IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wishart v. Mirhadi,*
2023 BCSC 627

Date: 20230419
Docket: M203525
Registry: Vancouver

Between:

Carlene Wishart

Plaintiff

And

Babak Mirhadi

Defendant

Corrected Judgment: The text of this judgment was corrected on the cover page on April 19, 2023.

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for Plaintiff:	J. Hanson N. Kohan
Counsel for Defendant:	G. Hardy J.S. Sheikhupura
Place and Dates of Trial:	Vancouver, B.C. January 30-31, 2023 February 1-3, 6-10, 2023
Place and Date of Judgment:	Vancouver, B.C. April 19, 2023

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Introduction

[1] The plaintiff Ms. Wishart seeks damages for injuries she suffered in a motor vehicle accident on August 10, 2018. Liability for the accident is admitted. Ms. Wishart claims chronic pain in her neck, mid to upper back, and chest, rib subluxation, and resulting low mood and anxiety.

[2] The defendant submits that Ms. Wishart has not established that her current health issues were caused by the accident. Ms. Wishart was involved in other car accidents before and after the subject accident, and she has other medical issues. The defendant submits that these caused her current state, and the subject accident caused a mild exacerbation of pre-existing conditions.

Ms. Wishart's Evidence

Pre-accident

[3] Ms. Wishart is 36 years old and has lived in the Kelowna area with her husband since 2006. They have two daughters ages 10 and seven.

[4] In 2008, she earned a bachelor of arts in psychology. Her plan was to gain work experience and then pursue an MBA. Up until the time of the accident in 2018, she had never applied to an MBA program.

[5] In the autumn of 2008, she began to work for Wyatt Auto Parts doing dispatch and deliveries. In May 2009, she began employment with Disney Canada Inc. ("Disney") in Kelowna. Disney had acquired a virtual online world for children, which had been created in Kelowna. She began as a customer service representative providing phone support, and over time was promoted, eventually to project coordinator for guest experience. Her first child was born in 2012. Ms. Wishart took a one-year maternity leave. In 2013 returned to work four days per week. After the birth of her second child in 2015, she took a 15-month maternity leave.

[6] Ms. Wishart did not return to Disney. She testified that this was her decision and it was a difficult one she made for her family, which always comes first. After child care expenses, it did not make sense for her to work. In cross-examination,

Ms. Wishart was asked whether she looked into any other job or accommodations that would enable her to stay at Disney. She repeated her evidence that this was her difficult choice to leave. There was no other reason she stopped working at Disney. She was then taken to Disney's letter terminating her employment because of competition and the need to downsize its workforce. Ms. Wishart was paid seven weeks severance, and in exchange for a release was offered another payment, one month of an "outplacement service program", and a relocation allowance. She accepted this offer and in total was paid over $22,000. Ms. Wishart said her termination had been "labelled involuntary", but did not agree it was. The letter said otherwise to compensate her on a greater basis. She had tried to negotiate a work from home schedule but Disney could not accommodate her.

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[7] Ms. Wishart began to work for her mother's company, Vault Valet Storage ("Vault"), located in Richmond, B.C. The opportunity made sense for her family's needs. The job was 20-30 hours per week, and could be done remotely from home. She communicated with customers, oversaw payments and accounts receivable, and wrote a procedures manual. Her plan was to continue working for Vault until her youngest child entered elementary school in the fall of 2020, at which point she would work full time in a job similar to that she had at Disney, and at about the same remuneration. Ms. Wishart was working for Vault at the time of the accident.

[8] In 2018 prior to the accident, Ms. Wishart started a remote executive assistant business. Her main client was the Boston Energy Group, an eight-employee company. Her role was primarily to assist with recruiting a software engineer. She posted ads, helped prepare for the interviews, did research, arranged travel, and ordered lunches. She worked 10-12 hours per week.

[9] Her husband is a red seal carpenter. In April 2018 he started his own home construction business. In June 2018 Ms. Wishart completed a QuickBooks course to help with the business.

[10] Ms. Wishart was the primary caregiver of their children, and did 70-80% of the household tasks. She did yard work as needed to assist her husband. They

purchased their home in 2011 and her husband, sometimes with her help, renovated their house and yard.

[11] Recreationally and socially, she was active and played on a soccer team, worked out in their home gym, hiked and camped, and was "unrestricted in physical activity". Her mother's family has a cabin at a lake in Idaho where the extended family met in the summer for a week. She participated in tubing and wake boarding. She had no problem sleeping. She was happy and attentive to her children.

[12] She had been involved in a car accident in 2008 or 2009. She sustained a neck injury and had treatment, but the injury persisted. In late 2016 she decided to address this, and began chiropractic treatment for neck pain and headache. These injuries had only a "mild impact", but it was enough that she could be better. The treatment continued until March 2018. The treatment "resolved the neck pain" with "great success". She had "full restoration" and no more headaches.

[13] She was cross-examined on clinical records regarding this injury. In December 2016, she attended a chiropractor several times complaining of pain in the neck, left shoulder, between the right scapula and spine (thoracic area), and mid lower back. She attended her family physician Dr. Seger, complaining of neck and head pain. In March 2017 she attended a different chiropractor with complaints of daily headaches. She said this referred to an acute episode. She agreed that "just normal living" seemed to aggravate her pain, the chiropractor recorded a significant amount of pain, and she had to cease activities. She attended this chiropractor again in July 2017 with headaches. Between October 2017 and March 2018, Ms. Wishart attended another clinic of chiropractors 36 times for neck and back pain. In the first visit she reported cervical and upper thoracic pain 6/10 present 90% of the time. In her last visit she reported pain of 5/10 present 40% of the time. In April 2018, she attended Dr. Segers with pain underneath her right scapula, and two tender spots in her right trapezius area. Her mother accommodated her work at Vault so she could attend these appointments.

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[14] With respect to other health conditions, Ms. Wishart has suffered from chronic facial acne since adolescence. This affected her self-esteem but did not hinder her professionally. In May 2017, Dr. Seger recorded that Ms. Wishart saw him for pain in her upper left chest for five days and she had tender ribs in that area. He diagnosed costochondritis. Ms. Wishart did not recall the complaint or that it was affecting her. In April 2018 Ms. Wishart joined soccer for the season. She suffered an AC joint separation when she fell on the field. She recovered after about two weeks.

Accident

[15] Ms. Wishart was a front seat passenger in a van stopped at an intersection. She was looking down at her cell phone when the van was struck from behind. She was wearing a seat belt with a shoulder strap. The impact threw her body forward into the seat belt, and her cell phone hit her forehead.

Post-accident

[16] Ms. Wishart has attended nearly 300 physiotherapy, chiropractic, massage, and kinesiology appointments. She has regularly attended appointments with her family physician and other physicians to whom she requested referrals, some of whom testified as fact witnesses. She and those physicians were taken in detail through clinical records. I will highlight some events below, but summarize here that in general, there was a slow improvement in her symptoms to the end of 2019, a decline in 2020 and a further decline after the summer of 2021.

[17] Following the accident, Ms. Wishart had muscular tension and pain in her neck, upper back and chest, and headaches. Initially Ms. Wishart’s symptoms did not improve as she expected. Her sleep was affected. She was worried, but hopeful she would recover. She took a muscle relaxant. She and her family had already scheduled a week in August at the Idaho cabin. They went but it was not a good trip because of the pain. In September 2018, she started attending a physiotherapist and kinesiologist. She tried to continue her usual work and activities but was struggling and had to reduce them. In early October 2018, she reported to her kinesiologist that it was the first time she did not wake up with a headache for two days in a row.

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Ms. Wishart had hiked the past weekend. She also reported a “popping” in one of her hips. The hip issue is not related to the accident but she considers this to be part of her hypermobility which I will discuss below. In November 2018, Ms. Wishart reported to her kinesiologist that she had a “pop” in the right shoulder, and was feeling improvement. In late November 2018, Ms. Wishart started attending a different GP, Dr. Covaser. Other than an initial note that she was attending physiotherapy for the accident injuries, Dr. Covaser did not record any complaints related to the accident until March 2019. Ms. Wishart said she was participating in therapies and continuing on the plan for recovery.

[18] In about March 2019, Ms. Wishart began seeing a chiropractor, Dr. Nair. Shortly after, she saw Dr. Covaser about a noise she could hear with rotational movement of her thoracic spine. The noise was a new complaint, but she had been having thoracic pain since the accident. By the summer of 2019, Ms. Wishart agreed she was hiking, played soccer, gardened, and helped with deck installation at their home, but her participation was not to her pre-accident level. For example, she missed some soccer games from symptoms. She reported neck and thoracic pain of variable intensity to her therapists, from brief periods of no pain to pain of 6-7/10. Reference is made in the therapists’ records to Ms. Wishart feeling her ribs were out of alignment. In August 2019 she reported to Dr. Covaser that her chiropractor had been working on her left ribs. In October 2019 Dr. Covaser prescribed amitriptyline for sleep which gave her mild relief but she did not take it longer than the prescription. She got further relief when she added massage to her therapies. By November 2019, she was having more better than bad days. In December 2019 she reported a lot of walking and carrying her toddler on a trip. She was feeling good but had to take a muscle relaxant on some days. Ms. Wishart agreed that by December 2019, she felt 70-80% recovery, which she attributed to the massage and chiropractic treatment from Dr. Nair.

[19] In the meantime, starting in September 2019 and continuing until at least April 2020, Ms. Wishart was investigated for left hydronephrosis (dilatation of the left kidney). The renal issues caused her mild anxiety.

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[20] In February 2020, she was driving approximately 70 km/hr when a deer leapt in front of her SUV. The SUV hit the deer and the car was written off. She did not suffer any injuries in the accident other than a headache. She was cross-examined that the pain she reported to her chiropractor after this accident was worse than before. Ms. Wishart said that her injuries are “dynamic” because of “instability” of her neck, back, and rib cage, and her joints can become aggravated and misaligned. The different pain levels she reported reflects that dynamic. Ms. Wishart denied the deer accident triggered driving anxiety or precipitated her referral to counselling in February 2020. She and Dr. Covaser had previously talked multiple times about getting counselling.

[21] Ms. Wishart’s symptoms worsened in 2020. She attributes this to the COVID-19 lockdowns preventing her from continuing with therapies. From February 2020 to April 2022, at the suggestion of Dr. Nair, Ms. Wishart attended Dr. Hooper for prolotherapy treatments. (As explained by medical witnesses, this is an injection of an irritating solution around ligaments to induce scarring to stiffen an area.) The prolotherapy provided some relief initially, but it never resolved the pain.

[22] In August 2021, Ms. Wishart and her husband were on their back deck when she sneezed and suffered what was later identified as a lower right anterior rib subluxation. Her husband took a picture which shows a few centimetres long bump near the lower part of her front right rib cage. Ms. Wishart said it is primarily her state of shock from this sudden change which she remembers. She fainted and when she awoke, the bump was gone. She was scared and followed up with Dr. Covaser. Ms. Wishart said it became “a really difficult thing to deal with”. She “felt like nobody understood it” and she did not have much direction on how to address it. Prior to this, she had the same feeling in her ribs many times, but not to that extent. She experienced a similar event a few weeks later and was able to “push and breathe” the rib back into place. Today, she holds her rib cage when she sneezes. She attributes these events to hypermobility and lack of stability within joints. She feels movement, pops and clicks, primarily in her upper back, neck, and rib cage.

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[23] In May 2022, Ms. Wishart had an acute painful attack in her stomach and attended the emergency department of a hospital. Ms. Wishart had lost weight. She attributes the weight loss to exercising too much, although as I will discuss below, others testified that around this time Ms. Wishart was not eating, and was complaining of diarrhea and gastric upset. Subsequent investigations were suspicious for superior mesenteric artery ("SMA") syndrome. (As explained by medical witnesses, this is a vascular abnormality which can impact gastric function.) There is no evidence SMA is related to the accident.

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[24] In June 2022, Ms. Wishart saw a physiatrist, Dr. Underwood, who assessed her for hypermobility. On Dr. Underwood's recommendation, Ms. Wishart tried wearing a compression garment and brace around her torso. The brace was helpful because it kept her in good posture and applied pressure on her abdomen, but it was too restrictive on her breathing.

[25] In October 2022, Ms. Wishart saw a radiologist, Dr. Cresswell, who injected the area in her rib where she gets the subluxation. She experienced relief which lasted a few weeks, and then the pain became worse. Dr. Covaser subsequently prescribed gabapentin. She has some pain relief and sleeps better with that drug, but it makes her a bit foggy. She uses cannabis for anxiety relief and as a sleep aid. She used cannabis before the accident. She attended Dr. Cresswell in February 2023 for another injection, but understands this is not a long-term solution.

[26] In the autumn of 2022, she began counselling for anxiety, chronic pain management, and low mood. It has been helpful. Ms. Wishart described driving and passenger anxiety to the point that she has panic attacks. She feels like she cannot breathe, and has no control over her body and environment. It is terrifying. This happens most often as a passenger. She is a "nightmare" backseat driver. If she experiences an attack as a driver, she has to pull over and do breathing exercises until she can resume. This "began and coincided with" the incident on her deck when she did not know what was wrong with her, she started to feel like nobody knew, and felt a loss of direction for getting better. She was anxious before but thought it was

manageable. This level of anxiety felt different and was out of her control. She is hopeful that with counseling and other treatments, she will be able to get it under better control. Dr. Covaser recently prescribed Ativan which she has taken once.

[27] Ms. Wishart continues to attend physiotherapy, chiropractic, and massage. Dr. Covaser has referred her to the pain clinic in Kelowna and she had an appointment shortly after the trial was scheduled to conclude. Her previous physiotherapist had recommended Pilates which she did for core strengthening, but had to stop when she lost weight in 2022. Ms. Wishart has also researched surgeons who address rib subluxation. She has spoken with two in the U.S. and had an appointment scheduled with one in March 2023.

[28] Currently, Ms. Wishart described that she has chronic pain in her upper back, neck and chest area, and ribs. She feels a restriction in her ability to take full deep normal breaths because of the pain. Her sleep is interrupted. Any relief she gets is temporary. She never had pain like this before the accident. Initially after the accident, she had muscular tension and pain, but not to this extent. It was more manageable. With the persistence of pain, she is anxious about her future. The pain has altered her outlook and ability to enjoy life. She is focused on getting “the right treatment” but her perception of that possibility is altered and she is working with her counsellor on this. Her life revolves around chronic pain. She does not participate in much socially including activities with her children. She finds herself choosing what she can do, and not wanting to do things she normally would have enjoyed.

[29] Vocationally, in early 2019 her work for the Boston Energy Group came to an end. There were two main reasons: her injuries, and because her role to help recruit a software engineer was complete and the company was downsizing its workforce. Her last few invoices were small, and reflect mostly ordering lunches. She has continued to work for Vault in the same role as prior to the accident. She has an ergonomic work station. Her maximum duration sitting is typically 1.5 to two hours. She is in front of a computer or on the phone. She requires breaks to stretch and attend appointments. Her mother is accommodating and when she takes times to

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attend appointments, it does not affect her earnings. She works five to 10 hours per week (although I note she reported 10 to 30 hours to experts). Her earnings have not changed since before the accident and her salary at Vault is equivalent to her salary at Disney. She is concerned about the longevity of her employment with Vault. Her mother is 66, and had Vault for sale for $15 million. They discussed whether she could take it over, but she has no intention of doing so based on location and price. She wants to return to a job similar to her role at Disney, but at present does not feel that is possible because she feels limited physically and mentally, and “never does anything at less than 100%”. She has not searched or applied for any job since the accident. She provides about 80 hours per year of bookkeeping for her husband’s company.

[30] There has been a “role reversal” of household duties with her husband, who is now contributing in the same capacity as she was before the accident. She has recruited her children to lift wet laundry into the dryer, carry laundry, unload the dishwasher, and put clothes away. In January 2023 she hired residential cleaners. They came twice and she found it “life changing”. She felt caught up on cleaning and her anxiety was reduced. She has hired the cleaners to come on a monthly basis.

[31] She feels she is not as good a mother as before the accident because of her mood. Her youngest daughter was three when the accident occurred, and their relationship is different from her older daughter. Her marriage is strained. She is very grateful for her husband. They do not hug because it is painful. Intimacy is painful.

[32] She no longer plays soccer. She is not using their home gym. The last two years, she and her husband have had a goal to get their children skiing, so she has skied with them on a “handful of occasions”, but is on the bunny hill with their youngest daughter. Some days she cannot go, and when she does, takes massage tools. She and her family have continued to travel to the Idaho cabin in the summers as well as go camping. She no longer does water sports. In 2021, she was gifted an e-bike, but leaning over strains her back, so her participation is limited. She can hike, but it “comes with aggravation”, so she limits her participation. In December

2018 she travelled to Hawaii for a trip with extended family. In November 2019 she travelled to Palm Springs where her parents reside in the winter. She also went to Disneyland with her children. In January 2023, she went to Hawaii. She is a member of a mineral club and can often not attend their monthly meetings. She has gone on a few field trips with the club to mineral claims.

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Family and Friends

Mr. Coltan Wishart

[33] He is Ms. Wishart's husband. He gave evidence similar to Ms. Wishart regarding her pre-accident condition, personality, recreational and social activities, and the division of household chores. He did not observe any limitations. In about 2017, Ms. Wishart had a "few symptoms involving her neck" for which she attended a chiropractor, but they were not hindering her activities. Ms. Wishart injured her shoulder while playing soccer in the spring of 2018, but it did not disable her. She wanted to be a successful person and had a great work ethic. She was planning to go back to her job at Disney. That job ended because of child care responsibilities and day care availability. He did not recall Disney was downsizing or a severance payment.

[34] After the accident, Ms. Wishart was in pain, struggling to sleep, and it was apparent that something was "not quite right". She has become anxious and irritable. He gave evidence similar to Ms. Wishart regarding the decline in her recreational and social activities, and the reversal of household duties. He disagreed that by late 2019, Ms. Wishart had resumed most activities and that she was better than she had been before the accident. Any activities she resumed were very limited. He did not observe a change in her condition after she hit the deer in 2020. He described the rib subluxation on their deck in August 2021, which he had seen a few weeks earlier and has seen multiple times since. Ms. Wishart is very anxious when she drives with him. This was apparent immediately after the 2018 accident. She did not have this before. He "slightly disagrees" that her anxiety became worse after the rib subluxation. She is anxious if she feels a sneeze coming on. Their marital relationship has changed. Ms. Wishart feels a lot of guilt. They cannot hug or cuddle

because it is too painful, and even the weight of his body in their bed can cause her to be uncomfortable. Generally, he has seen a few good days, but they are few, and any improvement is temporary. In the last year, Ms. Wishart's condition seems to have become worse.

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Ms. Allison Beynon

[35] Ms. Beynon lives in North Vancouver and is a physiotherapist. She and Ms. Wishart have been friends since they were young. They see each other two to three times per year. In 2016 and 2017 Ms. Wishart participated in outdoor activities at her bachelorette party at an adventure park, at her wedding, and on a short camping trip. She did not observe Ms. Wishart to have any restrictions, and she was her usual positive, easy going self.

[36] From 2019 to present they have had less contact because of COVID-19 and the birth of her children. In May 2022 they camped for three nights and in July 2022 went to the Idaho cabin. Ms. Wishart had massage tools with her both times and did not participate in activities. At the cabin, she was up early every morning saying she did not sleep well. She was short tempered and pain focused. She was visibly thin, not eating well, and in the bathroom a lot complaining of upset stomach and diarrhea. They discussed her diagnosis of SMA syndrome. She seems depressed.

Dr. Jennifer Vassel

[37] Dr. Vassel is Ms. Wishart's older sister and is a family physician in Langley. She described her in person contact with Ms. Wishart since 2016 which, except during the COVID-19 pandemic, has been a few times a year at gatherings centered around her children's birthdays, the yearly family trip to the Idaho cabin, a family holiday to Hawaii in December 2018, and Christmases. Prior to the accident, Ms. Wishart always came early to the birthday parties to help. At the cabin she was active in water sports. Dr. Vassel never observed any pain behaviour or limitation of function. Her sister was her usual upbeat self and helpful. Dr. Vassel did not observe nor was she aware that Ms. Wishart had any neck pain. She did not know Ms. Wishart attended chiropractors prior to the accident.

[38] Since the accident, Ms. Wishart has attended these family events, but she does not come early, appears to be in pain, is stiff, is sometimes in tears, does not help like she used to, or participate in physical activities. She is not herself. She is cranky, short, and constantly cracking her neck trying to relieve herself. Ms. Wishart's temper has negatively affected her relationship with their parents. She was aware that at some point her sister had a kidney issue. Her sister did not seem overly worried about it. In the summer of 2021, Ms. Wishart sent her a video of the corner of her rib protruding. It looked anatomically strange. She researched it and discussed it with her sister. Her sister appears to have deteriorated in the past 12 months. In the summer of 2022, Ms. Wishart looked thinner than usual and unwell, was crying, and in pain. On a visit, Ms. Wishart was so nauseous she could not eat.

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Treating Physicians

[39] Much of the physicians' evidence went over the same clinical records that were put to Ms. Wishart. To avoid duplication, I have only included their evidence to the extent that it added to the evidence of Ms. Wishart.

Dr. Isidor Segers

[40] Dr. Segers was Ms. Wishart's family physician from 2008 until November 2018. In June 2011, Ms. Wishart complained of neck stiffness, pain at the right side of the back and in both shoulders. She had been in an accident at that time, and reported an earlier accident in 2008 although he did not see her for the 2008 accident. The next time he has recorded a complaint of neck pain was in December 2016. In May 2017 Ms. Wishart complained of pain in the upper left chest and he diagnosed costochondritis. He saw her twice after the accident with complaints of neck and shoulder pain and stiffness (his locum saw her initially). She was improving when he last saw her in November 2018, and she still had ongoing neck pain.

Dr. Allen Hooper

[41] Dr. Hooper is a general practitioner who does prolotherapy injections. Prior to their first appointment in February 2020, Ms. Wishart had provided him with a document entitled "Thoracic Back/Rib Hypermobility and Pain Summary" regarding

herself. Ms. Wishart had a total of 14 sessions of injections from July 2020 to April 2022. He injected Ms. Wishart's thoracic spine and posterior rib cartilage areas. I note most injections were on the left, although some were on the right.

Dr. Florin Covaser

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[42] Dr. Covaser is a family physician. Ms. Wishart has been his patient since November 2018. He was not aware of, nor did Ms. Wishart and he discuss whether Ms. Wishart had any pre-accident neck and back issues. Between November 2018 and February 2019, she saw him for facial skin conditions. She wrote a letter to him regarding the upset this was causing her. In March 2019, Ms. Wishart complained of a grinding noise with spinal rotation. Dr. Covaser heard a small squeaky noise with rotation of her thoracic spine of unclear nature. He reassured her. Her neck pain had improved, but her thoracic pain to a lesser degree. In November 2019, Ms. Wishart requested a referral to Dr. Hooper for prolotherapy following a recommendation from her chiropractor. Dr. Covaser told her that there is limited evidence that it provides a benefit, and he could not recommend for or against it.

[43] In February 2020, Ms. Wishart was tearful about her prolonged symptoms, which she felt were stagnating. He referred her for psychological counselling. He does not recall her reporting the deer accident. During the COVID-19 pandemic, they had telephone visits only.

[44] In August 2021, Ms. Wishart reported a new symptom of rib subluxation. She showed him a picture. She was tender when pressing in that area. He could not feel a protrusion. Ms. Wishart was very thin and he thought she had lost weight. In November 2021, Ms. Wishart reported another episode of her rib slipping, and he recommended Pilates. In December 2021, he recommended resuming work with a kinesiologist to strengthen her muscles.

[45] In February 2022, Ms. Wishart said she had seen her physiotherapist who was trying to address her "problems with hypermobility". She had also discussed this with her sister and done research, and said she thought she might have Ehlers-Danlos Syndrome ("EDS"). (As explained by medical witnesses, this is a rare genetic

condition associated with weak connective tissue.) Ms. Wishart requested that a number of tests be ordered. Dr. Covaser ordered some but not others. Ms. Wishart requested a referral to Dr. Underwood, a physiatrist.

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[46] In June 2022, Ms. Wishart reported new gastrointestinal symptoms of abdominal pain and diarrhea with undigested food. She had been seen in the emergency room at the hospital and investigated. She had a suspected vascular problem inside her abdomen, and associated weight loss. (This is the possible diagnosis of SMA syndrome.) He discussed with her the importance of gaining weight, as weight loss can be both a cause and symptom.

[47] In July 2022, Ms. Wishart reported she had seen Dr. Underwood. They discussed she had hypermobility of some joints, and her persistent pain. Ms. Wishart reported that she was researching experts in the U.S. on slipping rib and Dr. Covaser told her he would send a referral if she provided him with a name. He prescribed amitriptyline to treat her chronic pain and insomnia.

[48] In August 2022 Ms. Wishart requested a referral to Dr. Cresswell, a radiologist. In November 2022 Ms. Wishart was tearful regarding her chronic pain. He prescribed gabapentin as she advised him the benefit from the injection from Dr. Cresswell did not last. He also prescribed a muscle relaxant. Later in November he referred her for counselling and also to a pain clinic. In January 2023 they discussed her psychological stress. She was anxious, and he prescribed Ativan.

Dr. Mark Cresswell

[49] Dr. Cresswell is a musculoskeletal radiologist. He saw Ms. Wishart on two occasions, in October 2022 and early February 2023. Dr. Cresswell performed an ultrasound examination of Ms. Wishart's ribs while she did movements. Ms. Wishart is thin, so he could see her ribs very well. When she did certain movements, he could feel and see a subluxation of the tip of the 9th floating right anterior rib over the 8th fixed right anterior rib. Unlike her left side, there was no intercostal muscle between these two ribs, so when she bent forward and the rib subluxated, the nerve which is in the area where a muscle normally would be, was impinged. When she

twisted and there was subluxation, the rib pushed against the right rectus abdominus muscle. He injected some anaesthetic and steroid at that location and Ms. Wishart reported a resolution of the pain in the front and substantial improvement to her right back pain. The nerve runs from front to back, so he concluded there was also referred pain to the back. He told Ms. Wishart that if the pain returned she may need surgical resection of the tip of the rib. He would not usually repeat the injection, but did so in February 2023 because she was awaiting assessment with a surgeon.

[50] Dr. Cresswell was cross-examined on the two versions of the consultation report he sent to Dr. Covaser. The second report was done at the request of Ms. Wishart. He understood she was going to see a surgeon and from his perspective, he wanted to provide helpful information to the next physician. In summary, the changes Ms. Wishart requested were to include that she had thoracic and paraspinal pain, and discomfort at the costochondral areas of the second to fourth ribs, and that these started after the accident. Ms. Wishart did not tell him about the accident during the first visit, although he knew of the paraspinal pain.

<u>Experts</u>

Dr. Tony Giantomaso

[51] Dr. Giantomaso is a physiatrist and was qualified as an expert in that area. He assessed Ms. Wishart on one occasion on September 30, 2022 at the request of Ms. Wishart's counsel.

[52] Dr. Giantomaso was advised of the following history from Ms. Wishart:

> Ms. Carlene Wishart relates a history of exacerbation of pre-existing neck pain, mid-back pain, right-sided chest pain and intermittent what she calls a "*popping*" of her right lower rib which seems to cause pain and nausea, temporally related to an August 10, 2018 motor vehicle accident.
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> …
>
> Prior to the accident in question she was involved in a 2008 motor vehicle accident causing mild neck pain which she basically recovered from and noted in the year prior to the accident in question she had very little neck pain but did see a chiropractor regularly for maintenance of her neck.

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[53] Dr. Giantomaso clarified that the history he obtained was of pre-existing neck pain and not pre-existing mid-back pain, although most of the time when people report neck pain it involves the upper thoracic vertebrae area down to T4 as the neck muscle are connected there.

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[54] On examination, Ms. Wishart was hypermobile, with trigger points in the muscles of her upper back, and tension of her paracervical and parathoracic muscles down to T10, slightly worse on the right. Palpation of the chest area and abdomen showed "some [mild] right sternal costochondritis in the 1st and 3rd ribs as well as some mild hypermobility in the left anterior [costo]chondral junction" but this did not cause pain and was more obvious on the right.

[55] Dr. Giantomaso diagnosed the following which were "temporally and causally" related to the accident:

> Diagnosis Likely Related to the Motor Vehicle Collision of August 10, 2018:
>
> > 1. Exacerbation and aggravation of pre-existing cervical sprain/strain injury consistent with a WAD-II injury. Chronic.
> >
> > 2. Exacerbation and aggravation of pre-existing thoracic sprain/strain injury grade 1-2. Chronic.
> >
> > 3. Post-traumatic costochondritis, new onset. Chronic and ongoing.
> >
> > 4. Mild traumatic brain injury (concussive force through the body or head, brief alteration of consciousness, no loss of consciousness, no abnormalities on brain imaging). No significant ongoing sequelae of brain injury.
>
> Diagnosis Pre-Existing or Unrelated to the Accident in Question:
>
> > 1. Possible hypermobility syndrome/Ehlers-Danlos Syndrome
> >
> > 2. Longstanding history of neck and upper back pain. Worse post-trauma.
>
> Diagnosis Outside of My Scope of Specialty but Possibly Related to the Accident in Question:
>
> > 1. Post-traumatic anxiety and low mood issues.

[56] I note that although there was a diagnosis of a mild traumatic brain injury, this was the only mention of it at trial, and it was not argued to be an on-going injury or one that caused any significant symptoms at the time of the accident.

[57] Dr. Giantomaso opined that Ms. Wishart will continue to experience chronic pain to some degree long term, but by following his recommendations, she may experience decreased pain and increased function. Ms. Wishart is capable of full-time sedentary work but would benefit from ongoing support through active rehabilitation, access to passive therapies, as well as an ergonomic assessment. She may have reduced ability to perform overtime and occasionally miss work during times of flare-ups for therapy as well as rest.

[58] “Costochondritis” means inflammation of the ligament around the ribs. It is a non-specific term used for any palpatory pain elicited directly over a rib. The vast majority is caused by muscle spasm. “Hypermobility” describes a benign condition, and is not a disease or diagnosis or an indication that something is wrong. It is very common in the population and probably does not relate to back or neck pain. Maintenance chiropractic treatment is controversial, as is treatment for “misaligned spine”. Some people find it helpful but it is difficult to have studies of this. Prolotherapy is a “little controversial”. It has not been studied much but some people find it helpful. It is often considered a reasonable treatment to try.

[59] Dr. Giantomaso does not find pain scales (1-10) as useful as asking a patient what they are functionally able to do. The number of treatments a person has undergone is not indicative of the level of pain or functional disability. He said, “if you have a hammer, everything is a nail”. It may be reflective of the medical system’s approach to treatment, including that patients are not able to access relevant practitioners or are encouraged to attend therapies without functional improvement. He strongly disagreed with multiple therapies every month when those treatments are not making a functional difference.

Mr. Gary Worthington-White

[60] Mr. Worthington-White is an occupational therapist and was qualified in that area. He conducted a functional capacity evaluation (“FCE”) and made housekeeping and cost of future care recommendations. He assessed Ms. Wishart on one occasion on September 29, 2022 at the request of Ms. Wishart’s counsel.

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While Mr. Worthington-White reviewed pre-accident records and considered what Ms. Wishart told him about her pre-accident function, his opinion is based on her current function, regardless of causation.

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[61] Ms. Wishart's self-reports of function were generally consistent with the FCE testing, but Ms. Wishart underrated her abilities in some areas. He agreed Ms. Wishart said she was moderately restricted from changing a lightbulb. During the assessment, Ms. Wishart:

> …did present with chronic pain behaviours, and remained focused on her symptoms and the impact they continue to have on all areas of her life. She was also focused on her ongoing treatments, finding a "cure" and getting better. She appears to be dependent on her treatments. The aforementioned findings indicate there is likely both a chronic pain and also a non-physical (psycho-emotional) component to her overall presentation. …

[62] Mr. Worthington-White noted in his report that on the following questionnaires, Ms. Wishart's results indicted the following personal assessment: pain ("severely disabled"); anxiety ("severe anxiety"); depression ("severe depression"); and neck disability ("severely disabled"). Ms. Wishart was attending physiotherapy once per week, and massage twice per week. This is a "high level of intervention at this period of time out from injury".

[63] The FCE testing showed that Ms. Wishart has capacity for limited/sedentary and light strength work, with occasional medium strength demands. To the extent Mr. Worthington-White reported norms in his report, Ms. Wishart had normal function, except that Ms. Wishart showed signs of pain and tolerance limitations to sustained spinal flexion and extension, and activities which placed increased or prolonged strain or force on the muscles of her mid back. These would include:

> …sustained periods of work intensive sitting (i.e. leaning forward and looking down), stooping/forward bending, repetitive lifting (especially from floor level), carrying and pushing/pulling as well as low level work requiring leaning forward and sustained overhead work requiring spinal extension.
>
> Consequently, jobs promoting neutral spinal postures, inherent positional changes (i.e. alternate between sitting and standing as dictated by her symptomatology) as well as reducing exposure to tasks that place increased strain/forceful loading of the structures and musculature of her mid back,

> would be most appropriate, as they would likely promote symptom control and overall work/activity durability.

[64] Mr. Worthington-White opined that based on Ms. Wishart's testing and notably her emotional presentation and focus on the need/dependency for regular treatment and further medical investigations, she does not appear to be well suited for regular full-time work at this time, but is suited for part-time work such as at Vault. However, with appropriate supports physically and psycho-emotionally, improved pain management and independence with exercise and symptoms management, "returning to physically suitable full-time work in the future would appear reasonable".

[65] Testing shows Ms. Wishart is physically capable of typical household tasks, and light yard work, but tasks requiring sustained spinal flexion or extension in combination with resistive reaching will likely result in some degree of symptom aggravation depending on exposure and other tasks. Ms. Wishart reported that she is physically capable of doing typical household tasks, but tries to minimize exposure for symptom management. I will address Mr. Worthington-White's housekeeping and future care recommendations in those sections of these reasons.

Mr. Hassan Lakhani

[66] Mr. Lakhani is an economist and was qualified in that area. He provided a report dated November 1, 2022 at the request of Ms. Wishart's counsel to provide the present value of Mr. Worthington-White's recommendations.

Ms. Joyce Lee

[67] Ms. Lee is an occupational therapist and was qualified to provide an opinion in that area. She did not assess Ms. Wishart but provided a response report dated December 14, 2022, to that of Mr. Worthington-White at the request of defence counsel.

[68] In summary, Ms. Lee stated that she does not consider Mr. Worthington-White's testing methodology or conclusions flawed, but there was not enough

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objective information to justify them. Ms. Wishart did quite well on FCE testing. Mr. Worthington-White based his opinion on Ms. Wishart's subjective reports of pain, which can fluctuate. Mr. Worthington-White had opined that tasks requiring sustained spinal flexion or extension will likely result in increased pain and decreased tolerance, and that tasks requiring sustained low level or overhead work in combination with resistive reaching will likely result in symptom aggravation. However, the testing for these tasks showed that Ms. Wishart met or exceeded industry standards. She agreed that Mr. Worthington-White would rely not only upon the test results, but also his observations, including pain response, fatigue, and fluidity of movement, which all underscore clinical judgment. She agreed that without seeing Ms. Wishart herself she could not bring that aspect to her opinion.

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[69] Ms. Lee opined that there was no objective information in Mr. Worthington-White's report as to why Ms. Wishart stopped certain tests (e.g. extreme stooping, overhead/neck extension). Other testing was terminated based on subjective complaints of pain, but there were no objective observations or biomechanical risk factors identified. Therefore, this may not be a valid measure of capacity. Similarly, Mr. Worthington-White indicated Ms. Wishart was observed to stand for up to 2 hours 25 minutes, and 60 minutes continuously, but did not measure her maximum capacity. With respect to work endurance, Ms. Wishart's pain levels were not worse at the end of the day, and this indicates her endurance was good.

Legal Framework: Causation and Assessment of Damages

[70] A plaintiff bears the burden of establishing causation on a balance of probabilities. That is, a defendant's tortious conduct in whole or in part, caused the accident, and the injuries the plaintiff suffered in the accident caused or contributed to the loss for which the damages are claimed: *Smith v. Knudsen*, 2004 BCCA 613 at para. 26; *Grewal v. Naumann*, 2017 BCCA 158 at para. 45.

[71] The basic test for causation is the "but for" test: *Clements v. Clements*, 2012 SCC 32. A plaintiff must establish that but for the defendant's tortious act, the injury would not have occurred. A plaintiff is not required to establish that the defendant's

tortious act was the sole cause of the injuries so long as it is part of the cause beyond *de minimus*: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183 [*Athey*]. Causation need not be determined by scientific precision: *Snell v. Farrell*, [1990] 2 SCR 311.

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[72] The basic principle of assessment of damages is that a plaintiff is to be put in the position he or she would have been in had the tortious act not taken place: *Athey* at para. 32.

[73] In *Blackwater v. Plint*, 2005 SCC 58, the Court discussed the difference between causation and the assessment of damages in tort:

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

[74] In considering a plaintiff’s original position, tortfeasors must take their victims as they find them, even if the injuries are more severe than would otherwise be expected (the “thin skull” rule). But tortfeasors are not responsible for the consequences of a pre-existing condition that the plaintiff would have experienced in any event (the “crumbling skull” rule): *Athey* at paras. 34–35; *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 24–28; *Dornan v. Silva*, 2021 BCCA 228 at para. 44.

[75] If there is a “measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award”: *Athey* at para. 35. Such a situation necessarily concerns a hypothetical event, which will be taken into consideration in the assessment of damages, as long as it is real and substantial possibility and not mere speculation: *Dornan* at para. 63.

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Findings of Fact

[76] In assessing the credibility and reliability of evidence, I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296. This includes: the ability and opportunity of a witness to observe events; whether the witness' evidence is consistent or inconsistent with other independent evidence; whether the witness changes his or her evidence or has said something different on a previous occasion; whether the evidence seems reasonable or unlikely; and any motive to shade evidence or lie. Ultimately, the Court considers whether the "evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time".

[77] The defendant takes issue with the credibility of Ms. Wishart as a result of her evidence regarding the ending of her job at Disney, and with the reliability of her evidence regarding her pre- and post-accident condition. The defendant refers to the principles summarized at para. 280 of *Dhaliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147, var'd on other grounds 2017 BCCA 260, and submits this Court needs to critically assess Ms. Wishart's complaints of continuing pain where there is little objective medical evidence to support Ms. Wishart's continuing injury for such a lengthy period of time.

[78] While I agree the evidence regarding the end of the job at Disney was concerning, I must consider this in the context of the whole of the evidence. I generally found Ms. Wishart to be a credible witness, although she tended to portray some aspects of her life prior to the accident more favourably than was likely, so I have viewed that aspect of her evidence with caution. The Disney situation is one example. I find that she did decide it was best for her family that she not return to work at Disney, but she omitted to testify initially that she was unable to negotiate an accommodated work situation and was terminated and received severance. I do not accept the defendant's submission that there is no objective supporting medical evidence. There were objective clinical findings by Dr. Giantomaso and Dr. Cresswell. Further, Ms. Wishart's evidence was corroborated by the compelling evidence of her husband and sister.

[79] Unless indicated otherwise, I accept the opinions of Dr. Giantomaso, and the evidence of the other health professional witnesses.

[80] Ms. Wishart has four categories of complaints: pain in the neck, upper and mid back; pain in the upper chest area (costochondritis); lower right anterior rib subluxation and pain; and anxiety and low mood. She also has hypermobility, a pre-existing condition. I will address each of these.

[81] With respect to the pain in the neck, upper and mid back, Ms. Wishart had a long-standing history of neck and thoracic pain since 2008. She portrayed it as relatively mild but needing treatment, and said it "completely resolved" with treatment between 2016 and 2018. She told much the same thing to Dr. Giantomaso. I do not entirely accept this, and this is another example where in my view, the portrayal of her pre-accident events or conditions was not entirely reliable. The pre-accident clinical records, with which she agreed, show more significant pain and disruption to her daily life. There are no clinical records concerning these pains after April 2018, four months before the accident. This does not necessarily lead to the conclusion that there was a complete resolution of her pre-existing symptoms. Dr. Segers' testimony indicates that there were periods of time prior to 2018 when Ms. Wishart did not attend for neck and back symptoms, yet Ms. Wishart said she had persistent symptoms. Similarly, I do not consider the fact that Dr. Covaser did not record complaints of accident injuries the first six times Ms. Wishart saw him, necessarily indicates that she had no pain: *Edmondson v. Payer*, 2011 BCSC 118 at para. 36. Further, given the last clinical entries in 2018 do not show a resolution of the symptoms, and Ms. Wishart testified that her regular chiropractor had moved and she did not find the last replacement chiropractor as effective, I find it unlikely that a 10-year history of pain completely stopped and was cured prior to the accident. I find it more likely that there was a waxing and waning of symptoms from a long-standing neck and thoracic injury.

[82] The evidence establishes and I find that Ms. Wishart's neck and thoracic pain now is overall significantly worse than it was pre-accident, and that the pre-existing

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neck and back condition contributed to the neck and back pain after the accident. I find that if the accident had not occurred there is a material risk that Ms. Wishart would have suffered ongoing waxing and waning neck and thoracic pain, but it would have been significantly less than it is now.

[83] I do not accept the defendant's submission that because by the summer of 2019, Ms. Wishart may have at times reported less pain (on a 1-10 scale) than what she reported before the accident, that all other pain after this time is caused by other issues. There is no expert evidence that supports this argument, and the other evidence does not support it. I previously described the general arc of her symptoms. Throughout, Ms. Wishart has had waxing and waning of her symptoms. I find that the deer accident in 2020 caused a very temporary aggravation of her accident injuries, but did not make a material change to her overall condition, and is not contributing now.

[84] With respect to the costochondritis, Ms. Wishart did not report any right upper anterior chest pain prior to the accident. On one occasion in May 2017 she reported upper left sided chest pain to Dr. Segers. There is no expert evidence to support the defendant's argument that this is a pre-existing condition. I accept Dr. Giantomaso's opinion that this single diagnosis of costochondritis, which is non-specific and can be caused by many factors, does not constitute a pre-existing condition that contributed to her current condition.

[85] With respect to the right anterior lower rib subluxation, there is no expert evidence that this was caused or contributed to by the accident. Dr. Giantomaso does not say that. On examination he found some mild sternal costochondritis at the right first to third ribs, and some "mild hypermobility" on the right and left "anterior costochondral junction". He does not refer to the rib subluxation in his diagnosis, but he was aware that Ms. Wishart reported that her rib "'pops out' in the anterior lower chest wall". In his listed diagnoses, he referred to the hypermobility was being pre-existing or unrelated. He stated:

> …Post-trauma she developed some post-traumatic chest pain and costochondritis that is of new onset.

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> Her history is complicated by hypermobility issues and a longstanding history of treatment for spinal dysfunction.
>
> However, it is clear that after the accident in question her symptoms increased significantly in the neck and upper back region and she essentially had new onset anterior rib features. …

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[86] In my view, he is referring to the costochondritis. He did not suggest in his testimony that he thought the lower rib subluxation was related to the accident, or explain how it could be related. It was not temporally related. It occurred three years after the accident, but I acknowledge that Ms. Wishart said she felt “rib misalignment” prior to that. Further, Dr. Cresswell described what he found, which was that Ms. Wishart has no muscle connecting the 9th rib to the 8th rib on the right. In summary, while causation need not be established by scientific precision, there is no persuasive expert or other evidence to establish on a balance of probabilities that the rib subluxation is caused by the accident.

[87] I pause here to address the issue of hypermobility which was raised by both Ms. Wishart and the defendant. There is no expert evidence that Ms. Wishart’s pre-existing hypermobility has made her accident injuries worse, or that it is a condition that would have caused her pain or symptoms without the accident. The only role it plays with respect to the accident injuries, is that in Ms. Wishart’s attempts to find a cure for her pain and the multiple therapies she has pursued, she appears to have concluded that there is some causal connection between the hypermobility, an alleged misalignment of her ribs and spine or other joints, the rib subluxation, and the accident injuries and the pain she suffers. If there is some causal connection in that mixture, it has not been proved on a balance of probabilities in this action.

[88] With respect to the anxiety and low mood, it is clear from the evidence that Ms. Wishart is quite anxious and has low mood as a result of the chronic pain. Her sister and husband gave compelling evidence of how the pain has affected Ms. Wishart. Dr. Giantomaso opined that the anxiety and low mood issues possibly are related to the accident. I find on the evidence at trial, which was more extensive than that before Dr. Giantomaso, that the accident injuries, in particular the persistent pain, have caused the anxiety and low mood. Ms. Wishart attributed these

to the accident injuries, and I accept her evidence. However, Ms. Wishart also testified that her anxiety got worse after the deck incident in 2021. I accept that evidence and find that the rib subluxation, which has not been proved to have been caused by the accident, also contributed to her anxiety and low mood.

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[89] The defendant argues there were other pre-existing conditions, and unrelated intervening events after the accident, that have caused or contributed to Ms. Wishart's current condition. In short, there is no expert evidence that supports these arguments, nor sufficient other evidence to support them. I will address each:

a) Pre-accident, Ms. Wishart had some complaints of headache and fatigue. I do not find these complaints as indicating that she had a pre-existing condition for which there was a material risk of becoming symptomatic after the accident. Nor is there evidence that they are a feature of her present condition. The headaches were only a feature in the immediate post-accident period, and there was no evidence of any ongoing complaint of fatigue.

b) Post-accident, Ms. Wishart had left kidney hydronephrosis which caused flank pain and investigations. She also had skin infections, but she had these prior to the accident and was functional. She was investigated for what seems to be significant gastric issues which caused weight loss, and she possibly has SMA syndrome. She was investigated for low blood pressure. I find all of these caused some level of concern, but in my view, any anxiety they caused was transient and pales in comparison to that caused by Ms. Wishart's ongoing pain from the accident injuries and the rib subluxation. However, while these other illnesses did not have a material effect on Ms. Wishart's mental health, I find the physical aspect of these illnesses (the acute kidney symptoms, and the gastrointestinal issues) likely affected her ability to work for periods of time in the past.

[90] In summary, I find:

1. Ms. Wishart has had neck and thoracic pain since 2008. It did not completely resolve prior to the accident, but waxed and waned.

2. The accident has caused Ms. Wishart to suffer: (1) increased neck and thoracic pain, which has waxed and waned but after some initial improvement has overall become significantly worse and persisted; (2) mild costochondritis in her upper chest which has persisted; and (3) anxiety and low mood from persistent pain.

3. There is a material risk that without the accident, Ms. Wishart would have continued to experience waxing and waning neck and thoracic pain, but to a much lesser degree than she currently has, and would continue to do so in the future. I assess the likelihood of Ms. Wishart continuing to experience those lesser symptoms as high, but the contribution to her pain to be small.

4. Ms. Wishart has not proved that the right lower anterior rib subluxations are caused by the accident. I note that Dr. Cresswell concluded that there was likely some referred pain from the 9th anterior rib subluxation to the back, but this was not tendered as expert opinion, so I consider it only for the fact that this was observed and the diagnosis was made. The rib subluxations are a cause and have contributed to Ms. Wishart's anxiety. In my view, the contribution to her anxiety is moderate, but overall her pain is the more significant functional disability.

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<u>Non-pecuniary Damages</u>

[91] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The amount does not depend solely upon the seriousness of the injury, but upon the court's assessment of loss and its ability to provide solace and ameliorate the condition of the plaintiff in his or her particular circumstances. While awards in other cases provide guidance, each case must be determined on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. A list of factors to consider in determining awards is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. Those include the: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or

impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle.

[92] Ms. Wishart seeks general damages in the amount of $125,000. She refers to the following cases: *Gohringer v. Hernandez-Lazo et al.*, 2009 BCSC 420 ($75,000, today's dollars $100,000); *Hollyer v. Gaston*, 2016 BCSC 1401 ($125,000, today's dollars $149,000); and *Hu v. Tan*, 2016 BCSC 908 ($90,000, today's dollars $107,000).

[93] The defendant submits that Ms. Wishart suffered a six to nine-month flare-up of pre-existing conditions, and that non-pecuniary damages should be $40,000 to $60,000, which should be further to reduced to reflect any negative contingencies. As I have rejected the premise of the defendant's argument, I also reject that the range suggested by the defendants is appropriate. Most of the cases cited by the defendants either reflect this premise, or I do not find the cases comparable (for example one primarily concerns a mild traumatic brain injury, another primarily concerns aggravation of a significant knee injury), or they appear to be cited for the deduction for pre or post-accident events. These are: *Safdari v. Buckland*, 2020 BCSC 769 ($90,000 less 25% reduction for pre-existing issues); *Good v. Buljan*, 2021 BCSC 2255 ($40,000); *Chiang v. Medland*, 2014 BCSC 737 ($100,000 award reflecting a 50% reduction for pre- and post-accidents events); *Dial v. Grewal*, 2010 BCSC 759 ($50,000); *Gill v. McChesney*, 2016 BCSC 1416 ($80,000); *Everett v. Solvason*, 2012 BCSC 140 ($15,000); *Ho v. Eccles*, 2021 BCSC 244 ($110,000 reduced to $99,000 for intervening injuries).

[94] Two recent B.C. Court of Appeal decisions have cautioned against relying on cases more than 10 years old for non-pecuniary awards because simply adjusting for inflation to current levels "ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component": *Valdez v. Neron*, 2022 BCCA 301, leave to appeal to SCC ref'd, 40442 (30 March 2023) at para. 58; *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, at para. 18. I have therefore relied on more recent authorities. Although there are differences, in my

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view, the most comparable of the cases in terms of injuries and their functional affect are *Hollyer* and *Hu,* the former concerning more functionally disabling injuries than this case.

[95] Ms. Wishart is relatively young. Her pain may be ameliorated but it is chronic, and will likely continue into the future. I accept her suffering as genuine and that the injury has profoundly affected her. It is clear she now has significant anxiety and low mood. Her relationship with her husband, children and family has been impaired. Her recreational and social activities and her former active lifestyle have been impaired. Using the case authorities as a guide, I assess non-pecuniary damages at $120,000, however there must be a deduction for material risk of pre-existing neck and thoracic pain, and mental health aggravation from the rib subluxation. I globally assess this at about 15%, and the resulting award is $102,000. In coming to this conclusion, as I will discuss below, I have included the symptom aggravation Ms. Wishart may have from doing routine household tasks inside and outside the home for which I have not made a separate award.

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Loss of Earning Capacity

[96] In assessing damages, past events must be proven on a balance of probabilities: *Athey* at para. 28. However, the test to be applied for assessing damages for both past and future hypothetical events is whether there is a real and substantial possibility, not speculation, of an event leading to a loss. The plaintiff is not required to establish these hypothetical events on a balance of probabilities. The events are given weight according to their relative likelihood: *Athey* at para. 27; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–17.

[97] A loss of earning capacity may be quantified either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach may be more useful when the loss is more easily measurable; the capital asset approach will be more useful when the loss is not easily measurable, for example where the plaintiff has returned to his or her former employment, but has still established a loss of capacity.

[98] While the assessment is not a mathematical exercise, economic or statistical evidence if available, may be a useful tool as a starting point, and in assessing what is fair and reasonable: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. At the end of the analysis, the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[99] In keeping with the principle that the plaintiff is to be put in the position he or she would have been in absent the tortious conduct, damages for loss of earning capacity are to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28–30.

[100] In *Rab v. Prescott*, 2021 BCCA 345, the Court set out the three-step process for assessing loss of earning capacity:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in Dornan at paras 93–95.

[101] As further explained in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 11–12, in cases where the plaintiff's injuries have led to a continuing deficit, but the plaintiff is earning a similar income at trial to what was earned pre-accident, the first and second steps become more important. In that situation, the factors in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.), are helpful in assessing whether there has been an impairment of the capital asset; in other words, a potential event that satisfies step one in *Rab*. As set out in para. 8 of *Brown*, those factors include whether:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

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> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

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[102] The Court's task is to compare Ms. Wishart's working life if the accident had not occurred with her working life after the accident.

[103] Ms. Wishart submits that a capital asset approach should be used and she should be awarded 2.5 times her last salary at Disney, grossed up to full-time hours, and further increased for inflation ($65,000 per year), for a total of $150,000. This encompasses both past and future loss of capacity. Ms. Wishart submits that she: lost her capacity for full-time work from 2018 to 2022, but acknowledges that her plan was not to return to full-time work until late 2020; lost her remote executive assistant work; is unable to do overtime work; and is unable to do heavier work.

[104] The defendant submits Ms. Wishart has not proved any loss of capacity. Dr. Giantomaso opined that Ms. Wishart is capable now of full-time work with appropriate supports, and Mr. Worthington-White opined she is not capable now, but full-time work would be reasonable in the future once she receives treatment. Further, both of these experts gave their opinions on the basis that Ms. Wishart's current condition includes the unrelated rib subluxations. There is a possibility of flare-ups in the future, but her pay from Vault does not depend on the number of hours she works. With respect to her without accident trajectory, the defendant submits the following negative contingencies should be considered: Ms. Wishart never worked more than 32 hours per week from 2012 to the accident; she took time off from work to accommodate her chiropractic treatments pre-accident; her career plan to pursue an MBA is highly improbable as she never had taken steps toward it in 10 years; she had subluxations and other illnesses not related to the accident; and other labour market contingencies such as unemployment. Alternatively, if the Court finds that there is a loss of capacity, a capital asset approach is appropriate given the complete lack of any economic evidence, and the same factors should be

considered, with respect to a loss of one to two years based on what she is currently earning.

[105] I turn first to Ms. Wishart's pre-accident work capacity. Although she testified about plans to do an MBA, I find a loss based on that is speculative, and it was not pressed in closing argument by her counsel. Ms. Wishart had not taken any steps toward that degree in the 10 years since she graduated and there was no evidence if a program was available in Kelowna. Prior to the accident, Ms. Wishart had worked for 10 years in light or sedentary jobs despite pre-existing neck and upper back pain. There is no evidence to suggest that she would have ever embarked on physically demanding jobs. Once she was at Vault, she was accommodated to seek treatment for her neck and back. While there is a possibility that she would have left Vault in the autumn of 2020 to work full-time elsewhere, I find it unlikely given the accommodations and salary Vault was paying her (equivalent to Disney), and her ability to care for her children while working from home, and avoiding child care costs. Her other unrelated illnesses (the kidney hydronephrosis, symptoms suggesting an SMA syndrome, and rib subluxations) which all would have taken place in any event, would have required work accommodations and potentially time away from work. These conditions further support that it is unlikely that Ms. Wishart would have changed jobs from Vault. I find the much more likely real and substantial possibility is that she would have continued to work for Vault up to the time of trial just as she has since the accident, and would continue to work for Vault into the future until her mother eventually sells it. I find the work with the Boston Energy Group would have come to an end without the accident, and there was no evidence of work or earnings from any other client. There is therefore no past loss of capacity.

[106] I turn now to post-accident work capacity. In my view, Ms. Wishart has met the four factors in *Brown* and has been rendered less capable overall of earning income she otherwise would have been able to earn. The impact of those limitations will likely come when Vault is sold. Dr. Giantomaso opines that Ms. Wishart is capable of full-time sedentary work but would benefit from supports. She may have reduced ability to perform overtime and occasionally miss work during times of flare-

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ups for therapy and rest. Mr. Worthington-White opines that she does not appear to be well suited for regular full-time work at this time, but with appropriate supports "returning to physically suitable full-time work in the future would appear reasonable". I accept these opinions. The difference is simply the timing within which Ms. Wishart will be able to return to full-time work. It is implicit in Dr. Giantomaso's opinion that Ms. Wishart will have the benefit of active therapy, attendance with a pain specialist or at a pain clinic, and counselling. This will take time. After that she could return to full time work, but I find it is likely she will likely continue with Vault until that business is sold, although I have also considered the possibility she may decide to leave earlier than that. When Vault is sold or Ms. Wishart leaves, she will be restricted to jobs where she has the ability to change positions, but I have also considered that these are the types of jobs she had in the past, and the type she would have likely pursued in any event. Thereafter, there is a real and substantial possibility that she will have limitations in her ability to do overtime work, and may have occasional flares of symptoms which will prevent her from working. There was no evidence she worked overtime since her children were born, but there was evidence she worked significant overtime before the children were born.

[107] Ms. Wishart is earning now what she likely would be earning without the accident. A capital asset approach is therefore appropriate. There is no economic evidence of average earnings or labour market contingencies for someone in Ms. Wishart's pre- or post-accident condition. I find that Ms. Wishart will need another year to attend a pain clinic or pain specialist, get active treatment, and counselling. This may require her to be away from Vault for more significant periods of time than what she has done in the past. I have considered the risk of flare-ups in the future and the resulting time lost, loss of ability to work overtime, and the risk that she may not be able to easily find an employer willing to accommodate her limitations once she leaves Vault.

[108] I must also consider what salary should be used. The plaintiff submits that it should be the full-time equivalent of what she earned at Disney, increased for inflation. The defendant submits it should be the average of her current salary at

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Vault which is about $34,000. In my view, the appropriate figure is between these two amounts. I determine this to be her former wage at Disney (at four days per week) adjusted for inflation, which is about $52,500. It is primarily her loss once she leaves Vault that is material, and she intended to return to a job similar to what she had at Disney. Ms. Wishart is smart and driven, so I reject the amount submitted by the defendant which is barely more than the equivalent of full-time minimum wage. I have also considered her stated plan to work full time, but she had not worked full time for five years prior to the accident, and said several times that her family always came first.

[109] In determining the appropriate multiplier, I have considered all of the contingencies identified and different scenarios. For example, if she were to have two, three-week flares requiring time away from work, this would be a loss of about 11.5%, and a salary of one year would compensate for nine years of such loss. Loss of overtime may not only affect her income, but also her prospects of advancement particularly as Ms. Wishart wanted to continue her work in project management. She may be unemployed for a time until she finds a new job, and she will require an employer who is accommodating to some extent. In considering all of these, I assess the multiplier should be two years at $52,500. The total is $105,000.

[110] I must also consider if there is a real and substantial possibility that Ms. Wishart would have lost time in any event in the future from her pre-existing neck and thoracic back injuries and other post-accident health conditions. While her mother accommodated her to attend appointments prior to the accident, there was no evidence she ever lost time at Disney because of her pre-existing conditions. She could possibly lose time in the future because of the rib subluxation. There was no evidence that there is a risk the left hydronephrosis or SMA will cause her loss of work in the future. I conclude that any deduction must be quite small and less than the deduction made for non-pecuniary damages. I therefore apply a deduction of about 10% and assess loss of capacity at $95,000.

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Loss of Housekeeping Capacity

[111] The principles which govern when a plaintiff may be awarded damages for loss of housekeeping capacity were reviewed in *Riley v. Ritsco,* 2018 BCCA 366 at para. 101 and *Kim v. Lin*, 2018 BCCA 77 at paras. 27–33. More recently, those principles were confirmed in *Haug v. Funk*, 2023 BCCA 110 at paras. 98–107, and *McKee v. Hicks*, 2023 BCCA 109 at para. 112, where the Court stated:

> [112]To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[112] Ms. Wishart seeks $65,000 under this head of damage based on the recommendations of Mr. Worthington-White to replace her loss of housekeeping capacity, and the present value calculations of Mr. Lakhani. The defendant submits that there should be no award.

[113] Ms. Wishart told Mr. Worthington-White that she is able to physically complete typical household tasks, however tries to minimize exposure for symptom management. Mr. Worthington-White states that "Ms. Wishart does present as physically capable of typical household tasks", but certain tasks "will likely result in some degree of symptoms aggravation, depending on exposures and how much her symptoms are aggravated from other tasks". He also states that Ms. Wishart is not well suited for all heavier seasonal cleaning/maintenance limitations such as prolonged raking due to tolerance. She is functional for short periods of lighter yard work such as lawn cutting, trimming plants, and watering gardens, which she does now. A combination of his recommendations and what Ms. Wishart claims is: 78 hours per year for 10 years for house cleaning; and 42 hours per year to age 70 for a "seasonal household upkeep/cleaning", "yard maintenance/gardening/seasonal activities"; and "home upkeep/maintenance".

[114] Ms. Lee disagrees with the recommendation for household cleaning. Ms. Wishart's complaints of difficulty with doing certain tasks e.g. unloading the dishwasher, laundry and changing bedsheets, are not supported by the FCE testing. Ms. Lee agrees there is some limited objective data through the FCE testing for seasonal housecleaning and yard work, but it is not clear how much Ms. Wishart did these tasks prior to the accident and how Mr. Worthington-White came to the hours and costs. There was no home assessment, and there may be strategies that would help make it easier for her to perform those tasks, for example lighter equipment.

[115] I do not make a separate award under this head for typical household tasks, whether indoor or outdoor, as Ms. Wishart is capable of doing them. Any symptom aggravation that Ms. Wishart may get from certain tasks was addressed under the award for non-pecuniary damages. The fact that Ms. Wishart's husband has taken over some of the work, or that she has recruited her children to help with chores, is not determinative. FCE testing shows that she can lift weights from floor to overhead that are more than is required for typical household work. For example, she can occasionally lift up to 30 pounds between upper thigh and shoulder and 40 pounds between the floor and shoulder. She is able to bilaterally carry boxes weighing 30 pounds over 50 feet. I conclude she can empty the dishwasher, or transfer laundry to the dryer, or carry laundry to the bedrooms, all short tasks with lighter loads. Further, Mr. Worthington-White found that Ms. Wishart underrated her abilities in some areas. I have also considered that when Ms. Wishart had cleaning services she found them beneficial. In my view, the benefit was more psychological rather than proving a loss of capacity, and with the improvement expected from rehabilitation and counselling, I expect she will be able to continue with housekeeping.

[116] I do make a separate award for heavier seasonal cleaning and heavier seasonal yard work as this is supported by the FCE testing and the experts. I find she is not capable of doing that due to tolerance limitations. As for the number of hours, Ms. Wishart stated that prior to the accident she participated on an as-needed basis to assist her husband. I therefore award 32 hours per year based on seasonal

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cleaning and yard work to age 70. I do not make an award for home maintenance as her husband is a contractor and was primarily doing the renovation work. She can still provide him with lighter assistance. The present value calculated by Mr. Lakhani is $30,234. However, this must also be reduced for the real and substantial possibility that Ms. Wishart's pre-existing neck and thoracic issues may have prevented her from assisting with some of these tasks. There is evidence in the chiropractic records to which Ms. Wishart agreed, that these were preventing her from at times from doing so before the accident. Again, the deduction varies by head of damage to reflect how likely the pre-existing condition would have prevented these activities. I therefore reduce that figure by about 10% and assess the loss of capacity at $27,500.

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Cost of Future Care

[117] An award for cost of future care is intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70. The medical necessity may be established by health care professionals other than a physician but there must be a link between the physician assessment and the other health care professional's recommendation: *Gao* at para. 70. The Court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64–72. The standard of proof for assessing cost of future care is real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209. If it is shown by the evidence that a plaintiff is unlikely to participate in a program, it cannot be said that an award for such a program is reasonably necessary: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 28.

[118] Based on the recommendations of Dr. Giantomaso, Mr. Worthington-White, and the calculations of Mr. Lakhani, Ms. Wishart seeks a total of $55,519 for future care costs. The defendant submits that Ms. Wishart has not met her burden to establish any entitlement for future care. I discuss these below.

Pain Management and Psychological Intervention

[119] Dr. Giantomaso recommended interventional pain management through a pain centre or specialist, and the services of a psychologist or counselling for post-traumatic anxiety and low mood issues. Mr. Worthington-White noted that pain centres are publicly funded. Ms. Wishart has already been referred to a pain specialist and clinic by Dr. Covaser. Mr. Worthington-White recommended 15 to 20 hours of psychological intervention at $225 per hour. Ms. Lee agreed that psychological intervention is warranted, but opined that Mr. Worthington-White did not provide justification for the number of sessions, nor is he an expert in clinical counselling.

[120] While I acknowledge Ms. Lee's comments, Mr. Worthington-White is a very experienced occupational therapist, a health professional, and in my view, he can express some opinion on the likely number of hours, particularly when in my view it is a modest amount. It is clear that Ms. Wishart requires psychological intervention, and it will not be a few sessions only. I accept Mr. Worthington-White's recommendation, and award $3,897.

Occupational Therapy

[121] Dr. Giantomaso recommended an occupational therapist assessment to make recommendations for an ergonomic workstation, on pacing, posture and positioning, and adaptive equipment. Mr. Worthington-White also recommended this for similar purposes at home and at work. This could also assist in reducing symptom aggravation. Mr. Worthington-White recommended 10 hours plus travel, and a contingency for another six hours plus travel for return to work attempts and ergonomic evaluations. Ms. Lee commented that the number of occupational therapy services seems high, without explanation.

[122] In my view, the recommendations of Mr. Worthington-White are reasonable and I accept his recommendations. I award $2,851.

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Treatment for Symptom Management

[123] Dr. Giantomaso recommended therapies, but only to decrease the intensity and duration of a flare up if one occurs for up to three weeks at a time, and a maximum of 24 sessions per year. He did not opine that 24 sessions per year would be required, nor did he give an end date. Mr. Worthington-White recommended a reduction in Ms. Wishart's "high level of intervention at this point in the rehabilitation process" over the next year, and thereafter 12 sessions per year of an allied health care professional for another six to seven years "after which it is common that individuals are familiar with appropriate exercises and symptoms control strategies and there is not necessarily a need for ongoing treatment", and if recommended by the medical professional another eight to 10 sessions per year for symptom exacerbation. Ms. Lee disagreed with Mr. Worthington-White's recommendations as she opined they are not supported by Dr. Giantomaso, nor do the therapies appear to have helped Ms. Wishart to promote independence with her ability to manage pain. Ms. Lee opined that a more reasonable recommendation is 12 sessions per year of either physiotherapy or massage over the next two to three years.

[124] Ms. Wishart has had nearly 300 sessions over the past more than four years. Dr. Giantomaso was quite clear that the level of therapy she was receiving currently was not indicated, so I do not accept Mr. Worthington-White's opinion that there should be another year of high-level of therapy. However, I am also not persuaded by Ms. Lee's opinion that all therapy should stop after two to three years. Dr. Giantomaso opined that his recommendations were not curative, however, there was some expected improvement with them, and with that I would expect less symptom flares over time. Weighing all this limited information and opinion, I find Mr. Worthington-White's assessment of another seven years of treatment at 12 sessions per year, to be reasonable. At $100 per session, the present value is $8,850, and I award that sum.

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Exercise Program and Kinesiologist/Trainer

[125] Dr. Giantomaso recommended 16 to 24 session of active rehabilitation for core strengthening, and cervical and scapular stabilization, as well as aerobic and resistance training. Thereafter, Ms. Wishart can continue on her own. Mr. Worthington-White recommended 15 sessions. He noted that Ms. Wishart has received some kinesiology in the past. Ms. Lee disagreed with more kinesiology assistance because Ms. Wishart has already received a number of active rehabilitation sessions with a kinesiologist. She also opined that there was no justification for the number of sessions.

[126] I accept Dr. Giantomaso's recommendations and award 24 hours at $75 per hour plus a 30% allowance for travel to her home gym. In my view it is important that Ms. Wishart have professional support for active rehabilitation. It is unclear how much active rehabilitation she has received as opposed to other therapies, but it appears less and at the beginning of her treatment. Since then, her circumstances have changed. I award $2,340.

Vocational Consulting

[127] Dr. Giantomaso did not make any recommendation for this. Mr. Worthington-White opined that Ms. Wishart would benefit from the involvement of a vocational consultant to help her explore suitable long-term employment and/or possible training/education programs. He recommended 15 hours of these services. Ms. Lee opined that Mr. Worthington-White has not provided any justification of how he came to the number of hours, although she agreed some vocational counselling would be beneficial.

[128] I disagree with Mr. Worthington-White and Ms. Lee. Ms. Wishart was working in a sedentary job prior to the accident, is working in one now, and pre-accident intended to continue in such a job. I have provided for occupational therapy assessment for any ergonomic requirements. This is not a situation where Ms. Wishart's injuries indicate she will be required to change careers. Ms. Wishart is

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clearly intelligent. She stated she kept her contacts in the IT industry. That is where she plans to eventually return. There is no award for vocational consulting.

Equipment

[129] Dr. Giantomaso did not make any recommendation for or against equipment. Mr. Worthington-White recommended funding of $100 every seven years for home exercise equipment. As Ms. Wishart had exercised regularly prior to the accident in her home gym, she likely would have incurred the cost for such equipment, and he recommended “splitting” costs. He also recommended a contingency of $200 every five years for the differential costs between regular ergonomic equipment (e.g. light weight or robotic vacuum, long-handled scrubber) to promote independence and symptoms control. He also recommended funding for an ergonomic desk and chair and replacement of these in the future at intervals, and finally a contingency of $500 for possible future equipment needs such an Obus Forme, document holder, or a monitor stand. Ms. Lee opined that Mr. Worthington-White did not provide supporting data of how the cost of these items were determined, and if other strategies could be implemented first. She also noted that the FCE testing did not show any limitations with reaching except overhead. Finally, she commented that the costs of the ergonomic desk and chair seem high based on the website Mr. Worthington-White cites.

[130] In my view, Ms. Wishart was incurring the cost of exercise equipment prior to the accident, and she has not shown that this cost or the need for it was caused or made any greater by the accident. The $200 differential cost for equipment is reasonable and necessary to enable Ms. Wishart to minimize any symptoms with tasks at home. I acknowledge Ms. Lee’s comments that Mr. Worthington-White has not cited every reference for cost, but he was not cross-examined on this, and I rely upon his expertise to estimate that amount. It is moderate and appears reasonable. Ms. Wishart has an ergonomic workstation at home. She may not have one when she eventually transitions to a job other than Vault, however, as Mr. Worthington-White noted, many employers will provide this. Considering this, in my view, it is appropriate to award this as a one-time cost only. The award is therefore $1,480

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(present value of $200 every five years for home equipment) + $1175 (average desk) + $800 (average chair) + $500 (other ergonomic equipment) = $3,955.

Medication and Aids

[131] Dr. Giantomaso recommended medication management for soft tissue pain. Mr. Worthington-White noted that Ms. Wishart was taking amitriptyline and provided the cost of $58.40 per year, and as Ms. Wishart has ongoing aggravation of her symptoms, he also recommended a one-time contingency of $750 for the cost of over-the-counter medications, topical ointments, cold packs, rollers, massagers, TENS Unit, and similar items. Ms. Lee opined that Mr. Worthington-White did not provide a breakdown of how he came to the $750, nor whether she has already tried these. She agreed that $750 works out to $6.25 per month for the next 10 years.

[132] I note that since Mr. Worthington-White's report, Ms. Wishart has been prescribed gabapentin for her pain as well as more recently Ativan for her anxiety. It is not clear if she is still taking amitriptyline. There is no indication for how long Ms. Wishart will remain on these medications, but given the chronicity of her symptoms and her prognosis, it appears it will be a number of years. At $100 per year for 10 years, the present value would be about $1,000. Making the best estimate I can on the evidence, I award that amount for medications. I also find that the $750 recommended by Mr. Worthington-White for other non-prescription medications and assistive items is reasonable and justified, and I award that amount. There is evidence that Ms. Wishart uses these items, and I rely on Mr. Worthington-White's experience in estimating the total cost without having to list the cost of each item. Mr. Worthington-White was not cross-examined on individual items. Further, the special damages receipts for similar items were in evidence, and to date they total more than $1,000. The total award for medication and other aids is therefore $1,750.

[133] The total award for cost of future care is $23,643. There is no deduction for any pre-existing conditions, as the evidence does not support a real and substantial

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possibility that any portion of these costs would have been incurred absent the accident.

Special Damages

[134] Claims for special damages must be reasonable, and when incurred in relation to treatment to promote a plaintiff's health, must be medically justified: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[135] Ms. Wishart seeks $7,034 for mileage costs, Pilates, pain patches, items such as massage tools, and the two times the housecleaners came. All of the receipts are in evidence. The defendant also submits that the expenses are not reasonable or justified and contingencies should be applied. The defendant also made submissions regarding three specific receipts but they do not form part of the damages advanced.

[136] I have reviewed the receipts and, in my view, they are reasonable and justified with the exception of part of the housekeeping assistance. There was $845 in housekeeping receipts. I have included half on the inference that as Ms. Wishart had not had any professional cleaning assistance since the accident, some of the work came within the category of seasonal housekeeping cleaning which she is not capable of doing. There is no basis to reduce any of the other items claimed. After the adjustment, I award $6,612.

Orders

[137] Ms. Wishart will have judgment against the defendant as follows:

Head of Damage	**Award**
a. Non-pecuniary damage	$102,000
b. Loss of Earning Capacity	$95,000
c. Loss of Housekeeping Capacity	$27,500
d. Costs of Future Care	$23,643
e. Special Damages	$6,612
TOTAL	**$254,755**

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[138] Unless there are settlement offers or other matters of which I am unaware, Ms. Wishart will have her costs of this action at Scale B. If the parties need to address costs, they may make arrangements through Supreme Court Scheduling to speak to the matter.

"Norell J."

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