

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ballantyne v. Kruger*,
2023 BCSC 1324

Date: 20230731
Docket: M114886
Registry: Kelowna

Between:

Pamela Ballantyne

Plaintiff

And

Sage Julie-Anne Kruger

Defendant

Before: The Honourable Justice Douglas

Reasons for Judgment

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Table of Contents

- I. INTRODUCTION..... 5
- II. BEFORE THE ACCIDENT..... 5
- III. SUNTEC FAMILY BUSINESS..... 6
- IV. THE ACCIDENT 8
- V. AFTER THE ACCIDENT..... 8
 - A. Immediate Aftermath 8
 - B. Injuries and Treatment 9
 - C. Current Status 10
 - D. Winding up of Suntec 12
- VI. MEDICAL EVIDENCE..... 12
 - A. Plaintiff’s Experts..... 12
 - B. Defendant’s Experts 13
 - C. Soft Tissue Injuries..... 14
 - 1. Dr. Raphael Chow, Physiatrist 14
 - 2. Dr. Paul Etheridge, Pain Management GP 16
 - 3. Dr. Francois Louw, Pain Management GP 18
 - 4. Dr. Simon Horlick, Orthopedic Surgeon 19
 - D. Vision Issues 20
 - E. Mild TBI or Concussion 22
 - 1. Dr. Donald Cameron, Neurologist 22
 - 2. Dr. Paul Etheridge, GP 25
 - 3. Dr. Francois Louw, GP 25
 - 4. Dr. Raphael Chow, Physiatrist 25
 - 5. Dr. Sheldon Lewkis, Neuro-Psychologist 25
 - 6. Melanie Bos, Occupational Therapist,..... 27
 - 7. Dr. Timothy McDowell, Neurologist 28
 - 8. Dr. Kevin Solomons, Psychiatrist 31
 - F. Mental Health Issues..... 32
 - 1. Dr. Lynne Zettl, Psychologist 32
 - 2. Dr. Donald Cameron, Neurologist 34
 - 3. Dr. Raphael Chow, Physiatrist 34
 - 4. Dr. Francois Louw, GP 34

5. Dr. Kevin Solomons, Psychiatrist 34

VII. CAUSATION..... 35

VIII. CREDIBILITY AND RELIABILITY OF EVIDENCE..... 40

IX. GENERAL DAMAGES 42

X. LOSS OF HOUSEKEEPING CAPACITY 45

XI. IN TRUST CLAIMS..... 48

XII. SPECIAL DAMAGES 51

A. Medications 53

B. House and Lawn Cleaning Services 54

C. Counselling and Psychotherapy 54

D. Work by Anisha Ballantyne 55

E. Gravity Float..... 56

F. MRI Scans..... 57

G. OT Services 57

H. Miscellaneous Items and Equipment..... 59

XIII. LOSS OF INCOME-EARNING CAPACITY 60

A. Legal Framework 60

B. The Closure of Suntec..... 62

1. Suntec before the Accident 62

2. Suntec after the Accident 64

3. Did the Accident cause Suntec to close? 68

4. Analysis and Conclusion 72

C. Ms. Ballantyne’s Residual Earning Capacity 80

1. The FCE..... 80

2. Vocational Assessments 83

a) Jodi Webster 83

b) Diana Cameron 85

3. Conclusion 87

D. Valuing the Loss..... 87

1. Expert Evidence 87

2. Past Loss 88

3. Future Loss 94

XIV. FUTURE COST OF CARE..... 97

A. Legal Framework 97

B. Parties' Positions..... 99

C. Expert Evidence 100

D. Analysis and Conclusions 100

 1. Occupational Therapy 100

 2. Physiotherapy 101

 3. Kinesiology..... 102

 4. Rehabilitation Assistant..... 102

 5. Psychological Services 102

 6. Prolotherapy and PRP Injections 103

 7. Vision Therapy Assessments..... 104

 8. Medications..... 104

 9. Equipment/Adaptive Aids 105

 10. Pool Pass..... 106

 11. Transportation Costs..... 106

 12. House Cleaning, Yard Maintenance and Snow Removal..... 107

 13. Vocational Support Services 107

XV. MITIGATION 108

XVI. DISPOSITION 108

I. INTRODUCTION

[1] On December 17, 2015, the plaintiff, Pamela Ballantyne, was involved in a high-speed collision on Highway 97, between Summerland and Kelowna, BC (the “Accident”). The Accident had life-altering consequences for Ms. Ballantyne.

[2] The defendant, Sage Julie-Anne Kruger, admitted liability for the Accident. Accordingly, the trial proceeded on damages issues only.

[3] The defendant acknowledges that Ms. Ballantyne sustained injuries in the Accident. The parties disagree about how they are correctly diagnosed including, in particular, whether or not Ms. Ballantyne suffered a mild traumatic brain injury (“TBI”), a distinction which potentially impacts her prognosis. The most contentious issue is whether Ms. Ballantyne is appropriately compensated for her lost earning capacity based on what she asserts is her share of the revenue that the family business would have generated but for the Accident.

II. BEFORE THE ACCIDENT

[4] Ms. Ballantyne was 46 years old at the time of the Accident. She was 53 years old at the date of trial and she is now 54. She married in 1991. She and her husband, Andrew Ballantyne, have two adult children together.

[5] By all accounts, Ms. Ballantyne was a happy, healthy, and physically active individual before the Accident. She said that she went to the gym regularly, took Aquafit classes, periodically participated in fitness bootcamps, and enjoyed running, biking, kayaking, and camping trips, evidence her husband, daughter, Anisha Ballantyne, and sister, Cheryl Fast, corroborated. According to Ms. Ballantyne, she and her husband crammed as much work as possible into four days during the summer so they could spend week-ends doing what they wanted with their family.

[6] Ms. Ballantyne denied having any emotional, psychological, cognitive, or significant physical limitations before the Accident, evidence her husband, daughter, and sister corroborated. Ms. Ballantyne’s family members all described her as an

active and engaged person who often organized family gatherings before the Accident. Mr. Ballantyne said his wife was both smart and a great multi-tasker.

[7] Ms. Ballantyne injured her iliotibial band at the age of 35 and had broken a few bones when she was younger; she said that she recovered fully from these injuries. She saw a chiropractor regularly for “maintenance” spinal health before the Accident but there is no evidence that she had any disabling or functionally limiting back pain. Based on the April 22, 2020 report of Dr. Francois Louw, Ms. Ballantyne’s family physician, she periodically attended chiropractic treatments before the Accident for tension headache, shoulder and upper back pain associated with computer use, and general aches and pains associated with outdoor activities. Based on Ms. Ballantyne’s history, Dr. Louw concluded that none of these problems caused her any long-term functional difficulties.

III. SUNTEC FAMILY BUSINESS

[8] Before the Accident, Ms. Ballantyne and her husband were the sole directors and shareholders of Suntec Doors and Windows Inc. (“Suntec”), a home-based family business that they incorporated in 2002. Suntec sourced and supplied doors and windows, mostly to contractors involved in high-end residential construction in the Kelowna area. Suntec manufactured no products.

[9] Mr. Ballantyne has extensive experience selling doors and windows. His primary roles for Suntec involved sourcing, pricing, and selling products and providing customer service. On his evidence, Suntec was able to compete for business based on the exceptional level of customer service that he provided.

[10] Ms. Ballantyne was responsible for Suntec’s administrative and office work. She prepared invoices using Quick Books software, tracked shipments and complex bids that were completed in stages, compiled documents for delivery at year end to A’Lana Rains, the Ballantynes’ personal and corporate accountant, communicated as necessary with Ms. Rains, and submitted GST and PST filings to the CRA. Ms. Ballantyne also tracked damaged product and customer credits, discounts, and payments. She converted prices from US to Canadian dollars as necessary. She

and her husband reviewed Suntec's profit margins for some jobs together; the amount Suntec could charge its main supplier for product service was fixed.

[11] Ms. Ballantyne periodically did a variety of other odd jobs for Suntec including making bank deposits, collecting or delivering products, and communicating with customers, as necessary. She monitored projects to ensure that clean-up and final services were completed.

[12] The Ballantynes both graduated from high school and gained extensive practical experience in the window and door supply business. However, neither has any formal certifications, designations, or qualifications.

[13] The Ballantynes described their skills as complementary; both said that they worked well together before the Accident. Ms. Ballantyne was more organised than her husband and she had computer skills that he lacked. On Mr. Ballantyne's evidence, she corrected five to 10 of his mistakes every week before the Accident, reconciling differences between prices that he had quoted to customers and the manufacturers' actual costs. Mr. Ballantyne's strengths included his in-depth knowledge of doors and windows and his meticulous approach to customer service. Together, the Ballantynes ran a successful small business that generated sufficient revenue to support their family.

[14] It is unclear precisely how many hours a week Ms. Ballantyne spent working for Suntec before the Accident. On her own evidence, her hours were variable and her Suntec work was not consistently a full-time job. Ms. Ballantyne was a stay-at-home mother and the primary caregiver for her children while they were in school. In addition to her Suntec work, she was largely responsible for indoor housework and much of the outdoor yard work at the Ballantyne family home before the Accident. She had time to open an online art gallery to promote local artists; ultimately, this business was not profitable and it closed in the spring of 2015. Ms. Ballantyne periodically pursued a variety of other interests, including volunteering, becoming a lay counsellor through her church, and upgrading some of her high school courses.

[15] Ms. Ballantyne admitted in cross-examination that she provided bookkeeping assistance to a few people before the Accident, in addition to her work for Suntec. She could not recall when she did so and denied that she was paid for all of it.

IV. THE ACCIDENT

[16] Ms. Ballantyne was returning from her father's house in Summerland, BC at the time of the Accident. It was late afternoon and had started snowing. She was travelling northbound at about 70 km/h when she saw the defendant's southbound vehicle approaching on a downhill stretch from around a corner at what appeared to be a high rate of speed. This vehicle began to spin before it crossed the centerline and collided with Ms. Ballantyne's vehicle. Ms. Ballantyne recalls seeing the approaching driver, apparently screaming with her eyes closed while gripping the steering wheel of her vehicle, before impact.

[17] Ms. Ballantyne had no opportunity to avoid the Accident: there were two lanes of traffic on her right and a natural rock cliff to her left. The defendant's car struck the front of Ms. Ballantyne's vehicle.

V. AFTER THE ACCIDENT

A. Immediate Aftermath

[18] The airbags in both involved vehicles deployed. Both vehicles were subsequently written off. Fire, ambulance, and police personnel attended at the Accident scene. The two drivers were transported by ambulance to the Penticton Regional Hospital. Ms. Ballantyne was assessed in the ER, prescribed narcotic medication for short-term pain relief, and discharged home early the next morning.

[19] Ms. Ballantyne does not know if she lost consciousness in the Accident. The first thing she remembers after impact is hearing the voice of an OnStar service operator informing her that she had been in an accident and that help was on its way. Ms. Ballantyne has an incomplete memory of the immediate aftermath of the Accident. She clearly recalls seeing the other driver's head slumped over the steering wheel and not knowing whether or not the defendant was still alive.

B. Injuries and Treatment

[20] Anisha Ballantyne recalled that, shortly after the Accident, her mother was unable to get up by herself, lost her balance easily, needed help to get to the bathroom, showed visible signs of pain, and seemed confused. She, Ms. Fast, and Mr. Ballantyne all said that Ms. Ballantyne participated minimally in the family's Christmas celebrations in December 2015.

[21] Once the prescribed short-term narcotic was discontinued in late December 2015, Ms. Ballantyne remembers having severe generalized pain. She described it as overwhelming and unbearable, saying that it felt like she had been hit by a truck. She reported excruciating pain in her back, neck, and head and said that she had to take shallow breaths because she had so much pain in her back and rib cage. In January 2016, she attended at the Kelowna General Hospital and was prescribed Tylenol and Advil.

[22] Ms. Ballantyne described multiple, wide-ranging problems after the Accident. She has received extensive treatment since the Accident, including occupational therapy, physiotherapy, kinesiology, vision therapy, and counselling. She has tried a variety of medications and injections for pain management and engaged in a home exercise program.

[23] According to Ms. Ballantyne, she was unable to move her left arm or shoulder for an extended, indeterminate period after the Accident. She could not wash her hair or hold a fork with her left hand. She had to support her left arm with pillows when sitting to alleviate pain.

[24] Ms. Ballantyne had low energy and often slept during the day after the Accident. She said that attending physiotherapy would exhaust her for the rest of the day and sometimes the following day. Left-sided pain and flashbacks of the Accident impaired her sleep.

[25] Ms. Ballantyne had daily post-Accident headaches, describing them as 10/10 in severity in the first year after the Accident. She recalls having extreme pressure in

her head, combined with severe neck pain that extended below her jaw, into her face, and up to the top of her head. Ms. Ballantyne also recalls having post-Accident dental pain. She ultimately saw an unidentified dental surgeon who took steps to alleviate this pain. Ms. Ballantyne complained of temporary hearing loss and severe left ear pain for an undefined period of time after the Accident.

[26] Ms. Ballantyne said that she lacked a good sense of where her body was in space after the Accident. She complained of post-Accident dizziness but could not recall how it was treated. She remembers having trouble putting her left heel down and being unable to bend or pull up her left foot. On her evidence, she was unable to determine where her foot was unless she looked at it, a problem that she said was complicated by her impaired vision.

[27] Ms. Ballantyne described her memory in the first year after the Accident as very spotty. She attempted to do GST calculations for Suntec in early 2016 and could not remember how to do so. By the one-year anniversary of the Accident, she recalls feeling depressed and being concerned about her lack of progress.

C. Current Status

[28] Ms. Ballantyne has ongoing back pain; she denied that it is like anything she ever experienced before the Accident. She acknowledged that it has improved since the Accident but said that it remains an issue, fluctuates with movement, and requires her to use a supported chair.

[29] According to Ms. Ballantyne, her back pain fluctuates between 1-3/10 in severity on a good day to 5-6/10 in severity on a bad day. She employs a variety of strategies to manage her pain including taking medication, using a TENS machine, and applying ice, a heating pad, and anti-inflammatory creams. She limits her consumption of Advil due to stomach issues.

[30] Ms. Ballantyne said that her walking tolerance is limited due to pain in her low back, sacroiliac ("SI") joint, and neck. She finds coordinating her walking with poles, moving her arms and legs, and maintaining her balance requires significant effort

and is fatiguing. She finds it easier to walk at home than in the community, describing it as a less stimulating and more controlled environment.

[31] Ms. Ballantyne now has two sets of glasses; one pair helps to correct double vision and the second pair is for reading. She admitted that her glasses assist with her post-Accident vision issues. She also had vision therapy after the Accident. Ms. Ballantyne described herself as an avid reader before the Accident but said that she now has trouble tracking words on paper and that she no longer reads very well.

[32] On Ms. Ballantyne's evidence, she falls randomly. She said that she has more difficulty maintaining her balance on windy days, evidence her husband, daughter, sister, and treating psychologist, Dr. Lynne Zettl, corroborated. According to Mr. Ballantyne, his wife's walking has improved since the Accident. However, he and others said that she still walks as if she has had a stroke.

[33] Ms. Ballantyne described her memory as better on some days than others. She is of the view that her thinking has slowed since the Accident, a view that is shared by her husband, daughter, and sister. She complains of ongoing headaches, decreased memory, difficulty recalling numbers, blurred vision, decreased depth perception, irritability, mood swings, impaired sleep, and fatigue. She now becomes easily overwhelmed and has a decreased interest in socializing. Physiotherapy assists with persistent ringing in her ears.

[34] Ms. Ballantyne was teary and emotional when discussing the Accident. She said that she still replays the sequence of events leading up to the Accident, including seeing the defendant driver slumped over the steering wheel of her car after impact. Various things trigger this emotional reaction, including watching movies or the television news, witnessing an accident scene, or hearing an ambulance siren. She has learned techniques to manage her panic attacks.

[35] Ms. Ballantyne no longer tolerates crowds or visual stimulation as well as she did before the Accident; she now avoids busy and fast-moving environments. She fatigues quickly and loses track of where her body is in space. She visits the local

farmers market regularly; her husband or daughter typically drive and they leave early to avoid crowds. Ms. Ballantyne is able to walk the three or four vendors' aisles; this is currently her one regular weekly summer outing. She now prefers to eat at home rather than go to restaurants. Even at home, she finds it necessary to control the number of people present due to her limited tolerance for stimulating environments.

[36] Ms. Ballantyne no longer drives. According to her husband, she is now an anxious passenger who “freaks out” in regular traffic, evidence Anisha Ballantyne and Ms. Fast corroborated.

D. Winding up of Suntec

[37] Suntec ceased operations on January 1, 2020, just over four years after the Accident. Mr. Ballantyne now works as an independent consultant. Ms. Ballantyne is not working in any capacity and is of the view that her Accident-related injuries preclude her from doing so. She currently receives CPP disability benefits. At issue is whether her Accident-related injuries caused Suntec to close.

VI. MEDICAL EVIDENCE

[38] Multiple medical experts testified at trial.

A. Plaintiff's Experts

[39] The plaintiff called:

- a) Psychiatrist, Dr. Raphael Chow, who was qualified as an expert in physical medicine and rehabilitation, able to offer opinions regarding musculoskeletal injuries and traumatic brain injury;
- b) Treating general practitioner, Dr. Paul Etheridge, who was qualified as an expert in general practice, with additional training in the management of chronic pain and the diagnosis, treatment, and prognosis of traumatic injuries;

- c) Treating general practitioner, Dr. Francois Louw, who was qualified as an expert family physician able to opine on traumatic injuries, myofascial pain, and the management of chronic pain;
- d) Treating developmental optometrist, Dr. Paul Rollett, who was qualified as an expert in optometry, including vision therapy and rehabilitation, able to opine on visual issues in both the general population and in individuals after trauma and brain injury;
- e) Occupational therapist (“OT”) and certified functional capacity evaluator, Melanie Bos, who was qualified as an expert in the area of occupational therapy, including functional capacity evaluations and the cost of future care;
- f) Neurologist, Dr. Donald Cameron, who was qualified as an expert in neurology, able to opine regarding TBI and post-traumatic brain injury syndrome;
- g) Treating registered clinical psychologist, Dr. Lynne Zettl, who was qualified to offer opinions regarding psychological conditions and injuries, including those related to trauma; and
- h) Neuro-psychologist, Dr. Sheldon Lewkis, who was qualified as an expert in the area of neuropsychology, able to give expert opinion evidence regarding TBI, post-traumatic stress disorder (“PTSD”), chronic pain, and other neuropsychological effects of trauma.

B. Defendant’s Experts

[40] The defendant called:

- a) Orthopedic surgeon, Dr. Simon Horlick, who was qualified as an expert in the area of orthopedic surgery, able to opine regarding the diagnosis and treatment of musculoskeletal conditions;

- b) Neurologist, Dr. Timothy McDowell, who was qualified as an expert in the area of neurology, able to opine regarding the diagnosis, treatment, and prognosis of neurological symptoms and disorders, including brain injury; and
- c) Psychiatrist, Dr. Kevin Solomons, who was qualified as an expert in the area of psychiatry, able to opine regarding the diagnosis, treatment, and prognosis of psychiatric and psychological disorders.

C. Soft Tissue Injuries

1. Dr. Raphael Chow, Physiatrist

[41] Dr. Chow first assessed Ms. Ballantyne on May 13, 2016, about five months after the Accident. He obtained a history, reviewed various documents, and conducted a physical examination. He observed Ms. Ballantyne walk with a left-sided limp. She reported ongoing dizziness, headaches, and pain in her cervical, thoracic, and lumbar spine and in her left shoulder, knee, heel, and ankle.

[42] Ms. Ballantyne was then taking Advil and Flexeril, doing home exercises, and using a stationary bike every second day for 12 minutes. She reported a 50% improvement in her symptoms since the Accident, being independent in her personal care, and having no psychological difficulties or problems with impaired cognition.

[43] Dr. Chow opined as follows in his report dated May 30, 2016:

- a) Ms. Ballantyne had pre-Accident neck and back pain, assessed by her as 1-2/10 in severity, for which she was receiving chiropractic treatment;
- b) The Accident caused a flare-up of her pre-existing neck and back pain; and
- c) Ms. Ballantyne sustained a soft tissue injury to her cervical, thoracic, and lumbar spine and contusions of her left knee and shoulder in the Accident.

[44] Dr. Chow re-assessed Ms. Ballantyne on December 9, 2019, almost four years after the Accident. She reported continued improvement and the following ongoing problems:

- a) Headaches (improved in frequency and intensity since his previous assessment);
- b) Neck and shoulder girdle pain (similar in intensity to his previous assessment);
- c) Thoracic spine and left rib pain (worse since his previous assessment and now including the left ribs);
- d) Low back pain (worse since his previous assessment);
- e) Imbalance (resulting in about three falls per year);
- f) Left lateral foot pain (a different problem than the one she initially described and reportedly worse with walking);
- g) New paresthesia in the left upper limb, especially the forearm;
- h) New psychological issues, including a tendency to cry and feeling stressed, anxious, moody, sad, irritable, and tired; and
- i) New memory and multi-tasking problems, dizziness, blurry vision, double vision, and difficulty swallowing.

[45] New trigger point findings were noted on examination of the left trapezius and thoracic and lumbar spine. The hips, knees, and ankle joints were pain-free. Ms. Ballantyne was noted to have poor dorsiflexion (i.e., the ability to raise the foot upward), a new problem. Dr. Chow opined as follows:

- a) Ms. Ballantyne had ongoing symptoms but was still improving;
- b) She continued to be restricted functionally;

- c) Physical examination demonstrated a deterioration in the cervical, thoracic, and lumbar spine range of motion and generalized weakness in the left lower extremity with poor balance;
- d) Ms. Ballantyne had a soft tissue injury to the cervical, thoracic, and lumbar spine, contusion of the left knee and shoulder, and a likely concussion with residual post-concussion syndrome;
- e) She had myofascial pain syndrome in the left trapezius, thoracic, and lumbar spine; and
- f) His differential diagnoses for her reported dizziness, visual disturbance and memory/concentration problems included post-concussion syndrome or late whiplash syndrome in association with chronic pain.

[46] Dr. Chow did not discuss central sensitization in his 2016 report. In his opinion, Ms. Ballantyne’s chronic pain developed into this condition; he noted that myofascial pain syndrome is associated with the sensitization process. He assessed her prognosis as guarded but remained hopeful that she would improve further. He recommended a therapist familiar with myofascial pain syndrome, electromyography (“EMG”) nerve conduction studies of the left lower extremity, and an MRI of the lumbar spine.

2. Dr. Paul Etheridge, Pain Management GP

[47] Dr. Etheridge has been a general practitioner (“GP”) since 1995. He completed two years of training, including interventional pain management, to become a GP anesthetist and a one-year pain fellowship at the McGill Pain Clinic. He has a special interest in musculoskeletal problems and practices in the area of interventional pain management in Kelowna.

[48] Dr. Etheridge assessed Ms. Ballantyne on June 14, 2016, about six months after the Accident. He obtained a history from her and reviewed various medical records before authoring a report dated June 14, 2016. Ms. Ballantyne reported

daily, right-sided occipital headaches (5–7/10 in intensity), periodic left-sided facial pain, right upper neck pain (3–4/10 in severity and aggravated by sitting), painful left neck swelling, vertigo, blurry vision in the left eye, left shoulder pain, low back pain (2–3/10 in intensity and aggravated by sitting), pain on the inside of the left knee, left ankle pain, left heel numbness, and a left foot drop that persisted for three to four months after the Accident. Dr. Etheridge detected mostly sensory changes in the left foot on examination, but no motor changes that indicated weakness.

[49] Dr. Etheridge opined that Ms. Ballantyne:

- a) Had pre-Accident injuries that did not interfere with her activities of daily living, recreational pursuits, or ability to do housework;
- b) Sustained a soft tissue injury to the neck with right C2-4 facet joint-generated pain, probably caused by injury to the joint capsules in the Accident;
- c) Has cervicogenic headaches that are probably related to upper cervical facet joint pain, probably caused by the Accident;
- d) Developed central sensitization (i.e., a central nervous system hypersensitivity to pain), probably as a result of injuries she sustained in the Accident;
- e) Sustained soft tissue injuries to the shoulder and upper back muscles as a result of the Accident;
- f) Sustained a grade 2 soft tissue injury to the low back in the Accident and probably has left L4/5 and L5/S1 facet joint-generated pain;
- g) Has myofascial pain affecting the lower back and hip muscles resulting from the soft tissue injury to her back;
- h) Probably sustained a tear of the medial collateral ligament of the left knee as a result of the Accident; and

- i) Developed weakness and sensory changes to the left leg and ankle or foot, which needs to be investigated before it can be diagnosed.

[50] According to Dr. Etheridge, central sensitization usually presents within one to two weeks following trauma but can be delayed, especially if the injury seems minor. He admitted in cross-examination that hyperalgesia can improve over time, particularly if the underlying cause of pain is addressed. However, he noted that, if the underlying pain generator remains, central sensitization usually persists.

3. Dr. Francois Louw, Pain Management GP

[51] Dr. Louw has 13 years of experience in family practice, emergency medicine, and GP anesthesia. He has treated complex chronic pain patients for the last 12 years.

[52] Dr. Louw has been involved in Ms. Ballantyne's care since December 2017. He assessed her in April 2020, at which time she reported gradual improvement with interventional pain treatments and rated her pain as 60% improved since the Accident. Dr. Louw diagnosed the following conditions:

- a) Left SI joint regional pain syndrome, superimposed on myofascial pain;
- b) Myofascial pain of the left elbow, with associated hyperalgesia and allodynia;
- c) Improved adhesive capsulitis of the left shoulder and bursitis;
- d) Cervical spondylosis; and
- e) Left T8-9 facet level arthralgia.

[53] According to Dr. Louw, central sensitization results in increased sensitivity of the sensory system; he said that patients with this condition typically have more pain for longer than the average person. He attributes Ms. Ballantyne's diagnosis of central sensitization to the Accident, noting a temporal association and the absence of pre-Accident chronic pain.

4. Dr. Simon Horlick, Orthopedic Surgeon

[54] Dr. Horlick has been an orthopedic surgeon since 1993. On February 27, 2020, he assessed Ms. Ballantyne at the defendant's request, thereafter authoring two reports dated February 27, 2020 and April 27, 2020. He opined as follows in his first report:

- a) There is nothing to suggest that Ms. Ballantyne had any significant musculoskeletal impairments or disabilities before the Accident;
- b) His physical examination was difficult due to multiple pain-related behaviors;
- c) Some features of her physical examination were worse (as compared to previous assessments by physiatrists and pain medicine specialists in May 2016 and June 2016);
- d) He found no significant musculoskeletal impairments (i.e., a clinically observable and measurable alteration in structure or function) of the osseous, disc, nerve-related, or intrinsic structures of the left shoulder, elbow, knee, ankle, or foot;
- e) There were no findings suggestive of any significant orthopedic-related pathology;
- f) The Accident caused Ms. Ballantyne's musculoskeletal complaints and central pain sensitization, which results in ongoing persistent symptoms;
- g) Her diagnoses of central sensitization and chronic pain are best treated by chronic pain specialists;
- h) Further, if not complete, recovery from her injuries is anticipated with appropriate treatments directed towards her chronic pain disorder; and

- i) While Ms. Ballantyne remains temporarily disabled, she will recover from her musculoskeletal complaints with further treatment and the passage of time.

[55] In his second report dated April 7, 2020, Dr. Horlick commented on the expert reports of Dr. Chow, the plaintiff's physiatrist expert, and confirmed that they did not alter his own opinions. He agreed with Dr. Chow's:

- a) Statement that Ms. Ballantyne reported her condition to be improving (which was consistent with her report to him);
- b) Diagnoses of soft tissue injury to the cervical, thoracic, and lumbar spine, left shoulder and knee contusions, and post-traumatic headaches as a result of the Accident; and
- c) Opinions that Ms. Ballantyne's musculoskeletal injuries are predominantly myofascial, that she meets the diagnosis for a chronic pain disorder with central sensitization, and that her left elbow complaints are not causally connected to the Accident.

[56] Dr. Horlick admitted in cross-examination that many things can cause chronic pain and that increased pain for unclear reasons falls into the category of central sensitization (i.e., enhanced recognition of painful stimulate in the brain or central nervous system). He disagreed with the blanket statement that traumatic soft tissue injury which persists for more than two years is more difficult to treat and more likely to be permanent, saying it depends on the diagnosis of the chronic pain condition.

D. Vision Issues

[57] Dr. Paul Rollett graduated with a degree in optometry from the University of Waterloo in 2011 and is a registered optometrist licensed to practice in BC. He completed a post-graduate fellowship in vision therapy and visual rehabilitation and has worked in this field since 2011. Dr. Rollett first assessed Ms. Ballantyne on

September 6, 2019, at which time she presented with multiple persistent visual symptoms following the Accident including:

- a) Double vision;
- b) Twitching of the eyes;
- c) Pressure in and around the eyes; and
- d) Poor peripheral vision.

[58] Dr. Rollett performed a detailed optometric assessment and authored two reports dated March 8, 2022 and April 30, 2022. He opined as follows:

- a) Ms. Ballantyne has intermittent esotropia of the left eye (a condition where one eye deviates inward and which can result in seeing objects as intermittently doubling, blurring, or moving out of focus), probably related to the Accident;
- b) Esotropia can be corrected with the use of prism glasses;
- c) Ms. Ballantyne also has a natural presbyopia (an age-related condition involving degraded muscles in the eye that requires individuals to use reading glasses), unrelated to the Accident, which is why Ms. Ballantyne has traditional reading glasses; and
- d) Based on Ms. Ballantyne's history and his findings, it would be extremely challenging for her to perform activities in a workplace requiring extensive reading or computer use.

[59] Dr. Rollett likened visual therapy to physiotherapy for the visual system. Ms. Ballantyne derived significant improvement from this therapy, including two to three times improvement in her depth perception, and a more stable alignment of her eyes. Adjustments were made to her glasses over time, a process that Dr. Rollett described as quite common. He agreed that she achieved major gains

with her esotropia and that the amount of deviation in her left eye posture decreased substantially with the use of a prism.

[60] Dr. Rollett last saw Ms. Ballantyne on May 4, 2021; additional modifications were made to her glasses in July 2021, resulting in further improvement to her eyes. Dr. Rollett agreed that most individuals have two sets of glasses: one for close work and one for distance viewing. He said that deficits are usually long-term in patients with acquired esotropia that persists for six to 12 months after trauma.

E. Mild TBI or Concussion

1. Dr. Donald Cameron, Neurologist

[61] Dr. Cameron has been a neurologist since 1990. On June 19, 2019, he assessed Ms. Ballantyne, obtained a history, and performed a neurological examination before authoring a report dated July 17, 2019. He relied on Ms. Ballantyne's history and assumed that it was accurate.

[62] Dr. Cameron explained that the diagnostic criteria for a mild TBI, also referred to as a concussion, includes any one of the following in the context of trauma: 1) any loss of time when the traumatic event occurs; 2) any loss of time or amnesia just before the event or injury; and 3) any period of amnesia up to 24 hours after the traumatic event. He agreed that the brain can suffer blunt force trauma or an acceleration/deceleration injury by striking the inside of the skull, without the need for a concussive blow to the head. He conceded in cross-examination that most individuals have interrupted, segmental, and non-continuous recollection of events up to 24 hours after a traumatic event.

[63] Dr. Cameron confirmed that mild TBI is a clinical diagnosis; a patient's history is therefore of critical importance. General neurological examinations and neuro-radiology studies (including MRIs and CTs of the brain) are normal in patients with mild TBI.

[64] According to Dr. Cameron, if a patient reports a worsening of their mild TBI symptoms over time, something else is usually going on including, for example, a

repeat injury or psychological issues that make a patient think they are getting worse over time. He noted that, less commonly, patients make such complaints for reasons related to secondary gain and confirmed that the natural history of mild TBI does not include worsening symptoms over time.

[65] Unlike patients with mild TBI, individuals with moderate or severe brain injury often have a focal neurological deficit (including, for example, one-sided weakness) and present as if they have had a stroke. Dr. Cameron distinguished those patients from individuals with mild TBI who have a more positive prognosis.

[66] Dr. Cameron explained that the symptoms of post-concussion syndrome include cognitive difficulties, decreased memory, concentration and attention span, slowed thinking, problems with multi-tasking and being easily distracted, irritability, mood swings, anger outbursts, blurred vision, dizziness, vertigo, balance problems, daytime fatigue, loss of libido, being overwhelmed in crowds, headaches, photophobia, noise sensitivity, and decreased self-confidence, self-esteem and interest in socializing. These symptoms need not all be present in order to make this diagnosis but patients must have a significant percentage of them. Most people who suffer mild TBI do not develop this syndrome. Of those who do, most have resolution within several weeks to months after their injury. About 10–20% have long term sequelae. Improvement generally continues for up to two years; thereafter, residual problems are probably permanent.

[67] Dr. Cameron observed that most people who suffer mild TBI syndrome also have soft tissue or musculoskeletal injuries. Some develop chronic pain (i.e., pain lasting more than six months) which aggravates their post-traumatic concussion syndrome and prolongs recovery. Dr. Cameron stated that a high percentage of patients with mild TBI develop increased anxiety, irritability, mood swings, and anger outbursts and become depressed, noting that depressive symptoms aggravate cognitive problems and chronic pain. Dr. Cameron acknowledged that it is very difficult to tease out what part of a person's disability is due to the original injury, ongoing pain, or psychological issues. He opined as follows:

- a) Ms. Ballantyne probably had a brief altered state or loss of consciousness at the time of the Accident and a period of post-traumatic amnesia for several hours thereafter;
- b) Her Glasgow Coma Scale (“GCS”), a measure used to prognosticate outcomes in patients with brain injury, was 15/15 (or normal) after the Accident and consistent with a mild TBI;
- c) Ms. Ballantyne probably fulfills the diagnostic criteria for a mild TBI sustained at the time of the Accident;
- d) Mild TBI is a clinical diagnosis, not demonstrated on MRI imaging, and his opinions are therefore not altered by Ms. Ballantyne’s normal post-Accident MRI of the brain;
- e) Ms. Ballantyne developed symptoms of post-traumatic concussion syndrome, including headache, dizziness, decreased balance, vertigo, impaired memory, difficulty recalling numbers, slowed thinking, blurred vision, decreased depth perception, a sense of being easily overwhelmed, irritability, mood swings, disturbed sleep, fatigue, decreased interest in socializing, decreased libido, and a need for daytime sleep;
- f) Her reports of ongoing cognitive dysfunction are likely multi-factorial and due to both chronic pain from her soft tissue and musculoskeletal injuries and psychological problems (including anxiety and depression) from the Accident;
- g) Patients improve for up to two years following physical injury, including TBI, and given the passage of time, Ms. Ballantyne will probably remain permanently partially disabled because of ongoing chronic pain and associated post-traumatic headaches; and
- h) Any residual symptoms from her mild TBI are probably now permanent.

[68] Dr. Cameron documented left give-way weakness and noted that Ms. Ballantyne was inhibited in accessing her left leg due to pain. He conceded that psychological issues are probably a component of her presentation and agreed that this is not a neurological issue. Dr. Cameron did not test Ms. Ballantyne's balance, describing this as a largely subjective complaint.

2. Dr. Paul Etheridge, GP

[69] In Dr. Etheridge's opinion, Ms. Ballantyne probably sustained a concussion in the Accident and now has post-concussion symptoms, including dizzy spells/vertigo, visual disturbances, and headaches.

3. Dr. Francois Louw, GP

[70] Dr. Louw diagnosed post-concussion syndrome. He noted observable weakness of Ms. Ballantyne's left ankle dorsiflexion (i.e., her ability to pull up her ankle), with episodes of left foot dragging and feeling clumsy. He attributed her left ankle issues to mild TBI, noting that an orthotic significantly improved her mobility.

4. Dr. Raphael Chow, Physiatrist

[71] Dr. Chow did not diagnose a concussion in 2016; Ms. Ballantyne then complained of no psychological issues. He made this diagnosis after completing a chronological review of her clinical records in 2019. Dr. Chow admitted in cross-examination that he had no difficulty communicating with Ms. Ballantyne in either 2016 or 2019, saying she was lucid and able to understand him.

5. Dr. Sheldon Lewkis, Neuro-Psychologist

[72] Dr. Lewkis completed his Ph.D. in psychology in 1994 at the University of Toronto. The focus of his private practice is clinical neuro-psychology. He defined neuropsychology as the applied science of brain-behavior relationships. Dr. Lewkis assessed Ms. Ballantyne over four days from December 3–6, 2018. He obtained a detailed history from her over about 12 hours, interviewed her husband separately for about 45 minutes, administered various tests, reviewed medical records, and

authored a report dated December 22, 2018. He had no concerns about the validity of Ms. Ballantyne’s reporting and opined as follows:

- a) Before the Accident, Ms. Ballantyne:
 - i. Had no serious emotional illness;
 - ii. Likely had no significant impairment of her brain function;
 - iii. Likely performed in the high average range in her daily intellectual (i.e., cognitive and executive) function;
 - iv. Had a capacity for academic study at the college level (based on her high school upgrade course marks); and
 - v. Demonstrated considerable competency, particularly in executive function and endurance, based on her parenting and involvement in Suntec; and

- b) After the Accident, his psychometric testing of Ms. Ballantyne:
 - i. Yielded a cluster of scores that likely represent an Accident-related diminishment in intellectual function; and
 - ii. Indicated statistically significant impairment in executive function in only one category (self-organization/problem solving).

[73] Dr. Lewkis concluded that Ms. Ballantyne has a significantly diminished ability to perform her former work duties and that she does not retain the competency to manage college or university level study successfully. He agreed that chronic pain is closely associated with neurophysiological dysregulation in a wide range of brain structures and has a widespread impact on mental function. In his opinion, Ms. Ballantyne has PTSD and an Accident-related insomnia disorder.

[74] In Dr. Lewkis’ opinion, Ms. Ballantyne’s diminished intellectual function was more robustly expressed in her persistent changes in accustomed day-to-day

functioning than in his psychometric testing. He acknowledged that this reflects the limitations of such testing. According to Dr. Lewkis, psychometric test results typically do not demonstrate the full degree of impairment in daily cognitive and goal-directed behavior because the testing:

- a) Is structured to maximize the examinee's performance; and
- b) Imperfectly simulates the kind of thinking and goal-directed behavior required in daily life (i.e., executive function).

[75] Dr. Lewkis admitted in cross-examination that Ms. Ballantyne had no pre-Accident psychometric testing and, accordingly, he had to estimate her pre-Accident baseline function. He conceded that the presence of significant headache during testing could impact an examinee's test performance. He noted that headache is an intrinsic part of Ms. Ballantyne's post-Accident condition.

[76] Dr. Lewkis also agreed that depression (which he did not think was present in Ms. Ballantyne's case), chronic pain, and PTSD could affect executive function. He admitted that teasing all this out can be difficult and that qualified health care professionals could reach different conclusions about this matter.

6. Melanie Bos, Occupational Therapist,

[77] Ms. Bos administered various cognitive tests during her functional capacity evaluation of Ms. Ballantyne on February 4, 2020 (the "FCE"). She described Ms. Ballantyne as a good historian who was able to provide details about the Accident and her treatment. She was noted to work quickly, to avoid interruptions, and to focus on the tests. Ms. Bos also observed her to be oriented, organized in her approach, and to demonstrate good problem-solving skills. Ms. Ballantyne had no difficulty learning new information or with sequencing tasks, sustained attention, alternating or shifting her attention, completing tasks requiring simple planning or more complex ones requiring divided attention. Ms. Bos noted no limitations with memory during testing. Ms. Ballantyne did best with visual (rather than verbal) cueing; Ms. Bos agreed that this could simply be how she learns.

[78] Ms. Bos designed her testing to increase physical and cognitive demands gradually over the course of the day. She agreed that Ms. Ballantyne had no difficulty understanding or following test instructions or completing questionnaires and screening instruments (including the GAD-7, PHQ-9, and PCL). Her work efficiency was assessed to be 80% at the end of the test day, a score that Ms. Bos agreed was “pretty good” for her age.

[79] Ms. Kennedy, the OT retained by plaintiff’s counsel shortly after the Accident, confirmed that she never had any difficulty understanding Ms. Ballantyne. She said that Ms. Ballantyne occasionally required information or instructions to be repeated in December 2015; she agreed that this improved over time but fluctuated and worsened when Ms. Ballantyne was stressed, emotional, or fatigued.

7. Dr. Timothy McDowell, Neurologist

[80] Dr. Timothy McDowell has been a neurologist since 2014. On February 29, 2020, he assessed Ms. Ballantyne, obtained a history from her, and conducted an examination. He authored a report dated March 11, 2020.

[81] Dr. McDowell explained that TBI involves a traumatic force to the brain that results in injury to the brain. He agreed that it need not be a direct blow to the head and that a transmitted force could result in concussion. He admitted in cross-examination that concussion is a broad term and encompasses a wide spectrum of injury severity. He agreed that concussion can cause cognitive problems, impaired memory, slowed thinking, and feelings of anxiety. Inconclusive findings which he agreed can be associated with concussion include headaches, light and sound sensitivity (more often a component of headache), nausea, dizziness, and imbalance. He denied that a feeling of head pressure is commonly associated with concussion. He admitted that someone can have a concussion without knowing it.

[82] Dr. McDowell denied that facial bruising is diagnostic of concussion, saying that concussion can present without it, and that facial bruising can be present in people who do not have concussion. Accordingly, he does not attribute much weight

to this finding. However, he agreed that the presence of facial bruising implies that a force was applied to the face in the setting of trauma.

[83] Ms. Ballantyne reported the following ongoing complaints to Dr. McDowell:

- a) Two types of headaches, including:
 - i. Headaches that were more severe, sometimes associated with nausea, occurred once or twice a month, could last all day, and improved with prolotherapy and other injections; and
 - ii. “Head pressure” that typically lasted a few minutes or longer if she pushed herself;
- b) Dizziness in stimulating environments and disorientation in the wind; and
- c) Cognitive symptoms including impaired memory that had improved since the Accident.

[84] Dr. McDowell made the following clinical diagnoses:

- a) Functional neurologic disorder (i.e., psychological, non-physiological, issues are most likely predominant factors in Ms. Ballantyne’s persisting symptoms);
- b) Post-traumatic headaches; and
- c) Concussion.

[85] Dr. McDowell defined functional neurologic disorder as an umbrella term which covers many different symptoms not believed to originate from structural or organic causes. In cross-examination, he denied ever having seen a persistent organic motor deficit arising from a concussion. In his opinion, Ms. Ballantyne displayed classic features of functional neurologic disorder, including abnormal eye movements, give-way left-sided weakness, an abnormal gait pattern, and abnormal

coordination testing that was inconsistent with objective aspects of her examination, imaging results, and other testing.

[86] Dr. McDowell admitted that a functional neurologic disorder can be challenging to treat but said that some patients do well with neuropsychiatric care. In his view, there is a significant possibility that Ms. Ballantyne's symptoms could improve markedly with this kind of treatment and that she could return to, or approach, her pre-Accident neurologic baseline. In his opinion, it is highly unlikely that Ms. Ballantyne's abnormal eye movements are due to brain injury.

[87] Dr. McDowell was confronted in cross-examination with Ms. Ballantyne's recorded complaints of a "fuzzy feeling" in the ambulance crew report and ER nursing records the day of the Accident. He interprets the former to mean that the paramedics were uncertain what to make of this complaint, noting that they did not describe Ms. Ballantyne as either confused or disoriented. He agreed that her complaints of head pain could be related to a brain injury.

[88] In re-examination, Dr. McDowell was taken to the records of the attending ER physician who assessed Ms. Ballantyne the day of the Accident. He places more weight on these records than on the nursing records, noting that the ER physician would have been responsible for making a diagnosis. He interprets the ER physician's records as consistent with an attempt having been made to diagnose a TBI; it is noted that Ms. Ballantyne suffered no loss of consciousness and had a normal GCS. It is significant to Dr. McDowell that the involved ER physician neither queried nor diagnosed a TBI.

[89] Dr. McDowell admitted that functional neurologic disorder is generally more difficult to treat the longer symptoms persist. He agreed it is "not dramatically wrong" to say that most healing from a TBI occurs within the first two years following injury. In re-examination, he added that studies have demonstrated that some patients with more moderate to severe TBI have recovered functionally up to ten years following their injury. No expert suggests that Ms. Ballantyne suffered a moderate or severe brain injury in the Accident and her neuroradiology imaging is inconsistent with this

diagnosis. While Dr. McDowell conceded that few things in medicine are impossible, he denies it is probable that a brain injury accounts for Ms. Ballantyne's ongoing symptoms.

8. Dr. Kevin Solomons, Psychiatrist

[90] Dr. Solomons is the defendant's psychiatrist expert. In his opinion, Ms. Ballantyne did not suffer a mild TBI in the Accident. He opines as follows:

- a) Mild TBI occurs when a person sustains a concussive blow to the head that results in a loss of, or alteration in, consciousness and post-traumatic amnesia;
- b) Mild TBI does not occur in the absence of these clinical features;
- c) Mild TBI may, or may not, be accompanied by non-specific neurocognitive symptoms (i.e., dizziness, balance issues, and light and sound sensitivity);
- d) The presence or absence of neurocognitive symptoms is not diagnostic of a mild TBI;
- e) Neurocognitive symptoms commonly occur in the absence of head injury and mild TBI; and
- f) If neurocognitive symptoms occur, they arise immediately and usually within hours or days.

[91] Dr. Solomons states that, while Ms. Ballantyne does not recall everything about the immediate aftermath of the Accident, her description of events indicates that she remembers many significant details. He therefore concludes that she suffered no post-traumatic amnesia. In his opinion, Ms. Ballantyne did not sustain a mild TBI and has not been neurocognitively impaired as a result of the Accident. In his view, none of the requisite diagnostic clinical features of a mild TBI are documented in the records.

[92] On Dr. Solomons' evidence, a concussive blow to the head is the distinguishing feature between a mild TBI and other forms of injury. In his view, the diagnosis of mild TBI requires a strike to the head; he denied that a coup-contra coup injury can cause brain damage. He was confronted in cross-examination with a photograph of Ms. Ballantyne's face taken on December 27, 2015; it appears to show the presence of old bruising. He agreed that he has no reason to dispute this photographic evidence. Ultimately, he admitted that the presence of facial bruising is compatible with a possible concussive blow to the head.

[93] Dr. Solomons conceded in cross-examination that Ms. Ballantyne's reference the day of the Accident to having a "fuzzy feeling" in her head might have been her way of expressing an altered level of consciousness, a possibility he did not address in his report.

F. Mental Health Issues

1. Dr. Lynne Zettl, Psychologist

[94] Dr. Lynne Zettl obtained a doctorate in clinical psychology at the Pacifica Graduate Institute in Santa Barbara, California in 1997. She has had a private psychology practice in Vancouver and Kelowna, BC since 1991. She described herself as a clinical counsellor who employs self-regulation therapy (i.e. de-sensitizing psycho-physiotherapy or mindfulness-based cognitive therapy).

[95] In July 2017, Ms. Kennedy referred Ms. Ballantyne to Dr. Zettl for the assessment and treatment of any Accident-related psychological conditions. Since then, Dr. Zettl has seen Ms. Ballantyne over 200 times, almost weekly for the last five years. Dr. Zettl said that she has been helping Ms. Ballantyne regulate her daily stress which, in turn, helps her manage her chronic pain. She agreed that chronic pain contributes to poor concentration, impaired memory, and depression and exacerbates PTSD by "kindling" the brain and the autonomic nervous system.

[96] In Dr. Zettl's view, PTSD is a misnomer in that patients with this condition respond as if the threat is still present. She described the intrusive images that can

be associated with PTSD as “brain tattoos”. She tries to help people “unstick” these images. She agreed that cognitive behavioral therapy (“CBT”) can help patients change their thoughts and perspective.

[97] In Dr. Zettl’s opinion, Ms. Ballantyne has PTSD, chronic pain, insomnia, and a mild neurocognitive disorder due to TBI as a result of the Accident. She relies on Dr. Lewkis’ opinions for the diagnosis of a neurocognitive disorder, admitting that she does not diagnose brain injury and is not qualified to perform neuro-psychological tests. In her view, Ms. Ballantyne’s chronic pain prevents her PTSD and insomnia from resolving completely. Despite a decrease in Ms. Ballantyne’s pain and PTSD symptoms, Dr. Zettl opines that Ms. Ballantyne continues to experience multiple cognitive deficits.

[98] By May 2020, Dr. Zettl noted moderate improvement in Ms. Ballantyne’s PTSD symptoms. Ms. Ballantyne’s insomnia was then well managed with medication. She reported fewer and less intense mood swings, decreased anxiety, an improved mood, being less dissociated and more fully present, and having fewer and less severe headaches. She also reported an improving memory and fewer word finding difficulties as compared to one year earlier.

[99] Dr. Zettl agreed that pain stimulates PTSD and that stress exacerbates Ms. Ballantyne’s symptoms. She admitted that litigation is stressful for most people, that Ms. Ballantyne has described this lawsuit as a source of stress, and that resolution of this claim will remove this perceived “threat” for Ms. Ballantyne.

[100] In Dr. Zettl’s view, Ms. Ballantyne’s ongoing mild TBI symptoms have not improved significantly. She admitted that Ms. Ballantyne has developed compensatory strategies and now has systems in place for recalling things. She conceded that the symptoms of PTSD and TBI overlap; on her evidence, once functional symptoms of PTSD improve, evidence of any enduring structural brain injury becomes more apparent. Notably, there is no evidence that Ms. Ballantyne sustained a structural brain injury in the Accident; the MRI of her brain is normal.

[101] Dr. Zettl concludes that Ms. Ballantyne’s prognosis is poor and that she is unlikely to recover fully to her premorbid functional level. She opines that Ms. Ballantyne is vulnerable to more intense PTSD if she has another accident and that she has an increased (but unspecified) chance of developing dementia.

2. Dr. Donald Cameron, Neurologist

[102] Dr. Cameron defers to experts in psychology regarding mental health issues. In his opinion, Ms. Ballantyne developed symptoms of anxiety and feelings of depression after the Accident. He conceded that psychological issues can improve with treatment.

3. Dr. Raphael Chow, Psychiatrist

[103] Dr. Chow defers to mental health experts regarding psychological issues.

4. Dr. Francois Louw, GP

[104] Dr. Louw noted that Ms. Ballantyne’s mood was stable at the time of his April 2020 assessment.

5. Dr. Kevin Solomons, Psychiatrist

[105] Dr. Solomons completed his psychiatry training in South Africa in 1987. He relocated to Canada and completed a fellowship in geriatric psychiatry in 1992. He has not had an active clinical psychiatry practice since early 2020.

[106] On March 4, 2020, Dr. Solomons assessed Ms. Ballantyne at the defendant’s request. He obtained a history, reviewed various medical records, and authored two reports dated March 25, 2020 and May 1, 2020. He opined as follows:

- a) Apart from a fear of driving recorded in her family physician’s notes, the post-Accident medical records of Ms. Ballantyne’s treating physicians reference no emotional, mental health, or psychiatric difficulties;
- b) Dr. Zettl’s records include no account “of a constellation, course and context of psychiatric symptoms that is consistent with any psychiatric diagnosis”;

- c) Ms. Ballantyne specifically disavowed features of a depressive or anxiety disorder;
- d) PTSD is a psychiatric illness which arises when a person experiences a severe life or limb-threatening trauma and develops persistent, intrusive recollections of it and phobic avoidance of circumstances that trigger those recollections;
- e) Dr. Zettl's records indicate that Ms. Ballantyne's concerns relate to future accidents and that she does not re-experience or have intrusive recollections of the Accident; and
- f) Ms. Ballantyne did not develop PTSD as a result of the Accident.

[107] Dr. Solomons admitted in cross-examination that reference to the PTSD exposure criterion could include a fear of actual or threatened death to one's self or to someone else. When provided with a description of the Accident, he conceded that it could meet the first diagnostic criterion for PTSD.

[108] Dr. Solomons was challenged about phobic avoidance including, in particular, Ms. Ballantyne's avoidance of driving. He understood that she overreacted to threatening driving conditions but otherwise had no difficulty when in a vehicle. He also understood that she was no longer driving for mostly physical reasons and that she had no trouble getting into a vehicle. Notably, those assumptions are inconsistent with a substantial volume of trial evidence to the contrary.

VII. CAUSATION

[109] The basic test for determining causation is the "but for" test. The plaintiff bears the burden of establishing that "but for" the defendant's negligent act or omission, the injury would not have occurred: *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 21; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14, 1996 CanLII 183 [*Athey*]. The "but for" test must be proven on a balance of probabilities: *Athey* at

para. 13. The Accident need not be the only cause of the plaintiff's injuries but it must be a causal factor beyond the "*de minimis*" range: *Athey* at para. 15.

[110] The most basic principle of tort law is that the plaintiff must be placed in the same position they would have been but for the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for another person. However, a defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway: *Dornan v. Silva*, 2021 BCCA 228 at para. 44 [*Dornan*].

[111] Apart from her left elbow complaints, which the defendant denies are related to the Accident, the cause of Ms. Ballantyne's ongoing physical and mental health problems is not contentious. Based on her report to Dr. Chow, Ms. Ballantyne had some intermittent, low grade, pre-Accident neck and back pain. The trial evidence supports the conclusion that it was not functionally limiting and I make this finding.

[112] A significant point of contention is whether or not Ms. Ballantyne sustained a mild TBI in the Accident. By extension, the parties also disagree about whether mild TBI explains Ms. Ballantyne's ongoing neurocognitive symptoms. Ms. Ballantyne's prognosis is potentially dependent on her diagnosis. Psychological conditions can be treated (with a variable degree of success); accordingly, they might be associated with a more favourable prognosis than residual deficits due to mild TBI and/or a post-concussion syndrome.

[113] Two neurologists testified at trial: Dr. Cameron for the plaintiff and Dr. McDowell for the defendant. In my view, they are the experts best qualified to opine on the diagnosis, treatment, and long-term implications of TBI. Dr. Cameron diagnosed Ms. Ballantyne with a mild TBI; Dr. McDowell diagnosed a concussion. Both confirmed that these diagnoses are interchangeable. I find that Ms. Ballantyne probably sustained a mild TBI, or concussion, in the Accident.

[114] Dr. Cameron opined that Ms. Ballantyne developed symptoms of a post-concussion syndrome; he conceded that it can be difficult or impossible to tease out whether ongoing post-concussion symptoms are due to the residual effects of a concussion, psychological factors, and/or pain. By contrast, Dr. McDowell diagnosed a functional neurologic disorder. Dr. Cameron did not make this diagnosis but, in my view, it is consistent with his conclusion that psychological factors, in combination with chronic pain, could explain Ms. Ballantyne's ongoing symptoms.

[115] Notably, Ms. Ballantyne did not complain of post-Accident cognitive impairment when she was first assessed by Dr. Chow in May 2016. Those complaints emerged when she was assessed by him on December 9, 2019. On Dr. Cameron's evidence, the natural course for individuals with mild TBI is not for their symptoms to worsen over time and, if they do, something else is usually going on including, for example, another injury or psychological issues. In my view, this evidence supports the conclusion that psychological symptoms feature prominently in Ms. Ballantyne's current disability. It is also consistent with Dr. McDowell's view that Ms. Ballantyne has a probable functional neurologic disorder.

[116] Drs. Cameron and McDowell both confirmed that Ms. Ballantyne's altered gait is not explained by an organic neurological cause. On Dr. Cameron's evidence, this kind of focal neurologic deficit presents in stroke patients; there is no evidence that Ms. Ballantyne suffered a stroke or other neurological injury that would explain her left-sided weakness and altered gait. In my view, this discrepancy between Ms. Ballantyne's presentation and the diagnosis of mild TBI lends credence to Dr. McDowell's diagnosis of a functional neurologic disorder. Ms. Bos initially assessed Ms. Ballantyne at her clinic and noted that she had an abnormal gait; she later assessed Ms. Ballantyne in her home and observed her gait to be normal. In my view, this inconsistency further strengthens Dr. McDowell's opinion that Ms. Ballantyne has a probable functional neurologic disorder.

[117] I reject the opinion of Dr. Louw that Ms. Ballantyne's altered gait is due to a neurologic cause; he is not a neurologist and this matter falls outside his expertise

as a GP. I also reject the opinion of Dr. Zettl that Ms. Ballantyne walks like she has had a stroke because she suffered a brain injury. Dr. Zettl admitted that she does not diagnose brain injury. She is not a physician, neurologist, or neuropsychologist. I prefer the opinions of Drs. Cameron and McDowell to those of Drs. Louw and Zettl regarding the diagnosis, treatment, and long-term implications of mild TBI.

[118] It is unclear why Ms. Ballantyne has not pursued a referral to a neuro-psychiatrist, or why no neuro-psychiatrist testified at trial. Doing my best on the available evidence, viewed as a whole, I conclude that Ms. Ballantyne's ongoing cognitive, emotional, and psychological symptoms are probably best explained by a functional neurologic disorder in the context of chronic pain and psychological issues. In my view, it is significant that Ms. Ballantyne consistently demonstrated good cognitive function during Ms. Bos' assessments. Dr. Lewkis admitted that Ms. Ballantyne's pre-Accident neurocognitive function was never tested, that the presence (as here) of headache during testing can confound results, and that neurocognitive testing has inherent limitations. In the circumstances, Dr. Lewkis necessarily estimated Ms. Ballantyne's pre-Accident intellectual function. He readily conceded that chronic pain is closely associated with neurophysiological dysregulation and that it has a widespread impact on mental function. Those conclusions are consistent with the opinions of Dr. Cameron and Dr. McDowell that pain and psychological difficulties are closely tied to cognitive function.

[119] The parties disagree about the correct diagnosis of some of Ms. Ballantyne's injuries and her realistic prognosis. Ultimately, I conclude that the intractable nature of Ms. Ballantyne's ongoing complaints, including reduced concentration, impaired memory, and cognitive difficulties, likely arise from a combination of chronic pain, anxiety, PTSD, and psychological problems, and that the corresponding difficulties associated with treating them likely means that the distinction between a diagnosis of functional neurologic disorder and/or symptoms of a post-concussion syndrome is of limited relevance: *Scoates v. Dermott*, 2012 BCSC 485 at para. 175.

[120] I have afforded Dr. Solomons' opinions regarding mild TBI virtually no weight. Dr. Solomons is a psychiatrist and not a neurologist. He has been retired from active clinical practice since early 2020 and his professional time is now spent mostly authoring medical legal reports, predominantly for ICBC. I am not satisfied that he offered objective opinions within his area of expertise. His "synthesized" definition of mild TBI is of no assistance. It is inconsistent with the views of the two neurologist experts who testified and I place no reliance on it.

[121] The factual assumptions underlying many of Dr. Solomons' conclusions are inconsistent with the trial evidence. He found that Ms. Ballantyne had no difficulty getting into a vehicle and became anxious only in dangerous traffic conditions, evidence that was directly contradicted by Ms. Ballantyne, her husband, daughter, sister, and treating psychologist, Dr. Zettl. I prefer the evidence of Drs. Zettl and Lewkis to that of Dr. Solomons regarding the diagnosis of PTSD. Some of the experts' reports are now quite dated, a factor I have considered in assessing Ms. Ballantyne's condition.

[122] I find that the Accident caused Ms. Ballantyne to sustain the following injuries:

- a) Soft tissue injuries to her neck and back that has resulted in chronic myofascial pain with probable central sensitization;
- b) Improved but ongoing intermittent headaches of variable intensity;
- c) Improved but persistent visual disturbances including blurred vision and decreased depth perception;
- d) Improved intermittent tinnitus;
- e) Fatigue and reduced stamina;
- f) A probable mild TBI or concussion;
- g) A functional neurologic disorder;

- h) PTSD; and
- i) Driving anxiety.

VIII. CREDIBILITY AND RELIABILITY OF EVIDENCE

[123] The principles to be applied when assessing the credibility of interested witnesses are discussed in the frequently cited passages of Justice O’Halloran in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186. Relevant factors include the ability and opportunity to observe events, the firmness of the witness’ memory, the ability to resist the influence of interest to modify recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes their testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally: *Bradshaw* at para. 186. I have applied those principles here.

[124] Credibility was not a significant issue at trial. I found Ms. Ballantyne to be a generally credible and forthright witness. She occasionally asked for questions to be repeated and some of her answers suggested a certain lack of confidence. However, she appropriately focused on the questions she was asked, consistently demonstrated a good understanding of them, and provided clear, careful, and responsive answers. Contrary to her lawyer’s suggestion, I do not agree that she demonstrated a tendency to ramble or an inability to understand questions.

[125] Ms. Ballantyne became emotional when discussing the Accident but I did not find this to be either surprising or unusual. There were occasional gaps in her memory, none of which I found to be remarkable given the passage of time and the traumatic nature of the Accident. In my view, the evidence demonstrates that Ms. Ballantyne has a well-entrenched perception of her own disability. I accept that this may have influenced the reliability of some of her evidence.

[126] Mr. Ballantyne and Anisha Ballantyne were generally straightforward witnesses. Mr. Ballantyne became somewhat confrontational in cross-examination; some of his answers were unresponsive and occasionally strayed into argument. Anisha Ballantyne was a clear, candid, and responsive witness. However, it was apparent that she has an imperfect understanding of Suntec's finances, the nature of her mother's role within Suntec, and why Suntec closed. Those limitations affect the weight that can be given to some of her evidence. While I found Anisha and Mr. Ballantyne to be generally credible witnesses, they are clearly not disinterested ones.

[127] Ms. Fast was a thoughtful witness who answered questions in a frank manner. Her limited contact with Ms. Ballantyne in 2017 and 2018 undermined her ability to comment on some matters. Contractor, Rod Reid, was a straightforward witness whose evidence I accept without difficulty.

[128] Some of Dr. Zettl's evidence strayed outside her area of expertise. Although she admitted that she does not diagnose brain injury, she attributed some of Ms. Ballantyne's symptoms to a brain injury. For example, she testified that Ms. Ballantyne walks like she has had a stroke because she has a brain injury. The two neurologist experts directly contradicted Dr. Zettl's evidence on this point: both agree that Ms. Ballantyne's altered gait is not explained by a neurological cause. Dr. Zettl also said that, once PTSD is treated, evidence of a structural brain injury becomes more apparent. While I accept the accuracy of this general statement, I do not agree that it applies here. The evidence of both neurologist experts, and the normal neuro-radiology imaging of Ms. Ballantyne's brain, is inconsistent with a structural brain injury causing a focal neurologic deficit.

[129] Dr. Zettl suggested in cross-examination that she administered no self-screening questionnaires to Ms. Ballantyne because they would have been "tortuous" and overwhelming for Ms. Ballantyne who would have been unable to complete them. Notably, Ms. Bos did so during the FCE and Ms. Ballantyne completed them without apparent difficulty. Dr. Zettl volunteered her unsolicited

views of Ms. Ballantyne as one of the most optimistic and hardest-working patients she has ever had, a statement that was apparently intended to bolster Ms. Ballantyne’s credibility. She also commented on the “heartbreaking” process that Ms. Ballantyne has endured since the Accident. Those statements give rise to some questions about Dr. Zettl’s independence and whether she might have misperceived her role to include advocating on behalf of her longstanding patient.

[130] For the reasons already stated, I attach minimal weight to Dr. Solomons’ evidence. He purported to offer opinions about a variety of matters that extend beyond his expertise, including, for example, the severity of Ms. Ballantyne’s physical injuries, how facial bruising evolves over time, and the significance of certain findings on neuroradiology imaging.

[131] A’Lana Rains has been the Ballantynes’ personal and corporate accountant for many years. She offered opinions based on documents that her own accounting firm had prepared. She accepted without question the Ballantynes’ uncorroborated evidence regarding Suntec’s bad debts after the Accident and their attempts to mitigate Suntec’s loss by collecting them. Ms. Rains is not a forensic accountant. While she offered opinions about the Ballantynes’ losses due to the closure of Suntec after the Accident, she made no attempt to quantify them. Ultimately, I have some questions about Ms. Rains’ independence.

[132] In my view, all the other experts were credible witnesses who confined themselves to their respective areas of expertise, offered balanced views, and made reasonable admissions, as appropriate.

IX. GENERAL DAMAGES

[133] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. Such cases, while helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[134] The Court of Appeal outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*]. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism, a factor which generally ought not to penalize a plaintiff.

[135] On the evidence of Ms. Ballantyne, her husband, daughter, and sister, she was physically adventurous and regularly involved in outdoor activities before the Accident. She and Ms. Fast both recounted at trial a bicycle camping trip that they took with their sons in the Gulf Islands. Ms. Ballantyne is no longer able to ride a free-standing bicycle. She now rides a recumbent bicycle for up to 45 minutes to promote circulation in her legs. Before the Accident, her family used to ski every winter; she has now given up this activity. According to Mr. Ballantyne, the most adventurous thing that his wife has done since the Accident is to go to the grocery store. They tried camping after the Accident but, on his evidence, it did not go well; Ms. Ballantyne felt vulnerable, had significant left hand and arm issues, and struggled to lie down.

[136] Mr. Ballantyne and Anisha Ballantyne both said that Ms. Ballantyne is now easily overstimulated. She no longer enjoys going to restaurants and prefers to dine at home. She has a limited walking tolerance, no longer drives, is an anxious passenger, and is socially isolated. She no longer works in any capacity. Her typical day is spent watching television, listening to audio books, reading on her phone, making light meals, doing light housework and home exercises, and attending medical appointments. In the summer, she tends raised vegetable beds, an activity that she admitted brings her some joy.

[137] Anisha Ballantyne acknowledged that her mother has made small improvements since the Accident. She can now watch television for a short period of time, listen to quiet music if no one is talking, walk a bit more using her poles, and do

some minor tasks in the kitchen. It is her impression that her mother is stressed, distressed, frustrated, sad, and lonely and that her memory seems inconsistent. They no longer engage in the same kind of outdoor activities that they once enjoyed together and they no longer have the same kind of conversations.

[138] I accept that the Accident fundamentally changed Ms. Ballantyne's life. I conclude on the evidence of the two neurologist experts that whether she has a functional neurologic disorder and/or symptoms of a post-concussion syndrome, her longstanding condition is now likely to be challenging to treat. I accept that while her physical symptoms may improve further, they are unlikely to resolve completely and Ms. Ballantyne will probably be left with some degree of ongoing chronic pain.

[139] Ms. Ballantyne seeks \$315,000 in general damages, an amount which approaches the rough upper limit for non-pecuniary damages, citing the following decisions:

- a) *Owen v. Folster*, 2018 BCSC 143 (\$210,000);
- b) *Afonina v. Jansson*, 2015 BCSC 10 (\$300,000);
- c) *Scoates v. Dermott*, 2012 BCSC 485 (\$250,000); and
- d) *Lines v. Gordon*, 2006 BCSC 1929 (\$225,000).

[140] The defendant assesses general damages in the amount of \$100,000 and relies on the following authorities:

- a) *Thaker v. Bhatti*, 2022 BCSC 401 (\$120,000);
- b) *Abkari v. Trac*, 2022 BCSC 910 (\$100,000);
- c) *Neil v. Martin*, 2021 BCSC 1727 (\$115,000); and
- d) *Kringhaug v. Men*, 2021 BCSC 991 (\$100,000).

[141] Many of the decisions on which Ms. Ballantyne relies are quite dated. The Court of Appeal has recently cautioned against relying on non-pecuniary awards in cases older than ten years because simply adjusting for inflation ignores the fact that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component: *Valdez v. Neron*, 2022 BCCA 301, leave to appeal to SCC ref'd, 40442 (30 March 2023) at para. 58; *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at para. 18.

[142] I have reviewed the authorities cited by counsel. Some involve substantially younger plaintiffs, plaintiffs with more significant physical injuries (including, for example, multiple fractures that required the surgical placement of hardware), or injuries that were likely to worsen over time. Some plaintiffs (unlike Ms. Ballantyne) sustained moderate (rather than mild) TBI, demonstrated objectively on MRI, had more extreme personality changes, or personal relationships that suffered more profound and enduring impacts.

[143] Some of the authorities relied on by defence counsel involve plaintiffs with more significant pre-existing conditions, plaintiffs who were less reliable historians, less physically active before their injury, not diagnosed with TBI or PTSD, or who sustained less serious injuries with more modest corresponding functional impacts, better recoveries, and more optimistic prognoses.

[144] While some of these cases have obvious parallels to the one before me, all are distinguishable. Having regard to the factors listed in *Stapley* at para. 46, the authorities cited by counsel, the trial evidence, my assessment of Ms. Ballantyne's original and post-Accident condition, and the nature of her ongoing symptoms, I award general damages of \$200,000. In doing so, I have considered the impact of her Accident-related injuries on her past loss of housekeeping capacity.

X. LOSS OF HOUSEKEEPING CAPACITY

[145] Ms. Ballantyne seeks a separate award in the amount of \$254,097, representing \$84,268 for the past loss of housekeeping capacity, and \$169,829 for the future loss of housekeeping capacity. The defendant submits that any loss of

housekeeping capacity is appropriately considered as part of a non-pecuniary award.

[146] According to Ms. Ballantyne, she was the main organizer for housework before the Accident, evidence that her husband, daughter, and sister corroborated. Ms. Ballantyne said that, while everyone in the family helped with cooking before the Accident, she did most of it, including the meal planning. On her evidence, she also did most of the heavy indoor cleaning and most of the planting. Ms. Ballantyne helped with the construction of a retaining wall and stone steps at their home before the Accident. Mr. Ballantyne did most of the snow removal and, according to Anisha Ballantyne, the lawn care.

[147] In the first few months after the Accident, Ms. Ballantyne was doing no housework. On her evidence, she was barely getting up. Mr. Ballantyne became more involved in this work. Ms. Ballantyne advances a related in trust claim on his behalf; I have considered it separately. She also seeks special damages for the cost of house cleaning and lawn services provided after the Accident and future care costs for housecleaning, lawn care services, and snow removal. The Ballantynes paid for housekeeping assistance once every second week before the Accident; they now receive this kind of assistance weekly; accordingly, Ms. Ballantyne claims 50% of this total cost as part of her claim for future care. In my view, there is substantial overlap in these claims.

[148] In 2016, Dr. Etheridge opined that Ms. Ballantyne's ability to perform normal housekeeping duties and to participate in recreational activities was limited by pain. In his view, these functional limitations would probably improve with ongoing active rehabilitation and pain management. At Dr. Chow's December 2019 assessment, Ms. Ballantyne reported that she had returned to light cooking, making beds, dishwashing, cleaning the kitchen, and grocery shopping, with pain.

[149] The principles that govern when a plaintiff may recover damages for the loss of housekeeping capacity were addressed in *Riley v. Ritsco*, 2018 BCCA 366 at para. 101 and *Kim v. Lin*, 2018 BCCA 77 [*Kim*]. The Court of Appeal recently

affirmed these principles in *Haug v. Funk*, 2023 BCCA 110 at paras. 98 – 107 [*Haug*] and *McKee v. Hicks*, 2023 BCCA 109 at para. 112 where the Court held:

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

[150] In my view, Ms. Ballantyne's past loss of housekeeping capacity is best assessed as a loss of amenities. I have considered this loss in my assessment of her claims for non-pecuniary damages, an in-trust award, and special damages for the cost of housecleaning and lawn care services.

[151] As noted by Justice Baker in *Purewal v. Uriarte*, 2020 BCSC 1798 at para. 149, while damages for the loss of homemaking capacity are assessed, not calculated, it is nevertheless useful to understand how the market-based claim is valued. Based on the recommendations of Ms. Bos, Ms. Ballantyne seeks future housecleaning support and yard maintenance for her lifetime. She also advances a separate in trust award for future housekeeping services that she anticipates Mr. Ballantyne will perform. In my view, these claims overlap. Ms. Bos recommends:

- a) Lifetime house cleaning support of 78 hours/year at \$35/hour (\$2,730/year); and
- b) Lifetime yard maintenance of 15 hours/year at \$75/hour or \$1,125/year and snow removal services 15 times/year at \$50/session or \$750/year.

[152] Using Mr. Turnbull's multipliers, the present value of these costs is:

- a) \$52,580 for house cleaning (to age 80, based on a multiplier of 19.260, inclusive of tax); and
- b) \$32,462 for yard maintenance and snow removal (to age 75, based on a multiplier of 17.313, inclusive of tax)

TOTAL: \$85,042

[153] On the trial evidence I accept, Mr. Ballantyne did the snow removal and most of the lawn care before the Accident; he remains able to do so. I make no award for the cost of snow removal and discount yard care costs by about two-thirds. In my view, there is a real and substantial possibility that Ms. Ballantyne would have required some assistance with housework before her age 80, and yard care before her age 75, absent the Accident. In my view, there is a real and substantial possibility that the Ballantynes will relocate to a smaller home, with fewer demands, at some point in their lives. I also conclude that there is a real and substantial possibility Ms. Ballantyne's condition will improve, with different treatment and the additional supports for which funding has now been provided. While I accept that Ms. Ballantyne requires assistance with heavier cleaning tasks, she remains able to do light housekeeping, albeit with some symptoms.

[154] Taking all of these considerations into account, I award \$35,000 for future house cleaning services. This figure roughly equals the present value of about 60 hours per year of additional house cleaning services (at \$35/hour) at the annual cost of \$2,100 to Ms. Ballantyne's age 70. It also includes future lawn care services, roughly equal to the present value of an annual cost of \$375 for about 5 hours per year of professional lawn care services (at \$75/hour) to Ms. Ballantyne's age 70.

XI. IN TRUST CLAIMS

[155] Ms. Ballantyne seeks to recover \$84,268 for a past in trust claim on her husband's behalf. This figure represents her estimate of Mr. Ballantyne's time spent doing housekeeping chores that she would have done but for the Accident (\$70,363) and driving her to medical appointments after the Accident (\$14,006). She also seeks \$169,829 for a future in trust claim on Mr. Ballantyne's behalf for estimated housekeeping costs (\$133,307) and driving service (\$36,522) to Ms. Ballantyne's age 70.

[156] According to Mr. Ballantyne, he assumed all of his wife's duties after the Accident, including cooking, cleaning, shopping, and driving, plus running Suntec.

On his evidence, he did approximately two hours per day of housework before the Accident and is now doing about four additional hours of house chores per day (i.e., 6 hours total). He estimates that he now does 90% of the cleaning that his wife once did and that he drives her to appointments once or twice a week.

[157] Ms. Ballantyne corroborated this evidence, saying that her husband now does most of the cooking, laundry, and yard maintenance and that he spends more time cleaning now than he did before the Accident. She estimated that he currently spends about one-half to one hour per day cooking and about two hours per week cleaning. She agreed that he no longer spends as much time driving her to appointments as he once did.

[158] On Anisha Ballantyne's evidence, her father still drives her mother various places, unloads the bottom drawer of the dishwasher, does housework and yard work, takes out the garbage, buys groceries, and does most of the cooking.

[159] Ms. Ballantyne calculates her past in trust claim based on:

- a) Two hours per day of additional housework and personal care provided to her by Mr. Ballantyne after the Accident, over and above what might be expected of a spouse, at \$25/hour (a mid-point between the current minimum wage and the \$35/hour quoted by Ms. Bos in her future cost of care report) or \$18,250;
- b) One hour per day of the same services to the date of trial at the same hourly rate or \$52,012; and
- c) Six and one-half hours per week spent driving Ms. Ballantyne to appointments in 2016 and two hours per week from 2017 to the date of trial (or 50% of the time that he estimates he actually spent, at minimum wage) or \$14,006.

TOTAL: \$84,268

[160] Ms. Ballantyne calculates her future in trust claim as follows:

- a) Housekeeping assistance (1 hour/day at \$25/hour to age 70, discounted to present value, using Mr. Turnbull's multiplier of 14.609) or \$133,307;
- b) Driving assistance (2 hours/week, 50 weeks per year at \$35/hour, discounted to present value using Mr. Turnbull's multiplier of 14.609) or \$36,522.

TOTAL: \$169,829

[161] Justice Kent recently summarized the basis for in trust awards in *Meckic v. Chan*, 2022 BCSC 182 [*Meckic*]:

[214] Generally speaking, the requirements for making such an in-trust award include the following:

- The assistance provided must be necessary for the care of the plaintiff as a result of her injuries;
- The services must be over and above what might be ordinarily expected from a family member or friend;
- Quantification of the award should reflect the true and reasonable value of the services performed, taking into account the time required and the quality and nature of the work;
- The maximum value of such services will generally be the cost of obtaining them from a professional third-party service provider; and,
- It is not necessary for the person providing the services to have foregone other income in order to qualify for such an award.

[162] In my view, Ms. Ballantyne's in trust claims are excessive and overlap with her other claims, including those for the loss of past and future housekeeping capacity, special damages (for the cost of house cleaning and lawn care services), and future care costs (for lifetime transportation costs, house cleaning costs to age 80, and yard maintenance and snow removal services to age 75).

[163] I award \$20,000 in trust for Mr. Ballantyne. This award is consistent with two recent decisions of this Court: *Kazemi v. Sturmane*, 2023 BCSC 127; *Meckic*. I accept that Mr. Ballantyne assumed his wife's share of cooking, cleaning, and yard care after the Accident, in addition to driving her to and from various healthcare appointments. I accept that his contributions were substantial and that they likely

exceeded what would reasonably be expected of a caring spouse in the circumstances.

[164] I make no separate future in trust award. I have made a pecuniary award for the loss of future housekeeping capacity and addressed Ms. Ballantyne's claim for future transportation costs in assessing her claim for future care costs. I have also made a separate pecuniary award for future housekeeping and lawn care services.

XII. SPECIAL DAMAGES

[165] Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred for treatment aimed at promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55 [*Redl*].

[166] The defendant admits special damages of \$114,678.58. This figure includes compensation for:

- a) Pharmaceutical Products - \$394.97
- b) Physiotherapy – \$17,826.70
- c) Taxi and Transportation Services - \$26,465.70
- d) Chiropractic Sessions – \$5,673
- e) Kinesiology - \$7,965.62
- f) Dental and Endodontic Services – \$1,202.70
- g) Prolotherapy - \$2,060;
- h) Counselling and Psychotherapy - \$43,825
- i) Pool Rehabilitation Services - \$1,316.75

- j) Vision Therapy and Optometry Services - \$4,761.04
- k) Parking - \$132
- l) Vestibular Treatment - \$1,632.65
- m) Yoga - \$301.35
- n) Ambulance Services - \$80
- o) Miscellaneous Items and Equipment - \$1,041.10

TOTAL: \$114,678.58

[167] I accept that these costs were reasonably incurred as a result of the Accident. I award special damages in this amount.

[168] The defendant disputes Ms. Ballantyne's claim for additional special damages in the amount of \$73,708.31. The parties agree that Ms. Ballantyne incurred these expenses. At issue is whether they were necessitated by the Accident. These costs include:

- a) Medications - \$3,544.51
- b) House and Lawn Cleaning Services - \$12,144.38
- c) Counselling and Psychotherapy for Mr. Ballantyne - \$9,975
- d) Work by Anisha Ballantyne - \$6,340.32
- e) Gravity Float - \$742.35
- f) Privately-funded MRI Scans - \$5,110.97
- g) OT Services - \$33,657
- h) Miscellaneous and Equipment - \$2,193.78

A. Medications

[169] The defendant disputes the cost of Glycerine and Senecot laxatives (\$24.12), describing them as regular over-the-counter medications that anyone might use periodically and denying that there was any trial evidence about how often this medication was required or whether it is Accident-related. Plaintiff's counsel submits that Ms. Ballantyne has led a sedentary life since the Accident and that she took this medication because her "systems were not working properly". I am not persuaded on the evidence that this is an Accident-related cost.

[170] The defendant disputes the costs of Esomeprazole (\$55.32) and Magnesium Chloride cream, also referred to as Pantoprazole Magnesium (\$60.39) and denies that the trial evidence supports the conclusion that this is an Accident-related cost. Plaintiff's counsel relies on Ms. Ballantyne's evidence that she had stomach issues as a result of taking Advil for post-Accident pain and that she therefore took Pantoprazole Magnesium (for her stomach) and Esomeprazole (for heartburn). He notes that Ms. Kennedy, his occupational therapist advisor, recommended magnesium to Ms. Ballantyne. I allow the claim for Pantoprazole Magnesium but not the claim for Esomeprazole. I am not persuaded on the trial evidence that Ms. Ballantyne's heartburn was caused by her consumption of Advil for post-Accident pain.

[171] The defendant denies that the cost of HHC and Advil in the amount of \$32.84 is supported by the trial evidence. Plaintiff's counsel relies on Dr. Louw's evidence that he directed Ms. Ballantyne to take HHC, a cannabinoid product, and that she has taken Advil for post-Accident pain. I award these costs.

[172] The defendant disputes the costs for Aventyl (\$15.10) and Goodman Medical Supplies (\$44.78) and denies that the trial evidence establishes they were incurred as a result of the Accident. Plaintiff's counsel says that Dr. Cameron recommended Aventyl (also referred to as Nortriptyline) to Ms. Ballantyne. I allow the costs for Aventyl but not the unspecified costs for Goodman Medical Supplies.

[173] The defendant disputes the cost of cannabis (\$2,942.45). Defence counsel concedes that there was trial evidence about Dr. Louw's prescription of cannabis to Ms. Ballantyne but denies that there was any evidence about its required frequency or strength. Plaintiff's counsel relies on Ms. Ballantyne's evidence that she takes cannabis, as prescribed by Dr. Louw, for pain management. On Dr. Louw's evidence, she was unable to tolerate many prescribed pain medications, including Naltrexone, Amitriptyline, and Duloxetine. She derives some pain relief from cannabis and did not require this medication before the Accident. I award this cost.

[174] In summary, I award a total of \$3,050.78 for additional medication costs.

B. House and Lawn Cleaning Services

[175] The defendant disputes Ms. Ballantyne's \$12,144.38 claim for post-Accident house and lawn cleaning services. Based on the receipts in evidence, these services were provided in June and July of 2016. The defendant denies that there is any evidence about why this service was then required. The plaintiff maintains that this cost is amply supported by the evidence at trial.

[176] I award \$12,144.48 for the cost of professional house and lawn cleaning services in the summer of 2016, approximately six months after the Accident. I accept that Ms. Ballantyne was then unable to perform her usual indoor and outdoor house chores as a result of her Accident-related injuries, and that Mr. Ballantyne could not do so because of the additional tasks he had then assumed. In my view, those factors, taken in combination, render the cost of these services reasonably necessary to replace the kind of work that the Ballantynes would have done themselves absent the Accident.

C. Counselling and Psychotherapy

[177] Ms. Ballantyne seeks to recover the cost of counselling services that her husband received after the Accident in the amount of \$9,975. Plaintiff's counsel relies on Mr. Ballantyne's evidence about the positive impact this counselling had on his efforts to save Suntec after the Accident. Mr. Ballantyne is not a plaintiff in this

action. I am not persuaded that Ms. Ballantyne can recover the cost of counselling services provided to her husband as special damages in this action. I was provided with no authority to support doing so. I do not award these costs.

D. Work by Anisha Ballantyne

[178] Ms. Ballantyne seeks to recover the amount that Anisha Ballantyne billed her parents for services she provided to Suntec after the Accident. The defendant disputes this cost and highlights a lack of clarity and multiple irregularities in the bills that Anisha Ballantyne submitted. Plaintiff's counsel relies on the Ballantynes' evidence about Suntec's post-Accident difficulties, Ms. Ballantyne's stated inability to do this work on a timely basis, and Anisha Ballantyne's explanations about the anomalies in her bills being due to her billing software.

[179] After the Accident, Anisha Ballantyne assumed some of the duties that her mother had previously performed for Suntec. She collected and delivered cheques to different vendors, deposited cheques, submitted service receipts to one of Suntec's main suppliers, helped to compile year-end documents in a binder for delivery to Ms. Rains, and created a new email account for Mr. Ballantyne using her own task management software to help him organize and prioritize tasks.

[180] At some point, Anisha Ballantyne started invoicing Suntec for her services. On her evidence, she was taking time off work to help her parents and it became apparent at some point that her mother's recovery was taking longer than expected.

[181] Anisha Ballantyne corroborated her mother's evidence that Ms. Ballantyne had prepared some Suntec cheques before the Christmas 2015 holiday. Accordingly, Anisha Ballantyne did not have to prepare any cheques until after Christmas 2015. She estimated that she was working an average of five to seven hours per week, three to four days per week, doing Suntec work (plus about another five hours per week providing personal assistance to her mother, including driving, helping around the house, and assisting with meal preparation) in 2016. Anisha Ballantyne said that she had to leave her own job about 10 times after the Accident

to help with a variety of family matters (including one occasion when she had to care for her brother who was in hospital).

[182] Anisha Ballantyne invoiced Suntec for her services. Her invoices are somewhat irregular; while dated the first day of the month, they relate to work that she performed thereafter. Her first invoice contains no details about any services rendered. She initially billed her work for Suntec at \$20 per hour, later increasing this rate to \$25 per hour, based on what she said she charged her own clients as a behavior analyst. There is no evidence that this hourly rate corresponds to the value of the work that she performed for Suntec. Her last invoice to Suntec is dated December 3, 2020. Some of the services that she billed to Suntec included delivering cheques for amounts Suntec owed third parties. Although Anisha Ballantyne understood that these deliveries were time-sensitive, she could not explain why they were not simply mailed. She admitted that she was not heavily involved in Suntec's financial matters.

[183] I accept that Anisha Ballantyne provided services to Suntec after the Accident because her mother was then unable to do them as a result of her Accident-related injuries. I award \$5,000 for these services. This roughly equals 250 hours at an hourly rate of \$20/hour. Based on Ms. Cameron's December 18, 2020 report, the 2020 median hourly rate for accounting clerks in the Thompson/Okanagan Region was \$20.50. Based on Ms. Webster's April 6, 2020 report, the 2018 median hourly rate for general office support workers and accounting or related clerks referenced was \$21.00. I do not accept that Anisha Ballantyne is entitled to be compensated for these services at the rate of \$25 on the basis that this is what she charged her own clients for her work as a behavior therapist. She is not a trained bookkeeper. I do not award the \$63.82 claimed for unspecified supplies and mileage.

E. Gravity Float

[184] The defendant disputes the cost of this service, describing it as a luxury item. Defence counsel highlights the absence of any medical evidence supporting it as reasonable and notes that, on Ms. Ballantyne's own evidence, she derived no

benefit from it. She pursued this service on Ms. Kennedy's recommendation that it might "calm her nervous system".

[185] This cost apparently relates to a non-medical service. It was not endorsed by any of the physicians involved in managing Ms. Ballantyne's post-Accident pain or by Dr. Zettl, who was treating Ms. Ballantyne's psychological symptoms. A plaintiff does not have *carte blanche* to undertake any and all therapies which they believe will make them feel better: *Redl* at para. 55. I do not award this cost.

F. MRI Scans

[186] Ms. Ballantyne seeks to recover \$5,110.97 for the cost of obtaining privately-funded MRI scans. The defendant submits that medically necessary MRI scans are publicly-funded and that the evidence does not support the conclusion that privately-funded scans were medically indicated. One MRI was for the left elbow; the defendant denies that Ms. Ballantyne sustained a left elbow injury in the Accident.

[187] Plaintiff's counsel argues that these costs are recoverable because they were incurred to: 1) ensure timely MRIs were obtained; and 2) benefit the treating physicians and the medical experts involved in this litigation.

[188] The trial evidence does not establish that these MRI scans were medically necessary or required emergently or urgently. I am not persuaded that the Accident caused Ms. Ballantyne's left elbow complaints. I do not award these costs as special damages.

G. OT Services

[189] Plaintiff's counsel retained Ms. Kennedy within days of the Accident. Some of her billed services were provided to Ms. Ballantyne; others relate to her time spent reviewing Ms. Ballantyne's file, communicating with plaintiff's counsel, and preparing reports for his review. The defendant denies that these costs are recoverable as special damages, noting that Ms. Kennedy was retained by counsel and not on the recommendation of any involved healthcare professional.

[190] Plaintiff’s counsel replies that the trial evidence demonstrated the benefits of Ms. Kennedy’s services. He submits that she provided Ms. Ballantyne with substantial post-Accident assistance regarding personal care, home office modifications, access to medical care (when Ms. Ballantyne did not have a family doctor), reintegration into the community, and maximisation of her comfort and function.

[191] I accept that the OT services Ms. Kennedy provided to Ms. Ballantyne are recoverable as special damages. I do not agree that all of the services she provided and billed directly to plaintiff’s counsel, including her review of various records, her communications with him, and her preparation of reports at his request, are compensable as special damages. I allow \$16,678 for the cost of the OT services that Ms. Kennedy and/or her rehabilitation assistant provided to Ms. Ballantyne directly. This amount includes meetings and direct communications with Ms. Ballantyne, rehabilitation services provided to Ms. Ballantyne, and time spent researching, collecting, and delivering equipment to Ms. Ballantyne.

[192] These costs are summarised below.

Invoice Date	Invoice #	Amount
2016-02-29	23126	\$1,459.50
2016-05-31	23347	\$777.00
2016-09-30	23648	\$1,641.25
2017-05-31	24171	\$3,024.00
2017-09-30	24441	\$3,280.50
2018-01-31	24706	\$2,037.75
2018-09-30	25310	\$3,147.75
2019-01-31	25585	\$1,310.25
TOTAL		\$16,678.00

[193] This amount does not include Ms. Kennedy's time spent reviewing records, travelling, communicating with plaintiff's counsel, or preparing reports at his request. In my view, those amounts are properly considered as costs in this action.

H. Miscellaneous Items and Equipment

[194] Ms. Ballantyne seeks to recover the cost of purchasing miscellaneous items and equipment after the Accident. The defendant disputes the following costs on the basis that they are either unclear or unsupported by the evidence:

- a) Magnesium Gel (as recommended by Dr. Louw) - \$34.71
- b) Body and Neck Pillow (as recommended by Ms. Bos) - \$223.97
- c) Cervical Neck Collar (as recommended by Ms. Kennedy for car travel) - \$9.99
- d) Ice Gel Packs (per Ms. Ballantyne, as recommended by her treating chiropractor) - \$10.00
- e) Used Exercise Bike (as recommended by Ms. Kennedy) - \$200
- f) Magnesium cream and Biofreeze (an anti-inflammatory cream, as recommended by Dr. Louw in his report) - \$40.98
- g) Kinesiology tape (per Ms. Kennedy, as recommended by physiotherapist) - \$24.15
- h) Posture perfecter (as explained by Ms. Kennedy for back support) - \$35.00
- i) Tablet mount (as explained by Ms. Kennedy and included in the modifications to Ms. Ballantyne's home office) - \$55.99
- j) Pedestals for washer and dryer (as recommended by Ms. Kennedy to facilitate access by Ms. Ballantyne) - \$667.52

- k) TENS electrodes (as recommended by Ms. Kennedy for use of a TENS machine) - \$44.78
- l) Mountain Equipment Co-op camping mattress (as recommended by Ms. Kennedy) - \$525.28
- m) Orthoquest socks and bracing (as recommended by Ms. Kennedy to improve gait) - \$230
- n) Orthomed wrist brace (as recommended by Ms. Kennedy) - \$90.29

TOTAL: \$2,192.66

[195] In my view, these costs are supported as reasonable by the trial evidence. I award special damages in this amount.

[196] In summary, I award additional special damages as follows:

- a) Medications - \$3,050.78
- b) House and Lawn Cleaning Services - \$12,144.38
- c) Work by Anisha Ballantyne - \$5,000
- d) OT Services - \$16,678
- e) Miscellaneous Equipment - \$2,192.66

TOTAL: \$39,065.82

[197] When this amount is added to the agreed figure of \$114,678.58, special damages total \$153,744.40. I award special damages in this amount.

XIII. LOSS OF INCOME-EARNING CAPACITY

A. Legal Framework

[198] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v.*

Bobell Express Ltd., 2005 BCCA 141 at para. 30 [*Rowe*]; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The burden of proof regarding actual past events is a balance of probabilities. When courts are assessing past loss of income, they are really assessing lost earning capacity: *Rowe* at para. 30.

[199] An assessment of the loss of both past and future earning capacity involves a consideration of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 [*Grewal*]. The plaintiff is not required to prove these hypothetical events on a balance of probabilities; a future or hypothetical possibility will be considered as long as it is a real and substantial possibility and not mere speculation: *Grewal* at para. 48.

[200] A claim for future loss of earning capacity requires the court to compare the plaintiff's likely future working life if the accident had not happened with the likely one after its occurrence, accounting for negative and positive contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33 [*Gregory*].

[201] Depending on the facts of the case, the loss may be quantified on either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*]. The earnings approach is typically used in cases where there is an identifiable loss of income: *Kringhaug v. Men*, 2022 BCCA 186 at para. 43. The capital asset approach is typically used when this is not the case and the court makes an award for the loss of opportunity.

[202] The Court of Appeal recently clarified the law regarding the assessment of lost future earning capacity in a trilogy of cases: *Dornan*; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; *Lo v. Vos*, 2021 BCCA 421. In *Rab*, Justice Grauer set out a three-step process for assessing future income loss:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the

future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.

[203] The assessment of damages is a matter of judgment and not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. Economic and statistical evidence may provide a useful tool to assist in determining what is fair and reasonable in the circumstances: *Grewal* at para. 49. While assessing an award for future loss of income is not a purely mathematical exercise, the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 54.

B. The Closure of Suntec

[204] The crux of the parties' dispute is whether the Accident caused Suntec to fail. Ms. Ballantyne asserts that it did. She seeks compensation for a presumed one-half share of the projected net revenue that she submits Suntec would have generated, but for the Accident. The defendant denies any liability for the closure of Suntec and describes this as a remote claim for pure economic loss that was not reasonably foreseeable at the time of the Accident.

[205] In the alternative, the defendant submits that, if Ms. Ballantyne's loss of earning capacity is valued based on hypothetical past and future revenue projections for Suntec, damages must be substantially discounted to reflect her failure to mitigate by not hiring a trained replacement to do the work that she had done for Suntec before the Accident.

1. Suntec before the Accident

[206] Before the Accident, Ms. Ballantyne was predominantly responsible for Suntec's office and administrative work. Mr. Ballantyne dealt with sales, quotes, product installation, and customer service. On Ms. Ballantyne's evidence, as corroborated by her husband, it was her role to:

- a) Generate invoices and documents incorporating project costs using Quick Books software;
- b) Submit PST and GST filings to Revenue Canada and compile tax documents for Ms. Rains; and
- c) Track product deliveries, damaged product, changes to orders, customer payments, credits, and discounts, and large projects that were completed in stages.

[207] Ms. Ballantyne periodically did a variety of other jobs including converting costs from US to Canadian funds, making bank deposits, and occasionally collecting and delivering product to “fill in the gaps” as necessary. On her evidence, she created spreadsheets to track various accounts, invoices, receipts, discounts, and commission sales; none of them is in evidence. According to the Ballantynes, they worked on profit projections together. While Ms. Ballantyne said that she liked to see a profit margin of at least 17% and 30 – 35% on larger projects, she conceded that Suntec’s profit margins were “all over the map” in the years 2009 to 2015. Mr. Ballantyne said that his wife totaled his quoted prices and corrected about five to ten of his mistakes per week.

[208] According to Ms. Ballantyne, her schedule in the year before the Accident was variable; she sometimes worked early or late but she did not necessarily work every day. She estimated her weekly hours to be 20+ in the slow season and up to 40+ in the busy season (i.e., January to March when they had their quoting peak and year end). Mr. Ballantyne said that his wife worked 20–25 hours per week during Suntec’s slow season and 40–60+ hours per week during the busy season. Based on what she observed when at home and what she heard from her mother, it was Anisha Ballantyne’s general impression that Ms. Ballantyne worked full-time hours on average.

2. Suntec after the Accident

[209] Ms. Ballantyne thinks that she took about one year off work after the Accident. She has no recollection of doing Suntec’s GST filing in January 2016. Mr. Ballantyne estimates that his wife was working about five hours per week for Suntec by the end of 2016. He described the difficulties he had juggling his increased responsibilities at home with his Suntec work that year, saying he was:

- a) Taking two or more hours out of his work day to drive his wife to and from appointments and waiting for her until the appointments ended;
- b) Dropping in to see her at home during his work day, even if she had no appointments;
- c) Doing all the cooking;
- d) Completing site visits alone instead of with home owners and builders as had been his previous practice; and
- e) Often finding it necessary to repeat site measurements because he was preoccupied with other matters.

[210] According to Mr. Ballantyne, he started to make a variety of mistakes after the Accident including:

- a) Ordering the wrong size product;
- b) Forgetting to order product;
- c) Forgetting to implement changes;
- d) Forgetting to meet trucks for deliveries or confusing shipping days;
- e) Forgetting to implement servicing or getting the day wrong; and
- f) Forgetting to include costs for hardware or ordering the wrong hardware and having to return it.

[211] However, on his own evidence, he was “going 100 miles an hour” and making multiple mistakes every week before the Accident.

[212] Ms. Ballantyne thinks that she resumed working about three hours per week for Suntec in 2017. She denied that she was working as efficiently as she had been before the Accident; on her evidence, she had to relearn a lot of what she had done previously. Mr. Ballantyne estimated that his wife was spending about five to six hours per week doing work for Suntec in 2017.

[213] At some point in 2017, Ms. Ballantyne became aware that her husband had gone into overdrive in an effort to manage her needs, various chores at home, and his Suntec work; it was her impression that he was burning out and not coping. She recalls that he was dropping the ball at work, business relationships were breaking down, and Suntec customers were getting angry. According to Mr. Ballantyne, he instructed his customers to communicate with him by messaging only and he relied more heavily on his service technicians instead of providing the high level of personalized customer service on which Suntec had built its reputation. Anisha Ballantyne began doing some basic tasks for Suntec in 2017, with direction from her mother.

[214] On Ms. Ballantyne’s evidence, she worked about six hours per week for Suntec in 2018. Mr. Ballantyne made some changes that year, saying he tried to correct what had been going sideways. He spent less time at home and tried to be more available to his customers. Mr. Ballantyne admitted that Suntec’s situation improved in 2018; however, in his view, too much damage had been done to Suntec’s reputation in the preceding years to salvage the business.

[215] The plaintiff called Kelowna contractor, Rodney Reid, who testified about the changes he observed in the way Suntec did business after the Accident. Mr. Reid’s company constructs new homes and completes residential renovation projects; he has worked in construction his whole life and in Kelowna for the last 28 years. Mr. Reid had frequent contact with Mr. Ballantyne and Suntec between 2002 and the date of the Accident. He described Mr. Ballantyne as the most sought-after person to

supply doors and windows to high-end construction projects in the Kelowna area before the Accident. He said that he managed to steer about 98% of his own clients to Suntec for this purpose.

[216] According to Mr. Reid, he watched the “wheels come off” Suntec after the Accident. From his perspective, everything was different. Delivery times were off and parts were missing. Mr. Ballantyne no longer provided impeccable clean-up service at the end of jobs. Mr. Reid found himself with many unhappy clients whose houses were ready for framing but who did not have their doors or windows. Ultimately, he was compelled to find a new supplier as Suntec’s issues were adversely affecting his own business.

[217] Apart from receiving some occasional help from their daughter, who is not a trained bookkeeper, clerk, or office manager, the Ballantynes made no attempt to replace Ms. Ballantyne after the Accident. In Mr. Ballantyne’s view, doing so would have meant hiring many people. He denied that his wife had the capacity to train anyone and said that he was already struggling with everything he was trying to do. On his evidence, he had no idea who to approach about finding a replacement worker, did not know all the details of his wife’s job, and had no time to investigate the matter. He described her recovery as an unknown moving target and insisted that no one could have replaced her in any event. Anisha Ballantyne gave similar evidence but conceded that she was not closely involved in Suntec’s finances or the decision to close Suntec.

[218] Ms. Ballantyne said that she was working about six to ten hours per week for Suntec by 2019, although not consistently or continuously. The Ballantynes, in consultation with Ms. Rains, decided to close Suntec that year. On their evidence, the following factors influenced their decision to do so:

- a) An increasing number of unhappy customers who were taking their business elsewhere;
- b) Suntec’s corresponding loss of reputation within the local community;

- c) Suntec's increased bad debt; and
- d) Mr. Ballantyne's inability to sustain the pace at which he had been working.

[219] Plaintiff's counsel submits that, while the records in evidence demonstrate that Suntec was in good financial health before the Accident, the following discernible and troubling trends emerged after the Accident:

- a) Although Suntec's 2012 year-end retained earnings were negative, bad debts were only \$3,672, dividends were strong at \$90,000, and no other negative signs were present;
- b) In 2013, income was slightly below average at \$83,000, there were no reported bad debts and retained earnings were positive at \$13,621, representing an improvement of approximately \$35,000 compared to 2012;
- c) In 2014, there were no reported bad debts, income and dividends totalled \$120,000, and retained earnings remained positive at \$1,024;
- d) In 2015, there were no reported bad debts, income and dividends totalled \$112,644, and retained earnings were only slightly negative at \$(5,613);
- e) In 2016, income and dividends totalled \$158,644, retained earnings were positive at \$39,453, and reported bad debts were \$17,242;
- f) In 2017, income and dividends totalled \$136,644 (a drop of \$22,000 from 2016), there was a retained earnings deficit of \$(112,458) and reported bad debts were \$69,933;
- g) In 2018, wages and dividends were \$138,644 but reported bad debts were \$50,241 and negative retained earnings were \$(46,195);

- h) In 2019, although gross profit was improved at \$(7,452), combined dividends and salary payable to the Ballantynes was only \$53,644 and reported bad debts increased to \$108,566; and
- i) By the middle of Suntec's 2020 fiscal year, no dividends and salary of only \$655 had been paid, retained earnings were negative \$(63,948), and reported bad debt was \$6,250.

[220] It is Ms. Ballantyne's position that these negative trends arose after the Accident and demonstrate conclusively that she was integral to Suntec's pre-Accident success and that her absence significantly affected her husband's post-Accident job performance.

3. Did the Accident cause Suntec to close?

[221] Two accounting experts offered opinions regarding the closure of Suntec. Ms. Ballantyne called Ms. Rains; the defendant called Antonio Volpe.

[222] Ms. Rains is a partner with a Kelowna accounting firm and was qualified as an expert in accounting. She prepared a report dated March 19, 2020; by then, she had been the accountant for Suntec and the Ballantynes for eight years. She relied on source documents that she had prepared, including annual financial statements for Suntec and the Ballantynes' personal tax returns, together with information that Ms. Ballantyne provided.

[223] Mr. Volpe is a certified management accountant and chartered professional accountant. He has over 36 years of forensic accounting experience. He was qualified as a forensic accountant expert, able to opine regarding accounting and business valuations including the quantification of economic loss.

[224] Ms. Ballantyne relies on the opinions of Ms. Rains to support her claim that the Accident caused Suntec to close. Based predominantly on her discussions with the Ballantynes, Ms. Rains opines as follows:

- a) Impairment in the performance by Ms. Ballantyne of her job functions would have affected the operations and profitability of Suntec;
- b) There was a noticeable trend, commencing in its 2016 fiscal year, of Suntec accumulating bad debts;
- c) This appears to be the single largest factor in Suntec's demise;
- d) Suntec had no reported bad debts in the three years before the Accident;
- e) Suntec reported bad debts of \$246,224 between 2016 and 2019;
- f) The critical change in Suntec's post-Accident profitability was due to bad debts that Suntec incurred in Ms. Ballantyne's absence;
- g) As Suntec became less profitable, there were insufficient corporate resources to continue paying its shareholders at the same historical level;
- h) By June 30, 2018, Suntec no longer had sufficient resources to continue ongoing compensation to its owners; and
- i) The Ballantynes' dividend income dropped (from total amounts in excess of \$100,000 in previous years) to \$33,000 in 2019.

[225] Ms. Rains concluded that it would have been difficult or impossible to replace Ms. Ballantyne in a cost-effective manner. It is unclear how her experience as an accountant qualifies her to offer this opinion. Mr. Volpe critiques Ms. Rains' opinions and concludes that they are unsupported. He opines as follows:

- a) Ms. Rains is in a position of conflict by offering opinions based on financial statements that her own firm prepared, and by purporting to offer an expert opinion while simultaneously having advised Suntec and the Ballantynes about tax planning matters for more than eight years;

- b) Suntec revenues increased in its 2016 fiscal year and, although they declined in 2017 and 2018, annual revenues in those years were similar to, or higher than, its three fiscal years before the Accident;
- c) There is no evidence that Suntec suffered poor margins or lower sales as a result of the Accident;
- d) Other than the cost of sales (which could have been due to the nature of jobs received) and bad debts, Suntec's other expenses were apparently unaffected by the Accident and do not indicate that Suntec incurred any inefficiencies or extra costs as a result of the Accident;
- e) Based on his analysis, Suntec experienced a reduction in cash flow before the Accident, apparently as a result of repaying a debt of \$343,573 in its fiscal year ended June 30, 2015;
- f) It is unclear if the bad debts Suntec reported after the Accident were due to the Accident;
- g) Ms. Rains provides insufficient information to determine the nature of Suntec's bad debts, why they were incurred, whether they resulted in a loss to Suntec, or why Suntec could not have pursued those accounts receivables; and
- h) Based on his review, Suntec improved its collection of accounts receivable after the Accident.

[226] Mr. Volpe also notes that Ms. Rains does not quantify the potential loss sustained. He observed that Suntec was generating substantial revenue before it closed. He agreed that there are many reasons why an owner might decide to close a business. He admitted that tracking costs and deliveries, identifying changes in orders and corresponding costs, proper invoicing, and meeting customer demands are all important to a business. He conceded that a failure by Ms. Ballantyne to perform her work duties could have a negative impact on Suntec. However, in his

view, the tasks that she performed for Suntec comprised mostly mundane, not highly technical, and readily replaceable work that required no special skills or formal certifications.

[227] Mr. Volpe understood that Mr. Ballantyne was responsible for customer contact, business development, and generating Suntec revenue. He conceded in cross-examination that, if Suntec had suffered a loss of reputation in the community, this might be a factor in the owners' decision to close Suntec. However, in his opinion, the Ballantynes had a variety of options available to them after the Accident other than closing Suntec, including building alliances, repositioning Suntec in the market as a broker or middleman, expanding Suntec's client base, or reducing its services.

[228] There was substantial trial evidence about Suntec's post-Accident bad debts. Mr. Volpe underscored the importance of distinguishing between when bad debt is incurred and when it is reported. Ms. Rains confirmed that bad debt can only be reported in the year it is determined to be uncollectable. She admitted that she had an obligation to ask the Ballantynes about Suntec's bad debt to ensure the completeness of its financial statements. She said that it is up to a client to determine what action is appropriate to attempt to collect a debt; the Ballantynes told her that Suntec's post-Accident bad debts were not collectible. She accepted the accuracy of this information and assumed that they had done everything reasonably possible to collect Suntec's bad debts.

[229] For reasons that are unclear, the Ballantynes did not corroborate their evidence about Suntec's post-Accident accumulation of bad debt with any contemporaneous supporting documentation, including, for example, letters, emails, or text messages. Plaintiff's counsel suggested that this was, at least in part, a matter of proportionality. However, Ms. Ballantyne is advancing a substantial claim for income loss and asserting that the post-Accident accumulation of bad debts featured prominently in Suntec's demise. The Ballantynes took none of Suntec's debtors to court to collect on unpaid debts; according to Mr. Ballantyne, he had

made mistakes, was not in a position to insist on payment, and was unfamiliar with the court process.

[230] Mr. Volpe admits that there was a significant increase in Suntec's reporting of bad debts after the Accident. He agreed that, examined superficially, in isolation, and with no context, this is a red flag. However, as a forensic accountant, he emphasized the importance of understanding what is causing an increase in reported bad debt. In Suntec's case, that would involve reviewing information about a handful of debts. He requested, but did not receive, this kind of information. He conceded that, all else being equal, it makes business sense that write-offs are more likely if work is not being done properly or on time.

[231] There was considerable trial evidence about two of Suntec's large receivables. One involved a project that started in 2013 and spanned several years. Mr. Ballantyne denied that this bad debt dated back to 2013; on his evidence, the owner insisted on a holdback and the final product was not delivered until 2016. He said that the owner took issue with some of the product, was unhappy when a service technician rather than Mr. Ballantyne attended at the job site to address the issue, and refused to pay the second installment of the holdback. The second receivable was identified as more than 90 days old in Suntec's General Ledger as of June 30, 2016; Mr. Ballantyne conceded that he might have been aware of this debt before then. On his evidence, it related to an owner who did not like the look of an installed spacer bar and insisted that glass be replaced before he paid his bill, matters that Mr. Ballantyne conceded he did not address.

4. Analysis and Conclusion

[232] Plaintiff's counsel urges me to find that, because the Ballantynes operated Suntec as a closely-held family business, and both were integral members of one small symbiotic team, Ms. Ballantyne ought to recover one-half of the lost revenue that she says Suntec would have generated, but for the Accident. He relies on various authorities where plaintiffs were compensated based on lost business earnings caused by their accident-related injuries: *Everett v. King*, 1981 CarswellBC

376, 1981 CanLII 716 (S.C.), aff'd 1983 CanLII 705 [Everett]; *Turchak v. Patel*, 1992 CarswellBC 1592, [1992] B.C.W.L.D. 1888 (S.C.), aff'd 1993 CarswellBC 1634 [Turchak]; *Hart v. Hansma*, 2014 BCSC 518 [Hart]; *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 [Reynolds]; *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155, aff'd 2018 BCCA 410 [Hans]; *Wilhelmson v. Dumma*, 2017 BCSC 616 [Wilhelmson].

[233] The Accident occurred on December 17, 2015; Suntec ceased operations on January 1, 2020. The defendant denies that Suntec's closure more than four years after the Accident was reasonably foreseeable as a result of the Accident, citing *Midgley v. Nguyen*, 2013 BCSC 693 at paras. 307–314 and *Hans* at para. 436.

[234] Mr. Ballantyne was the face of Suntec. He was the Suntec owner who had an extensive, industry-specific knowledge of doors and windows. It was his role to generate business, to communicate directly with Suntec clients, and to formulate individualized plans for the sourcing, installation, and servicing of doors and windows at customers' residential construction projects. On the Ballantynes' uncontroverted evidence, it was his exceptional customer service which gave Suntec its competitive edge.

[235] I accept without difficulty that Ms. Ballantyne was an integral member of the two-person team that operated Suntec before the Accident. The Ballantynes clearly had complementary skills. Together they ran a successful small business. Ms. Ballantyne was organized, detail-oriented, and had bookkeeping and computer skills that her husband lacked. Mr. Ballantyne's strengths included his detailed product knowledge and his meticulous customer service. I accept that the Ballantynes worked well together and that Ms. Ballantyne's work contributed significantly to Suntec's success.

[236] On the trial evidence as a whole, I conclude that Suntec's closure in January 2020, more than four years after the Accident, was likely the result of a marked decline in the quality of Mr. Ballantyne's customer service, a corresponding increase in client dissatisfaction, and Suntec's eventual loss of reputation and referrals from

within the local building community. I accept that, after the Accident, Mr. Ballantyne struggled to manage all of the tasks that he had assumed at home while maintaining the same high level of customer service on which Suntec had built its reputation. I also accept that Ms. Ballantyne's absence adversely affected his job performance.

[237] The parties disagree about whether or not the work that Ms. Ballantyne did for Suntec before the Accident could have been replaced. In my view, the answer to this question is relevant to a determination of two issues before me: 1) whether Ms. Ballantyne's Accident-related injuries caused Suntec to close; and 2) whether Ms. Ballantyne took reasonable steps to mitigate her loss.

[238] Plaintiff's counsel denies that Ms. Ballantyne was replaceable after the Accident, describing her role in Suntec as equal in importance to that of her husband. However, apart from involving Anisha Ballantyne to do some basic tasks in 2017, the Ballantynes made no attempt to hire a replacement worker to do any of the jobs that Ms. Ballantyne had done for Suntec before the Accident. Accordingly, the evidence fails to establish on a balance of probabilities that they could not have found a suitable replacement. Ms. Ballantyne has a high school diploma and many years of practical experience working with her husband for Suntec in a largely administrative role. However, she has no formal training, certifications, or qualifications as a bookkeeper, clerk, or office manager. On her own evidence, Suntec was a business that the Ballantynes could have adjusted as they got older by hiring people to do various things for them. It is unclear on the evidence why they could not have done so after the Accident.

[239] Defence counsel deny that Ms. Ballantyne's work for Suntec was sufficiently specialized that it was irreplaceable. They rely on Mr. Volpe's opinion that the Ballantynes had many viable options for keeping Suntec open after the Accident.

[240] I accept that it was initially unknown how long Ms. Ballantyne would be disabled from work after the Accident. In my view, it was reasonable for the Ballantynes to avoid incurring the expense of hiring someone to perform her essential Suntec duties immediately after the Accident. However, in my view, the

Ballantynes would reasonably have known that Suntec could not remain a viable business indefinitely unless someone assumed Ms. Ballantyne's essential administrative tasks. Mr. Ballantyne knew that his wife had regularly corrected a substantial number of his mistakes before the Accident and that, unless he was taking the time to do so himself, no one was checking his quotes, prices, or orders for accuracy after the Accident.

[241] In my view, it would have been apparent by mid-2016 that Mr. Ballantyne was unable to juggle his Suntec work with all of the other duties that he had assumed at home, and that Ms. Ballantyne's recovery would not be imminent. However, the Ballantynes took no steps to hire an appropriately trained person to do any of Ms. Ballantyne's critical Suntec work. I conclude that they likely could have done so and prefer Mr. Volpe's opinion to that of Ms. Rains on this point. Unlike Ms. Rains, Mr. Volpe is a forensic accountant and has no personal or professional association with the Ballantynes. In my view, he was an independent witness. I accept his opinion that the Ballantynes could have pursued other options that did not involve closing Suntec. This conclusion is consistent with Ms. Ballantyne's own evidence that Suntec was a business that she and her husband could have adjusted over time, as they wished, by hiring others to do things for them.

[242] In my view, the Ballantynes could have scaled back some of Suntec's work and/or reduced its involvement in more complex projects in order to ensure that Suntec maintained a high level of customer service. Alternatively, they could have considered, at least temporarily, sourcing products from their main supplier only in order to simplify the administrative demands on Suntec.

[243] I also conclude that Mr. Ballantyne could have prioritized his time differently after the Accident. The Ballantynes could have hired someone to perform all of the tasks that Mr. Ballantyne assumed at home after the Accident and claimed those costs as mitigation expenses in this litigation. Doing so would have allowed Mr. Ballantyne to remain focused on Suntec, the Ballantynes' sole source of income at the time. The Ballantynes were already using a professional cleaning

service before the Accident and could have expanded their use of those services. By May 2016, Ms. Ballantyne was using taxi services (as indicated by the documents in evidence supporting the agreed special damages) and managing independently at home during the day.

[244] On the Ballantynes' evidence, as corroborated by Mr. Reid, the Kelowna building industry is a small, tightknit community. At the time of the Accident, Mr. Ballantyne and Mr. Reid had a longstanding professional relationship and their businesses were closely integrated. Mr. Reid confirmed that he has a highly skilled office manager. It is unclear why the Ballantynes did not consult Mr. Reid, his office manager, or any of their other industry contacts about finding a trained person to do Ms. Ballantyne's critical Suntec work after the Accident.

[245] Ms. Rains admitted in cross-examination that her accounting firm is familiar with Quick Books software, has accounting technicians, and provides basic bookkeeping services to some of its clients. She conceded that a portion of Ms. Ballantyne's Suntec duties comprised basic bookkeeping. The Ballantynes did not pursue the option of having Ms. Rains' firm provide Suntec with bookkeeping assistance after the Accident.

[246] Plaintiff's counsel underscores that Ms. Ballantyne worked variable hours and that this would have made it more difficult to find a replacement worker. However, on the trial evidence, Ms. Ballantyne chose irregular hours in order to accommodate the various other activities that she wished to pursue, in addition to her Suntec work. I am not persuaded that a replacement worker would have been required to follow the same schedule that Ms. Ballantyne chose for herself.

[247] Ultimately, I conclude that Ms. Ballantyne's essential Suntec duties likely could have been replaced after the Accident. I find that, if they had been, Mr. Ballantyne could have remained focused on maintaining the high level of customer service on which Suntec depended for its business. By his own admission, Suntec's financial situation improved when he refocused his time and energy on Suntec in 2018. This evidence reinforces my view that, if he had done so earlier, and

if the Ballantynes had replaced Ms. Ballantyne's basic bookkeeping functions, Suntec would likely have remained a viable business. On the evidence of both Mr. and Ms. Ballantyne, she resumed some of her Suntec work in late 2016 or early 2017 and was able to provide some direction to Anisha Ballantyne who assumed some basic Suntec duties in 2017. I conclude that Ms. Ballantyne could have provided a comparable level of direction to Mr. Ballantyne or to a trained bookkeeper, as necessary. I do not agree that it would have been necessary to teach a trained bookkeeper how to perform basic bookkeeping functions. While I accept that Mr. Ballantyne was unfamiliar with the details of his wife's Suntec duties, he was intimately familiar with Suntec and could have provided a trained bookkeeper with information about this business and its basic clerical needs, as necessary.

[248] The Court of Appeal recently addressed the difference between legal causation and factual causation in *Tellini v. Bell Alliance*, 2022 BCCA 106 [*Tellini*]. Justice Newbury, writing for the Court, explained that a plaintiff must establish both before a defendant is liable in negligence:

[45] The Supreme Court of Canada considered legal causation more recently in *Nelson (City) v. Marchi* 2021 SCC 41. It involved a plaintiff who had been injured when attempting to cross a snowbank created by city workers who were clearing snow from the street. Several issues were decided by the Court, but beginning at para. 96, the Court said this about causation:

It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfiice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability

analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[Emphasis added in *Tellini*.]

[249] Applying those principles here, I conclude that Ms. Ballantyne has not met the onus she bears of establishing both factual and legal causation so as to permit me to find that the defendant's negligence caused Suntec to close. I conclude that her essential Suntec duties were probably replaceable and that Suntec's closure, more than four years after the Accident, is too remote to have been reasonably foreseeable: *Tellini* at para. 43.

[250] I also conclude that many of the cases on which Ms. Ballantyne relies, where courts assessed the claims of injured plaintiffs based on business losses, are distinguishable on their facts. None involved the closure of a business more than four years after the subject accident.

[251] In *Hans* and *Wilhelmson*, the plaintiff spouses and business partners all suffered accident-related injuries; notably, Mr. Ballantyne was not injured in the Accident. In those two cases, the plaintiffs all had industry-specific knowledge that was unique to their businesses and not readily replaceable. In *Hans*, both plaintiffs were experienced long-haul truckers; in *Wilhelmson*, the plaintiffs shared a passion for construction work and the operation of heavy trucks and equipment. By contrast, I have found that Ms. Ballantyne's essential job duties were neither irreplaceable nor industry specific.

[252] In *Hans*, the defendant Volvo accepted that Mr. Hans' past and future loss of income-earning capacity claims should be assessed based on an award for one-half of any proven income losses suffered by the plaintiffs as a team: *Hans* at para. 658. There is no such admission here. Justice Davies found that, although Mrs. Hans' injuries were not severe, the loss of her partner precluded her from earning income: *Hans* at para. 660. I do not agree that Mr. Ballantyne was precluded from earning income through Suntec as a result of his wife's Accident-related injuries. In fact, Suntec continued to generate income for an additional four years after the Accident.

In *Wilhelmson*, the plaintiff suffered catastrophic physical and psychological injuries, including the death of her partner in the subject accident, and, by extension, the loss of any opportunity to earn an income with him in the heavy equipment/excavation business. Those facts are not analogous here.

[253] In *Turchak*, the injured plaintiff and business co-owner had industry-specific knowledge of spa equipment; his uninjured wife worked in the office. By contrast, Mr. Ballantyne, who was not involved in the Accident, was the Suntec owner with a deep understanding of doors and windows. It was his extraordinary customer service which distinguished Suntec from its competitors before the Accident. Ms. Ballantyne worked in the office and her Suntec role was predominantly clerical. Notably, when Mr. Ballantyne redirected his focus to Suntec in 2018, Suntec's financial situation improved.

[254] Unlike the plaintiff in *Everett*, I am not persuaded that Ms. Ballantyne was the driving force behind Suntec. In *Everett*, the Court concluded that the plaintiff had taken reasonable steps to mitigate the company's loss. I would be unable to reach the same conclusion, if I had decided that it was appropriate to assess Ms. Ballantyne's claims for lost earning capacity based on hypothetical revenue projections for Suntec.

[255] As noted by Justice Smith, speaking for the Court in *Rowe*, there are many different ways to value a loss of income: *Rowe* at paras. 30–32. Focus on the loss of a stream of income as the compensable loss, rather than as evidence of the value of the loss is misplaced: *Rowe* at para. 33. While I accept that plaintiffs can recover lost business income that arises from their accident-related injuries in appropriate cases, I am not persuaded that this is such a case.

[256] Notably, in *Hart*, another decision on which Ms. Ballantyne relies, the injured plaintiff's damages were assessed based on the extra labour costs incurred to replace his work, the value of subcontracted work that his business would have done in-house but for the accident, and the value of lost sales to one specific customer: *Hart* at para. 146. That is not how Ms. Ballantyne calculates her income loss.

[257] As noted by the Court of Appeal in *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19, it is not the actual lost income which is compensable but rather the lost capacity; the measure may vary as circumstances require. The Court noted further that the overall fairness and reasonableness of the award must be considered, having regard to all the evidence, and that an award for the loss of earning capacity requires the assessment of damages, not a calculation according to some mathematical formula: *Ibbitson* at para. 19.

C. Ms. Ballantyne’s Residual Earning Capacity

[258] The parties disagree about whether Ms. Ballantyne will ever return to work.

1. The FCE

[259] Ms. Bos is a certified functional capacity evaluator and has been a community-based occupational therapist since 1997. On February 4, 2020, she interviewed Ms. Ballantyne and conducted the FCE. On February 5, 2020, she conducted a home assessment and interviewed Mr. Ballantyne. Ms. Bos authored two reports: the FCE report dated March 19, 2020, and a future cost of care report dated May 6, 2022. Ms. Ballantyne reported the following ongoing symptoms to Ms. Bos at the FCE:

- a) Right-sided neck pain;
- b) Low back pain;
- c) Mid-back/rib pain;
- d) Headaches;
- e) Double vision;
- f) Fatigue; and
- g) Cognitive fatigue.

[260] Based on the results of her testing, Ms. Bos was satisfied that Ms. Ballantyne provided a good effort during the FCE. She concluded that Ms. Ballantyne's reported pain and level of disability were reliable and consistent with her own observations.

[261] Ms. Ballantyne presented with an abnormal gait, walking as if she were marching and lifting her knees as if it were dark and she did not know where to put her feet. She was noted to lean to the right and to have a wider than normal stance. This altered gait, leaning, and marching presentation were all noticeably improved when Ms. Bos re-assessed Ms. Ballantyne at home; compensatory patterns were observed less often and Ms. Ballantyne was able to walk down stairs with a reciprocal gait (i.e., one step per foot). In cross-examination, Ms. Bos admitted that Ms. Ballantyne's gait in her home was normal, as compared to how she initially presented.

[262] Ms. Ballantyne took breaks of up to 20 minutes during the FCE; she lay down once and slept for 40 minutes. Ms. Ballantyne rated her pain at the start, peak, and end of the FCE; those reports demonstrated no significant increase in pain levels and a more significant increase in headache and fatigue. She reported increased symptoms the following day. Ms. Bos assessed Ms. Ballantyne on two occasions; she agreed that her test results were similar on both occasions. In assessing Ms. Ballantyne's pain complaints, Ms. Bos relied on both subjective reports and objective signs of pain.

[263] Ms. Bos assessed Ms. Ballantyne's functional capacity to work at the FCE and offered the following opinions thereafter:

- a) Based on Ms. Ballantyne's test results, the length of time she had been off work, and her slow return to working hours and demands, she did not demonstrate the capacity to return to her previous administrative work due to its cognitive demands;

- b) Ms. Ballantyne is able to perform work requiring increased cognitive demands for executive function (i.e., attention, reasoning, planning, and working memory) for 10–15 minutes at a time;
- c) She can do less cognitively demanding tasks for longer;
- d) She does not demonstrate the capacity to return to school to obtain a professional degree or supportive diploma in the health care setting and the physical demands of an occupational therapist and OT assistant exceed her current abilities;
- e) Ms. Ballantyne is suited to a home-based or quiet and controlled office environment where she can work for two to three hours per day, incorporating breaks and pacing; and
- f) She would be able to take a self-paced online continuing education course provided her work and schooling did not exceed two to three hours per day.

[264] Ms. Bos understood in error that Ms. Ballantyne had been working full-time before the Accident; Ms. Ballantyne reported that she was working 6–10 hours per week for Suntec after the Accident (i.e., about 25% of full-time hours). In her opinion, Ms. Ballantyne could do a different kind of work for that long now but not return to her former job. She agreed that Ms. Ballantyne demonstrated a good understanding of what her former job entailed and that she was able to explain it.

[265] Ms. Bos concluded that Ms. Ballantyne could work two to three hours a day, with breaks, in a quiet, controlled environment doing a job that involved simple routines and few decisions, without interruptions. She agreed that Ms. Ballantyne could supervise someone doing her former job for 10–15 minutes at a time, with breaks as necessary.

2. Vocational Assessments

[266] Two vocational consultants testified at trial: the plaintiff called Jodi Webster; the defendant called Diana Cameron.

a) Jodi Webster

[267] Jodi Webster has a Master of Arts degree in Industrial and Organizational Psychology, a graduate certificate in Forensic Vocational Rehabilitation from the University of Florida, and an Honours Bachelor of Arts degree in Psychology from UBC. She is a Canadian certified vocational evaluator, return to work disability manager, and certified vocational rehabilitation professional. She was qualified as a vocational consultant expert, able to opine regarding job skills training, return to work coordination, job coaching, and labour market research.

[268] Ms. Webster assessed Ms. Ballantyne on March 18–20 and 23, 2020; three sessions were remote and one was conducted in person. She obtained a history from Ms. Ballantyne, reviewed medical records, administered a variety of cognitive, vocational, and other tests, and authored a report dated April 6, 2020. Ms. Webster incorporated validity measures into her tests. She assumed that Ms. Ballantyne’s subjective self-report of her transferrable skills was accurate and opined as follows:

- a) Ms. Ballantyne is neither employable nor placeable and her vocational prognosis is guarded;
- b) Ms. Ballantyne is unable to consider other forms of education or employment until she makes significant gains in multiple areas;
- c) Ms. Ballantyne’s driving problems, headaches, vision issues, increased fatigue, cognitive limitations, and mental health difficulties have the largest cumulative impact on her vocational status;
- d) Ms. Ballantyne has some residual soft skills but, given the breadth of her limitations, she would be precluded from returning to her former job and fulfilling the demands of this position;

- e) Several of the vocational tests that Ms. Webster administered were heavily accommodated, likely resulting in higher scores that are not reflective of Ms. Ballantyne's current performance levels; and
- f) Targeting sympathetic employers will not increase Ms. Ballantyne's chances of securing employment.

[269] In Ms. Webster's opinion, if Ms. Ballantyne were healthy, she would be suited to the following occupations:

- a) General office support worker; and
- b) Accounting and related clerical positions.

[270] Ms. Webster noted that, despite Ms. Ballantyne's many years of practical work experience, she is now over 45 years of age and without any administrative certifications or arm's-length work references. In her opinion, it might have taken Ms. Ballantyne longer to secure a job and she might have started at a lower wage than she earned when working for Suntec, if the Accident had not occurred and she had been required to search for work. She agreed that Ms. Ballantyne's pre-Accident employment history is a significant factor in determining her without-Accident work trajectory.

[271] Ms. Webster cited the 2018 Job Bank Wage Report which provides a median hourly rate for general office support workers and accounting clerks of \$21.00. The same source indicates that the 2018 median hourly rate for OT assistants was \$23.40. Based on 2016 Statistics Canada Census data, the median earnings for females living in the Central Okanagan whose highest level of education was high school was \$41,248.

[272] Ms. Webster admitted that paid work and volunteer positions can provide individuals with a sense of purpose, structure, and other benefits, if they are able to meet the demands of employment. In her experience, individuals with multiple barriers to employment (including pain, tolerance, and fatigue) typically do not enjoy

success transitioning to paid or volunteer work. She conceded that, if treatment is successful and Ms. Ballantyne makes gains in certain areas, vocational intervention or volunteer work might be worth exploring. However, she noted that multiple failed attempts to return to work can be detrimental and lead to a “crumbling resume”, decreased mood, and increased fear and anxiety about returning to work.

b) Diana Cameron

[273] Diana Cameron is a registered clinical counsellor and vocational rehabilitation consultant. She has a master’s degree in counselling psychology and specializes in vocational rehabilitation. She was qualified as an expert in the area of vocational rehabilitation, able to opine regarding vocational assessments, career and job search counselling, the administration and interpretation of vocational tests, and labour market research. Ms. Cameron is not involved in job placement.

[274] Ms. Cameron assessed Ms. Ballantyne on February 26, 2020 in Vancouver. Ms. Ballantyne discontinued the assessment before its completion due to reports of aggravated symptoms; she declined to return the following day, saying that she did not feel well enough to do so. She also declined to complete some tests due to her concerns that they were unsuitable. Ms. Cameron travelled to Kelowna to complete her assessment of Ms. Ballantyne on July 13, 2020; Ms. Ballantyne again discontinued the assessment early due to reports of symptom aggravation. It is unclear why Ms. Ballantyne was able to complete the assessment by her own vocational consultant but not the one undertaken by Ms. Cameron.

[275] Ms. Cameron obtained a history from Ms. Ballantyne, reviewed documents, administered vocational tests, conducted some occupational and labour market research, and authored a report and rebuttal report (both dated December 18, 2020) and an addendum report dated May 21, 2021. She critiqued Ms. Webster’s reports and concluded as follows:

- a) Based on the opinions of Drs. Cameron and Lewkis, Ms. Ballantyne is likely restricted to supported employment with an accommodating employer; and

- b) Based on the opinions of Drs. Solomons, Horlick, and McDowell, Ms. Ballantyne has the potential to return to competitive work in the future.

[276] Based on Dr. Chow's opinion that Ms. Ballantyne has the tolerance to work one and a half to three hours per day, inconsistently and with breaks, Ms. Cameron agreed that Ms. Ballantyne is not currently competitively employable. She admitted that, without support, she will face significant challenges returning to work.

[277] Ms. Cameron discussed the 10-week Progressive Goal Attainment Program (the "PGAP"). She said that it targets psychosocial barriers to a return to work and is one way to address an elevated perception of disability that might be a barrier to employment. It involves setting and meeting incremental goals that a person might once have thought were beyond their reach. It prompts attendees to question their beliefs about perceived limitations that might be barriers for them.

[278] Ms. Cameron noted that Ms. Ballantyne perceives herself to be totally disabled from work; in her opinion, vocational rehabilitation is unlikely to be successful for Ms. Ballantyne unless this view changes. She confirmed that the PGAP is different from pain management programs: the focus is on activity resumption rather than symptom reduction. The theory underlying the PGAP is that excessive focus on symptoms can result in an entrenched disability perception and maladaptive behaviors that preclude active engagement in rehabilitation, including a return to work. In her experience, the PGAP has favourable outcomes for people with a wide range of disabling conditions.

[279] Ms. Cameron agreed that the PGAP will not address Ms. Ballantyne's altered gait, vision issues, or fatigue; the focus of the program is on function and not symptom management. She does not question the validity of Ms. Ballantyne's symptoms but rather, her focus on them. She denied that Ms. Ballantyne's work with Ms. Kennedy is comparable to completion of the PGAP. She described the PGAP as the gold standard, saying that individuals lose momentum if treatment is provided over a more extended period. Despite the passage of time since the Accident, she is optimistic that Ms. Ballantyne could benefit from the PGAP. She testified that, while

Ms. Ballantyne will not suddenly feel well after the PGAP, it will challenge her beliefs. Notably, Ms. Bos, the plaintiff's OT expert, supports Ms. Ballantyne's participation in the PGAP.

[280] Ms. Cameron fairly conceded that Ms. Ballantyne's presentation is complex. In her view, there is substantial value to Ms. Ballantyne participating in work, even if it is not full-time or highly skilled. In her opinion, work could provide Ms. Ballantyne with a sense of purpose, enhanced self-esteem, and opportunities to engage socially and to help others. Ms. Ballantyne reports feeling socially isolated; in Ms. Cameron's opinion, there is benefit to Ms. Ballantyne in not spending all day at home alone.

[281] Ms. Cameron agreed that volunteer work would be the best place for Ms. Ballantyne to start; this would provide some information about her tolerance. She could then consider paid work, based on her demonstrated ability to manage the demands of a volunteer position.

3. Conclusion

[282] I accept the shared opinion of Ms. Webster and Ms. Cameron that Ms. Ballantyne is not currently competitively employable. I find that, although she resumed working a modest and variable number of hours for Suntec after the Accident, Ms. Ballantyne worked inconsistently and less efficiently than she had before the Accident. I also find that she would likely have been unable to compete for work on the open market after the Accident. However, I am not persuaded that Ms. Ballantyne will never work again.

D. Valuing the Loss

1. Expert Evidence

[283] Three experts offered opinions regarding the calculation of Ms. Ballantyne's income loss claims based on lost Suntec earnings. Ms. Ballantyne called:

- a) Ms. Rains; and
- b) Business valuator, Derek Sanders.

[284] Mr. Sanders is a chartered business valuator, financial analyst, and accountant. He was qualified as an expert in the area of accounting and business valuations, including economic loss quantification. He authored a report dated May 18, 2022, based on his discussions with the Ballantynes and a review of financial documents. He was asked to calculate their combined income loss from the Accident to August 15, 2022, and any future income loss thereafter. He offered opinions about the value of hypothetical projected Suntec earnings, absent the Accident.

[285] The defendant called Mr. Volpe. Mr. Volpe reviewed tax documents and Ms. Rains' report. He requested, but did not receive, additional information regarding Suntec's 2019 and 2020 financial statements and its reported bad debts, customers, revenue, and accounting policies. He authored two reports dated May 21, 2020 and July 4, 2022 and critiqued the reports of Mr. Sanders and Ms. Rains.

2. Past Loss

[286] The parties' positions regarding Ms. Ballantyne's income loss claims are diametrically opposed. Ultimately, I conclude that neither end of this proposed broad spectrum is reasonable.

[287] Plaintiff's counsel suggested five distinct approaches for assessing past income loss, including doing so based on:

- a) Suntec's hypothetical projected lost revenue after the Accident;
 - b) The income that Ms. Ballantyne submits she would have earned through Suntec but for the Accident;
 - c) The income that Ms. Ballantyne says she would have earned through other employment but for the Accident;
 - d) The cost to Suntec of replacing Ms. Ballantyne's labour after the Accident;
- or

e) An in trust claim for services rendered to Suntec after the Accident.

[288] The application of these approaches produces dramatically different estimates of past income loss, ranging from a low of \$184,008 to a high of \$1,205,000. I endorse the comments of Justice Betton in *Fleming v. McAllister*, 2017 BCSC 521 at para. 102:

It is of note that the two assumptions are presented as alternative methods of identifying a specific loss and yet they produce dramatically different results. Logic would suggest that if they were each reliable methodologies the results would at least be similar. There can in fact be only one actual loss value. The task is to determine what it is. The fact that these efforts provided dramatically different results is an indication that one or both assumptions is/are flawed.

[289] Those observations are both instructive and analogous here.

[290] Plaintiff's counsel's first two approaches are based on estimates of Suntec's hypothetical lost revenue as a result of the Accident, using either Ms. Sander's projections or Ms. Rains' figures. Mr. Sanders' calculations produce an estimated past income loss in the range of \$1,122,000 - \$1,205,000. I do not accept the assumptions underlying Mr. Sanders' calculations; in my view, they are not supported by the evidence and substantially overvalue Ms. Ballantyne's loss.

[291] Alternatively, plaintiff's counsel proposes that his first approach be applied based on a one-half share of the revenue that he submits the Ballantynes would have earned through Suntec in the form of dividends and wages, as set out in Ms. Rains' report. Applying these assumptions produces an estimated past loss in the amount of \$1,014,301, before discounting 50% of Suntec's actual pre-trial income (\$435,845) to reflect Ms. Ballantyne's presumed one-half share. Applying this discount results in an estimated pre-tax past income loss of \$578,456. I do not accept the assumptions underlying these calculations. They produce figures that are inconsistent with the average dividends Suntec paid to the Ballantynes in the five years before the Accident. These figures also assume that Suntec would have paid the Ballantynes dividends that consistently matched the rate of inflation, an assumption that is not supported by the trial evidence. It is also unclear on the

evidence how closely Suntec dividends correspond to the value of Ms. Ballantyne's lost earning capacity.

[292] The plaintiff's second approach involves calculating past income loss based on what Ms. Ballantyne submits she would have earned through Suntec but for the Accident, ignoring Mr. Ballantyne's income from other sources, and assuming that Ms. Ballantyne would have been entitled to a one-half share of Suntec's income. This approach yields a net pre-tax figure for past income loss of \$342,357.

[293] Given my finding that Ms. Ballantyne has not established on a balance of probabilities that the Accident caused Suntec to close, I have not adopted either of the plaintiff's first two approaches. Ultimately, it is Ms. Ballantyne's loss of earning capacity that must be valued and not the loss of Suntec.

[294] The plaintiff's third approach involves assessing Ms. Ballantyne's past loss of earning capacity based on what she could have earned working as an occupational therapist or OT assistant. There was some trial evidence about the possibility of Ms. Ballantyne pursuing this kind of work before the Accident. She had upgraded her high school biology and chemistry courses and obtained good marks, but otherwise taken no steps to do so. On her evidence, she had planned to take some additional courses at her own pace over time, with the goal of supplementing her Suntec income and using paid work in the community to replace some of the volunteer work that she had done previously. She switched to an online program after her mother died in 2012 and registered for two courses in psychology and biology. She admitted that she never planned to work full-time as an OT assistant or to have a "huge thriving business".

[295] In my view, there is no real and substantial possibility that, but for the Accident, Ms. Ballantyne would have completed the training necessary to become an OT or an OT assistant. Ms. Cameron notes in her December 18, 2020 report that the OT Therapist Assistant program is an intensive, full-time two-year program. She cites the Government of Canada's 2020 Job Bank data which indicates that the average age of recent graduates is 26 years. Ms. Ballantyne was not enrolled in this

program at the time of the Accident; she was then 46 years old. In my view, it would be unduly speculative to assess the loss of earning capacity based on incomes for either an OT or an OT assistant.

[296] As a possible fourth alternative, plaintiff's counsel proposes, but does not endorse, an assessment of Ms. Ballantyne's past lost earning capacity based on what it would have cost to replace the work that she provided to Suntec before the Accident. He submits that, if this approach is applied, Suntec would have been required to hire at least one full-time employee at an hourly rate of \$25 (for an annual cost of \$52,000).

[297] On her own evidence, Ms. Ballantyne was not working full-time hours before the Accident. It is unclear why Suntec would have been required to hire a full-time employee to replace the work that Ms. Ballantyne had been doing for Suntec before the Accident. It is also unclear why a professional bookkeeper could not have worked as efficiently as Ms. Ballantyne. The proposed annual salary of \$52,000 for a replacement worker is inconsistent with the median hourly rates that Ms. Webster and Ms. Cameron both referenced for office clerks and bookkeepers.

[298] Finally, plaintiff's counsel suggests that past income loss be calculated in the form of an in-trust award, based on the additional work that others were required to do as a result of Ms. Ballantyne's Accident-related injuries, citing *Weaver v. Pollock*, 2018 BCSC 531 at paras. 128–141. No one assumed all of Ms. Ballantyne's Suntec work after the Accident. Mr. Ballantyne denied having a good understanding of what his wife did for Suntec or how to do it. Their daughter, who is not a bookkeeper, provided basic services only to Suntec. Ultimately, I am not persuaded that this is an appropriate means of assessing Ms. Ballantyne's past loss of earning capacity.

[299] The defendant assesses Ms. Ballantyne's past loss in the amount of \$30,000, based on the number of hours they assert she was working for Suntec before and after the Accident. This figure assumes a net loss of about 14 hours of work per week, calculated at the 2020 median wage rate of \$20.50 for accounting clerks in the Thompson/Okanagan Region, less estimated tax of 15%, discounted further to

reflect the fluctuating nature of Ms. Ballantyne’s pre-Accident work hours. In my view, this figure underestimates Ms. Ballantyne’s loss.

[300] Ms. Ballantyne worked in a limited capacity after the Accident and has not worked at all since Suntec closed in January 2020. I accept that she has suffered a past loss of earning capacity. This conclusion is not controversial. The challenge is to value the loss. I am required to assess Ms. Ballantyne’s past loss of earning capacity and not to calculate it with mathematical precision. The award must be reasonable, supported by the evidence, and fair to both parties.

[301] Based on her filed tax returns in evidence, Ms. Ballantyne reported income from Suntec, before and after the Accident, as set out below.

Tax Year	Income Source	Total Income
2013	\$51,875: Taxable Dividends \$2,562: Gross Business Income \$(1,831): Net Business Income	\$50,044
2014	\$10,000: T4 Income (Suntec) \$59,000: Taxable Dividends \$3,028: Gross Business Income \$(13,290): Net Business Income	\$55,710
2015 [Year of the Accident]	\$10,000: T4 Income \$54,280: Taxable Dividends \$243: Interest and Investment Income \$2,285: Gross Business Income \$(2,645): Net Business Income	\$61,878
2016	\$10,000: T4 Income \$80,730: Taxable Dividends \$320: Interest and Investment Income	\$91,050
2017	\$10,000: T4 Income \$62,860: Taxable Dividends	\$77,860

2018	\$10,000: T4 Income \$68,440: Taxable Dividends	\$78,440
2019	\$10,000: T4 Income \$18,975: Taxable Dividends	\$47,847
2020	\$1,540.37: RRSP Income \$14,000: Other Income \$(907.38): Business Income	\$14,632.99

[302] In 2021, Ms. Ballantyne reported disability benefits in the amount of \$15,940.44 to the CRA.

[303] In my view, it is virtually certain that, but for the Accident, the Ballantynes would have continued to operate Suntec in the same manner they had since 2002. They had established a niche market for Suntec in the Kelowna residential construction industry. Mr. Ballantyne's excellent customer service had earned Suntec a positive reputation with local contractors and distinguished Suntec from its competitors. Suntec was generating sufficient revenue to support the Ballantynes and their lifestyle.

[304] About one year after the Accident, Ms. Ballantyne resumed working a modest number of hours for Suntec. The trial evidence persuades me that she did this work less consistently and more inefficiently than she had before the Accident. However, I accept the evidence of Ms. Rains that the quality of Ms. Ballantyne's bookkeeping remained very good. It is unclear on the trial evidence who prepared Suntec's GST and PST filings after the Accident. There is no evidence that they were not completed, as required by the CRA. There is also no evidence that the Ballantynes hired anyone to do this work, or that either Mr. Ballantyne or Anisha Ballantyne did it.

[305] On all the evidence, I conclude that there is no real and substantial possibility that Ms. Ballantyne could have competed for work on the open market or earned any income outside Suntec after the Accident and before trial. Apart from sharing in the net revenue that Suntec generated after the Accident, she had no pre-trial income.

[306] On Ms. Ballantyne's evidence, she worked 40+ hours per week during Suntec's busy season (from January to March, or three months per year) and 20+ hours during Suntec's slow season (i.e., from April to December, or nine months per year). This information translates into a weighted average of about 25 hours of work per week over the course of one year. Recognizing that Ms. Ballantyne's work hours fluctuated somewhat and doing my best on the available evidence, I assess gross past loss of earning capacity in the amount of \$210,000. This figure roughly equals what Ms. Ballantyne could reasonably have earned working about 30 hours a week for 52 weeks per year as a bookkeeper at the hourly rate of \$21.00, based on the 2018 Job Bank Wage Report median hourly rate for general office support workers and accounting clerks.

[307] This award incorporates a discount to reflect mid-range estimates of the hours that Ms. Ballantyne worked for Suntec after the Accident as follows:

- a) 2016 – zero hours;
- b) 2017 – three hours per week x 50 weeks (or 150 hours total);
- c) 2018 – six hours per week x 50 weeks (or 300 hours total); and
- d) 2019 – eight hours per week x 50 weeks (or 400 hours total).

TOTAL: 850 Hours (or \$17,850 at an hourly rate of \$21.00).

[308] In my view, this award is reasonable and fair to both parties. I leave it to counsel to discount this figure for tax.

3. Future Loss

[309] The parties provided similarly polarized estimates of Ms. Ballantyne's future loss of earning capacity. Plaintiff's counsel suggests multiple different approaches to the calculation of future loss, resulting in a wide-ranging estimates from \$575,900 to \$3,931,625. Ms. Ballantyne seeks damages in the amount of \$1,408,418. The

defendant estimates future income loss in the amount of \$100,000. In my view, the plaintiff overvalues her loss and the defendant does the opposite.

[310] Using the plaintiff's first approach and Ms. Rains' data, plaintiff's counsel estimates future income loss based on the dividends that he says Suntec would have paid the Ballantynes absent the Accident, less the \$50,000/year that Mr. Ballantyne testified he is now able to earn. This estimate assumes that Ms. Ballantyne has no residual earning capacity. Based on these assumptions, plaintiff's counsel submits that, absent the Accident, Suntec would have paid the Ballantynes \$177,171 in 2022 (less Mr. Ballantyne's current income of \$50,000) for a net loss commencing in 2022 of \$127,171 per year. The present value of this income stream (using Mr. Turnbull's multiplier of 11.075), is \$1,408,418 to age 65 or \$1,631,349 to age 68.

[311] Alternatively, plaintiff's counsel estimates future income loss based on Ms. Ballantyne's assumed one-half share of the estimated without-Accident annual income that he says Suntec could have generated as of the date of trial (\$88,585). The present value of this annual loss of income is \$981,079 to age 65 (based on Mr. Turnbull's multiplier of 11.075) or \$1,136,368 to age 68 (using a multiplier of 12.828).

[312] Defence counsel rely on the opinions of Drs. Horlick and McDowell regarding Ms. Ballantyne's prognosis, and on Ms. Cameron's view that vocational support might help Ms. Ballantyne achieve gainful employment. They assess future income loss in the amount of \$100,000:

- a) Assuming Suntec paid Ms. Ballantyne the median wage of \$20.50/hour for an accounting clerk in the Thompson/Okanagan Region and she worked 10-20 hours per week for an annual wage of \$10,250 to \$20,500 (or a rough mid-range of \$16,000);
- b) Applying Mr. Turnbull's income multiplier of 12.770 to an annual loss of \$16,000 for a loss of \$204,320 to Ms. Ballantyne's age 65; and

- c) Applying a discount (of more than 50%) to reflect the positive contingency that Ms. Ballantyne's condition might improve (in accordance with the opinions of Drs. Horlick and McDowell), thereby resulting in an estimated future income loss of \$100,000.

[313] Ms. Ballantyne is currently not working in any capacity. In my view, it is clear that the Accident resulted in injuries which have impaired her ability to work and that this loss is ongoing. In my view, the first and second steps, as set out in *Rab* at para. 47, are met. This conclusion is not seriously disputed. The challenge is to value the loss.

[314] There is no perfect means of assessing Ms. Ballantyne's loss of future earning capacity. I am required to assess this loss and not to calculate it with mathematical precision. While I accept that Ms. Ballantyne is currently not competitively employable, I do not agree that her future vocational prospects are as dim as her lawyer suggests. Ms. Ballantyne's overall condition has improved since the Accident and appears to have stabilized. On the evidence of Drs. Lewkis and Zettl, PTSD is treatable. Ms. Ballantyne's PTSD symptoms have improved since the Accident. If she implements the treatment recommendations of Drs. Lewkis and McDowell, seeks a referral to a neuropsychiatrist, completes the PGAP, and is able to modify her entrenched perception of her own disability, I conclude there is a real and substantial possibility that her condition will improve and she will be able to return to some kind of work.

[315] I assess Ms. Ballantyne's loss of future earning capacity in the amount of \$350,000. This figure roughly equals the present value of 30 hours of work for 52 weeks per year at the hourly rate of \$25.00 to age 65, before discounting to reflect contingencies. I have not used the median employment income of \$41,248 for females in the Central Okanagan aged 25 to 64 years who have completed high school. As noted by Ms. Cameron, this figure includes earnings for full-time, full-year workers. On Ms. Ballantyne's own evidence, her work was part-time and fluctuated seasonally. However, in assessing future loss, I have adjusted the hourly rate

slightly (to reflect a rough mid-point between the median and high figures that Ms. Webster and Ms. Cameron provided) to reflect more current rates.

[316] I accept that Ms. Ballantyne enjoyed her work and that she had no definite retirement age in mind before the Accident. In my view, there is a real and substantial possibility that she would have continued working beyond age 65, absent the Accident. However, I find that there is an equally real and substantial possibility that she would not have done so. The Accident clearly demonstrated that Suntec was vulnerable to the usual vagaries of life, including accident, injury, and disability, and that the Ballantynes had no contingency plan in place for emergencies or other adverse life events.

[317] My assessment of future income loss in the amount of \$350,000 includes a discount to reflect the real and substantial possibility that, with different treatment, as recommended by Drs. Lewkis and McDowell, and completion of the PGAP, as recommended by Ms. Cameron and Ms. Bos, Ms. Ballantyne's condition will improve and she will be able to return to work. Because Ms. Ballantyne is suited to home-based work, and demonstrated the capacity to work up to 10 hours per week for Suntec after the Accident, I conclude there is also a real and substantial possibility that she might resume providing basic bookkeeping services to a small number of clients at her own pace from her home at some point. Having regard to Ms. Ballantyne's age, the length of time she has been out of the work force, the duration of her symptoms, and the challenges associated with treating them, I conclude that a relatively modest discount in the range of about 20% is appropriate to reflect these contingencies; my award incorporates such a discount.

[318] In my view, this award is reasonable and fair to both parties.

XIV. FUTURE COST OF CARE

A. Legal Framework

[319] Justice Kent conveniently summarized the principles that apply to an assessment of future care costs in *Dzumhur v. Davoody*, 2015 BCSC 2316:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party [...] Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts. [...] It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

[320] An assessment of future care costs is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The court must identify the specific amount awarded for each item claimed: *Sunner v. Rana*, 2015 BCCA 406 at para. 50. The cost of each particular item is an important consideration in assessing whether it meets the test of reasonableness: *Elzinga v. Sharpe*, 2019 BCSC 314 at para. 210. The plaintiff must prove there is a real and substantial possibility that the cost will be incurred: *Owen v. Folster*, 2018 BCSC 143 at para. 314.

B. Parties' Positions

[321] The parties have divergent views regarding Ms. Ballantyne's future care costs. She seeks to recover \$489,143; the defendant estimates this claim in the amount of \$31,102.

[322] Plaintiff's counsel relies on the future care recommendations of Ms. Bos, and the future care multipliers of Mr. Turnbull, the plaintiff's economist expert, to calculate the present value of these costs. Ms. Ballantyne does not seek to recover the cost of vocational services on the basis that she is competitively unemployable. On her evidence, she is unable to tolerate Cyclobenzaprine, Gabapentin, or Lyrica. Based on Ms. Bos' report and Mr. Turnbull's multipliers, the present value of those combined services (\$3,586) and medications (\$9,724) for Ms. Ballantyne's lifetime is \$13,310. Factoring in a discount of \$13,310 results in estimated future care costs of \$489,143.

[323] Defence counsel calculate future care costs in the amount of \$31,101.75 as set out below.

Item	Annual Cost	Present Value Total
Counselling	\$10,660 (twice per month x 2 years)	\$20,857
Passive Treatment		
i) Physiotherapy	\$1,800 (24 x \$75/session)	\$3,522.60
ii) Laser/Needling	\$825 (11 x \$75/visit)	\$1,614.53
Drug Therapy		
i) Cyclobenzaprine	\$20.00	\$20.00
ii) Cannabinoid	\$846.72	\$1,657.03
iii) Pain Cream	\$56.00	\$109.59
Injections		
i) Prolotherapy	\$675 (2 x \$250 + 1 x \$175)	\$1,321
ii) PRP	\$2,000 (5 x \$400/session)	\$2,000

C. Expert Evidence

[324] Prior to authoring her May 6, 2022 future care report, Ms. Bos reassessed Ms. Ballantyne at home on March 10, 2022. She noted some improvement in Ms. Ballantyne’s physical and emotional symptoms. Her gait was improved and she had better range of motion in her left arm, fewer left eye symptoms, better overhead reaching, and improved strength. Ms. Bos admitted that her overall assessment of Ms. Ballantyne was more positive than it had been two years earlier.

[325] Ms. Bos noted that Ms. Ballantyne was able to walk with a reciprocal gait on stairs although she reported that this felt awkward, as if her left knee was locking. Ms. Bos noted that this was a change and not something that Ms. Ballantyne had reported two years earlier. Ms. Ballantyne’s gait was improved but remained uneven with reduced balance and lower extremity weakness. She demonstrated ongoing left-hand weakness. She was less emotional than she had been on previous testing.

[326] Ms. Kennedy was qualified as an expert in occupational therapy, able to opine on functional capacity, future care needs, cognitive functional capacity evaluations and return to work in patients following concussion. She first met Ms. Ballantyne on December 23, 2015, and remained involved in her care until December 2018. During that time, she recommended and supplied Ms. Ballantyne with a variety of adaptive aids and equipment, provided therapeutic and case management services, and assisted Ms. Ballantyne in making ergonomic adaptations to her home office.

D. Analysis and Conclusions

1. Occupational Therapy

[327] Ms. Bos recommends two additional years of occupational therapy, to include 38 hours in year one, and 12 hours in year two at a rate of \$119/hour for a total cost of \$5,950. The present value of this cost is \$5,853.

[328] Ms. Ballantyne has had extensive occupational therapy since 2016. However, I conclude that she could benefit from additional OT support to assist her in

becoming more engaged in self-directed activities. Ms. Ballantyne confirmed that she is receptive to pursuing this kind of treatment. I award this amount.

2. Physiotherapy

[329] Based on Dr. Chow's report dated December 26, 2019, he supported ongoing physical therapy and an exercise program to maximise Ms. Ballantyne's function. He noted that Ms. Ballantyne had not yet reached maximal medical improvement and that her condition was still improving. Ms. Ballantyne has attended physiotherapy regularly since 2019. In his report dated April 15, 2020, Dr. Chow generally endorsed Ms. Bos' recommendations but offered no opinion about the frequency or duration of further physiotherapy.

[330] While Dr. Louw supported ongoing bi-weekly physiotherapy sessions in his report dated April 22, 2020, he too is silent about the recommended duration of this treatment. Based on the recommendations of Drs. Louw and Chow, Ms. Bos suggests continued physiotherapy sessions every two weeks at a cost of \$125/session for a total annual cost of \$3,250 for an unspecified duration. The present value of this lifetime cost is \$76,112.

[331] In my view, this is excessive. None of the involved treating or expert physicians endorsed ongoing passive physiotherapy twice a month for life. Ms. Ballantyne has had substantial physiotherapy to date. The agreed special damages include \$17,826.70 for physiotherapy from January 7, 2016 to March 12, 2020.

[332] On the trial evidence that I accept, I conclude that Ms. Ballantyne might benefit from a different approach to her treatment, as recommended by Drs. Lewkis and McDowell. In my view, funding ongoing bi-weekly physiotherapy indefinitely, in the absence of medical evidence to support it as necessary, risks reinforcing Ms. Ballantyne's already entrenched perception of her own disability. I conclude that it would be beneficial for Ms. Ballantyne to transition away from passive therapies to a more active, self-directed form of rehabilitation, for which funding has now been provided.

[333] I award a contingency fund of \$6,000 to allow Ms. Ballantyne to access additional physiotherapy during her lifetime, as necessary. This roughly equals the present value of two physiotherapy sessions per month for two years.

3. Kinesiology

[334] In his May 30, 2016 report, Dr. Chow recommended kinesiology support to teach Ms. Ballantyne proper exercise technique. Dr. Louw agrees that she would benefit from a kinesiologist-directed exercise program for physical deconditioning. Ms. Bos recommends 12 kinesiology sessions per year for two years at a cost of \$87/session (\$1,044/year). The present value of this cost is \$2,144, including tax. I award this amount.

4. Rehabilitation Assistant

[335] Ms. Bos recommends a rehabilitation assistant for two years at a cost of \$50/hour. She recommends a total of six hours per month for the first year, and three hours per month for the second year, for a total cost of \$5,400. The present value of this cost, including tax, is \$5,566. While I accept that Ms. Ballantyne has had substantial occupational therapy to date, I agree that she could benefit from the additional support of a rehabilitation assistant to help her become more actively engaged socially and recreationally. I award this amount.

5. Psychological Services

[336] Dr. Zettl testified that Ms. Ballantyne will require psychological support when she faces challenges in life. She hopes that Ms. Ballantyne's PTSD will go into remission but said that Ms. Ballantyne is vulnerable to it resurfacing in times of stress. She recommends that Ms. Ballantyne have psychotherapy available to her as an option.

[337] Dr. Zettl supports ongoing weekly psychotherapy for the next two years and then twice per month for at least another two years. On her evidence, Ms. Ballantyne may require more frequent sessions to adjust to changes and new stresses in her life. Thereafter, she recommends 12 counselling sessions per year to age 70.

[338] Dr. Lewkis recommends continued psychotherapy to help Ms. Ballantyne adjust to changes since the Accident, once a week for one additional year, or less if she feels they are no longer necessary, and additional sessions at times of emotional crises, as necessary. In his view, EEG biofeedback sessions would be most effective (40 sessions at \$200/session) or 10–15 sessions of EMDR as an alternative.

[339] In Dr. McDowell's view, Ms. Ballantyne's treatment to date has likely been poor as it has not been acknowledged that she has a functional neurologic disorder. In my view, the preponderance of trial evidence supports the conclusion that Ms. Ballantyne's most disabling problems are psychological. I conclude that she would benefit from a referral to a neuropsychiatrist and implementation of Dr. Lewkis' treatment recommendations.

[340] Ms. Bos recommends two counselling sessions per month for two years (\$5,280/year), followed by 12 sessions/year to age 70 at an annual cost of \$2,640, based on a cost of \$220/session. The present value of this lifetime cost is \$66,990.

[341] I award \$10,328, the present value cost of two counselling sessions per month for two years. I also award a lifetime contingency fund of \$15,000 to allow Ms. Ballantyne to access further psychological services, as and when needed. This figure roughly equals the cost of three additional counselling sessions per year at a cost of \$220 per session for life. The total award for psychological services is therefore \$25,328.

[342] In making this award, I have considered the real and substantial possibilities that Ms. Ballantyne's PTSD will go into remission and that her mental health will improve once this litigation is resolved and she pursues the treatment recommendations of Drs. McDowell and Lewkis.

6. Prolotherapy and PRP Injections

[343] Ms. Bos recommends three to five sessions of prolotherapy at a cost of \$200–\$300/session for a total cost of \$600–\$1,500. Assuming annual costs of

\$1,050 for prolotherapy and \$1,600 for PRP injections, The total present value of this treatment is \$2,650. I award this amount.

7. Vision Therapy Assessments

[344] In his April 30, 2022 report, Dr. Rollett recommends an annual examination by an optometrist certified in vision therapy and rehabilitation (or with comparable qualifications) for the next five years (at a cost of \$225.60/session). Ms. Bos recommends five years of vision therapy at a cost of \$225/year. The present value of this cost is \$1,064. I award this amount.

8. Medications

[345] Dr. Cameron recommended a variety of medications, some of which Ms. Ballantyne has tried and been unable to tolerate. He suggested that she would be a candidate for a trial of Botox therapy for her headaches. There is no evidence that Ms. Ballantyne has pursued this treatment to date.

[346] In Dr. Louw’s opinion, Ms. Ballantyne’s condition has mostly plateaued. However, he agrees that she is likely to receive some ongoing benefit from medications, cannabinoid treatments, and biomechanical/regenerative injections. Ms. Ballantyne is now using CBD and another product called 10/10 for spikes in her pain.

[347] Excluding the cost of Gabapentin and Lyrica (which Ms. Ballantyne said she cannot tolerate) and the cost of Amitriptyline (which, on Dr. Louw’s evidence, she was unable to tolerate), Ms. Bos estimates Ms. Ballantyne’s future lifetime medication costs as follows:

- a) CBD 1:20 - \$648/year
- b) CBD 10:10 - \$900/year
- c) Voltaren Gel - \$55.88/year
- d) Cyclobenzaprine – \$108.40/year

e) Topiramate (“Potential”) - \$270.40/year

TOTAL: \$1,982.68/year

[348] On Ms. Ballantyne’s evidence, she uses Cyclobenzaprine sparingly and last filled her prescription for this medication in March 2018. Accordingly, I have reduced the cost of this medication by 75% to roughly \$27/year. I have not included the speculative cost of Topiramate. Making these adjustments reduces the estimated annual cost of medications to \$1,631.

[349] As noted by Justice Gomery in *Gill v. Borutski*, 2021 BCSC 554 at para. 122, one can only speculate as to what medicines a plaintiff will require when they are 60, 70, or 80 years old. I note that Dr. Chow recommends against long-term medication use in his report dated May 30, 2016. Doing my best on the available evidence, I award a contingency fund for future medication costs in the amount of \$25,000. This roughly equals the present value of estimated annual medication costs in the amount of \$1,630 to age 70. This accounts for the contingency that Ms. Ballantyne may not require these medications for longer than this if her condition, including her perception of her pain and disability, improves with the treatments recommended by Drs. Lewkis and McDowell and her completion of the PGAP.

9. Equipment/Adaptive Aids

[350] Ms. Ballantyne uses a heating pad, TENS machine, body and neck pillow, walking poles, and orthotics. Ms. Bos recommends the following equipment:

- a) Heating Pad - \$173.60 for life to be replaced every five years;
- b) TENS Machine - \$115 for life to be replaced every 10 years;
- c) Cervical Pillow - \$174.22 for life to be replaced every five years;
- d) Body Pillow - \$279 for life to be replaced every five years;
- e) Microspikes - \$89.95 for life to be replaced every five years;

- f) Orthotics - \$750 for life to be replaced every two years; and
- g) Therapeutic glasses - \$750 - \$800 for five years.

[351] Dr. Rollett opines that annual lens or prescription changes (at an expected cost of \$750 - \$800 each) for the next five years are likely although it is possible that this might only be necessary for the next two years. The total present value of these costs is \$15,552. I award this amount.

10. Pool Pass

[352] Ms. Bos recommends a lifetime pool pass at a cost of \$459.28 to age 64 and thereafter at the reduced annual cost of \$340.21. The present value of this cost is approximately \$7,107. I award this amount.

11. Transportation Costs

[353] Ms. Ballantyne does not anticipate returning to driving. On the assumption that she will never do so, Ms. Bos estimates her lifetime transportation costs in the amount of \$136.20/week or \$7,082.40/year, based on the cost of taxi fare for three return trips of 20 kms per week. The present value of this cost is \$165,863.

[354] Ms. Ballantyne is physically able to drive. However, the trial evidence persuades me that her PTSD and driving anxiety currently prevent her from driving safely. On the evidence of Drs. Lewkis and Zettl, Ms. Ballantyne's PTSD is treatable; Dr. Zettl confirmed that Ms. Ballantyne has enjoyed moderate improvement in her PTSD symptoms to date. If Ms. Ballantyne completes the PTSD treatment recommended by Dr. Lewkis, I conclude there is a real and substantial possibility that she will resume driving. I also conclude on the trial evidence of Mr. Ballantyne that he and his wife might move to a less remote location at some point, where public transit is available and driving is not required to access amenities.

[355] Some of Ms. Ballantyne's family members periodically accompany her on some of her excursions including, for example, to the local farmers market. I therefore conclude that others will sometimes be available to drive Ms. Ballantyne. I

also conclude that Ms. Ballantyne will have substantially fewer medical appointments in the future than she has had in the last seven years. Some of Ms. Bos' recommended future treatment costs (including, for example, home physiotherapy) include travel costs and do not require Ms. Ballantyne to drive. In my view, there is a real and substantial possibility that Ms. Ballantyne would have stopped driving and required transportation assistance at some point in her lifetime as she aged, absent the Accident. She would also have incurred some transportation costs absent the Accident.

[356] Taking all of these considerations into account, I award a contingency fund to cover Ms. Ballantyne's Accident-related transportation costs in the amount of \$50,000. This roughly equals the present value of six weekly return trips of 20 kms to age 70.

12. House Cleaning, Yard Maintenance and Snow Removal

[357] I have made a pecuniary award for the future loss of housecleaning capacity. I have not therefore also awarded future care costs for housecleaning, yard maintenance, and snow removal costs.

13. Vocational Support Services

[358] Ms. Bos recommends one year of vocational support at an annual cost \$1,500– \$4,500. Ms. Cameron recommends that Ms. Ballantyne participate in the PGAP at a one-time cost of \$2,000, before attempting to return to paid work. Assuming Ms. Ballantyne derives benefit from it, she recommends 15–30 hours of vocational rehabilitation counselling at a cost of \$100–\$150/hour.

[359] I assume that Ms. Ballantyne will pursue the PGAP in about one year. Accordingly, I have not discounted this cost to present value. The present value of vocational rehabilitation counselling for one year (assuming a midpoint estimate of 22 hours and a mid-range hourly rate of \$125) is \$2,720. The total award, factoring in the cost of the PGAP, is \$4,720. I award this amount.

[360] In summary, I award the present value of future care costs as follows:

- a) Occupational Therapy - \$5,853
- b) Physiotherapy - \$6,000
- c) Kinesiology - \$2,144
- d) Rehabilitation Assistant - \$5,566
- e) Psychological Services - \$25,328
- f) Prolotherapy and PRP Injections - \$2,650
- g) Vision Therapy - \$1,064
- h) Medications - \$25,000
- i) Equipment/Adaptive Aids - \$15,552
- j) Pool Pass - \$7,107
- k) Transportation Costs - \$50,000
- l) Vocational Support - \$4,720

TOTAL: \$150,984

XV. MITIGATION

[361] The defendant submits that, if damages are awarded to Ms. Ballantyne for the loss of Suntec, they are appropriately discounted due to a failure to mitigate. I have not awarded damages for the loss of earning capacity on this basis. Accordingly, I need not consider the issue of mitigation.

XVI. DISPOSITION

[362] I award damages as follows:

- a) General Damages (including past loss of housekeeping capacity) - \$200,000

- b) Future loss of Housekeeping Capacity - \$35,000
- c) In Trust Claim - \$20,000
- d) Special Damages - \$153,744.40
- e) Past Income Loss - \$210,000
- f) Future Income Loss - \$350,000
- g) Future Care Costs - \$150,984

TOTAL: \$1,119,728.40

[363] Absent information of which I am unaware that might alter this view, Ms. Ballantyne is entitled to costs on the ordinary scale. If there are any matters arising from these reasons, the parties are at liberty to apply to speak to them by contacting Supreme Court Scheduling within 30 days.

“Douglas J. “