IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gundarah v. Teves,*
2023 BCSC 1540

Date: 20230901
Docket: M185586
Registry: Vancouver

Between:

Sandeep Kaur Gundarah

Plaintiff

And

Mario Jorge Correia Miranda Teves

Defendant

Docket: M185587
Registry: Vancouver

Between:

Sandeep Kaur Gundarah

Plaintiff

And

Ho Ying Chan and Honda Canada Finance Inc.

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:	S. Anderson
Counsel for the Defendants:	K. H. Hall A. Meade
Place and Dates of Trial:	Vancouver, B.C. January 30-31, 2023 February 1-3, 6-10, 2023
Place and Date of Judgment:	Vancouver, B.C. September 01, 2023

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Introduction

[1] These are my reasons for judgment in two motor vehicle personal injury claims. Liability for both claims is admitted by the defendant. These reasons reflect my decision on the appropriate quantum of damages.

[2] The plaintiff was involved in a rear-end collision on April 22, 2016 (the "First Accident"). She was driving her 2008 motor vehicle southbound on 152nd Street in Surrey, British Columbia when she slowed to stop her vehicle because vehicles ahead had slowed to stop. One of her sons was a passenger in her vehicle. Her vehicle was struck from the rear by a 1992 Ford Van driven and owned by the Defendant, Mr. Teves. Repair estimates set out damage of $6,417.32 to the Plaintiff’s vehicle as a result of the First Accident. She was 41 years old at the time of the First Accident.

[3] The Plaintiff was involved in a second rear-end collision on August 16, 2016 (the "Second Accident") collectively (the “Accidents”). At that time, she was driving her vehicle travelling westbound on Steveston Highway in Richmond, British Columbia. One of her son’s was in the vehicle with her. She came to a stop for a vehicle ahead that had stopped. While stopped, her vehicle was struck from the rear by a 2015 Honda van driven by the Defendant Ms. Chan. As a result of the Second Accident the Plaintiff’s vehicle was rendered a total loss due to damage estimated at $10,665. Ms. Chan’s vehicle sustained damage estimated at $21,784.51.

[4] As a result of the Accident, the plaintiff claims she suffered a number of injuries, with central sensitization syndrome, chronic fatigue, depression and anxiety being her primary injuries.

[5] The plaintiff claims losses under the following heads of damage;

a) Non-pecuniary damages;

b) Past and future loss of earning capacity;

c) Past and future loss of housekeeping capacity;

d) Cost of future care;

e) In-trust claim; and

f) Special damages.

[6] The defendants submit that the plaintiff's injuries are not as severe or debilitating as she submits.

[7] The plaintiff seeks a total award under all heads of damages of approximately $2,800,000. The defendant submits an appropriate total award is approximately $930,000 to $1,050,000, with no award for the in-trust claim.

[8] For the reasons that follow, I find that the plaintiff is entitled to compensation under all heads of damages and order a total award of $1,260,370.29.

Background

[9] The Plaintiff is a divorced single parent of 3 sons born in 2000, 2003, and 2004. She and her children live in a half-duplex in Richmond, British Columbia. Her parents, now 78 and 80 years old, live nearby. She raised her children without support from their father. She suffered physical and emotional abuse from her husband during the marriage.

[10] The Plaintiff completed and received a Certificate in Computer Education from a college in India in 1993. She subsequently immigrated to Canada with her parents that same year, 1993. In 1995, she graduated from high school in Vancouver. After high school, the plaintiff completed a course in Computerized Banking Services. The plaintiff started working at a bank in 1995 full time as an operations manager.

[11] In September 1996, she enrolled at BCIT and successfully completed 4 accounting related courses through May 1997. In 1999, she completed the Career Foundation Skills Program, in the Business Program for Bankers at the Institute of Canadian Bankers. In 2010, she completed in-house courses in financial investment and in 2011 an investment funds course with the Investment Funds Institute of Canada.

[12] At the time of the First Accident, the plaintiff worked as a customer service manager at the same bank on a full-time basis.

[13] At the time of the First Accident the plaintiff was active, maintained her home and yard herself, and also enjoyed raising her three teenage sons. She was involved in her sons' activities and socialising with other parents after sporting events. She enjoyed walking, biking and hiking. She would regularly walk and jog while at her sons' sporting practices. They took trips with her family, including Victoria, Kamloops, Kelowna, Banff, Drumheller, the Oregon Coast and Los Angeles. This included trips for sporting events. The plaintiff liked having her hair and nails done, and wearing beautiful clothes.

[14] She testified that she enjoyed her work and helping her customers. She dedicated herself to ensuring her children were well taken care of and successful in school and their endeavours.

[15] In 2014, the plaintiff suffered from dizziness which resolved in or about early 2015 after receiving Vitamin D supplements and B12 injections due to diagnosed Vitamin D and B12 deficiency. Low blood pressure was also noted for the Plaintiff. In March 2016, she was diagnosed with hypothyroid which was treated with Synthroid medication. Dr. Dodd agreed that the Plaintiff was treated extensively for vertigo in 2014 and 2015. The plaintiff has had similar episodes since 2020, albeit of a shorter duration, resulting in the same medication and referrals to the same types of specialists as in 2014 and 2015.

[16] Dr. Todd described the plaintiff's physical conditioning as poor in the two years prior to the First Accident. This was based on the plaintiff's complaints of weight gain and lack of exercise on February 10, 2014, her subsequent battle with vertigo symptoms that prevented her from exercising, and her complaints of exhaustion in March 2016, which led to a diagnosis of hypothyroidism.

Treatment

[17] The plaintiff sought medical treatment after each of the Accidents. She has undertaken a variety of treatments and tests.

[18] The Plaintiffs medical examinations and treatments after the First Accident included the following:

a) Appointments with Dr. Sharon Dodd, her Family Physician, with the first visit occurring on the day of the First Accident and regular appointments thereafter and ongoing at the time of the Second Accident;

b) Admission to the Richmond Hospital Emergency Room on April 27, 2016;

c) Appointments with physiotherapists starting on May 3, 2016 and ongoing at the time of the Second Accident;

d) Appointments with a registered massage therapist, starting on June 29, 2016 and ongoing at the time of the Second Accident;

e) An Appointment with Dr. Elliott Weiss, Physiatrist, on referral by Dr. Dodd, with the Plaintiff's appointment occurring on July 11, 2016.

[19] The Plaintiffs medical examinations and treatments after the Second Accident included the following:

a) On the day of the Second Accident the Plaintiff was taken by ambulance to Richmond Hospital and was admitted to Emergency;

b) Appointments with Dr. Dodd, with the first visit occurring on the day following the Second Accident and visits thereafter to present;

c) Appointments with various physiotherapists from September 1, 2016, to November 2020;

d) Four appointments with Dr. Weiss, from September 15, 2016 to January 12, 2017;

e) Massage therapy from October 26, 2016 to November 2, 2016;

f) Appointment with Dr. Evan Kwong, Physiatrist, on referral by Dr. Dodd, on March 23, 2017;

g) An appointment with Dr. Kristin Jack, Neurologist, on referral by Dr. Dodd, on December 14, 2017 and Dr. Neville Schepmyer, Neurologist, on May 10, 2018;

h) Two appointments with Dr. Antonio Avina-Zubieta, Rheumatologist, on referral by Dr. Dodd, on December 21, 2017 and January 11,2018, and further appointments with Dr. Jonathan Chan on May 31, 2018 and August 1, 2018 and Dr. Muxin Sun from November 12, 2019 to present;

i) An appointment with Dr. Michael Shabbits, Psychiatrist, on referral by Dr. Dodd, on February 2, 2018;

j) Fourteen appointments for acupuncture from February 8, 2018 to May 16, 2018 and one in 2020;

k) Individual and group sessions with Dr. Kenneth Heng, Psychiatrist, from March 12, 2018 to present;

l) Two appointments with Dr. Renee Talbot, Ophthalmologist, on referral by Dr. Dodd, on April 30, 2018 and September 10, 2018;

m) Appointments with numerous physicians and specialists at the ChangePain Clinic in Vancouver from September 25, 2018 to present;

n) Two appointments with Dr. Lisa Ghant, Naturopath, in 2019, regarding diet;

o) An appointment with Dr. Lillian Wong, Otolaryngologist, on referral by Dr. Dodd, on July 9, 2020;

p) An appointment with Dr. Shivani Vora, Dentist, with the Plaintiffs on April 25, 2019;

q) Telephone Appointments with a clinical counsellor with Vancouver Coastal Health, in August and September 2020;

r) An appointment with Beatrice Yeh, Pedorthist, on November 2, 2020;

s) Chiropractic treatment from February 2021 to present;

t) Treatment by Dr. Richard Arseneau, Internal Medicine Specialist from August 25, 2020 to present; and

u) Zoom sessions with the chronic pain group at BC Women's Hospital commencing in 2020.

Assessment of the Evidence

Credibility of the Plaintiff's Evidence

[20] Assessing credibility involves a consideration of a number of factors as set out in *Bradshaw v. Stenner,* 2010 BCSC 1398 at para. 186 (aff'd 2012 BCCA 296):

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the

> witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[21] The defendants submit that the plaintiff is not a reliable witness. They submit her evidence was vague and she often used hyperbole when describing her symptoms. Examples of this they submit are as follows, all of which were elicited on direct examination:

a) She was "crying and screaming" immediately following the First Accident;

b) She felt her "back turning into log" at Richmond Hospital;

c) She "felt like I was dying" on the flight to China (during a pre-planned vacation for a hockey trip);

d) A headache felt like her "eye was coming out" at the scene of the Second Accident;

e) She cried during her testimony stating "why do I exist?";

f) Describing herself as "useless" and "defective";

g) Stating "I'm trapped in this body. I'm not supposed to live like this. I'm a prisoner in my body" and "I have not had a minute for years that isn't pain-free";

h) She feels like she is a "victim of my own body"; and

i) Stating "I have no friends now" and then going on to speak about a friend, who drove her to a hockey tournament and shared a hotel room with her.

[22] They further point to her ability to provide very detailed evidence about her work history, easily recalling dates, pay scales, and job duties as far back as 1995,

but then giving very vague evidence about her symptoms. The plaintiff was very teary on direct examination and became argumentative and angry on cross-examination.

[23] The plaintiff gave very few specifics in her evidence about her function at work and the effect of her injuries on her job. She stated on direct examination that she cried in front of a customer, she had sensitive hands, was afraid she would make mistakes, and was embarrassed that she would forget the names of customers. She otherwise did not detail whether symptoms were aggravated at work, what tasks they prevented her from doing, how often they were an issue at work, or how severe they were. She did not explain how she was able to manage her symptoms for the ten months she worked in 2017, nor why she could no longer manage these symptoms. Her testimony was that she was unable to do her job due to pain. Her co-worker, the only employment witness called, gave evidence that she did not observe any change in the plaintiff's performance or energy levels pre and post-Accidents. The plaintiff testified that as a single mother she had no choice but to try and work. She lasted as long as she physically could. She did not want to appear to be unfit for work. The co-worker overlapped her for about three hours each day at the time and their stations were far apart which may account for some of the discrepancy in the evidence. The plaintiffs' sons testified as to how exhausted she was in 2017, when she returned from work. She tried to return to work because she loved her job. She cried after coming home. He described her as "completely broken". Her oldest son and her mother took over maintenance of the household. They described the plaintiff doing nothing in the home in 2017, and the need to hire others to do outdoor maintenance. When she is at home, she mostly stayed in her room.

[24] The Plaintiff provided a head to toe list of areas of symptoms but submit the defendants, she gave little detail about those symptoms. She provided no evidence on how severe each symptom was, what aggravated or relieved it, how long the symptom lasted when it was bothersome, how frequently the symptoms occurred, how frequently each affected her function, or indeed, how any of them affected her

function in any way. While the plaintiff provided evidence about what her symptoms were, and what activities she now avoids, she provided no details explaining how her symptoms affected her function, such as what symptoms each activity would elicit or how much she could do before symptoms became problematic. The plaintiff submits her vague reporting is a function of having so many symptoms over many years. Her sons gave some specific observational evidence of the plaintiff's exhaustion and swelling in her hands. Her diagnosis of central sensitization symptom is consistent with an overwhelming feeling of chronic pain and heightened sensitivity to everyday sensations. The plaintiff reported in real time to her treatment providers in a more specific manner, particularly early on.

[25] The Plaintiff gave evidence of activities that she enjoyed prior to the Accidents. She did not state whether she has tried to do them since the Accidents. However, her sons testified that the plaintiff walked a lot, doing laps at their practice fields, biked during the summer, did long hikes with them a couple time each summer, including the Joffrey Lakes trial and that she had no difficulties. Yet, in 2014 the plaintiff was unable to work for six months in 2014 due to symptoms related to vertigo and she was reported as being deconditioned in the moths leading up to the first accident.

[26] She gave evidence of her inability to walk for 20 continuous minutes without taking a break which conflicts with the Occupational Therapist, Natalie Hull's evidence that the Plaintiff reported in October, 2022 being able to walk for upward of 20 minutes continuously. One of her sons testified that the plaintiff walks 15 to 20 minutes at most, and that she just stops and sits on a bench and will chat with passers by. This occurs about two times a week in nice weather and in the last winter it only occurred twice as far as her knew. The plaintiff repeatedly alternated between sitting and standing throughout her days of testimony but was observed by Ms. Hull to sit continuously for 45 minutes.

[27] The plaintiff states she has had no improvement, however, Dr. Arsenault stated on cross-examination that her pain had improved from a score of 17 to 14, which he referred to as a "substantial improvement".

[28] The plaintiff does have a very expressive way of describing her symptoms and the events. Her sons confirmed the plaintiff's highly emotive reaction to the incidents and her concerns for them, as well as how she describes her symptoms. I accept also that the plaintiff is frustrated and her depression also affects how she envisages her past, present and future.

[29] For the most part the plaintiff's symptoms are subjective and her diagnoses and the expert opinions are based on her own reporting.

[30] In *Van Tol v. Rodway*, 2022 BCSC 1173, the plaintiff presented in a similar manner, which resulted in the Court stating the following (para. 77 and 78):

> [77] Ms. van Tol did not agree she exaggerated her symptoms when she described them to physicians. She testified that when she told Dr. Shuckett she was a "walking pain machine", and her "brain has turned to mush", and another physician that noise from a mill that was "boring into her brain", these were how she felt.
>
> [78] While I agree that Ms. Van Tol tended to describe her injuries in dramatic terms, I found her to be generally credible. However, I find some of her evidence was not always reliable. I accept that Ms. van Tol has suffered significant symptoms, and I find that Ms. van Tol has had an emotional or psychological response to her injuries, with frustration and anxiety, which has not only impacted her recovery, but also her perception of pre-accident and post-accident circumstances. I therefore view her evidence concerning her injuries, and hence the medical opinions based solely on her subjective complaints, with that caution in mind. I do not conclude this is a situation of intentional exaggeration on the part of Ms. van Tol. This is the way she perceives events...

[31] I adopt this approach to the plaintiff's evidence, with the caveat that the plaintiff's central sensitization syndrome does mean that she experiences heightened pain in relation to day to day events, for which otherwise an average person would experience as painless or minimally painful events.

Injuries

[32] The plaintiff has an extensively documented history of reported symptoms and medical treatment pre and post Accidents. At trial, a number of experts were qualified with respect to the plaintiff's injuries.

Dr. Sharon Dodd, Treating Family Practitioner

[33] The plaintiff's witness, Dr. Sharon Dodd, was qualified as an expert in the field of medicine as a general practitioner. She has a long history of being the plaintiff's family physician. She also appears to have a remarkable ability to obtain specialised referrals for her patients.

[34] In her opinion, as a result of the First Accident, the plaintiff suffered from muscle tension headaches, neck, left shoulder, lower back, sacral and coccygeal soft tissue injuries. The Second Accident exacerbated the previous injuries. After each Accident she had several vague intermittent pain and paresthesia symptoms in her hands, forearms and feet. The plaintiff did not have any previous problems with any of these areas before the two Accidents.

[35] The plaintiff continued to have generalized pain in multiple joints and muscle areas, more frequently in both shoulders, middle back, lower back, bilateral sacral region, both knees, ankles and feet. She also complained of severe fatigue, daytime sleepiness, memory decline, depressed mood and headaches.

[36] Dr. Todd confirmed that the plaintiff was diagnosed with Fibromyalgia (FM) by several specialists. She noted that FM is characterized by widespread musculoskeletal pain and fatigue, often accompanied by cognitive and psychiatric disturbances. There are no diagnostic lab tests for FM. FM is one of the many manifestations of an underlying syndrome called central sensitization syndrome. Central sensitization can be defined as a state in which the central nervous system amplifies sensory input across many organ systems. This results in heightened sensitivity in the perception of pain from non-painful stimuli (allodynia) and greater pain than would be expected from painful stimuli (hyperalgesia). It has been

theorized that chronic posttraumatic muscle pain, such as pain from MVA related injuries, is associated with central sensitization syndrome.

[37] She defers to a pain specialist as to whether her soft tissue injuries from the Accidents caused the development of FM.

[38] Dr. Todd confirmed the plaintiff has tried many different prescription medications without any reported significant improvement in her condition. These included Cymbalta, Lyrica, Nortriptyline, Vimovo, Tylenol #3, Escitalopram, Fluvoxamine, Naltrexone, Gabapentin and Abilify, Rexulti, Mirtazapine and Tegretol. She has also tried many different therapies, from which she attained very limited reported temporary relief with a few. These included acupuncture, trigger point injections, dry needling, massage, cupping, stretching, hydrotherapy, nerve blocks and a sphenopalantine ganglion block. Finally, she was recommended to start Ketamine infusion therapy by her physicians at Change Pain Clinic. She stated this therapy is very costly and not covered by the plaintiff's insurance.

[39] Dr. Todd opined that the plaintiff's prognosis for full recovery from the motor vehicle accident injuries and subsequent chronic pain conditions is very poor. This is due to her condition remaining the same and not improving in the 6 years since the accidents.

Dr. Richard Arseneau, Internal Medicine Specialist

[40] Dr. Arseneau was qualified as an expert in the field of medicine with specialty in internal medicine. His first interaction with the plaintiff occurred by telephone on August 25, 2020. Dr. Arseneau saw the plaintiff on five further occasions between October 27, 2021 and June 20, 2022. The first examination occurred on June 14, 2022, six years after the Accidents.

[41] He opines that the plaintiff sustained the following injuries from the Accidents:

a) Myofascial Pain Syndrome (MPS)

b) Fibromyalgia (FM)

c) Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS)

d) Tension-Type Headaches

e) Irritable Bowel Syndrome (IBS)

f) Migraines

g) Non-Cardiac Chest Pain

h) Pelvic Pain Syndrome

i) Temporomandibular Disorder (TMD)

j) Depression

k) Anxiety

[42] He describes myofascial pain as a regional soft tissue pain syndrome arising from muscles. It may develop after soft tissue injuries or other chronic pain conditions. MPS is a central sensitivity syndrome similar to fibromyalgia (FM) but, with more localized pain. Like FM, MPS is often associated with other symptoms such as fatigue, neurocognitive symptoms (brain fog), sleep disturbance, and unexplained symptoms (e.g., dizziness and autonomic symptoms (adrenaline system)). As well mood disturbance and anxiety often co-exist. He states the pain often has neuropathic features such as paresthesia's, burning pain, shooting pain, and allodynia (pain to touch). He notes the plaintiff has many of these features. Treatment is similar to treatment for FM.

[43] Dr. Arsenault stated risk factors for developing what he describes as a "devastating chronic pain syndrome" include moderate or severe pain intensity, female gender, history of adverse childhood events, family history of chronic pain, severe interference with general activity, having one or more central sensitivity syndromes, and using more pain management strategies.

[44] He stated it is not surprising that the plaintiff went on to develop more widespread pain after the Second Accident. The reciprocal nature of FM and other types of pain "intensify and aggravate each other, leading inexorably to a worsening of the situation".

[45] With respect to the relationship between the two Accidents, Dr/ Arsenault opines:

> The two subject MVAs were relatively close. She likely developed MPS after the first subject MVA. Whether or not she would have go on to develop FM, ME/CFS, or other CSS in the absence of the second subject MVA, I cannot say with any certainty. However, it is my opinion that she, more likely than not, went on to develop FM, ME/CFS, or other CSS, as a result of the second subject MVA. The first accident likely predisposed her to a worse outcome with the second accident.

[46] Dr. Arsenualt concludes that given the duration and severity of the plaintiff's, and the co-existence of other central sensitivity syndrome, "it is more likely than not that the plaintiff will remain disabled indefinitely".

[47] Dr. Arseneau confirmed that he took the plaintiff at her word with respect to her pre-Accident condition. He accepted that she was high energy and had no pre-existing cognitive or physical limitations. He did not ask the her whether some of her complaints, which included nausea and dizziness had occurred prior to the Accidents, nor did he ask whether any of those symptoms had previously been disabling.

[48] He confirmed that the diagnostic criteria for ME/CFS includes perceptual and sensory disturbances (visual, paraesthesia, and vertigo), problems with balance and coordination, light-headedness, and nausea. The plaintiff agreed that those symptoms disabled her from working for six months in 2014. Dr. Arseneau was not aware of this.

[49] Neither was Dr. Arsenault aware of the abuse she suffered during her marriage or that the plaintiff's ex-husband made contact with her in 2018 and in 2020 which was stressful to her and she reported this to Dr. Shabbits on February

20, 2018 and to Dr. Dodd on July 14, 2020. He opines that a precipitant, or trigger, usually causes the onset of ME/CFS, and MPS. The list of potential precipitants includes infections, physical trauma, psychological stress or trauma.

[50] Dr. Arseneau did not observe any pain behaviour on the part of the plaintiff during his examination, other than reports of tenderness, and did not find her to be pain-focused. This significantly conflicts with the plaintiff's presentation at trial as she exhibited pain behaviour on numerous occasions by rubbing her leg and back and repeated standing and sitting.

[51] Dr. Arseneau dismissed the possibility of a diagnosis of somatic symptom disorder. This diagnosis was made by the Plaintiff's expert Dr. Axler. Dr. Srsenault agreed that individuals with somatic symptom disorder have symptoms that are very distressing or result in significant disruption of their functioning. He agreed that individuals with somatic symptom disorder have excessive and disproportionate thoughts and behaviours about their symptoms but disagreed that the Plaintiff fell into that category.

Dr. Muxin Sun, Rheumatologist and Chronic Pain Specialist

[52] The plaintiff called Dr. Sun who was qualified as an expert in rheumatology and chronic pain. He examined the plaintiff in person on May 31, 2022.

[53] Dr. Sun opines that the plaintiff's current presentation is most consistent with chronic widespread pain and central sensitization. She also has chronic fatigue syndrome. He agrees with the diagnosis made by Dr. Arseneau.

[54] He describes central sensitization as follows:

> Central sensitization represents alterations in the central nervous system involving changes in the level of neurotransmitters in various areas of the brain and spinal cord. This results in increased pain signaling in the central nervous system with decreased pain threshold, causing more sensations of pain. It can also be associated with irritable bowel syndrome, interstitial cystitis, headache, and non-cardiac chest pain. In most cases, patients with central sensitization will also complain of post-exertional fatigue, anxiety, poor sleep, and mental fogginess.

[55] A definitive diagnosis cannot be made through imaging.

[56] Given the time that has passed since experiencing chronic pain symptoms after the Accidents it is his opinion that the plaintiff has reached maximal medical improvement. Further improvement is unlikely.

[57] He further states:

> Patients who have a history of chronic pain are at risk for further pain complaints in the future. It is possible that if her symptoms improve, her future risk will decrease, but due to the complex nature of her pain, it is probable that her current injuries and complaints could be exacerbated by even small accidents or injuries in the future, beyond what we would typically see in a person who has never lived with a chronic pain condition.
>
> Patients with a history of central sensitization will also have increased pain after surgeries, more so than a patient without a history of chronic pain. Thus, any future surgeries will be at risk of aggravating her pain complaints and exacerbating her soft tissue pains.

[58] Chronic pain, he states leads to decreased exercise and cardiovascular deconditioning with weight gain, which in turn increases the risk of metabolic syndrome as well as diabetes, hypertension, and cardiac disease. The plaintiff ahs experienced weight gain.

[59] In his opinion the plaintiff has partial disability in terms of performing activities of daily living, certain household chores, and certain aspects of her work. This partial disability will persist for the foreseeable future.

[60] Further, in his opinion the plaintiff will have difficulty with activities such as prolonged sitting, forward flexion, and repetitive motions. Over time, as patients get older, their chronic pains will tend to worsen.

[61] The defendants submit that Dr. Sun’s opinion is While Dr. Sun's opinion on the whole is reasonable, however it is undercut by the fact that he only reviewed the records of the pain clinic which treats the plaintiff and not her more historic records.

Dr. Aubey Axler, Psychiatrist

[62] Dr. Axler was called by the plaintiff. He was qualified as an expert in psychiatry. He assessed the plaintiff on October 13, 2022.

[63] Dr. Axler diagnosed the plaintiff with the following conditions:

a) Persistent depressive disorder, currently major depressive episode, and moderate with anxious distress;

b) Adjustment disorder with anxiety. This pertains to her driving anxiety which continues because of the motor vehicle accidents; and

c) Somatic symptom disorder with predominant pain, severe.

[64] He opines that the plaintiff's prognosis for full resolution of her depression is poor. This is because many medications have been tried and she has had a long course of her depression. In addition, she has a significant pain disorder which complicates the treatment of depression and leaves her with a higher chance of continued depression.

[65] Not being able to work has been a significant loss for her as she reported working was important for her sense of self and as her children have now grown up, this may add to her depression as she does not feel fulfilled with the workplace that she may have had if not for the pain and depression. With further psychotherapy there may be some improvement with her mood but that, but in his opinion it would be would be limited and the prognosis of that would be guarded.

[66] Her driving anxiety is mild.

[67] He opines that the Accidents are probably related to her somatic symptom disorder with predominant pain, probably related to her adjustment disorder with anxiety and probably related to her ongoing persistent depressive disorder:

> If not for these two accidents, I do not feel the Plaintiff would have these three conditions.

The Plaintiffs Pre-existing Health Issues

[68] The plaintiff has pre-existing conditions that should be taken into account when assessing her general damages. The defendants refer to the plaintiff's pre-existing vitamin and mineral deficiencies. They also refer to the vertigo experienced in 2014 and early 2015.

[69] Defendants need not compensate a plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the Accident: *Athey v. Leonati, ("Athey")* [1996] 3 S.C.R. 458 at para. 35.

[70] A "measurable risk" or "a real or substantial possibility and not mere speculation" is required in order to find that the pre-existing condition would have manifested in the future regardless of the defendant's negligence is required. The measurable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence: *Athey* at paras. 27 and 35.

[71] The defendant is only required to return the injured plaintiff to the original position that she would have been in "but for" the accident: *Athey* at para. 35.

[72] The court must take into consideration the risk established by the evidence that the pre-existing condition would have detrimentally affected the plaintiff in the future in any event: *Jokhadar v. Dehkhodaei*, 2010 BCSC 1643 at para. 109. The onus of proving the plaintiff suffered from a pre-existing condition that is the cause of her symptoms is on the defendants*: Kim v. Lin*, 2016 BCSC 2405 at para. 88.

[73] Dr. Dodd agreed that the Plaintiffs vitamin and mineral deficiencies have been contributing to the Plaintiffs current complaints, particularly her fatigue. Drs. Arsenault and Sun were not aware of the deficiencies, and while acknowledging additional information may affect their opinions, they were not asked by the defendants how the information might have affected their opinions. The symptom of fatigue was not problematic at the time of the First Accident. Fatigue is a significant symptom associated with the plaintiff's chronic pain. I accept that a limited amount of fatigue is likely associated with the plaintiff's vitamin and mineral deficiencies,

however, they are being treated with supplements. I find that the plaintiff's fatigue is to a much greater extent caused by injuries incurred from the Accidents.

[74] Prior to the Accidents, the plaintiff also suffered from dizziness, nausea, a feeling that her ears were plugged, feeling off balance, light-headed, and feeling faint. This was diagnosed as vertigo. The symptoms were disabling for six months in 2014 and resolved after treatment. Similar symptoms reoccurred in 2020, well after the Accidents. She has since had multiple episodes of dizziness, however, the disabling nature is unknown given her numerous other complaints. The defendants have not shown that any similar symptoms occurred by reason of a reoccurrence of vertigo and are unassociated with the injuries from the Accidents.

Damages

Non-Pecuniary Damages

[75] *Stapley v. Hejslet*, 2006 BCCA 34 outlines the purpose of and considerations for assessing non-pecuniary damages. At para. 46 the Court of Appeal sets out an "inexhaustive list of common factors" to be considered, being the:

> (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 …).

Pain, Suffering, Loss of Enjoyment and Loss of Amenities

[76] The plaintiff refers me to non-pecuniary awards of $200,000 (present value $271,603) in *Adamson v. Charity*, 2007 BCSC 671; $200,000 (present value

$252,549) in *Felix v. Hearne*, 2011 BCSC 1236; $225,000 ($240,480 present value) in *Steinlauf v. Deol*, 2021 BCSC 1118; $200,000 ($222,602 present value) *in Gill v. Apeldoorn*, 2019 BCSC 798; $200,000 ($221,017 present value) in *Moges v. Sanderson*, 2020 BCSC 1511; $200,000 ($221,017 present value) in *Fletcher v. Biu*, 2020 BCSC 1304; $195,000 ($215,492 present value) in *Tougas v. Mostat*, 2020 BCSC 1281; $180,000 ($215,247 present value) in *Sebaa v. Ricci*, 2105 BCSC 1492; $180,000 ($212,215 present value) *in Pololos v. Cinnamon-Lopez*, 20166 BCSC 81; $190,000 ($209,966 present value) in *Niescierowicz v. Brookes*, 2020 BCSC 1590; and $190,000 ($209,966 present value) in *Bhatti v. Jones*, 2020 BCSC 1935.

[77] These awards focus on the effect of daily chronic pain and depression on one's life. Plaintiffs were not able to retain employment due to their injuries, and their activities were limited. However, the circumstances in some of these cases were very different from the plaintiff's. In *Adamson,* the primary injury was a brain injury with cognitive disfunction. In *Felix*, the plaintiff experienced significant post traumatic stress disorder ("PTSD") after their passenger was killed in the accident. The injuries in *Steinlauf,* also included PTSD after the defendant's tractor-trailer violently struck the plaintiff's vehicle.

[78] The plaintiff submits an appropriate range for a non-pecuniary award is $210,000 to $270,000 on the basis that the interference with the plaintiff's quality and enjoyment of life has been substantially and permanently impaired due to the Accidents. Prior to the Accidents, the plaintiff was happy and highly functional. She was highly involved in her three teenage sons lives, busy with child-rearing and the life of a 'hockey mom', all the while maintaining successful full-time employment as a bank customer service manager. She took pride in her home, maintaining all of the home herself, inside and outside. She took pride in her work, and was noted as being well liked among staff and well known by clients and the community. She walked and cycled in her community regularly.

[79] After the accidents, the plaintiff's life has been significantly limited. She attempted to regain her life at work by returning to work at the bank in early 2017 and persevering through pain and fatigue until she could no longer carry on by November 2017. Her time since has been spent on countless appointments with physicians and therapists. Her walks are limited, with very little other activity. She attends few of her sons' activities. She spends most days resting at home, in pain, exhausted and depressed. She relies largely upon her family to care for her and her home.

[80] The defendant refers me to the non-pecuniary awards of $150,000 in *Van Tol*; $105,000 in *Pang v Burns*, *2020 BCSC 356; $120,000 in McAuley v Goodrich*, 2020 BCSC 2014.

[81] In the above-noted decisions, all of the plaintiffs suffered ongoing chronic pain and psychological distress that rendered them unable to continue working to some degree and restricted their housekeeping capacity. The Defendants submit that $125,000 to $150,000 is the appropriate range for non-pecuniary damages.

[82] I find Dr. Axler's and Dr. Sun's opinions on the extent of the plaintiff's injuries, diagnoses, and prognosis to be the most reliable. Dr. Todd's observations as well as the extensive detailed reporting of symptoms by the plaintiff over the years, and the observations of the plaintiff's lay witnesses align with their opinions. Whatever the specific diagnoses, be it CSS, FM, or somatic disorder, the plaintiff has chronic pain with heightened sensitivity and depression as a result of the Accidents which significantly limit her enjoyment of life.

[83] The Plaintiff was 41 years at the time of the First Accident. She missed out on being an active parent for her sons during their high school years. Her quality of life has been significantly impacted.

[84] In the circumstances, I find that an appropriate award for non-pecuniary damages for the plaintiff is $200,000.

Past and Future Loss of Earning Capacity

[85] A loss of earning capacity may be quantified either on an earnings approach or a capital asset approach. The earnings approach may be more useful when the loss is more easily measurable, while the capital asset approach will be more useful when the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[86] Claims of loss of earning capacity have recently been addressed in the "Grauer Trilogy" of decisions: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos,* 2021 BCCA 421.

[87] In *Rab*, the Court set out the three-step process for assessing loss of earning capacity:

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

[88] Both past and future income loss are properly considered on the basis of loss of income earning capacity: *Ibbitson v. Cooper,* 2012 BCCA 249, at para. 19.

[89] Given the plaintiff's prolonged full-time employment history at TD Canada Trust prior to the Accidents and for a period of time after the Accidents, her loss of earning capacity is best assessed using an earnings approach.

Employment History

[90] The Plaintiff has been employed with the bank since 1995. In January 2011, she became a manager of customer service. She remained in that position until December 2012. From December 2012, to November 4, 2013, the plaintiff was a

personal banking associate. On November 4, 2013, she returned to the role of manager of customer service and was in this position at the time of the First Accident. She worked 37.5 hours a week in each of these positions.

[91] The plaintiff was off work from the date of the First Accident to July 6, 2016, when she attempted a gradual return to work until July 11, 2016. Then she was off work until August 15, 2016, when she attempted another gradual return to work, but had the Second Accident the next day on August 16, 2016.

[92] The Plaintiff was off work from the date of the Second Accident to January 22, 2017, at which time she commenced a gradual return to work as a manager of customer service. From February 20, 2017 to November 20, 2017, the plaintiff worked full time in that position.

[93] The Plaintiff has not worked since November 20, 2017.

[94] Since the First Accident the Plaintiff has been in receipt of short term disability income paid through the bank, long term disability insurance income benefits, and CPP income disability benefits.

[95] At the date of the First Accident the Plaintiff's position was classified as level 6. On November 1, 2018, the bank changed the classification from level 6 to level 7.

[96] At the time of the First Accident and Second Accident, a manager customer service was entitled to base pay of $50,075 annually (based on 37.5 paid hours per week) and incentive compensation. In addition, the plaintiff was eligible for and participated in the bank group benefits package including medical, dental, short term disability, long term disability and a defined benefit pension plan.

Has the plaintiff suffered a reduced capital asset?

[97] The plaintiff was a functioning parent, homemaker, and bank employee before the Accident.

[98] Dr. Todd opines that the plaintiff will not be able to return to employment in any occupation.

[99] Dr. Arseneau opines that the plaintiff is disabled from work indefinitely and is unlikely to be gainfully employed in her own or any occupation, even part-time.

[100] Dr. Sun opines that the plaintiff has partial disability in terms of performing activities of daily living, certain household chores, and certain aspects of her work which will persist for the foreseeable future. Her symptoms make her less competitive in the future job market.

[101] Dr. Axler opines that further psychotherapy may result in improvement in the plaintiff's mood but it would be limited.

Natalie Hull, Occupational Therapist

[102] The plaintiff called Ms. Hull who was qualified as an expert in the field of occupational therapy and qualified to opine on functional capacity, and costs of future care. She conduced an in-home assessment of the plaintiff on September 21, 2022. She also reviewed the opinions of the medical experts.

[103] The plaintiff participated in functional testing with variable levels of physical effort, ranging from guarded to high.

> Guarded effort, observed in the form of self-limiting behavior, was associated with reports of increased pain and/or concerns of further symptom aggravation, as well as her reported approach to activity in general (i.e. a paced approach). Overall, she demonstrated a consistently low level of physical function and low activity tolerance. Test results are therefore believed to be a reasonable reflection of Ms. Gundarah' s current physical functioning while acknowledging that her overall physical functioning is variably impacted by fatigue and pain factors.
>
> Her self-reports of function were consistent with clinical measures of functional abilities and limitations.

[104] Ms. Hull decided, based on her home based assessment indicating low level of functioning and low activity tolerance, clinic-based testing scheduled for the next

day for the purposes of conducting a work capacity evaluation was cancelled. Ms. Hull opines:

> In terms of overall work endurance, from a physical functioning perspective, it is my opinion that Ms. Gundarah does not demonstrate the requisite basic functional tolerances for even part-time work in a sedentary capacity at this time.

[105] The Plaintiff sat for two hours and 13 minutes and was in a prone position for an additional 44 minutes, leaving only 45 minutes for testing and observation of various tasks. Ms. Hull's opinion is based on the Plaintiffs subjective reports of her pre and post-Accidents limitations as well as her observations while in the plaintiff's home. She did only one reliability test and one functional test, both of which were done only once and not multiple times as recommended. Ms. Hull did not ask her to perform any cleaning tasks or yard maintenance task. She observed the plaintiff make tea and a light snack. The plaintiff was not asked to perform any other food preparation tasks.

[106] Ms. Hull reported that the plaintiff was able to complete 96% of self care items, 56% of light housekeeping tasks, 19% of heavy housekeeping tasks, and 2% of heavy home maintenance tasks. The plaintiff reported to her that she is able to dust, load and unload the dishwasher, do her own laundry, grocery shop on her own, and assemble a meal.

[107] The lack of any significant testing makes it difficult to get a more clear picture of the plaintiff's ability to care for herself or her home. I am concerned about appearance of advocacy as Ms. Hull selected photographs for her report that fit her description of the Plaintiffs home being cluttered and rundown. Despite having them in her file, Ms. Hull did not include photos of the plaintiff's kitchen and the living room that she uses, both of which depict neat, tidy, and uncluttered areas. An additional photo of the plaintiff's bedroom also depicts a more tidy area than the photograph included with the report would suggest.

[108] I treat Ms. Hull's opinion regarding the plaintiff's level of functioning with caution.

[109] That said, the parties agree that the plaintiff's functionality has been reduced since the Accidents as described above. They disagree as to the extent of that reduction. She has suffered a reduced capital asset.

Will the plaintiff's reduced capital asset lead to a real and substantial possibility of wage loss?

[110] The parties also agree that the plaintiff's reduced capital asset has led to past loss and will lead to a real and substantial possibility of wage loss. They disagree as to the value of that loss.

What is the value of the past and possible future loss?

[111] The plaintiff submits, that but for the Accidents, there was a real and substantial possibility that she would have been promoted to the position of branch manager by January, 2017. In the alternative, she would have remained in her current position until retirement.

[112] The Plaintiff gave evidence on direct examination that at the time of the Accidents, she had been in a Level 6 position since 2011 (level 7 as of 2018). It is the highest level she had ever achieved at the bank, where she had worked since 1995. Branch manager was a level 9 position. In order to assume a promotion to that level by 2017, we would have to assume that she would go through three levels of promotions in less time than she had spent at Level 6.

[113] The bank has many types of level 7, 8 and 9 employment positions with various job requirements. The plaintiff stated she planned to continue her career advancement at the bank to a level 7, 8 and 9 position. She did not apparently share these plans with her co-worker or the other witnesses.

[114] The plaintiff testified that the branch manager position requires a bachelor's degree, which she does not have. While her co-worker stated that she herself was asked to apply for an assistant branch manager (level 8) or branch manager position (level 9) without a Bachelor's degree, that occurred when many years ago and there is no evidence that that would still be a possibility now. The plaintiff applied for a

promotion in January 2016 and was not the successful candidate, despite having had a good year and a good interview.

[115] Despite having worked together since 2011 and being involved in the plaintiff's performance management, her co-worker gave no evidence as to her understanding of the plaintiff's career aspirations, or the reasonableness of them, in her experience. I do not find there was a real and substantial likelihood that the plaintiff would have been promoted to the position of branch manager by January 2017 or afterward.

[116] The plaintiff had a sizeable mortgage on her home with a balance of $440,940 at the time of the First Accident, and a lack of financial savings.

[117] The plaintiff testified that at the time of the Accidents she had planned to work full time until age 70. The plaintiff was eligible for a full unreduced employment pension at age 62. The plaintiff and her co-worker testified that the average retirement age from the bank was 62. Mr. Gosling confirmed that the statistically tracked average retirement age for all Canadians employed in banking is 62.

Darren Benning, Economist

[118] The plaintiff called Mr. Benning, who was qualified as an expert in economics and to render opinions on plaintiff's past and future lost of income and the present value of those losses as well as the present value of the plaintiff's cost of future care.

Mark Gosling, Economist

[119] The defendants called Mr. Gosling, who was qualified similarly to Mr. Benning. He prepared a responsive opinion to that of Mr. Benning.

Past Income Loss/Past Loss of Earning Capacity

[120] Mr. Benning's opinion is based on the assumption that, in the absence of the First and Second Accidents, the Plaintiff would have continued working as a customer service manager earning her historical income without promotion, or that she would earn income comparable to that of an average female bank manager in

British Columbia, meaning she would be promoted. He provides a past income loss range, after tax, as follows:

a) $335,368 based promoted to a branch manager position January 1, 2017 to date of trial, presuming a 100% rate of participation in the labour market, without negative labour market contingency deductions for unemployment, and part time employment or part-year employment;

b) $300,239 historical income without promotion from the date of the First Accident on April 22, 2016 to the date this trial, with the same assumptions.

[121] Mr. Gosling's estimates take into consideration average unemployment or part-time work. If promoted as Mr. Benning estimates, Mr. Gosling's estimate for past wage loss is $283,391. Without promotion the figure is $244,946.

[122] The parties agree that an award would require a reduction of $57,302 for the short term disability benefits received by the plaintiff.

[123] Given the plaintiff's long work history and the age of her children, and my finding regarding a promotion, Mr. Benning's estimate without promotion is more applicable. Accounting a small contingency for disability in that period of time of 5% and the short-term disability benefits, I award the plaintiff $230,800 for past income loss. This amount is after-tax.

Future Loss of Earning Capacity/Income Loss

[124] Mr. Benning provided estimates for future income loss using negative labour market contingency deductions for disability and unemployment. He does not provide for voluntary withdrawal from the labour market and part time employment based on his instructions. He again provides a comparison between with and without promotion. On this basis, he estimates the plaintiff's loss of future income, without promotion, age 65 at $1,010,871, and 70 at $1,449,863. In testimony he calculated he loss to age 62 would be $853,000. With promotion, as assumed for past-loss, her

loss is estimated to age 65 would be $1,395,227, age 70 at $1,759,617, and age $75 would be $2,061,761.

[125] Mr. Gosling includes additional contingencies in his estimates. As he does for past-loss, he allows for an average chance of non-participation, unemployment and part-time work. Without promotion, to age 62 he estimates the present value of the loss at $661,775, age 65 $732,481, and age 70 at $786,088. With promotion to branch manager his estimates are to age 62 $867,457, age 65 $963,429, and age 70 $1,031,558.

[126] I do not find that an assumption there would be no voluntary reduction of participation in the workforce until retirement for the plaintiff. Any number of things have a possibility of changing in her life over the next 15 to 23 years. She may have grandchildren for whom she may want to provide care. She is an only child to two aging parents who she testified she did not want to place them in a care home. As an only child, there is a likelihood she will benefit to some extent from their estate when they pass. They own a house nearby.

[127] There is also a possibility that the plaintiff may be able to return to some form of work at some point in the future. Dr. Dodd conceded it is premature to opine that the plaintiff is permanently disabled, as all treatment options have not been exhausted. Dr. Sun opines that the Plaintiff may be able to return to part time work in the future. Dr. Axler provides no opinion on disability at all. The medical evidence does not establish that the plaintiff has zero residual capacity.

[128] Despite the plaintiff's testimony, I find it is most likely that she will retire at the same age as her colleagues and others in the banking industry in her branch based occupation. She will be eligible for a full unreduced pension as well as public pension benefits at that age. All of her children will highly likely be independent.

[129] There is also, I find a significant possibility that the plaintiff, although not likely obtaining a promotion as branch manager at level 9, will obtain a promotion to

level 7 or 8 given her long proven history with the bank, her ambition, and the availability of other positions.

[130] I find that, absent consideration of a residual capacity for employment, and considering the possibilities of additional contingencies noted above, an amount that is the mid-point between Mr. Golsing's without and with promotion estimates to age 62 is appropriate in the circumstances. That amount is $764,616.

[131] I further find that there is a real and substantial possibility that the plaintiff could work part-time at a more sedentary job at some point in the future. In *van Tol*, at para 132, a 15% reduction was made to the future income loss in order to take this "small possibility" into account. This is an appropriate contingency with residual earning capacity of the plaintiff.

[132] In all of the circumstances I find that an appropriate assessment of the plaintiff's loss of future income is $650,000.

Cost of Future Care and Loss of Housekeeping Capacity

[133] The test for establishing a claim for cost of future care is set out in *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.). There must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina* at para. 199.

[134] If the evidence shows that the plaintiff is unlikely to use the services recommended, awards for those services should not be made: *Izony v. Weidlich*, 2006 BCSC 1315, at para. 74.

Supplements, Neurofeedback, Transcranial Stimulation, and Hyperbaric Oxygen Treatment

[135] Dr. Arseneau recommends a number of supplements that can be helpful in the treatment of pain, fatigue, and cognitive symptoms. He agreed in cross-examination that these supplements would not all be taken at the same time. Dr. Arseneau did not know whether the plaintiff was taking any of these supplements prior to the Accidents and advised that all British Columbians should take Vitamin D. The Plaintiff's own evidence was that she was taking vitamins prior to the Accidents.

[136] Dr. Arseneau suggested treatments are unlikely to bring about “substantive recovery”. The purpose would be mainly to reduce pain levels. He opined that the recommended treatments would likely have no real improvement on the Plaintiffs function. He confirmed his recommendations were standard and not specific to the plaintiff. His recommendations were only made in his expert report, and not to the plaintiff while he treated her. There is insufficient evidence explaining how the recommended treatments, neurofeedback, transcranial stimulation, and hyperbaric oxygen treatment could be expected to make a material difference to the plaintiff’s situation. With respect to the hyperbaric oxygen treatment, Dr. Arseneau agreed in cross-examination that ME/CFS and fibromyalgia are not on the Health Canada list of approved conditions that can be positively affected by this therapy. The plaintiff stated she would try transcranial stimulation but only as a last resort.

[137] The plaintiff was already using supplements prior to the Accidents and likely would have continued with them in any event.

[138] There is insufficient evidence to find that these treatments are medically necessary.

Ketamine Infusion

[139] Infusion therapy is recommended by Dr. Sun. he notes:

> Unfortunately, infusion therapy is not a permanent cure. Some patients can have months of relief from one infusion, while others will require repeated infusion sessions.

[140] The only cost submitted is the cost of treatment at CHANGEpain Clinic set out in Ms. Hull's cost of care recommendations. Infusions can be covered by Medical Services Plan if done at St. Paul's Complex Pain Clinic. Unfortunately, no steps have been taken at the time of trial to secure treatment at that location. I find that this is a necessary treatment for the plaintiff. However, I fully expect that with the assistance of her treatment providers at the pain clinic and the remarkable referral skills of Dr. Todd the plaintiff will be able to secure this treatment through the publicly funded stream. There is no evidence that this treatment is needed on an urgent basis.

Psychological Counselling

[141] The Defendants accept Dr. Sun and Dr. Axler's recommendations for counseling and cognitive behaviour therapy. The parties agree to Mr. Benning's cost associated with treatment in the amount of $4,341 for 26 sessions.

Occupational Therapy & Rehabilitation Assistant Support

[142] The Defendants accept the recommendation for occupational therapy services to assist with the Plaintiffs function within her home. I agree with their objection to the need for rehabilitation assistant support as such services are duplicative. For this cost I accept Mr. Benning's cost assessment, and accounting for travel, in an amount of $7,718 for 30 sessions.

Active Rehabilitation

[143] The Defendants accept Dr. Sun's recommendation for active rehabilitation sessions with a kinesiologist. I award the amount set out by Mr. Benning which is $1,473, based on 20 sessions.

Physiotherapy & Massage Therapy Treatment (Symptom Management Treatment)

[144] Dr. Dodd advised the plaintiff has also tried many different therapies, "from which she attained very limited temporary relief with a few". These included acupuncture, trigger point injections, dry needling, massage, cupping, stretching, hydrotherapy, nerve blocks and sphenopalatine ganglion block". However, she was still of the opinion that the plaintiff will require physiotherapy, massage therapy, acupuncture and trigger point injections to control her pain symptoms.

[145] Dr. Sun was not aware of the timing or frequency of the various treatments tried by the plaintiff. He agreed that having this information would have influenced his opinion on the plaintiff's future care needs. The plaintiff's evidence was that no therapy, including chiropractic treatment and acupuncture, have helped. Yet, when reporting the level of pain, it has actually substantially improved. This is consistent with the plaintiff's continued participation in treatments. Alleviation or reduction in

pain levels is beneficial to the plaintiff's enjoyment of life and functionality. I find that symptom management treatments are medically necessary for the plaintiff and award the amount of $67,281 as the present value of those treatments as set out by Mr. Benning.

Naturopath/Nutritional Consult

[146] Dr. Arsenault recommended sessions with a naturopath to address future flare ups. The plaintiff did consult a naturopath in 2019 who recommended a change in diet and to take pro-biotics to address her stomach acid issues after an acid blocker did not work. This was helpful for the plaintiff and she continues to take probiotics. There does not appear to be any medical necessity for a naturopath at this point.

Prescription Medication

[147] In her report, Ms. Hull sets out a number of prescription medications that the plaintiff reported taking at the time of her assessment in September 2022. The plaintiff herself was unable to provide specifics as to the medication that she is currently taking, stating she could not remember. Vitamin D is listed by Ms. Hull but I will not include that since the plaintiff began taking it prior to the Accidents. Mr. Benning estimates the cost of Aventyl, Fluvoxamine, and Pregabalin to be $26,547 based on dosages the plaintiff was prescribed and taking when assessed by Ms. Hull. The defendants submit given the plaintiffs' vague evidence on this issue, the cost of the medication should be reduced. I accept that the plaintiff continues to take her medication as prescribed given her overall adherence to following her treater's recommendations particularly medical doctors.

[148] I award the amount of $26,547 with regard to prescription medication.

Vitamins & Supplements

[149] The plaintiff testified that new supplements taken to address her symptoms after the Accidents were magnesium, P.E.A.k Activate, protein drinks, apple-cider vinegar and probiotics. These stated were recommended by Dr. Todd and/or the

naturopath. She did not keep receipts but testified she spends about $300 a month on these items. She also takes Tylenol Arthritis and Tylenol extra strength for her pain symptoms.

[150] Dr. Sun testified that the efficacy of the various vitamins and supplements recommended by him could only be determined if they were initiated at different times. He did not know when the various vitamins and supplements were initiated and that evidence was not provided by the plaintiff. As such, it cannot be known which, if any, of the recommended vitamins and supplements have had a positive effect on the plaintiff's condition. The one item which was started at a discreet time and which the plaintiff testified benefitted her was probiotics but this is not itemised by Ms. Hull or costed out by her or Mr. Benning.

[151] Apart from the Tylenol, there does not appear to be evidence as to their purpose.

[152] I will award the amount of $4,500, for Tylenol and probiotics.

Housekeeping, Gardening/Yard Work, & Roof Cleaning/Gutter Clearing

[153] A damage award to the plaintiff to recognize a loss of or diminished capacity to take care of her household may be made under any of the five heads of damages including cost of future care: *Kroeker v. Jansen*, 1995 CanLII 761 (BC CA).

[154] 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, that loss may be compensated by a pecuniary damages award: *Kim v. Lin*, 2018 BCCA 77, at paras. 33 and 34.

[155] The evidence of the plaintiff, supported by the evidence of her sons and her parents, was that the plaintiff completed all household chores, yard work and home maintenance herself prior to the Accidents. This included maintenance of a large garden, seasonal cleaning of the gutters on the roof of her home and power washing the driveway. However, after the accidents her housekeeping capacity has been

reduced to basic tidying, dusting, and her personal laundry. She now pays for a gutter cleaning service and relies on her parents and children to help with maintaining the home.

[156] Dr. Arseneau recommended house cleaning and seasonal cleaning in his report. He agreed in cross-examination that he did not have any discussions with the Plaintiff as to the specific tasks that she could and could not do around the home. I disregard his recommendation as he has not set out the basis for this future care item.

[157] Dr. Dodd, who was very involved in the plaintiff's care, did not recommended assistance with housecleaning or yard maintenance. Dr. Sun makes no recommendation for housekeeping or yard maintenance assistance in his report.

[158] Ms. Hull opines that the plaintiff requires assistance with bathroom, floor cleaning, vacuuming and seasonal house cleaning. The plaintiff's own reporting to Ms. Hull indicates that she is capable of completing many tasks within her home, albeit at a slower pace than she did before the Accidents.

[159] Ms. Hull includes in her opinion on the level and cost of services required an assumption that the plaintiff's capacity would have reduced by 25% at age 75, 50% at age 80 and 100% by age 85 in any event. Mr. Benning estimates the present value of the cost of future home maintenance, including cleaning support, gardening, yard work, roof cleaning and gutter cleaning at the levels set out by Ms. Hull, is $104,097.

[160] The plaintiff is able to complete many housekeeping tasks. It is also very likely that as her children age they would have taken on more of the housekeeping duties with respect to there own rooms and common areas, or move away from the family home such that the amount of house cleaning would be less over time. I accept however that the plaintiff wanted her children to focus on their schooling and activities such that they would not have been expected to contribute toward the home maintenance to a great extent. As well, it is very likely that the plaintiff would

have ceased climbing up on her roof and standing on a ladder to do roof and gutter maintenance after the age of 50.

[161] Taking my findings into consideration, I find that the plaintiff has experienced a loss in capacity to maintain her home to the standards she did prior to the Accidents, and asses this loss as a loss of capital asset in the amount of $50,000.

Total Cost of Future Care

[162] The total award for cost of future care is therefore $161,860.

Tax Gross-Up

[163] The award for future care may need to be grossed up to offset the tax payable on investments in the future. This may be spoken to by counsel if there is no agreement.

In-Trust Claim

[164] The plaintiff seeks an award for an in-trust claim based on services provided by family members.

[165] A summary of the factors to be considered in the assessment of "in trust" claims is set out in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180:

> (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.

[166] Since the Accidents in 2016, the plaintiff relied upon her parents and sons to carry out the daily food preparation and household chores including tidying the home and doing the laundry, vacuuming and household cleaning. She relies upon her mother to often prepare the meals for her and her sons. She relied on her father to also tidy her home and care for the yard and lawn.

[167] She seeks an amount of $35,000 with respect to past and future services.

[168] I accept that the plaintiff's sons were not expected to help with maintenance of the family home prior to the Accidents and that only stepped up when their grandparents insisted they contribute to cleaning. The plaintiff's family dynamic was such that her sons were not expected by her, nor did they expect themselves, to have to contribute to housecleaning and yard work. As they age and become more independent there would likely have been an expectation of contribution.

[169] This is different from the expected and historic contributions made by the plaintiff's parents.

[170] I award a nominal amount of $2,500 with regard to the services performed by the plaintiff's children.

Special Damages

[171] The amount of $14,974.04 in special damages has been agreed upon.

[172] However, the additional special damages of the plaintiff, which total $42,160.00, are in dispute, and are claimed by the plaintiff. These are:

a) One expert hearing invoice dated October 31, 2019 of $50.00, based on the Plaintiffs testimony that hearing testing was recommended by Dr. Dodd;

b) Based on the Plaintiffs testimony, non-prescription medications purchased by the Plaintiff and estimated by the Plaintiff at $55 per month from April 22, 2016 to January 30, 2023, of $4,510.00;

c) Based on the Plaintiffs testimony that non-prescription vitamins and supplements purchased by the Plaintiff and estimated by the Plaintiff at $300 per month from April 22, 2016 to January 30, 2023, of $24,600; and

d) Based on the Plaintiffs testimony lawn mowing and roof cleaning paid by the Plaintiff and estimated by the Plaintiff at $2,000 per year from April 22, 2016 to January 30, 2023, of $13,000.

[173] In *Redl v. Sellin*, 2013 BCSC 581, at para. 55, the Court set out the following with respect to claims for special damages:

> Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiffs physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness...

[174] There was no evidence that the hearing test performed on October 31, 2019 was related to the First or Second Accident.

[175] The plaintiff has not provided receipts for the non-prescription vitamins and medication that she alleges to have taken over the years. She is claiming a significant sum for these items. They are based on the expenses being incurred on a monthly basis from the date of the First Accident to the date of trial yet there is no evidence that the Plaintiff has been taking the same vitamins and non-prescription medications on a monthly basis since April 2016. The plaintiff's testimony, and that of her experts, is that these non-prescription medications and vitamins were initiated, or ought to have been initiated, at varying times. The plaintiff took vitamins prior to and following Accidents for unrelated reasons. The Plaintiff has not provided any receipts to support the cost of these items saying she did not keep them.

[176] Given the lack of evidence regarding the claim for vitamins and non-prescription medications, the reasonableness of the expense cannot be determined.

[177] Regarding lawn mowing and roof cleaning expenses from April 2016 to January 2023, the plaintiff provided one receipt dated June 17, 2022 and totals $236.25 with a balance owing of $153.56. There is no indication on the receipt that the balance owing was actually paid, nor is there any indication as to the work performed. The expenses are claimed from April 2016 to the date of trial, which is contrary to the evidence of the collateral witnesses who say that the lawn mowing was done by the plaintiff's father for an undefined period of time. There was no evidence as to when paid cleaning was initiated.

[178] The Court may dismiss expenses claimed as special damages due to the lack of documentary evidence: *Al-Hendawi v. Sidhu*, 2006 BCSC 522, at paras 150-154; *Daito v. Chan*, 2012 BCSC 209, at paras. 63-64; *Palangio v. Tso*, 2017 BCSC 1573, at paras. 333 and 334.

[179] The balance of the prescription medication claimed from April 22, 2016 to November 3, 2022 pertains to medication that the Plaintiff was either taking prior to the Accidents, such as Synthroid or medication that was prescribed for reasons that are not related to the Accidents, such as antibiotics. Given that no evidence was elicited to support this claim, the reimbursement of $1,814 for prescription medication is not reasonable.

[180] I will award the amount of $236.25 for maintenance costs incurred and evidenced by a receipt and as was explained by the plaintiff.

[181] The total award for substantiated and reasonable special damages is therefore $15,210.29.

Conclusion

[182] In summary, I make the following orders for awards in accordance with the reasons above:

Non-pecuniary damages	$200,000
Past loss of earning capacity (after tax)	$230,800
Future loss of earning capacity	$650,000
Cost of future care including loss of housekeeping capacity	$161,860
In-trust claim	$2,500
Special damages	$15,210.29
Total	**$1,260,370.29**

[183] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. Otherwise the plaintiff is entitled to her costs at Scale B.

"Wilkinson J."