IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burr v. Sharma,*
2023 BCSC 1559

Date: 20230905
Docket: M199361
Registry: New Westminster

Between:

Jody Lyn Burr

Plaintiff

And

Dave Puri Sharma, Ashok Puri Sharma, Nicole Anne Mott, Trevor James Price and John Gregory Logan

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:	J.C. Moulton S.P. Grey
Counsel for the Defendants:	M.J. Straw D. Lambert
Place and Dates of Trial:	New Westminster, B.C. January 16-20; 23-27, 2023
Place and Date of Judgment:	New Westminster, B.C. September 5, 2023

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Introduction

[1] In October 2016, the plaintiff was driving home from work at a Willowbrook dental clinic when her SUV was struck from behind (the "Accident"). The vehicle that struck her was owned by Ashok Sharma and driven by Dave Sharma (the "Defendants"). The Accident resulted in extensive damage to the plaintiff's vehicle, Mr. A. Sharma's vehicle and other vehicles involved.

[2] The plaintiff suffered multiple injuries to her body and continues to experience physical symptoms, post-traumatic stress disorder ("PTSD"), major depression and chronic pain caused by the Accident.

[3] Liability is not in issue. The central issue at trial was the plaintiff's entitlement to damages under the following heads:

- non-pecuniary damages;
- past income loss;
- future income loss/diminished earning capacity;
- cost of future care; and
- special damages.

[4] The plaintiff also makes an in-trust claim for monies to compensate her spouse and daughter.

[5] There is a defence claim that the plaintiff failed to mitigate her damages.

[6] The plaintiff seeks damages totalling $2,246,000 while the Defendants have evaluated the plaintiff's claim at between $858,000 and $868,000.

Background

[7] At the time of the Accident, Jody Burr, the plaintiff was a 47-year-old office manager for Willowbrook Dental Clinic (the "Dental Clinic"). She has been in a

marriage-like relationship with Darrell Unger for 28 years and has three adult children. The plaintiff resides with Mr. Unger in a 60-year-old house on a 2.5-acre ranch in Langley, BC (the "Family Home"). Mr. Unger works in the construction business. The plaintiff and Mr. Unger raised three children while living on their ranch and in the early 2000s she completed a dental receptionist course and began working for the Dental Clinic. She was subsequently promoted to manager of the Dental Clinic.

[8] The plaintiff is right-handed. She is 5'3" tall, weighed approximately 140 pounds of the time of the Accident and currently weighs 190 lbs.

[9] Her youngest child, Jesse, who is 21, lived in the Family Home until the fall of 2016 when he travelled to an American university to study and pursue an interest in baseball; he is a high-level baseball player who was supported by the plaintiff in the years leading up to the Accident.

Plaintiff's Pre-Accident Health and Activity

[10] At the time of the Accident, the plaintiff was in good health although she had a history of high blood pressure treated by medication. She had three surgeries in 2015 requiring absences from work of between two and three months. Two surgeries treated a detached retina and one surgery was a partial hysterectomy performed toward the end of 2015. She experienced vertigo in 2005 or 2006 but not again any time closer to the Accident.

[11] Before the Accident, the plaintiff enjoyed many outdoor activities including fishing, hiking, skiing, horseback riding, golfing, and tennis. She would golf approximately ten times per year with her husband, friends or children.

[12] The plaintiff was able to ski black diamond runs; she would ski approximately 8-12 times per year mostly at Mount Baker in Washington State but also at other locations. She said she would hike once a month at various places in BC and enjoyed dog-walking and cycling in the Boundary Bay and Campbell Valley Parks.

[13] The plaintiff said her relationship with her spouse before the Accident was great, emphasizing that they enjoyed their recreational activities together.

[14] Prior to the Accident, she was able to drive and perform all regular housekeeping duties.

[15] For 13 years, the plaintiff and her husband owned recreational property at Black Mountain Ranch near Mount Baker in Washington State (the "Washington Property"). They would use the Washington Property approximately every second weekend. Her children grew up visiting the Washington Property, which facilitated their skiing at Mount Baker. The plaintiff and her husband sold the Washington Property four years ago, in part because the plaintiff's injuries limited her ability to enjoy the recreational opportunities it offered.

The Accident

[16] The plaintiff recalls the Accident happening in October 2016 while she was driving alone in her car on the Langley Bypass near the intersection at Glover Road. She recalls coming to a stop at a train crossing the Langley Bypass but did not recall how long she was stationary. She was using a shoulder and lap seatbelt at the time. She does not remember the actual impact; her first recollection after the Accident is "white stuff" and the smell of smoke. She was frightened and remembers being taken on a stretcher to an ambulance. Her clothes were being cut off.

[17] She recalls fire department staff and ambulance staff at the scene of the Accident. She does not remember any treatment she might've received at the Accident but noted the first indication that she was injured became apparent when she was in the ambulance and observed pain in her head, neck, chest, right knee and ankle that were "killing me".

[18] The plaintiff was taken to Langley Memorial Hospital. She could not recall the duration of her stay in hospital but confirmed her husband drove her home.

Plaintiff's Injuries

[19] The plaintiff reported the following injuries and symptoms stemming from the Accident:

a. chronic mild traumatic brain injury ("MTBI");

b. dizziness caused by pathological injury to the inner ear;

c. chronic pain attributable to myofascial injuries to the neck, shoulders and back;

d. chronic post-traumatic headaches;

e. trochanteric bursitis to left hip;

f. right shoulder rotator cuff tendinitis;

g. cognitive issues including confusion and memory problems;

h. chronic depression;

i. anxiety and PTSD;

j. rib fracture; and

k. right knee injury.

Plaintiff's Post-Accident Life

[20] The Accident has had a serious impacts on many aspects of Ms. Burr's life. Prior to the Accident, the plaintiff had no physical or functional limitations at work, home, in her social life or in her recreational activities. Due to her injuries she has permanent ongoing pain in her neck and back and has headaches that occur four times each week. She suffers from dizziness four to five times per week. Her left hip and knee are periodically symptomatic. She is now left spending a lot of time indoors, on her own and she struggles to get quality sleep. Despite engaging in

various treatments, Ms. Burr is left to cope with chronic pain, headaches, dizziness, blackouts and psychological impacts of the Accident, including PTSD.

[21] While she enjoys going to the pool and for walks, dizziness and pain make her unable to participate in many of the activities she used to enjoy with her family including skiing, golfing, and hiking; due to her symptoms and limitations, the plaintiff is also unable to cycle, garden and do the household chores at her pre-Accident levels. She said she has little motivation or interest in life which contrasts with her pre-Accident situation and she is socially limited to smaller groups; she finds noise bothers her. Before the Accident she enjoyed travel and during two post-Accident vacations to Hawaii, she was unable to enjoy her time.

[22] Ms. Burr used to be independent and now feels much more dependant on others. She relies on her spouse for rides, as she no longer drives. Mr. Unger now handles all the family finances. She used to do the heavier indoor chores for her household, and now she is only able to do lighter tasks such as light vacuuming, sweeping, laundry and some cooking. She is restricted in performing heavy tasks including reaching and bending. She cannot wash windows or clean behind toilets and other activities of that sort. She no longer does the shopping. She has difficulty using a computer for any period of time as she is easily fatigued and has been unable to return to work since the Accident.

[23] She feels that her concussion (MTBI) is affecting her; she said “something is just not right”. She receives trigger point injections from physiatrist Dr. Ansel Chu and attends a physiotherapy clinic for treatment to her neck, mid back, lower back, left hip and right shoulder. She said that she had two falls resulting from blackouts in 2021. She has also fallen due to dizziness but these blackouts occur without warning symptoms or dizziness.

[24] She has received counselling for depressed mood but did not believe the COVID-19 pandemic contributed to her lower mood.

[25] Intimacy with her spouse has been significantly impacted. She has recently begun volunteering with seniors approximately seven hours a week in one to two hour increments.

[26] She attempted to return to work shortly after the Accident but was unable to complete the tasks at hand. She struggled with memory and could not focus on her duties. She plans to work with an occupational therapist and wants to return to work but is concerned that her current symptoms eliminate the possibility of working at this time.

Defendants' Submissions Concerning the Plaintiff's Injuries

[27] The Defendant's' submissions focused on the possibilities of improvement in the plaintiff's condition with further treatments discussed by the attending experts and whether the blackouts were caused by the Accident.

[28] They also argued that there should be a substantial reduction in the plaintiff's entitlement to damages due to her failure to mitigate the effects of the injuries by pursuing an active rehabilitation program offered by "LifeMark".

Medical Opinions

[29] The plaintiff relied on the opinions of three medical doctors and the functional capacity evaluation performed by Ms. Caroline Cotton, an occupational therapist. The Defendants relied on an opinion from Dr. William Craig, a physiatrist.

Dr. Max Kleinman

[30] Dr. Kleinman examined the plaintiff on May 7, 2018 and provided a report dated May 31, 2018 (the "First Report") followed by a second report dated September 29, 2022 based on a virtual appointment with her on August 29, 2022 (the "Second Report").

[31] In the First Report, Dr. Kleinman reported that the plaintiff's presentation was multifactorial related to musculoskeletal pain, post-concussive syndrome secondary

to MTBI, and issues involving psychological disturbance. In May 2018, he said her current presentation includes:

> 1. [Whiplash Associated Disorder] WAD II injury cervicothoracic spine with chronic regional myofascial pain.
> 2. Biomechanical disorder of the lumbosacral spine.
> 3. Right knee chronic soft tissue sprain\strain, no evidence of internal derangement as per imaging.
> 4. Left hip trochanteric bursitis;
> 5. Chronic posttraumatic headaches – Multifactorial including issue secondary to a mild traumatic brain injury and development of a post concussion syndrome, further complicated by secondary issues including non-restorative sleep, possibly depressive symptomology as well as analgesic rebound headaches
> 6. chronic pain with associated depressive symptomology – the diagnosis of pain or the mood disorder requires a evaluation and is outside my area of expertise. I was not convinced of a true “chronic pain syndrome”; however, Ms. Burr does appear to be trending in this direction. She will need to be monitored with respect to this issue.

[32] Dr. Kleinman observed that there was a psychological component related to the MTBI and post-concussive syndrome that appeared to be a significant component of her presentation. She has difficulty with memory, concentration as well as with light and sound and problems with dizziness, all related to this issue. He said she may be experiencing some intermittent somatic referral.

[33] At that time of **his first report** Dr. Kleinman could not say that the plaintiff had reached her maximum medical recovery but the likelihood of complete recovery was negligible “and more likely zero”. He observed that her musculoskeletal injuries form a major component of her chronic pain with an apparent central sensitization and psychological overlay. Her overall prognosis is negative and the best that can be hoped for is to stabilize her condition to avoid further deterioration. **In his second report** he said she has now reached the state of maximum medical improvement that is encapsulated in the AMA Guides 6th edition as:

> the point at which a condition has stabilized and is unlikely to change (improve or worsen) substantially in the next year with or without treatment

[34] She was experiencing tingling in both hands and feet but Dr. Kleinman concluded this evidence did not support a neurological impairment diagnosis.

[35] Dr. Kleinman commented on the plaintiff's diminished functional tolerances involving activities at or above shoulder height, activities straining her neck and back, activities involving repetitive and subsisting postures, weight-bearing activities including walking, crouching, kneeling and bending, and activities involving executive function including memory, concentration and communication as well as multi-tasking. He said she will need to structure her activities and environments to balance her symptoms, limitations and functional needs.

[36] He concluded that there was a strong balance of probabilities that there is a causal link between the indexed accident and Ms. Burr's current presentation.

[37] Dr. Kleinman believes the plaintiff would benefit from participating in a comprehensive chronic pain program that would assist in management of her situation but not pain resolution.

[38] He concluded that the plaintiff was completely disabled from any occupation for which she would be reasonably suited by education, training or experience by reason of her accident related injuries. She has difficulty with respect to activities in and around her home as well as social and recreational activities. He considered her disabled in particular relating to the heavier demands around the home and her ability to participate in social and recreational activities.

[39] At the time of his second report in September 2022, Dr. Kleinman reviewed the plaintiff's history of treatment services and treating physicians. He concluded she had not had any significant improvement since his first contact with her. He said her presentation was characteristic of chronic pain syndrome but that she needs input from a mental health care practitioner. Nonetheless, her musculoskeletal injuries

remained a major component of her health that now includes chronic pain syndrome, difficulties with memory, concentration and focus and dizziness.

[40] Notwithstanding her earlier concussive symptomology, Dr. Kleinman opined in his Second Report that “her cognitive difficulties related to elements such as chronic pain, mood, sleep dysregulation as well as cognitive blunting effects of the medication she has been using.”

[41] Dr. Kleinman observed that the plaintiff is gaining some benefits from trigger point injections and relief with improvement in her sleep but concluded that her overall prognosis was poor and she was at a point of maximum medical improvement; he did not anticipate further recovery of function on a pain-free basis. He defined “maximum medical improvement” by reference to the AMA Guides 6th edition indicating that Ms. Burr has “reached this state” and therefore her “further recovery of function on a pain-free basis can no longer be anticipated to a reasonable degree of medical certainty and her condition should be considered permanent and static”.

[42] Under cross-examination at trial, Dr. Kleinman conceded that his opinion concerning her maximum medical improvement is made from the perspective of a physical medicine and rehabilitation expert. He also said that pain eradication was not a goal for the plaintiff but treatment should address “trying to make her more comfortable.”

[43] He said trigger point injections and a trial of Botox might make her headaches better.

[44] He opined that, subject to a vocational rehabilitation report and improvements in her mental health, the plaintiff was completely disabled from any occupation she was suited to and is by reason of the injuries disabled to the extent of heavier demands in and around the home. She is also unable to participate in social and recreational activities as before the accident and would be at risk of further exacerbations due to the forces and postures involved in her pre-Accident activities.

[45] Lastly, Dr. Kleinman said that the plaintiff did not report right shoulder pain at his first meeting with her; those symptoms were apparent only on his second encounter with the plaintiff and they could be unrelated to the Accident. He did not comment on the plaintiff's mention to Dr. Watt that she had pain behind her right shoulder blade in November 2016 and that she had decreased range of motion in her right shoulder in January 2017.

Dr. Vance Tsai

[46] Dr. Tsai is an otolaryngologist who provided an opinion in his January 14, 2019 letter. He reviewed the plaintiff's symptoms and reported concerns including dizziness and falls every month or two.

[47] He discussed the deployment of the airbag in the plaintiff's car and said this type of explosive deployment can cause acoustic injury to the inner ear. He said his objective testing results supported a vestibular pathology implicating a pathophysiology underlying her dizziness and affirming his conclusion that her abnormal balance function was related to her injury.

[48] He said deployment of the airbag was analogous to an explosion in a confined space. He observed that the mechanism of the injury was consistent with a traumatic inner pathology associated with imbalance concerns.

[49] Overall, he concluded that her dizziness was caused by the inner ear injuries sustained in the Accident and this dizziness plays a significant role in her inability to return to her previous occupation. The dizziness could be multifactorial. He did not believe further therapy would provide more than marginal improvement to her symptoms.

[50] He said she should avoid working on ladders or at heights as well as activities such as cycling or strenuous skiing. He also suggested that dizziness can impact a person's occupational future and can strain domestic relations.

[51] Under cross-examination, he noted that the plaintiff's experience with vertigo in 2005 or 2006 was not likely related to her current issues. He noted that she reported dizziness problems 18 days after the Accident, quite soon in relation to the cause of her dizziness. Moreover, he said that the plaintiff's experience with blacking out is not necessarily a vestibular issue but may be indicative of a vestibular problem.

[52] Finally, he recommended that the plaintiff have specialized vestibular physiotherapy as the gold standard for treating vestibular disorder. However, this therapy does not eradicate the impact of the injury.

[53] Under cross-examination, Dr. Tsai said that blacking out without preceding sensations is not characteristically related to a vestibular injury but experiences can be ambiguous. Blacking out is less consistent with a vestibular issue and could be cardiac or neurological in origin or could be multifactorial including the impact of a vestibular issue.

[54] Dr. Tsai said that if the plaintiff had received vestibular physiotherapy earlier she could have made gains in long-term results. He said that vestibular physiotherapy could be requested by the family doctor or a physiotherapist.

[55] He also said vestibular physiotherapy will not eliminate symptoms or underlying pathology but can lead to some marginal symptom improvement.

Dr. Michael Butterfield

[56] Dr. Butterfield is a neuropsychiatrist and pain medicine specialist. He reviewed the plaintiff's headache symptoms, right shoulder pain, neck pain, low back pain, dizziness, depression, cognitive function and PTSD symptoms. He concluded the plaintiff had a whiplash disorder, chronic right adhesive capsulitis, headaches attributable to her MTBI and possible whiplash with migrainous features, major depressive disorder secondary to MTBI, PTSD and major neurocognitive disorder secondary to MTBI.

[57] Dr. Butterfield opined that the plaintiff's prognosis was poor notwithstanding options for further symptom management. The comorbidity of PTSD, depressive disorder and multi-site chronic pain indicates a poor prognosis in terms of resolution of the symptoms.

[58] Under cross-examination Dr. Butterfield agreed the plaintiff had been involved in physiotherapy and occupational therapy rather than active rehabilitation. She had done some exposure therapy and cognitive behavioural therapy but he recommended more intense treatments in this area that could improve her function and mood.

[59] He endorsed the use of Botox for headache management and concluded that CGRP (calcitonin gene-related peptide) monoclonal antibodies could also be helpful in managing her headaches.

[60] Dr. Butterfield was "hopeful" that his recommendations concerning new medications would lead to a reduction in the plaintiff's headaches. He believed the plaintiff's problems arose from a constellation of symptoms, including her MTBI.

[61] Dr. Butterfield's testing of the plaintiff's cognitive abilities showed significant deficiencies, worse than he had seen in other patients.

[62] Dr. Butterfield recommended medication adjustments and frequent psychological treatments that may yield some limited improvement in her outcomes. Overall, he opined that if the plaintiff received more intense treatments, he would expect improvement with her headaches, PTSD and depression.

[63] He said she received some exposure therapy after 2020 had these treatments had been sub-optimal.

[64] Dr. Butterfield said the plaintiff was not yet at maximal improvement but the prognosis is poor due in part to the passage of time and other factors.

[65] He said interdisciplinary programs can improve outcomes, depending on the type of program. He said these multidisciplinary programs do not usually include

psychological services. Dr. Butterfield said that if the plaintiff's symptoms had been tackled earlier (closer to the time of the Accident), with active rehabilitation efforts, her chances of improvement would have been higher; but did not agree they would have been "much" higher.

Dr. William Craig

[66] Dr. Craig is a physical medicine and rehabilitation physician who examined the plaintiff on April 19, 2022.

[67] Dr. Craig opined that the plaintiff suffered the following injuries:

a) WAD Type II;

b) chronic right adhesive capsulitis;

c) persistent headache attributable to traumatic brain injury and possible whiplash migrainous features;

d) major depressive disorder secondary to traumatic brain injury;

e) PTSD; and

f) major neurocognitive disorder secondary to traumatic brain injury.

[68] Dr. Craig opined that the plaintiff's cognitive symptoms more likely than not resulted from mood issues, insomnia, medications, headaches, and her pain issues in addition to hr brain injury. He said she could adjust her medications to reduce her cognitive difficulties but that her headaches were most likely cervicogenic in nature and suggested that additional treatments were available.

[69] Dr. Craig concluded the plaintiff probably had a mild acquired brain injury but other factors likely contributed to her cognitive symptoms.

[70] He suggested that her right shoulder symptoms suggest a possible right rotator cuff tendinopathy but suggested an ultrasound "for completeness sake". He

also said her back and left hip pain were primarily myofascial and that a kinesiology program would be helpful.

[71] He suggested that a change in medication could improve her cervicogenic headaches and he suggested other measures that might improve her symptoms.

[72] He noted that she had degenerative changes in her knee as early as 2017 but was not reporting any symptoms at the time of his examination. Last, he said her mood disorders can be a barrier to recovery from pain depending on her pain threshold and perceived capacity. He did not provide an opinion on this question and deferred to a psychologist or psychiatrist on the issue.

[73] He said that from a physical perspective he did not believe she was unable to return to her pre-Accident employment. He suggested that her brain injury would not interfere with her ability to return to work. He thought she was overweight and should become more physically active.

[74] He said that sleep deprivation, mood disorders, headaches, pain and medications can cause cognitive symptoms. While consistent with a brain injury, the plaintiff symptoms were also consistent with mood and vestibular issues.

[75] Dr. Craig was cross-examined on the plaintiff's refusal to pursue an active rehabilitation program with a kinesiologist as a substitute for a physiotherapy program.

[76] Overall Dr. Craig did not believe the plaintiff's prognosis was guarded because there was some room for improvement. He felt there were many treatment options available to the plaintiff and that she could make progress in dealing with her cognitive issues if her mood difficulties could be resolved but he would defer to neurologists and otolaryngologists with regard to her dizziness and to a psychologist or psychiatrist on issues of depression, anxiety and mood disorders.

[77] The plaintiff contends Dr. Craig was unresponsive to cross-examination questions and demonstrated an unbalanced and biased approach to his evidence, including his opinion that the plaintiff's prognosis was not guarded.

[78] In his conclusion, Dr. Craig said the plaintiff suffered a moderate soft tissue injury to her mid and lower back with headaches that relate to ongoing myofascial pain in the neck and shoulders. He did not comment on her dizziness or mood complaints can be interpreted as save to say her symptoms could be due to a brain injury, mood problems and vestibular issues.

[79] Overall, I do not accept Dr. Craig's view that the constellation of the plaintiff's symptoms do not result in a guarded prognosis. In this regard, he does not deal with her psychological difficulties or her auditory injury. In my view, the opinions of Dr. Kleinman, Butterworth and Tsai are more reliable and persuasive.

Causation

[80] The plaintiff alleges that the Accident caused her a wide range of injuries, including concussion (MTBI), vestibular injury causing dizziness, chronic pain in the neck, shoulders and back, headaches, cognitive issues, depression, anxiety, and PTSD (the "Alleged Injuries"). Prior to the Accident, she was symptom-free aside from experiencing vertigo several years prior.

[81] The onus is on Ms. Burr to prove on a balance of probabilities that (1) she suffered the Alleged Injuries; and (2) that the Accident caused the Alleged Injuries. To establish causation, the plaintiff must demonstrate that but for the Accident she would not have suffered the Alleged Injuries: *Clements v. Clements,* 2012 SCC 32 at para. 8. Inherent in the "but for" test is a requirement that the Accident was necessary to bring about the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, 1996 CanLII 183; *Clements* at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[82] Ms. Burr need only establish a "substantial connection between the injury and the defendant's conduct", beyond the *de minimus* range, in order to establish

causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327, 1990 CanLII 70; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11. The “but for” test must be applied in a “robust common sense fashion” with no requirement for scientific evidence of the precise contribution the defendant’s negligence made to the injury: *Welder v. Lee*, 2019 BCSC 1328 at para. 76; *Clements* at para. 9.

[83] On the question of causation, I note at the outset that the Defendants do not dispute that most of the Alleged Injuries were in fact caused by the Accident, with the exception of the plaintiff’s blackouts, which I will address below. That said, the Defendants are at odds with the plaintiff on the future impact and severity of the Alleged Injuries.

[84] As laid out above in my review of the expert evidence, there is ample expert evidence adduced at trial to support the conclusion that the Accident did in fact cause the Alleged Injuries. I will address the Defendants’ contention that the Accident did not cause the plaintiff’s blackouts and that her injuries are not as severe as she contends.

[85] The defendant contends that the plaintiff’s experience with some infrequent blackouts in February 2021 is evidence of a health problem that is unrelated to the Accident. The plaintiff said these incidents happen without warning, such as dizziness.

[86] Dr. Tsai said that the plaintiff had suffered an auditory injury attributable to the deployment of the airbag and the car that provoked damage to her inner ear. He concluded that her dizziness resulted from the inner ear injury. On cross-examination he said the plaintiff’s blackouts without dizziness were less consistent with a vestibular cause, but experiences can be ambiguous and the vestibular issue could be a factor in the blackouts.

[87] Although the plaintiff had experienced vertigo in 2006, Dr. Tsai said these incidents were unrelated to the plaintiff’s current health issues.

[88] The plaintiff had not suffered blackouts prior to the Accident. She suffered a brain injury as a result of the Accident and I accept that her ongoing symptoms have multifactorial origins. I conclude that these blackouts are not frequent and are more likely connected to other injuries suffered from the Accident in spite of the absence of a definitive medical opinion on this point.

[89] The plaintiff is obliged to prove that the defendant's negligent caused her injury. However, where a defendant's negligence caused multiple injuries including a auditory injury and head injury, the absence of definitive scientific proof does not preclude the plaintiff's claim. On the facts of this case, it was open to the defendant to prove their negligence did not cause the plaintiff's condition leading to blackouts, but did not.

[90] The principles described by Sopinka J. in *Athey v. Leonati* are apposite. Justice Sopinka said in *Snell v. Farrell*, [1990] 2 S.C.R. 311:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.
>
> [Emphasis added.]

(See also *Sam v. Wilson*, 2007 BCCA 622).

[91] I find that the temporal connection between the accident and onset of these blackouts in addition to the wide range of other injuries suffered by the plaintiff, including that her brain injury and auditory injury, that I can infer that these symptoms were more likely than not caused by the negligence of the defendant. This is not a case where there are medical opinions presenting a contrary diagnosis; I am satisfied on the balance of probabilities with regard to common sense reasoning that the occurrence of the blackout events stems from the impact of the injuries caused by the defendants negligence.

[92] The plaintiff suffers from sleep difficulties, fatigue, and personality changes including irritability and anger. She struggles with daily activities and is unable to return to her previous employment.

[93] The medical experts agree she is suffering from a constellation of symptoms that are causing ongoing problems and is not likely to fully recover. The evidence has satisfied me that the plaintiff suffered a brain injury in addition to a vestibular injury and prolonged cognitive symptoms and dizziness are multifactorial in origin but all caused by the Accident.

[94] I accept that the plaintiff's injuries are permanent and will impair her ability to return to her pre-Accident physical health. Notwithstanding the opinions of Dr. Kleinman and Dr. Butterfield that the plaintiff has plateaued, there are prospects for improvement due to a considerable number of the treatment measures that the plaintiff has yet to pursue. These include Botox treatments for her headaches, vestibular physiotherapy, medication changes, ongoing psychological treatments and exposure therapy for PTSD, and continued occupational therapy.

[95] I am satisfied that the opinions of Dr. Kleinman, Dr. Tsai and Dr. Butterfield more persuasively explain the cause of the plaintiffs ongoing symptoms some of which are related to the psychological aftermath of this Accident for her. Notably, Dr. Craig deferred to the opinions of psychologists or psychiatrists on this point.

[96] The Defendants have argued the plaintiff "failed to participate in an active rehabilitation program of any kind". They say she did not begin working with an occupational therapist until spring of 2020 and did not have psychological therapy until the fall of 2020.

[97] I will address the Defendants' submissions concerning the plaintiff's failure to mitigate her losses below in these reasons.

[98] The Defendants pointed to the plaintiff's ability to take holidays in Mexico, Montréal and twice to Hawaii as activities indicating a higher level of recovery than suggested by the plaintiff. The defence also contended she was not as seriously impaired as she said she was, because she was able to use the Washington Property for socializing with friends after the Accident and that she was able to exercise in a swimming pool. The Defendants cite the plaintiff's volunteer work

providing support and companionship to seniors over seven hours a week, one to two hours at a time, as an indication of her improving function, albeit a modest step. They also contend the plaintiff will likely experience significant stress reduction with the conclusion of the litigation and suggest that alone will facilitate further improvement.

[99] I accept that with additional treatments and attention to other recommendations of the doctors, the plaintiff will likely have some very modest improvement in her symptoms and function. However, I accept Dr. Kleinman's opinion that complete recovery is unlikely and she will be left with symptoms in the long-term with risks of further "exacerbations or aggravation of the chronic soft tissue injuries that were sustained". The plaintiff has diminished functional tolerances and will need continuing re-evaluation from year-to-year. I do not accept the defendant's contention that the plaintiff is not as severely affected by her injuries as she presents.

Damages

[100] I turn now to consider the plaintiff's entitlement to damages under each of the heads claimed.

A. Non-Pecuniary Damages

[101] I find the plaintiff is entitled to $215,000 in non-pecuniary damages.

[102] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, disability, inconvenience, disfigurement, and loss of enjoyment of life": *Dikey v. Samieian*, 2008 BCSC 604 at para. 139. Assessment of non-pecuniary damages is generally informed by the non-exhaustive list of factors to be considered in assessing non-pecuniary damages as outlined in *Stapley v. Hejslet*, 2006 BCCA 34 at para 46:

> …
> (a) age of the plaintiff;
> (b) nature of the injury;

> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> …
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[103] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[104] The plaintiff referred to the following cases suggesting that non-pecuniary damages be assessed at $225,000:

a. *Gill v. Apeldoorn*, 2019 BCSC 798: The plaintiff was 45 years old at the time of the accident and suffered injuries for years leading up to trial, at which time he continued to experience psychological problems including depression and PTSD. He had soft tissue injuries, back neck and shoulder pain, headaches, and tingling in the arm. He was unable to return to his employment as a longshoreman and the evidence was that he might never be able to return to work. The Court awarded him $200,000 in non-pecuniary damages.

b. *Kempton v. Struke Estate,* 2020 BCSC 2094: the plaintiff had a serious learning disorder growing up and pre-existing anxiety, depression, and chronic back pain, as well as other pre-existing injuries. In 2015 he was in the subject accident. He did not suffer physical injuries beyond some minor problems but did exacerbate some pre-existing injuries. The accident caused a significant change in his personality and he suffered a loss of self-esteem in addition to significant psychological damage. The

Court found that he would have lifelong struggles with PTSD and depression and awarded him $200,000 in non-pecuniary damages.

c. *Owen v. Folster*, 2018 BCSC 143: the plaintiff was 46 years old at the time of the 2010 accident and suffered an MTBI. He had cognitive deficits with post-concussion syndrome symptoms including dizziness and light-headedness. He had chronic pain, headaches, behavioural changes, memory problems, psychological symptoms and nausea. His injured significantly impacted his vocational, recreational and domestic activities and resulted in changes in his personality, cognition, and general capabilities. The Court awarded him $210,000 in non-pecuniary damages.

d. *Tan v. Mintzler and Miller,* 2016 BCSC 1183: As a result of a 2012 accident when she was in her early 50s, the plaintiff suffered from chronic pain, depression, anxiety, mild PTSD, and mild cognitive difficulties including memory issues. She suffered an MTBI at the time of the collision involving psychological challenges. The plaintiff had a guarded prognosis with a poor expectation that pain in her face and jaw would lessen with treatment. There was some prospect of improving her psychological difficulties but she suffered from impairment of her relationship with her husband. She was unemployable and compromised in her ability to maintain her home. The Court awarded $210,000 in non-pecuniary damages.

e. *Moges v. Sanderson,* 2020 BCSC 1511: the plaintiff claimed damages for injuries sustained as a result of three accidents in his mid-20s. As a result, he suffered a complex of physical and psychological injuries accompanied by continuing pain in his neck, low back, right shoulder, knee and ankle. He suffered migraine headaches, myofascial pain and chronic pain with a moderately severe depressive disorder, generalized anxiety and somatic symptom disorder. The plaintiff's physical activities were limited to short walks, limited driving and sedentary tasks. The Court found him severely

restricted in his employment and other activities of daily living; the accidents left him with a “bleak future” and the Court awarded $200,000 in non-pecuniary damages.

[105] The Defendants referred to the following authorities to assist in assessing the plaintiff’s non-pecuniary damages which they suggest fall in the range of $120,000:

a. *Pan v. Lau*, 2020 BCSC 288: the plaintiff was 59 years old at the time of the accident. The Court found she had significant credibility issues and there was wide disparity in the opinions of some of the medical experts. The plaintiff did not suffer a brain injury but did have some diminished cognitive efficiency and difficulties with memory and concentration following the accident. She had some degree of back, shoulder and neck pain with continuing headaches and blurry vision. She had experienced gradual improvement of her physical symptoms but her psychological problems persisted. The Court awarded her $80,000 in non-pecuniary damages.

b. *Mandra v. Lu*, 2014 BCSC 2199: the plaintiff was a 53-year-old millwright who, as a result of a 2008 accident, was reduced to living with constant pain in his mid and upper back. He had neck pain, headaches and leg pain; he became nervous, forgetful and depressed. He was disabled from working and his social life and relationship with his spouse were impaired. The Court awarded him $75,000 in non-pecuniary damages.

c. *Sparks v. Keller*, 2022 BCSC 231: At the time of the trial, the plaintiff was 44 years old and suffering from headaches, nausea, blurred vision, memory difficulties, sleeping difficulties, neck shoulder arm and back pain, and symptoms into her legs as a result of a 2017 accident. She had some limitations walking, daily headaches, memory problems and anxiety when driving. Her symptoms had not changed in three years and were unlikely to improve. Overall her ability to work, care for her family, and enjoy family

activities affected her quality of life. The Court awarded her $125,000 in non-pecuniary damages.

d. *Luis v. Marchiori*, 2015 BCSC 1: in this case, the 49-year-old plaintiff had predominantly soft tissue injuries to her shoulder, chronic disabling pain in her neck, right shoulder and lower back, moderate to severe depression, PTSD, and weakness in her right hand. There had been two accidents and it was unlikely her pain, depression and PTSD would resolve. She was completely disabled from working, driving and domestic activities. The Court awarded $120,000 in non-pecuniary damages.

[106] In this case, the plaintiff is a 54-year-old woman who was involved in a serious collision causing her substantial ongoing and debilitating injuries in what was an immediately traumatic experience for her. It is clear on the evidence that the injuries Ms. Burr receive as a result of the Accident have had a profound and longstanding effect on her quality of life. The plaintiff's recovery has been slow and overshadowed by the psychological component related to the mild traumatic brain injury and post concussive syndrome.

[107] As a result of the Accident and her injuries, the plaintiff now suffers permanent chronic pain, headaches, and dizziness, blackouts, symptoms of an MTBI, cognitive impairments, depression and anxiety. She experiences pain on a daily basis limiting her physical abilities.

[108] Before the Accident, the plaintiff had an active life style recreationally, domestically, socially and vocationally. She dedicated substantial time to her son's baseball career resulting in some absences from work before the Accident. The plaintiff was at a significant turning point in her life shortly before the Accident; her son had recently left home and begun University leaving her with greater freedom to assume additional duties at her employment where she had a promising future in her career. There is no doubt that but for the Accident the plaintiff would have continued to be active in sports, her career and her social life.

[109] The plaintiff contends that before the Accident she was a positive, hard-working and socially active individual. She had been involved in sports her entire life and regularly participated in skiing, golf, biking, hiking and family activities and was without limitations recreationally, vocationally and socially.

[110] The testimony from her spouse, daughter Stevie Burr, friend Maureen Power, Dr. Cam Garrett (a former dentist at the Dental Clinic) and Dr. Aly Kanani, (her employer), underscored the features of the plaintiff's pre-Accident condition, performance and activity levels contrasted with their observations of her personality, activity, and performance, in her post-Accident life.

[111] She has lost much since the accident, notably the ability to progress in a challenging and remunerative career. The loss of the social context of work for a woman who cared for her children in their early years followed by entry into a career she enjoyed is significant.

[112] Having examined the authorities provided by the Defendants and the plaintiff, I am satisfied that the cases most closely reflecting the extent and nature of injuries suffered by the plaintiff in this case are *Tan*, *Owen* and *Moges* which, after accounting for inflation, were awards in the range of $229,000 to $255,000 in 2023 dollars.

[113] I have taken into account all of the awards referred to by the Defendants and the plaintiff and the principles referred to in *Stapley* conclude that the sum of $215,000 appropriately reflects the impacts of the plaintiff's injuries on her post-Accident life and future prospects of improvement.

B. Past Loss of Earning Capacity

[114] The plaintiff contends that her net income loss from the date of the Accident until trial is $409,936 (net):

a) 2016 at $12,325;

b) 2017 at $53,611;

c) 2018 at $80,000 (net less 20%);

d) 2019 at $80,000 (net less 20%);

e) 2020 at $90,000 (net less 20%);

f) 2021 at $90,000 (net less 20%); and

g) 2022 at $100,000 (net less 20%).

[115] The Defendants contend that gross past wage loss should be assessed at $325,000. The Defendants' sum is arrived at by calculating past income losses:

a) 2016 at $10,000

b) 2017 at $50,000;

c) 2018 at $50,000;

d) 2019 at $50,000;

e) 2020 at $55,000;

f) 2021 at $55,000; and

g) 2022 at $55,000.

[116] The Defendants contend the plaintiff worked 32 hours per week on average before the Accident. There was a discrepancy between the evidence of Ms. Cotton and the plaintiff concerning the plaintiff's work schedule. Ms. Cotton said the plaintiff reported to her working Tuesday to Friday whereas the plaintiff testified she worked Monday to Thursday. Nothing turns on which specific days of the week she was working. The Defendants contend the plaintiff would not have, and did not intend to increase her work schedule to 40 hours per week after her son left for University.

[117] For approximately 15 years before the Accident, the plaintiff had worked at Willowbrook Dental Clinic, owned by Dr. Aly Kanani since 2013. The plaintiff viewed

her role at the Dental Clinic as a full-time position, although she spent significant amounts of time taking her son to baseball tournaments. She would work hard to finish her weekly duties in four days to facilitate taking Fridays off. If she took Friday off, she was not paid for that day.

[118] The Defendants contend there was no realistic prospect of the Dental Clinic paying the plaintiff more than $55,000 per year after 2019 and that the gross wage loss does not exceed $325,000. The plaintiff asserted, based on the evidence below, that her salary would have increased substantially over the years between the Accident and the trial.

[119] The assessment of the plaintiff's past income loss is informed by the testimony of Dr. Kanani. He is an orthodontist practising in the Langley and Surrey communities for 16 years. Together with his wife, a general dentist, they are involved in 30 clinics in the lower mainland of BC. Dr. Kanani met the plaintiff in December 2013 when he and his wife acquired the Dental Clinic in Willowbrook.

[120] Dr. Kanani worked at a clinic approximately two kilometres away from the Dental Clinic and had regular contact with the plaintiff after him and his wife took over the clinic in 2013. He and his wife relied heavily on the plaintiff in her role as clinic manager for general oversight of the Dental Clinic. He described the plaintiff as an exceptionally hard-working and meticulous employee who was well-liked in her role as clinic manager.

[121] His contact with the plaintiff occurred both at the clinic and after hours when they dealt with workplace issues.

[122] He testified that if the plaintiff had not stopped working after the 2016 Accident, she would have remained office manager at the Dental Clinic with the prospect of expanding her duties. He said the current office manager of the Dental Clinic is now paid $100,000 per year. He has office managers at his other clinics but the Dental Clinic is one of the two top clinics in their group of dental clinics.

[123] Dr. Kanani said the salary for the office manager at the Dental Clinic increased for a number of reasons: he and his wife reward longevity in employees; the clinic is very busy and has grown dramatically; and he believed it was necessary to increase wages to keep talent. Dr. Kanani confirmed that he and the plaintiff had an understanding that she would take time away from work to support her children's activities. As long as she performed all of her duties, she was allowed to take time off without pay.

[124] Since 2016, the scope of business and managerial duties at the Dental Clinic has increased significantly. Dr. Kanani testified he discussed with the plaintiff expanding her role to include oversight of three clinics. The discussion centred around the possibility of the plaintiff becoming a regional manager for those clinics in her area including the Dental Clinic and two satellite clinics. The current salary for a regional manager is in the range of $115,000–$120,000.

[125] Dr. Kanani testified that he believed he had more than one discussion with the plaintiff about expanding her role; he believed that the last discussion they had was within one to two months of the Accident. The plaintiff's testimony was less specific; she said that she had had a conversation with Dr. Kanani about moving into a higher paying position with his dental practice and she very much wanted to progress in her career into a position with higher pay and responsibility.

[126] Dr. Kanani was questioned about a statement given by his wife to someone assisting the Defendants in preparation for this trial. In his wife's statement, she did not make any reference to the potential for the plaintiff's promotion and suggested she would have continued working as an office manager. He witnessed his wife's statement but was uncertain if he had discussed the contents with his wife.

[127] Dr. Kanani acknowledged that the plaintiff was earning $32.50 per hour in October 2016 and, at that time, was receiving a competitive wage. In cross-examination, it was suggested that he would not have voluntarily increased the plaintiff's wages spontaneously. He was most adamant that he would have provided

voluntary salary increases to retain top talent (the plaintiff) at his clinics and that it was important to be proactive in offering salaries to retain staff.

[128] Dr. Kanani said that his clinics were closed for between two and three months during the COVID-19 pandemic, although clinics were never fully closed, phones were answered and emergencies dealt with.

[129] Overall, Dr. Kanani was a forthright and compelling witness in describing the growth and extent of his 30 dental and orthodontic offices in the lower mainland and the plaintiff's prospects. His testimony was not seriously undermined in cross-examination and I am satisfied that if the plaintiff were working today at the Dental Clinic, her salary would be in the order of $100,000–$115,000 based on an hourly rate of $45–$55. I do not find any significant inconsistency between Dr. Kananis' testimony and the details set out in the written statement given by his wife.

[130] I also accept that if the plaintiff had been promoted to a regional manager's position, her salary at present could be in the range of $115,000–$120,000.

[131] The principles applicable to claims for past income loss were set out by Justice Garson in *Ibbitson v. Cooper*, 2012 BCCA 249. The Court in *Ibbitson* said:

> [19] While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

(See also *Hardychuk v. Johnstone,* 2012 BCSC 1359 at para. 178.)

[132] In this assessment of past income loss, the question is what *would* the plaintiff have earned between the date of the Accident and trial, not what *could* have been earned: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v.*

British Columbia, 2003 SCC 53 at para. 49. The assessment involves a consideration of hypotheticals which are a real and substantial possibility: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Rab v. Prescott,* 2021 BCCA 345 at para. 28.

[133] I am satisfied that the plaintiff was rendered incapable of doing her duties at the Dental Clinic by virtue of the Accident and could not have worked for an income for any other employer up to and including the trial date.

[134] There is some certainty concerning the timing of when the plaintiff would have received salary increases but I am satisfied that her salary would have increased between 2017 and 2022.

[135] Dr. Garrett, a former dentist with the Dental Clinic testified that he was paying an office manager $80,000 per year but that person left his employ for a higher salary. The plaintiff's daughter, Stevie Burr, is the manager of a similar dental practice and she earns $115,000 per year.

[136] The plaintiff invites the Court to assume she would have received her pre-Accident salary for 2016 and 2017 and that her salary would have been increased to $80,000 per year for 2018 and 2019, based on the testimony of Dr. Garrett and Dr. Kanani. She contends that her salary would have risen again to $90,000 for 2020 and 2021 and to $100,000 in 2022.I accept the plaintiff's assertions that the plaintiff's salary as set out in economist Darren Benning's report (the "Benning Report") was 14.3% below her actual income for 2017 because he used a 31 hour work week in his calculations.

[137] I am not satisfied the plaintiff would have begun working five days per week until 2017. After her son left for university, she had not returned to working five days per week when the Accident happened and her transition to full-time work would more likely have started in 2017.

[138] I do not accept that the net loss for 2018 through 2022 should be subject to a 20% reduction to achieve a net loss without a proper accounting of those tax

deductions which, if not agreed, will be referred to the registrar for a report and recommendation concerning the net amounts payable.

[139] The assessment of the plaintiff's past wage loss reflects the interruption in income that would have occurred as a result of the COVID-19 pandemic and the closure of the Dental Clinic. Dr. Garrett testified that his practice was closed for two and a half months due to COVID-19. Ms. Burr testified that her employment was interrupted for three months due to COVID-19. Dr. Kanani said his clinics were closed between two and three months, but could not recall if they were fully closed because telephones were still being answered.

[140] As indicated, the Court's assessment of her loss of past earning capacity must take into account the plaintiff's impaired earning capacity up to 2022 and the amount should reflect what she *would have* earned but for the Accident. On the evidence, I am unable to assess this claim on a mathematical calculation of the amount the plaintiff would have been paid if she had not been injured because there are no specific dates available as to when her salary may have increased. , I am satisfied that the assessment of the plaintiff's past earning capacity has been proved based on the real and substantial possibility that the plaintiff would have worked continuously from October 2016 to the trial date and on a full-time basis after January 2017. In my view there is **no real or substantial chance the plaintiff would not** have worked continuously until the trial absent the injuries from the accident (emphasis added).

[141] Taking into account Dr. Kanani's and Dr. Garrett's testimony, and taking into account the uncertainties I have discussed, I assess the loss of the value of the work the plaintiff would have performed but for her injury, at $509,000 (gross), taking into account a two and a half month employment interruption during the COVID-19 pandemic and the delay in her return to full-time work until 2017, and subject to deductions as set out in s. 98 of the *Insurance (Vehicle) Act,* R.S.B.C. 1996 c. 231 [*Act*].

[142] If the parties are unable to agree on the deductions to be taken into account under the *Act*, either party will have liberty to apply for a determination of this issue.

C. Future Loss of Income Earning Capacity

Legal Framework

[143] Plaintiffs injured as a result of a tortfeasor's negligence are entitled to be put into the position they would have been in had the collision not happened, insofar as money can compensate for that loss: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8.

[144] In *Pololos v. Cinnamon-Lopez,* 2016 BCSC 81, Voith J. (as he then was) summarized the principles applicable to an analysis under this head of damage:

> [133] The relevant legal principles are well-established:
>
> a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
>
> b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
>
> c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
>
> d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
>
> e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
>
> f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, 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.

> g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[145] The framework for assessing a claim of this kind was more recently described by Justice Grauer in *Rab* at para. 47, in his summary of the three-step process for examining future earning capacity losses. To summarize, the Court said:

a) the evidence must disclose a *potential* future event, most often chronic injury, that could damage an individual's capacity to earn income;

b) there must be a real and substantial possibility that the future event will cause a pecuniary loss: and

c) to value the possible future loss, there must be an assessment of the relative likelihood of the possible event occurring.

[146] At the end of the assessment, the court must take into account whether a damage award assessed under this head is fair and reasonable: *Rab* at para. 47; *Lo v. Vos,* 2021 BCCA 421 at para. 117. The principles concerning overall fairness and reasonableness of an award were discussed in *Jurczak v. Mauro*, 2013 BCCA 50 and *Rosvold.* In summary, those cases said:

a) the assessment of a loss is a fact-intensive, case-specific inquiry, and the trial judge is in the best place to determine what is fair and reasonable (*Jurczak* at para. 11);

b) The overall fairness and reasonableness of the award must be considered taking into account all the evidence (*Rosvold* at para. 11); and

c) Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable (*Jurczak* at para. 36).

[147] Assessing loss of future earning capacity requires a comparison of the evidence of the plaintiff's likely future working life if the Accident had not happened

with the plaintiff's likely future working life after the Accident: *Rosvold* at para. 11; *Pololos* at para. 133. I conclude that the appropriate approach warranted by the evidence in this case is the earnings approach.

Submissions of the Parties

[148] The Defendants concede that the plaintiff has suffered an impairment to her future earning capacity. The Defendants take the position that the plaintiff's future loss of income earning capacity should be assessed at $346,500 based on a future without-accident earning capacity of $60,000 per year ($40 per hour at 30.5 hours per week).

[149] These submissions rested on five hypotheticals which, if taken into account, would reduce the value of the damage to the plaintiff's future earning capacity. Those four hypotheticals are:

a) the plaintiff was working 30 hours per week over the four years before the Accident and would not likely have increased those hours absent the Accident and the plaintiff's income would have been paid based on that factor;

b) the plaintiff would more likely than not have retired no later than her 64th birthday;

c) it is possible that the plaintiff will return to work in the future; and

d) the plaintiff's medical history of blackouts constitutes a measurable risk that, absent the Accident, the plaintiff would have missed time from work in any event because of an underlying medical condition that would cause blackouts.

[150] The Defendants contend there is a possibility the plaintiff's function will improve and she will be able to return to work before age 64 and her pre-Accident propensity toward blackouts would likely have been disabling even without the injuries caused by the Accident. They contend the potential for blackouts disabling her from employment should be assessed as a 5% possibility.

[151] The Defendants contend that there is a real and substantial possibility for improvement in the plaintiff's headaches, mood disorders, cognitive difficulties, dizziness, and pain symptoms such that she could return to some form of employment before age 64. They argued that this hypothetical possibility is not mere speculation but can be assessed in light of her prospects for improvement. The Defendants also referred to the plaintiff's recent volunteer work, her motivation to return to work, and potential improvement in her cognitive impairments. The Defendants stressed that during the trial, the plaintiff was lucid and displayed a grasp of issues in her responses to various questions posed to her. The Defendants do not deny the plaintiff has memory issues but submit that those features do not prevent her from returning to work in some capacity.

[152] This submission is also based on the assertion that the plaintiff's without-Accident hours of work of 30 hours per week at $40 per hour from the date of trial to age 64 would produce total earnings of $466,500 net present value ("NPV"). The defendants contend that without the Accident the plaintiff would have worked only until age 64.

[153] The Defendants contend there is a real and substantial possibility the plaintiff will be able to earn $25 per hour for 20 hours per week of part-time employment after two years from the trial. Taking into account that she will require two years to undergo recommended treatments, this level of income could generate $200,000 until age 64. They suggest there is a 60% possibility she will earn income before her expected retirement date. Thus, to account for this contingency, they say her loss of future earning capacity should be valued at $346,500; this sum represents a 25% reduction in the plaintiff's damages under this head of damages.

[154] The Defendants also urged the Court to take into account the return to work contingency summarized in *Colgrove v. Sandberg*, 2022 BCSC 671.

[155] The defendants also argued there should be a further 5% reduction of the plaintiff's damages because she suffered blackouts in 2021 that would have occurred even if the Accident had not happened. The defence claims it should not

be responsible for a loss not caused by the Accident. They say there is a real and substantial possibility that blackouts will affect her employment income in the future and should result in a total reduction of 30% which further reduces the loss to $326,550.

[156] The plaintiff claims $1,200,000 for loss of future earning capacity on the basis she would likely have worked well past age 65 and her salary would have increased to $100,000 per year by the time of trial with a potential for further increases if she was to be promoted.

[157] She submits there is no real or substantial possibility she will be able to return to her pre-Accident employment or any other significant employment and the measure of her damages for loss of future earnings should be valued by comparing what she would likely have earned at the Dental Clinic after 2022 but-for the Accident and what she will be able to earn in the future, given her injuries. She contends she will not earn any income between the trial date and her likely retirement date.

Analysis

[158] I find there is a real and substantial possibility that the plaintiff's capacity to earn income has been diminished because of the injuries caused by the defendant's negligence. She will earn less income between the trial date and her retirement date than she would have without the Accident.

[159] Both parties' submissions focused on the earnings approach to this assessment rather than the capital asset approach. The differences in positions turned on the question of whether the plaintiff would likely return to work in the future, whether she would have suffered blackouts unrelated to the Accident that would have interfered with her ability to earn income and when she likely would have retired absent the consequences of the Accident.

[160] In this case, the medical evidence of Dr. Kleinman and Dr. Butterfield allow for the possibility of some improvement in the plaintiff's symptoms and ongoing

disability. Overall, Dr. Kleinman initially believed she had not achieved maximum improvement but later considered the plaintiff's prognosis to be poor and concluded that she had reached the state of maximum medical improvement and would not be pain-free in the future. She has diminished functional tolerances and will continue to need assistance with her chronic pain that impedes her ability to return to work.

[161] Any expected improvement in her symptoms will be minimal.

[162] Moreover, the physical capacity evaluation performed by Ms. Cotton indicated the plaintiff would only be suitable for some part-time work but she was not competitively employable on a part-time basis.

[163] Ms. Cotton opined that the plaintiff's pre-Accident employment required a "high level of cognitive ability". In her role at the Dental Clinic, the plaintiff was responsible for running eight different dentists' practices. She was also responsible for billing, payments and other high-level tasks. Based on Ms. Cotton's assessment findings, Ms. Burr "has reduced cognitive capacity at this time, and this should be more thoroughly investigated via neuropsychological testing". In her summary, Ms. Cotton said that the plaintiff would be able to:

> …physically tolerate very part-time, sedentary work in an environment that allowed her to be flexible with varying her position, taking breaks, and having a slower pace of work. From a cognitive standpoint, it is questionable that she would be able to tolerate the complex demands of a managerial position, and this should be further evaluated by the appropriate professional.

[164] The plaintiff has balance difficulties due to the damage to her inner ear and should not be working on ladders or heights. After two years from the time of the Accident, Dr. Tsai opined that vestibular physiotherapy would be marginally helpful to her.

[165] In Dr. Butterfield's summary of the plaintiff's condition, he observed there are some further treatment options. He felt that her injuries and symptoms will continue to have a significant impact on her income earning ability in part due to chronic pain, cognitive symptoms and psychiatric symptoms.

[166] Dr. Craig did not find any physical symptoms that would prevent the plaintiff from working but he deferred to opinions of an otolaryngologist and neurologist as to how her dizziness would affect participation in exercise programs.

[167] Regarding the blackouts, the plaintiff says that some of her blackouts were preceded by dizziness and others were not. Dr. Tsai opined that people with inner ear injuries are unable to fully articulate such events, understandably because they become unconscious during the incident.

[168] The plaintiff contends the only reasonable inference concerning the blackouts is that they happen infrequently and are likely related to the vestibular pathology. There was no reliable evidence about how often these events happened or when they occurred or whether the effects would disable a person from remaining at work and performing duties after recovering consciousness.

[169] The Defendants contend these blackouts that happened in 2021 indicate that she would have suffered income loss in the future as a result of falls related to blackouts.

[170] However, there was no evidence that she had experienced these blackouts before the Accident or that the blackouts had lasting effects or were disabling of the plaintiff except on a temporary basis. There is little meaningful basis to assess the probability of these occurrences without the Accident or the potential impact on her earnings.

[171] I conclude the evidence does not support an inference that there is any reasonable or measurable chance that these incidents would have interfered with the plaintiff's ability to earn income absent the Accident warranting a 5% reduction in her damage award.

Conclusion: Future Income Loss

[172] I am satisfied the plaintiff has proved there is a real and substantial possibility she will experience a loss of income from the date of trial until age 65 caused by the ongoing effects of the injuries she suffered in the Accident.

[173] In weighing the possibilities and probability concerning the plaintiff's prospects, I find that but-for the Accident it is likely she would have benefited from substantial salary increases payable by her employer. Dr. Kanani's testimony provides persuasive and credible evidence. I have accepted that her income would have likely increased by the trial date. Those increases would have formed the basis of her future compensation.

[174] Taking into account Dr. Kanani's testimony, I find that by 2022 the plaintiff would likely have earned in the order of $100,000 per year as clinic manager and there was also a reasonable possibility the plaintiff's income could have increased to as much as $115,000 if she had become a regional manager for his clinics. This possibility of the plaintiff achieving a more rewarding position is one contingency that maybe taken into account.

[175] Dr. Kanani testified that he intermittently increased staff salaries, in part to reward for past performance and to retain valuable staff. He said the plaintiff would have been earning approximately $100,000 at the date of trial. The testimony of Dr. Garrett reinforces the fact that managers of dental practices were receiving substantially higher incomes by 2018 and in the market for staff, it is more difficult to find office management staff. Similarly, Stevie Burr, the plaintiff's daughter, testified about her employment as a dental office manager; she earned incomes of $113,000 in 2021 and $115,000 in 2022.

[176] Although the Defendants pointed to some inconsistencies in testimony concerning conversations between the plaintiff and her employers about the future, I accept Dr. Kanani's testimony that, but for the Accident, the plaintiff would have continued as clinic manager with the potential of a promotion to regional manager of other clinics, and a commensurate salary increase.

[177] Mr. Benning included in his testimony that statistically, women on average retire by age 63 or 64. It is possible that the plaintiff might have retired before 65. The age of her spouse (73) when she became 65 might have factored into her decision to retire earlier than 65. That said, Mr. Unger testified that his work was not physically demanding and that he could likely continue working beyond age 65 himself. I accept the Defendants' contention that there are other reasons why people retire early, including family obligations, illness, declines in physical durability, and changes in life's focus.

[178] In the past, the plaintiff had taken time away from work, in part to assist her son in pursuit of his baseball career. She testified that she had been a homemaker and managed her family's affairs until her children were of an age that she could look for work. At that juncture, she said it was her "turn" to pursue a career of her own choosing. Based on the plaintiff's history of not working while raising her family and obtaining a significant management position later in life, I conclude that the plaintiff's future income loss should be calculated to age 65. The plaintiff and her spouse indicated they had not formed any plan to retire at a specific age and it would be speculative to consider a retirement date before or after age 65.

[179] In my view, the comments of Gomery J. in *Colgrove* at para. 123 that retirement at 65 is a societal norm are apposite. The Court said 65 is an age when persons will or may receive their Canada Pension Plan benefits and old age security payments and marks a most likely retirement age.

[180] Turning to the plaintiff's with-Accident future earning capacity, the occupational therapist, Ms. Cotton, opined that the plaintiff is not competitively employable or physically able to tolerate work except for "very part-time sedentary work in an environment that allowed her to be flexible".

[181] Although there is a possibility the plaintiff might return to part-time work, I conclude the circumstances do not suggest she has a meaningful chance of recovering to a level that she could work on any sustained part-time basis without

accommodations and support. She will not likely be able to work on a part-time basis at the level suggested by the Defendants (emphasis added).

[182] The plaintiff's cognitive deficits, dizziness, chronic pain, cognitive symptoms and psychiatric symptoms will continue to dramatically limit her ability to return to work and diminish any chance that she can earn income from any employment save and except some minimal part-time work.

[183] I am required to assess the overall likelihood of her succeeding in a return to some type of employment following further treatment. I find that further treatment improving the plaintiff's function to the point that she can return to some type of part-time employment will not likely come to fruition for many months or years. There was no evidence concerning the question of when such steps might raise her level of function to the point that she could return to some type of work.

[184] The Defendants contend there is a 60% likelihood the plaintiff might obtain part-time employment at 20 hours per week in two years, producing $200,000 in income by age 63.

[185] Taking into account there is medical evidence that there are a number of treatment options and other measures the plaintiff may pursue that could result in improving her overall physical and emotional condition and facilitate a return to some kind of work I accept there is a real and substantial possibility she might earn some income in the future. Although the prospects of the plaintiff achieving significant earnings from employment are minimal I assess that there is a 7.5% chance of the plaintiff achieving earnings.

[186] Taking into account the uncertainty of when, or if, she might be capable of part-time work, the level of prospective income she might earn (which will depend heavily on her recovery from cognitive deficits), and the need for a flexible employer, I estimate the probability of her having future income to age 65 reduces her loss to 92.5%.

[187] In my view, the plaintiff's loss of future income earning capacity from the date of trial to age 65 is based on a without-Accident income of $100,000 per year, reduced to $92,500 after taking into account the negative contingency that she may be able to return to work before age 65 and earn some income. In this case, there is some evidence the plaintiff's income could have exceeded $100,000 per annum if she had been promoted to a regional manager of Dr. Kanani's clinics. The prospect of her promotion to regional manager represents a positive contingency.

[188] I make no reduction in the award on the basis that the plaintiff's without-Accident income might have been affected by blackouts. The evidence does not support the argument that the plaintiff's history of blackouts proves that, absent the Accident, she would have lost work days due to such incidents.

[189] The Defendants urge the Court to measure the plaintiff's loss of future earning capacity using a present value multiplier of $7,775 to age 63 as set out by economist, Mr. Benning. This multiplier takes into account reductions for labour market contingencies and premature death. The Defendants suggest that the actuarial multiplier ($10,793 to age 65) would not accurately reflect the plaintiff's future because it only includes contingencies for premature death. The third multiplier provided by Mr. Benning was an economic multiplier ($8,139 to age 65), which takes into account only labour market contingencies and survival rates.

[190] It seems to me that the appropriate multiplier should take into account the actuarial multiplier with adjustments for other positive and negative contingencies. There is no mathematical certainty on how these contingencies will operate in the plaintiff's life and I am satisfied that the midpoint between the economic multiplier and actuarial multiplier to age 65, or $9,466 for every thousand dollars of lost income, should be applied to reflect all contingencies, including the real and substantial possibility she might have been promoted to regional manager with a commensurate increase in her income, impacting an assessment of the NPV of the plaintiff's income stream to age 65 as well as the other possibilities of early withdrawal from the work force. In this case, the plaintiff's award for loss of future

income earning capacity is $946,600 less 7.5% to reflect her future income prospects.

[191] Taking into account that I have estimated the chance the plaintiff may earn part-time income before age 65 at 7.5%, I assess the value of her impaired earning capacity caused by the Accident at $875,000.

D. Cost of Future Care

[192] The plaintiff seeks an award of $262,106 to compensate for her future care costs including $133,508 to compensate for her impaired housekeeping capacity into the future. By contrast, the Defendants contend the plaintiff should be awarded $72,500 which includes $20,000 in housekeeping costs.

[193] The plaintiff's claims for one-time expenses include:

- occupational therapy at $5192;
- rehabilitation services at $13,500;
- vestibular physiotherapy $1126;
- kinesiology at $1726;
- psychology at $3771;
- driver's rehabilitation at $4133;
- recumbent bike at $811; and
- walking poles at $113.

[194] The plaintiff's claims for yearly costs include:

- non-prescription medications $18,020
- kinesiology at $18,154;

- housekeeping at $ 133,508;
- lawn care at $37,085;
- peri care at $1,708;
- duloxetine at $20,717;
- amitriptyline at $870;
- tramadol $3770; and
- gabapentin at $4178.

[195] The Defendants accept that the one-time expenses for occupational therapy, rehabilitation services, vestibular physiotherapy, kinesiology treatment and psychology are appropriate. The Defendants also accept the yearly expenses for gabapentin is appropriate. The Defendants contend that an allowance for housekeeping should be limited to $20,000, non-prescription medications to $5000, and duloxetine to $10,358.

[196] The plaintiff concedes that the rehabilitation services, at $13,500, are not required and should be deleted from the claimant.

[197] I will address the plaintiff's claims that have not been expressly conceded by the Defendants.

E. Loss of Housekeeping Capacity

[198] The plaintiff is seeks damages to her housekeeping capacity, both before trial and into the future. I will deal with these claims together.

[199] The guiding principles were set out in *Kim v. Lin*, 2018 BCCA 77:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of

> amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[200] She submits that the net present value of her future loss under this head this claim is $133,508. She also claims $93,600 is the measure of her past loss of housekeeping capacity from the date of the accident to the date of trial. This latter sum is based on a calculation of the cost of hiring a housekeeper based on the extra hours her husband dedicated to housekeeping work she had performed before the accident.

[201] Based on the nature and extent of the plaintiff's injuries and capacity, I find that the proper award should compensate for the loss of her capacity rather than assessing that claim as part of her nonpecuniary damage award.

[202] Ms. Cotton's recommendation for future services she will not be able to perform is based on the plaintiff's report that she cannot tolerate bending, putting her head down, and heavier tasks associated with housekeeping needs. Before the Accident, the plaintiff performed 70% of the household upkeep duties; at present she is reduced to doing approximately 10% of that work. The plaintiff's spouse is currently spending 10 to 12 hours weekly in performing all of the household duties not done by outside help or the plaintiff.

[203] The plaintiff is now able to do light dusting, vacuuming, laundry and general tidying. She previously engaged an outside service provider to assist in housekeeping duties at $30 per hour but stopped the service before the trial.

[204] Ms. Cotton's recommendation is that three hours per week of housekeeping assistance (156 hours per year) would allow Mr. Unger to return to his pre-Accident level of housekeeping work. She estimates that costs for professional service providers range from $34 to $50 per hour, meaning a yearly cost of between $5304 and $7800.

[205] The plaintiff and her husband retained replacement services to assist in housekeeping that she was unable to perform before trial. I find that this type of assistance will be needed into the future due to her damaged capacity to do many of the household chores.

[206] Dr. Kleinman said that the plaintiff is “at least partially disabled, in particular as it relates to heavier housekeeping and home maintenance, as a direct result of the indexed accident.” He also stated that her disability relates to “heavier physical demands”.

[207] I accept that the plaintiff was before trial and is now rendered less able to perform housekeeping activity at the same level she performed before the Accident. She continues to be able to perform some duties and her husband has shouldered substantially more responsibility for this work than before the Accident. Based on the recommendations by the physicians concerning medication changes, treatment changes, and additional treatments, I am satisfied there is some prospect that her physical condition will improve in the future. Once she receives vestibular physiotherapy she may achieve some modest improvement. Following these improvements, there is reason to expect she will increase her abilities to perform domestic chores outlined in the report. There is no certainty on the question of when the plaintiff’s condition will improve, if ever, nor the extent of that improvement. Nonetheless she will remain somewhat disabled in performing household duties.

[208] It must always be remembered this is an assessment of the impairment to the plaintiff’s capability to perform at her pre-Accident level of housekeeping. It is my conclusion that housekeeping help at two hours per week will sufficiently compensate for the plaintiff’s loss and that this help can be obtained for as little as $30 per hour.

[209] Taking into account the net present value of yearly costs calculated by Mr. Benning, I find that the lifetime value of the impairment to the plaintiff’s housekeeping capacity is $90,000. I have estimated that sum at approximately 70%

of the amount claimed keeping in mind that the plaintiff's capacity may yet improve and that she is motivated to improve her function.

[210] The claim for past loss of her housekeeping capacity at $93,600 is predicated on her husband's estimate of the number of hours he committed to housekeeping work over six years at 520 hours per year; at $30 per hour the replacement cost for the work not performed by the plaintiff would be $93,600.

[211] It must be remembered that the plaintiff testified that she was performing 70% of the housekeeping chores whereas she currently is able to perform only 10% of those chores. Taking into account these factors I have concluded that a fair estimate of the value of the impact of the plaintiff's injuries on her housekeeping capacity is $60,000.

Lawn Care

[212] Ms. Cotton recommended hiring someone to mow the plaintiff's lawn two to three hours per week. It is important to note that Mr. Unger said that the outdoor work at the house was shared between them and both of them were engaged in cutting the grass before the Accident. He currently cuts the grass once every two weeks. I do not accept that the plaintiff was the only family member to cut the grass (her son Jesse and Mr. Unger also cut the lawn). Furthermore, I am not satisfied that the plaintiff would have been cutting the grass to age 80 absent the Accident. Overall, I estimate the value of the plaintiff's impaired ability to do outside work at $10,000.

Kinesiologist

[213] Ms. Cotton opined that the plaintiff would be able to complete exercises in her home on the advice of the kinesiologist who came to her home. She estimated that the plaintiff might initially require between six and ten sessions totalling $1200–$2125 including travel costs. The Defendants accept the plaintiff's claim for initial kinesiology assistance at $1726.

[214] The parties do not agree on the plaintiff receiving compensation for check-ins three to four times per year with a kinesiologist at the cost of between $600 and $850. Dr. Kleinman commented, saying that she should only attend for treatments when she's having significant flareups.

[215] I am not convinced that the plaintiff could not travel to a kinesiologist at that person's premises rather than paying $85 per hour to have a kinesiologist travel to the plaintiff's residence. Moreover, none of the doctors have suggested that kinesiology services will provide any significant improvement in her circumstances that will not be available through other services that have been recommended to her. She may benefit from periodic consultations concerning her exercise program and I estimate that the sum of $5,000 will adequately compensate her for the required number of sessions after taking into account the uncertainty of the need for these services an in addition to the initial cost agreed to by the defendant.

Peri Care, Long Handled Scrub Brush and Tips

[216] While I accept that the recommendation for the plaintiff to have peri care and a long handled scrub brush may promote safety and improve her ability to care for herself, the amount claimed is excessive to the extent it would carry on to age 98. In my view, the amount claimed for peri care ($1708) is unreasonable and I award $1000.

Recumbent Bike and Walking Poles

[217] The suggestion for this style of bike came from an unnamed third person to the plaintiff who then reported the suggestion to Ms. Cotton. Ms. Cotton agreed with the recommendation. The suggestion is this bicycle will give her an opportunity to do cardiovascular exercises with reduced risks of dizziness and falling. I am not satisfied that, on the evidence, the acquisition of a recumbent bike or walking poles are in the nature of devices that will achieve any meaningful assistance in the plaintiff's recovery or ongoing function.

Non—Prescription Medication

[218] The plaintiff claims $18,020 to enable her to a obtain non-prescription medications such as muscle relaxants and topical gels. Ms. Cotton could not predict how long the plaintiff might require these medications. She has been advised to obtain Botox injections for her headaches and to undertake a comprehensive chronic pain program. There is little in the medical opinions to suggest that muscle relaxants or topical gels are needed, or more importantly needed on a long-term basis. While I accept that the plaintiff suffers from pain and headaches, she will more likely than not obtain relief from other physician-recommended treatments. I am of the view that $5,000 will be sufficient to provide her with these medications in the short-term, until further treatments are completed.

Duloxetine, Amitriptyline, Gabapentin and Tramadol

[219] The plaintiff has used these medications for some time. She seeks compensation based on the prospect that she will use them at the same frequency and dosage until age 90.

[220] Other than the fact that the plaintiff continues to experience pain, sleep difficulties, dizziness, headaches, neck and back pain, left hip pain, right knee pain cognitive difficulties and mood disruption, there is no clear medical advice concerning what medications she should continue with. I accept that physicians are prescribing these medications for her to address her current symptoms but no expert opined on the need to continue these medications for the balance of her life. The principles governing claims for future care costs were summarized by Justice Voith (as he then was) in *Liu v. Bipinchandra*, 2016 BCSC 283:

> [158] A plaintiff is entitled to compensation for the costs of their future care based on what is reasonably necessary to restore that plaintiff to his or her pre-accident condition to the extent that is possible. The test for determining an appropriate award under this head of loss is an objective one based on medical evidence. An award for the costs of future care must be supported by medical evidence that justifies the claims being made, or the costs being sought. In addition, those costs must be reasonable; *Milina* at 84.

[221] Clearly, awards for cost of future care must be supported by some medical evidence that justifies the claims being made. In this case, the plaintiff's need for pharmaceutical medications at this time are assumed to be necessary because they are currently prescribed by physicians. However, there is no evidence concerning the duration of the plaintiff's need for these medications or what may become necessary after she undergoes all of the treatments that have been recommended.

[222] Ultimately, the question of for how long she will need the medications is unresolvable on the evidence save to say that aspects of her disability and condition must be seen in light of Dr. Kleinman's opinion that "her overall progress now should be considered poor". Dr. Kleinman opined that chronic pain such as that experienced by Ms. Burr is extremely difficult to manage and the best that can be generally hope for is to stabilize her condition in order to avoid further deterioration. Dr. Kleinman said she would benefit from a comprehensive chronic pain program and is getting reasonable responses from trigger point injections and some relief with her sleep modulation. He also believed that her cognitive difficulties relate to "chronic pain and sleep dysregulation and that there are cognitive blunting effects of the medication she has been using."

[223] The plaintiff seeks $29,535 for these four medications combined. Absent better medical evidence on the plaintiff's need for these medications over time and more accurate estimates of her prospects for improvement and reduction in the needs for these medications, and taking into account the Defendants' concession regarding her claim for gabapentin, I assess the plaintiff's lifetime future care costs for these three medications at $15,000 and $4,178 for Gabapentin.

Driver Rehabilitation

[224] Ms. Thompson also suggests the plaintiff would benefit from a driver's rehabilitation program once she is not suffering dizziness. The cost of these sessions would be $3110–$4850. The plaintiff testified that she is unable to drive at present. She drove before the Accident and Ms. Thompson suggests "she may benefit from driver's rehab to help familiarize her with driving again". In my view, the

evidence to support this claim does not meet the plaintiff's burden of proof. I will not order compensation for this intervention.

[225] In total, the award for cost of future care includes the one time amounts agree on, namely:

$5192 for occupational therapy

$13,500 for rehabilitation services

$1126 for vestibular physiotherapy

$1726 for kinesiology

$3771 for psychology

Total $ 25,315

[226] Added to this is that sum I have assessed yearly costs:

$60,000 for housekeeping

$10,000 for lawn care

$5,000 for yearly kinesiology

$1,000 for peri care

$5,000 for non-prescription medication

$4,178 Gabapentin

$15,000 for prescription medication

Total $100,178

F. In-Trust Claim

[227] Finally, the plaintiff seeks an interest award to compensate family members who have provided services such as housework, nursing and domestic assistance in the days after the Accident. In this case, she seeks $20,000 for her husband and daughter. Mr. Unger testified he lost a significant amount of work which he estimated conservatively to be 1500 hours over the past six years; although I accept Mr. Unger was Ernest in his attempt to measure the additional time he assisted his wife, I do not accept his estimate without some reservation. He did not lose any income, but he was compelled to work weekends and overtime to make up the time lost caring for his wife.

[228] Stevie Burr testified she missed two weeks of income from her job to care for her mother following the Accident.

[229] The Defendants argue the interest award should be in the range of zero dollars to $10,000.

[230] In *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124, Justice D. Smith (as she then was) summarized the relevant principles to be applied in assessing an "in trust" claim as follows:

> [180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:
>
> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or

> undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[231] Mr. Unger said that his role in the family changed after the Accident and he began performing many of the chores, inside and outside of the home, that were formally done by the plaintiff. He said after the Accident, life changed and he became the plaintiff's caregiver. He took time off work to help out and since the Accident he often drives her to appointments. He said he had logged 1500 hours spent driving the plaintiff places, in part because she is frightened to drive or use taxis as a result of the Accident.

[232] Mr. Unger services to the plaintiff including driving her to appointments were clearly necessary and beyond the plaintiff's capabilities at the time.

[233] Other than his general assertion of caring for the plaintiff after the Accident, his major commitment to the plaintiff's care was driving. He testified that drivers in his company earn $37 per hour while delivery drivers are paid $30–$35 per hour.

[234] In the circumstances, Mr. Unger's estimate of 1500 hours multiplied by $30 would produce a value of $45,000. In my view, that sum constitutes an inappropriate interest award for the services described in his testimony. I accept the plaintiff's submission that the sum of $10,000 would be an appropriate interest award for Mr. Unger's services provided in the wake of the plaintiff's injuries and the care and attention he provided the plaintiff.

[235] Stevie Burr said she missed two to three weeks work looking after the plaintiff after the Accident. She said she has taken Fridays off for six years and attends aqua size classes with the plaintiff.

[236] Although Stevie Burr testified that she took time off to be with her mother following the Accident, there was little evidentiary support for an in-trust claim in her favour. There was no clear description of the services she provided or the reasons she was with her mother for the two to three weeks following the Accident; it would

be speculative to guess what services were provided and the value of any reasonable services she provided. I make no interest award for her.

G. Special Damages

[237] The parties reached agreement during the trial that the plaintiff would be awarded special damages of $16,317.92.

Mitigation

[238] The Defendants contend that the plaintiff's refusal to participate in the active rehabilitation program (the "LifeMark Program") recommended by ICBC to Dr. Watt underlies their submission that her damages must be reduced because of her failure to mitigate. The Defendants assert that if the plaintiff had pursued the LifeMark Program, she could have avoided some portion of her losses.

[239] The plaintiff refutes the allegation that she failed to mitigate her losses and asserts that that the evidence does not support the conclusion that if she had attended the LifeMark Program, her symptoms would have been lessened and she would have achieved more substantial recovery from all of her debilitating symptoms thereby reducing her losses.

[240] The plaintiff submits that she did not refuse to participate in an active rehabilitation program generally, rather she refused to participate specifically in the LifeMark Program due to her discomfort with the assessor when she attended the program on one occasion. There was no evidence provided that LifeMark was the only agency offering active rehabilitation programs nor whether Dr. Watt considered referring her to another agency. The choice of LifeMark was made by ICBC.

The Legal Framework

[241] The Defendants carry the onus to prove that a plaintiff has failed to mitigate their loss by failing to pursue a course of medical treatment recommended by doctors. This principle is set out in *Chiu v. Chiu*, 2002 BCCA 618 as follows:

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

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

[242] First, it is necessary to consider whether the Defendants have proved that the plaintiff acted unreasonably in refusing to attend the Life Mark Program. At the second stage, the Defendants are obliged to prove on the balance of probabilities "the extent, if any, to which the plaintiff's damages would have been reduced had [she] acted reasonably": *Chiu* at para. 57.

[243] In *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144, the Court described the mitigation test as follows:

> [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this Court's judgment in *Chiu*: "there is some likelihood that he or she would have received substantial benefit from it ..."
>
> [Emphasis added by Garson J.A.]

(See also *Haug v. Funk*, 2023 BCCA 110.)

[244] To be clear, the Defendants are required to prove that the plaintiff's damages "would have been reduced" not only that they would have "received substantial benefit" from such treatment: *Haug* at para. 55.

[245] Once it is established that the plaintiff's damages would have been reduced if the recommended treatment had been taken by the plaintiff, then the court assesses damages as they would properly have been assessable if the plaintiff had, in fact, undergone the treatment and secured the degree of recovery expected: *Janiak v. Ippolito,* [1985] 1 S.C.R. 146 at 166, 1985 CanLII 62.

[246] Failure to follow every recommendation from every doctor does not equate to a failure to mitigate: see *Souto v. Anderson* (1996), 17 B.C.L.R. (3d) 238, 1996 CanLII 3341 (C.A.) and *Haug* at para 42.

[247] The standard of proof concerning both parts of the test is the balance of probabilities: *Janiak* at 165; recently clarified in *Haug* at para. 55.

[248] The fact that a recommended treatment might afford some relief or lessening of symptoms does not meet the threshold to establish that the treatment would have reduced the plaintiff's damages: *Rhodes v. Surrey (City)*, 2018 BCCA 281 at para. 66.

Analysis

[249] The Accident happened in October 2016. In the months after the Accident up to December 2017, the plaintiff was seen by various doctors, including Dr. Watt (general practitioner), Dr. M. Hussein (neurologist), and Dr. Chu (physiatrist).

[250] ICBC appears to have invited the plaintiff's attendance for assessment at LifeMark Health Centre where she was assessed once in August 2017. The resulting LifeMark report contains suggestions for treatment that must, if accepted, be ordered by the primary care physician, Dr. Watt.

[251] LifeMark sent a program outline to Dr. Watt, including a reference to active rehabilitation. The plaintiff spoke to Dr. Watt on September 18, 2017 about her experiences at the LifeMark assessment during the summer and explained the bad experience that happened during that meeting. By November 15, 2017, Dr. Watt believed the plaintiff would be ready to engage in the program suggested by LifeMark and she made a request for the plaintiff to attend LifeMark early in 2018 which was the earliest opportunity she would have had to accept this treatment.

[252] The plaintiff testified that during the initial assessment at LifeMark, she felt one assessor was trivializing the Accident as a "fender bender" and made comments on her personal appearance, all of which was upsetting. She was upset by his

questioning and decided that she was not comfortable going to that service provider for assistance. She told Dr. Watt about this experience and declined Dr. Watt's continued recommendation she attend the program.

[253] LifeMark was the only active rehabilitation program recommended to the plaintiff.

[254] No one from LifeMark testified at trial. The Defendants contend the plaintiff unreasonably failed or refused to attend the LifeMark Program which would have involved "active rehabilitation – 10 sessions 121 exercise with a kinesiologist".

[255] The evidence indicates that by July 2017, the plaintiff was walking and bicycling for 15 minutes at a time. Dr. Watt had recommended several treatments including physio therapy at Eclipse Physiotherapy. Dr. Watt said this was not an active rehabilitation program. Dr. Watt did not comment on the plaintiff's water exercises at the pool, exercises at the gym or walking.

[256] At that time, the plaintiff was receiving physiotherapy treatments two to three times per week, regularly attending a pool where she did water walking, and other activity in a float tank. She also has a gym in her home which she used, and at times she had exercised at a gym in her physiotherapist's office.

[257] The plaintiff's physiatrist, Dr. Chu, had recommended she receive Botox treatments which he arranged. It was recommended that she remain active as tolerated and she reported that swimming improved her condition.

[258] Dr. Watt said she had had previous patients who had experienced positive outcomes after participating in an active rehabilitation program. She was not asked to provide a medical opinion concerning the expected outcomes of an active rehabilitation program as compared to the other steps taken by the plaintiff in 2017 and 2018.

[259] Dr. Butterfield said that the success of interdisciplinary programs can improve outcomes depending on the type of program used and the proximity between those

treatments and the initial injury. In similar programs he has seen, Dr. Butterfield testified that interdisciplinary programs do not customarily involve psychological treatment components. He was not asked to opine on the recommendations set out in Exhibit 11, Tab 7 A, page 13. The principal recommendation relied upon by the Defendants in this reference concerns the plaintiff's failure to pursue "active rehabilitation – 10 sessions of one to one exercise with a kinesiologist".

[260] Dr. Butterfield was satisfied that if the plaintiff's symptoms had been addressed "earlier", her chances of improvement could have been higher. He reiterated that the closer in time to the injury that an interdisciplinary program is commenced, there is a better chance of improvement.

[261] On cross-examination, Dr. Butterfield said that the plaintiff had not reached her maximum level of improvement but he would expect only small improvements in the future.

[262] There was no evidence that addressed the question of what length of time between an injury and treatment would provide assurances of improvements in the plaintiff's symptoms nor the anticipated extent of such improvements. In this case, the plaintiff's first scheduled opportunity to receive interdisciplinary treatment was for early January 2018; this was approximately 15-months after the Accident.

Reasonableness of the Refusal

[263] The first issue to be decided is whether the plaintiff's response to her experience at LifeMark was unreasonable. In *Yeomans v Buttar*, 2021 BCSC 343 Kent J. said there are two components to this test involving subjective and objective elements, as follows:

> [145] The test for reasonableness in the context of mitigation has both subjective and objective components. The subjective aspect of the test requires the court to examine the plaintiff's personal circumstances and any constraints on her ability to mitigate. The objective component of the test requires the court to assess what a reasonable person *in that plaintiff's circumstances* would have done. The determination is a question of fact.

[264] The issue apposite to this case was discussed in *Ueland v. Lynch*, 2019 BCCA 431:

> [31] Having considered these authorities, this court concluded in *Gill* that a plaintiff's "personal circumstances" may properly play a role in assessing the reasonableness of his or her mitigation efforts. Willcock J.A. reasoned:
>
> > In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person *in that plaintiff's circumstances* would do. As stated above, where a trier of fact applies the correct test, this Court must defer to their determination on this question of fact.
> >
> > The trial judge in this case found the respondent had made a reasonable attempt to follow the recommended course of treatment but was constrained by her circumstances from fully engaging in the exercise program recommended to her. In my view, he did not err by taking into account her personal circumstances or by distinguishing *Friesen* as a case where the plaintiff refused to consider reasonable employment options. *Friesen* was a case where this Court found the plaintiff's course of action was arbitrary and unreasonable. [At paras. 26–7; emphasis by underlining added.]
>
> [32] What, then, is meant by "personal circumstances" in the context of the case at bar? As we have seen, the phrase may include a plaintiff's *pre-existing* health, including a psychological 'thin skull'. According to Cooper-Stephenson at least, it *may* also include his or her family and employment circumstances; perhaps religious beliefs or community norms; and even the financial ability, or lack thereof, to borrow money to pursue a particular course of recovery. Age and physical condition are other obvious limiting factors. To this extent, the test is applied to a person *in the plaintiff's shoes* — an 'objective/subjective' test. It may be unreasonable to expect him or her to overcome the strictures to which his or her life was subject prior to the injury — a "pre-existing condition" in some sense. This does not mean, however, that "personal circumstances" should be interpreted so as to permit a plaintiff to conduct him- or herself in a manner that is objectively *unreasonable* because of a stubborn wish for reprisal of some kind or because he or she simply chooses for some personal reason to act unreasonably. The law does not accept that a plaintiff may, as a matter of free will, make *unreasonable choices* concerning mitigation and look to the defendant for compensation. The point of an objective test is to ensure that plaintiffs do not fail *unreasonably* to take steps in mitigation. No case was cited to us that would support the plaintiff's position to the contrary in this case.

[265] The question on this issue is whether the plaintiff's subjective aversion to the assessment doctor at LifeMark based on her initial experience justified her refusal to attend that program in January 2018. Here, the plaintiff was in the grip of physical symptoms in her upper back, shoulder areas, neck, low back and other places. She was having dizziness, headaches, effects of an MTBI, depressive symptoms and chronic pain stemming from a violent collision which left her with post-concussive symptoms and PTSD. The psychological components of her condition were all related to the MTBI.

[266] She was upset with her interaction at LifeMark because of the assessor's apparent trivialization of her Accident and other off-hand comments concerning her appearance. She continued to follow all of Dr. Watt's other recommendations and did not reject active rehabilitation general.

[267] She was participating in an exercise program with Eclipse involving gym exercise under supervision of a physiotherapist Mss. Schneider and doing exercises while swimming.

[268] By May 2018, Dr. Kleinman said the plaintiff's chronic pain syndrome was in need of a mental health care practitioner's input to determine her disability and treatment options.

[269] Refusal to attend a recommended treatment program may be unreasonable where it is contrary to the response of a reasonable person in that plaintiff's circumstances. However, refusal to accept one type of treatment from one specific service provider can not alone constitute an unreasonable refusal. Importantly, the plaintiff's reaction seems based on an unpleasant interaction with the LifeMark assessor; her response does not appear to have been driven by a rejection of participating in an active rehabilitation program in principle.

[270] The reasonableness of an injured person's refusal to take treatment has been addressed in a number of cases cited by the parties. I conclude that looking beyond

the plaintiff's understanding of the recommendation, her personal reaction to the assessor at LifeMark is consistent with the response of the reasonable person.

[271] There was no evidence of an inquiry with staff at LifeMark concerning the plaintiff's interaction with the assessor. There is no explanation why Dr. Watt did not look for a different service provider of the same active rehabilitation services due to the plaintiff's adverse reaction to LifeMark. It does not appear the plaintiff was simply conducting "herself in a manner that is objectively *unreasonable* because of a stubborn wish for reprisal of some kind or because [she] simply chooses for some personal reason to act unreasonably": *Ueland* at para. 32. She was visibly upset by her experience and no opinion contrasted expected outcomes form LifeMark's program with the efforts she was making while following Dr. Watt's other recommendations

[272] By contrast with the plaintiff's circumstances, the facts in *Liu* were dramatically different than those in the instant case. In that case, the plaintiff had "eschewed virtually all of the treatment recommendations that ha[d] been made to her by the myriad physicians she ha[d] seen" (at para. 71). In that case, there was evidence that two thirds of persons who had similar forms of headache pain benefited from Botox treatment. Thus, the Court inferred that it was probable that the plaintiff would have benefitted from Botox treatment. There was also medical evidence that the plaintiff's use of herbal medicines were of no benefit to treating her headache symptoms. In the end, the Court concluded that the plaintiff's failure to follow "most treatment recommendations" was not reasonable.

[273] In *Yeomans* the plaintiff had failed to undergo medical treatments recommended by various physicians over five years, including cortisone injections. The Court held that she had failed to mitigate her losses and reduced all heads of damages by 15% (at para. 155).

[274] I have concluded the plaintiff's decision to decline treatment offered by Life Mark was not an unreasonable refusal to undertake an active rehabilitation program but, a reasonable refusal to attend at LifeMark specifically, based on the assessor at

LifeMark minimizing her complaints and undermining her confidence in the program. Aside from her refusal to attend Life Mark, she continued to follow the other recommendations of Dr. Watt.

[275] Bearing in mind these features, I find the Defendants have failed to prove that the plaintiff's refusal to attend the LifeMark Program was unreasonable.

The Extent to Which Damages Would Have Been Avoided

[276] If I am wrong in my conclusion that the plaintiff's failure to attend the Life Mark Program was not unreasonable, I will also consider whether the evidence enables me to determine the extent to which her damages would've been avoided if she had been involved in that program.

[277] Dealing with the second branch of the test from *Chiu*, the Defendants must prove on the balance of probabilities that the plaintiff's injuries would have been reduced to some degree had she acted reasonably. If I conclude the Defendants have proven that point, I must assess the measure of the reduction of the award based on the extent her damages could have been reduced or avoided by acting reasonably.

[278] Although improvement would have been expected if the plaintiff had pursued an active rehabilitation program, the Defendants have not proved the extent improvement to her symptoms nor the extent to which those improvements would have hypothetically reduced her losses.

[279] The evidence on this point was provided largely from cross-examination of the plaintiff's family doctor and Dr. Butterfield. While I accept that the plaintiff might have benefited from an active rehabilitation program close to the time of the Accident, neither of these doctors said that her injuries "would have been" reduced. Dr. Watt said she had observed other patients to benefit from active rehabilitation treatment and Dr. Butterfield said he would have expected improvement in her symptoms, depending on the details of the program.

[280] The Defendants pointed to the findings of Voith J. in *Liu*, indicating that inferences can inform the conclusion concerning benefits of treatment:

> [103] Instead, it is open to a defendant to establish the second aspect or branch of the mitigation test indirectly. Thus, if most persons are assisted by a particular treatment the Court can, as a matter of inference, determine that it is probable that a particular plaintiff would have benefitted from that treatment.
>
> [104] In this case, the indirect evidence that two-thirds of persons who have the form of headache pain that Ms. Liu has benefit from Botox treatments establishes, as a matter of inference, that it is probable Ms. Liu would also benefit from such treatments.

[281] In this case, the Defendants have not proved on the balance of probabilities that the plaintiff's symptoms would have been reduced by the active rehabilitation program proposed. Unlike the case in *Liu*, there was no evidence in this case that everyone, or a majority of people, or even two thirds of people would have experienced improvement from such treatments. The doctors opined that improvements can be achieved from active rehabilitation services. There was no discussion about how the plaintiff's actual treatments and activities would have affected her recovery other than the opinion that injured persons would improve after active rehabilitation. The evidence did not support the Defendants' submission that benefits of the proposed program would be "enormous".

[282] The burden of proof on the Defendants is on the balance of probabilities and, in my view, the evidence does not support a conclusion that the plaintiff's damages would have been reduced if she had taken the treatment.

[283] The decision on this point cannot be based on speculation. The evidence is that the plaintiff might have achieved some benefit if she had pursued active rehabilitation. None of the doctors estimated kind improvements that were discussed in *Liu* or *Yeomans* and the medical evidence does inform the assessment of the "extent" to which the active rehabilitation program would lessened her symptoms; improvement would likely have been minor.

Conclusion

[284] In the result, I have concluded that before statutory deductions the plaintiff will receive $1,840,810.92 in damages as follows:

Head of Damage	**Award**
a. Non-pecuniary damages	$215,000
b. Gross Past Loss of Earning Capacity	$509,000
c. Future Loss of Earning Capacity	$875,000
d. Costs of Future Care	$65,493
e. Past and Future Loss of Housekeeping Capacity	$150,000
f. In Trust Claim	$10,000
g. Special Damages	$16,317.92
TOTAL	**$1,840,810.92**

[285] If there are mathematical errors in these reasons the parties have leave to apply for correction of the sums ordered.

[286] The plaintiff has been substantially successful in this action and will be entitled to costs unless the Defendants wish to make submissions on this point in which case submissions must be made within 30 days of receiving these reasons.

"Armstrong J."