groin and buttock pain that persists to present day. The plaintiff also testified that the day after the Second Accident, she started experiencing neck pain, pain in her stomach area, stiffness, weakness, nausea, and migraines. The plaintiff's testimony that she "started" experiencing neck pain the day after the Second Accident is difficult to reconcile with the fact that at the time, she remained off work, allegedly because of ongoing debilitating neck pain that she attributed to the First Accident.

[68] The plaintiff saw Dr. Hayton the day after the Second Accident, complaining of injury to her left knee, and reporting that she had hit her head on the steering wheel, had a sore neck and lower back, and that her neck range of motion was not

good. Dr. Hayton recommended that she ice her head and take Advil. The plaintiff returned to Dr. Hayton on September 30, 2016, reporting that she could hardly move and was “really stiff”.

[69] The plaintiff’s neck and hip remained sore in October 2016, but she obtained a note from Dr. Hayton for physiotherapy and, in November 2016, obtained a note saying she could swim. Dr. Hayton also ordered an MRI of her hip and lower back.

[70] In January 2017, the plaintiff reported to Dr. Hayton that she had started swimming once a week along with her physiotherapy, but that it “really put her back”. Dr. Hayton prescribed additional medications. His January 27, 2017, chart notes also indicated that he was aware she had been seeing a fertility clinic in Victoria, and that he made a further referral for her to Olive Fertility Centre.

[71] On February 23, 2017, Dr. Hayton also referred the plaintiff to Dr. Arezoo Azadi, a psychiatrist, “for her injuries sustained in two MVAs”.

[72] The plaintiff undertook physiotherapy after both Accidents and also worked with a kinesiologist after the Second Accident, who recommended that she engage in light fitness activities. The plaintiff testified that she did between 20–40 sessions at the Harry Gerome and Delbrook community centres, which included water exercises and stretching. The plaintiff also takes various medications as prescribed by Drs. Hayton and Azadi, along with Advil and Tylenol.

Cessation of Work and LTD Application

[73] The plaintiff initially stopped working on her own volition following the December 2015 incident when she testified that her neck suddenly seized up at work. She reported this to Dr. Hayton, who provided her with a note that she could not work because of her neck pain, and then continued to do so from that point onwards.

[74] A review of Dr. Hayton’s chart notes, taken together with his evidence at trial, confirm that these notes were provided despite him having little to no understanding

of the plaintiff's job duties and how her physical limitations impacted her ability to perform those duties, and with minimal steps taken by Dr. Hayton to examine the plaintiff or otherwise attempt to objectively verify the plaintiff's subjective reporting of her pain, physical limitations, and resulting inability to return to work. Indeed, Dr. Hayton admitted under cross-examination that he was unaware of what her job duties were at the time. This is demonstrative of a concerning pattern of conduct by Dr. Hayton in which he provided the plaintiff with off-work notes even when it became apparent that he did not have an accurate understanding of her current job duties or whether there were accommodations or modifications available to enable her to work.

[75] The plaintiff received short term illness and injury ("STIIP") benefits through her employer from December 2015 to June 10, 2016. The plaintiff's last day of paid employment with the LDB (via STIIP) was June 10, 2016. In November 2016, the plaintiff was advised that she had received a STIIP overpayment of \$8,000. She has not yet repaid those funds.

[76] On July 25, 2016, Dr. Hayton completed a form for Great West Life indicating that the plaintiff was suffering from "[m]oderate to severe pain/numbness/decreased range of motion" and that she was "unable to stand/sit/lift too long". He also indicated that "[p]hysio has been done with some success. More physio may be prescribed". Dr. Hayton indicated that there were no psychological factors contributing to or prolonging the plaintiff's recovery. Dr. Hayton declined to provide a date by which the plaintiff would be suitable to start a return to work program and the number of hours/days per week she would be capable of working. Instead, he noted: "[u]nlikely to be able to return to work at previous employer. Suggest re-training program".

[77] As of September 12, 2016, Dr. Hayton's chart indicates "[i]njuries still preventing her from working forms filled re this". Dr. Hayton testified that he relied on the plaintiff's assertions that she was unable to work due to her injuries in continuing to provide her with these forms.

[78] On May 2, 2016, the plaintiff submitted the LTD Application for “constant neck pain and limited range of motion”. She claimed long-term disability benefits for the period starting on June 21, 2016, after her STIIP ended. Great West Life denied the plaintiff’s application on August 24, 2016. It could not conclude that “the evidence submitted was sufficient to support a continuous period of being totally disabled”. The plaintiff appealed and proceeded to a claims review hearing in February 2017, which resulted in the CRC Report.

[79] The plaintiff reported the results of the CRC Report to Dr. Hayton. This is reflected in his February 8, 2017, chart note, which also noted the lack of findings on her MRI: “Had workplace evaluation they said she should be at work. Had her MRI which showed little”. On February 18, 2017, Dr. Hayton again noted that “[t]he public review says [the plaintiff] wasn’t totally disabled” but he nonetheless continued to provide her with off-work notes.

[80] Dr. Hayton’s chart notes also show that the plaintiff kept him apprised of her employer’s requests for information about her prognosis, the 2017 functional capacity assessment that resulted in the CRC Report, her impending termination in 2018, and her union’s requests for information in furtherance of a potential grievance.

[81] The plaintiff testified that in March 2017, the LDB requested that she return to work full time, full duties, but she did not do so because she was not able to. She testified that Dr. Hayton and her physiatrist, Dr. Azadi, said she was not capable of returning to work in any capacity. Dr. Hayton apparently remained of the view, based on the plaintiff’s reports of pain and disability, that she was unable to work. By way of example, Dr. Hayton noted the following on March 30, 2017:

Doing some aquafit on her own her leg and her neck get sore will take a break and Liquor store wants her back at work on Monday. She cant do that. They are moving towards possible termination . ? The medical panel she went to was to see if she could have been BTW LAST March She is still not able to work due to her injuries.

[82] Dr. Hayton’s next encounters with the plaintiff were on May 18 and 19, 2017, when his chart notes indicate that he completed disability forms for her. There is no indication that Dr. Hayton undertook an updated assessment of the plaintiff’s condition or understanding of her job duties or available accommodations prior to completing those forms.

[83] On July 5, 2017, the plaintiff applied for Canada Pension Plan benefits. Her application was denied on November 23, 2017, on the basis that the plaintiff did not “have a disability that is both severe and prolonged as defined under the CPP legislation” (emphasis in original). The pension adjudicator determined that the plaintiff remained capable of performing some type of work, as her injuries were mild and she was actively participating in treatment. The plaintiff sought reconsideration, which was also denied on May 8, 2018. Dr. Hayton provided medical reports for both applications.

[84] In 2019, the plaintiff successfully applied for Canada Pension Plan benefits, retroactive from August 2016. She currently receives benefits of \$1,100 per month.

Efforts to Conceive Via Surrogacy

[85] Despite the plaintiff’s ongoing pain and physical limitations after the First Accident, she persisted in her efforts to conceive a child via surrogacy between the First and Second Accidents, and her efforts in this regard continued into the summer of 2017.

[86] The plaintiff’s recollection of the fertility treatments she underwent personally and her efforts at in vitro fertilization (“IVF”) through her surrogate was vague, at best. For example, she could not recall when she had her first egg retrieval, when the first embryo was transferred to her surrogate, or when the last attempted transfer took place. The plaintiff’s inability to recall such events was surprising given how important conceiving a child was to her and the associated personal, physical, and monetary costs she was incurring—the latter of which she testified was in the tens of thousands of dollars.

[87] Nonetheless, the limited details the plaintiff did recall, contemporaneous documentation, and Mr. Giassemis's evidence establishes that in the summer of 2015, the plaintiff found a surrogate in Nanaimo and was attending a fertility clinic in Victoria.

[88] Further and despite the alleged sudden onset of debilitating neck pain in September and again in December 2015, the plaintiff underwent multiple procedures in furtherance of surrogacy from September 2015 through November 2016. On September 22, 2015, she had blood work done; she took medications and injections in anticipation of an egg retrieval in the fall of 2015; she had further bloodwork done on November 20, 2015; and underwent an egg retrieval procedure on December 1, 2015.

[89] Mr. Giassemis also testified that he recalled taking the ferry to Vancouver Island four to five times after the First Accident, and that there were additional times when the plaintiff went without him. This is consistent with Dr. Hayton's charts, which included a notation indicating that in February 2016, the plaintiff was doing IVF with her surrogate in Nanaimo. Mr. Giassemis recalled that they pursued four to five cycles of IVF. This is consistent with the plaintiff's admission on cross-examination that she underwent five IVF cycles with the Victoria fertility clinic that resulted in the creation of four embryos, which were transferred to the surrogate over two cycles. Unfortunately, no pregnancy resulted.

[90] The plaintiff testified that while she was still considering surrogacy after the Second Accident, she came to realize by the spring of 2017 that her limitations may prevent her from having children. However, she admitted under cross-examination that she obtained a referral from Dr. Hayton to Olive Fertility Centre and continued to pursue surrogacy into the summer of 2017.

[91] On July 24, 2017, the plaintiff attended Olive Fertility Centre to explore further options to conceive via surrogate, using either her own or donor eggs. The plaintiff testified that had the second opinion from Olive Fertility Centre been favourable, she would likely have proceeded with additional IVF efforts. She also agreed that

following her consultation with Olive Fertility Centre, she intended to speak further with her husband about whether to try further attempts with her own eggs or move to using donor eggs.

[92] The plaintiff does not appear to have disclosed her ongoing efforts to conceive via surrogacy with her treating physiatrist, Dr. Azadi. Nor did the plaintiff disclose her surrogacy efforts as part of the medical history she provided to the physicians who assessed her in connection with this litigation, namely Drs. Rhonda Shuckett and Giantomaso. The plaintiff's older sister, Fanoula Arvanitis, was also unaware that the plaintiff was pursuing fertility treatments in Victoria.

The Plaintiff's Condition at Trial

[93] The plaintiff testified that the Accidents have had a significant ongoing impact on her life. While some aspects of her symptoms have improved, others have levelled off but are "still there". She testified that she does not have as much pain on a daily basis anymore and that the pain in her neck has reduced. However, she still experiences migraine headaches, her range of motion is quite limited, and she still has pain in her right hip and lower back/buttocks. As a result, she testified that her balance is poor. Overall, her tolerance for activity is considerably lessened from what it was pre-Accidents, though she tries to manage as best she can.

[94] The plaintiff described waking up on a typical day and doing her exercises, which she finds slow and exhausting. She manages the tasks she has to do each day with her abilities. She finds overexerting herself leads to a worsening of her symptoms, meaning she experiences pain, headache or stiffness, dizziness, and nausea. She testified that she has fainted on occasion. However, the plaintiff admitted that when her hip pain does increase, it no longer lasts for many weeks as it used to.

[95] The plaintiff testified that she presently has difficulty sitting for extended periods of time. How long she can sit varies depending on the day from 20 to 60 minutes. She testified that she can stand for up to two hours and walk for up to an hour without a break. The plaintiff is able to use a computer for 30 minutes before

doing so aggravates her headaches. She cannot focus for long periods of time, with some days being better than others. The plaintiff also testified that she continues to experience nausea and dizziness, which occurs about two to three times a month.

[96] The plaintiff is able to do errands on her own, including light grocery shopping, and goes to various community centres in Vancouver and North Vancouver to exercise. She is able to carry ten pounds for short distances, vacuum on a daily basis, cook light meals, set and clear the table for meals, wash dishes, and navigate up and down the stairs in her home.

[97] The plaintiff is able to drive her vehicle, including for lengthy periods of time when required. For example, she was able to travel repeatedly to Vancouver Island for surrogacy appointments, she was driving from her home in North Vancouver to the west side of Vancouver at the time of the Second Accident, and she drove through heavy traffic for 60–70 minutes to attend the assessment with Mr. Gander on January 31, 2022. The plaintiff has also been able to travel for vacations since the Accidents. She travelled to Hawaii with her sister, and to Mexico and Banff with Mr. Giassemis.

[98] The plaintiff is able to participate, though at lesser frequency and intensity, in some of the pre-Accident activities she enjoyed, including raising budgies, going boating on her husband's boat (but not actively fishing), moderate hiking on groomed trails in Lynn Valley, and walking with her friends and family. Fanoula Arvanitis testified that she and the plaintiff continue to go for walks at local beaches, on the West Vancouver sea wall, at the parks near the University of British Columbia, and at Jericho beach, but is considerably slower moving than previously. The plaintiff now walks with a limp and testified that she cannot do "extreme" hiking, bike, or golf like she used to.

Impacts on Family and Social Relationships

[99] The plaintiff testified that she experiences frequent bad moods and frustration that she can no longer do the things she wants to do or used to be able to do. She testified that she no longer enjoys socializing with her family and friends because

she finds it exhausting and it aggravates her symptoms, and takes time for her to recover. However, the plaintiff does still socialize with friends and family. Her cousin, Teresa Amaral, testified that in March 2022, she met the plaintiff for lunch at a restaurant in Burnaby where they sat for 1.5 to two hours, with the plaintiff getting up once to use the washroom. Fanoula Arvanitis and Mr. Kramer also testified to socializing with the plaintiff in various respects following the Accidents.

[100] The plaintiff's injuries have caused difficulties in her marriage. She testified that she and Mr. Giassemis now have more frequent arguments, there is increased stress in their marriage, and Mr. Giassemis feels the burden on him has increased because of the plaintiff's inability to contribute to household and financial responsibility as she used to. The plaintiff and Mr. Giassemis's intimate life is now more limited in frequency than previously; the plaintiff finds intercourse painful and not enjoyable. The plaintiff testified that they now argue frequently and have discussed separation or divorce.

Expert Evidence – Medical Diagnosis and Functional Capacity

[101] The plaintiff tendered reports from four medical experts: Dr. Shuckett, a rheumatologist; Dr. Azadi, a physiatrist; Dr. Hayton, her general practitioner; and Dr. Giantomaso, a physiatrist retained by the defendants. The plaintiff also tendered the report of Mr. Gander, an occupational therapist and expert in work capacity evaluation.

[102] The weight to be given to the opinion of an expert depends on the degree to which the underlying assumptions have been proven by other admissible evidence: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40. The opinion evidence proffered by the experts in this case relies heavily on the plaintiff's description of her symptoms. Where the plaintiff's description of their symptoms is unreliable, the opinion of the expert will be unreliable and, therefore, should be given less weight: *Wettlaufer v. Air Transat A.T. Inc.*, 2013 BCSC 1245 at para. 49.

[103] The importance of the plaintiff's reliability and credibility in reporting their symptoms to the usefulness of an expert's report was described by Chief Justice

Wilson in *Leonard v. British Columbia Hydro and Power Authority*, 49 D.L.R. (2d) 422 at 424–425, 1964 CanLII 485 (B.C.S.C.), as cited in *Wettlaufer* at para. 50, as follows:

... The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to rejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[emphasis added]

[104] In my view, this case falls within the circumstances described by Wilson C.J.S.C. in *Leonard*. The plaintiff's lack of credibility and reliability in providing her medical history, the injuries she suffered, the ongoing sequelae of pain resulting therefrom, and her functional capacity post-Accidents has significantly and negatively impacted her ability to prove the facts and assumptions underlying the expert evidence on which she relies. Her tendency to amplify her pain on assessment, and her failure to provide complete and accurate medical histories to the experts who assessed her in connection with this litigation significantly undermines the weight that can be given their opinions on both causation and the nature, extent, and duration of the plaintiff's injuries and chronic pain.

Dr. Hayton – General Practitioner

[105] Dr. Hayton is the plaintiff's general practitioner and was qualified to give opinion evidence in the area of general practice, including family medicine. Dr. Hayton prepared two reports dated August 23, 2017 ("2017 Report"), and January 24, 2022 ("2022 Report").

[106] Neither of Dr. Hayton's reports set out the facts or assumptions upon which his opinions are based. The 2017 Report makes the overarching assertion that it is "based my report on my knowledge of this person as a patient, my chart records on the patient and my memory of my interactions with the patient". An assertion of this nature does not comply with the requirements of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 for expert reports and is wholly insufficient, as it leaves me unable to determine whether the factual foundation for his opinion has been established on the evidence before me. This is further complicated by Dr. Hayton's significant reliance on and acceptance of the plaintiff's subjective complaints of pain and my finding as to the lack of credibility and reliability of that evidence.

[107] The 2017 Report diagnoses the plaintiff as suffering "soft tissue injuries (Whiplash like) causing her to have headaches and neck and back and shoulder pain" from the First Accident. Dr. Hayton prescribed physiotherapy, Tylenol, Advil, and muscle relaxants. He noted that he saw her a few weeks later and that she reported improvement and had returned to work with modified duties. Dr. Hayton goes on to state that he saw the plaintiff regularly over the following nine months.

[108] The 2017 Report did not address the plaintiff's sudden onset of worsening and debilitating neck pain in December 2015. He only referred to the September 2015 incident, following which the plaintiff returned to work, saying this:

Unfortunately her injuries were severe enough to make it impossible for her to continue to work at her job with the Liquor Board. Her job entailed some heavy lifting which she was unable to do due to her injuries. An xray [sic] of her neck in September of 2015 revealed some degenerative changes and cervical spasm likely due to her soft tissue injuries from her MVA.

[109] Dr. Hayton's reference to September 2015 as the material point in time for the onset of the plaintiff's debilitating neck pain is not consistent with the plaintiff's evidence at trial. Her evidence was that the December 2015 seizing occurrence was more serious and debilitating than what occurred in September.

[110] Dr. Hayton's description of the plaintiff's job duties at the time also appears to be predicated on a misunderstanding of the nature of her job duties, specifically that

she was required to do heavy lifting. Despite noting that the plaintiff had returned to work for nine months on modified duties after the First Accident and the plaintiff's evidence that those modified duties did not include heavy lifting, Dr. Hayton appears to have predicated his opinion that she was unable to do her job as of December 2015 at least in part on her job duties including heavy lifting. Thus, in addition to the multitude of other issues with the 2017 Report, it is also internally inconsistent.

[111] More importantly, Dr. Hayton's chart notes do not support the causative link between the sudden worsening of the plaintiff's neck pain in the fall of 2015 that he drew in both his 2017 and 2022 Reports. As noted above, he testified that at the time, he found the sudden worsening of pain surprising and inconsistent with the expected progression of her injuries and was worried that it might be indicative of meningitis.

[112] Dr. Hayton opined in his 2017 Report that the plaintiff was "unable to work, and her activities of daily living and ability to due [sic] house work or enjoy extracurricular activities were all severely impaired". He also noted that a June 2016 MRI of the plaintiff's neck "did not reveal anything sinister which would cause her symptoms however soft tissue Whip Lash [sic] like injuries do not show up on MRIs". He thus advised the plaintiff that "her injuries may affect her employability, ability to enjoy extracurricular activities, perform her house hold chores and activities of daily living in the future".

[113] As to the Second Accident, Dr. Hayton's 2017 Report said this:

Unfortunately on September 16th of 2016 [the plaintiff] came to my office where she described the events of a sever [sic] MVA she had been involved in the night before. She was driving her Toyota Camry when she was rear-ended by another vehicle. Her forehead hit the steering wheel which occurs with this type of accident and she injured her Left leg and again severely strained her neck, back and hips as her body was flung back and then forward due to the severity of the impact. Her car was towed from the scene and later 'written off'. She was very nauseated in my office that day due to her pain. I examined her and found her to be very banged up and diagnosed her with soft tissue injuries (Whiplash like) to her neck and back and soft tissue injuries to her hips and lower body as well. I prescribed Advil and manual therapy and rest to see if her injuries would improve. I saw [the plaintiff] over the next year on numerous occasions in my office as I followed

her attempt to recover from her injuries. She followed my directions very well. An MRI of her hip did not reveal any fracture or ligament or tendon tear however MRIs do not [sic] show all soft tissue injuries. [The plaintiff] was unable to work due to her injuries and her injuries also impacted [the plaintiff's] activities of daily living ability to enjoy her extracurricular activities, and her ability to do her household chores.

[114] Regarding the plaintiff's prognosis, Dr. Hayton opined in the 2017 Report that "due to her MVA related injuries", there is a significant chance that the plaintiff's future employability, ability to enjoy extracurricular activities, and do household chores and activities of daily living will all be "significantly affected" and that the plaintiff had been "unable to work at the Liquor Board since December of 2015 due to [the First Accident]".

[115] Dr. Hayton provided the 2022 Report based on a review of the 2017 Report, his chart notes, and Dr. Shuckett's report, among other materials. The 2022 Report adds little. Dr. Hayton provides conclusory opinions devoid of any factual foundation, detail or explanation. For example, the 2022 Report opines that:

My most appropriate diagnosis for [the plaintiff's] symptoms are Soft Tissue Injuries that were sustained in both of [the Accidents] and her symptoms include chronic pain in the areas injured. It is my opinion that [the plaintiff's] condition arose from [the Accidents] and that [the Accidents] are responsible for the entire extent of her injuries.

...

It is my opinion that the conditions that are a result of [the Accidents] have significantly limited her activities of daily living, employability, household duties and recreational activities. At this point, 5 1/2 years since [the Second Accident] and my knowledge of [the plaintiff's] medical condition in my opinion her activities of daily living, employability (including all types of occupations), household duties and recreational activities will be affected adversely in the future which could be for the rest of [the plaintiff's] life.

[116] As to her future employment prospects, Dr. Hayton opines in the 2022 Report as follows:

With respect to [the plaintiff's] previous job with the Liquor Distribution Branch it is my opinion that she has been totally disabled from this job since her December 21 2015 MVA.

[117] It was suggested that the “December 21, 2015 MVA” date in the above-noted excerpt was a mistake, that Dr. Hayton intended to opine that the plaintiff had been totally disabled since the First Accident on December 28, 2014. I do not accept this explanation. As Dr. Hayton noted in his 2017 Report, the plaintiff returned to work full time on modified duties for nine months after the First Accident. She could not, therefore, have been totally disabled from December 2014 onward. It was only after the alleged sudden onset of debilitating neck pain in December 2015 that the plaintiff never again returned to work at the LDB.

[118] It also became apparent over the course of cross-examination that Dr. Hayton’s practice in terms of assessing the plaintiff, making clinical notes, and drafting his two reports was not careful, comprehensive, or consistent. The 2017 Report described the First Accident as more significant than reflected in his clinical notes or the plaintiff’s testimony. He described it as being “serious” and said that it “jarred her entire body very severely”, yet neither of these statements are reflected in his clinical notes from the plaintiff’s January 2, 2015, consultation following the First Accident. Dr. Hayton also opined that in 2016, the plaintiff “suffered severely” from, among other things, shoulder pain “due to her MVA” despite there being no mention of shoulder pain in his clinical notes for the relevant timeframe.

[119] Dr. Hayton’s reports were also inconsistent in material respects with other medical documentation he purported to review in forming his opinion. By way of example, the 2017 Report stated that “An xray [sic] of her neck in September of 2015 revealed some degenerative changes and cervical spasm likely due to her soft tissue injuries from her MVA”. Dr. Hayton’s September 22, 2015, clinical notes make no mention of cervical spasms. Dr. Hayton acknowledged that this was an overstatement as the underlying x-ray report noted “[m]ild to moderate cervical spondylotic changes” and gave a final impression of “[m]ild cervical spondylosis”. When confronted in cross-examination with the fact that the x-ray report made no mention of cervical spasms, he became defensive, resisted any concession that it did not note cervical spasms, and attempted to justify the comment in his report by testifying outside his area of expertise and speculating that the x-ray did show such

changes and that some radiologists might be able to glean cervical spasms from an x-ray.

[120] Dr. Hayton attempted to explain other inconsistencies between his reports and clinical notes by saying he relied on his memory of the plaintiff when drafting his reports. This does not explain all of the inconsistencies, but in any event, Dr. Hayton's memory of the plaintiff was proven to be poor, and I do not accept this explanation. By way of but one example, when asked about a reference to fertility counselling in the 2017 Report, Dr. Hayton said that he could not recall why the plaintiff was having difficulties getting pregnant and testified that he advised her to try to get pregnant at a certain time of her menstrual cycle. When it was put to him in cross-examination that the reason the plaintiff could not get pregnant was because she had had a hysterectomy, he maintained that it was still possible she could have carried a child if it was only a partial hysterectomy. Only after being confronted with the plaintiff's chart did he finally concede that she had in fact had a hysterectomy, and admit that—contrary to his earlier testimony—he had not given her advice about trying to time her pregnancy with her menstrual cycle.

[121] Dr. Hayton also failed to distinguish whether the injuries he opined were caused by the First Accident and the Second Accident. The plaintiff conceded in oral argument that this limits the usefulness of his opinion to the Court. This is particularly the case when considered in addition to the multitude of other issues arising with Dr. Hayton's evidence outlined above.

[122] I have carefully considered Dr. Hayton's two reports and *viva voce* testimony and concluded that his opinion evidence ought to be given no weight. Both of Dr. Hayton's reports contained instances of advocacy and material inconsistencies with his clinical notes and the preponderance of the evidence before me. Dr. Hayton's testimony was replete with errors and instances of embellishment, speculation and advocacy.

[123] In particular, I do not accept Dr. Hayton's evidence that from the First Accident onwards, the plaintiff was unable to return to work in any capacity. In

forming this opinion, Dr. Hayton appears to have relied almost entirely on the plaintiff's subjective reports of pain and limitations and did so without having an accurate understanding of her actual job duties or what accommodations may be available to her to enable her to return to work in either a full- or part-time capacity.

Dr. Azadi – Psychiatrist

[124] Dr. Azadi was the plaintiff's treating psychiatrist and was qualified to give expert opinion evidence in the area of physical medicine and rehabilitation, specifically the diagnosis, prognosis, and treatment of chronic pain. In her capacity as treating psychiatrist, Dr. Azadi saw the plaintiff on multiple instances from July 17, 2017, through February 2, 2022. She prepared a report dated March 30, 2022, which was based on her review of her clinical records for the plaintiff.

[125] Dr. Azadi's prognosis for the plaintiff was guarded. She opined that the plaintiff's symptoms are chronic and the chance of resolution is unlikely. Dr. Azadi opined that the plaintiff will continue to deal with pain and that it is likely her current function will be her new baseline for function in the foreseeable future. The plaintiff is expected to have ongoing difficulty with repetitive activities and any physically demanding jobs. She also expects the plaintiff to have limitations regarding repetitive house chores, yard work, and heavy or seasonal household work. Dr. Azadi opined that the plaintiff would benefit from attending a multidisciplinary pain clinic.

[126] For the reasons set out below, I give Dr. Azadi's opinion no weight. First, and like the other experts who testified, Dr. Azadi relied on the truthfulness and accuracy of the plaintiff's self-reported history in forming her opinions. This significantly limits the weight that can be given to her opinions as a result of my negative finding as to the credibility and reliability of the plaintiff's evidence. Dr. Azadi appears to have essentially formed her opinion that the plaintiff could not return to work based predominantly on the amount of pain the plaintiff described and without an accurate understanding of her job duties or available accommodations or modifications.

[127] Dr. Azadi's report also failed to set out the facts and assumptions underlying her opinion, and she had difficulty identifying them in her *viva voce* evidence. This

renders me unable to determine whether the facts upon which her opinion was based were in fact established on the evidence before me. Dr. Azadi was also unaware of important aspects of the plaintiff's medical and work history. She was not aware of the plaintiff's 2003 Accident and resulting neck pain, the December 2015 incident where the plaintiff's neck seized at work and that resulted in her stopping work, the plaintiff's ongoing efforts to pursue surrogacy after the Accidents, what modified job duties were available to the plaintiff, or whether or not the plaintiff had attempted to work with modified duties after the Accidents.

[128] Additionally, the very limited factual foundation discernible from Dr. Azadi's report was proven to be incorrect in multiple instances. Dr. Azadi's opinion that the plaintiff's right hip injury was "likely related" to the First Accident is demonstrably incorrect. The plaintiff testified that she did not suffer any injury to her right leg or hip in the First Accident. Further, her basis for attributing the plaintiff's neck pain to the First Accident was predicated on the plaintiff not having neck pain prior to the Accident. This is incorrect: the plaintiff experienced prior neck pain from the 2003 Accident and the 2006 Workplace Injury.

[129] Dr. Azadi also attempted to explain the plaintiff's symptoms in a manner that was not consistent with the plaintiff's own evidence, including in testifying that the plaintiff's labral tear was caused by the First Accident when the uncontroverted evidence was that this injury resulted from the Second Accident. Dr. Azadi also speculated that the plaintiff may have experienced pain in her arm when lifting at work, despite the plaintiff being on modified duties that did not require her to lift at all material times from her return to work after the First Accident to December 2015 when she ceased work entirely.

[130] Dr. Azadi was the only physician who suggested that the numbness in the plaintiff's arms could be caused by the Accidents, but she did not provide a definitive diagnosis. Rather, she opined that what she diagnosed as bilateral arm paresthesia was "[l]ikely somatic referral pain from myofascial pain syndrome or nonspecific thoracic outlet syndrome, also likely related to her injuries sustained from her motor

vehicle accidents of 2014/2016” (emphasis added). The basis for this opinion is not apparent in the report, which is particularly troubling given that the plaintiff underwent electrodiagnostic studies in 2018, 2019, and 2021, all of which reported normal results. Dr. Azadi’s opinion in this regard is also inconsistent with Dr. Shuckett’s opinion that the plaintiff’s arm numbness was likely orthostatic in nature, and Dr. Azadi agreed in cross-examination that she would defer to Dr. Shuckett on whether, if the plaintiff did in fact have thoracic outlet syndrome, it was related to the Accidents.

[131] Finally, Dr. Azadi demonstrated a tendency to advocate on behalf of the plaintiff. She was also argumentative at times and opined in areas outside of her expertise, including diagnosing the plaintiff with anxiety and opining on whether she would benefit from anti-depressants or anti-anxiety medication.

[132] In light of the cumulative effect of the deficiencies in Dr. Azadi’s report and evidence at trial, and bearing in mind that she also relied on the veracity and accuracy of the plaintiff’s reported pain and limitations, I give her opinion no weight.

Dr. Shuckett – Rheumatologist

[133] Dr. Shuckett is a rheumatologist and was qualified to provide opinion evidence in the area of rheumatology. Dr. Shuckett assessed the plaintiff on March 5, 2019, and provided a report dated June 10, 2019. She conducted a physical examination of the plaintiff with a focus on musculoskeletal examination, interviewed the plaintiff, and reviewed medical records.

[134] Dr. Shuckett opined that the plaintiff suffered a soft tissue injury to her neck and shoulder girdle areas from the Accidents, which she believes likely started with the First Accident and worsened with the Second Accident. She also opined that the plaintiff suffered back pain, pain in her right groin and buttock, labral tear, and right sacroiliac strain injury resulting from the Second Accident.

[135] Dr. Shuckett was unable to arrive at a definitive diagnosis with respect to the plaintiff’s shoulder injury, particularly shoulder impingement, because the necessary

tests either could not be done, or were equivocal. She also deferred any diagnosis regarding the plaintiff's headaches or post-concussion syndrome to a neurologist.

[136] With respect to the plaintiff's complaints of dizziness, Dr. Shuckett agreed on cross-examination that those symptoms were probably orthostatic-related, namely caused by orthostatic blood pressure issues. Notably, she did not definitively attribute the plaintiff's dizziness to the Accidents. Dr. Shuckett's report also indicated that at the time of her assessment in March 2019, the plaintiff "denied numbness or tingling".

[137] Dr. Shuckett found that as a result of her "widespread pain index and symptom severity score", the plaintiff met the criteria for a diagnosis of fibromyalgia and also opined that she has central pain sensitization operative in her presentation. The weight that can be given to Dr. Shuckett's opinion in this regard is significantly undermined by my finding that the plaintiff tended to amplify her pain presentation on assessment. Dr. Shuckett was unable to explain much of her reasoning that formed the basis of the plaintiff's diagnosis and her reliance on out-of-date diagnostic criteria for fibromyalgia. Dr. Shuckett chose—and sought to justify her choice—to use the 1990 and 2010 criteria, despite acknowledging the new and authoritative 2016 update. Further, her conclusions regarding tender points, widespread pain index scoring, and symptom severity scale scoring were inconsistent with the plaintiff's presentation.

[138] Finally, Dr. Shuckett deferred to a mental health specialist to determine whether there may be an element of somatic symptom disorder. Further, while she suspected that there may be emotional health issues participating in the plaintiff's pain, she did not make a diagnosis of clinical depression; Dr. Shuckett again deferred to a properly qualified mental health practitioner to make this diagnosis. No opinion evidence was tendered by either party regarding the plaintiff's mental health.

[139] Dr. Shuckett's opinion as to the plaintiff's prognosis was guarded. She opined that the plaintiff was unlikely to significantly improve, that there was a significant chance she would not return to the workforce, and that her limitations with sitting

would render a desk job difficult for her. Dr. Shuckett recommended that the plaintiff attend a multidisciplinary pain clinic.

[140] As was the case with the other experts who testified, Dr. Shuckett assumed that the history provided by the plaintiff and her reported pain and limitations were true and accurate. By consequence, Dr. Shuckett's opinion was predicated on facts and assumptions that were not proven on the evidence, which significantly decreases the weight that can be given to it. For example, Dr. Shuckett:

- a) Does not appear to have had an accurate understanding of the plaintiff's job duties prior to the First Accident; she assumed the plaintiff did clerical work and "heavy lifting in the warehouse". While those were components of the plaintiff's job, this description is not consistent with the plaintiff's evidence about what her job duties as a clerk entailed prior to the First Accident, let alone her modified duties post-First Accident;
- b) Assumed that the plaintiff was off work for most of the first nine months after the First Accident. This is not correct; the plaintiff returned to work after the First Accident and worked full time with modified duties until December 2015;
- c) Understood that the plaintiff did not have any musculoskeletal issues of any note before the Accidents and did not suffer any injuries of note in her prior accidents. Dr. Shuckett does not appear to have been aware of the 2003 Accident or the plaintiff's 2006 Workplace Injury, both of which involved musculoskeletal injuries, or that the plaintiff's injuries from the 2003 Accident persisted for years thereafter;
- d) Assumed that the plaintiff could not vacuum and that it is too difficult for her to cook meals. This is inconsistent with the plaintiff's own evidence that she can cook meals and her and Mr. Giassemis's evidence that she can and does vacuum. Indeed, Mr. Giassemis testified that the plaintiff likes to vacuum every day; and

- e) Understood that the plaintiff had not had any prior workplace injuries. This is demonstrably inconsistent with the proven facts, which established that the plaintiff suffered three prior workplace injuries.

[141] Moreover, Dr. Shuckett's prognosis for the plaintiff, in particular her opinion that she had reached maximum medical improvement and that there was a significant chance that she was unlikely to get back to her original state, was not born out on the evidence. The plaintiff's own evidence demonstrated improvement in her symptoms and ability to endure periods of walking and sitting from when she was assessed by Dr. Shuckett in March 2019 to the time of trial. The plaintiff's functional capacity also appears to have improved from what she reported to Dr. Shuckett by March 2022 when she underwent the functional capacity assessment with Mr. Gander.

[142] As such, I accept Dr. Shuckett's opinion that the plaintiff suffered soft tissue injuries to her neck and shoulder girdle areas that started from the First Accident and were exacerbated by the Second Accident, and that the plaintiff suffered back, right groin, and buttock pain, and a right sacroiliac strain injury from the Second Accident. I also accept Dr. Shuckett's opinion that the plaintiff's dizziness is likely caused by orthostatic blood pressure issues, which she did not attribute to the Accidents. I accept Dr. Shuckett's diagnosis of fibromyalgia and conclusion that the plaintiff suffers from some chronic pain, though not to the extent reported. I do not accept Dr. Shuckett's opinion that there is a significant chance that the plaintiff will not return to the workforce.

Dr. Giantomaso – Psychiatrist

[143] Dr. Giantomaso is a psychiatrist and was qualified to provide opinion evidence in the area of the diagnosis, prognosis, and treatment of chronic pain from concussions or musculoskeletal injuries. Dr. Giantomaso assessed the plaintiff on March 11, 2022, and prepared a report dated March 18, 2022. He conducted a physical examination of the plaintiff, interviewed her, and reviewed some of her medical records. Dr. Giantomaso assumed that the information contained in the

medical and clinical reports he reviewed and the history given to him by the plaintiff were accurate and that she made an honest effort in his physical examination.

[144] The history provided by the plaintiff to Dr. Giantomaso regarding her injuries and return to work following the First Accident was brief, lacking in material details, and inaccurate in material respects. In particular, the plaintiff does not appear to have disclosed to Dr. Giantomaso that she returned to work for nine months on modified duties following the First Accident, or the sudden onset of debilitating neck pain in December 2015. Nor does she appear to have disclosed the fact of her 2003 Accident and resulting neck injuries, as the “past pain history” section of Dr. Giantomaso’s report notes “[t]here is no prior history of concussion, neck, upper back, low back or hip pain”. Nor does it appear that the plaintiff disclosed her ongoing efforts to pursue surrogacy and the medical procedures and treatment she underwent in furtherance of that process from at least December 2015 to July 2017.

[145] The factual assumptions underlying Dr. Giantomaso’s report are also materially inaccurate and inconsistent with the preponderance of the evidence, including the plaintiff’s own evidence, as to her attempt (or lack thereof) to return to work after the Second Accident. Whether this is on account of the plaintiff’s self-reporting or due to error on his part is not clear. In this regard, Dr. Giantomaso’s report is predicated on the inaccurate assumption that the plaintiff did in fact return to work after the Second Accident, as evidenced in the following passage:

... After the second accident she missed days here and there and continued trying to work but her neck and hip pain slowed her down to the point that she was eventually let go from her work and has not been able to return to work for several years. She has no plans to return to work.

[146] These material omissions from the plaintiff’s medical history and ability to return to work between the two Accidents undermine and significantly lessen the weight that can be given to Dr. Giantomaso’s opinion that the injuries he diagnosed were “directly causally related to the motor vehicle collisions in question and are not otherwise pre-existing”.

[147] With respect to his observations and examination of the plaintiff, Dr. Giantomaso's report noted that he did not observe any overt pain behaviours during the history-taking portion of his assessment. However, he noted the following significant pain behaviours and findings on physical assessment:

- a) "She moved slowly and some aspects of the physical exam such as shoulder examination and hip examination were essentially impossible due to her basically locking and fighting against a proper examination";
- b) Strength examination was hard to test because she demonstrated "quite an extreme pain response to even active resistance in the hips and shoulders";
- c) Gait examination was difficult to test because "[s]he put hardly any weight through her right leg at all and on the date of the examination [March 11, 2022] she was essentially hopping on one leg almost";
- d) "She moved very stiffly and had a significant shoulder-hiked posture. She put barely any weight through the right leg"; and
- e) "Hip examination was difficult to perform due to an extreme pain response".

[148] As to the plaintiff's gait specifically, Dr. Giantomaso recalled she could not weight bear and barely put any pressure on her right leg and, as noted above, testified that he believed the plaintiff used a cane. He also testified that he could not test her right leg without an "extreme pain response". When pressed about the cane, he fairly conceded that while he could not be absolutely certain she used one, he believed she was using some form of assisted walking device, or used the walls and was hopping on one leg. He again testified that he remembered the plaintiff's case because it was so abnormal.

[149] Dr. Giantomaso testified that he recalled the plaintiff well because there was a lot of amplification of pain, including significant pain responses that would be

considered quite severe and very significant restriction of range of motion in multiple body areas, and instances of inconsistencies. Dr. Giantomaso was surprised at how different the plaintiff's comfort level was while sitting during the history-taking portion of his assessment when compared to "the minute she got up and I had to examine her". He noted by way of example that shoulder hiking was not noticeable while sitting, but became something obviously physically limited during examination.

[150] Consistent with his observations, Dr. Giantomaso noted the following in his report:

However, [the plaintiff's] presentation on the date of my independent medical examination was of severe disability. She had global reduction in range of motion in the cervical spine, global reduction in range of motion in the shoulders, diffuse pain throughout the spine, and an inability to put even a little bit of weight through her right leg due to reported severe hip and groin pain that negatively impacted her ambulation to the point where walking long distances without a walking aid such as a cane or walker would seem to be almost impossible. She had very poor balance.

My physical exam findings included signs of soft tissue injury; however, she was very sensitive to even light touch in multiple areas of the spine. Her right leg had reduced range of motion even with straight leg raise that did not fit with a labral injury as a predominant cause of pain.

[151] Based on the information available to him, including the plaintiff's self-reported history, Dr. Giantomaso diagnosed the plaintiff with the following injuries arising from the First Accident:

- a) Chronic post-traumatic cervical sprain/strain injury consistent with WAD-II injury;
- b) Chronic post-traumatic thoracic sprain/strain injury grade 1–2;
- c) Chronic post-traumatic lumbar sprain/strain injury grade 1–2; and
- d) Chronic post-traumatic cervicogenic headaches.

[152] Dr. Giantomaso diagnosed the following injuries arising from the Second Accident:

- a) Exacerbation and aggravation of the injuries from the First Accident;
- b) Right hip injury; and
- c) Mild traumatic brain injury with no significant ongoing sequelae.

[153] As to the plaintiff's demonstrations of pain during his assessment, Dr. Giantomaso testified that he had to decide whether her pain behaviours were overt and purposeful, or part of a chronic pain syndrome. He was not ready to say she did not have any centralized sensitization and testified that there was "probably a little bit of both going on". He testified that this was "one of those in between cases where I could have gone either way and perhaps I took the easy way out and said she should see a psychiatrist". Thus, by way of a diagnosis of exclusion, Dr. Giantomaso opined that the plaintiff has diffuse myofascial pain with significant central sensitization combined with signs of high anxiety and possible somatization, which he causally linked to both Accidents.

[154] In the end, Dr. Giantomaso decided to give the plaintiff "the benefit of the doubt" and diagnosed her with diffuse myofascial pain with significant central sensitization. However, the weight that can be given to his determination in that regard, is, as discussed later in these reasons, significantly undermined by the plaintiff's failure to provide him with an accurate history of her injuries and tendency to exaggerate her pain and resulting limitations.

[155] Dr. Giantomaso strongly recommended that the plaintiff be referred to a multidisciplinary pain clinic, noting that a holistic approach with psychological and pharmacological support and progressive exercise is likely the best way forward.

[156] I prefer Dr. Giantomaso's opinion to that of Dr. Azadi. Dr. Giantomaso presented as a careful and forthright witness who conceded the difficulties in forming an opinion based on his assessment of the plaintiff, even where doing so may have reflected negatively on him, for example in admitting that he may have taken the path of least resistance in giving the plaintiff the benefit of the doubt in diagnosing diffuse myofascial pain with significant central sensitization. However, the

inaccuracies and omissions in the history provided by the plaintiff to Dr. Giantomaso, together with my findings as to the reliability and credibility of her evidence as a whole, significantly undermine the foundations underpinning his opinion, particularly given his evidence that this case could have gone either way.

[157] Considering the totality of the evidence before me, I am not confident that Dr. Giantomaso would have come to the same conclusions had he had a more accurate and complete history from the plaintiff and had she not amplified her pain behaviours on assessment. Put differently, the facts and assumptions regarding the plaintiff's medical history and her presentation on assessment that were relied on by Dr. Giantomaso were not proven on the evidence before me. It cannot be known whether Dr. Giantomaso would still have given the plaintiff the benefit of the doubt had she provided him with a complete and accurate medical and work history, and not amplified her pain on assessment.

[158] In the result, I accept that the plaintiff suffered the cervical, thoracic and lumbar sprain/strain, and right hip injuries diagnosed by Dr. Giantomaso resulting from the First and Second Accidents. I also accept that she suffers from some chronic pain as a result thereof. Nevertheless, as consistent with my treatment of Dr. Shuckett's opinion, I give significantly less weight to his opinion that the plaintiff suffers from significant central sensitization combined with signs of high anxiety and possible somatization resulting from the Accidents. That opinion is seriously undermined by the frailties in the plaintiff's own evidence.

Mr. Gander – Functional Capacity Evaluation

[159] Mr. Gander is an occupational therapist and functional capacity evaluator. He was qualified to give expert opinion evidence in the areas of occupational therapy and as a certified work capacity and functional capacity evaluator.

[160] Mr. Gander assessed the plaintiff on January 31 and February 1, 2022, and provided a report dated March 2, 2022. Mr. Gander conducted a clinical-based evaluation of the plaintiff on the day of his assessment, and evaluated her in her home on the second day. In the course of his assessment, Mr. Gander interviewed

the plaintiff and also reviewed medical records provided by the defendants. Mr. Gander assumed that the plaintiff was being honest in the history she provided and in demonstrating her functional capacity during his assessment and relied on what she told him in forming his opinions.

[161] Mr. Gander noted some inconsistencies in the plaintiff's behaviours during his assessment, but characterized them as low. Mr. Gander opined that based on his assessment, the plaintiff did not exhibit sufficient overall activity tolerance and levels of productivity to be competitively employed full time in any capacity, including in her pre-Accidents' job with the LDB. He did not, however, opine that the plaintiff cannot ever return to work, full time or part-time, in any capacity. Rather, Mr. Gander assumed that the plaintiff's limitations were as she presented them, and in light of that assumption, opined that with a modified part-time structure, the plaintiff is capable of safely performing work activities that incorporate physical demands that remain within the bounds of her demonstrated abilities and limitations.

[162] With respect to her tolerance for sitting, the plaintiff reported to Mr. Gander that she could sit for one hour, but on assessment demonstrated intervals of 20 minutes at the beginning of the day, which decreased to five to ten minutes by the end of the day. At trial, she testified that she can sit for up to an hour, though it varies day to day sometimes being as short as 20 minutes, but other times up to two hours with adjustments.

[163] With respect to her tolerance for standing, Mr. Gander noted that the plaintiff reported that she could stand for up to one hour. On assessment, Mr. Gander noted that the plaintiff stood for similar durations as she sat—i.e. from five to 20-minute intervals—but reported she could do more. At trial, the plaintiff testified that she could stand for up to two hours before she has to switch tasks.

[164] Based on the information provided to him by the plaintiff and his assessment of her, Mr. Gander opined that the plaintiff's current limitations for sitting and standing would render pursuing sedentary work challenging, even on a part-time basis, noting that a "sympathetic" employer would be required to encourage her

dependability and to optimize her efficiency and comfort. He also testified that she may be able to return to work with interventions, depending on the nature of the role. Indeed, in closing argument, the plaintiff accepted the possibility that she may be able to return to part-time work.

[165] Consistent with the opinions of Drs. Giantomaso, Azadi, and Shuckett, Mr. Gander recommended that the plaintiff attend at an interdisciplinary pain clinic. He opined that the plaintiff would benefit from participating in interdisciplinary treatment that incorporates working with a psychologist and an occupational therapist, both of which the plaintiff reported she had not yet engaged in. In Mr. Gander's opinion, depending on the outcome of such treatment, this may enable the plaintiff to identify volunteer or remunerative work opportunities that would be suitable for her.

[166] Finally, Mr. Gander notes that achieving a complete absence of symptoms and associated limitations is usually not a prerequisite for reintegrating into the workplace and that remaining out of the work force is associated with a variety of negative health outcomes.

[167] As is the case with the physicians' expert reports, Mr. Gander's conclusions and the weight that can be given to his report are undermined by the plaintiff's failure to provide a complete and accurate medical and work history, her tendency to amplify her pain on assessment, and the fact that I have found her evidence as a whole lacking in reliability and credibility. Nonetheless, I note that despite these issues, Mr. Gander did not opine that the plaintiff was completely disabled from working in any capacity. Rather, even assuming that the plaintiff's limitations were as she presented them, he opined that the plaintiff is capable of safely performing work activities that incorporate physical demands within the boundaries of her demonstrated abilities and limitations with a modified part-time structure.

Findings Regarding the Plaintiff's Accidents-Related Injuries

Legal Framework

[168] The analytical framework was recently summarized by Justice Horsman (as she then was) in *Rattan v. Li*, 2022 BCSC 647:

[105] The onus is on the plaintiff to prove on a balance of probabilities that the defendants caused or contributed to the injuries for which she seeks compensation. The general test for causation is the “but for” test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant’s tortious act: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 13–14 [*Athey*].

[106] Tortfeasors must take their victims as they find them in the sense that the defendant is liable for the plaintiff’s injuries, even if those injuries are more severe than might be expected in the average person: *Athey* at para. 34. At the same time, the defendant is not required to put the plaintiff in a better position than she would have occupied absent the wrongdoing. The defendant is liable for the injuries caused, but need not compensate for the effects of a pre-existing condition if there is a “measurable risk” that the plaintiff would have suffered those effects in any event: *Athey* at para. 35.

[107] Unrelated intervening events are taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff’s original position adversely in any event, the net loss attributable to the defendant’s wrongful conduct is not as great, and damages are reduced proportionately: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 36 [*T.W.N.A.*].

[108] The question of whether the plaintiff’s original position would, regardless of the tort, have been adversely affected by a pre-existing condition or an unrelated intervening event turns on a consideration of hypothetical events. Hypothetical events need not be proven on a balance of probabilities—rather, they are given weight according to their relatively likelihood. A future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. Where the evidence establishes a real and substantial possibility of the occurrence of a future or hypothetical event, this is a contingency that must be accounted for into the assessment of damages: *T.W.N.A.* at paras. 35 and 48.

Findings

[169] In her submissions, the plaintiff did not distinguish between injuries arising from the First Accident or the Second Accident. Rather, she asserts that the medical experts all “attributed the cause of the Plaintiff’s chronic pain condition to the Accidents”.

[170] For their part, the defendants accept that the plaintiff suffered minor soft tissue injuries to her neck and upper back area as a result of the First Accident, and minor soft tissue injuries to her lower back and right hip area as a result of the Second Accident. In the defendants' submission, all of the plaintiff's injuries should have resolved with the expected course of recovery for such injuries, namely three to six months.

Physical Injuries and Ability to Return to Work

[171] Each of the medical experts who testified in this case indicated that they accepted the medical history provided to them by the plaintiff as true and accurate. However, as I have found above, the plaintiff did not provide a complete and comprehensive medical history to the experts who assessed her. Notably, she did not disclose her ongoing efforts to conceive via surrogacy after the First Accident, or that her neck pain from the First Accident had improved before the sudden onset of debilitating neck pain in December 2015, prior to the Second Accident. The plaintiff's pattern of attributing all medical issues to the Accidents and minimizing other potential causes or aggravating factors was evident in the medical histories she provided to the experts who opined in this case. Considered in conjunction with her tendency to amplify her pain behaviours on assessment, I find that this significantly undermines the weight that I can give to the expert opinion evidence before me.

[172] Bearing these limitations in mind, and relying in particular on Drs. Giantomaso and Shuckett's opinions, which I prefer to those of Drs. Azadi and Hayton, I find that the plaintiff suffered the following physical injuries as a result of the First Accident:

- a) Chronic post-traumatic cervical sprain/strain injury consistent with WAD-II injury;
- b) Chronic post-traumatic thoracic sprain/strain injury grade 1–2;
- c) Chronic post-traumatic lumbar sprain/strain injury grade 1–2; and
- d) Chronic post-traumatic cervicogenic headaches.

[173] I also find that the plaintiff suffered the following injuries as a result of the Second Accident:

- a) Exacerbation and aggravation of the injuries from the First Accident;
- b) Right hip injury; and
- c) Mild traumatic brain injury with no significant ongoing sequelae.

[174] However, I am unable to conclude on the evidence before me that the sudden onset of debilitating neck pain that occurred in December 2015, and as a result of which the plaintiff ceased working, was more likely than not caused by the First Accident. The evidence before me, particularly in light of the inaccurate and incomplete history provided to the experts, is not sufficient to establish the necessary causative link between the First Accident and the sudden onset of neck pain of such significance as to render the plaintiff completely disabled from working in any capacity. This is particularly the case given that the plaintiff worked for nine months following the First Accident and returned to work again after the September 2015 alleged worsening of her neck pain.

[175] While I accept that the plaintiff was still experiencing some pain from her injuries from the First Accident in the fall of 2015, Dr. Hayton noted that her symptoms had been improving, consistent with the expected prognosis for soft tissue injuries of that nature. Given the lack of reliability and credibility of the plaintiff's evidence and the issues with the expert evidence as a whole that render it of limited assistance to me, I find that the plaintiff simply has not established on a balance of probabilities that the sudden onset of debilitating neck pain that occurred in December 2015 was more likely than not caused by the First Accident.

[176] Despite my concerns with the credibility and reliability of the plaintiff's evidence, and the negative impact that has on the weight that I can give to the expert opinion evidence before me, I am nonetheless satisfied that that plaintiff has proven on a balance of probabilities that she suffers from some chronic pain in her shoulders and right hip resulting from the injuries she sustained in the Accidents,

predominantly following the Second Accident. Even treating the plaintiff's complaints of ongoing pain and self-reported limitations cautiously, I find the medical opinion evidence before me sufficient to establish a diagnosis of chronic pain syndrome. There was unanimity in the expert evidence in this regard, and also as to the recommendation that the plaintiff would benefit from attendance at a multidisciplinary pain clinic.

Numbness and Dizziness

[177] The plaintiff testified that she developed numbness in her arms after the First Accident. This was inconsistent with her testimony on discovery that she could not recall which of the Accidents triggered the numbness in her arms. Dr. Azadi's chart notes suggest that the plaintiff first raised the issue of her arms becoming numb at night in July 2017, which would be after the Second Accident.

[178] Regardless, I find that the numbness in the plaintiff's arms did not become a significant factor warranting further medical investigation until some point after the Second Accident. More specifically, the plaintiff denied any numbness or tingling on assessment by Dr. Shuckett in March 2019. She did report numbness to Dr. Azadi who referred her for multiple nerve conduction tests. The first nerve conduction test was completed by Dr. Kristine Chapman in 2018, and Dr. Azadi performed two subsequent tests in 2019 and 2021. All three tests returned results within a normal range.

[179] The plaintiff also reports complaints of dizziness—indeed she testified that this is the primary factor that she says prevents her from being sufficiently reliable to undertake volunteer work or part-time remunerative work in any capacity. Mr. Gander noted that the plaintiff's ability to complete tasks on his assessment was hampered by complaints of dizziness. The plaintiff has also complained to Dr. Azadi that physical activity can contribute to her dizziness. Dr. Azadi admitted that she did not investigate the plaintiff's complaints of dizziness. Dr. Azadi testified that the plaintiff's fainting episode "was not related to anything related to" the Accidents.

[180] Regardless, the plaintiff's presentation and complaints of dizziness to Dr. Azadi and Mr. Gander are not consistent with her testimony at trial that she only experiences dizziness two to three times per month. Moreover, the preponderance of the expert evidence before me was that that the plaintiff's dizziness is likely a vascular concern. The plaintiff saw Dr. Keith Baxter, a vascular surgeon, in 2022, who did not recommend any further treatment.

[181] Considering the whole of the evidence before me, I find that the plaintiff has not proven on a balance of probabilities that the numbness in her arms or dizziness she experiences at times is causatively linked to either of the Accidents.

Impact of Injuries on the Ability to Work

[182] The plaintiff continued to work full time with modified duties for nine months after the First Accident, during which time Dr. Hayton's chart notes suggest a pattern of gradual improvement in her symptoms and functional abilities. The consensus in the evidence of the medical experts was that the usual trajectory for soft tissue injuries is gradual improvement over time. Such improvement is generally reflected in Dr. Hayton's chart notes over the approximately nine-month period following the First Accident.

[183] The plaintiff's recollection of what she was doing at work when her neck seized in December 2015 was poor, though she was adamant that the pain came on suddenly while she was at work. She reported her pain to Dr. Hayton—though he too testified that he did not know what the plaintiff was doing when her symptoms allegedly worsened at work—and testified that she then followed his advice that she was unable to return to work in any capacity.

[184] However, Dr. Hayton advised the plaintiff to remain off work based on his acceptance of the plaintiff's reports of pain and limitations, largely in the absence of an informed consideration of what her job duties entailed and the impact of her limitations on her ability to fulfill those duties. He did not consider what accommodations were available to her in the workplace or appear to conduct any

meaningful objective assessment of her limitations at the various points in time as he continued provide her with off-work notes or completed related forms.

[185] I find that the plaintiff likely amplified her reports of pain to Dr. Hayton such that he did not have an accurate understanding of the nature and extent of the plaintiff's pain and limitations. Dr. Hayton did not have an accurate understanding of the plaintiff's job duties, particularly the requirement for lifting. As such, I find that the notes and the forms he prepared and signed are not persuasive evidence of the plaintiff's inability to return to work due to her injuries from the Accidents, nor is his expert opinion evidence to the same effect.

[186] The gaps in the evidence as to what transpired immediately prior to the sudden onset of severe pain in December 2015 are also notable. In particular, the plaintiff could not recall what she was doing at the time, other than that she was at work. Her husband had no recollection of this event, nor does she appear to have mentioned it to her mother or sister. Fanoula Arvanitis did not recall anything about the plaintiff's last day of work. Mrs. Arvanitis only recalled the plaintiff having neck pain after the First Accident generally and could not recall if the plaintiff took time off work. The plaintiff's subsequent conduct, particularly in pursuing surrogacy and the treatment and procedures she underwent, and travel to and from Vancouver Island in furtherance of that in the period from December 2015 onwards, is also inconsistent with her being entirely disabled from working in any capacity as a result of her injuries from the First Accident.

[187] My conclusion that Dr. Hayton's expert reports can be given no weight is also problematic for the plaintiff, as he was the medical expert who had the most complete information about her medical history in support of his opinion that the plaintiff was unable to work in any capacity whatsoever from December 2015 onwards. Dr. Hayton's opinions are not persuasive evidence of the plaintiff's inability to work in any capacity because of his reliance on the plaintiff's self-reported symptoms and misunderstanding of the plaintiff's actual or accommodated job duties: *Gee* at paras. 114–115.

[188] More importantly, despite these issues with the plaintiff's testimony and presentation on assessment, Mr. Gander did not opine that she is completely disabled from working in any capacity. Rather, even assuming that the plaintiff's limitations were as she presented them, he opined that the plaintiff is capable of safely performing work activities that incorporate physical demands within the boundaries of her demonstrated abilities and limitations with a modified part-time structure.

[189] I accept Mr. Gander's opinion and, factoring in the issues with the plaintiff's testimony and presentation on assessment, find that this likely represents the plaintiff's minimum functional capacity. Put differently, while I am unable to determine with any accuracy the true extent of the plaintiff's limitations, I find that the plaintiff's functional capacity is likely greater than Mr. Gander's conclusion, such that she is likely capable of returning to work at her position as a clerk with the LDB at least in a part-time capacity, though unlikely full time, full duties.

[190] The plaintiff admitted that she never sought to return to work or made inquiries about options for a gradual return to work, including what modifications or accommodations could be made for her in terms of managing her pain and functional limitations. It is difficult to reconcile this with her evidence that she loved her job and wanted to return to work, particularly in light of the fact that she knew such accommodations were available to her based on her experience after her 2001 hysterectomy, 2003 Accident, and the First Accident (which accommodations included avoiding lifting and overhead reaching).

[191] The plaintiff bears the onus of establishing that the injuries she sustained in the Accidents prevented her from returning to work in her position as a clerk with the LDB in any capacity, even part-time and with accommodations or a gradual return to work, as a result of her injuries from the Accidents: *Gee* at para. 125. I find that, the plaintiff has not discharged this onus. Simply put, the evidence does not establish that the plaintiff has been incapacitated from working in any capacity from December 2015 onwards as a result of the injuries she suffered in the Accidents.

Assessment of Damages

[192] The plaintiff claims non-pecuniary damages and the following pecuniary damages: loss of income earning capacity (past and future), pension loss, cost of future care, loss of housekeeping capacity, and special damages. She also advances an in-trust claim on behalf of her husband, Mr. Giassemis, for past and future housekeeping services.

Non-Pecuniary Damages

Legal Framework

[193] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and those she will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.

[194] Common factors influencing an award of non-pecuniary damages include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital, and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006). It is also recognized as a matter of ordinary experience and common sense that a person's ability to tolerate chronic pain diminishes with age: see e.g. *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166(e); *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[195] An award of non-pecuniary damages must be fair and reasonable to each party, with fairness measured in part against awards made in comparable cases: *Rattan* at para. 124. However, other cases only serve as a rough guide, as each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The amount of the award depends on the seriousness of the injury considered in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

Discussion

[196] The plaintiff seeks an award of non-pecuniary damages in the range of \$150,000 to \$175,000. The plaintiff relies on the following authorities, where awards ranged from \$110,000 to \$200,000 for plaintiffs suffering chronic pain with resulting psychological injuries: *Dunn v. Heise*, 2021 BCSC 754, rev'd in part on other grounds 2022 BCCA 242; *Han v. Ha*, 2020 BCSC 1136; *Iampietro v. Leung*, 2019 BCSC 1750; *Moges v. Sanderson*, 2020 BCSC 1511; *Primeau v. Dhaliwal*, 2022 BCSC 19; and *Shapiro v. Dailey*, 2010 BCSC 770, rev'd in part 2012 BCCA 128.

[197] The defence agrees that some non-pecuniary damages are properly awarded, but say that in light of the plaintiff's amplification of the impact of the Accidents on her life, the proper award is in the range of \$40,000 to \$60,000. In support of their position, the defendants rely on the following authorities: *Hinder v. Yellow Cab Company Ltd.*, 2015 BCSC 2069; *Sharma v. Bhullar*, 2020 BCSC 379; *McLean v. Kraft*, 2015 BCSC 2212; *Tsonis v. Mizuguchi*, 2020 BCSC 643; and *Curry v. Powar*, 2015 BCSC 610.

[198] The plaintiff was 42 at the time of the First Accident and 50 at the time of trial. Prior to the Accidents, the plaintiff was a happy and relatively healthy individual who had a positive relationship with her partner and enjoyed a variety of recreational activities, including hiking, biking, golfing, and fishing. As a result of the Accidents, the plaintiff suffered soft tissue injuries that have resulted in profound changes to her lifestyle such that she now lives with chronic pain (though as noted above, I do not accept that this pain is as debilitating as the plaintiff represented to her physicians and in her testimony), which has impacted her physical and mental state, relationship with her husband, and enjoyment of life generally.

[199] While the evidence suggests that the plaintiff can still participate in some of the recreational activities she enjoys, for example swimming, walking/moderate hiking, and boating, she cannot do so to the same extent she did prior to the Accidents. Even accounting for the issues with the credibility and reliability of the plaintiff's evidence that in turn undermines the expert opinions proffered, it is fair to

conclude that a full recovery is unlikely even following treatment at a chronic pain clinic. Similarly, the prospect of the plaintiff returning to full-time remunerative employment is guarded, though the evidence of Dr. Giantomaso and Mr. Gander suggests she may be able to return to work in a part-time capacity.

[200] I find the defendants' authorities of greater assistance on the facts before me than those cited by the plaintiff. The plaintiff's authorities involved slightly younger plaintiffs with generally more significant objective injuries than the plaintiff here. Importantly, with the exception of *Primeau*, the plaintiff's authorities did not involve instances where there were significant issues with respect to the credibility and reliability of those plaintiffs' evidence. Notably, the issues with the plaintiff's evidence in *Primeau* were regarding non-disclosure of income and cannabis use, not the type of embellishment or amplification of symptoms on assessment that I found was the case here and which undermines not only the plaintiff's evidence, but also the foundation for the expert opinions proffered by the parties.

[201] While some of the defendants' authorities also involve younger plaintiffs, they are more closely akin to the circumstances presently before the Court. While each case must be assessed on their particular facts, I find that the circumstances of the plaintiff are most similar to those in *McLean*. In that case, the plaintiff of similar age and injuries was awarded \$50,000 in non-pecuniary damages, despite there being issues with the reliability and credibility of her evidence, which lead the Court to treat her evidence with caution, as I have found is appropriate here. However, in my view, even accounting for the issues with the plaintiff's evidence, I find that the ongoing sequelae of the plaintiff's injuries and their impact on her enjoyment of life and relationships with her husband, family, and friends to be more significant than in *McLean*. Accordingly, in addition to adjusting for inflation, I find the present circumstances merit an award closer to that in *Curry*.

[202] Accordingly, based on my consideration of the *Stapley* factors, the authorities cited by the parties, and the evidence before me, I conclude that \$90,000 is a fair

and reasonable award of non-pecuniary damages to the plaintiff in the circumstances of this case.

Expert Economic Evidence

[203] The plaintiff tendered two expert reports from an economist, Darren Benning, regarding future income loss and cost of care (dated March 24, 2022) and pension loss (dated April 20, 2022). Mr. Benning was qualified as an expert in the field of economics and calculation of future income loss multipliers, future cost of care multipliers, and future income loss relating to pension loss.

[204] The defendants tendered an expert report dated April 29, 2022, from an economist, Judy Ren, regarding future income loss, future cost of care, and pension loss. On the issue of future cost of care, Mr. Benning and Ms. Ren arrive at substantially similar multipliers.

[205] With respect to future loss of income, Mr. Benning and Ms. Ren calculate similar actuarial multipliers to age 67: 14,448 and 14,452, respectively. However, Mr. Benning and Ms. Ren diverge on the assumptions informing the economic multiplier. Mr. Benning estimates the economic multiplier as 9,417, having considered negative labour market contingencies (“NLMC”) relating to non-participation, unemployment, and part-time work. Ms. Ren opines that Mr. Benning relies on “considerably higher” labour force participation of British Columbia females with the plaintiff’s age and educational profile. According to Ms. Ren, Mr. Benning erroneously assumes that individuals who leave the labour force at age 50 do not return. Accounting for labour market returnees reduces the economic multiplier by 13% to 8,238.

[206] The multiplier for future pension loss is also at issue. Ms. Ren opines that Mr. Benning does not consider the possibility and impact of the plaintiff working part-time at the LDB on her hours and hourly wage. Further, although Mr. Benning considers a period of unemployment following her termination at the LDB, his calculation assumes that the plaintiff would earn an identical wage at a new employer.

[207] Ms. Ren also assumes that the plaintiff would have retired at age 61.2, which is consistent with her future income multipliers and data from the Public Service Pension Plan (“PPSP”) on retirement age trends. Conversely, Mr. Benning’s report assumes that the plaintiff would have remained working until age 67.

Loss of Past Earning Capacity

Legal Framework

[208] An award of damages for past or future loss of earning capacity compensates for a plaintiff’s pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have—not could have—earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[209] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff’s life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44, 48–49.

[210] The plaintiff claims loss of income from December 29, 2015, to September 15, 2016, resulting from the First Accident, and from September 2016 to trial (May 30, 2022) resulting from both Accidents. The plaintiff calculates the value of this claim, net of taxes and reduced by 7% to reflect “fitting and thus applicable Negative Labour Market Contingencies” as \$234,918. This calculation is based on the plaintiff working full time at \$24.4883 per hour for 35 hours per week, 52 weeks per year over the 6.58-year period from December 29, 2015, to trial. The defendants say that the plaintiff is not entitled to an award for past income loss arising from the Accidents.

Discussion

Pre-Trial Without-Accident Earning Capacity

[211] To assess the plaintiff's without-accident earning capacity, it is necessary to consider what she would have earned absent the Accidents. I find as a fact that absent the Accidents, the plaintiff likely would have continued working for the LDB in her clerk position.

[212] I find that the plaintiff's annual T4 income in the years preceding the Accidents provides a more accurate measure of her income than the calculations based on hourly rate and hours worked per week relied on by the plaintiff. This is because the plaintiff failed to substantiate the basis for calculating her loss based on working 35 hours per week for the entire 52 weeks of the year. I also find that the period between December 29, 2015, to the date of trial is 6.41 years, contrary to the plaintiff's submission.

[213] The plaintiff's T4 earnings for the previous three years prior to the Second Accident (2013–2015, notably, including the year after the First Accident) were largely consistent at \$46,216, \$46,116, and \$46,282 respectively. This results in average T4 earnings of \$46,205 per year, and approximately \$296,174 for the 6.41-year pre-trial period.

[214] However, I find that the plaintiff's without-accident earnings must be reduced by 10% to reflect the negative contingency that she would have missed work on account of other factors, including injury and illness. This reduction is supported by the plaintiff's past history of missing work on account of illness or injury, as noted in her 2014 EPDP. She missed work due to the stomach issues and resulting surgery she had in July 2018. She also encountered two fainting episodes that it is reasonably likely would have resulted in time off work: first in 2017, when she fainted and injured her hand, and second in 2021, when she again fainted and sustained a possible concussion and headaches. The preponderance of the expert evidence regarding the plaintiff's dizziness and fainting spells was that these were likely vascular in nature and not causatively linked to the Accidents.

[215] I thus assess the plaintiff's without-accident earning capacity for the period from December 29, 2015, to May 30, 2022 as \$266,557.

[216] The plaintiff has not returned to work since December 2015 and as such, says her past loss of earning capacity is equivalent to her pre-trial without-accident earning capacity. The plaintiff relies on Dr. Hayton's continued provision of off-work notes to substantiate her inability to return to work in any capacity. However, for the reasons set out above, I do not accept Dr. Hayton's opinion evidence on this point. I have also rejected Dr. Azadi's opinion to similar effect.

Pre-Trial With-Accident Earning Capacity

December 2015–September 2016

[217] The plaintiff's evidence that she was unable to return to work in any capacity from December 2015 to the Second Accident is not supported by any expert evidence that reflects her actual abilities considered in light of the requirements, work conditions, and available accommodations for the position of clerk at the LDB. This is particularly the case given that the experts relied in material part on the plaintiff's subjective reporting of her pain and resulting limitations such that their opinions are undermined by the plaintiff's lack of credibility and reliability and her tendency to amplify her pain and functional limitations on assessment.

[218] As noted above, Dr. Hayton was the physician who had the most complete picture of the progression of the plaintiff's injuries during this time frame. He testified that the sudden severe worsening of the plaintiff's neck pain was not the typical or expected progression for her injuries, and his contemporaneous chart notes indicate that he was concerned she may have meningitis. The other experts were unaware of the circumstances leading to the plaintiff's cessation of work, namely that the neck pain in December 2015 occurred suddenly, without any identifiable cause or event, and after the plaintiff had returned to work on modified duties for nine months after the First Accident and reported improvement in her symptoms. This gap in the factual foundation for the experts' opinions renders them of little assistance in

establishing that the sudden onset of debilitating pain in December 2015 was caused by the First Accident.

[219] Moreover, the plaintiff's evidence that no accommodations were available to her, which is implicit in her testimony that the LDB required her to return to work full time, full duties as of March 2017, is not consistent with the preponderance of the evidence before me. In particular, the plaintiff's evidence on this point is contradicted by Mr. Kramer and Ken Mooney, a staff representative in the BCGEU's advocacy department, and is inconsistent with the plaintiff's own evidence that she was accommodated on multiple prior instances. Indeed, accommodations provided to the plaintiff enabled her to return to work full time for nine months following the First Accident. And the plaintiff acknowledged that at least in respect of the 2001 hysterectomy, the accommodations provided were not time-limited and were available to her for as long as she needed them.

[220] Simply put, the plaintiff never made any attempt to return to work after December 2015, nor did she make any inquiries as to the availability for a graduated return to work or options for modifications to her job duties following from December 2015 onwards.

[221] The causal link between the First Accident and her cessation of work in December 2015 is further weakened by the incongruity of the plaintiff being totally disabled from any form of work, while contemporaneously continuing to pursue surrogacy and the preponderance of the other evidence before me as to her functional abilities at the material time. It is also undermined by the fact that neither Mr. Giassemis nor other members of the plaintiff's family had any recollection of a sudden onset of severe pain in December 2015 or really any understanding of the circumstances that resulted in the plaintiff going off work.

[222] As such, I find that the plaintiff has not established that, despite months of gradual improvement in her symptoms and having returned to work full time on modified duties for at least nine months following the First Accident, she became completely disabled from working in any capacity as a result of sudden and

unexplained onset of neck pain in December 2015. As such, I make no award for past loss of earning capacity for the period of December 2015 to the date of the Second Accident.

September 2016–May 30, 2022

[223] The plaintiff did not attempt to return to any work after the Second Accident and as such, the Court is left to assess her with-accident earning capacity based on hypothetical events where there is a real and substantial possibility that those events would have occurred. Based on Dr. Giantomaso’s opinion and Mr. Gander’s report, I am satisfied that there is a real and substantial possibility that the plaintiff could have worked in her clerk job with modified duties or accommodations—as she did following the First Accident—at least in a part-time capacity following the Second Accident. Additionally, I am satisfied that there is a real and substantial possibility that the plaintiff could have worked in a sedentary job, likewise with accommodations.

[224] I assess the plaintiff’s with-accident earning capacity for the period of September 2016 to May 30, 2022 (5.7 years) based on the following factors:

- a) The plaintiff could have earned approximately \$46,205 per year for full-time work in her clerk position; and
- b) A 50% reduction is appropriate to reflect the real and substantial possibility that she would only have been able to work part-time, even with accommodations.

[225] Given my findings regarding the reliability of the history the plaintiff provided to the experts who assessed her, and her tendency to amplify her symptoms on assessment, I do not make any further reduction to account for the possibility that Dr. Giantomaso or Mr. Gander may have incorrectly concluded that the plaintiff was capable of returning to work. In my view, it is more likely that the plaintiff had greater capacity to return to work than she demonstrated.

[226] As such, I find that a reasonable assessment of the plaintiff's with-accident earning capacity from September 16, 2016, to May 30, 2022, is \$135,000. This represents a loss of approximately 50% of the plaintiff's without-accident earning capacity for the same time frame, which I find is reasonable in all of the circumstances.

[227] I find that the plaintiff thus suffered a net past loss of earnings of \$105,000 based on the following:

- a) Her without-accident income earning capacity for the period September 15, 2016, to May 30, 2022, was \$263,368;
- b) Her with-accident earning capacity for the same period was \$135,000;
- c) A 12% reduction (as provided by the plaintiff and not disputed by the defendants) for taxes pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231; and
- d) A further 7% reduction for NLMC.

[228] The parties agree that I need not determine issues relating to the subrogation rights of the plaintiff's employer relating to STIIP benefits paid to the plaintiff under the British Columbia General Employees' Union ("BCGEU") collective agreement. The plaintiff's counsel has undertaken to satisfy any such rights to ensure issues of double recovery do not arise.

Future Loss of Earning Capacity

Legal Framework

[229] An award for loss of future earning capacity represents compensation for pecuniary loss. Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened.

Accordingly, the central task for the court is to compare the plaintiff's likely future

working life with and without the accident: *Rattan* at para. 145, citing *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157.

[230] The proper approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

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

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

[231] The three-step process for considering claims for loss of future earning capacity is as follows:

- a) Does the evidence disclose a potential future event that could give rise to a loss of capacity;
- b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and

- c) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

See *Rattan* at para. 148, citing *Rab* at para. 47.

[232] When an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future, the first and second step of the analysis may well be foregone conclusions since the plaintiff clearly lost capacity and income: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11. The assessment is then not simply whether there was a loss of capacity, but whether that loss gave rise to a real and substantial possibility of a future loss and the value of that loss: *Ploskon-Ciesla* at para. 11; *Rab* at para. 33.

[233] At the third step of the analysis, damages may be assessed using the “earnings approach” or the “capital asset approach”. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial and typically involves a determination of the plaintiff’s without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff’s past earnings history: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91, citing *Lo* at para. 109; *Dornan* at paras. 155–156.

[234] The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset rather than a loss of earning capacity. It is also helpful when a plaintiff has yet to establish a settled career path, as the capital asset approach creates a more holistic picture of a plaintiff’s potential future: *Ploskon-Ciesla* at paras. 16–17. Where the capital asset approach is used, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff’s pre-accident income as a tool: *Rab* at para. 72, citing *Pallos v. Insurance Co. of British Columbia*, 100 B.C.L.R. (2d) 260 at para. 43, 1995 CanLII 2871 (C.A.); *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[235] Assessing the value of a future loss of earning capacity requires a comparison of the plaintiff’s working life if the accident had not happened and their

working life after the accident: *Bains v. Cheema*, 2022 BCCA 430 at para. 21, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.

[236] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

Discussion

[237] I am satisfied that the evidence before me discloses potential future events that could give rise to a loss of capacity, namely that the plaintiff's injuries will prevent her from sustaining full-time employment in the future, thereby rendering her less valuable to herself as a person capable of earning an income in a competitive job market. I am satisfied that there is a real and substantial possibility that this loss of capacity will cause the plaintiff pecuniary loss in the future.

[238] The plaintiff says the appropriate approach in this case is the earnings approach and that but for the Accidents, she would have remained working in her clerk position at the LDB until retirement at the age of 67, earning \$49,188 per year in 2022 dollars. The plaintiff's position is that there is a real and substantial possibility that even with further treatment, she will never obtain the functional gains necessary to return to any form of gainful or steady employment as a result of the injuries she suffered in the Accidents.

[239] The plaintiff relies on the actuarial report of Mr. Benning. She submits that applying an economic multiplier with its reductions for part-time work, seasonal work, early retirement, and early death would not be fair to her, but also recognizes that using a purely actuarial multiplier would not be fair to the defendants as at least some NLMC ought to apply. As such, the plaintiff proposes using a "interpolated" mixed multiplier of the mid-point of Mr. Benning's actuarial and economic multipliers of 11,932.5 per \$1,000: see e.g. *Basra v. Masood*, 2019 BCSC 2156 at paras. 96, 103. Applying this interpolated multiplier, the plaintiff submits that the present value of her future income earning capacity without the Accidents is \$586,940 ($\$49,188 \times 11.9325$).

[240] The defendants say the plaintiff's claim for loss of future earning capacity is extravagant and without merit. In their submission, the plaintiff has not discharged her burden of proof of establishing a real and substantial possibility that she will suffer a loss of the future earning capacity as a result of the injuries she suffered in the Accidents. The defendants say that there is no evidence of significant limitations due to her alleged physical injuries; rather, the plaintiff's evidence was that she does not work primarily because of issues with balance and dizziness—issues that were not established to be caused by the Accidents.

[241] While not stated directly, the defendants appear to take the position that the capital asset approach is appropriate and say that in the event that the plaintiff's injuries have impaired her future earning capacity, one year of income would be an appropriate award. The defendants say this would compensate the plaintiff for the time off work required to receive additional treatment—including attendance at a multidisciplinary pain clinic—to enable her to re-enter the workforce.

[242] The defendants also say that if the Court determines that the earnings approach is appropriate and thus finds it necessary to apply income loss multipliers, those provided by Ms. Ren are more appropriate than Mr. Benning's because Mr. Benning's reasoning that those who exit the workforce in their 50s do not return is not logical.

Post-Trial Without-Accident Earning Capacity

[243] I agree with the plaintiff that there is a real and substantial possibility that but for the Accidents, she would have remained working in her clerk position with the LDB until retirement at age 67. She repeatedly testified that she loved her job and had no intentions to leave it or retire early. She had applied for promotions on multiple occasions, but was not the successful candidate. The plaintiff's average annual earnings were approximately \$46,205 in her role as a clerk with the LDB.

[244] However, I do not agree that the plaintiff would necessarily have remained at work in a full-time capacity throughout this time. As set out above, the plaintiff had a

history of time off work for various reasons, including prior accidents, workplace related injuries, and illness as documented in her 2014 EPDP.

[245] The plaintiff's ongoing efforts to pursue surrogacy also give rise to a real and substantial possibility that rather than working full time until retirement, she may have required not insignificant time away from work, both in order to pursue surrogacy itself, and had it been successful, by way of parental leave and a potential return to the workforce post-leave in something less than a full-time capacity.

[246] Accordingly, I find that had the Accidents not occurred, the plaintiff would have worked in her role as clerk with the LDB at approximately 85% capacity.

[247] Mr. Benning provided a present value economic multiplier to age 67, but I accept Ms. Ren's evidence that Mr. Benning's multipliers overstate the estimated labour force participation rate when compared to the statistical average for females in British Columbia of the same age and educational profile as the plaintiff, and fails to account for individuals returning to the labour force over the age of 50.

[248] The evidence does not, in my view, justify using the plaintiff's interpolated multiplier approach to determine the present value of the plaintiff's loss. As explained in Ms. Ren's report, the economic multiplier reflects NLMC of non-participation in the labour force, unemployment, part-time work, and part-year work, based on statistical evidence or, in other words, the typical experience. Although the plaintiff has a lengthy work history, she also demonstrated a disposition to miss work, including on account of workplace injuries and medical issues. In the circumstances, I am not persuaded that NLMC should be ignored.

[249] As such, I find that the economic multipliers set out in Table 2 of Ms. Ren's report are appropriate in this case and have used those multipliers in my present value calculations.

[250] Applying Ms. Ren's multipliers, I estimate the plaintiff's post-trial, without-accident earnings to be approximately \$380,637 ($\$46,205 \times 8.238$) plus a 10% reduction to account for negative contingencies reflecting a real and substantial risk

the plaintiff would not have worked full time even without the Accidents, resulting in a net present value of approximately \$345,000.

Post-Trial With-Accident Earning Capacity

[251] The plaintiff has not worked or made any attempt to return to work since December 2015. She submits that a reduction of 10–20% to her without-accident post-trial earning capacity is appropriate to account for possible future income earning capacity, resulting in a range of \$469,552 to \$528,246 for loss of future earning capacity.

[252] The plaintiff acknowledges that if—as I have found—it remains possible that she will eventually be able to return to some form of remunerative employment, then that would result in a reduced award for loss of future earnings capacity. However, the plaintiff also notes that as a matter of ordinary experience and common sense, a person’s ability to tolerate chronic pain diminishes with age, leading to a real and substantial possibility of loss of future income: *Davidge* at para. 166(e); see also *Morlan* at para. 41.

[253] The onus of establishing a real possibility of future income loss is not a heavy one; however, the plaintiff’s own perception that they may not be competitive in the marketplace is insufficient: *Dhaliwal v. Randhawa*, 2016 BCSC 2005 at para. 73, referring to *Kim v. Morier*, 2014 BCCA 63 at paras. 7–8 [*Morier*]. A plaintiff must show that there “is a realistic possibility [they will] be less able to compete in the marketplace—with economic consequences, not merely psychological ones”: *Deegan v. L’Heureux*, 2023 BCCA 159 at para. 49, citing *Morier* at para. 8; *Ghaly v. Mand*, 2023 BCSC 451 at para. 190.

[254] The gaps in the plaintiff’s evidence and her failure to provide full and frank disclosure of her medical history to the experts who assessed her render their opinions largely speculative in nature and leave little more than the plaintiff’s own perception and speculation that she is completely disabled. The plaintiff’s failure to make any attempt to return to work in any capacity after December 2015, or even make inquiries about what accommodations would be available to her, further

highlights the speculative nature of her subjective view that she is incapable of returning to work in any capacity.

[255] As such, while I find that the plaintiff has established a real and substantial possibility that a future event will cause a pecuniary loss, I do not accept a real and substantial risk of pecuniary loss to the full extent claimed by the plaintiff, i.e. equivalent to the loss of income based on full-time work. This is particularly the case as ongoing symptoms alone do not justify an award for loss of future earning capacity. Rather, the plaintiff must demonstrate that the injuries she suffered have disabled her from performing required employment functions; or more generally, a possibility that the injury manifests or will manifest itself in a way that causes financial loss in the future: *Ghaly* at para. 188, citing *McKay v. Raiwal*, 2015 BCSC 220 at paras. 78–79; *Deegan* at para. 52.

[256] Further, while a “real and substantial possibility” is a lower standard than a balance of probabilities, mere speculation or subjective apprehensions regarding the occurrence of a future event resulting in a loss of future earning capacity or its capacity to cause pecuniary loss is insufficient to ground a claim under this head of damages: *Dornan* at paras. 63-64, citing *Athey* at para. 27.

[257] The preponderance of the evidence before me, considered in light of my findings regarding the plaintiff’s tendency to embellish and amplify her pain and functional limitations on assessment, establishes a real and substantial possibility that even with treatment (attendance at a multidisciplinary pain clinic), the plaintiff will suffer a loss of earning capacity in that she will only be able to return to remunerative employment in a part-time capacity.

[258] In the result, the plaintiff has not established a real and substantial possibility that as a result of the Accidents, she will suffer a pecuniary loss of her full-time income. I have rejected Drs. Hayton and Azadi’s evidence that she is not capable of returning to work in any capacity whatsoever. Mr. Gander opined that the plaintiff may be able to return to work in a part-time capacity, even assuming he had an

accurate understanding of the plaintiff's history, pain, and limitations, which I have found he did not.

[259] This is to be compared with the plaintiff's future earning capacity post-Accidents. Given my findings on the nature and extent of the plaintiff's injuries and her ability to work, I estimate that the plaintiff's residual earning capacity is 50% of her pre-Accidents annual income at the LDB. Applying Ms. Ren's economic multiplier as above, the present value of the plaintiff's residual earning capacity is \$190,319, namely \$380,637 ($\$46,205 \times 8.238$) x 50%.

[260] In assessing damages for future income loss, I must also consider positive and negative contingencies: *Ploskon-Ciesla* at para. 35, citing *Gregory* at para. 33. In the present circumstances, positive contingencies arising from the evidence include that the plaintiff appears to have made some progress in terms of her ability to perform household chores (e.g. cooking meals, light housework, and vacuuming) and participate in leisure activities (including going out on Mr. Giassemis's boat). There is also the possibility that she may experience further improvement in her symptoms following treatment at a multidisciplinary pain clinic. The plaintiff's tendency to amplify her symptoms on assessment also suggests that her prospects of returning to work may be better than Dr. Giantomaso and Mr. Gander opined: see e.g. *Wood v. Kim*, 2023 BCCA 156 at paras. 14, 17.

[261] However, certain negative contingencies also come into play. The plaintiff may not see improvement following treatment at a multidisciplinary pain clinic, and her condition and ability to tolerate her pain may also worsen over time. It is also possible that the plaintiff may struggle to gain steady employment or employment with an employer willing or able to accommodate her limitations.

[262] Considering these positive and negative contingencies and anchoring my assessment in the objective evidence and calculations available to me, I find that \$190,000 reflects a fair and reasonable assessment of the plaintiff's residual earning capacity using the earnings approach.

Conclusion

[263] This process is an assessment rather than a calculation and, ultimately, the award must be based on what is reasonable in all the circumstances: *Jurczak v. Mauro*, 2013 BCCA 507, at paras. 36–37. Projections, calculations, and formulas are useful to the extent that they help determine what is fair and reasonable in the circumstances: *Basra* at para. 108; *Kringhaug v. Men*, 2022 BCCA 186 at para. 44.

[264] Based on my estimate of the plaintiff's with- and without-accident post-trial earning capacities, my assessment of her future loss of earning capacity is \$155,000.

Loss of Pension Benefits

[265] The plaintiff claims \$149,889 in pension loss based on what she says is a significant likelihood that she would have continued in her unionized position with LDB, earning pension benefits, until retiring at age 67. In support of the claim, the plaintiff relies on Mr. Benning's report dated April 20, 2022, which valued her loss of opportunity to contribute to the PPSP based on various assumptions, not all of which were established on the evidence.

[266] The defendants say no award for loss of pension benefits is warranted. They address this aspect of the plaintiff's claim in a single paragraph of their closing submissions, in which they articulate the following position:

... the plaintiff's loss of pension benefits to date is due to her own actions as she has been the author of her own misfortune. The defendants strongly resist having to compensate the plaintiff for loss of pension benefits she may have sustained or may sustain in the future. She can mitigate her loss by returning to work in a position that offers pension benefits under the [PPSP].

[267] The plaintiff bears the onus to establish that there is a real and substantial possibility of a loss of pension benefits: see e.g. *Rattan* at paras. 178-179; *Trites* at paras. 99, 107, 115. Evidence is required to establish a real and substantial likelihood of pension loss; awards should not be "automatically tacked on to an award for future loss of earning capacity": *Rattan* at para. 178, citing *Harlow v. Thompson*, 1999 BCCA 271 at paras. 18–20.

[268] A real and substantial possibility of future loss of pension benefits was not established in *Rattan*, where the pension plan was not in issue and the economist report made several unproven assumptions in its quantification of the loss: paras. 176–177. Claims for loss of pension benefits will also be dismissed where the court is unable to assess the likelihood of the loss occurring: see e.g. *Midgley v. Nguyen*, 2013 BCSC 693 at paras. 332, 334.

[269] The plaintiff's pension loss claim is predicated on her remaining in her unionized position (and therefore continuing to contribute to the PPSP) in a full-time capacity to the age of retirement. This assumption is a central pillar underpinning Mr. Benning's opinion quantifying the plaintiff's pension loss: he assumed that she would have continued to work full time in her role as clerk with the LDB until age of retirement no later than 67 years old and that she would have accrued full service from mid-2016 to the date of trial. Mr. Benning's calculations did not account for the impact of part-time or part-year work, but did account for non-participation in the labour force and unemployment. Mr. Benning also made one other fundamental assumption in valuing this loss, namely that the plaintiff's employment was terminated in December 2017 as a result of the Accidents.

[270] Based on these assumptions, the weight that I am able to give to Mr. Benning's valuation of this loss is significantly minimized by the fact that the key assumptions upon which it is predicated have not been established on the evidence. First, Mr. Benning's assumption that but for the Accidents, the plaintiff would have continued to work full time is not consistent with the plaintiff's past work history, which shows multiple instances of time away from work, including in 2001, 2003, 2006, and 2014.

[271] More problematic however, is Mr. Benning's assumption that the plaintiff was terminated from her unionized position because of the Accidents. In this regard, the plaintiff fails to address the evidence of Mr. Mooney, who testified on behalf of the defendants. Mr. Mooney was the plaintiff's representative with respect to multiple

outstanding grievances she had arising from her failure to return to work after the Accidents, including a grievance of her ultimate termination.

[272] Mr. Mooney testified that in order to move the plaintiff's grievances forward, the union required a prognosis for the plaintiff. In furtherance of this, in September 2018, Mr. Mooney sought a prognosis for the plaintiff from Dr. Hayton. Dr. Hayton did not provide a prognosis, responding simply that the plaintiff's ability to work was "unknown". Dr. Hayton's September 13, 2018, chart notes suggest that he also refused the union's request that the plaintiff see a physiatrist: "Note for her union again. They want her to see some sort of Physiatrist I said no. Keep working on her ST injuries".

[273] Mr. Mooney testified that Dr. Hayton's response that the plaintiff's prognosis was "unknown" was not sufficiently detailed to enable the union to proceed with the grievance. Mr. Mooney nonetheless persisted in requesting further information from Dr. Hayton through the plaintiff, but testified that she was "very guarded" in response to his requests. Mr. Mooney would have liked to call Dr. Hayton to speak with him about the plaintiff's prognosis, but testified that the plaintiff was not comfortable with him doing so and that he did not receive authorization from her to speak with Dr. Hayton directly.

[274] The union determined that it could not pursue the grievance of the plaintiff's termination without the necessary evidentiary foundation, and in particular, without a prognosis. Mr. Mooney also testified that the grievance was also complicated by the outcome of the plaintiff's 2017 claims assessment hearing, as set out in the CRC Report. As such, his evidence was that the plaintiff received a "turn down letter" from the union informing her that her grievances would not be proceeding to arbitration. The plaintiff disagreed with the union's handling of her grievances and pursued an internal appeals process. She was unsuccessful in that regard, and Mr. Mooney's decision to withdraw the grievance was upheld.

[275] Dr. Hayton's refusal to provide a prognosis for the plaintiff or to engage in any form of dialogue with the union regarding a potential means for the plaintiff to return

to work is difficult to reconcile with the plaintiff's evidence that she wanted to return to work. Her evidence that the LDB was insisting that she return to work full time and doing full duties is also difficult to reconcile with the uncontroverted evidence that the LDB has a history of accommodating injured workers so as to enable them to return to work in a capacity consistent with their abilities. Indeed, the plaintiff was accommodated in her role as clerk on at least three prior occasions: following her 2001 hysterectomy, 2003 Accident, and the First Accident.

[276] The plaintiff's former co-worker, Mr. Kramer, testified that he was afforded extensive accommodation—to the point of retraining for an entirely different job classification—following a back injury that rendered him unable to continue to perform his job duties. Mr. Mooney also confirmed that a variety of accommodations were available and that workers who are off work for lengthy periods of time may be entitled to greater accommodations to enable them to return to work.

[277] The plaintiff bears the burden of proving that her inability to return to work in any capacity and the resulting loss of her unionized position was caused by the Accidents. Considering the evidence as a whole, I find that she has not established that her termination, and by consequence her pension loss, was caused by the Accidents. In my view, the plaintiff had exactly the type of employer that Mr. Gander opined would be conducive to her returning to work in some capacity, namely a sympathetic employer who was willing to provide the necessary accommodations. Yet, the plaintiff never made any attempt to return to work in any capacity, nor did she make any inquiries as to what options for accommodation might be available to her, despite having a history of being accommodated in her clerk position.

[278] In my view, the loss of the plaintiff's unionized position and consequent loss of ability to contribute to the PPSP resulted from the plaintiff's failure to provide—via Dr. Hayton—sufficient or accurate information about her current and expected medical prognosis to her employer and union, along with her failure to make any inquiries as to what accommodations, if any, were available to enable her to return to work in a capacity consistent with her limitations.

[279] Mr. Mooney's evidence was clear that the union wanted to fight for the plaintiff's job, but was unable to do so without a sufficient prognosis; something more than Dr. Hayton's bare assertion that her prognosis was "unknown". This failure was then further exacerbated by the plaintiff's refusal to permit her union representative to speak with Dr. Hayton directly to attempt to obtain the information necessary to enable the grievance to proceed.

[280] Key assumptions underpinning Mr. Benning's report have not been proven. I also note that the PPSP is not in evidence before me. In these respects, the present circumstances are akin to those in *Rattan*, where the plaintiff was found not to have established a real and substantial possibility of future loss of pension benefits: *Rattan*, at paras. 177–179.

[281] I am thus unable to conclude on the evidence before me that the plaintiff has established a real and substantial possibility of future loss of pension benefits resulting from the Accidents. In the result, I make no award for loss of pension benefits.

Cost of Future Care

[282] The principles that govern the assessment of cost of future care were summarized by Justice Gomery in *Gill v. Borutski*, 2021 BCSC 554:

[107] 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 [*Gignac*] at paras. 29–30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31–32. 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.

[109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28–31.

[283] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Quigley v. Cymbalisty*, 2021 BCCA 33 at paras. 43–44, citing *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.). An award of future care costs is not intended to account for the cost of amenities that make the plaintiff's life more bearable or enjoyable, but are not medically justified: *Rattan* at para. 181, citing *Warick v. Diwell*, 2018 BCCA 53 at para. 24.

[284] Future care costs are a matter of prediction. The court must determine the present value of the future reasonable care needs of the plaintiff, allowing for contingencies to account for the fact that the future may differ from that suggested by the evidence at trial: *Rattan* at para. 182, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[285] The plaintiff seeks an award of \$14,500 for the cost of future care, primarily in respect of the cost of attending a multidisciplinary pain clinic to facilitate her rehabilitation and possibly enable to her to return to the workforce. The plaintiff relies on Dr. Giantomaso and Mr. Gander's recommendations to that effect.

[286] The defendants submit that no award is justified or, alternatively, only a nominal award for physiotherapy costs is appropriate. Their primary position is that treatment at a private chronic pain clinic is not justified in the plaintiff's case, as her complaints of ongoing pain are not credible and, regardless, she is functioning in her social and home life.

[287] I agree with the plaintiff that there was consensus among the medical experts and Mr. Gander that the plaintiff attend a multidisciplinary pain clinic. Mr. Gander testified that the cost of such a program is approximately \$14,000 to \$15,000, and the plaintiff seeks an award of \$14,500.

[288] I find that attending a multidisciplinary pain clinic is medically justified on the evidence before me, particularly given that such a clinic will include additional outpatient services. Indeed, the plaintiff acknowledges that counselling would be provided as part of this treatment and as such, does not seek a separate award in that regard. In my view, the amount sought by the plaintiff of \$14,500 is reasonable and fair. The plaintiff is awarded \$14,500 for the cost of future attendance at a multidisciplinary pain clinic.

[289] Mr. Gander opined that the plaintiff is a candidate for working with an occupational therapist to facilitate, among other things, potential future work activity. However, the plaintiff does not seek any award in that regard nor is there any evidence before me as to the associated cost of such treatment.

[290] The plaintiff points to Dr. Giantomaso's opinion that past courses of multiple passive therapies have "essentially failed" and accordingly, does not seek any award for future cost of physiotherapy or similar forms of treatment.

Loss of Housekeeping Capacity

[291] Damages for loss or impairment of housekeeping capacity may be awarded where the plaintiff has established she has lost the ability to perform household tasks as she did previously: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28. These damages will be valued as the cost of replacement services where that value is available: *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 67–68; *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34.

[292] Loss of housekeeping capacity may also be compensated through a non-pecuniary award, where appropriate, including where a plaintiff is able to perform tasks with difficulty or chooses not to complete the tasks at all: *McKee v. Hicks*, 2023 BCCA 109 at para. 112; *Liu v. Bains*, 2016 BCCA 374 at para. 26, citing *McTavish* at paras. 68–69.

[293] The plaintiff seeks an award of \$61,082 for cost of future housekeeping services, comprised of three hours per week at \$31 per hour to age 70, reduced by

25% to account for the possibility that the plaintiff's condition will improve sufficiently that she will be able to discontinue these services earlier than age 70. The defendants say no award is warranted.

[294] Mr. Gander's opinion is that the plaintiff requires housekeeping services to compensate for her current limitations, and that these services continue while she engages in behaviourally-based treatment. In Mr. Gander's opinion, the plaintiff's current level of housekeeping assistance (which she reported was three hours per week at a cost of \$35 per hour to clean the bathrooms, kitchen, and living room) is adequate at present, but if she realizes improved functioning, then this may allow for a reduction in housekeeping services.

[295] I am not satisfied that the award sought by the plaintiff is warranted on the evidence before me. The plaintiff reported to Mr. Gander that she is able to do some light housekeeping, including loading and unloading the dishwasher, operating a canister vacuum, and doing laundry. She is also able to make a bed with modifications to the task. Mr. Giassemis's evidence was that the plaintiff does not do tasks that require low reaching or bending, but that they purchased a new vacuum, and the plaintiff likes to vacuum every day.

[296] The evidence suggests the plaintiff now has greater capacity for housekeeping tasks than she demonstrated to Mr. Gander, and indeed, he opined that there is a prospect that her condition will improve following attendance at a multidisciplinary pain clinic. This evidence also establishes that either the plaintiff exaggerated her limitations in terms of housekeeping tasks when being assessed by Dr. Giantomaso, or had made significant improvements in the intervening period.

[297] Mr. Gander did not opine that the plaintiff requires three hours of housekeeping assistance on a weekly basis to the age of 70. Nor is such an award consistent with the evidence as to the plaintiff's functional abilities, considered in light of my findings as to the credibility and reliability of her evidence generally.

[298] In my view, an award of bi-weekly (twice monthly) housekeeping of three hours per week at \$31 per hour to age 70 is warranted on the evidence before me. This results in an annual cost of \$2,232, and, applying the present value multipliers set out in Ms. Ren's report (which are nearly identical to those of Mr. Benning), a present value of \$35,366 ($\$2,232 \times 15,845/\$1,000$). I award \$35,500 for loss of housekeeping capacity.

In-Trust Claim – Past and Future Loss of Housekeeping Capacity

[299] The plaintiff attempted to advance an in-trust claim on behalf of Mr. Giassemis for past and future housekeeping services. However, no such claim was made on the pleadings, and in the face of the defendants' assertions of prejudice, the plaintiff withdrew this claim. Accordingly, I make no findings in that regard.

Special Damages

[300] The parties agree that the plaintiff incurred special damages expenses in the amount of \$11,636. This is net of the plaintiff's claim for special damages related to obtaining pedicures, which she abandoned in closing argument.

[301] The defendants dispute whether some of these expenses were causally related to the Accidents. The defendants' position is that \$3,614.92 in special expenses are appropriately claimed, namely those claimed for physiotherapy treatments, over-the-counter medications required to address her soft tissue injuries, mileage to physiotherapy, and the heating pads and massage cushions she purchased.

[302] The defendants say the balance of the expenses claimed are without medical justification, namely prescription invoices from September 2015 onwards, medications used by Mr. Giassemis, an invoice for a legal consultation regarding termination of her employment, costs associated with loss of dental benefits, postage charges, parking receipts, the cost of Dr. Hayton completing forms required by her employer or union, and the cost of housekeeping services. With the exception

of the plaintiff's prescription expenses and housekeeping expenses addressed below, I agree.

[303] The expenses claimed in relation to Mr. Giassemis's prescriptions, loss of dental benefits, and legal consultation regarding termination of employment all arise from the termination of the plaintiff's employment. The plaintiff adduced no authority in support of these expenses being treated as special expenses and in any event, I concluded that the plaintiff did not establish on the evidence that her termination was caused by the Accidents. These expenses are thus not reasonably necessary as a consequence of the Accident and as such, they are disallowed.

[304] With respect to the plaintiff's prescription medications, despite my conclusion that the plaintiff did not establish that the sudden onset of debilitating pain in December 2015 was caused by the First Accident, I nonetheless accepted that she continued to experience pain and disability from her injuries from the First Accident at that time. As such, I find that the special expenses claimed for medications from September 2015 onwards were reasonable and medically justified.

[305] The plaintiff claims \$4,100 in housekeeping services that were incurred from September 2021 onwards. Mr. Giassemis testified that he paid these expenses and that they represent four hours of housekeeping per week. The defendants dispute these expenses on the basis that the evidence does not support a medical justification for housekeeping services at the time they were incurred. The defendants note that Mr. Gander opined that the plaintiff is capable of performing light housework, including vacuuming, and the evidence showed that she was not responsible for yard work prior to the Accidents. I disagree. Mr. Gander opined that the plaintiff's current level of housekeeping was required to compensate for the plaintiff's then-current limitations. I allow the \$4,100 in housekeeping expenses.

[306] I agree with the defendants that the balance of the special expenses claimed by the plaintiff have not been proven to be reasonable or medically necessary. For example, the plaintiff adduced no authority in support of her claim for reimbursement

of parking expenses or the cost of Dr. Hayton completing various forms as special expenses.

[307] In the result, I award the plaintiff special damages of \$7,714.92 (\$3,614.92 in agreed items and \$4,100 in housekeeping expenses) together with those prescriptions costs falling within the parameters set out above.

Failure to Mitigate

[308] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. The defendant has the burden of proof on the issue of mitigation: *Pearson v. Savage*, 2020 BCCA 133 at para. 74. This involves proving on a balance of probabilities the causal link between an unreasonable failure to follow a prescribed treatment and a reduction of some degree in the plaintiff's damages: *Haug v. Funk*, 2023 BCCA 110 at para. 75.

[309] The burden on a defendant in proving failure to mitigation was summarized in *Rattan* as follows:

[205] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. This includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing their accident-related injuries. The defendant has the burden of proof on the issue of mitigation. This involves proving two elements: first, that the plaintiff acted unreasonably in not taking the steps that the defendant says ought to have been taken, and second, that the plaintiff's loss would in fact have been eliminated or reduced had the step been taken: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Cummings v. Hitt*, 2015 BCSC 530 at paras. 104–105.

[310] The defendants say that the plaintiff failed to mitigate by failing to attempt acupuncture treatments and by failing to return to work at the LDB—with or without accommodations—or if she was unable to do so, then by seeking out alternative employment.

[311] I conclude that the defendants have failed to prove the first element of the defence of mitigation as to acupuncture in that they have not established that the plaintiff acted unreasonably in failing to engage in a consistent program of acupuncture at an earlier date. Acupuncture was but one potential option

recommended by Dr. Azadi and there is no evidence that the plaintiff's loss would in fact have been reduced had she attempted acupuncture.

[312] The defendants also characterize the plaintiff's failure to attempt to return to work as a failure to mitigate. I agree with Justice Lamb in *Porter v. Feizi*, 2023 BCSC 491, at para. 44, that it is more appropriate to assess her past loss of earning capacity based on the real and substantial possibilities established by the expert evidence, adjusted for contingencies. My award for future loss of earning capacity accounts for the plaintiff's failure to attempt to return to work, as her prolonged absence from the workforce is a negative prognostic factor in assessing the likelihood that she will return to work. As such, I decline to make any further deduction on account of the plaintiff's failure to make any attempt to return to her position with the LDB at any time after December 2015.

Conclusion

[313] In the result, the plaintiff is awarded the following damages against the defendants, jointly:

a) Non-pecuniary damages	\$90,000
b) Past loss of earning capacity	\$105,000
c) Loss of future earning capacity	\$155,000
d) Loss of housekeeping capacity	\$35,500
e) Cost of future care	\$14,500

[314] Total damages, net of special damages, are awarded in the amount of \$400,000.

[315] The plaintiff is also entitled to special damages in the amount of \$7,714.92, together with the additional special damages awarded in paragraph 304 above. The parties are to review the plaintiff's special damages to determine which prescriptions

fall within those parameters. If they are unable to agree on the amount of special damages, they have leave to reappear before me.

[316] As the successful party, the plaintiff is presumptively entitled to her costs from the defendants, at Scale B. If any party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

“Hughes J.”