IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Searle v. Xie,*
2023 BCSC 1716

Date: 20231003
Docket: M182884
Registry: Vancouver

Between:

Anne Michele Searle

Plaintiff

And

Bi Xia Xie and Jian Ye Xie

Defendants

Corrected Judgment: The cover page of the judgment was corrected on October 5, 2023.

Before: The Honourable Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:	J. Bednard C. Hartnett
Counsel for the Defendants:	J. Burgoyne P. Pandher
Place and Dates of Trial:	Vancouver, B.C. February 13–17, 2023
Place and Date of Judgment:	Vancouver, B.C. October 3, 2023

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Introduction

[1] The plaintiff, Anne Michele Searle, claims damages for injuries arising from a motor vehicle accident that occurred on April 19, 2016 (the "Accident") at the intersection of East 1st Avenue and Slocan Street, in Vancouver, British Columbia (the "Intersection").

[2] At the time of the Accident, Ms. Searle was driving east on East 1st Avenue, in the curb lane. The defendant, Bi Xia Xie, was driving a vehicle owned by the defendant, Jian Ye Xie, and travelling south on Slocan Street. For simplicity, I will refer to the driver defendant, Bi Xia Xie, as the "Defendant" when I am referring only to this defendant.

[3] The defendants admit liability but take the position that Ms. Searle was contributorily negligent and that liability should be apportioned 50 percent to her. This is disputed by Ms. Searle. She submits that the defendants are 100 percent liable.

[4] Ms. Searle alleges that the Accident caused soft tissue injuries resulting in pain and stiffness in her neck; pain in her back and left calf; shooting pain down her left leg; headaches; and stiffness and unusual sensations throughout her body. She alleges that these injuries aggravated pre-existing symptoms in her low back. She says that her Accident-related symptoms improved gradually, eventually her neck pain almost completely resolved, and she has been left with restricted range of motion in her neck, intermittent back pain, and intermittent pain and other symptoms in her legs. She says her ongoing symptoms are permanent, have left her vulnerable to further injury, have impaired her ability to engage in recreational and housekeeping activities, and have impaired her ability to work to her full pre-Accident capacity. She claims non-pecuniary damages, past loss of income-earning capacity, future loss of income-earning capacity, cost of future care, and special damages. In total, she quantifies her claim at $609,020.87.

[5] The defendants concede that Ms. Searle was injured in the Accident; specifically, that she suffered soft tissue injuries causing pain in her neck, back, and

legs, and that the Accident aggravated her pre-existing degenerative spinal condition resulting in some temporarily increased low back symptoms. However, they say Ms. Searle's Accident-related symptoms were short-lived, and any ongoing symptoms are attributable to the pre-existing condition and would be present even if the Accident had not occurred. The defendants' position is that the evidence does not support a claim for past loss of income-earning capacity, future loss of income-earning capacity, or cost of future care. The defence quantifies Ms. Searle's non-pecuniary damages at $30,000, accepts that she incurred special damages of $2,512.96, and submits that both amounts must be reduced by 50 percent for her contributory negligence.

Liability

[6] At the Intersection, East 1st Avenue has two eastbound lanes and two westbound lanes, separated by a large median. Slocan Street has one northbound lane and one southbound lane. Traffic on Slocan Street must cross the median when travelling through the Intersection. The Intersection has a pedestrian-controlled light for traffic on East 1st Avenue and a stop sign for traffic on Slocan Street.

[7] The Accident occurred at about 6:25 a.m. There was little traffic. As Ms. Searle approached the Intersection, the pedestrian controlled light facing her was flashing green. She saw the Defendant's vehicle cross the westbound lanes on East 1st Avenue and stop in the median. Believing the Defendant would wait until there was a break in the eastbound traffic, Ms. Searle proceeded. The Defendant did not wait. When Ms. Searle saw that the Defendant was entering the eastbound lanes in front of her, she slammed on her brakes and swerved but was unable to avoid the collision. The front driver's side bumper of Ms. Searle's vehicle struck the front passenger side door of the Defendant's vehicle.

[8] Ms. Searle testified that she was close to the Intersection when the Defendant entered the eastbound lanes on East 1st Avenue in front of her. Ms. Searle estimated she was about a truck length before Intersection when she saw the

Defendant come to a stop in the meridian, she had already slowed down to about 45 kilometres per hour, and as she "passed the crosswalk", the Defendant darted out.

[9] Ms. Searle's account is the only evidence of the circumstances leading to the Accident. The Defendant did not testify. No engineering evidence was tendered. I was not provided with measurements of the Intersection or the distance travelled by either vehicle from the point of entry into the Intersection to the location of impact.

[10] It is not disputed that the Defendant had a stop sign and, pursuant to s. 186 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, she was required to stop:

> 186. Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop
>
> (a) at the marked stop line, if any,
>
> (b) before entering the marked crosswalk on the near side of the intersection, or
>
> (c) when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

[11] Having come to a stop at the stop sign, the Defendant was obliged to comply with s. 175 of the *Motor Vehicle Act*:

> 175 (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,
>
> (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
>
> (b) having yielded, the driver may proceed with caution.
>
> (2) If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

[12] In addition to these statutory duties, drivers have common law duties to drive with due care; in particular, to take reasonable precautions in response to hazards: *Salaam v. Abramovic*, 2010 BCCA 212 at paras 18–21. These common law duties are described in *Stewart v. Dueck*, 2012 BCSC 1729 at paras. 38–40:

> [38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23.
>
> [39] It is a well-settled proposition that drivers in this province are entitled to assume, within reason, that the other users of the roads in British Columbia will obey the law: *Mills v. Siefred*, 2010 BCCA 404 at para. 26.
>
> [40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard of care, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28.

[13] The driver with the right-of-way is typically referred to as the "dominant driver", while the other driver is typically referred to as the "servient driver". When a driver in the servient position proceeds through an intersection in disregard of their duty to yield the right-of-way and a collision results, they cannot hold the dominant driver at fault for the collision unless it is established that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's disregard of the law the dominant driver had a sufficient opportunity to avoid the accident by acting in the manner of a reasonably careful and skilful driver: *Salaam* at para. 26.

[14] A driver proceeding on a green light has only a limited duty of care to a driver who unlawfully enters an intersection. The driver proceeding on a green light owes "no duty to traffic entering the intersection in disobedience to the lights, beyond a duty that, if [they] in fact see such traffic, [they] ought to take all reasonable steps to avoid a collision": *Damore v Motyer*, 2018 BCSC 2399, at paras. 31–33, citing *Yick v. Johnson*, 2012 BCSC 1485, which in turn cited *Wong v. West* (1960), 30 W.W.R. 526 (B.C.C.A.), and *Horsman v. McGarvey* (1983), 43 B.C.L.R. 192 (C.A.).

[15] In summary, the Defendant was required to yield to traffic travelling east on East 1st Avenue that was in the intersection or so close as to constitute an "immediate hazard", but if there were no vehicles in the intersection or sufficiently close to be an immediate hazard, she was entitled to proceed and approaching

traffic was required to yield the right of way. If Ms. Searle was in the intersection or so close as to constitute an immediate hazard, then the Defendant was the servient driver and Ms. Searle, as the dominant driver, was entitled to assume that the Defendant would obey the rules of the road, but Ms. Searle was also required to yield if she had a sufficient opportunity to avoid the collision by conducting herself in a manner which a reasonably careful and skilful driver would have done. If Ms. Searle was not in the intersection or so close as to constitute an immediate hazard, then the Defendant was the dominant driver and Ms. Searle, as the servient driver, was required to yield the right-of-way, but the Defendant was also required to yield if she had a sufficient opportunity to avoid the collision by conducting herself in the manner of a reasonably careful and skilful driver.

[16] It is well-established that an approaching vehicle is an “immediate hazard” if it is so close to the intersection that its driver must take some sudden or violent action to avoid the threat of collision with the other vehicle: *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.) at 410. The point in time to assess whether the approaching vehicle is an “immediate hazard” is the moment before the other driver proceeds.

[17] Defence counsel emphasizes that, according to Ms. Searle, the Defendant proceeded into the Intersection from a complete stop and crossed nearly two lanes before being struck by Ms. Searle’s vehicle. The defence submits that in these circumstances, Ms. Searle’s vehicle must have been further west of the Intersection at the moment the Defendant entered than Ms. Searle described in her testimony, and that Ms. Searle would have been able to avoid the Accident had she been paying attention and going at a slower speed.

[18] I do not agree. As mentioned, Ms. Searle’s account is the only evidence of the circumstances leading to the Accident, and no engineering evidence or measurements of the Intersection were presented. It would be speculative for me to make liability findings based on the difference between the distance from where the Defendant was stopped to the location of impact and the distance from the crosswalk through which Ms. Searle passed to the location of impact. There is no

evidence of anything blocking the Defendant's view of Ms. Searle's vehicle, such that Ms. Searle ought to have anticipated that the Defendant might not see her. There is no evidence that the Defendant did anything to foreshadow that she would cross into Ms. Searle's line of travel. The evidentiary record does not support an inference that Ms. Searle had sufficient warning that the Defendant was going to proceed such that Ms. Searle had time to stop and ought to have stopped. Even if Ms. Searle was further west of the intersection at the crucial moment, the evidentiary record does not establish that she had a sufficient opportunity to avoid the collision by conducting herself in the manner of a reasonably careful and skilful driver.

[19] I accept Ms. Searle's description of the events leading to the collision. I find that Ms. Searle was very close to the Intersection, probably just entering the crosswalk, when the Defendant darted out in front of her. I find that Ms. Searle slowed down before the Defendant entered the Intersection and, notwithstanding that and her attempt to take evasive action, she could not avoid the collision. Ms. Searle's vehicle clearly was an immediate hazard in the moment before the Defendant proceeded into the intersection. Ms. Searle was the dominant driver. She was entitled to assume that the Defendant would obey the rules of the road. While she was also required to yield if she had a sufficient opportunity to avoid the collision, the evidence does not support the conclusion that she had such an opportunity.

[20] The defendants are 100 percent liable for the Accident.

Summary of the Evidence Relevant to Causation and Damages

The Plaintiff's Background and Pre-Accident History

[21] Ms. Searle was 51 years old at the time of the Accident and 57 years old at the time of the trial. She lives alone in a detached house in east Vancouver.

[22] Ms. Searle obtained a diploma in Fine Arts from Emily Carr University of Art and Design. She started working full-time in the film industry in 2001. She became a

member of the International Alliance of Theatrical Stage Employees (IATSE) in 2003.

[23] Ms. Searle has worked as a scenic artist, scenic or paint lead, foreman, and paint coordinator on film productions. All of these are positions within the "paint department" of a production. The work of the paint department is not limited to painting. Members of the paint department apply a variety of materials to decorate sets, from backgrounds and large set pieces, to smaller items within the set. Before the Accident, Ms. Searle typically worked as a scenic artist, paint lead, or foreman.

[24] Ms. Searle described the responsibilities of each position in a paint department:

a) The paint coordinator is the senior position. The duties of this job include liaising with the other production departments and teams, meetings, phone calls, and visits to sets. Long hours are usually required but the position does not involve physical labour. Paint coordinators must have their own "kit" of equipment in order to obtain work. A production will have only one paint coordinator.

b) A foreman works under the paint coordinator, supervising the work actually being performed in the paint department. A foreman creates samples of work to be approved for use on a set, ensures that the other workers know how to mimic the samples, and ensures that the work is carried out properly. Most productions will have only one foreman, but some will have two. Most of Ms. Searle's experience in the film industry is as a foreman.

c) A scenic or paint lead is responsible for a portion of a paint department's work on a particular set. Although leads have some supervisory duties, they are also expected to perform physical labour on the set. The number of leads on a production will vary.

d) A scenic artist performs most of the physical labour in a paint department. The job of a scenic artist is referred to as "working on the floor". Scenic artists must have the ability to perform all the physical tasks required to prepare a set. The work ranges from light to very heavy. Typically, a scenic artist will be required to carry ladders and five-gallon paint containers, and to use "thinset", a type of cement that is mixed and applied to scenery to create textured effects. The number of scenic artists on a production will vary. On one of Ms. Searles' recent jobs, there were 18 people working on the floor.

[25] Ms. Searle also explained the process of obtaining work in the paint department of a film production. The paint coordinator, a foreman, and a few other key individuals will typically form a “crew”. The paint coordinator will generally obtain work for the crew, either by seeking out jobs or by accepting offers from people they know in the film industry. Success in obtaining work depends heavily on the reputation of the paint coordinator. Crews often stay together for years, and sometimes for decades. If a crew is hired to work on a seasonal production, it is generally assumed that they will stay on that production for the duration of the season.

[26] Another way to obtain work in a paint department is as a “daily”. This means working in an individual capacity rather than as a member of a crew and usually means working on the floor. Someone who works as a daily has little control over the conditions of their work. Daily workers also have a reduced commitment to remain on a particular production. It is common for members of a crew to work as a daily during periods when their crew does not have a project. In that case, it is accepted that they will leave the production where they are working as a daily if their crew obtains work elsewhere.

[27] Before the Accident, Ms. Seale worked as a daily during periods that her regular crew was not working.

[28] In 2015, Ms. Searle injured her low back at work while lifting a piece of scenery. She experienced immediate low back pain. She received a massage from another employee and rested in a trailer. She finished the day of work on light duties and returned to work the next day.

[29] By the fall of 2015, Ms. Searle was complaining to her family doctor, Dr. Pierre-Paul Lizotte, about low back pain and related leg symptoms. At trial, she admitted to having sporadic pain in her leg and buttock and strange sensations in her left foot, like “pulling hairs”. Ms. Searle initially believed that this could be related to the requirement to wear steel-toed shoes at work and she obtained a note from Dr. Lizotte to excuse her from wearing steel-toed shoes.

[30] Dr. Lizotte ordered an X-Ray, CT scan, and MRI scan of Ms. Searle's lumbar spine. The X-Ray and CT scan were performed before the Accident. The MRI was ordered before the Accident but not conducted until a few weeks after the Accident. The CT scan, performed on January 8, 2016, revealed significant degenerative disc disease including a disc bulge at L4/5 resulting in canal stenosis with compression of the L5 nerve roots. The MRI, performed on May 5, 2016, revealed multilevel degenerative changes to the lumbar spine, most advanced at L4/5 where there was a generalized disc bulge with extrusion and mild facet hypertrophy resulting in canal stenosis and compression of the L5 nerve roots. Dr. Lizotte diagnosed degenerative disc disease and referred Ms. Searle to Dr. Paul Bishop, a back pain specialist at a spine clinic.

[31] Although Ms. Searle experienced intermittent back pain, leg pain, and strange sensations in her legs before the Accident, she testified that these symptoms did not materially limit her activities.

[32] Ms. Searle testified that before the Accident, she was generally able to perform the duties associated with all types of work in a paint department. As is common in the film industry, she worked long hours on set. It was not uncommon for her to work six-day weeks and occasionally she worked all seven days in a week. Ten to twelve-hour days were common. She testified that she had not seen Dr. Lizotte for a few months before the Accident because she was not experiencing anything more than minor back or leg pain. She was able to tolerate heavy lifting at work, although she had been advised to limit overhead lifting. She had full range of motion in her back and she did not have any neck pain or stiffness.

[33] Ms. Searle testified that before the Accident, notwithstanding her physically demanding job, she had plenty of energy for activities outside of work. She personally performed all of her household chores, including minor carpentry and repairs. She did most of her own gardening, but hired a gardener to assist with some tasks such as leaf removal and garden tidying. Ms. Searle was involved in her neighbourhood. She assisted her neighbours by shovelling snow off their sidewalks

and by helping them haul refuse to the dump. She also participated in a neighbourhood cleanup and beautification project in the lane behind her house.

[34] Before the Accident, Ms. Searle enjoyed a variety of recreational activities, including paddle boarding, scuba diving and snorkeling while on vacation, motor biking, cycling, dancing, and swimming. She also was involved in the local arts community and attended openings at galleries on a regular basis. She enjoyed travelling. She made several trips to Costa Rica and, in 2015, she travelled to Venice. In 2012, she purchased a property in Costa Rica, across the street from a property owned by her friend. This was bare land, on which she hoped to build an art studio.

[35] Ms. Searle's lay witnesses, Rick Athey and Dick Hellofs, corroborated her evidence of her pre-Accident physical capabilities. Neither of them was cross-examined.

[36] Mr. Athey worked with Ms. Searle . He testified that prior to the Accident, Ms. Searle did not appear to have difficulty with physical work. He described her as a "force of nature" and someone who moved fast.

[37] Mr. Hellofs is Ms. Searle's neighbour. He described Ms. Searle as being very energetic and able-bodied prior to the Accident. He testified that he saw her engaged in physical activities around her house and in the neighbourhood. He testified that when the neighbours got together on the lane beautification project, Ms. Searle did the majority of the heavy work.

The Immediate Aftermath of the Accident

[38] After the Accident, Ms. Searle got out of her vehicle on her own. Ms. Searle called 9-1-1 and waited for the emergency services to arrive.

[39] Ms. Searle testified that she did not have any symptoms at the scene of the Accident, other than feelings of "adrenaline". After speaking to emergency services and contacting her boss to advise him that she was going to be late, she drove to

work. When she got there, she phoned ICBC to make arrangements for repairs to her vehicle.

[40] On the day of the Accident, Ms. Searle performed only light duties at work. Over the course of the day, she began to feel pain in her neck, stiffness, and a strong pinch in her left calf, and she got a headache.

Post-Accident Condition and Treatment

[41] Ms. Searle testified that her symptoms increased during the weeks following the Accident. She said she developed pain along the centre of her back and experienced stiffness throughout her body. She continued to have a sharp pain in her left calf. She had shooting pain down her left leg. These symptoms worsened over time and she developed worsening lower back pain. Ms. Searle testified that in addition to pain, she experienced what she described as “zings” and other unusual sensations in her body that affected her ability to sleep at night.

[42] Ms. Searle testified that, in the months following the Accident, she had significant difficulty performing her regular household tasks as a result of her pain. She testified that in the period just after the Accident, she had difficulty even with personal care tasks such as putting on clothing, particularly socks and undergarments. She was only able to purchase very small amounts of groceries at a time because her ability to lift was impaired. She relied on neighbours for help. She usually drove to the grocery store but, on occasion, she would attempt to walk to “Benny’s”, the corner store approximately one block away from her residence. She had to stop and take breaks both on the way there and on the way back.

[43] As discussed in more detail later, despite her pain, Ms. Searle continued to work as a foreman on a show called “Beyond” in the weeks following the Accident, but with modified duties. Since then, she says there have been periods when she was unable to work due to her symptoms.

[44] There were two incidents in 2019 that Ms. Searle says resulted in a temporary increase in her pain.

[45] While on a camping trip in the summer of 2019, Ms. Searle lost her balance and fell backwards, on to her tailbone. On her return to Vancouver, Ms. Searle went to St. Joseph's Hospital where X-rays were taken. She testified that she was told that it was just a bruise and to take over-the-counter pain medication as required.

[46] The more significant injury occurred later in the summer of 2019. Ms. Searle had been cleared by her doctor to return to floor work and she had accepted, but not yet started, a casual position in that role. She had some continuing symptoms in her legs and attended an osteopathic treatment because she thought this would help prepare her for floor work. During the treatment, Ms. Searle experienced immediate and severe pain in her right leg. This pain became progressively worse over the next few days. She cancelled the upcoming floor work. Once Ms. Searle became more mobile, she went to see Dr. Lizotte who provided her with opioid pain medication in case she had future flare-ups. The increased symptoms gradually improved and she was able to return to work in October 2019.

[47] After the Accident, Ms. Searle was followed by Dr. Lizotte and Dr. Bishop, the spine specialist. She was also seen by Dr. Alister Prout, a neurologist.

[48] Ms. Searle tried a number of treatment modalities, including physiotherapy, massage therapy, and osteopathy. She found that physiotherapy sessions sometimes helped her feel better and sometimes made her feel worse, but they did not result in significant improvement.

[49] Ms. Searle also worked out with a trainer at Steve Nash gym. This trainer specialized in back pain. He took her through an exercise program that was designed to improve her balance. However, he left Steve Nash and was replaced by a trainer who did not specialize in back pain. Ms. Searle then discontinued these exercise sessions on the advice of Dr. Bishop.

[50] Over the years since the Accident, Ms. Searle has taken Tylenol with codeine and Advil liquid capsules in order to manage her symptoms. She testified that she generally avoids taking medication unless her symptoms are particularly severe.

Post-Accident Employment and Activities

[51] As mentioned, at the time of the Accident, Ms. Searle was working as a foreman on a show called “Beyond”. Notwithstanding what she described as significant pain, she continued to work as a foreman on this job until the production finished in July 2016. The paint co-ordinator on that production was a person named Steve Crane. Ms. Searle had worked with Mr. Crane for a long time and she testified that he accommodated her by permitting her to restrict her work to light duties and allowing her to take time off work to attend physiotherapy appointments.

[52] When the Beyond project finished, Ms. Searle was off work completely for a couple of months. She testified she turned down work during this period due to her Accident-related symptoms.

[53] In September 2016, Ms. Searle started working as a paint co-ordinator on a show called “The Deep”. Again, a paint co-ordinator position does not involve physical labour. Mr. Crane was instrumental in getting this job for Ms. Searle. He was retiring and offered to let Ms. Searle use his “kit” so she could pursue paint co-ordinator opportunities. He also convinced the production designer on The Deep to hire Ms. Searle as a paint coordinator. Although paint coordinator positions do not involve physical labour, Ms. Searle found that even walking through set locations aggravated her symptoms, and she brought another worker along to carry her bag.

[54] Production on The Deep wrapped up in late October of 2016. Ms. Searle testified that she took a few months off work as a result of her ongoing symptoms to focus on her recovery. After that, she decided to continue to seek out work as a paint coordinator to avoid physical labour, although this restricted the number of job opportunities available to her.

[55] Ms. Searle next obtained work as a paint coordinator on the pilot for “The Good Doctor”. She worked on that project from March 6, 2017 to April 13, 2017, and was asked to return for the first season of the show, which started production on June 19, 2017. Conditions on the first season of the show were difficult and resulted in the crew working seven-day weeks. Ms. Searle testified that this pace of work was

not sustainable for anyone. In August 2017, the construction crew was fired and the paint crew left the production in solidarity with the construction crew, hoping to move to another show together. Unfortunately, this did not happen.

[56] Ms. Searle testified that she was not able to find work as a paint coordinator during the balance of 2017. She testified that without a source of income, her financial situation deteriorated and she had to sell her Costa Rican property to pay off some debt. She began to worry about her inability to find work as a paint coordinator and started to consider the possibility of returning to floor work, as her symptoms had improved. However, she did not yet have clearance from Dr. Bishop to return to floor work, so she did not seek out this type of work and turned it down when it was offered.

[57] In the later part of 2017, when Ms. Searle was unsuccessful obtaining work as a paint coordinator, Mr. Crane decided to sell his kit. According to Ms. Searle, a kit of this kind would be worth approximately $100,000 new. She testified that she could not afford to purchase Mr. Crane's kit and eventually he sold it to a third party. Ms. Searle testified that without Mr. Crane's kit, she was not able to pursue work as a paint coordinator.

[58] Ms. Searle worked on an art installation for a local artist in the fall of 2017. This was a short-term project that did not require full days or full weeks of work, but it was hands-on painting work. Ms. Searle testified that her success with this project indicated to her that she might be able to return to floor work if accommodations were available.

[59] In early 2018, Dr. Bishop cleared Ms. Searle to attempt floor work, provided she avoided the heavier aspects of the work. Ms. Searle testified that this would not generally be possible, but she knew a paint coordinator named Shelley Dowson who was aware of Ms. Searle's injuries and had a reputation for being accommodating. Ms. Dowson had secured work for her crew on a show called "Riverdale" and she hired Ms. Searle as a lead but soon promoted her to second foreman, a position that does not typically exist. This reduced the requirement for physical labour. Ms. Searle

worked on Riverdale until the end of March 2018. Ms. Dowson's crew, including Ms. Searle, was hired on again for the following season of Riverdale, which started filming in mid-June of 2018 and continued until April of 2019. Ms. Searle continued to work as second foreman.

[60] After finishing up on Riverdale in April 2019, Ms. Searle did not seriously look for work. As already mentioned, she planned to try a casual job on the floor but changed her mind following the injury she sustained during an osteopathic treatment in the summer. Instead of looking for work on her own, she waited for Ms. Dowson to obtain work for the crew on another production.

[61] Ms. Dowson did not find other work until the fall of 2019 when Ms. Searle, as a member of Ms. Dowson's crew, started work on a show called "Home Before Dark". By this time, Ms. Searle's pain had substantially improved. Filming on this show continued until March 2020, when the production was shut down due to the COVID-19 pandemic. Ms. Searle testified that she received some pay until April of 2020 as the production wanted to ensure the crew was available if pandemic restrictions were lifted quickly. This did not materialize and Ms. Searle was off work due to the pandemic shut down until September 2020 when production resumed. She continued to work on Home Before Dark until the beginning of February 2021.

[62] Ms. Searle testified that after Home Before Dark, she was not able to find suitable work until September of 2021, when she started work on a show called "Shogun". This was floor work, which Ms. Searle accepted because she had been out of work for months and needed to earn an income. She said she hoped that she would be able to manage the work because her symptoms had improved.

[63] Ms. Searle described the work conditions on Shogun as "atrocious". The sets were located on a large site and the parking lot was two long city blocks away. There was deep mud on set and flooding issues. Ms. Searle described struggling to pull a garden cart full of paint up a hill in the rain and indicated that this was characteristic of the difficult conditions on set. Eventually, Ms. Searle told the lead painter she worked under about her back issues. She was then reassigned to work in set

decoration, painting decorative objects that would be placed within scenes, which was lighter work.

[64] Ms. Searle stayed on Shogun for only a few weeks because Ms. Dowson secured work for her crew, including Ms. Searle, on the pilot of a show called “Dead Boy Detectives” in October of 2021. The pilot finished shooting in February of 2022. Ms. Searle worked on that show as a foreman and did not describe any issues with her ability to perform the work.

[65] Ms. Searle next worked on was a show called “Kill the Orange Faced Bear”, also as a foreman with Ms. Dowson. This job started in April 2022 and was supposed to continue through the summer. However, due to a corporate merger, the show was cancelled and production ended in early May 2022.

[66] In the summer of 2022, Ms. Searle worked for a local artist on a project in Sun-Yat Sen Gardens. She worked as a contractor, hiring subcontractors to complete the work. The project lasted six weeks and her hours varied from close to full-time to only half-time. She also usually worked six hour days instead of full days.

[67] Ms. Searle then obtained work, again as a foreman on Ms. Dowson’s crew, on the next season of Dead Boy Detectives. She was working in that position at the time of the trial.

[68] Ms. Searle testified that she continues to be unable to take on floor work unless she knows the paint coordinator or foreman, and knows that she will be accommodated. She said this means that she can no longer work as a daily, which significantly limits her ability to pick up work when her core crew is not working.

[69] I turn now to activities unrelated to employment.

[70] Ms. Searle testified that since the Accident, she has been unable to do most of her gardening and she just “let the garden go”. Recently, she hired gardeners to take out most of her plants to reduce the need for ongoing maintenance.

[71] In the months following the Accident, Ms. Searle said she was unable to perform household tasks and shopping. She said her friends provided assistance with grocery shopping and other heavier household tasks. She said she resumed performing most household duties by about 2017.

[72] Ms. Searle testified that she was unable to participate in any recreational activities after the Accident. She initially attempted to go to art openings, but found that she was required to stand for long periods of time and there were no chairs available. She stopped going to openings for a year or more until her standing tolerance improved.

[73] Ms. Searle attempted to return to cycling after the Accident but found that it aggravated her symptoms. She made a number of modifications to her bicycle, but these were not sufficient to avoid the aggravation. Eventually, she purchased a new bike, but she has been hesitant to resume cycling. She testified that by 2019, she had resumed some activities and, shortly before the trial, had started kayaking on calm water without difficulty.

[74] Mr. Athey and Mr. Hellofs corroborated Ms. Searle's testimony about the change in her physical capabilities after the Accident, to some extent.

[75] Mr. Athey said he noticed that Ms. Searle did not move as quickly as she had before the Accident and she seemed to take more breaks.

[76] Mr. Hellofs said he saw Ms. Searle appearing to have difficulty moving around, and he saw her display expressions and body language indicative of pain. He testified that he saw her struggling when walking to the corner store. He said that after the Accident, Ms. Searle began asking him and his wife for help with physical tasks, such as unloading her truck.

Plaintiff's Condition as at Trial

[77] In summary, the trajectory of Ms. Searle's symptoms, according to her, was as follows. She experienced extremely limiting, severe back pain and leg pain for

several months after the Accident followed by a gradual improvement in her symptoms, with significant improvement by about one year post-Accident when she resumed performing most household duties and later, in the fall of 2017, successfully completed a hands-on painting project. She described how, over the course of 2017, she judged her recovery based on how many breaks it took her when walking to Benny's. She testified that about one year after the Accident, she was able to make the walk without breaks. Her doctor cleared her to attempt floor work in early 2018. She experienced substantial improvement by the summer of 2019, when she intended to return to floor work, but then she had two temporary flare ups caused by discrete events unrelated to the Accident which caused her to abandon that plan. Those flare ups gradually resolved.

[78] Ms. Searle testified that she currently has no neck pain, but she continues to have restricted range of motion in her neck, particularly on the left side when twisting her neck.

[79] Ms. Searle testified that her back pain is intermittent and highly dependent on the activity she is engaged in. She is usually able to avoid pain by shifting positions between standing, sitting, and walking. She said she continues to have intermittent leg symptoms, including pain that travels down her legs, burning sensations, and sensations of vibration.

[80] Ms. Searle testified that if she does something that aggravates her symptoms, such as shovelling snow, it affects her legs and makes walking difficult. She continues to be careful to avoid sudden movements and movements with resistance. She describes modifying "everything all the time" in order to avoid aggravating her symptoms.

[81] Ms. Searle is currently able to fulfill all of her job duties as a foreman. However, she testified that she is able to work on the floor only in a limited capacity and if she is accommodated. Ms. Searle continues to be able to perform her household tasks and do light planting and pruning in her garden, but she remains

unable to perform heavy gardening. Since 2019, Ms. Searle has resumed some recreational activities.

Expert Medical Evidence

[82] Ms. Searle relied on the expert medical evidence of Dr. Gillian Simonett, a physiatrist, who conducted an independent medical examination on September 21, 2022 and authored a report dated October 31, 2022. The defence relied on the expert medical evidence of Dr. Seyed Hosseini, also a physiatrist, who conducted an independent medical examination on October 21, 2022 and authored a report dated November 4, 2022.

[83] There is no material difference in the opinions of the two medical experts, but Dr. Hosseini addressed the impact of the pre-existing degenerative disc disease on Ms. Searle's current condition and Dr. Simonett did not directly address that point. Dr. Hosseini expressed the opinion that Ms. Searle's current condition is largely related to her pre-existing condition and that her pre-existing degenerative disc disease is a progressive condition that would have eventually resulted in increased symptoms regardless of Accident. Dr. Simonett did not express an opinion about whether the Accident caused or contributed to Ms. Searle's current condition, but she did opine that Ms. Searle's pre-existing condition left her at risk for symptom aggravation.

[84] Dr. Simonett was not cross-examined at the trial. In her report, she expressed the following opinions:

- prior to the Accident, Ms. Searle had a history of low back pain with radicular leg symptoms that corresponded with imaging showing degenerative changes to the spine and, as a result of that history, she was "quite vulnerable";
- given her history and her physically demanding job, Ms. Searle "had a poor prognosis for her low back pain and radicular symptoms prior to the [Accident]";
- given her history and her physically demanding job, Ms. Searle "will remain at high risk for ongoing pain symptoms including pain flares";

- the Accident likely resulted in neck pain and the aggravation of low back/radicular symptoms;

- Ms. Searle requires ongoing work modifications, especially to avoid heavy lifting, will remain at risk for not being able to work to her full capacity, but would likely tolerate more sedentary jobs;

- Ms. Searle continues to be partially disabled and will likely remain so for the foreseeable future;

- Ms. Searle should engage in ongoing core strengthening exercises which "may" require periodic supervision, such as through active rehabilitation, to ensure proper technique; and

- Ms. Searle should work with a medically supervised clinic for assistance in losing weight, may benefit from using a bidet, and may benefit from a surgical opinion in the event of a flare of the radicular leg symptoms.

[85] As alluded to, the difficulty with Dr. Simonett's evidence is that she did not express an opinion, or at least a clear opinion, on the duration of the Accident-caused aggravation of Ms. Searle's low back/radicular symptoms or whether Ms. Searle's current condition is attributable to the Accident, the pre-existing condition, or both.

[86] In his report, Dr. Hosseini expressed the following opinions:

- Ms. Searle had pre-existing lumbar spine pain, spinal stenosis, and degenerative changes;

- Ms. Searle sustained soft tissue injuries in the Accident, which "may" have aggravated the lumbar spine;

- it is "difficult to see how much the [A]ccident is affecting her current symptomology", but he believes her ongoing back pain is "related to her pre-existing condition" or "largely related to her pre-existing condition";

- it is "difficult to identify when Ms. Searle's accident related injury was improved given […] she has always had underlying back pain";

- Ms. Searle's limitations at work "may be related more to her pre-existing condition rather than her accident-related injury", and he believes that her current disability is "more related to her underlying pre-existing condition"; and

- Ms. Searle should undergo further imaging, consider taking a short term muscle relaxant, and participate in a “proper physical therapy regime” including stretching and strengthening.

[87] Dr. Hosseini was cross-examined at trial. During cross-examination, he agreed that, based on Ms. Searle’s own report, her current condition is worse than her condition immediately before the Accident, but he said the “majority” of the difference is attributable to the pre-existing condition. He also agreed that Ms. Searle’s condition improved, gradually, between the Accident and his assessment of her in October 2022.

[88] Counsel for Ms. Searle submitted that Dr. Hosseini’s report should be given no weight because of a number of alleged problems with his methodology and the manner in which he testified. For example, he was said to have been unfamiliar with the material on which his report was based, disorganized, careless, and, at times, evasive. I do not agree. There was nothing about Dr. Hosseini’s report, the way he testified, or the things he said that caused me to question his impartiality or the reliability of his evidence.

Credibility

[89] The plaintiff’s credibility is vitally important in any personal injury case involving subjective symptoms such as those upon which Ms. Searle’s case is based. The court must be very careful when assessing a plaintiff’s credibility “when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery”: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.).

[90] The factors identified by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, play a role in assessing whether the evidence of a witness is truthful and accurate. These factors include the ability of the witness to resist being influenced by his or her interest in recalling the relevant events; the internal and external consistency of the witness's evidence; whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly

independent or undisputed evidence; whether his or her evidence seems unreasonable, improbable, or unlikely, bearing in mind the probabilities affecting the case; and the witness's demeanour, meaning the way he or she presents while testifying.

[91] The defence did not directly challenge Ms. Searle's credibility, but did argue that her testimony was vague.

[92] I had no concerns about Ms. Searle's credibility. I did not find her testimony to be overly vague. She reasonably described her symptoms. She did not attempt to provide precise dates for each change in her symptoms, but that is not surprising given their gradual improvement. She made admissions against her interest. For example, she admitted the neck pain resolved and she acknowledged that the osteopathic treatment she underwent in the summer of 2019 caused the worst pain she ever felt. She was generally agreeable, reasonable, responsive, and consistent. She presented as a stoic witness, only briefly describing the impact of the injuries on her recreational and social life, which indicates she is not prone to exaggeration. I have no difficulty accepting her testimony.

Findings on the Plaintiff's Condition and Causation

[93] In *Kallstorm v. Yip*, 2016 BCSC 829, Justice Kent summarized the legal principles applicable to determining causation where there is more than one potential cause of a plaintiff's condition:

> [318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, repeated many times since, and which include:
>
> 1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
> 2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
> 3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long

as it is it is part of the cause of an injury, the defendant is liable; and

4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[319] The above paradigm addresses principles of liability. It does not address principles related to the assessment of damages in tort. The latter requires consideration of conditions or events unrelated to the tort(s) which occurred either before or after the plaintiff's injury and which impact the nature or extent of the compensation that should be awarded for the tort. In such situations, *Athey* reminds us to consider first principles:

> [32] ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence ("the original position"). However, the plaintiff is not to be placed in a position <u>better</u> than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss. ... [Justice Major's emphasis.]

[320] In *Blackwater v. Plint*, 2005 SCC 58, the Court put it this way:

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

[321] It is in the above context that the so-called doctrines of "thin skull" and "crumbling skull" come into play. In that regard *Athey* held:

> [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's" original position".

> The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke* [(1990), 74 D.L.R. (4th) 1 (Ont. C.A.)]; *Malec v. J.C. Hutton Proprietary Ltd.* [(1990), 169 C.L.R. 638 (Aust. H.C.)]; Cooper-Stephenson, [Ken, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, ON: Carswell, 1996)], at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. [Justice Major's emphasis.]

[94] There is no dispute that the Accident caused soft tissue injuries to Ms. Searle that resulted in neck pain and stiffness, and a substantial aggravation of back pain and radicular leg symptoms. A more difficult question is whether the aggravation was temporary and has fully resolved or whether the Accident caused Ms. Searle's ongoing symptoms.

[95] As explained in the excerpt from *Kallstorm* quoted above, it is essential to distinguish between causation as the source of a loss, on the one hand, and the rules of damage assessment in tort, on the other. Where there may be a tortious cause and a non-tortious cause (such as a pre-existing condition), so long as the tortious act is a cause of the plaintiff's loss, the defendant is fully liable. However, in assessing the appropriate quantum of damages required to return the plaintiff to their original condition, it is necessary to take account of any measurable risk that a non-tortious cause, such as a pre-existing condition, would have detrimentally affected the plaintiff, regardless of the defendant's negligence.

[96] At this stage, I am determining only whether Ms. Searle has established that it is more likely than not that the Accident was a cause of her current condition. As already noted, Ms. Searle's medical expert, Dr. Simonett, did not express an opinion on the duration of the aggravation caused by the Accident or the cause or causes of

Ms. Searle's current condition. However, Dr. Hosseini did express an opinion on the latter. It was his opinion that the non-tortious, pre-existing condition was the greatest contributing factor. He referred to Ms. Searle's current condition as "largely" related to the pre-existing degenerative disc disease, and said the "majority" of the difference between her current condition and her pre-Accident condition was attributable to the pre-existing condition. I accept this evidence. It clearly implies that, in Dr. Hosseini's view, the pre-existing degenerative disc disease is not the sole cause of Ms. Searle's current condition and that her current condition was caused at least in part by the Accident. Again, so long as the Accident is one cause of Ms. Searle's loss, the defendants are fully liable for that loss.

[97] For these reasons, I find that the Accident caused soft tissue injuries to Ms. Searle that resulted in temporary neck pain and stiffness, and a substantial aggravation her pre-existing back pain and radicular leg symptoms. I find that, while Ms. Searle's neck pain has resolved and her back pain and leg symptoms have gradually improved, she has been left with more significant ongoing symptoms than she had prior to the Accident and that the Accident was a cause of the ongoing symptom exacerbation.

[98] As discussed, Ms. Searle was a credible and reliable witness. Her evidence about the nature, extent and progression of her symptoms was not undermined and I accept it. In summary, I find:

- the Accident caused soft tissue injuries to Ms. Searle that resulted in temporary neck pain and stiffness, and a substantial aggravation her pre-existing back pain and radicular leg symptoms;
- Ms. Searle suffered from extremely limiting, severe back pain and leg symptoms for several months after the Accident followed by a gradual improvement, with significant improvement by about one year post-Accident, and substantial improvement by the summer of 2019;
- in the summer of 2019, Ms. Searle experienced temporary flare ups in her pain as a result of a fall and an osteopathic treatment;
- Ms. Searle's neck pain has resolved, but she continues to have restricted range of motion in her neck;

- Ms. Searle continues to suffer from back pain that is intermittent and highly dependent on activity; she is usually able to avoid pain by shifting positions between standing, sitting and walking;

- Ms. Searle continues to suffer from intermittent leg symptoms, including pain that travels down her legs, burning sensations, and sensations of vibration;

- Ms. Searle's Accident-caused injuries temporarily prevented her from performing duties required of her as a member of a paint department;

- with the improvement in her symptoms, she can work as a foreman and paint co-ordinator, but she can perform as a floor worker only with accommodations which essentially prevents her from working as a daily;

- Ms. Searle's injuries temporarily prevented her from performing household tasks and gardening but, with the improvement in her symptoms, she is now able to take care of the household duties and perform light gardening, remaining restricted from heavy gardening;

- Ms. Searle's injuries temporary prevented her from participating in recreational and social activities but, with the improvement in her symptoms, she returned to at least some of these activities by 2019; and

- as a result of her ongoing symptoms, Ms. Searle must be careful to avoid sudden movements and movements with resistance, and she modifies her activities to avoid aggravating her symptoms.

[99] Before leaving the issue of causation, I wish to address a submission made by Ms. Searle's counsel in final argument. Ms. Searle's counsel emphasized that there is no dispute that Ms. Searle's suffered from a significant or sharp increase in pain as a result of the Accident and since then she has gradually improved. He noted that her condition is worse today than it was prior to the Accident but that she demonstrated improvement since the Accident. Ms. Searle's counsel said Dr. Hosseini admitted that with her pre-existing condition, he (Dr. Hosseini) would expect a build up of symptoms year over year, in the absence of the Accident. Ms. Searle's counsel argued that, accordingly, the ongoing improvement since the Accident suggests that Ms. Searle's current condition reflects the injuries she sustained in the Accident and not a progression of her pre-existing condition.

[100] In my view, it is not possible to draw that conclusion from Dr. Hosseini's evidence. Dr. Hosseini agreed that he would expect a gradual worsening of symptoms from the pre-existing condition alone, but he did not resile from the opinion that Ms. Searle's current condition was largely attributable to the pre-existing condition. I am not persuaded there is an inconsistency in that evidence. The reality is that Ms. Searle's symptoms worsened significantly after the Accident and have gradually improved since, but the improvement has not been constant or linear. It is not possible, at least on the evidentiary record, to infer that her pre-existing condition has not progressed from the mere fact that she experienced overall symptom improvement since the exacerbation caused by Accident; in other words, there is no basis in the evidence to conclude that improvement in the Accident-caused exacerbation was not accompanied by progression in the degenerative condition.

Damages

General Principles

[101] In *Meckic v. Chan*, 2022 BCSC 182, Justice Kent reviewed the legal principles governing the assessment of damages in personal injury cases, including the analytic framework endorsed by a trilogy of decisions decided by our Court of Appeal:

> **A. The "Simple Probability" Standard of Proof**
>
> [109] The assessment of damages in a personal injury case necessarily deals not only with past events but also with hypothetical and future events. The standard of proof for past events is, of course, the balance of probabilities and, once proven, such matters are treated as certainties. Hypothetical or future events, on the other hand, need not be proved on a balance of probabilities standard; instead, future or hypothetical possibilities are taken into account so long as they are "real and substantial possibilities and not mere speculation, and they are given weight according to their relative likelihood": *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 SCR 458, paras. 27-29; *Grewal v. Naumann*, 2017 BCCA 158, paras. 44-49.
>
> [110] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absence of the defendant's negligence. This is the plaintiff's "original" or "without-accident" position. This is then compared with the plaintiff's "injured" or "with-accident" position and the difference between the two represents the plaintiff's loss: *Athey*, para. 32.
>
> [111] There are thus four scenarios which the Court is required to assess:

1. What actually happened to the plaintiff in the past to the date of trial, a determination that includes life events between the accident and the trial, all of which, once proven on a balance of probabilities, is treated as a certainty;
2. What would have occurred to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario);
3. How would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario); and,
4. How will the plaintiff's life proceed in the future now that the accident and resultant injury has occurred (the future hypothetical "injured" or "with-accident" scenario).

[112] Scenarios 2 to 4 above involve past or future hypothetical possibilities which, as noted, will be taken into consideration so long as they are "real and substantial possibilities" as opposed to "mere speculation". This of course begs the question: how does one determine the difference between the two and, once the former is established, how does it apply to the quantification of damages?

[113] The leading text on personal injury damages in Canada is Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Carswell, 2018). Chapter 2 of that text addresses "Proof of Damages" and discusses the "simple probability" standard of proof and its application to the assessment of damages contingent upon chance. The word "probability" is used in its statistical sense, i.e.[,] denoting <u>any</u> degree of chance. [Emphasis added by Kent J.]

[114] Some of the substantive principles set out in the text include the following (citations omitted):

- The "simple probability" standard of proof evaluates the degree of probability that any sequence of events will occur or would have occurred, and therefore the degree of probability that the plaintiff will suffer or would have suffered the material loss. It then awards damages for the material loss proportionate to the established degree of probability;
- The Court thus estimates what are the chances that a particular event will or would have happened, usually expressed as a percentage, and reflects those chances in the amount of damages which it awards;
- All contingencies, positive or negative, that are established on the evidence as realistic as opposed to merely speculative possibilities must be given effect;
- However, there comes a point when a chance or probability is so small that it might be characterized as "speculative", or "too remote" and thus excluded from consideration; and,

- The plaintiff recovers damages in proportion to the likelihood that the event and its consequences might have or may occur; this is done by scaling the award downwards or upwards in accordance with the percentage likelihood.

[115] In *Athey*[,] the example of the simple probability standard being applied was:

> if there is a 30% chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30% of the anticipated extra damages to reflect that risk (para. 27).

B. The BCCA Trilogy

[116] In 2021, the BC Court of Appeal issued a trilogy of judgments clarifying the above principles and illustrating their application to the assessment of damages in personal injury cases. The cases include *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421. They involved hypotheticals and contingencies related to pre-existing injuries, past and future loss of earning capacity, future care costs, as well as non-pecuniary general damages for past and future pain and suffering.

[117] In *Dornan*, the Court noted in para. 92 that contingencies fall into two categories namely,

- "general contingencies" which simply as a matter of human experience are likely to be experienced by everyone and which are often "not readily susceptible to evidentiary proof" but which "may be considered in the absence of such evidence" nonetheless; and,
- "specific contingencies", ones peculiar to the particular plaintiff which must be supported by evidence that their occurrence is actually realistic as opposed to simply a speculative possibility.

[118] Insofar as general contingencies are concerned, the Court must be mindful that they can be positive as well as negative[,] i.e. that everyone's life has "ups" as well as "downs" and that any allowance premised only on general contingencies "should be modest".

[119] Insofar as specific contingencies are concerned, however, whether positive or negative in nature, the Court must go beyond a determination of their existence to also analyze the evidence and decide the relative likelihood of their occurrence and their consequences.

[120] *Dornan* explains the difference between a contingency that is a real and substantial possibility as opposed to mere speculation:

> A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable (para. 63).
>
> [Emphasis added [by Kent J.].]

[121] Elsewhere in the judgment, the Court stated that,

> the risks commonly encountered on this rather dangerous planet [e.g. car accidents, tripping and falling, etc.] will not suffice to establish a real and substantial possibility..... such events can happen to anyone

> but....are not predictable..... [and thus] would not give rise to a measurable risk (para. 77).
>
> [Emphasis added [by Kent J.].]

[122] In *Dornan*, the trial Court applied a 30% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs to reflect the negative contingency that, given his lifestyle and history, the plaintiff was at risk of suffering a concussion with serious consequences in any event. The Court of Appeal upheld the finding that a further without-accident concussion was a real and substantial possibility for the plaintiff, however reduced the contingency deduction from 30% to 15% for future losses (and to only 10% for past losses) based on its own analysis of the second step in the process, namely determining the relative likelihood that the real and substantial possibility would actually materialize (an analysis that the Court of Appeal said the trial judge did not actually undertake: "in this case, the judgment addresses the real and substantial possibility analysis only implicitly, and is silent on the relative likelihood", para. 135).

[123] The Court of Appeal acknowledged that the task confronting the trial judge was "not easy":

> By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence (para. 134).
>
> [Emphasis added [by Kent J.].]

[124] The "right process" insofar as specific contingencies is concerned (in *Dornan*, the possibility of the plaintiff incurring a serious concussion injury regardless of the accident) is:

- Step one: determine with reference to the evidence whether the hypothetical future event is a real and substantial possibility (i.e. a measurable or predictable risk as opposed to mere speculation), and if so,
- Step two: determine, again with reference to the evidence, the relative likelihood [i.e. the chances] of that event actually occurring in order to arrive at an appropriate contingency deduction (*Dornan*, para. 113, emphasis added).

[125] *Lo v. Vos* is another case where the trial judge applied an "across-the-board" 20% contingency deduction to the awards for nonpecuniary damages, future care costs and loss of future earning capacity on account of the plaintiff's pre-existing back conditions. The trial judge found that the accident caused physical injuries that contributed to chronic pain, which in turn lead to depression, anxiety and post-traumatic stress disorders rendering her totally disabled from working. However, the trial judge also concluded there was a "measurable risk" the plaintiff would have developed a major depressive disorder consequent on pre-existing lower back pain and leading to a level of pain and disability similar to the sort experienced at trial. Hence the 20% contingency deduction.

> [126] The Court of Appeal set aside the contingency deduction on the basis that the evidence at trial did not establish any contingent risk that was a real and substantial possibility, as opposed to simply an impermissible speculative possibility. There was no expert evidence that, absent the accident, the plaintiff had any inherent vulnerability to, or any risk of developing mental health problems because of her pre-accident conditions. While it was essential for the trial judge to consider the plaintiff's pre-existing state in the assessment of damages, whether that original state gave rise to a measurable risk of her developing, mental health problems in any event (a future hypothetical event) was "a different question requiring additional evidence" (paras. 74-78, emphasis added [by Kent J.]).

[102] I agree with and adopt that description of the applicable legal principles.

Impact of the Plaintiff's Pre-existing Condition

[103] As discussed, before the Accident, Ms. Searle was diagnosed with significant degenerative disc disease that was causing nerve root impingement and was symptomatic.

[104] Dr. Hosseini emphasized that Ms. Searle's pre-existing degenerative disc disease is a progressive condition and he expressed the opinion that, even if the Accident had not happened, her symptoms would have increased over time. It is his opinion that the pre-existing condition is the most significant cause of her current condition; in other words, its progression has already manifested. He also expressed the view that Ms. Searle's physical work is another contributing factor.

[105] Dr. Simonett's report is not inconsistent with that view. As already noted, it is her opinion that, as a result of Ms. Searle's history and her physically demanding job, she "had a poor prognosis for her low back pain and radicular symptoms prior to the [Accident]" and that she will remain at high risk for ongoing pain symptoms including pain flares (emphasis added).

[106] The evidence of Dr. Hosseini and Dr. Simonett just referred to establishes a real and substantial possibility that, given the nature of Ms. Searle's pre-existing symptomatic degenerative disc disease and her physical work, her condition would have progressed and caused the same or similar ongoing symptoms even in the absence of the Accident.

[107] It is now necessary to determine, with reference to the evidence, the relative likelihood of that real and substantial possibility actually materializing, and its consequences, in order to arrive at an appropriate contingency deduction. Obviously, this cannot be projected with exactitude: *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331 at para. 21.

[108] The expert medical evidence supports the conclusion that there is a very high likelihood that Ms. Searle's condition would have eventually worsened even in the absence of the Accident. Again, Dr. Hosseini said it is a progressive condition and, given its nature, he attributed most of her current symptomology to it. Dr. Simonett said the combination of the pre-existing condition and Ms. Searle's job resulted in a "high risk" for ongoing pain symptoms and flares.

[109] Ms. Searle's own medical history and Dr. Hosseini's evidence indicates a likely gradual deterioration. His opinion that the pre-existing condition is the most significant cause of Ms. Searle's current condition suggests that the progression has already manifested and demonstrates its likely consequences. I am satisfied, on the medical evidence taken as a whole, that there is a very high likelihood (approaching certainty) that Ms. Searle's condition would have gradually deteriorated to her current state regardless of the Accident, and on Dr. Hosseini's opinion that her current state is largely attributable to the pre-existing condition, I find that it is more likely than not that this would have occurred by about the time of the trial, with the likelihood increasing over time. On this basis, in my view, it is necessary to apply a significant contingency deduction of 60% to future losses, to reflect the ever increasing likelihood.

[110] Ms. Searle was 51-years-old at the time of Accident and 57-years-old at the time of the trial. Assuming a life-expectancy of about 80 years, the six years between the Accident and the trial represents about 20 percent of her likely post-Accident lifetime. With that in mind, I would apply a contingency deduction of 35 percent to non-pecuniary damages to reflect:

- 80 percent of her post-Accident lifetime (23 years from the trial) with a 60 percent likelihood of the contingency occurring and 20 percent of her post-Accident lifetime (6 years between the Accident and the trial) with a 30 percent likelihood, the weighted average of which is 54 percent, and

- a reduction to that weighted average to reflect the reality that most of the pain and suffering to be compensated by the non-pecuniary award occurred in the pretrial period.

[111] On the same reasoning, I would apply a 30 percent contingency deduction to past income loss.

Non-Pecuniary Damages

[112] An award of non-pecuniary damages is intended to compensate for pain, suffering, and loss of enjoyment of life prior to the trial and into the future. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle. I have taken these factors into consideration.

[113] Awards of non-pecuniary damages in other cases provide a useful guide, however, the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by a specific individual.

[114] There is no doubt that Ms. Searle’s Accident-caused injuries had a substantial impact on her enjoyment of life, and her ongoing symptoms continue to have some ongoing impact. Again, I found her to be a credible witness and I accept her account of the nature, severity, and progression of her symptoms, and the impact they had and continue to have on her functionality.

[115] Before the Accident, Ms. Searle was an active and energetic person, who enjoyed her job. She suffered from intermittent back pain and radicular leg symptoms, and had been diagnosed with significant degenerative disc disease including a disc bulge at L4/5 resulting in canal stenosis with compression of the L5 nerve roots. Her back and leg symptoms did not materially interfere with her functionality or enjoyment of life, but they were significant enough that her family doctor ordered diagnostic imaging and referred her to a back pain specialist at a spine clinic.

[116] Following the Accident, Ms. Searle suffered from neck pain and stiffness as well as extremely limiting, severe back pain, and leg symptoms for several months. The neck pain eventually resolved. The other symptoms gradually improved, with significant improvement by about one year post-Accident, and substantial improvement by the summer of 2019, about three years post-Accident. Notwithstanding the improvement, Ms. Searle continues to have restricted range of motion in her neck and continues to suffer from intermittent back pain and intermittent leg symptoms that are highly dependent on the activity she is engaged in.

[117] The prognosis for improvement in Ms. Searle's condition is poor and she is at high risk of future deterioration.

[118] The Accident-caused injuries had a significantly negative effect on most aspects of Ms. Searle's life for about a year. During the first year following the Accident, she was extremely limited in her ability to walk and lift. She managed to continue to work by modifying her duties, but she was left exhausted at the end of a work day. She was unable to engage in most of her pre-Accident recreational and community activities or perform household duties. She had to rely on friends and neighbours for assistance. Although Ms. Searle's functionality has improved, she must avoid certain movements and modify her activities to avoid aggravating her symptoms, and she can no longer perform all duties required of a floor worker in a paint department on a film set.

[119] Ms. Searle quantifies her non-pecuniary damages claim at $100,000. She relies on the following cases as comparators:

- *Thiara v. Neuls*, 2021 BCSC 1319 ($110,000 awarded in non-pecuniary damages);
- *Kim v. Baldonero*, 2022 BCSC 167 ($90,000 awarded in non-pecuniary damages, plus an additional $22,000 for loss of housekeeping capacity); and
- *Page v. Roy*, 2022 BCSC 1802 ($100,000 awarded in non-pecuniary damages).

[120] The defence submits that an award of $30,000 is appropriate, citing the following cases:

- *Ford v. Lin*, 2021 BCSC 456 ($30,000 awarded in non-pecuniary damages);
- *Dorsey v. Bhindi*, 2016 BCSC 499 ($25,000 awarded in non-pecuniary damages);
- *Currie v. McKinnon*, 2012 BCSC 698 ($22,000 awarded in non-pecuniary damages);
- *Anderson v. Dwyer*, 2010 BCSC 526 ($20,000 awarded in non-pecuniary damages); and
- *Ahmadi v. West*, 2014 BCSC 2020 ($35,000 awarded in non-pecuniary damages).

[121] The cases relied on by Ms. Searle are appropriate comparators. They concern plaintiffs whose injuries included injuries similar in nature to those sustained by her. While those plaintiffs suffered a broader scope of symptoms, including headaches, the impact of the injuries on their enjoyment of life was similar to that of Ms. Searle.

[122] The cases relied on by the defence concerned plaintiffs whose injuries were significantly less severe than those sustained by Ms. Searle, and fully or very substantially resolved within a year or two. In contrast, Ms. Searle did not achieve

substantial improvement for over three years, and she continues to suffer from ongoing symptoms.

[123] The most significant factors in this case are the severity and duration of Ms. Searle's initial symptoms; the near certainty that she faces many years of ongoing symptoms; the fact that her prognosis for improvement is poor; the impact of her initial symptoms on her functionality; and the ongoing need to avoid certain movements and to modify her activities.

[124] Having considered all the authorities, before application of the contingency deduction, I would have assessed Ms. Searle's non-pecuniary damages at $100,000. After applying the contingency deduction of 35 percent, I award her non-pecuniary damages of $65,000.

Past Loss of Income-Earning Capacity

[125] A claim for past loss of income or income-earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[126] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period, but taking into account all realistic contingencies.

[127] Members of the paint department of a film production are paid an hourly rate. The rate depends on the job classification and the nature of the production itself, and increases with experience. In addition to the hourly rate, a member of a paint department will typically receive "rental" pay, which is a flat fee for making their cell phone, vehicle, or computer available for work use.

[128] Ms. Searle says that but for the Accident, she would have continued the same work pattern she followed in the four years before the Accident, working roughly the same number of hours, with the exception of 2015 when she said she chose to take an extended break and therefore worked fewer hours. She says she would have worked with a crew when that work was available, most often as a foreman, and would have obtained floor work as a daily in between jobs with her crew. She testified that in the first year or so after the Accident, there were periods when she pushed herself to work even though it took a significant toll on her body and other periods when she did not work to focus on her recovery. After that, she says she remained unable to fulfill all duties required of a floor worker, which meant she could not work as a daily during periods when her crew was out of work.

[129] Ms. Searle's earnings records show how many hours she worked in the years before and after the Accident, including how many overtime hours. She proposes using a tool referred to as a standard time hour (which she abbreviated as "STE") to simplify the comparison of her work over different periods. An STE counts overtime hours to reflect the premium at which those hours are paid. For example, if Ms. Searle worked eight hours at regular pay and four hours overtime at one-and-a-half times her regular pay, she would have worked 14 STEs (8 + (4 x 1.5) = 14).

[130] From Ms. Searle's earnings records, it is possible to calculate her STEs worked in each year from 2012 to 2022. She averaged 2,385 STEs per year over the three years before the Accident, including 2015, which, as noted, she characterizes as a low outlier year. She averaged 2,474 STEs per year over the four years before the Accident, including 2015. She averaged 2,634 STEs per year over the four years before the Accident, but excluding 2015.

[131] Ms. Searle was paid a daily rental fee for use of her own equipment such as cell phone or vehicle. She conservatively estimates the rental fee at $30 per day worked.

[132] Ms. Searle submits that her without-Accident annual income-earning capacity should include 2500 STEs per year, which reflects about 178 days of work. Thus,

she submits that her without-Accident annual income earning capacity should also include 178 rental payments of $30 each. She says the difference between that capacity and her actual earnings in each year between the Accident and trial, except 2020, reflects the past loss of income-earning capacity resulting from the Accident. She omits 2020 from the calculation because she acknowledges that as a result of the COVID-19 pandemic lockdown, the difference in that year between what she could have earned and what she did earn cannot be attributed to the Accident.

[133] Ms. Searle calculated the difference between 2500 STEs and the number of STEs she actually worked in each year from 2016 to 2022, but omitting 2020 from the analysis. She then used actual pay rates for each of those years to value the loss of STEs at $221,932. To that she adds $13,490, representing the difference in days worked in each of those years multiplied by $30, to reflect lost rentals. In this way, she quantifies her past loss of earning capacity claim at $235,000.

[134] I generally accept Ms. Searle's submissions concerning her past loss of income-earning capacity claim, but with the exceptions addressed below.

[135] In my view, before considering the potential impact of her pre-existing condition, Ms. Searle's without-Accident annual income-earning capacity is appropriately quantified as 2400 STEs per year plus an additional 171 rental payments of $30 each. This is based on the average number of STEs she worked per year over the three years before the Accident, including 2015. I do not accept that 2015 should be treated as outlier. It is likely that, absent the Accident, Ms. Searle would have been increasingly inclined to take breaks as she aged.

[136] I have already outlined Ms. Searle's testimony about the extent to which she worked after the Accident, and the reasons for the gaps. I accept that evidence.

[137] I find that, but for her physical condition, Ms. Searle would have pursued work during the periods between July 2016 and March 2017 when she did not work. I accept that after March 2017, if more work had been available as paint coordinator, she would have taken it. I accept that by 2018, she accepted all the foreman and

paint co-ordinator work that was reasonably available. I also accept that, with the exception of the pandemic shutdown in 2020 and the six months between May and October 2019, but for her physical condition, she would have worked as a daily when not working as a foreman or paint co-ordinator with her crew. I have omitted the six months between May and October 2019 because Ms. Searle acknowledged that she chose not to work in the period between finishing Riverdale in April 2019 and starting Home Before Dark in the fall of 2019. Her earnings records show that she started working on Home Before Dark in early November 2019.

[138] With these adjustments, I would have assessed Ms. Searle's past loss of income-earning capacity claim at $162,970, before applying the contingency deduction of 30 percent to reflect the likelihood that her pre-existing symptomatic degenerative disc disease would have progressed and caused the same or similar symptoms in the pretrial period even in the absence of the Accident. That amount reflects the combination of:

- The difference between 2400 STEs and the number of STEs Ms. Searle worked in each year from 2016 to 2022, but omitting 2020 from the analysis because of the pandemic shutdown and also omitting 2019 from the analysis because Ms. Searle worked for six months of that year and did not look for work during the other six months. Using actual pay rates for each of those years, the value of the loss of those STEs is $154,720, and

- $8,250 representing lost rental payments of $30 each in each of the same years (i.e. omitting 2019 and 2020), calculated on the basis that STEs of 2400 in a year represents about 171 days of work.

[139] After applying the contingency deduction of 30 percent, I award Ms. Searle damages for past loss of earning capacity in the amount of $114,079.

Future Loss of Income-Earning Capacity

[140] The Court of Appeal has discussed the principles governing claims for loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305, Justice Garson, writing for the Court, cited its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, and described the approach at para. 53 as follows:

> [53] […] in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages.
>
> [Emphasis in original.]

[141] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 7–10, the Court of Appeal recently restated the operative principles which had previously been revisited in *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421:

> [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
>
> [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of *Rab* when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.
>
> [9] I will repeat those principles here, drawing heavily on *Rab*. I do so because it is clear the judge did not undertake the requisite steps when assessing damages, nor did he make the findings of fact necessary to quantify an award. This dearth of analysis leaves us to speculate on the basis for the award, as it did in *Schenker v. Scott*, 2014 BCCA 203 at paras. 55–56.
>
> [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
>
> > [47] ... 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* [*v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.)]). 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.

[142] I have no difficulty concluding that Ms. Searle has established a potential future event that could lead to a loss of capacity. While her back pain and leg symptoms have gradually improved, she has been left with more significant ongoing symptoms than she had prior to the Accident. The Accident was a cause of the ongoing symptom exacerbation. Her condition is unlikely to improve and she is at high risk of future deterioration. I have found that she is able to work on the floor but only with accommodations, which means that she is essentially unable to work as a daily. This is unlikely to change. As a result, she has become less valuable to herself as a person capable of earning income in a competitive labour market. There has been an impairment of the capital asset: see *Rab* at paras. 36 and 60.

[143] There is a real and substantial possibility that this loss of capacity will cause a pecuniary loss. I accept that, but for her physical condition, Ms. Searle would have continued to supplement the income she earned as a foreman or paint co-ordinator working with a crew, by taking floor work as a daily when her crew was not working. She can no longer do that. The loss of capacity will have future economic consequences. She has established a real and substantial possibility of a pecuniary loss.

[144] The next step involves assessing the value of that future loss, which must include assessing the relative likelihood of contingencies.

[145] Ms. Searle testified that before the Accident, she intended to continue to work in the film industry until retirement, which likely would have been after age 65 and perhaps as late as age 70. I accept that evidence. However, I conclude that there is a real and substantial possibility, the likelihood of which would increase over time, that as she aged she would have worked fewer STEs. In this regard, I note that she testified that she planned to eventually work only six months a year, spending the other six months a year in Costa Rica.

[146] The past loss of income-earning capacity analysis already performed demonstrates that, assuming full-time work, Ms. Searle’s loss of capacity can be roughly valued at $32,500 a year ($162,970 over the five years 2016, 2017, 2018,

2021, and 2022). Based on the whole of Ms. Searle's evidence, it is most likely that she would have transitioned from full-time work to roughly half-time work by about age 60 (three years after the trial), and then continued to work half-time to about age 67 (part way between 65 and 70). On this basis, before application of the contingency deduction of 60 percent to reflect the likelihood that Ms. Searle's pre-existing symptomatic degenerative disc disease would have progressed and caused the same or similar symptoms even in the absence of the Accident, I would have assessed Ms. Searle's future loss of income-earning capacity claim at $240,000. This is based on an annual loss of $32,500 for three years ($97,500) and an annual loss of $16,250 for seven years ($113,750), which totals $211,250, grossed up to reflect the likelihood of rate increases over those years.

[147] After applying the contingency deduction of 60 percent, I award Ms. Searle damages for future loss of income-earning capacity in the amount of $96,000.

Cost of Future Care

[148] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore them to their pre-accident condition, insofar as that is possible, and to preserve and promote their mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[149] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be reasonable and medically justified, but not necessarily medically necessary, to be recoverable: *Milina* at para. 212.

[150] Ms. Searle claims $21,150 for the cost of future care. This is based on the recommendations from Dr. Simonett and Dr. Hosseini for an ongoing exercise regime, with periodic supervision. Ms. Searle's claim is based on an initial 36-session course of physiotherapy to establish a regime, two visits per year for 15 years (to age 72) for periodic supervision; and five visits per year for 15 years (to

age 72) for flare ups, at a cost of $150 per visit, which reflects what she has paid for physiotherapy.

[151] I agree that the evidence of Dr. Simonett and Dr. Hosseini sufficiently supports this claim, but subject to the contingency deduction of 60 percent to reflect the likelihood that Ms. Searle's pre-existing symptomatic degenerative disc disease would have progressed and caused the same or similar symptoms even in the absence of the Accident. I award Ms. Searle damages for the cost of future care in the amount of $8,460.

Special Damages

[152] Ms. Searle claims special damages of $6,870.87 for a variety of items, including obtaining photocopies or forms from Dr. Lizotte, physiotherapy, massage therapy, parking, medications, yard work, and a variety of miscellaneous items including a whole body cleanse, a new bicycle, and some shoes.

[153] There is no dispute that the specific costs underlying this claim were incurred. The defence concedes that some of the amounts claimed are reasonable and recoverable. However, the defence submits that the cost of obtaining doctors' forms is a disbursement and several of the miscellaneous items including the cleanse, shoes, and bicycle, as well as the yard work up have not been justified. The agreed to items total $2,512.96.

[154] Justice Fleming summarized the applicable principles in *Dhillon v. Singer*, 2017 BCSC 414 at para. 200:

> [200] Claims for special damages are subject to a standard of reasonableness in the context of the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55. Medical justification for a treatment related expense aimed at promoting the plaintiff's physical or mental well-being is a factor in determining whether it is reasonable. Subjective factors can also be considered, including whether the plaintiff believes the treatments were medically necessary. With respect to cost, the courts have been prepared to allow claims for expenses at the level of optimum care, although plaintiffs are not entitled to recovery for the cost of any procedure they believe will make them feel better.

[155] I have reviewed the evidence concerning each of the disputed items and I agree with the defence position on all but one of them. In particular, there is no medical justification for the cleanse, shoes, or bicycle and those items were not otherwise shown to be reasonable in the context of Ms. Searle's injuries.

[156] The exception concerns the yard work. It was performed in 2021 and 2022 at a cost of $1,800. The defence submitted that this claim was not reasonable because the work was performed six years after the Accident. I am not persuaded by that submission. As discussed, Ms. Searle remains restricted from heavy gardening and she testified that this work involved removing plants to make the garden easier for her to maintain. This is reasonable. However, as the yard work was performed in 2021 and 2022, it is appropriate to apply the "past loss" contingency deduction of 30 percent to reflect the likelihood that Ms. Searle's pre-existing symptomatic degenerative disc disease would have progressed by 2021 or 2022.

[157] I award Ms. Searle special damages of $3,772.96, which is the sum of the agreed to items ($2,512.96) and the cost of the yard work reduced by 30 percent ($1,260).

Conclusion

[158] The defendants are 100 percent liable for the Accident.

[159] In summary, the damages awarded to Ms. Searle are:

Non-pecuniary damages	$65,000.00
Past loss of earning capacity	$114,079.00
Future lost of income-earning capacity:	$96,000.00
Cost of future care:	$8,460.00
Special damages	$3,772.96
Total:	$287,311.96

Costs

[160] Subject to further submissions, Ms. Searle is entitled to her costs. If the parties cannot agree or if there are circumstances of which I am unaware, they may make arrangements through Supreme Court Scheduling to speak to that issue.

"Warren, J."