

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *O'Grady v. Virk*,
2023 BCSC 48

Date: 20230111
Docket: M218389
Registry: New Westminster

Between:

Sharon O'Grady

Plaintiff

And

**Kuldeep Virk and Beant Virk and Lawrence Schmidt
and Julie Schmidt**

Defendants

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for Plaintiff:

J. Woods

Counsel for Defendants:

R. Rogers
K. Croft

Place and Dates of Trial:

New Westminster, B.C.
September 6-9 and 12, 14-16, 2022

Place and Date of Judgment:

New Westminster, B.C.
January 11, 2023

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I. INTRODUCTION

[1] The plaintiff, Sharon O’Grady, was involved in two separate motor vehicle collisions, the first on September 21, 2017, and the second on May 24, 2018 (hereafter the “First Accident” and “Second Accident” respectively, and the “Accidents” collectively).

[2] Ms. O’Grady claims that the injuries she sustained in the Accidents have had a profoundly negative impact on her physical and psychological well-being. Neither of the collisions were Ms. O’Grady’s fault and the defendants admit liability. As such, this trial only concerns the assessment of Ms. O’Grady’s damages.

[3] Ms. O’Grady was 26 years old at the time of the First Accident. She claims that because of the Accidents she suffers from back pain, debilitating migraines, and depression. She says these injuries have caused her to stop working as a dog groomer, a profession she loved. Indeed, she has not worked since the First Accident, and a major focus of her claim relates to her lost past income and future earning capacity. She also claims substantial damages for pain and suffering. She points to her physical pain and psychological issues, which she says have caused difficulties in her relationship and prevented her from being the parent she wished to be. At the heart of Ms. O’Grady’s claim is that her life was on an upward trajectory—both personally and professionally—but that the Accidents dramatically and permanently altered that path for the worse.

[4] The defendants argue that the damages claimed by Ms. O’Grady are excessive. They say that she had pre-existing depression, headaches, and hand and wrist pain that must be considered when assessing her damages, and in particular when predicting her future earning capacity. They also argue that Ms. O’Grady failed to mitigate her damages by taking appropriate measures, such as attending regular health treatments, and so her damages should be lessened. Finally, the defendants assert that with proper treatment, Ms. O’Grady’s symptoms should improve in time, thus reducing the amount of damages required to put her in the same position she would have occupied had the Accidents not occurred.

II. FACTS

A. The Witnesses

- [5] In addition to Ms. O'Grady, the following lay witnesses testified at trial:
- a) Yorkhander Gomez, Ms. O'Grady's common-law spouse;
 - b) Paula Hatton, Ms. O'Grady's former manager at Dapper Dog Services Ltd. ("Dapper Dog");
 - c) Paul McInnis, the owner of Dapper Dog; and
 - d) Dorothea Anas, a friend of Ms. O'Grady and her former co-worker at Dapper Dog.
- [6] I qualified the following individuals as expert witnesses:
- a) Dr. Mitchell Spivak, qualified as an expert in psychiatric medicine and in the diagnosis, prognosis, and treatment of individuals involved in motor vehicle accidents;
 - b) Dr. Tony Giantomaso, qualified as an expert in the field of physical medicine and rehabilitation, including the diagnosis, treatment, and prognostication of individuals suffering from chronic pain;
 - c) Dr. Johann Brink, qualified as an expert in general and forensic psychiatry, and the diagnosis, prognosis, and treatment of psychiatric conditions;
 - d) Dr. Timothy McDowell, qualified as an expert in neurology, including the diagnosis, treatment, and prognosis of neurological diseases and injury; and
 - e) Darren Benning, an economist qualified to give opinion evidence as to the estimates of past and future economic loss.

[7] I will include my findings of fact from the lay and expert witnesses in my analysis of the issues when discussed below.

B. Credibility and Reliability of Witnesses

[8] Given the importance of their testimony to my conclusions, I wish to begin with some brief comments regarding my perception of the credibility and reliability of two of the primary witnesses at the trial, Ms. O'Grady and her spouse, Mr. Gomez.

[9] Ms. O'Grady appeared to me to be a credible witness. While she focused on the negative aspects of her life that she says were caused by the motor vehicle accidents—which is not unusual, and frankly expected in a case regarding damages for injuries—I found she also acknowledged the positive aspects of her life including the support of Mr. Gomez despite her condition and her love of her children and expressed some hope for her future. In this regard I found that Ms. O'Grady answered questions in a straight forward manner. When she could not remember specific details of events she said so.

[10] I observed she was in physical discomfort while giving her testimony. While I cannot be certain, my observations of Ms. O'Grady indicated she experienced genuine discomfort from having to sit for prolonged periods of time while being examined over a number of days of trial. For instance, I observed her fidgeting and attempting to stretch, and it appeared to me that the frequency of her movements increased the longer she was required to remain seated. She also became emotional at several points during her testimony when speaking of the impact of the Accidents on her health and her relationships with her children, spouse, and pets. Again, while I cannot know with certainty, I found these episodes to be genuine expressions of how distraught and frustrated Ms. O'Grady felt when describing how the Accidents changed her life.

[11] I accept the defendants' submissions that Ms. O'Grady did not have a strong recollection of certain dates or the chronology of events occurring since the accidents, and especially those related to her health appointments and her

recommended treatment or prescriptions. However, I find Ms. O'Grady's inability to recall when she saw her specialists for particular treatments unsurprising given the passage of time since the Accidents and Ms. O'Grady's migraines and other pain symptoms. Ms. O'Grady saw many health professionals over a number of years. When confronted with health records, such as clinical notes, Ms. O'Grady accepted that the information on the records as accurate representations of the treatment she received. Further, on major issues, such as her work, family, and recreational activities both before and after the accidents, I found Ms. O'Grady's testimony was generally corroborated by the evidence of other witnesses.

[12] I remain mindful of the oft-cited summary of the principles governing the assessment of credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013). To that end, I find that while some of Ms. O'Grady's testimony regarding the frequency of her treatments was not reliable, it had no impact on my overall assessment of this case, as she accepted the information presented in clinical records as accurate. Furthermore, in terms of her describing her overall symptoms from her injuries and how they impacted her life, I accept that Ms. O'Grady was credible and presented a reliable and accurate account. In summary, I accept Ms. O'Grady's evidence, which will be described in greater detail below.

[13] I also found Mr. Gomez to be both credible and reliable as a witness. He recounted his life with Ms. O'Grady before the Accidents and the aftermath of the Accidents and impacts on Ms. O'Grady and their family. Mr. Gomez appeared credible regarding the impact Ms. O'Grady's injuries have had on the family unit. As I will discuss below, he detailed the changes in Ms. O'Grady's life that affected the family. He candidly acknowledged that her injuries have changed her personality and their relationship profoundly, and that he is doing his best to adjust to the changes. Mr. Gomez struck me as loyal and hard working and remained supportive and hopeful that Ms. O'Grady might regain in the future some semblance of her physical and psychological health before the Accidents.

C. Ms. O'Grady – Before the Accidents

[14] Ms. O'Grady testified that she grew up in Maple Ridge on a small hobby farm. She developed an interest in animals in part because her mother was a professional dog breeder who bred championship dogs for dog shows. Ms. O'Grady's interest in animals increased through her involvement in the 4-H youth organization, of which she was a member from age ten to 21.

[15] Ms. O'Grady explained that she found school challenging. She struggled with academic tests due to what she says were symptoms of Obsessive-Compulsive Disorder ("OCD") and Attention Deficit and Hyperactivity Disorder. Her schools provided her with some accommodations, including additional time to take tests. She nonetheless had difficulty in test-taking, and especially in math and science, where "black and white" answers were required. She most enjoyed her physical education and music classes. She was an avid alto saxophone player and performed in both the school jazz and concert bands. Playing the saxophone continued to be one of Ms. O'Grady's primary interests from the time she left school up until the time of the First Accident.

[16] After graduating high school, Ms. O'Grady worked at various retail jobs. In 2010, she found a job as a dog bather at a veterinarian clinic. While this position aligned with her interest in animals, she was unable to deal emotionally with the euthanasia of pets, which was part of the clinic's practice.

[17] In 2011, Ms. O'Grady was working part time at a restaurant and also started working at Dapper Dog as a dog bather. She also attended Western Dog Grooming School for a three-month intensive program where she obtained a "grooming certificate". Due to a conflict with another dog bather, she paused working at Dapper Dog until she obtained her grooming certificate. After doing so, Ms. O'Grady resumed her work at as a dog groomer at Dapper Dog.

[18] Ms. O'Grady testified that in the early days of her work at Dapper Dog, she had trouble being a good employee because of stress in her personal life. This was

corroborated by the testimony of Ms. Hatton, her manager at Dapper Dog, who testified that during the first two years of Ms. O'Grady's work, Ms. O'Grady had attendance issues and would not provide enough advance notice if she could not make a shift and would also sometimes leave work earlier than expected.

[19] However, Ms. Hatton also testified that she had a discussion with Ms. O'Grady sometime during Ms. O'Grady's second year of work, informing Ms. O'Grady that while her grooming work was very good, she needed to improve her reliability in order to be a good employee. The testimony of Ms. O'Grady, Ms. Hatton, and the owner of Dapper Dog, Dan McInnis, all indicate that Ms. O'Grady took this talk to heart and made a determined effort to become an excellent employee. Ms. O'Grady testified that because she needed to take public transportation to get to work, she would wake up at three in the morning in order to get to work on time. Ms. Hatton testified in glowing terms as to the quality of Ms. O'Grady as an employee, describing her as "stepping up her game" and becoming an expert groomer of poodles, that are the most difficult dog breed to groom. Ms. Hatton testified that Ms. O'Grady was very artistic in her grooming and was fun and passionate about her work. Ms. Hatton testified that it seemed that Ms. O'Grady had "found her groove" and that she was a team player and everyone enjoyed working with her.

[20] Ms. O'Grady continued her informal education and dog grooming by taking webinars and attending seminars in Nevada, Washington State, and Oregon. She also went to grooming competitions, including placing in second place in the last grooming competition that she attended prior to the First Accident. Ms. O'Grady testified that prior to the Accidents she hoped to continue dog grooming and eventually to open a grooming business out of her house. She did in fact provide some dog grooming services from her house prior to the accidents, but this work generated only to approximately \$50 or \$100 per month in additional income.

[21] In 2016 (her last full year of work before the First Accident), Ms. O'Grady earned \$34,724 in annual income from Dapper Dog. She was paid \$18 per hour and

worked approximately 40 hours per week. She testified that the hours would fluctuate depending on the time of year; Christmas and early summer were the busiest times, and immediately after Christmas was the slowest.

[22] Ms. O'Grady testified that between approximately 2011 and 2016, she experienced many stressful events in her life, including a bad relationship and ultimately a break up with her then-boyfriend. According to Ms. O'Grady, the relationship and its demise was emotionally and financially straining. Ms. O'Grady testified that her former boyfriend depleted her bank accounts and "maxed out" her credit cards. She testified that she was constantly contacted by bill collectors, and that her credit card balances and bills were not paid. She also testified that she had transportation problems because she did not have a car and so had to take a bus to work making it difficult to be on time for work. Ms. O'Grady testified that this was an extremely stressful time for her.

[23] The stress from her debt issues improved when she declared bankruptcy in 2016. She was discharged from bankruptcy in 2017. Ms. O'Grady testified that leading up to her declaration of bankruptcy her stress increased due to the calls from the bill collectors. Ms. O'Grady's clinical medical records corroborate her claims in that in April 2016, she reported to her family physician, Dr. Warmenhoven that she was experiencing more stress and headaches. Clinical records indicate that in April 2016, Dr. Warmenhoven prescribed Ms. O'Grady sertraline to, according to Ms. O'Grady, deal with the depression and stress she was experiencing at that time related to her ex-boyfriend and financial issues.

[24] In respect of her pre-accident recreational activities, sometime in 2016, Ms. O'Grady met Mr. Gomez and the two began dating. It was clear to me that they care deeply for each other, and that they thoroughly enjoyed their early courtship. Ms. O'Grady enjoyed salsa dancing with Mr. Gomez, hiking with her friends, dog walking, and working out at the gym. She became very involved in training for bikini bodybuilding, which required her to work out four to five times each week. This had

been a goal of Ms. O'Grady's since she was 15 years old. The training involved lifting weights, squats, bench presses, curls, cardio, sprinting, and jumping rope.

[25] Ms. O'Grady's level of fitness and health before the First Accident was confirmed by collateral witnesses, including:

- a) Mr. Gomez, who said that physical fitness was a passion he and Ms. O'Grady shared, including by routinely going on hikes together with their dogs near Simon Fraser University;
- b) Ms. Hatton, who worked out with her often at a gym at lunch and said that Ms. O'Grady was very strong; and
- c) Ms. O'Grady's friend, Dorothea Anas, who hiked with Ms. O'Grady and said that during the hikes Ms. O'Grady was able to hike while carrying her dogs.

[26] Although her health was generally very good before the First Accident, Ms. O'Grady suffered from migraines, which I will address in more detail below. These migraines occurred approximately once per month, although there is some discrepancies in the evidence regarding the frequency of Ms. O'Grady's pre-accident headaches as a clinical record by her treating physician, Dr. Warmenhoven states that in 2016 she had migraines once a week to every second day. Again, I will address the issue of pre-existing headaches below, but accept Ms. O'Grady's evidence that she was able to work through these migraines, including at Dapper Dog. She said she did so by wearing sunglasses in order to protect her from light sensitivity. Ms. O'Grady's testimony with respect to her migraines and ability to work through them was supported by Ms. Hatton, who observed Ms. O'Grady occasionally wearing sunglasses while Ms. O'Grady was working at Dapper Dog.

D. The Accidents

[27] The parties generally agree on the details of the Accidents. The First Accident occurred on September 21, 2017, at the intersection of Dewdney Trunk Road and

216th Street in Maple Ridge, BC. Ms. O'Grady was driving and proceeded into the intersection after coming to a full stop. Her vehicle was then struck in the front driver's side by a vehicle operated by the defendant Kuldeep Virk.

[28] The Second Accident occurred at the intersection of Brown Avenue and 224th Street in Maple Ridge, BC, on May 24, 2018. Ms. O'Grady was a passenger in the car, and Mr. Gomez was driving. Mr. Gomez's vehicle proceeded through a stop sign at the four way stop after coming to a complete stop, and was struck on the passenger side by a vehicle operated by the defendant, Lawrence Schmidt.

E. The Injuries

[29] Immediately after the First Accident, Ms. O'Grady did not lose consciousness. She described feeling confused and sore, and felt back and neck pain immediately. She travelled to the hospital by ambulance and was examined. At the hospital, she felt slightly nauseous and emotionally overwhelmed.

[30] Generally, after the First Accident Ms. O'Grady reported experiencing extreme pain, and found it hard to do any tasks around the home. She said that turning her head was challenging. She said she experienced pain when she turned her head and had constant back pain. She described the pain as dull pains that were also sharp, like she had bricks on her back that felt like they were cutting into her neck. Ms. O'Grady also described occasionally feeling a "twisting knob" in her back that when it occurred required her to collapse on the floor because of the intensity of the pain. Ms. O'Grady also testified that after the First Accident she had extreme anxiety regarding driving or being in a car.

[31] In respect of her headaches, Ms. O'Grady testified that they were "nothing like" the headaches she had before and brought on nausea and intense pain. The headaches she experienced after the First Accident, according to Ms. O'Grady were completely disabling and required her to crawl on the floor to the bathroom when one occurred. These migraines were stronger, and she could not be around light or

have people speak to her. She testified that when having a headache, even if a person asked her a simple question, it would reduce her to tears due to the pain.

[32] Mr. Gomez testified that he attended the hospital after the First Accident and Ms. O'Grady was in the emergency ward for about six hours. He testified that after the First Accident, after they returned home from the hospital, Ms. O'Grady was "not Sharon", she sat in the corner of the room wearing sunglasses and with no lights on. Mr. Gomez was so concerned about Ms. O'Grady's condition that he quit his job three days after the First Accident to provide care to her.

[33] Ms. O'Grady testified that she was feeling somewhat better as time passed from the First Accident, but she still had a "stabbing, twisting pain pressure and tightness" in her back. She also still had headaches three to four times a week on average that would usually last four to five hours. The longest headache she remembered lasted from early morning to the next day.

[34] The impact of the Second Accident caused Ms. O'Grady to strike her head on the passenger side window. She was bleeding from a laceration to the right side of her head. Ms. O'Grady believes she momentarily lost consciousness after the impact. She testified that she recalls everything appearing without colour in black and white. Ms. O'Grady needed assistance out of the vehicle and Mr. Gomez wrapped her head in his shirt to try to stop the bleeding. Ms. O'Grady was taken to the hospital by ambulance and examined. A scan was performed where it was determined that Ms. O'Grady had suffered a concussion. Ms. O'Grady also testified that she felt in pain and confused immediately after the Second Accident. She felt increased neck and back pain and was given a neck brace, but it was too large for her to use without increasing the pain. At the hospital, Ms. O'Grady had trouble communicating with the health care professionals because it was hard for her to cognitively understand what was being asked of her. After her headwound was treated she was discharged. She testified that upon returning home she slept for 36 hours.

[35] Ms. O'Grady testified that she felt increased tiredness as time passed after the Second Accident. She also perceived a decline in her cognitive ability and spatial recognition, which caused problems with her balance. Her anxiety related to driving and her depression also worsened after the Second Accident.

[36] Beyond Ms. O'Grady's own testimony, there is consensus between the medical experts that Ms. O'Grady suffered injuries as a result of the Accidents. The minor variation amongst the experts relates to the extent of the injuries and the prognosis.

[37] For instance, Dr. Giantomaso opined that the First Accident likely caused Ms. O'Grady: mild traumatic brain injury; post-traumatic mixed headaches including neck and migraine headaches; post-traumatic cervical sprain/strain injury consistent with a whiplash injury; chronic post-traumatic thoracic sprain/strain injury; and chronic post-traumatic lumbar sprain/strain injury. Dr. Giantomaso further opined that the Second Accident likely caused an exacerbation and aggravation of pre-existing cervical, thoracic, and lumbar sprain/strain injuries.

[38] In respect of her psychological issues, Dr. Spivak opined that Ms. O'Grady suffers from somatic symptom disorder with predominant pain, if one considers the degree to which her life has been consumed by her pain and physical injuries. She also suffers from severe driving anxiety.

[39] Finally, both Dr. McDowell and Dr. Brink, although not explicit in their reports, accepted during cross-examination that the Accidents caused Ms. O'Grady's ongoing brain injuries and psychiatric conditions, respectively.

[40] I will discuss my findings with respect to causation below.

F. The Impact of the Injuries of Ms. O'Grady's Life

[41] Ms. O'Grady testified that she has never felt relief from the back pain she got as a result of the First Accident. She described it as an intense dull pain, but one that is also sometimes sharp. She said the pain is as if she had bricks on her back

that were cutting into her neck. At another point in her testimony, she described the pain as feeling like the twisting of a knob in her back. She stated that when the pain reaches a certain level of intensity, she needs to collapse into a chair or the floor until the pain subsides.

[42] Ms. O'Grady also testified that as a result of the Accidents she now has migraines three to four days per week. She says the migraines are accompanied by nausea. Although she had migraines before the Accidents, Ms. O'Grady testified that the migraines she has now are "nothing like" the pre-accident headaches, both in frequency and intensity. She testified that the headaches she suffered before the Accidents occurred once or twice a month. As previously mentioned, while uncomfortable, she said those headaches did not prevent her from performing work and activities as long as she made certain modifications, such as wearing sunglasses to reduce light sensitivity. She testified that the migraines she experienced after the First Accident have completely disabled her and she feels a pain in her forehead area and when the pain is at its worst she needs to crawl to the bathroom in pain.

[43] Ms. O'Grady also testified that as a result of the Accidents she suffers from severe anxiety related to being in a car. She says she is unable to be in a car as a passenger without feeling intense anxiety. This testimony was corroborated by Mr. Gomez, who said that in past instances where Ms. O'Grady was a passenger she would "scream and throw her hands up". Mr. Gomez also testified that on one occasion he tried to have Ms. O'Grady drive in a parking lot to overcome the anxiety, and she had a "little freak out" and could not continue.

[44] As will be described in greater detail below, Ms. O'Grady has not worked since the First Accident. She says that the pain she experiences would make working nearly impossible. She testified that she is unable to even groom her own dogs, who are well behaved.

[45] Ms. O'Grady has not continued with the physical activities she did prior to the Accidents, such as going to the gym or working out. She testified that "it is ridiculous

to think I could go back to the gym when I have trouble lifting a cup out of the cupboard". Since the Accidents, she has also stopped hiking with her friends, and says she has no social life because she has a lack of money and an inability to drive to meet with friends or former colleagues. She also testified that due to her inability to work, her financial situation is grave, requiring her to get food from the food bank. She says having to do so causes her to feel feelings of shame.

[46] Since the Accidents, Ms. O'Grady and Mr. Gomez have had two children. The first child was born in April 2020 and the second in April 2022. Ms. O'Grady says her injuries have greatly impacted her ability to parent her children, and testified that sometimes she feels like a terrible mother because she is not able to participate with her children as she would like. She testified that she feels that the "luxury of play was taken away" from her by the Accidents.

[47] Ms. O'Grady testified that since the Accidents she has a short temper and gets angry with Mr. Gomez. Her evidence was that her injuries have changed their relationship. She says they are trying to adapt to life with the injuries. In short, Ms. O'Grady says this has required the couple to go from a life of salsa dancing, excitement, and free movement to a life dominated by her injuries and treatment.

[48] Finally, Ms. O'Grady testified that she has trouble sleeping, and that she is generally concerned about her and her family's future. She does not see how her condition will improve, and does not know how she will drive her children to activities when they get older. When asked if she had joy in life, she testified as follows:

On a leisurely level there is nothing that brings me joy. On a passion level there is nothing that brings me joy. The only thing that—you know—I do find myself smiling, is when I'm enjoying the presence of my children. But even then, it's—it doesn't feel full. I don't feel true joy. Because I know that in those moments I'm not taking part the way I want to be. I'm handicapped in those situations. So, I am getting to witness them laughing, but I am not really being part of it.

III. ISSUES

[49] The defendants admit liability. The issues in this case thus relate to the calculation of Ms. O'Grady's damages. Specifically, the court is tasked with

assessing the amounts for non-pecuniary damages, loss of past income, and future loss of earning capacity. Ms. O'Grady has not claimed separate damages related to a loss of future housekeeping capacity, but argues that the court should increase the amount of non-pecuniary damages to account for that loss. The parties generally agree as to the amount of special damages. Finally, despite not being expressly claimed by Ms. O'Grady, the defendants propose an amount to compensate Ms. O'Grady for the cost of her future care.

[50] Issues related to the assessment of damages include causation and an alleged failure on the part of Ms. O'Grady to mitigate her losses by not diligently participating in recommended medical treatments. I will address these two issues first before generally considering Ms. O'Grady's claim for damages.

IV. LAW AND ANALYSIS

A. CAUSATION

[51] While the defendants acknowledge that Ms. O'Grady suffered injuries as a result of the Accidents, they disagree about the extent to which the Accidents can be considered the sole cause of her symptoms. They argue that Ms. O'Grady had certain pre-existing conditions that contribute to Ms. O'Grady's current symptoms.

[52] The primary test for causation asks whether the plaintiff would have suffered the injury but for the defendant's negligence. This "but for" test recognizes that compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23. The plaintiff must establish causation on a balance of probabilities, and causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13–17 [*Athey*]. However, it is settled law that a defendant's negligence need not be the sole cause of the injury for the 'but for' test to be satisfied: *Athey* at para. 17; see also *Baglot v. Fourie*, 2019 BCSC 122 at para. 280.

[53] The defendants argue that Ms. O'Grady had a history of headaches and depression prior to the Accidents. Further, they argue that she had a previous wrist injury which should also factor into the court's analysis regarding the extent to which the Accidents have caused her current health issues.

[54] In my view, the evidence does not support the defendants' argument. I am satisfied that on a balance of probabilities, the Accidents are the cause of Ms. O'Grady's current pain symptoms. Ms. O'Grady's life was on an upward trajectory when not one, but two car accidents altered that trajectory significantly. At the time of the First Accident, she had a job she thoroughly enjoyed, a new partner she loved, and she had just put an emotionally and financially draining relationship behind her.

[55] While the issues of Ms. O'Grady's pre-existing health issues will factor into my quantification of damages, I have no hesitation in concluding on a balance of probabilities that the Accidents are the cause of Ms. O'Grady's injuries. To reiterate, my conclusion is based, in part, on the following expert evidence, which supports a finding that the Accidents are the cause of Ms. O'Grady's injuries:

- a) Dr. Spivak concluded that Ms. O'Grady's symptoms have been predominantly driven by her experience of pain. While he defers to other experts regarding the causal connection between the Accidents and the pain, he states "it does appear that her challenges with pain arose in the aftermath of the accidents and there appears to be a strong logical and temporal association between her pain and the [Accidents]." Dr. Spivak further opines that Ms. O'Grady's anxiety associated with being in motor vehicles can only be accounted for by the accidents; and
- b) Dr. Giantomaso opined that "the mechanisms of action of the Accidents could reasonably be associated with Ms. O'Grady's injuries including injuries to the cervical, thoracic and lumbar spine and post-traumatic headaches.

[56] I note the opposing expert evidence of Dr. Brink, who opined in his report that Ms. O'Grady's current psychiatric difficulties did not commence with the accidents of 2017 or 2018. He opined that Ms. O'Grady was predisposed to developing anxiety and depression in the face of trauma as a result of her history since childhood of OCD, along with other personal issues she faced as a child.

[57] However, much of Dr. Brink's opinion was based on his view that Ms. O'Grady was undertreated, a conclusion he reached in part on the assumption that Ms. O'Grady waited six months after the First Accident to see Dr. Sawhney. Dr. Brink's testimony suggested that he did not review the medical records of Dr. Warmenhoven, Ms. O'Grady's family physician. Ms. O'Grady saw Dr. Warmenhoven within five days of the First Accident. While there is considerable consensus amongst the experts that Ms. O'Grady was undertreated, this apparent oversight regarding when she first sought medical assistance affects the weight of Dr. Brink's conclusions regarding Ms. O'Grady's treatment.

[58] Further, Dr. Brink's opinion concludes that Ms. O'Grady was predisposed to anxiety in the face of trauma, and then lists the various events he considered to be potential contributing stressors including: stress of the birth of her children; ongoing financial difficulties; deterioration of her common-law relationship; and a possible element of post partum depression. However, amongst these traumatic events Dr. Brink did not mention the two traumatic car accidents at issue in this case. In cross-examination, Dr. Brink clarified that the list of potentially traumatic events he provided in his report was not intended as exhaustive. Further, in cross-examination, Dr. Brink acknowledged that the Accidents are substantially responsible for Ms. O'Grady's psychiatric conditions.

[59] I do not accept the defendants' argument that Ms. O'Grady's prior headaches, wrist injury and depression before the Accidents can be considered to have caused her current symptoms. Although Dr. Warmenhoven's clinical records indicate that in April 2016, Ms. O'Grady reported to him that she was suffering from increased headache frequency of three to four headaches a week and that she was feeling

depressed, I find that these symptoms can be linked to Ms. O'Grady's stressful circumstances she was experiencing at that time due to her financial issues and issues with her ex-boyfriend. Similarly, I conclude that the wrist injury is an acute injury that has not impacted Ms. O'Grady's current symptoms. However, to the extent that Ms. O'Grady suffered some level of pre-existing migraine condition, I will account for it in my assessment of her damages as the defendants should not be responsible for Ms. O'Grady's health issues that would have been present regardless of the Accidents.

[60] In summary, while Ms. O'Grady may have experienced acute incidents of headaches and depression in the past, the totality of evidence both from the medical experts and those who observed Ms. O'Grady's condition after the Accidents leaves me with no hesitation in concluding that the Accidents caused Ms. O'Grady's current health and psychiatric injuries.

B. MITIGATION

i. Law

[61] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. The defendant has the burden of proof on the issue of mitigation. Namely, where the plaintiff has not pursued a course of medically-recommended treatment, the defendant must prove that: (i) the plaintiff acted unreasonably in not doing what the defendant says the plaintiff should have done; and (ii) the plaintiff's loss would have been reduced or eliminated had the step or steps been taken: *Baskerville v. Liu*, 2022 BCSC 2164 at para. 347, citing *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 [*Chiu*] and *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62. Whether the plaintiff acted reasonably is a factual question, considering all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202 [*Gilbert*].

[62] The following articulation of the test for mitigation was articulated by Low J.A. in *Chiu*:

57 The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has

not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146.

[63] Each part of the two-part test set out by the Court of Appeal in *Chiu* attracts a distinct burden. The first aspect—i.e., whether the plaintiff acted unreasonably in not taking the treatment—must be proven on a balance of probabilities, because it is based on a consideration of past facts. The second aspect—i.e., the extent, if any, to which the plaintiff's damages would have been reduced had the plaintiff followed the recommended treatment—will be weighted according to its relative likelihood, provided the possibility is real and substantial, because it is based on hypothetical events: see *Gao v. Dietrich*, 2018 BCCA 372 at paras. 37–39; and *Evans v. Keill*, 2018 BCSC 1651 at para. 121.

[64] Mr. Justice Verhoeven helpfully summarized the legal principles relating to a mitigation defence in *McNabb v. Rogerson*, 2022 BCSC 1514:

[134] In summary:

- a) The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of the loss.
- b) In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to the plaintiff by doctors, the defendant must prove two things:
 - i. that the plaintiff acted unreasonably in deliberately avoiding the recommended treatment, and
 - ii. the extent, if any, to which the plaintiff's damages would have been reduced had the plaintiff acted reasonably.
- c) In order to meet this second part of the test, the defendants must establish a real and substantial possibility that any part of the losses could have been avoided.
- d) If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.

ii. Parties' Position

[65] The defendants acknowledge that Ms. O'Grady made some efforts to mitigate her damages by initially following the recommendations of her healthcare specialist. However, they assert that she failed to mitigate in two significant ways. First, they argue she missed several scheduled therapy sessions, and thus failed to follow the recommendations of her health care providers to attend appointments with both family doctors and specialists in British Columbia. Second, they allege Ms. O'Grady deliberately stopped taking her prescribed antidepressant medication, sertraline, while she was pregnant and when breastfeeding. The defendants accept that it was Ms. O'Grady's choice to stop taking sertraline, but say that there was no evidence that the drug would be dangerous for her or her children. They say the defendants should not bear the full consequence of her decision to stop the medication.

[66] In response to these submissions, Ms. O'Grady says she was unable to attend all of her treatments because of the symptoms she has suffered as a result of the Accidents. Specifically, she says her headaches and low mood made it difficult for her to organize her treatments. She also says the financial hardship caused by the Accidents resulted in Ms. O'Grady not having a phone, home internet or a vehicle to attend the appointments. Furthermore, Ms. O'Grady argues that there was very limited public transportation where she lived and, even if she had access to a vehicle, she could not drive due to her driving anxiety. Finally, she acknowledges that she did not take sertraline when pregnant because she was concerned about its potential impact on the development of her children. In her words, she wanted to "have a very natural body" during pregnancy. In summary, Ms. O'Grady says that, in the circumstances, the steps she took to treat her symptoms were reasonable.

iii. Determination

[67] I am satisfied the evidence supports a finding Ms. O'Grady did not attend all of her appointments largely, if not entirely, because of the circumstances caused by the Accidents. Ms. O'Grady testified, as corroborated by Mr. Gomez, that because

she could no longer work due to the Accidents, money was scarce, which had the following consequences:

- a) Ms. O'Grady could not afford home internet to schedule or track appointments;
- b) Ms. O'Grady and Mr. Gomez shared one cellular telephone and so it was difficult to schedule, change or cancel appointments;
- c) Ms. O'Grady and Mr. Gomez were required to live in a relatively remote area because that was the rent they could afford, which meant she did not have access to public transportation to get to appointments; and
- d) Ms. O'Grady and Mr. Gomez had only one vehicle—and in any event, because of her driving anxiety, Ms. O'Grady would be unable to drive herself to appointments.

[68] Further, I note that some of Ms. O'Grady's treatment occurred during the COVID-19 pandemic when many medical visits had to occur virtually over the internet. Not having internet access would, in my view, add an additional hurdle to Ms. O'Grady attending virtual medical appointments. I do not find it fair or reasonable for the defendants to blame Ms. O'Grady for not attending or scheduling appointments when many of the obstacles preventing her from doing so were ultimately the result of the defendants' actions.

[69] Similarly, I find it inappropriate to fault Ms. O'Grady for not being able to organize or remember her appointments due to her migraines and impaired cognitive functioning. Ms. O'Grady's evidence was that she was frequently unable to organize her affairs to attend medical appointments as a result of her depression and anxiety. Those circumstances are analogous to prior findings by this court that a plaintiff should not be penalized for a lack of diligence in following treatment recommendations stemming from depressive symptoms caused by a defendant's negligent conduct, at least in part: see *Wagner v. Newbery*, 2015 BCSC 894 at

para. 232 and *Kempton v. Struke Estate*, 2020 BCSC 2094 at paras. 197–200. In sum, it strikes me as unfair to penalize Ms. O'Grady for the consequences of cognitive issues she suffered as a result of the defendants' conduct.

[70] In regard to the defendants' assertion that Ms. O'Grady failed to mitigate her damages by ceasing taking sertraline during her pregnancy, I find that Ms. O'Grady did not act unreasonably in making the decision about what medications she would take during her pregnancy. In my view, it is reasonable for Ms. O'Grady to make decisions regarding her health in respect of her pregnancy that she viewed were in the best interest of her and her children. In assessing mitigation defences, the court has considered a plaintiff's decision regarding medications while pregnant. In *Cross v. Boehlke*, 2014 BCSC 2225, the court found it had "no criticism" of the plaintiff's decision to cease all medications and treatments after finding out she was pregnant: at para. 193. Similarly, in *Mattson v. Spady*, 2019 BCSC 1144, the court noted, with respect to a failed mitigation defence, that because the plaintiff "was pregnant and/or breastfeeding for a significant period of her recovery time ... her medication options were thus restricted": at para. 141. I am satisfied that Ms. O'Grady made genuine efforts to attend appointments and took reasonable steps to treat her medical conditions. In this regard, I also note that my review of Ms. O'Grady's treatment records indicate that in addition to meeting with her family physician, she attended in excess of 150 physiotherapy treatments at Oasis Physiotherapy and Maple Ridge Physiotherapy and ten counselling sessions with Ms. Lana Rados. Ms. O'Grady also took medications, other than sertraline during her pregnancy, as recommended.

[71] The defendants also appear to argue that Ms. O'Grady failed to pursue other courses of treatments or medications recommended by the expert specialists who examined her for the purposes of this litigation. Their assertion appears to be that Ms. O'Grady, armed with the treatment recommendations in the independent medical reports, should have taken steps to follow those recommendations. I reject that argument. While Ms. O'Grady, assuming she had personal access to the expert opinions, could have asked her treating physician to pursue treatments, she was otherwise powerless to prescribe herself medications or write referrals for

treatments. Based on the evidence before me, in my view, Ms. O'Grady should not be held to a standard of formulating her own treatment plan for recovery. She is, as are all non-medical professionals in this country, somewhat at the mercy of health practitioners.

[72] Given the foregoing, I conclude the defendants have failed to meet their burden that Ms. O'Grady failed to mitigate her damages such that her damages should be reduced.

[73] I will now consider the specific heads of damages claimed by Ms. O'Grady.

C. NON-PECUNIARY DAMAGES

i. Law

[74] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities in an amount that is fair and reasonable to both the plaintiff and defendant. The fairness of non-pecuniary damages is assessed against awards made in comparable cases. However, such cases only serve as a rough guide, since what is fair and appropriate in each case will depend on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[75] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (19 October 2006) [*Stapley*], the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

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

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

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

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

[76] Ms. O'Grady's circumstances, before and after the Accidents, must be considered to determine what award will place her in the position she would have occupied had it not been for the defendants' negligence. In other words, as best as money can do, Ms. O'Grady is to be compensated to put her in no better or worse a situation than if the Accidents had not occurred.

[77] The defendants must take Ms. O'Grady as she is. The assessment of non-pecuniary damages is necessarily influenced by the plaintiff's personal experiences in dealing with their injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25. This is so even if her injuries are more severe than they would be for another person. However, the defendants are not required to compensate Ms. O'Grady for any debilitating effects of a pre-existing condition which she would have experienced anyway: *Athey* at paras. 32–35.

ii. Parties' Positions

[78] Ms. O'Grady argues that an appropriate amount of non-pecuniary damages is \$200,000. She arrives at this amount on the view that she is only 31 years old and has to live with the dramatic impact of her injuries for many years. As well, she cites the fact that as a result of her injuries she has been deprived of the opportunity to continue working in a profession she loved. She also says the injuries she has suffered as a result of the Accidents have caused her to feel that she is not a good mother to her two children, and have negatively impacted her intimate relationship with Mr. Gomez. In particular, Ms. O'Grady points to the fact that as a result of the accident she is unable to walk with her dogs, compete in bodybuilding, play her saxophone, and have social interactions. In essence, Ms. O'Grady says that her life

was on an upward trajectory prior to the Accidents; instead, as a result of the Accidents, she says many of her hopes and expectations for the future were dashed.

[79] In her written submissions, Ms. O'Grady summarizes her position regarding the impact of the accidents on her life in support of her claim for non-pecuniary damages:

In the case at bar, we have a plaintiff who, at only 26 years old, suffered severe injuries as the result of the defendants' negligence. Her injuries are multifactorial, impact her daily life, and at this point have continued for five years. She has lost the ability to work, to drive, and to properly care for her children and animals. The plaintiff wakes up every morning not knowing if she will be faced with a disabling headache or perhaps, if she is lucky, only the constant daily pain in her neck and back. She has lost her social relationships, her relationship with her spouse has been negatively impacted, and she worries every day about what kind of life she is going to be able to provide in the future for her young children.

[80] As justification for a claim of \$200,000 in non-pecuniary damages, Ms. O'Grady relies upon the following cases, which she says are similar to the circumstances of her case:

- a) *Chen v. Crystal Computer Ltd.*, 2022 BCSC 1051 – A 55-year-old female plaintiff suffered chronic and permanent soft tissue injuries to her neck, chest, and back. These injuries resulted in a persistent case of somatic symptom disorder which left the plaintiff physically inactive and frustrated that she could no longer pursue her recreational and personal life. The plaintiff was awarded \$185,000 for non-pecuniary damages;
- b) *Noftle v. Bartosch*, 2018 BCSC 766 – A 46-year-old female plaintiff was diagnosed with chronic pain somatic symptom disorder and major depressive disorder. The plaintiff suffered significant injuries to her neck, collarbone, left shoulder, right shoulder, and mid back. The plaintiff had fluctuating moods and inability to sleep well. The plaintiff was awarded \$170,000 for non-pecuniary damages, which adjusted for inflation using the Bank of Canada's inflation calculator is equivalent to \$196,000 today; and

- c) *Choi v. Ottahal*, 2022 BCSC 237 – A 63-year-old female plaintiff was injured in two separate motor vehicle accidents. Although she previously suffered from some migraines and depressive symptoms, the court found the accident caused the plaintiff to suffer post-traumatic headaches, chronic pain, post-traumatic stress disorder, persistent depressive disorder, and other injuries. The court found the plaintiff also lost her ability to work as an ESL teacher—a job that she found rewarding and was a significant part of her life. The plaintiff was awarded \$210,000 in non-pecuniary damages.

[81] The defendants assert that the appropriate amount to compensate Ms. O'Grady's pain and suffering is \$75,000. The defendants did not explicitly set out their calculations. They did, however, submit that \$75,000 is an appropriate amount for non-pecuniary damages after reducing the (undefined) total by 10% to account for Ms. O'Grady's pre-existing depression, anxiety, and migraines, and for her failure to mitigate her damages. I have rejected the defendants' causation and mitigation arguments above. Accordingly, after accounting for the rejected 10% reduction, I infer that the amount to which the defendants argue Ms. O'Grady is entitled for non-pecuniary damages must be \$83,333.

[82] In support of an award for non-pecuniary damages, the defendants rely on the following cases:

- a) *Hale v. Keyes*, 2020 BCSC 559 – The plaintiff, a 34-year-old mother of three, had a history of non-debilitating migraine headaches that significantly worsened following the accident. The plaintiff also had a fear of driving and difficulty sleeping. She was awarded \$75,000 in non-pecuniary damages;
- b) *Kagrimanyan v. Weir*, 2018 BCSC 1458 – A 35-year-old female plaintiff was expected to continue to experience chronic pain in the form of headaches and lower back pain into the future. This pain impacted her recreational, social, and domestic activities. The court held that physical

conditioning would likely improve her ability to cope with and manage her pain symptoms. The plaintiff was awarded \$75,000 in non-pecuniary damages;

- c) *Luck v. Shack*, 2019 BCSC 1172 – The plaintiff was 36 years old at the time of trial and experienced ongoing lower back pain after an accident, which became sporadically severe following the birth of her son. She had difficulty, among other things, in caring for her children, and was expected to face a lifetime of moderate pain. The plaintiff was awarded \$75,000 in non-pecuniary damages; and
- d) *Johnson v. Randhawa*, 2020 BCSC 708 – A 41-year-old mother of two was involved in two motor vehicle accidents, resulting in headaches, driving anxiety, and pain to the neck and upper back. The plaintiff was found to have made minimal efforts to restore her conditioning. The plaintiff's pain was no longer considered chronic at the time of trial: para. 99. The plaintiff was awarded \$70,000 in non-pecuniary damages.

iii. Determination

[83] I have reviewed the cases provided to me by the parties. I am persuaded that the negative impact on Ms. O'Grady's life from the injuries caused by the Accidents is significantly more severe than the impacts at issue in the cases relied upon by the defendants.

[84] The following evidence, which I find as fact, are in my view the most significant factors in my analysis of the impact of the Accidents on Ms. O'Grady's life, remaining mindful of the factors set out by the Court in *Stapley*:

- a) Ms. O'Grady was 26 years old at the time of the First Accident, which I consider to be relatively young. She potentially has decades of life ahead of her, during which she will have to live with the consequences of the Accidents;

- b) Ms. O'Grady and Mr. Gomez had an active social life prior to the First Accident. They often salsa danced at Latino clubs in Vancouver with friends. After the Accidents they no longer participate in this activity and both testified they do not socialize. While I accept that a reduction in social activity when a couple has children is normal, the evidence from Mr. Gomez and Ms. O'Grady was that they had no social life after the Accidents;
- c) Ms. O'Grady was very physically fit before the Accidents, training to be a bikini bodybuilder. Ms. Hatton testified about Ms. O'Grady's strength in the gym, noting that she could lift very heavy weights. Ms. Anas testified that before the Accidents, she and Ms. O'Grady would hike two or three times per month in the summer and once per month in the winter. They would hike a steep trail, under a power line, known as the "Coquitlam Crunch". She described Ms. O'Grady as in good shape. However, since the Accidents, Ms. O'Grady has not worked out at all and not hiked with Ms. Anas. She has gained weight, which she says has impacted her body image and self-worth, and has abandoned her dream of becoming a bikini bodybuilder;
- d) Ms. O'Grady's testimony was that she cannot care for her children as she wishes. She described that at times she "feels like the worst mother ever when [she] cannot do things with them". She describes that she has trouble physically playing with her children, and does not take them for walks because her injuries do not allow her to chase after them if required, rendering walks with them too dangerous;
- e) Ms. O'Grady testified she cannot care for her pets as she wishes, and feels guilty that she cannot exercise her dogs the way she was able to before the Accidents;
- f) Ms. O'Grady is no longer able to play the saxophone. She cannot hold the instrument and cannot support its weight using a neck strap because

doing so causes her pain. Furthermore, she testified that for reasons unknown to her, since the Accidents, she is unable to read sheet music as she did before;

- g) Both Mr. Gomez and Ms. O'Grady testified that their relationship has suffered greatly due to the Accidents. Before the Accidents, Mr. Gomez testified that Ms. O'Grady would "not hurt a flower" and was a patient and good communicator. However, there are times after the Accidents that she gets angry and becomes verbally and physically aggressive towards Mr. Gomez; and
- h) Finally, Ms. O'Grady testified that in terms of leisure or passion, nothing brings her joy since the Accidents. The only thing she enjoys are her children, a joy that is undermined by her feeling that she cannot fully participate in raising them.

[85] While no monetary value can put Ms. O'Grady back in the situation she was in prior to the Accidents, in my view, as a result of the profound impact on her life, a significant award of non-pecuniary damages is appropriate. My assessment of the evidence was that Ms. O'Grady has endured severe pain and suffering since the First Accident to the date of trial. While I accept that there is room for improvement with proper treatment (as I will discuss below), it appears that Ms. O'Grady will endure some level of impairment permanently. In considering the appropriate award for non-pecuniary damages, I recognize that the timing of the First Accident was especially difficult for Ms. O'Grady, who had persevered through a rough patch in her life and was on an upward trajectory in both her personal and professional life. She had appeared to have found the job she loved, the person she loved and wanted to spend the rest of her life with, and was able to pursue her hobby and love of animals both personally and professionally. She also was preparing to compete in a form of bodybuilding. All of these important aspects of her life were taken away from Ms. O'Grady as a result of the Accidents.

[86] I am also awarding Ms. O'Grady a slightly higher award for non-pecuniary damages than I might otherwise in order to compensate her for the loss of housekeeping capacity. I accept that Ms. O'Grady is unable to conduct household chores as she did prior to the accident. However, I note that Mr. Gomez and Ms. O'Grady moved in together only two weeks prior to the First Accident. They thus did not have sufficient time to establish a pattern of how Mr. Gomez and Ms. O'Grady would share (or not share) the household tasks in a reality where the Accidents did not happen. That said, in my view, from the testimony of both Mr. Gomez and Ms. O'Grady, I accept that neither party expected that Ms. O'Grady would have so little housekeeping capacity when the couple decided to move in together. I am satisfied that it is appropriate for Ms. O'Grady's non-pecuniary award to reflect to some extent compensation for her loss of housekeeping capacity.

[87] Given the foregoing, I conclude that an appropriate award to compensate Ms. O'Grady for her pain and suffering is \$185,000, subject to an adjustment of 15% that I will now describe.

[88] I accept as fact that Ms. O'Grady suffered from headaches that negatively impacted her life prior to the Accidents. In my view, it is appropriate to reduce her non-pecuniary award to account for Ms. O'Grady's pre-existing headaches. While the evidence varied about the frequency of Ms. O'Grady's headaches before the Accidents, I accept the opinion of Dr. McDowall who concluded, "[c]ertainly some of the ongoing headaches would be occurring regardless of these accidents". Given that Ms. O'Grady would have some level of headaches whether the Accidents occurred or not, I conclude that the \$185,000 of pecuniary damages should be reduced to account for this pre-existing pain and suffering.

[89] As well, included in my 15% reduction to her non-pecuniary award is my view that, based on the expert opinions, there is a substantial likelihood that with proper treatment, Ms. O'Grady's pain and psychological suffering will improve over time. As I will discuss below, the expert opinions support a finding that while Ms. O'Grady is unlikely to ever fully recover from the Accidents, she has received suboptimal

treatment. As such, reading the expert opinions as a whole, it appears that with proper treatment there is a possibility that Ms. O'Grady symptoms will improve. In my view, this calls for a shortening of the duration of the non-pecuniary damages.

[90] For clarity, I must express that I do not accept that Ms. O'Grady's previous issues with depression are pre-existing conditions that contributed to her current depression. As I will describe below, I find that her previous depressive episodes were a result of several acute events going on in her life at the same time, mostly involving a bad relationship that caused both tremendous emotional and financial stress to Ms. O'Grady. As such, I will not reduce the non-pecuniary damages to reflect a pre-existing condition of depression that contributed to her current symptoms; I do not find one to exist.

[91] Given the foregoing, I find that an award of \$157,250 (\$185,000 less 15%) is warranted for non-pecuniary damages.

D. PAST WAGE LOSS

i. Law

[92] Compensation for past loss of income, or more accurately past loss of earning capacity, is based on what the plaintiff would—not could—have earned had the injury not occurred: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[93] The plaintiff need not establish earnings loss on a balance of probabilities, since what would have happened between the date of the accident and prior to trial is essentially hypothetical, as are predictions regarding future losses. As the Court of Appeal stated in *Smith v. Knudsen*, 2004 BCCA 613:

[29] ... What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[94] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

ii. Parties' Positions

[95] Ms. O'Grady claims \$160,000 for past lost earnings. She asserts that she has been unable to work—other than a few attempts at private dog grooming—from the First Accident until the date of trial. As noted above, this was a job she very much enjoyed and in which she was, by the accounts of those with whom she worked—Ms. Hatton, Mr. McInnis, and Ms. Anas—very skilled.

[96] Ms. O'Grady quantifies her claim for past wage loss through the opinion of Darren Benning. Mr. Benning bases his calculations assumptions that included the following:

- a) Ms. O'Grady's after-tax income loss from the date of the First Accident to the date of the trial was \$148,185, based on the assumption that Ms. O'Grady, but for the Accidents, would have continued to work full-time as a dog groomer at Dapper Dog earning \$18 per hour and would have received a raise to \$20 per hour in 2019; and
- b) Mr. Benning included wage inflation into his calculations.

[97] Ms. O'Grady asserts that based on the evidence adduced at trial, Mr. Benning's calculation is too modest and requires an upward adjustment. Mr. Benning's calculations accounted for the Labour Market Contingencies ("LMC") Adjusted income in respect of income loss calculations, which includes reductions capturing unemployment and less than full-time work. Ms. O'Grady says that the LMC adjustment applied by Mr. Benning of a reduction of between 7.9% and 8.9% to Ms. O'Grady's lost wages is too high because at trial the evidence was that Ms. O'Grady would not have been unemployed from 2017 to 2022. She points to the evidence of Mr. McInnes, who testified that work was available to Ms. O'Grady from Dapper Dog from the date of the First Accident to the date of trial.

[98] In sum, Ms. O'Grady argues that the 8% reduction to her wages is unrealistically high, in part on the basis that in 2016, she was earning more income than the amounts used by Mr. Benning in his calculations for her wage loss. She says a more accurate measure of her lost income is the full-time, full-year earnings presented by Mr. Benning, which results in a gross past wage-loss of \$207,498. Applying Mr. Benning's tax reduction of 13% to this amount results in Ms. O'Grady's past wage loss at \$180,523.

[99] Ms. O'Grady recognizes, however, that this amount does not account for two major factors. The first is the COVID-19 pandemic, which, based on the evidence of Mr. McInnis, reduced the volume of his dog grooming business. The second is the birth of Ms. O'Grady's two children. Both of these events should result in a reduction of Mr. Benning's calculation of \$180,523. Ms. O'Grady suggests that the reduction should be approximately \$20,500, resulting in a past wage loss amount of \$160,000.

[100] Finally, Ms. O'Grady acknowledges that she has been the recipient of Temporary Total Disability ("TTD") benefits for five years, and that pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, those amounts are to be deducted from any award made by the court either on agreement of the parties or by further court order.

[101] The defendants assert that an appropriate amount for past lost wage earnings is \$100,000. They argue that Ms. O'Grady's earnings in the years prior to the First Accident never exceeded \$35,000. They also argue that Mr. Benning's calculations do not account for the fact that, had Ms. O'Grady continued to work following the First Accident, she would have been paid for her two parental leaves through Employment Insurance ("EI") benefits. The defendants argue that for the 66 potential weeks of parental leave with her first child and the 16 weeks from the birth of her second child to the date of trial, Ms. O'Grady would have earned at least half of her income earned at Dapper Dog.

[102] Further, the defendants, like the plaintiffs, recognize that Mr. Benning did not adjust the wage loss to reflect the impact of the COVID-19 pandemic on the dog

grooming business. Finally, the defendants assert that Ms. O'Grady continued to offer some grooming services from home after the First Accident. While not setting out with specificity their calculations, the defendants' position is that \$100,000 represents Ms. O'Grady's lost past earnings when considering these factors.

iii. Determination

[103] In assessing Ms. O'Grady's loss of past wages, I must determine the real and substantial possibility of what income Ms. O'Grady would have earned, while taking into account all realistic contingencies that could impact her earning capacity. This process requires me to weigh possibilities and probabilities of hypothetical events, which are given weight according to their relative likelihood: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, leave to appeal to SCC ref'd, 29761 (8 January 2004).

[104] The duration of time between the First Accident (September 21, 2017) and the start of trial (September 9, 2022) is 1,814 days, this being 259 weeks or 59 months and 19 days. I will use this calculated duration in my analysis below.

[105] I conclude that as a result of the Accidents, Ms. O'Grady could not work at her job as a dog groomer at Dapper Dog. I also accept that Ms. O'Grady would have continued to work at Dapper Dog had it not been for the Accidents. Ms. O'Grady testified that she loved her job. Mr. McInnes, Ms. Hatton, and Ms. Anas testified Ms. O'Grady was good at her job, in terms of grooming dogs and interacting with customers both human and canine. I see no evidence that suggests Ms. O'Grady would not continue to be a valued employee of Dapper Dog. I accept that there was a substantial possibility that Ms. O'Grady would have continued to be employed by Dapper Dog from the date of the First Accident to the date of the trial.

[106] The expert opinions also support a finding that Ms. O'Grady was unable to work as at dog groomer at Dapper Dog after the First Accident:

- a) Dr. Giantomaso concluded that Ms. O'Grady "...worked as a dog groomer for many years and has been unable to return to work due to neck, upper back and low back pain and headache issues. In my opinion she is not

competitively employable as a dog groomer but certainly could be employed in another sedentary to light work field”;

- b) Dr. Spivak concluded that “the chronic nature of her vehicular anxiety portends a poor prognosis.” However, Dr. Spivak determined that there is a link between Ms. O’Grady’s physical issues that prevent her from returning to work and her psychological issues. He opined, “I presume that if her physical symptoms resolved, there would be significant improvement in her psychological symptoms and thus she may be able to work (notwithstanding vehicular related anxiety if it persists.)”; and
- c) Dr. McDowell opined that he found no ongoing organic neurological basis for some of Ms. O’Grady’s symptoms, and that he believed there could be a significant improvement in headache intensity and frequency if she practiced better headache hygiene and followed other treatment recommendations. However, he noted that even with the treatment it would reduce “her disability from 2 to 1 day per week”.

[107] I accept the evidence of Ms. O’Grady, including that she enjoyed her work prior to the Accidents such that her injuries are the cause of her stopping her work, as well as the opinions of the experts that she is currently unable to work. I therefore conclude that the Accidents have caused an economic loss to Ms. O’Grady from the date of the First Accident to the date of trial.

[108] As mentioned previously, the economic expert, Mr. Benning, provided one calculation of Ms. O’Grady’s loss of past income based on the assumption that Ms. O’Grady would have had ongoing earnings of \$18 per hour from the date of the First Accident to 2019, at which point she would have received a raise to \$20 per hour. This totaled \$148,185 when adjusted for tax and EI deductions. Mr. Benning also provided two other possible calculations. Mr. Benning based the second scenario on the assumption that Ms. O’Grady would have had the average full-time, full-year earnings of a BC female pet groomer of the first quartile (lowest) earnings. This scenario totalled \$111,226, after being adjusted for tax and EI deductions.

Mr. Benning based his final scenario on the assumption that Ms. O'Grady would have had the average full-time, full-year earnings of a BC female pet groomer of the third quartile (second highest) earnings. This scenario totalled \$134,299, after being adjusted for tax and EI deductions.

[109] In my view, there may be some merit to the plaintiff's argument that Mr. Benning's calculations overstate the possibility that Ms. O'Grady would be unemployed by Dapper Dog, given the glowing reviews of her by Mr. McInnes and Ms. Hatton. However, it does not appear that Mr. Benning adjusted the possibility of unemployment to reflect the negative impact of the COVID-19 pandemic on Dapper Dog specifically and Ms. O'Grady's possible employment during that time.

[110] I accept that, in this context, Mr. Benning's negative contingencies for Ms. O'Grady's potential unemployment are appropriate. Although the negative contingency does not account for the business slow downs caused by the COVID-19 pandemic testified to by Mr. McInnis, it also does not factor that Ms. O'Grady took two parental leaves during the same period, thus leaving the workforce. In other words, I find that the parental leave, which I account for below, essentially offsets the possible impacts of the COVID-19 pandemic.

[111] I note that LMC adjustments are designed to account for unemployment caused by unforeseen events, including, as stated by Mr. Benning in his report, "temporary absences to care for other family members or to pursue other interests (i.e., education, travel) and involuntary withdrawal for reasons of illness, sickness or disability." While uncertain if these events would have happened to Ms. O'Grady, that is precisely the purpose of these actuarial models; they provide a statistical prediction for uncertain events. I am not prepared to depart from them in calculating a negative contingency for Ms. O'Grady's past loss income.

[112] Given there have been 159 weeks between the first accident and the trial, Ms. O'Grady's lost income is roughly \$932 per week, after all of the LMC and tax adjustments (i.e., \$148,185 divided by 159 weeks).

[113] To reiterate, I accept the defendants' submission that any loss of past earnings must account for Ms. O'Grady's two parental leaves. I find there is a substantial likelihood that Ms. O'Grady would have spent at least some of the time between the First Accident and trial on parental leave. The evidence of Mr. McInnis was that Dapper Dog did not "top-up" parental leave. If Ms. O'Grady took parental leave for 52 weeks on her first parental leave and an additional 16 weeks of parental leave from the birth of her second child to trial, her total parental leave would have been 68 weeks. The evidence was that EI benefits are half of what an employee earns, to a maximum of \$638.

[114] Accordingly, I will reduce the amount of Ms. O'Grady's lost income from the First Accident to the date of trial by 68 weeks at a rate of \$466 per week, being half of her Dapper Dog income calculated by Mr. Benning (\$932). This results in a reduction of Mr. Benning's first scenario calculation of Ms. O'Grady's lost income (i.e., \$148,185) by \$31,688 (i.e., 68 weeks by \$466 per week). Thus, I calculate that Ms. O'Grady suffered a loss of past income from the date of the First Accident to the date of trial of \$116,497 this amount has been adjusted to remove tax and EI deductions. While there may be a modest variation in this amount on the basis that EI deductions are not deducted from parental leave benefits, I conclude that given all of the considerations, the amount is appropriate.

[115] In my view, this methodology captures a more accurate representation of Ms. O'Grady's lost wages. Namely, this approach accounts for her working at Dapper Dog from September 2017 to the present while also reducing the lost income to reflect the impacts of her income that would have occurred while she was on two parental leaves.

[116] My analysis has made no adjustment for TTD benefits paid to Ms. O'Grady. I will leave it to the parties to deduct the appropriate amounts from my award for loss of past income. If they are unable to agree, they can make arrangements to appear before me for that purpose.

E. FUTURE LOSS OF EARNING CAPACITY

i. Law

[117] In assessing a claim for future loss of earning capacity, the court is to compare a plaintiff's future earning capacity with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157 [*Dornan*]. This assessment necessarily involves a prediction of possible events that are unable to be known with exactitude. While there is “no one right answer”, the court must use a process that is “tethered to the evidence”: *Dornan* at para. 134.

[118] Similarly, for a future potential loss to be considered for the purposes of assessing damages, its occurrence must be a real and substantial possibility and not mere speculation: *Athey* at para 27. A risk of loss that is a real and substantial possibility as opposed to mere speculation is measurable and supported by evidence: *Dornan* at para. 63.

[119] The Court of Appeal developed a three-step approach to assessing claims for a future loss of earning capacity in *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]. The Court set out the steps at para. 47:

- a) Whether the evidence discloses a potential future event that could give rise to a loss of capacity;
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
- c) What is the value of that possible future loss, having regard to the relative likelihood of any such possibility occurring?

[120] Once a conclusion is reached using the above steps, the court must then determine if the award for future loss of earning capacity is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117 [*Lo*].

[121] There are two principle approaches to quantifying the future loss of earning capacity once it has been proven by the plaintiff: the earnings approach or the capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*].

[122] As explained in *Wang v. Johal*, 2019 BCSC 1036 at para. 79, the earnings approach involves a form of math-oriented methodology such as, among other things, postulating a minimum annual income loss for the plaintiff's remaining years of work, or multiplying the annual projected loss by the number of remaining years and calculating a present value.

[123] The capital asset approach however relies on a set of factors to determine whether there has been an impairment of the capital asset. If the court finds the capital asset has been impaired, these same factors help in assessing the value of that lost asset: *Rab* at para. 36. The factors were set out by Mr. Justice Finch (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) [*Brown*], and include:

- a) whether the plaintiff has been rendered less capable overall of earning an income from all types of employment;
- b) whether the plaintiff is less marketable or attractive as an employee to potential employers;
- c) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
- d) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[124] The earnings approach will be appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64, citing *Perren*. By contrast, the capital asset approach is generally used in cases where the plaintiff continues to earn income near or above pre-accident levels, but there is, nonetheless, a measurable risk of a future loss of earning capacity. The capital asset

approach often involves a damage award consisting of a multiple of the plaintiff's annual income. Most often, the amount of the award is one or two years of income: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) at para. 43; *Kim v. Baldonero*, 2022 BCSC 167 at para. 91 [*Kim*].

[125] I note that these above-stated principles regarding the assessment methodology of a plaintiff's future loss of earning capacity were recently summarized by the Court of Appeal in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 7 to 17 [*Ploskon-Ciesla*].

ii. Parties' Position

[126] Ms. O'Grady asserts that she is permanently disabled and may not be able to work again. The economic models provided by Mr. Benning estimate Ms. O'Grady's lost future lifetime earnings to age 65 at \$871,956, based on her current income and factoring in regular raises and adjusting for LMC. Ms. O'Grady says this amount is too low. She argues Mr. Benning's calculations do not take into account the evidence at trial of Ms. O'Grady's increased earning potential, but for the Accidents, due to: (1) increased demand for dog groomers, and associated increased pressure on wages; and (2) Ms. O'Grady's skill as a dog groomer and her prior stated desire to begin her own dog grooming business.

[127] Ms. O'Grady asserts that, given these factors, her future earning capacity is represented in one of the following three scenarios:

- a) The first scenario is based on the evidence of Mr. McInnes that dog grooming compensation is increasing, and that in his experience dog groomers earn between \$25 and \$30 per hour. Using Mr. Benning's multiplier to age 65, this sets a range of \$998,608 to \$1,198,329;
- b) The second scenario is based on the evidence of Ms. Hatton and Ms. Anas that a self-employed dog groomer can earn between \$200 and \$300 per day. Based on 260 working days a year, if self-employed,

Ms. O'Grady could earn in a range of \$52,000 to \$78,000 per year, which, after applying Mr. Benning's economic multiplier to age 65, results in earnings in the range of \$998,608 to \$1,308,051; and

- c) The third scenario is based on Ms. Hatton's testimony that an hourly groomer can earn between \$18 and \$25 per hour. Using Mr. Benning's value for the number of hours worked per year (i.e., 2080 hours), this rate results in an annual salary of between \$37,440 and \$52,000. Applying Mr. Benning's economic multiplier to age of 65 results in earnings in the range of \$718,997 and \$998,608.

[128] Ms. O'Grady submits that, based on these scenarios, the starting point for calculating her loss of future earnings, after being adjusted for labour market contingencies, is \$1,100,000. However, she further submits that this figure should be reasonably reduced by 10% (i.e., \$110,000) to represent the possibility that she might sufficiently recover from her multiple disabilities to return to work. Accordingly, Ms. O'Grady sets her claim for future loss of earning capacity at \$990,000.

[129] The defendants say that since Ms. O'Grady worked for only three years as a dog groomer prior to the Accidents, there is insufficient data to construct a model to predict her lost income decades into the future. Namely, the defendants point to the fact that Ms. O'Grady's T4 income from Dapper Dog was \$29,595 in 2015, \$34,724 in 2016, and \$23,818 in 2017. They say that extrapolating this limited past employment income data for the purposes of calculating steady employment and regular raises over a 30-year future period is inadequate.

[130] Accordingly, the defendants say that Ms. O'Grady's future loss of income is not easily measurable and should appropriately be calculated using the capital asset approach. They submit that a fair award to compensate Ms. O'Grady for her future loss of earning capacity is \$80,000. This amount is roughly equivalent to the sum of the income she earned at Dapper Dog in the last two years prior to the Accidents.

iii. Determination

[131] Given that Ms. O'Grady has not worked since the First Accident, many of the facts relevant to the analysis of her past wage loss are also relevant to the determination of her future loss of earning capacity.

[132] Under the first step of *Rab*, I find that there is a real and substantial possibility that the loss of Ms. O'Grady's future capacity will materialize as a result of her injuries. In other words, while this analysis requires me to consider hypothetical future events, on the evidence I am satisfied that it is beyond mere speculation that Ms. O'Grady will suffer impairment to her future capacity as a result of the Accidents: *Kim* at para. 88.

[133] In coming to this conclusion, I have applied the factors set out in *Brown* to determine whether there has been an impairment to Ms. O'Grady's ability to earn income. Specifically, I find that as a result of the Accidents, Ms. O'Grady: (i) has been rendered less capable overall from earning income from all types of employment; (ii) is less marketable as an employee to potential employers; (iii) has lost the ability to take advantage of all job opportunities which might otherwise have been open to her; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market.

[134] Due to the physical nature of dog grooming—as testified to by Ms. O'Grady, Mr. McInnes, Ms. Hatton, and Ms. Anas—along with the expert opinions regarding Ms. O'Grady's physical limitations, I find she is unlikely to work as a dog groomer again. Indeed, as set out above, the experts all opined that Ms. O'Grady, as a result of the Accidents, will face at least some form of permanent disability. In my view, this impairment has rendered Ms. O'Grady less able to earn income in the future.

[135] The second step of the *Rab* analysis requires the court to determine whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. Ms. O'Grady has not worked since the date of the First Accident and continues not to work, which I accept is caused by the

Accidents. Thus, there is a real and substantial possibility that the Accidents have caused her a pecuniary loss. Indeed, Ms. O'Grady, as set out extensively above, had prior to the Accidents found a vocation that she enjoyed and that she is now unable to pursue.

[136] It appears that Ms. O'Grady's training and experience is specialized and therefore limited to the dog grooming professions. I find this means her skills may not easily transfer to other paying professions. Given this limited scope of work and the little training she has in other work (apart from retail services), I have no trouble in concluding that the Accidents will cause Ms. O'Grady an economic loss in the future.

[137] That the second step of the *Rab* test is satisfied in this case is further supported by the following evidence, which I find as fact:

- a) Dr. Giantomaso's opinion that Ms. O'Grady is competitively unemployable given the nature, frequency, and intensity of her headaches and, to a lesser extent, due to her soft-tissue pain;
- b) Dr. Brink's opinion that Ms. O'Grady presently remains disabled due to her psychiatric symptoms; and
- c) Dr. Spivak's opinion that Ms. O'Grady's inability to work as a dog groomer is largely the product of physical injury, but is also significantly limited because she is unable to drive due to her driving anxiety.

[138] Under the third step of the *Rab* analysis, I am to compare the likely scenario of Ms. O'Grady's future working life had the Accidents not occurred with her likely future working life given the impact on her life of the injuries caused by the Accidents. I am then to adjust this difference for positive and negative contingencies. Of course, as courts have held, this process "invariably involves an element of 'crystal ball gazing'": *Marriott v. Peterson*, 2021 BCSC 1066 at para. 56.

Nevertheless, the scenarios and the conclusions drawn by the court must be tethered to the evidence adduced at trial and not based on speculation.

[139] Generally, I find there is a real and substantial possibility that, were it not for the Accidents, Ms. O'Grady would continue to work as a dog groomer at Dapper Dog. Supporting this finding is Ms. O'Grady's testimony, which I accept as fact, of her love of dog grooming, which she considered her calling. I am further persuaded by the evidence of Ms. Hatton and Mr. McInnes that Ms. O'Grady was a skilled dog groomer and good with clients. For instance, I note the evidence of Ms. Hatton that Ms. O'Grady groomed dogs competitively, and had achieved overall greater success in such competitions than Ms. Hatton, although Ms. O'Grady had competed for a shorter period of time than had Ms. Hatton.

Earnings Approach versus Capital Asset Approach

[140] There is some merit to the defendants' argument that since Ms. O'Grady has had a limited number of years of consistent earnings as a dog groomer, the court does not have a sufficient basis for predicting her future loss of income decades into the future using the earnings approach. However, I find that in the particular circumstances of this case the evidence demonstrates that Ms. O'Grady was especially content in her career and was set on a clear professional trajectory. Ms. O'Grady had worked for three years at Dapper Dog and obtained her grooming certification. She was dedicated to being a groomer and was well-respected by her colleagues and employer. I accept that there was a substantial likelihood that she would have continued on this path. As such, I find it is more appropriate to calculate Ms. O'Grady's future loss of earning capacity using the earnings approach, as opposed to the capital asset approach.

Mr. Benning's Calculations of Future Loss of Earning Capacity

[141] To reiterate, I accept there is a real and substantial possibility that Ms. O'Grady will not be able to work again as a dog groomer, and have found that the Accidents may cause an indefinite impact on her earning potential. I must therefore consider what the lifetime impairment to that earning potential will be. As I

have set out above, Mr. Benning calculated several scenarios for Ms. O'Grady's future earning capacity. Ms. O'Grady says these amounts are too low, given the evidence at trial of Ms. Hatton, Mr. McInnis, and Ms. Anas. I do not agree.

[142] In respect of Ms. Hatton's evidence that a groomer can make \$200–\$300 per day (resulting in a lifetime loss to Ms. O'Grady of \$998,608–\$1,198,329), I do not find it is sufficiently supported by the evidence and reject it as unrealistic in the present case. While I do not doubt that, based on Ms. Hatton's experience, a dog groomer can make between \$200 to \$300 per day, I find such experience too limited and anecdotal (i.e., too small a sample), and generally an unreliable basis upon which to calculate consistent earnings for a 30-year period into the future. In my view, it would be unsafe to evaluate a future scenario for Ms. O'Grady's earnings based on this limited, non-specific, and uncorroborated evidence.

[143] For similar reasons I find Ms. Anas's evidence that she earns between \$52,000 to \$72,800 an insufficient basis for assessing Ms. O'Grady's future earnings. While I have no reason to doubt Ms. Anas's evidence as it pertains to her experience, it is one example from one dog groomer. Her evidence does not provide sufficient data upon which to ground a reliable basis for Ms. O'Grady's potential earnings well into the future.

[144] A further basis for my rejection of the scenario posited by Ms. O'Grady that her future earnings should be based on operating her own grooming business is that, other than taking a few additional clients, there was no evidence that she had taken any steps before the Accidents to operate her own business such as making a business plan or otherwise initiate her own business. In my view, these factors taken together with the general evidence about earnings of at home dog groomers, make it not a real and substantial possibility that Ms. O'Grady would take the steps necessary to open and successfully run a business of her own that would earn upwards of \$50,000 per year.

[145] Given the foregoing, I accept Mr. Benning's opinion that, had the Accidents not occurred, Ms. O'Grady had the potential to continue working at Dapper Dog from

the date of trial until age 65 and to earn \$871,956. This amount accounts for various contingencies and is adjusted to reflect its net present value of a future income stream. For the purpose of his calculations, Mr. Benning assumed that Ms. O'Grady would have earnings of \$18 per hour (in 2017 dollars) and then receive a raise to \$20 per hour in 2019 to her retirement at age 65 in 2055. I accept the assumptions upon which Mr. Benning's calculations are based subject to the contingencies I will now apply.

Applying the Contingencies to the Future Loss of Earning Capacity

[146] Having concluded that Ms. O'Grady's without accident earnings would be \$871,956, under the third step of the analysis set out in *Rab*, I must now consider the relative likelihood of future events and adjust the amount for negative or positive contingencies. I find that there is one positive contingency (increasing her future loss) and two negative contingencies (reducing her future loss) that would have impacted Ms. O'Grady's future earning capacity. I will now turn to each of the three contingencies in turn.

[147] In respect of a positive contingency, I find that Ms. O'Grady had superior skill in dog grooming. The evidence of Mr. McInnis, Ms. Hatton, and Ms. Anas all indicate that Ms. O'Grady was a skilled dog groomer. As set out above, she had successfully competed in private dog show events, and had even received greater recognition in a short period of time than had Ms. Hatton. Thus, in light of her particular skills, I find it is a substantial likelihood that Ms. O'Grady would have been in greater demand and commanded more pay. I set the amount of this contingency at 5%. I have assessed only a modest contingency given my determination that Ms. O'Grady's future working scenario is as an employee. In my view, even if Ms. O'Grady is a superior dog groomer as compared to her colleagues, I expect that her flow of work, job security and pay are largely not within her control. I also accept the evidence of Mr. McInnes that, while there has been increased wage pressure on dog grooming generally, margins are not large in the industry and owners like himself attempt to keep wages low. As such, I find that although she has superior skill as a dog

groomer, Mr. Benning's calculation of her future earnings should only be increased by 5%.

[148] Of the negative contingencies that will reduce Ms. O'Grady's future loss of earning capacity, I find the greatest factor is that with proper care and treatment, Ms. O'Grady's condition could improve such that she will be able to return to the workforce in some capacity, thus reducing her future earnings loss.

[149] I base this conclusion on the opinion evidence provided by the experts. For instance, Dr. Giantomaso states that Ms. O'Grady has reached maximal medical improvement and is unlikely to improve in the future "without significant and consistent medical intervention". The inference I draw from Dr. Giantomaso's conclusion is that Ms. O'Grady's condition may improve with proper, significant and consistent medical intervention. Dr. Giantomaso recommends a follow up with neurologists and suggests Ms. O'Grady may benefit from Botox or triptan agents. He further opines that the current treatment of Ms. O'Grady's migraines has not met the standard of care. This conclusion supports that with better care, Ms. O'Grady's symptoms have a substantial likelihood of improving. In fact, as set out above, Dr. Giantomaso opined that while Ms. O'Grady cannot return to work as a dog groomer, she "certainly could be employed in another sedentary to light work field".

[150] Dr. McDowell's opinion also indicates that with proper treatment Ms. O'Grady's symptoms could be significantly reduced, thus allowing her to return, in some capacity, to work. Dr. McDowell opines:

[Ms. O'Grady] should proceed with a treating neurology consultation that was planned. She should practice general headache hygiene, including adequate rest, hydration, stress reduction, and regular aerobic exercise. She should start a headache diary to see if there are other triggers that can be identified. She should start a preventative agent, first line options would include nortripyline, or topirame among others. If there are unsuccessful, CGRP agents or botulimum toxin could be considers. With all these interventions, I think it is likely that there could be a significant improvement in headache intensity and frequency, perhaps reducing her disability from 2 to 1 day per week.

[151] Dr. Brink also concluded that the prognosis for a good recovery for Ms. O'Grady is guardedly optimistic.

[152] Finally, Dr. Spivak opined that Ms. O'Grady would benefit from a referral to a multidisciplinary pain program on the view that it would provide her with further physical relief. Dr. Spivak suggested that such a program may also connect Ms. O'Grady with a psychologist who can specifically target her pain-related symptomology and "help bolster her coping mechanisms around pain management". As well, Dr. Spivak advised that Ms. O'Grady may benefit from switching from sertraline to an alternative drug that could provide additional benefit for pain management. Finally, Dr. Spivak opined that with proper treatment for her driving anxiety, Ms. O'Grady will be able to drive. If this possibility occurs, Ms. O'Grady employment prospects would broaden.

[153] The general consensus gleaned from these expert opinions is that to date Ms. O'Grady has received sub optimal treatment, and that with proper and extensive care her symptoms may improve. I find this expert evidence thus suggests there is a substantial likelihood that Ms. O'Grady's future loss of earning capacity will be lessened. In other words, these opinions indicate a contingency should be incorporated in the calculation of Ms. O'Grady's loss of future earning capacity representing the likelihood that she will, at some time in the future, return to work in some capacity.

[154] I accept Ms. O'Grady's evidence that she faces significant pressures and stress as a result of the financial difficulties caused to her and her family as a result of the Accidents. I conclude from that testimony that if those pressures are reduced following an award of damages from this trial, those stressors may become less acute, thus improving her general condition. For instance, some of the obstacles Ms. O'Grady currently faces with respect to working, including not having an internet connection or cell phone or the ability to travel to work easily, may lessen if she has additional financial means. If that occurs, to my thinking, the probability increases of her capacity improving to a level to which she could return to some form of work.

[155] I also find there is a substantial likelihood that Ms. O'Grady will return to the workforce in some capacity even if her symptoms do not improve. I base this conclusion on the fact that Ms. O'Grady is currently raising two children and tending to eight pets (four dogs, two cats, and two birds). While the evidence is that Mr. Gomez assists with many of the duties regarding the children and pets, I conclude that once the children are older and in school they will require less full-time care by Ms. O'Grady. This suggests she may have more capacity to return to work at that time. In my view the skills necessary to look after a household of two children and eight pets should be transferrable to at least some level of paid income. Thus, I conclude it would not be proper to ignore the possibility that in the future—i.e., when the children are older and Ms. O'Grady is no longer responsible for their care—Ms. O'Grady will have at least some additional time and energy to pursue some form of paid work. This finding would be especially relevant if her symptoms ease in the future due to improved treatment, a possibility described above.

[156] Accordingly, I set the appropriate contingency that Ms. O'Grady will work again in the future at 30%. I find this number reflects my conclusions that, with proper treatment and changing familial duties, she will in the future be in a position to regain some portion of her lost earning capacity caused by the Accidents.

[157] The second negative contingency relates to a real and substantial possibility that Ms. O'Grady would have worked fewer hours than those calculated by Mr. Benning on the basis that she would need to spend time providing care to her children. I base this finding in part on Mr. Gomez's testimony. He testified that, given his upbringing in Cuba, he anticipated he would have a "traditional" family unit. Per Mr. Gomez, this arrangement would involve him working outside the home and Ms. O'Grady spending more of her energies at home with the children, rather than her working outside the home full-time. As well, I note that Ms. O'Grady has in fact largely remained at home with her children. However, I recognize that she says this was by necessity and not a choice, namely because she has been unable to work outside of the home due to the Accidents.

[158] Based on these factors, I conclude that there was a real and substantial possibility that Ms. O'Grady would, regardless of the Accidents, not have worked full-time hours, at least until her children reach the age of majority.

[159] Mr. Benning based his calculations on the assumption that Ms. O'Grady would engage in full-time work (as adjusted for LMC) to 65 years of age. Thus, I find it appropriate to reduce his calculation of the without accident scenario by an additional 20% contingency. I have arrived at 20% as an appropriate contingency based on the following:

- a) Ms. O'Grady's children are currently infants. If she reduced her time away from full-time work, it would likely be during the first 18 years of their lives;
- b) Ms. O'Grady has potentially 34 years of working life ahead of her to age 65. As such, for the next 18 of her remaining 34 working years (approximately 53%) she would have been working less than full-time; and
- c) I conclude that Ms. O'Grady's less-than-full-time working hours would be either half to three quarters of full-time. I took the average between half and three-quarters working to determine her part-time work week of 62.5% of a full work week.

[160] Based on these assumptions, I conclude that for 53% of Ms. O'Grady's remaining working life, even if the Accidents had not occurred, she would have likely worked part-time hours, being approximately 62.5% of full-time hours. In other words, for 53% of her remaining working years, I conclude that Ms. O'Grady would have worked 37.5% ($1 - 62.5\%$) fewer hours than if she were working full-time. Accordingly, I find it appropriate to reduce Ms. O'Grady's without income earnings by 53% of 37.5—i.e., 19.9%. For ease of calculation I round this figure to 20%. I note that another way to view this contingency is to hold that Mr. Benning's assumptions do not reflect my conclusion, based on my view of the evidence, that Ms. O'Grady will work fewer full-time hours to age 65. However, by my assessment, applying the adjustment as a contingency achieves the same result and is an appropriate

reflection of my view of the evidence in predicting Ms. O'Grady's future working scenario.

[161] In sum, I conclude it is appropriate to apply to Ms. O'Grady's loss of future earning capacity award a positive contingency of 5% and a total negative contingency of 50%, being the sum of the first and second contingencies described above (i.e., 30% and 20%, respectively). This results in a balance of a negative contingency of 45%. When applied to Mr. Benning's calculation of a lost future income of \$871,956, the 45% negative contingency amounts to a reduction of \$392,380.20. This results in a damage award for future loss of earning capacity, when adjusted for its net present value of \$479,575.80.

[162] In making these calculations, I am aware that the Court of Appeal has emphasized that the process is "not a mathematical exercise"; instead, "it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue": *Ploskon-Ceisla* at para. 7. I am aware of the pitfalls of delving into a mathematical realm to calculate my view of Ms. O'Grady's possible future outcomes. However, I have attempted to tether my assumptions and the basis of my calculations to the evidence presented to me at trial.

F. COST OF FUTURE CARE

i. Law

[163] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to, as best as possible with a monetary award, restore the injured person to the position he or she would have been in had the accident not occurred: see *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29 [*Gignac*].

[164] In determining an appropriate award for the cost of future care, the plaintiff must demonstrate an evidentiary link between her pain symptoms and disability and the recommended treatment: *Gignac* at para. 32. In other words, the test for

determining the appropriate cost of future care award is an objective one based on medical evidence: *Palidwor v. De Vries*, 2021 BCSC 85 at para. 45. Specifically, the test is whether the items or services claimed are medically justified and whether the claims are reasonable: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.).

[165] In assessing whether the future care costs are justified, the court is to determine if the proposed care recommended by the expert is both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for him or her to justify a claim in respect of that service: see *Warick v. Diwell*, 2018 BCCA 53 at para. 55; *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74. However, just because the plaintiff has refused a type of treatment in the past does not mean that she will be denied an award for it as part of her future care.

[166] As is obvious from the flexibility in courts' approaches to assessing the cost of future care, each case must be determined on its own facts. The award can also be adjusted to reflect the likelihood that future treatment will improve or maintain a plaintiff's injuries suffered as a result of a defendant's actions. In all, the assessment of this head of damages is ultimately an exercise in prediction, and not one of precise accounting: see *Alvarado v. KCP Heavy Industries Co. Ltd.*, 2022 BCSC 1668 at para. 93, citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

ii. Parties' Positions

[167] Ms. O'Grady did not make a claim for cost of future care. However, the defendants concede that the evidence supports that Ms. O'Grady requires additional treatment. While they assert that she has failed to pursue treatments in the past – as is evident from their argument that she failed to mitigate her damages – they submit that her future care costs should be \$2,500.

iii. Determination

[168] I accept, based on the submissions of the defendants, that Ms. O'Grady is entitled to an award for cost of future care in the amount of \$2,500. I note, however, that in light of the consensus in the expert opinions that Ms. O'Grady has received sub-optimal treatment, and especially with respect to her migraines, it is crucial that she pursue future care by following the recommendations of the experts in an attempt to improve her physical and psychological symptoms. I wish to emphasize that the objective of an award of damages is to attempt to put a plaintiff in the same situation he or she occupied before the injuries occurred. As such, while the award for the cost of future care is relatively modest, it is my sincere hope that Ms. O'Grady will pursue all treatments available to her in an effort to improve her health and well-being.

G. SPECIAL DAMAGES

i. Parties' Positions

[169] The issue of special damages was not a focus of either party. Ms. O'Grady claims special damages in the amount of \$4,961.29. The defendants submit that "[i]f the Court finds that the amounts claimed were incurred as reasonably and necessarily incurred expenses related to the Accident, the Defendants will pay for the same". I interpret the defendants' position as general acquiescence to Ms. O'Grady's claim for special damages.

[170] In submissions, Ms. O'Grady reduced her claim for special damages to a lump sum of \$4,500 and states that she has verified her expenses by providing receipts.

ii. Determination

[171] I have reviewed the receipts provided by Ms. O'Grady. Given those receipts, the fact that the defendants' did not suggest the receipts are illegitimate or inaccurate, and the numerous medical visits Ms. O'Grady attended since the First Accident, I award her special damages in the amount of \$4,500. I am satisfied that

Ms. O'Grady proved at trial that these expenses were reasonably and necessarily incurred as a result of the Accidents.

V. ORDER

[172] Ms. O'Grady is entitled to the following award of damages against the defendants, rounded to the nearest dollar:

Non-pecuniary Damages	\$157,250
Loss of Past Wage Loss	\$116,497
Loss of Future Income	\$479,576
Costs of Future Care	\$2,500
Special Damages	\$4,500
Total	\$760,323

[173] Ms. O'Grady is entitled to her costs at Scale B, subject to any offers or other matters that may require an adjustment to costs. If the parties wish to address costs, they may make arrangements with Trial Scheduling to appear before me for that purpose within 30 days of receipt of these reasons.

[174] Furthermore, the parties have leave to appear before me to address adjustments that may be required to finalize the award related to prejudgment interest or other matters, if they are unable to come to an agreement.

[175] I wish to thank counsel for their able presentation of the evidence and submissions, and for their assistance to the court throughout this matter.

“Gibb-Carsley J.”