IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Courchesne v. Chau,*
2023 BCSC 1969

Date: 20231109
Docket: M193371
Registry: Vancouver

Between:

Chantal Courchesne

Plaintiff

And

Tsz Chau, 1110486 BC Ltd. and
GM Financial Canada Leasing Ltd. Societe
De Location GM Financial Ltee

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for the Plaintiff:	W.E. Derber
Counsel for the Defendants:	E. Haupt K.H. Hall
Place and Date of Trial:	Vancouver, B.C. June 12-16, 19-23, 26-29, September 11-15, and 18-20, 2023
Place and Date of Judgment:	Vancouver, B.C. November 9, 2023

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Introduction

[1] Chantal Courchesne was en route to the Vancouver airport in Richmond, BC, on October 29, 2017 in a taxi when the taxi was hit from behind. Ms. Courchesne was returning to Ottawa after attending a dermatology conference in Vancouver. At the time, she was the chief executive officer ("CEO") of the Canadian Dermatology Association (the "CDA"). Both liability and amount of damages are in issue.

Liability for the Collision

[2] The defendants deny liability for the collision. Tsz Chau was the driver of a new white Chevy Colorado (the "Colorado") that rear-ended the taxi (the "Collision"). The Colorado was owned by 1110486 B.C. Ltd., Mr. Chau's employer. Mr. Chau was listed as the principal operator of the Colorado, and he had permission of his employer, Mr. Chen, to drive the Colorado. Mr. Chau was driving to the airport to pick up an iPad that Mr. Chen had left behind.

[3] Ms. Courchesne was in Vancouver with two staff members from the CDA. The conference ended on October 29, 2017. Ms. Courchesne, Jonelle Istead and Pamela Belfer were in the taxi, a Toyota Prius (the "Taxi") heading to the airport. They were scheduled on a flight to return home to Ottawa later that afternoon.

[4] Paramjit Dhatt was the driver of the Taxi. Leo Berdej was a witness at the scene, following behind the Taxi and the Colorado. Mr. Dhatt, Mr. Berdej, Mr. Chau, Ms. Courchesne, Ms. Istead and Ms. Belfer all testified about the Collision. The witnesses provided differing accounts of what happened. One of the main disputed facts is the colour of the traffic light at the time of the Collision.

[5] The Collision occurred on Grant McConachie Way near the intersection with Templeton Street. The Taxi and the Colorado were travelling westbound towards the airport.

The Plaintiff

[6] Ms. Courchesne testified the conference finished at about noon, and she was travelling to the airport with Ms. Istead and Ms. Belfer. They were picked up by the

Taxi from the Fairmont Waterfront hotel in Vancouver. The plaintiff testified the Collision occurred at approximately 2:00 p.m. or 2:30 p.m. They were all seated in the back row of the Taxi – Ms. Istead was behind the driver, Ms. Courchesne in the middle seat, and Ms. Belfer was behind the front passenger seat. Ms. Courchesne was not wearing a seatbelt.

[7] One of the doctors had forgotten his jacket at the hotel. The plaintiff retrieved it so she could give it to him at the airport. She recalls being in a bit of a rush, as the doctor's flight was leaving earlier than her flight. She made plans to give him the jacket at security. She testified she was texting during the drive to the airport, updating the doctor as to her estimated time of arrival. Ms. Courchesne testified her head was looking down at the time the Collision occurred. She does not recall if the Taxi was stopped at the time of the Collision.

[8] Ms. Courchesne testified her body went forward. She believes she hit the back seat as the back of her head and neck hurt. After the Collision, she could not find her eyeglasses or her phone. At first, she was confused if she had been wearing her eyeglasses, but then decided she must have been as she needed them to text. She later found her eyeglasses in the trunk and her phone was underneath Ms. Belfer.

[9] The rear window of the Taxi shattered. Ms. Courchesne testified the three women were covered in small pieces of glass. She recalls looking up shortly after the Collision and seeing the traffic light was red for the Taxi. After the Collision, the Taxi drove through the intersection and pulled over on to the side of the road. Mr. Chau also pulled over. Everyone got out of their vehicles. The plaintiff testified she was not able to turn her head.

[10] After a while, they all got back into the Taxi and drove to the airport.

Leon Berdej

[11] Mr. Berdej worked in the area of the airport and at the time of the Collision, he was heading to Tim Hortons. He testified there were three through lanes on Grant McConachie Way heading west towards the airport, at the intersection of Templeton

Street. He testified he was in the left lane and the Colorado had earlier passed him on the right as he was coming off the Arthur Laing Bridge on to Grant McConachie Way. The Colorado later changed lanes into the left lane, and Mr. Berdej changed into the middle lane.

[12] Mr. Berdej testified the Taxi was in the middle lane, ahead of him. At about 10 to 15 metres before the intersection, the Colorado changed from the left through lane to the middle lane, in front of Mr. Berdej. He described the lane change as being sudden. He testified at the same time, he noticed the traffic light turned red. Mr. Berdej saw the Colorado stop behind the Taxi. After the traffic light turned green and he proceeded through the intersection, Mr. Berdej observed the Taxi and the Colorado pulled over on the side of the road. Mr. Berdej saw the drivers come out of the vehicles, and he knew there had been an accident. Mr. Berdej stopped and provided his contact information to the Taxi driver. Mr. Berdej testified that he believed the Colorado rear-ended the Taxi while it was stopped at the red light.

[13] Mr. Berdej testified the Collision occurred at 7:00 a.m. or 8:00 a.m. He testified the Taxi was yellow and the Colorado was a late model dark coloured pickup. He testified the passengers in the Taxi were a couple in their mid-twenties who were sitting close to each other. This was the only accident he had witnessed in this area.

The Defendant Tsz Chau

[14] Mr. Chau testified he was driving to the airport on Grant McConachie Way when the Taxi came from his right and changed into his lane in front of him. The Taxi was about three to four car lengths in front of Mr. Chau when the Taxi changed into his lane. He testified the Taxi was very close to the intersection at the time it changed into his lane; he estimates it was about a car length and a half from the intersection when it changed lanes.

[15] Mr. Chau then heard a siren from an ambulance that was in the left lane. Mr. Chau directed his attention briefly to the ambulance, but he testified he did not turn his head. He testified the Taxi suddenly stopped in front of him, and Mr. Chau was not able to stop in time and slid into the back of the Taxi. Mr. Chau testified the

traffic light was green for him when the Taxi stopped in front of him. He estimates his speed was between 55 and 65 kilometres per hour at the time of the Collision. He testified he was wearing his seatbelt and he was not injured. When he arrived at the airport, he noticed there was a small leak under the engine. He drove the Colorado to a car dealership and left it there to be repaired.

[16] Mr. Chau made a report to ICBC later that day about the Collision. In the report, there is no reference to the Taxi changing into his lane.

Jonelle Istead

[17] Jonelle Istead was seated behind the driver in the Taxi. She testified she offered to move so the plaintiff could access the buckle of her seatbelt, but the plaintiff did not put it on. Ms. Istead testified the drive to the airport was erratic, that it was a "rougher ride". She testified the Taxi was slowing down, that it felt like it had stopped, before the Taxi was hit from behind. She does not recall the colour of the traffic light when the Collision occurred. Ms. Istead did not suffer any injuries from the Collision.

Pamela Belfer

[18] Pamela Belfer testified there was a seatbelt for the plaintiff's seat, but the plaintiff did not put on the seatbelt. The head rest for the middle seat in the back is smaller and shorter than the headrests on the two sides. She testified the drive was a bit erratic but no one said anything to the Taxi driver. The Taxi was stopped at a red light when it was hit from behind. She described the stop at the red light as being a hard stop, and not gradual. She testified the Taxi did not change lanes before the Collision. She recalls seeing an ambulance to her left but does not recall hearing a siren.

Paramjit Dhatt

[19] Paramjit Dhatt was driving the Taxi. He drove taxis occasionally at the time. He testified he had driven this Taxi before, and he conducted a pre-trip inspection at the start of his trip. This inspection included checking that all the seatbelts were working. There are signs in the back of the Taxi reminding passengers to wear seatbelts.

[20] He testified this trip was the last one he was making that day. He picked up the plaintiff, Ms. Istead and Ms. Belfer from downtown Vancouver. He was driving them to the airport. He testified he was in the middle lane on Grant McConachie Way near Templeton Street. About 30 seconds before the Collision, there was an ambulance with its siren activated. He testified that vehicles stopped for the ambulance. He estimates this occurred about 100 metres before the intersection.

[21] Once the ambulance passed, Mr. Dhatt started moving again. He was approaching the Templeton Street intersection and noticed a yellow light when he was about 20 to 40 feet from the intersection. He stopped the Taxi. The Colorado hit him from behind, pushing the Taxi four to five feet into the intersection. Mr. Dhatt testified he thought his brakes had failed, because even with his foot on the brakes the Taxi was being pushed. He testified the traffic light was red for him when he was hit from behind. Mr. Dhatt testified he did not change lanes before the intersection.

[22] Mr. Dhatt did not see the Colorado before it hit him. He testified a witness at the scene provided him contact information; he wrote down the name Leon Berdej on an accident form he completed for the taxi company.

[23] Mr. Dhatt testified there was luggage in the front passenger seat, and the trunk was filled with luggage. A photograph of the blue Taxi taken shortly after the Collision showed the back window had shattered. He testified the back window was tinted so he could not see out of it.

Findings on Liability

[24] The Court has to assess the credibility and reliability of the witnesses who testified about how the Collision occurred. An assessment of credibility relates to truthfulness while reliability relates to accuracy. The art of assessment is described in *Bradshaw v. Stenner*, 2010 BCSC 1398:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and

> opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
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> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[25] The witness who had the best view of the moments before the Collision was Mr. Berdej. He was travelling behind both the Taxi and the Colorado. While I accept Mr. Berdej provided inaccurate details about the colour of the vehicles, the number of passengers, and the time of day of the accident, his account of how the vehicles were travelling was clear. It was consistent between direct and cross-examination. Mr. Berdej's name was written as a witness to the Collision in the accident form filled out by Mr. Dhatt later that day. That provides some corroboration that Mr. Berdej did witness the Collision. The important point in his account of the Collision – that the Taxi was stopped at a red light when Mr. Chau rear-ended it – was corroborated by the other witnesses who testified about the colour of the traffic light except Mr. Chau. Mr. Berdej is also an independent witness and not a party to this action.

[26] Mr. Chau was the only witness who testified the traffic light was green when the Taxi stopped in front of him. Mr. Berdej, Mr. Dhatt and Ms. Belfer testified the traffic light was red. The plaintiff and Ms. Istead did not recall the colour of the traffic light.

Mr. Chau's version of events is that the Taxi driver changed into his lane shortly before the Collision. The Taxi then stopped suddenly on a green light when there was a siren from the ambulance. According to this scenario, the only reason the Taxi stopped was due to the ambulance, as the traffic light was green.

[27] However, this version is inconsistent with the events that followed. Three of the witnesses (the plaintiff, Mr. Berdej and Mr. Dhatt) testified about stopping for a period of time after the Collision before driving through the intersection and pulling over to the side of the road. If the traffic light was green, there would have been no need to wait to pull over.

[28] I find the traffic light was red when the Taxi was stopped at the intersection. Mr. Chau did not stop in time and rear-ended the Taxi. I do not find the Taxi changed lanes into Mr. Chau's lane, cutting him off. Other than Mr. Chau, no one testified about the Taxi changing lanes shortly before the Collision. I note there was no reference to the Taxi cutting in front of him in the note recorded by an ICBC representative when Mr. Chau reported the Collision later that day. Mr. Dhatt denied changing lanes before the intersection. Ms. Belfer testified there was no lane change by the Taxi and Mr. Berdej testified it was the Colorado that changed lanes, cutting in front of Mr. Berdej.

[29] I find the evidence of Mr. Berdej the most reliable in his account of how the Collision occurred. He had the best view of both vehicles. He is an independent witness with no interest in the litigation. I accept the evidence of Mr. Dhatt, Ms. Belfer and Mr. Berdej that the Taxi was stopped at a red light when it was hit from behind by Mr. Chau's vehicle. Mr. Chau had a duty to drive at a distance that allowed him to safely stop: *Varga v. Kondola*, 2016 BCSC 2406 at para. 87. Even if I accept his evidence that the Taxi changed into his lane and stopped for the ambulance on a green light, which I do not accept, Mr. Chau testified the Taxi was three to four car lengths in front of him when it changed into his lane. I find that is sufficient distance to have allowed Mr. Chau to stop if he was following at a safe distance. I find Mr. Chau

liable for the Collision. Pursuant to s. 86 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, I find the other defendants vicariously liable.

Contributory Negligence – No Seatbelt

[30] The defendants argue the plaintiff was contributorily negligent for not wearing a seatbelt in the Taxi.

[31] The onus is on the defendants to prove contributory negligence: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 22. The analysis involves two considerations – whether the plaintiff failed to take reasonable care in her own interests and if so, whether that failure was causally connected to the loss she sustained: *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 373. The defendants have to prove the plaintiff's failure to take reasonable care was both a factual and legal cause of the plaintiff's loss.

[32] In this case, I find the evidence established there was a functioning seatbelt in the middle seat where the plaintiff sat in the Taxi. I accept the evidence of Mr. Dhatt that he checked before his shift that morning and the seatbelt worked. I find the plaintiff did not wear a seatbelt, though it was available to her.

[33] However, I find the defendants have not proven on a balance of probabilities that the lack of a seatbelt contributed to the plaintiff's injuries. Although a plaintiff may be found to have failed to take reasonable care for his or her own safety by not wearing an available seatbelt, the evidence must establish that the seatbelt was operational and the plaintiff's injuries would have been reduced by usage to justify a finding of contributory negligence: *Gilbert* at para. 24. There was no evidence from any witness that any of the plaintiff's injuries would have been prevented or minimized if she had been wearing a seatbelt. The defendants ask the Court to apply a common sense approach to this analysis, arguing that the other individuals involved in the same Collision were wearing seatbelts and they were not injured. However, I note Ms. Istead and Ms. Belfer had higher headrests than the plaintiff did. There was no evidence the plaintiff's headrest was adjustable. It would be speculation to find it was the lack of a seatbelt and not the lack of a higher headrest that caused the plaintiff's injuries. In the

circumstances of this case, I find the defendants have not proven contributory negligence on the part of the plaintiff.

Evidence of Damages

[34] The plaintiff called a number of witnesses as well as providing extensive evidence herself about the injuries she suffered after the Collision. The witnesses were her husband, her co-workers at the CDA, other work colleagues and friends. There were three medical experts called by the plaintiff. The defendants called some of the plaintiff's co-workers at the CDA and three medical experts. I have reviewed all of the evidence.

Evidence of the Plaintiff

[35] Ms. Courchesne provided extensive evidence over a number of days, both in person and remotely when she had to return to Ottawa. I have reviewed all of it though I will only summarize the necessary evidence.

Pre-Accident

Work Activities

[36] The plaintiff resides in Ottawa and is currently 53 years old. She completed a Bachelor of Social Sciences degree from the University of Ottawa in 1991. She then started working as an administrator at the Canadian Museum of Civilization and later with government ministers in an advisory role. From 2000 to 2009, the plaintiff was working at the Canadian Medical Association (the "CMA") as manager of parliamentary affairs and special projects. From 2009 to 2011, she worked part time at Carleton University as a consultant on a health initiative as well as part time as executive director of the Canadian Parks and Recreation Association. In 2011, she was recruited for the position of CEO for the CDA.

[37] As CEO, the plaintiff worked closely with the Board of Directors (the "Board") for the CDA, who are dermatologists. She described her role as delivering on the strategic plan - the Board members tell her where they want to go and her job is to get them there. The plaintiff believed that her role as CEO matched her abilities and

personality. She enjoyed being in charge and making decisions. During her time at the CDA from 2011 to 2019, the plaintiff testified the revenue increased from $1.8 million to $4.8 million. Staff increased from 4 to 15. The plaintiff testified she was successful in bringing into the fold other dermatology associations and groups, so that the CDA accessed those groups' funds while assisting them with administration.

[38] The plaintiff testified she was ambitious and driven. She completed continuing education programs after she entered the workforce. She volunteered her time at various committees and boards, for both professional and community organizations. She was part of organized professional networking groups, chairing some of these groups at times. She created an informal CEO group, to bring together other CEOs of non-profit groups to brainstorm and share ideas.

[39] Part of her mandate at the CDA was to raise its profile. The plaintiff testified she regularly attended conferences locally, nationally and internationally. The CDA hosted an international dermatology conference in 2015. In addition, there were annual conferences every June which the plaintiff was instrumental in planning. The plaintiff regularly attended meetings with the president of the Board. Depending on where the president was located, these meetings would often be by telephone at night. The plaintiff was working approximately 60 hours a week before the Collision.

[40] The plaintiff explained that the life cycle of a CEO in the non-profit world is typically five to seven years. This is because members of the Board change in that time, and with a new president the CEO may not enjoy the same level of support. The plaintiff testified that starting in 2015, she began keeping her eyes open for other opportunities. She regularly kept in contact with recruiters about new opportunities. She was shortlisted for three organizations before the accident. She did not make it further with two of those organizations but was further shortlisted for the third group, a Canadian pilotage group for ship captains. She was one of two remaining applicants for this role. She interviewed for this position in November 2018. She testified that due to her injuries, she ultimately decided to withdraw from the competition.

[41] The plaintiff testified that her career plan was to move to a larger organization with a bigger budget. When she started working at the CDA, her salary was $110,000 with an additional 15% in lieu of benefits, and an annual RRSP contribution of $4,000. When she left the CDA in 2019, her salary was approximately $180,000 and her T4 showed employment income of $200,029. For her next step, the plaintiff testified she was looking for an organization with a staff of 25 to 50 employees and a base salary of $200,000 to $250,000. The plaintiff testified she was also interested in working internationally.

Family, Social and Recreation Activities

[42] The plaintiff is married with two teenage sons. She was busy with her children's activities, as they are both high level competitive swimmers. She regularly woke up at 5:00 a.m. to take them to the pool. She did the majority of the cooking and grocery shopping for her family. Ms. Courchesne swam with a masters' group, ran with her dog and was part of a rowing group. She was trained as a level three judge in competitive swim meets, and she had wanted to reach level five in judging so she could go to the Olympics if her sons qualified.

[43] The plaintiff testified she socialized when she travelled for work. She would meet up with her friends during her travels, and sometimes her husband joined her at the end of her conferences to explore new places. When she was home, Ms. Courchesne focused on work and her family.

Health

[44] The plaintiff testified she was in excellent health before the Collision. She rarely missed a day of work due to illness. Her mental health was good. She had no issues getting a good night's sleep.

[45] She had whiplash from a previous motor vehicle accident in 1994. The plaintiff testified she received physiotherapy for a month and her neck issues resolved. She had a previous concussion at 21 years old, when she hit the wall of the pool with her

head while swimming. She believed she also had a concussion in grade two when she was hit with a baseball. She had no lasting effects from any of these incidents.

The Accident

[46] Immediately after the Collision, the plaintiff testified she was not able to turn her head, she could not lift her left arm and her neck and head hurt. At the airport, she was visually examined by some of the dermatologists. She was looking for Advil. She asked Ms. Istead to drive her home when they arrived at the Ottawa airport, as she did not want to take a taxi.

[47] The next day, the plaintiff went to her chiropractor. She returned to work, and initially resisted going to see a doctor. A few days later, at the urging of her staff, the plaintiff went to the emergency department of the local hospital as her symptoms were worsening. The plaintiff testified it was the headaches, nausea and dizziness which prompted her to seek treatment. At the hospital, a CT scan of her head was normal. She was diagnosed with a concussion and advised to take time off work. The plaintiff testified she cancelled her work travel plans. She took two weeks off work.

Post Accident

[48] The plaintiff tried to continue her work. She testified the main barriers to her working were her headaches and her inability to think and make decisions. She reduced her hours. Initially, she was tired after a couple of hours at the office and she would need to go home. She cut down on the amount of time she would have to spend on computer screens, as she found looking at screens triggered headaches and nausea. She asked her staff to print for her any documents she needed to review. She testified she drew the blinds in her office, as lights bothered her. She frequently kept her office door shut. She was sensitive to loud noises. Her memory was affected after the Collision; she found she could not remember what she discussed with her staff the day before. To cope, she started keeping folders for each staff member so she can write down what she had discussed. The plaintiff hired outside staff to assist her on some projects. She took a lot of Advil.

[49] In the first six months immediately after the Collision, the plaintiff testified she believed she would get better with time. She was focused on recovery. In early 2018, the plaintiff was receiving massage therapy, chiropractic treatment, acupuncture and vision therapy. She also saw an occupational therapist, neuro-psychologist, and a physiatrist. Her main symptoms in the period immediately after the accident were neck and shoulder pain, headaches, dizziness, nausea, eye pain and cognitive difficulties with focus and memory. She was experiencing some peri-menopausal symptoms, and began hormone replacement therapy in approximately July 2018.

[50] The plaintiff was working more hours at the office by the spring of 2018. She was there three days a week, working shorter hours. In spring 2018, she travelled to Tanzania on a work trip. She travelled to San Diego for a week to attend a dermatology conference in February 2018. In April 2018, she travelled to Orlando with her family. In June 2018, she travelled to Vietnam with the CDA.

[51] She was able to increase her hours to almost full time by spring 2019. By that point, the plaintiff had stopped many of her treatments so she could focus on work. She also stopped some of the medications she had been taking for her symptoms. During cross-examination, the plaintiff was asked about various responses she gave to her health care providers during 2018 and 2019, indicating her symptoms were improving. I will return to the admissibility and use of these clinical records.

[52] In 2019, the plaintiff experienced tension at work due to her relationship with the incoming president, Dr. Kerri Purdy. The plaintiff testified to conflicts in the relationship, and she felt a lack of trust. A formal performance evaluation of the plaintiff was undertaken in the fall of 2019 by an outside firm. The plaintiff testified she was feeling paranoid at this time about her work; while she was not afraid of losing her job, she was stressed and she did not feel at ease with the direction the Board was moving.

[53] In November 2019, the plaintiff decided to go on medical leave. She had just seen Dr. Kevin Loopeker, an optometrist in Vancouver, and was told she needed therapy for vestibular injury. The plaintiff testified this was the straw that broke her. She felt she could no longer continue in her position as CEO as she was not capable

of fulfilling her responsibilities. She testified she already felt she was failing in her job, and she could not endure having to take more time off work for more therapy. On approximately November 21, 2019, she gave notice to the Board that she would be off work for eight months. She requested a note from her doctor stating that she needed to be off work. She never returned to her position.

[54] Since that time, the plaintiff has not worked. Before the Collision, she had started a Masters degree program in 2017 in philanthropy and not for profit leadership at Carleton University. The plaintiff testified she believed an advanced degree would help her career. She was in the professional stream, not the academic stream, due to her related work experience. After the Collision, she returned to the program in May 2019. She was able to complete the requirements for the Masters degree in 2020. She testified she received accommodations from the university.

[55] The plaintiff also had the idea to start Concussion Central, a non-profit podcast and online centralized resource for patients navigating the medical system after a concussion. Concussion Central launched in approximately May 2021. The plaintiff testified while she had the idea to start the group, she needed other people to carry it out.

Current Symptoms

[56] The plaintiff testified her current symptoms are pain in her eyes, headaches, nausea, dizziness, burping, light and sound sensitivity, limited peripheral vision, limited range of motion in shoulder when swimming freestyle, cognitive issues with poor memory, inability to focus, difficulty finding words when speaking, low mood and fatigue.

[57] The plaintiff testified that currently, she needs to limit herself to one or two activities a day to manage her symptoms. She cannot do any activity that requires cognitive focus for more than 30 minutes, as her symptoms will be triggered. She tries to keep the same schedule week to week, as otherwise she may forget a task. She does better with routine. She exercises at the gym once or twice a week, swims once a week and walks the dog. She needs continuing treatments for her symptoms for

maintenance. She currently receives massage therapy, acupuncture, occupational therapy, chiropractic treatment and neuro-physiotherapy. She receives Botox injections every ten weeks to assist with the migraines.

[58] She avoids crowded places with loud noises, as she finds those environments over-stimulating. She tires easily, and often needs to nap in the afternoons. She has difficulties with balance. She testified she needs to look at the ground while she is walking, otherwise she will experience dizziness. When she goes up and down stairs, she needs to use a handrail. She cannot tolerate bright lights. She needs a list when she goes shopping, otherwise she will forget to buy items. She testified she constantly has headaches. She describes having three different types of headaches – a primary type from the front of the head that is the most frequent; an acute headache from the right temple; and a headache that goes from top of her head down to her neck. Once she experiences one symptom, she testified other symptoms will soon emerge. She described it as a cascading effect. She restricts her driving now to short distances as she feels her peripheral vision is limited.

[59] The plaintiff testified her most debilitating symptom is the migraines. When she has a headache, that takes precedence over her other symptoms. She testified that her cognitive skills are not the same as before the Collision; she used to be articulate but now she struggles to find words. Before the Collision her memory used to be a "steel trap"; now she says her memory is like "swiss cheese". She has difficulties absorbing information; she described it as like "someone put a bucket over my head and nothing can get in". She cannot make decisions. She has low mood. She was taking anti-depressants but decided to stop in August 2022, as she felt the medication was numbing her so she could not experience any joy.

Surveillance Video of the Plaintiff

[60] The defendants obtained surveillance video of the plaintiff in Ottawa. The surveillance video of January 11, 2020 is approximately 14 minutes. The video shows snippets of the plaintiff at a Home Sense store and later driving to Costco. The video appears to be taken at approximately 4:00 p.m. to 5:00 p.m. in the late afternoon. It

was dark and raining. At Home Sense, the plaintiff walked down aisles and looked at items. She crouched down twice and stayed low to look at some items on the bottom shelf. She drove to Costco. The parking lot appeared to be full, and there were many shoppers inside. She pushed a cart and shopped, walking up and down aisles. She had a piece of paper in her hand which she appeared to check. She was walking at a normal pace and looking around. She did not appear to look down at the ground while she was walking. When questioned about this video, the plaintiff testified that she crouched down to look at items at Home Sense and did not bend down and get up. She testified it is the up and down which can trigger her symptoms so she tries to avoid bending down, and crouches or squats instead.

[61] The video from August 31, 2021 shows the plaintiff at various points throughout the day. The video is approximately 13 minutes long. The plaintiff was walking her dog early in the morning. She had headphones on and was looking at her cell phone while walking. She bent down and picked up after her dog on multiple occasions during the walk. She was walking at a quick pace. In the afternoon, the video shows the plaintiff leaving the office of her physiotherapist at Lifemark and getting into the passenger seat of a vehicle. She is later seen coming out of an ice cream shop carrying a tray with four cups with one hand. She gets back into the same vehicle. The video shows the vehicle arriving at her residence. She gets out of the passenger seat still carrying the tray with cups, and walks up the front steps to her house without holding on to the handrail. When questioned about this video, the plaintiff testified she had to take a different route while walking the dog due to construction. She testified she does not usually walk on the busy street that is shown on the video. She explained that her eyes are looking down on the ground even if her head is not down. She also explained that when her symptoms are acting up, she tries to avoid driving and that was likely why her son was driving her to physiotherapy.

The Clinical Records

[62] The defendants argue that some of the clinical records used to cross-examine the plaintiff ought to be admitted for truth. The defendants argue pursuant to *Egan v. Andrychuk*, 2022 BCCA 110 [*Egan*], clinical records are admissible for truth, as the

plaintiff is a party to the litigation. The plaintiff objects to the admission of these clinical records for truth. She argues the maker of the notes did not testify at trial.

[63] To properly understand this issue, it is necessary to describe the entries the defendants seek to admit. The entries can be grouped into clinical notes made by the plaintiff's family doctor, Dr. Barnes, in April and May 2018; post-concussion questionnaires completed by the plaintiff for Dr. Barnes in April and May 2018; handwritten notes from the plaintiff's physiotherapist from April and May 2018; and patient evaluation forms from the chiropractor's office from July 2018 to February 2019. The plaintiff told her medical providers how she was feeling, and those statements are recorded in the clinical notes.

[64] The issue about admissibility of the clinical notes and what use can be made of them did not arise until after the close of evidence and before final submissions. The defendants seek to admit these clinical notes as they argue the plaintiff was reporting improvements in her symptoms in this time period, and as such, they argue these clinical notes show that the plaintiff was in fact having significant improvement at this time. That is, the defendants argue the clinical notes not only show the plaintiff made these statements but that they were true.

[65] The plaintiff was cross-examined at trial about these clinical notes without objection. Her responses generally fell into two categories: she did not remember what she told the medical provider on that date, or that she was choosing to be optimistic by under-reporting her symptoms. She did not clearly admit or deny making the statements.

[66] As I understand the defendants' position, they seek to admit the clinical records under the business records exception to the hearsay rule to prove the plaintiff made the statements attributed to her, and further, because the plaintiff is a party to the litigation, they argue the clinical records can be treated as truth under the party-admissions exception. They rely on para. 55 of *Egan*:

> [55] In application of the above law, the trial judge here did not err in her approach to admissibility of the subjective notes as evidence that Mr. Egan

> made the statements therein recorded and as evidence of the truth of those statements. The judge accepted Dr. Yang's testimony that she had and complied with a duty to record accurate and contemporaneous notes about patient visits. The subjective notes purporting to record statements made by Mr. Egan were admissible under s. 42 as evidence that Mr. Egan made those statements, subject to the jury's assessment. And if the jury was convinced that the statements were made, because Mr. Egan is a party, the party-admissions exception further allowed Mr. Egan's statements to be treated as evidence of their truth, again subject to the jury's assessment. The weighing of the evidence at both of these stages is properly left with the jury unless the judge in their gatekeeping role is of the opinion that the prejudicial effect of the evidence outweighs its probative value: see e.g., *R. v. Khelawon*, 2006 SCC 57. The trial judge here understood the potential prejudicial effects inherent in these sorts of clinical records (see *Edmondson* at paras. 36–37) and provided instructions to the jury to limit those prejudicial effects. And the procedural prerequisites prescribed by s. 14 of the *Evidence Act* were complied with: see Transcript at 257–258. This evidence could properly be relied upon by the jury in answering the question regarding causation of Mr. Egan's ongoing shoulder injury.

[67] However, in my view, the defendants have not satisfied the preconditions for admission of the clinical records as business records, under either the common law or s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124. What is required under either route to admissibility is evidence the clinical records were made in the usual and ordinary course of business, and the entries were made contemporaneously with the event or shortly after. The common law for admissibility of business records stems from *Ares v. Venner,* 1970 CanLII 5 (SCC), [1970] S.C.R. 608, [1971] 14 D.L.R. (3d) 4 in which Hall J., for the Court, stated, at 626:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the defendant here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the defendant had so wished.

[68] Similar considerations for admission of business records are set out in the *Evidence Act*:

> 42(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

> (a) the document was made or kept in the usual and ordinary course of business, and
>
> (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

[69] The defendants rely on a document agreement that was signed by both parties to argue they have satisfied the preconditions for admission. The defendants point to para. 2 of the document agreement:

> 2. For the purposes of this action a copy of a document that is listed in Schedule A or Schedule B may be entered in evidence in the trial of this action by any party by filing such copy as an exhibit. By filing the copy of the document as an exhibit shall, without further evidence, be *prima facie* proof that:
>
> a. A copy of a document is a true copy of the contents of the original document,
>
> b. It was written or created or is effective on or around the date it bears on its face,
>
> c. Where on its face or by its content or nature it was intended to be delivered to another person (e.g., a transmittal slip) that it was so delivered in the normal course of business, whether by post, fax, telex, or physical delivery,
>
> d. Where it purports on its face to have been received on a particular date or at a particular time, that it was so received,
>
> e. Where it purports on its face to have been written or created by or under the instructions of the person who signed it, or purported to authorize its creation that it was so written created or authorized, and
>
> f. Purported signatures appearing on the Documents are authentic.

[70] In my view, the document agreement in this case does not contain any evidence of the duty of the medical practitioner to make accurate notes, that the notes are made in the usual and ordinary course of business, or that the notes are made contemporaneously with the patient visit. In *Egan*, there was such evidence: paras. 22, 55. I agree with the defendants that it is not necessary to have the maker of the clinical notes testify, but there must be evidence that preconditions for admission under the business records exception have been met. Because that evidence is lacking, I find the clinical notes not admissible as business records.

[71] The use of clinical records where the preconditions for admission as business records have not been established is discussed in *Cunningham v. Slubowski*, 2003 BCSC 1854. In that case, the plaintiffs sought to admit the clinical records of Dr. Abelman, but there was no evidence of compliance with s. 42 of the *Evidence Act*: *Cunningham v. Slubowski*, at para. 9. Justice McKenzie (as she then was) set out the use that can be made of statements attributed to the plaintiff contained in the clinical notes:

> [14] The defendants may cross-examine the plaintiff on his prior statements recorded by Dr. Abelman in the clinical records. If the plaintiff admits that he made a particular statement to Dr. Abelman, and it is inconsistent with his testimony at trial, the statement can generally be used only to assess the plaintiff's credibility. The statement is not admissible for its truth unless it constitutes an admission against the plaintiff's interests. If it is an admission against interest, it is admissible for the truth of its content, depending on the jury's assessment of it.
>
> [15] Also, if the plaintiff admits he made the prior statement to Dr. Abelman and he adopts it in his testimony, that prior statement becomes admissible for the truth of its content, depending upon the jury's assessment of it.

[72] I am guided by these principles as to the use that can be made of the clinical notes put to the plaintiff in her cross-examination. To the extent that she admitted she made the statements in the clinical notes, and those statements are different than what she testified to at trial, the fact that she made those earlier statements can be used to assess her credibility. If the statement is an admission against her interest, then it is admissible for truth, subject to the Court's assessment of weight.

Credibility of the Plaintiff

[73] The defendants submit the Court ought to carefully scrutinize the plaintiff's evidence. This is especially so as there are no objective tests to measure pain and headaches. There are no independent methods to verify if someone's pain is real. Pain is inherently subjective. The Court needs to carefully assess the plaintiff's evidence along with all the evidence to determine the existence and extent of the plaintiff's injuries. Justice Wilson sounded the following caution in *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83:

> [83] When the plaintiff's complaints are entirely or primarily subjective, the court must exercise caution in determining whether those complaints are genuine. The absence of objective findings increases the opportunity for exaggeration or distortion, and even fabrication. However, the fact that symptoms cannot be objectively photographed or measured does not mean they are not genuine and real and deserving of compensation.

[74] Credibility refers to veracity and reliability refers to accuracy. The Court has earlier set out the *Bradshaw* factors. The defendants argue the plaintiff is not a reliable witness and they take issue with her credibility. The defendants acknowledge the plaintiff has been injured in the Collision; however, their position is her injuries are not to the extent she claims.

[75] The defendants take issue with the plaintiff's claim about her poor memory. They argue the plaintiff during her testimony was able to recall many details quickly and accurately, such as dates, names, times and medications. I agree the plaintiff showed no memory problems during her evidence. However, I note she likely prepared herself to answer these types of questions. She was able to recall events about which she likely anticipated she will be questioned about.

[76] The defendants argue the plaintiff overstated her pre-accident activities and understated her post-accident functionality. For example, they argue the plaintiff did not do as much around the house pre-accident as she claimed, as she had a housecleaner. Post accident, while the plaintiff testified she did not do any of the writing for the group project for the Masters' program, the evidence of her classmate was the plaintiff did write parts of the paper. I have considered the examples provided by the defendants. I find most of these examples were not significant details and they do not detract from her credibility.

[77] The defendants urge the Court to consider the clinical records from 2018 and 2019, which show the plaintiff reporting improvements in her symptoms to her health care providers. As discussed earlier, I did not find these clinical records admissible as business records. Their only possible use is if the plaintiff admitted to making the statements during cross-examination. The clinical records can then be used as prior inconsistent statements in assessment of her credibility. If they are statements against

interest, the Court can consider the clinical records as truth, subject to the Court's assessment of weight. In my view, I do not place much weight on any of the clinical records. Whether in the assessment of her credibility or accepting them for truth of the contents, I do not find much weight can be placed on the plaintiff reporting improvements. The clinical records are sporadic, covering only a few snapshots in time. In the context of the records from her chiropractor, it is unclear if she is reporting improvement in her neck and shoulder area, or overall improvement in all her symptoms.

[78] With respect to the surveillance videos, the defendants submit the video contradicts the plaintiff's evidence about her functionality. They point to her evidence that she needs to look down while she walks, and argue the videos clearly show her walking with her head up and looking around. The plaintiff testified she always needs to use handrails when she is on stairs; the video shows her walking up the stairs to her house balancing a tray of cups without holding on to the handrail. The plaintiff testified she avoids bending down to pick up items and instead prefers to squat to avoid triggering her dizziness; the video shows the plaintiff bending down multiple times to pick up after her dog.

[79] While I find the plaintiff generally credible, I do have some concerns about the reliability of her evidence about her functionality after reviewing the videos. I acknowledge these videos are only short snippets into her life and obviously do not provide a longer-term view of her functionality. However, I agree with the defendants the videos do not show the plaintiff having any difficulty with walking at a brisk pace and shopping at busy stores. I reviewed the videos a few times and I did not see the plaintiff looking down at the ground for more than a few seconds; the majority of the time when she was shown walking in the videos her head was up and looking around. She appeared to have no issues with her balance, bending down to pick up after her dog and carrying a tray with cups with one hand while going up the stairs. I will consider this evidence along with all the other evidence in assessing the extent of her injuries.

Witnesses for the Plaintiff

Jamie Risk

[80] Mr. Risk is the plaintiff's husband. He testified that before the Collision, the plaintiff did the majority of the household chores, such as grocery shopping, meal planning and laundry. He cooked one or two nights a week and the plaintiff cooked the other nights. They shared childcare equally, with the plaintiff taking the kids to their activities during the day while he took them swimming in the evenings. When the plaintiff had to attend conferences out of town, often he would join her near the end and make a trip out of it. He testified the plaintiff was a good traveller and would plan the logistics of their outings.

[81] Mr. Risk testified the plaintiff often worked 60 hours a week before the Collision. He described the plaintiff as ambitious, wanting to progress in her career. He testified they had discussed the possibility of her working abroad in Europe, so the children could have an international experience. As he was a software engineer, he could work from anywhere in the world. He described the plaintiff as being in good physical and mental health before the Collision.

[82] On the night the plaintiff returned home after the Collision, Mr. Risk helped her out of the vehicle. He described the plaintiff as stiff, not moving her head, and needing assistance with the steps up to the house. In the first year after the Collision, he described the plaintiff taking Advil daily. He testified she was constantly tired. The plaintiff used all her energy to focus on work, and Mr. Risk and the children supported her.

[83] Mr. Risk testified that the plaintiff started having difficulties finding words when she was talking to him. She would stutter and pause. He described watching her become upset after a call from a recruiter, asking her to apply for a job with the Canadian Bar Association. He testified that she had to decline. In his view, the plaintiff was grieving the loss of her career after the Collision. He testified that currently, she limits herself to one or two activities a day. She can no longer attend the children's swim meets, as she finds them too noisy and long. The last time they attended one to

speak to the coach, they only stayed for the warmup and left when the meet began. However, he testified that this triggered her symptoms such that she was burping in the car all the way home.

[84] Mr. Risk described the plaintiff as having a poor memory now, compared to before the Collision. He testified that she needs to look at the ground while she walks or she will stumble. She no longer attends functions with extended family, as she is not able to socialize in large groups. He tries to drive the plaintiff more often now. He was aware that in late 2019 there was more stress for the plaintiff at the CDA due to the new president.

Sybil Dahan

[85] Ms. Dahan lives in Montreal and met the plaintiff in 2011 when they were on a flight travelling to the same dermatology conference. Ms. Dahan was the president of a pharmaceutical company at the time. They saw each other at conferences throughout the years, and sometimes travelled together. Ms. Dahan described the plaintiff as ambitious before the Collision.

[86] Ms. Dahan had promised a trip to Italy for the plaintiff's 50th birthday. Due to Covid, the trip was delayed until the summer of 2022. Ms. Dahan was aware of the plaintiff's limitations, and had made scaled-back daily plans. Even then, Ms. Dahan testified she believed the trip was too much for the plaintiff. The plaintiff could not visit a museum, as she experienced dizziness. Ms. Dahan had booked a private tour of the Sistine Chapel in the early morning before it was open to the public. However, the plaintiff was not able to walk with the tour group and ended up getting lost. Ms. Dahan testified the plaintiff appeared tired as the trip went on.

Dr. Gordon Searles

[87] Dr. Searles is a member of the CDA, and first met the plaintiff in 2010 when she was recruited for the position of CEO. Dr. Searles testified the plaintiff was vibrant in her role. The CDA was the host of the world congress conference in Vancouver in 2015 and Dr. Searles testified the plaintiff planned a very successful conference.

During his tenure as president, he had weekly phone calls with the plaintiff to discuss issues. He found the plaintiff to be effective in her role.

[88] After the Collision, Dr. Searles noticed that sometimes the plaintiff missed attending conference calls. The plaintiff sometimes forgot what was discussed previously. From his experience, the plaintiff still seemed to know what was going on and was able to delegate what needed to be done.

Suzanne Joyal

[89] Ms. Joyal met the plaintiff at their children's school in approximately 2009. She was offered a job by the plaintiff as chief strategist at the CDA in 2016, later becoming the director of marketing and communications. She worked closely with the plaintiff both before and after the Collision.

[90] Before the Collision, Ms. Joyal described the plaintiff as high energy with lots of ideas for the organization. The plaintiff was involved in all aspects of the communications strategy, writing a letter to be inserted into the annual report and proofing the report in both English and French. After the Collision, Ms. Joyal testified the plaintiff was no longer as involved, and Ms. Joyal began to make the decisions with no input from her. She described the plaintiff as less available. The plaintiff was often searching for words when she spoke. Ms. Joyal noticed the plaintiff stepping back from some of her committee work. Ms. Joyal left the CDA in 2021. She testified the plaintiff contacted her about working on Concussion Central. Ms. Joyal volunteered some of her time helping with the website.

Colin Saravanamutto

[91] Mr. Saravanamutto met the plaintiff when they were both working at the CMA. He also works in the non-profit sector, currently as the executive director of a world animal organization. He has kept in touch with the plaintiff through professional networking events through the years. He explained the CEO group in the non-profit sector is a small community. The plaintiff organized a small group of CEOs in Ottawa to meet informally to share information and network. Mr. Saravanamutto testified that

usually after about five years, most CEOs know that it is time to move on, as the members of the board change.

[92] In 2019, the plaintiff hired him to work on a small consulting project at the CDA, as he was taking a nine-month sabbatical in between jobs. He described the job as only requiring a few days of work. His understanding was the plaintiff was struggling with members of the Board at that time. He described the plaintiff on the occasions he met her as low in energy after the Collision.

Annette McCunn

[93] Ms. McCunn owns an event management company. Her company was contracted to put together conferences for the CDA. She met the plaintiff in 2011. She described the plaintiff before the Collision as ambitious and outgoing. The plaintiff attended for long days at each of the conferences. She was available to meet with members and sponsors, and at the gala dinner the plaintiff would make sure everyone had a good time.

[94] After the Collision, Ms. McCunn described difficulties in getting in touch with the plaintiff in relation to conference planning. She resorted to contacting staff members so decisions could be made. She observed the plaintiff attending conferences, but noticed the plaintiff was not staying as long, often going back to the hotel room to rest.

Steve Wharry

[95] Mr. Wharry met the plaintiff when they were both working at the CMA in 2002. He only saw the plaintiff about once a year after she left the CMA. He was hired by the plaintiff on a short-term project at the CDA from February to May 2018, working two days a week. His impression was that after the Collision, the plaintiff seemed more distracted and less able to concentrate. He noticed she was searching for words when she spoke, and her energy level seemed lower. If they met at her office, he noticed her curtains were drawn.

Robyn Hopkins

[96] Ms. Hopkins was the director of finance at the CDA. She met the plaintiff in 2012, and worked closely with her both before and after the Collision. Ms. Hopkins started her role part time, and by 2017 she was working up to four days a week.

[97] Ms. Hopkins described the plaintiff before the Collision as high energy, with an effective and efficient management style. Ms. Hopkins, the plaintiff and Andrea Vanden Tillaart met regularly as the management team. Ms. Hopkins testified the plaintiff was articulate, organized and decisive.

[98] After the Collision, Ms. Hopkins testified the plaintiff was keeping her office door shut more often. The plaintiff asked for documents to be printed instead of emailed. Her memory was not as good, as she saw the plaintiff writing notes to remind herself of discussions. Ms. Hopkins also witnessed the plaintiff not getting on as well with the president of the Board.

[99] Ms. Hopkins testified she also had some difficulties with the Board after Dr. Purdy became president. Ms. Hopkins testified the Board became more adversarial, and she felt disrespected in her role. Ms. Hopkins decided to leave the CDA in July 2020.

Jennifer Ruddy

[100] Ms. Ruddy met the plaintiff through the Masters' program at Carleton. Ms. Ruddy was in the academic stream and the plaintiff was in the executive stream. They worked on group projects together. Ms. Ruddy testified that the plaintiff often worked remotely, reviewing their draft and making suggestions. The plaintiff also wrote part of the project.

[101] Ms. Ruddy testified the plaintiff offered her a job with Concussion Central in 2021. Ms. Ruddy completed the registration for non-profit status and created some podcasts. The plaintiff was a member of the board, and Ms. Ruddy testified they would plan their board meetings for late mornings when the plaintiff would have the most energy. Ms. Ruddy was paid for six months in 2021, she then worked for free in 2022,

and eventually she resigned in late 2022. She testified the podcasts never generated enough listeners.

Dr. Kevin Loopeker

[102] Dr. Loopeker is an optometrist who focuses on visual dysfunction associated with mild traumatic brain injuries. He was not qualified as an expert and testified as a fact witness.

[103] Dr. Loopeker conducted an examination of the plaintiff in November 2019. He found the plaintiff had mild visual-vestibular mismatch, which he described as the eyes and the brain not integrating properly. He also found mild light sensitivity and mild residual binocular instability, which he described as the eyes not functioning well together. He recommended specialty eyeglass lenses and vestibular therapy.

Witnesses for the Defendants

Pamela Belfer

[104] Ms. Belfer worked at the CDA from October 2015 to December 2020. She was a passenger in the Taxi on the date of the Collision.

[105] Ms. Belfer testified after the Collision, the lights were frequently off in the plaintiff's office. The plaintiff left work earlier after the Collision. She testified about a strain in the relationship between the plaintiff and the Board in 2019 with the new President.

Jonelle Istead

[106] Ms. Istead worked at the CDA from October 2017 to February 2020. She was a passenger in the Taxi on the date of the Collision.

[107] Ms. Istead testified after the Collision, the plaintiff continued to work regularly at the office and maintained her work travels. She spoke with the plaintiff most days when she was at the office, and Ms. Istead did not notice anything unusual in the plaintiff's speech. Her view was the plaintiff was articulate. Ms. Istead testified the

plaintiff did not come in regularly to the office near the end in November 2019, when the relationship between the plaintiff and the Board became strained.

Dr. Kerri Purdy

[108] Dr. Purdy was the Vice President of the CDA in 2017/2018, President Elect in 2018/2019, and became President in 2019/2020. In her role, she met with the plaintiff in person at board meetings and committee meetings, and when she was President, had weekly meetings with the plaintiff by telephone. Dr. Purdy testified she did not notice any changes in the plaintiff from before and after the Collision.

[109] Dr. Purdy on behalf of the Board initiated an external performance review of the plaintiff. This review consisted of interviews with the plaintiff, CDA staff, current and former Board members, as well as industry partners. Some of the staff and Board members interviewed would have known the plaintiff from before the Collision. The review was completed shortly before the plaintiff went on leave in November 2019. As a result, no action was taken based on the review. Dr. Purdy testified the results of the review were average, with the plaintiff receiving an overall score of 3 out of 5.

The Expert Witnesses

For the Plaintiff

Dr. Pamela Squire

[110] Dr. Squire was qualified as an expert in chronic pain. She conducted an independent medical legal examination of the plaintiff on August 18, 2022. She conducted a physical examination. Dr. Squire found muscle tightness, described as palpable myofascial adhesions and/or trigger points affecting multiple muscles in the plaintiff's face and around her jaw, left neck, shoulder and shoulder blade, front ribs, left arm and forearm. Dr. Squire also found tightness in the right foot.

[111] Dr. Squire's opinion was the plaintiff suffers from chronic moderate left shoulder and neck pain; chronic moderate low back pain; chronic intermittent headaches; chronic intermittent right great toe pain; adjustment disorder with anxiety and

depressed mood; closed head injury with mild traumatic brain injury and prolonged post-concussion syndrome.

[112] In Dr. Squire's opinion, the plaintiff is predominantly limited by her headaches, nausea, balance issues, dizziness, visual motor dysfunction, slower processing speed, difficulty with word finding and challenges with focus and concentration. Dr. Squire is of the view the plaintiff's prognosis for recovery from her myofascial pain is poor. She agrees that the plaintiff "is fully disabled from any kind of employment due to her ongoing post-concussion symptoms" and "this is more likely than not a permanent disability". Dr. Squire agreed there was likely a psychological component to the plaintiff's symptoms and treatment in that area would be very helpful.

Dr. Christina Cheung

[113] Dr. Cheung was qualified as an expert in neurology. She conducted two independent medical legal examinations of the plaintiff on October 1, 2020, and October 27, 2022. Dr. Cheung diagnosed the plaintiff with whiplash injury and concussion, a prolonged post-concussion syndrome and post traumatic headaches with migraine features. Dr. Cheung noted objectively there were no significant neurological deficits aside from ongoing word-finding difficulty and tangential speech. After her second assessment, Dr. Cheung was of the view the plaintiff is permanently completely disabled from her prior job as CEO and any alternative occupations. Dr. Cheung recommended CGRP treatment for the headaches.

Dr. Soma Ganesan

[114] Dr. Ganesan was qualified as an expert in psychiatry. He conducted an independent medical legal examination of the plaintiff on November 9, 2022. His assessment consisted of an interview with the plaintiff and having her complete a number of self-rating questionnaires. He concluded as a result of the Collision, she suffered from post-concussion syndrome with evidence of amnesia; mild traumatic brain injury; major depressive disorder, moderate; generalized anxiety disorder, moderate; post traumatic stress disorder, currently mild to moderate. His view is "unless the combination of emotional and cognitive function shows some improvement

and she can tolerate more stimulation and be able to focus on the computer, read, and watch TV for longer than half an hour, it is difficult to expect her to become involved in any meaningful work". He also commented that "returning to a paying job will be very challenging to expect".

[115] During cross-examination, Dr. Ganesan was asked about the plaintiff after the Collision continuing to work for two years, completing a Masters program and starting Concussion Central, and whether these facts impact on his opinion that she could not return to work. Dr. Ganesan's response was he would need more information on how the plaintiff was able to do these tasks. When pressed about whether he ought to have found out these details before rendering his opinion that she was not going to be able to return to a paying job, Dr. Ganesan's response was his role was not to conduct a vocational assessment.

Patrick Reynolds

[116] Mr. Reynolds was qualified as an expert in recruitment of executives. He provided evidence on the recruitment process for executives in the non-profit sector, and salary ranges for different sizes of organizations. He also provided an opinion on the plaintiff's career projection.

[117] Mr. Reynolds testified that most CEOs have a tenure of approximately seven years in an organization. In the non-profit sector, small organizations are defined with those up to 30 employees and budgets of up to $5 million, mid-size organizations have between 30 to 150 employees and budgets of $5 to $10 million, and large organizations have more than 150 employees with budgets more than $10 million. Salary ranges for small associations are usually between $100,000 and $130,000 with little opportunity for bonus; mid-sized organizations pay between $150,000 and $250,000 and some have small performance bonuses of 10% to 15%; and large organizations can pay $200,000 to $350,000 plus.

[118] His opinion is the plaintiff would have likely progressed to the upper part of the salary range for each step of her career progression. However, he noted that "this is based on her success with a small organization and there is no guarantee of similar

success in larger organizations". His opinion is she would have likely increased her salary to $230,000 by 2019, with an additional 3% to 5% increase a year for cost of living and merit increases for about seven years, taking her salary beyond $300,000. His opinion is the plaintiff would likely make a second move by 2026, taking her salary close to $350,000. He states that "it is hard to predict later career progression for candidates". These figures are base salaries and do not include other benefits such as extended health or RRSP matching programs. However, he noted this is different with each organization and most associations do not pay bonuses.

[119] In terms of what his firm looks for in potential candidates, Mr. Reynolds testified a candidate's past relationship with the board of directors is important. If board members made negative comments about a candidate, that would be telling. A candidate's leadership style and ability to get along with the board is an important consideration. Mr. Reynolds testified that candidates sometimes choose a backward step in their career, moving to a smaller organization for increased quality of life. He explained that every candidate's motivation is different. There are also part time CEO positions available with smaller organizations, as well as international placements. He does not handle these requests.

For the Defendants

Dr. Timothy McDowell

[120] Dr. McDowell was qualified as an expert in neurology. He conducted an independent medical legal examination of the plaintiff on February 17, 2023. A physical examination of the plaintiff produced normal results. An MRI of the plaintiff's brain taken in July 2020 which Dr. McDowell reviewed was normal.

[121] Dr. McDowell's opinion is the plaintiff suffered a concussion/mild traumatic brain injury with persistent post traumatic headaches. His opinion is based on what the plaintiff recalled from the Collision, and he believes that a concussion occurred with "more than 50% likelihood". However, he qualified this by stating it is possible that "most of her symptoms are predominantly on the basis of whiplash with some immediate significant psychological response". His view is that the plaintiff's ongoing

cognitive complaints are likely based on chronic migraine headaches and psychological factors. He believes it is unlikely there is "any significant organic neurodegenerative cognitive disability attributable to this mild traumatic brain injury now or in the future".

[122] Dr. McDowell's opinion is "headache disability is inherently subjective" but he had no reason to dispute the fact that the plaintiff is "currently totally disabled". He recommends CGRP therapy for the headaches. His view is with this therapy, there is a "significant chance" for improvement of her headaches "on the magnitude of 50%".

Dr. Kathryn Fung

[123] Dr. Fung was qualified as an expert in psychiatry. She conducted an independent medical legal examination of the plaintiff on August 16, 2022.

[124] Dr. Fung's opinion is the plaintiff has adjustment disorder with mixed anxiety and depressed mood, chronic. Dr. Fung disagrees with Dr. Ganesan's diagnosis of post-concussion syndrome. Dr. Fung points out post-concussion syndrome was eliminated from the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* ("*DSM-V*") in 2013. The closest equivalent diagnosis is mild neurocognitive disorder due to traumatic brain injury. Her view is without any neuropsychological testing, a diagnosis of a mild neurocognitive disorder due to a traumatic brain injury cannot be given.

[125] Dr. Fung also disagreed with Dr. Ganesan's diagnosis of major depressive disorder, generalized anxiety disorder, and post traumatic stress disorder. Dr. Fung points out Dr. Ganesan's report did not outline sufficient facts to support those diagnoses, but that he relied on self-rated tests to form his opinion. Dr. Fung testified that an adjustment disorder is not better or worse than a diagnosis of major depressive disorder; she explained it is simply a different diagnosis which requires different treatment.

[126] In Dr. Fung's view, prognosis for the plaintiff is guarded. Her opinion is if the headaches improve, then the severity of her adjustment disorder will decrease. Also,

the prognosis of the plaintiff's cognitive difficulties depends on the underlying cause, which requires neuropsychological testing. If the cause of the cognitive complaints is due to treatable factors, such as headaches, anxiety, low mood, poor sleep, then further improvement is possible.

[127] In Dr. Fung's view, the plaintiff is currently and likely permanently unable to work as a CEO due to a combination of her physical and psychiatric injuries. However, in her view, alternate work is a possibility with an adjustment disorder. In her experience, an adjustment disorder by itself would not result in complete disability from work. She points to the fact that the plaintiff was able to complete her Master's degree after the Collision.

Dr. Colleen Quee Newell

[128] Dr. Quee Newell was qualified as an expert in vocational assessments. She conducted an assessment of the plaintiff on August 15, 2022. Her opinion is that the plaintiff currently is not capable of a return to work in any capacity. However, if the plaintiff has a positive response to treatment, Dr. Quee Newell's view is she could work in a business management position with a smaller organization on a part time basis.

Adverse Inference

[129] The defendants ask the Court to draw an adverse inference against the plaintiff for not calling as witnesses at trial Dr. Barnes, her family doctor, and Ms. Vanden Tillaart, a co-worker at the CDA. The defendants also seek an adverse inference against the plaintiff for not undergoing neuropsychological testing.

[130] The law related to adverse inferences was set out by Justice Voith in *Zawadzki v. Calimoso*, 2011 BCSC 45 at para. 149:

> [149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v.*

> *Quinn* (1994), 1994 CanLII 978 (ON CA), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287.

[131] The defendants argue Dr. Barnes was one of the plaintiff's primary care providers, and she ought to have obtained an expert report from Dr. Barnes. As for Ms. Vanden Tillaart, the defendants argue she was a long-time co-worker who took the plaintiff to the emergency department a few days after the accident. She would have knowledge of the plaintiff's condition and how she was at work. Instead of calling Ms. Vanden Tillaart as a witness, the plaintiff chose to call other witnesses who only had brief interactions with her. The defendants further argue the plaintiff chose not to undergo neuropsychological testing even though she was referred for such testing. The experts have agreed this type of testing would be important in assessing the plaintiff's cognitive ability, which is a key issue in the trial.

[132] In my view, Dr. Barnes and Ms. Vanden Tillaart could have been called by the defendants. There is no evidence that they could not do so. As for not undergoing neuropsychological testing, the plaintiff testified Dr. Moustgaard, her psychologist, advised her it was not necessary. The Court is not prepared to draw an adverse inference against the plaintiff for not undergoing testing that one of her doctors advised her not to do. In my view, it is not appropriate to draw any adverse inferences and I decline to do so.

Causation

[133] The basic legal principles respecting causation are found in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183. The general test for causation is the "but for" test requiring the plaintiff to prove on a balance of probabilities that their injury and loss would not have occurred but for the negligence of the defendant. 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: see *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328, 1990 CanLII 70.

[134] 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 part of the cause of an

injury, the defendant is liable. The contribution to the cause of the injury must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

[135] The plaintiff immediately after the Collision could not turn her head. She could not lift her left arm and her neck and head hurt. Since the Collision, she has regained most of her range of motion in her head, neck and shoulders, except that her shoulder is still limiting her ability to swim the front crawl. The headaches have continued. There are other effects on the plaintiff – nausea, dizziness, sensitivity to sound and light. The plaintiff also experienced cognitive deficits. She has trouble finding words when she speaks and her memory is worse. There are psychological effects – the plaintiff has low mood, low energy and questions her value.

[136] In my view, the plaintiff's physical, cognitive and psychological injuries are caused in whole or in part by the Collision. There is no evidence the plaintiff had any of these symptoms before the Collision. While she did have a previous concussion in 1991 and whiplash from a motor vehicle accident in 1994, the evidence is she had recovered. I find the plaintiff has proven on a balance of probabilities the Collision caused her current injuries.

[137] All the medical experts agree the plaintiff suffered a mild traumatic brain injury from the Collision. They agree the plaintiff continues to have effects from this concussion. There is disagreement among the experts if this should be called post-concussion syndrome; the plaintiff's experts used this term while the defendants' experts testified this term is no longer used in *DSM-V*. Regardless of the term for the medical diagnosis, all the experts agree the plaintiff's headaches since the Collision are a significant symptom for her. In any event, I understand the defendants agree the plaintiff was injured by the Collision; the defendants take issue with the extent of those injuries and prognosis for further improvements.

Findings on Causation

[138] Based on the totality of the evidence, I make the following findings with respect to the plaintiff's condition and causation:

1. The plaintiff suffered a mild traumatic brain injury from the Collision. This concussion has had long lasting effects, including prolonged intermittent headaches.

2. Immediately after the Collision, the plaintiff could not turn her head and move her left arm. She has recovered her range of motion, except her left shoulder is still limiting her ability to swim the front crawl.

3. The plaintiff has some myofascial pain from the Collision in her upper body, including neck, shoulder, front ribs and arms.

4. The plaintiff has suffered some cognitive deficits due to the Collision. Her memory has been adversely affected. She has difficulty finding words when she speaks. Her brain processing speed is slower than before the Collision. Her ability to focus has diminished. However, without formal neuropsychological testing, it is difficult to assess the extent of her cognitive deficits.

5. The plaintiff has psychological effects from the Collision. She has experienced grief and loss of her previous life, including her career.

6. Her current symptoms are pain in her eyes, headaches, nausea, dizziness, burping, light and sound sensitivity, limited peripheral vision, limited range of motion in shoulder when swimming freestyle, cognitive issues with poor memory, inability to focus, difficulty finding words when speaking, low mood and fatigue.

Assessment of Damages

Non-pecuniary damages

[139] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

> The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[140] While the cases cited are helpful, as noted in *Stapley* at para. 45:

> [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal,* [[1981] 2 S.C.R. 629 at 637, 1981 CanLII 35] is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury*

> *Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* [*v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 at 284,1978 CanLII 12]).

[Emphasis added in *Stapley*.]

[141] The injuries from the Collision have had a significant impact on the plaintiff, both personally and professionally. The plaintiff can no longer attend her sons' swim meets, as she finds the noise and light overwhelming. This is a significant loss for her, as her sons are top level swimmers who regularly come in the top five in their age category. She has missed out on being there during their achievements. She can no longer travel as she had before the Collision. She tires easily, and is no longer willing to go on adventures. She is easily disoriented. She cannot simply enjoy the sights and sounds of a new locale if she is bothered by her symptoms. She is embarrassed by her symptoms, such as continuous burping, and not being able to speak smoothly. She feels as if the public speaking skills she worked hard to hone have been wasted. She described herself going from living as an extrovert for most of her life to now being an introvert, needing to be alone. She feels a sense of insecurity and helplessness, as she relies on her husband for physical and emotional support. She worries about what will become of her if something happened to her husband, as she feels she is no longer capable of living independently.

[142] Perhaps her biggest sense of grief comes from the loss of her career. The evidence is the plaintiff was ambitious and driven with big career goals. She always liked being in charge, and being a CEO suited her. She feels now her goal of being a CEO of larger and larger organizations is out of reach. Her sense of identity is wrapped up in her career, and without her job, she feels she is less. Before the Collision, the evidence is the plaintiff continuously sought out more to do and had the confidence to execute her plans. Without her job, the plaintiff feels she has nothing interesting to talk about when she meets with friends. As she testified, she now retreats. The Collision has left her with continuing emotional difficulties.

[143] The plaintiff seeks non-pecuniary damages of $275,000. She relies on cases where there was a mild traumatic brain injury with ongoing physical symptoms and emotional changes. She relies on *Young v. Anderson*, 2008 BCSC 1306; *Roussin v. Bouzenad*, 2005 BCSC 1719; *Lines v. Gordon et al. and ICBC*, 2006 BCSC 1929; *Burdett v. Eidse*, 2010 BCSC 219 and 2011 BCCA 191; *Chowdhry v. Burnaby (City of)*, 2008 BCSC 1337; and *Wallman v. John Doe*, 2014 BCSC 79.

[144] The defendants submit $200,000 is appropriate for non-pecuniary damages. They also rely on cases of a mild traumatic brain injury with ongoing physical symptoms and lingering emotional effects. The defendants rely on *Meckic v. Chan*, 2022 BCSC 182; *Kowalski v. Chepil*, 2021 BCSC 1585; and *Jantzi v. Moore*, 2020 BCSC 1489.

[145] I find generally the cases cited by the defendants to be better comparators, as these cases are more recent. I find *Kowalski* the most relevant. Like Ms. Courchesne, the plaintiff in *Kowalski* also suffered a mild traumatic brain injury, with ongoing pain, headaches, sleeplessness, depression, anxiety and somatic symptom disorder. The plaintiff tried to work reduced hours, with less use of computer screens, but found himself unable to cope due to memory issues and frustration. He eventually stopped working. The plaintiff was not working in his computer job at the time of trial, and the evidence was he may not be able to work in the future. The Court awarded non-pecuniary damages of $150,000.

[146] Loss of housekeeping capacity can be included either as a separate head of damage or included as part of the non-pecuniary award. Where there is evidence the plaintiff is still able to perform household tasks but with difficulty, that loss may be compensated by a non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 at para. 33. It is at the discretion of the trial judge.

[147] There is no evidence the plaintiff cannot perform housekeeping tasks. She testified she does not do the dishwasher and vacuum due to the need to move up and down, and due to the noise of the vacuum. In my view, this limitation ought to be included as part of the non-pecuniary award rather than as a separate head of

damage. The evidence does not go so far as to suggest the plaintiff is incapable of doing dishes or vacuuming. The evidence is the plaintiff's children have moved out. The housekeeping tasks ought to be lessened due to fewer people living in the home. The plaintiff's husband also lives with her, and it is reasonable to expect they can share the tasks, with the plaintiff doing the ones that suit her best.

[148] The plaintiff has suffered a mild traumatic brain injury with ongoing physical symptoms, leading to low mood and energy. She lost a very valuable career which was financially rewarding. She lost a part of her identity when she could no longer work. In these circumstances, I find an award of $200,000 for non-pecuniary damages is fair and reasonable.

Past Income Loss

[149] The plaintiff's position is without the Collision, she would have left the CDA by 2019 and obtained a higher paying job. She argues the evidence shows she had been looking for another opportunity since 2016 and had been interviewed for other positions before the Collision. She was young when she started with the CDA. She argues she achieved significant success in raising the profile of the CDA by increasing staff and revenue for the organization. She was on track to move up in her career if not for the Collision.

[150] The plaintiff relies on a hypothetical event for her argument of past income loss. Proof of a hypothetical event is the same whether it is a past or future event, and proof on a balance of probabilities is not required: *Grewal v. Naumann,* 2017 BCCA 158 at paras. 45–49. The plaintiff must show the hypothetical event was a real and substantial possibility, and not mere speculation. If the Court finds this hypothetical event was a real and substantial possibility, the Court will have to assess the relative likelihood of this event occurring.

[151] The plaintiff claims loss of income from 2019 when she left the CDA to the date of trial. She presents two hypothetical scenarios of her earnings, both based on the evidence of Mr. Reynolds regarding salary ranges for larger non-profit organizations. She argues without the Collision, she would have left the CDA and obtained a job with

a larger organization with a base salary of $230,000 in 2019. She seeks to add to the base salary an annual increase of 4% for cost of living and merit increase, a 6% RRSP contribution from the employer, and an additional 5% for extended health benefits or potential bonus. Her second scenario is based on 5% for cost of living and merit increase, 7% RRSP contribution, and an additional 5% for extended health benefits or potential bonus. By her calculations, from 2019 to 2023, the total income lost in the first scenario after taxes is $776,408.05 and $803,823.35 in the second scenario. The parties agree the plaintiff has an income tax rate of 32.5%.

[152] The defendants argue the plaintiff has not proven a real and substantial possibility that she would have worked at another job without the Collision. They argue her past income loss from 2019 to the date of trial should be based on her salary at the CDA. Her salary at the CDA in 2019 was $200,000. The evidence was the CDA paid a cost of living increase each year of 2.5%. Based on the defendants' calculations, the plaintiff's loss of income from 2019 to the date of trial is $515,397 after taxes.

[153] In my view, the evidence does not establish there was a real and substantial possibility the plaintiff would have obtained a job with a starting salary of $230,000, increases of 4% per year and additional benefits, by 2019 without the Collision. The evidence was from the three job opportunities the plaintiff pursued before the Collision, the one that she was further shortlisted for was the job with the Pilotage association. She testified that job had a salary of approximately $210,000 annually. She did not progress further in the process in the other two jobs she had interviewed for, one of which had a higher salary of $230,000. The plaintiff relies on the evidence of Mr. Reynolds that her career progression was highly probable. His evidence was she would have moved to a job with a salary of $230,000 by 2019, a salary of $300,000 by 2024, and she would have made $350,000 by 2026. However, Mr. Reynolds did not have the information about the results of the plaintiff's three job applications before the Collision. He also did not have information about the plaintiff's performance review from 2019, where she received average results. While it can be argued that performance review may have been affected by the plaintiff's injuries from the

Collision, there were members of the Board and staff interviewed that knew the plaintiff's work from before the Collision. As Mr. Reynolds' opinion is based on incomplete information, I find this affects the weight that it can be given.

[154] The plaintiff testified that she was called twice after the Collision by a recruiter about a job with the Canadian Bar Association and she had to decline. She testified the CEO position of the Canadian Bar Association is the type of job with a large professional organization that she had always hoped to obtain. She testified she believed the salary for the Canadian Bar Association would have been more than $300,000. While I accept her evidence that such a phone call meant to her that she was moving at the expected pace through her career, I find a call from a recruiter is not sufficient to show a real and substantial possibility that the plaintiff would have been successful in that competition. There is simply no evidence that a call from a recruiter means anything other than a potential invitation to apply. While I accept that it was a real and substantial possibility that the plaintiff would have obtained another job by 2019 without the Collision, I do not find that the evidence shows it would have been a job with a significant increase in salary.

[155] In the circumstances, I find without the Collision the plaintiff would have stayed working at the CDA until the trial date or at a job with a similar pay scale. As such, I find the defendants' calculations based on her salary at the CDA to be a reasonable and fair assessment of her past loss of income. I assess her loss of past income to be $520,000 after taxes.

Loss of Future Earning Capacity

[156] The plaintiff claims more than $7 million as her loss of future earning capacity. She argues that without the Collision, she was on track to advance through her career.

[157] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal recently restated the operative principles to determine loss of future earning capacity, which had previously been revisited in *Dornan v. Silva*, 2021 BCCA 228, in *Rab v. Prescott*, 2021 BCCA 345, and in *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* …, 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, 1985 CanLII 149 (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.

[158] The third step in the process for considering claims for loss of future earning capacity may involve either the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, and the plaintiff has an established work history. The capital asset approach should be undertaken generally when there has been no loss of income at the time of trial but a loss of earning capacity, as the plaintiff has not yet established a clear career path: *Ploskon-Ciesla* at paras. 16–17. The plaintiff's argument on her future loss of earning capacity builds on her argument for loss of past income. Using the figures provided by Mr. Reynolds, the plaintiff calculates each year

of lost income based on a salary of $230,000 in 2019 plus the yearly increases and benefits. The plaintiff calculates this to age 70 for the two scenarios discussed earlier. For scenario one, the net present value of total loss of future earning capacity is $7,263,928.16 and $7,864,931.68 for scenario two.

[159] The defendants argue the report of Mr. Reynolds should not be used to calculate loss of future earning capacity. They further argue the plaintiff has not exhausted her treatment options, and further improvement in her symptoms may be possible. There is evidence that the Emgality injections (CGRP therapy) as recommended by Dr. McDowell and Dr. Cheung have been helpful for the plaintiff's headaches. As of the trial date, the plaintiff had been receiving Emgality for two months. The evidence is there was some improvement for her, though with the added stress of the trial in June, the headaches increased. The plaintiff was also starting a new antidepressant. The defendants argue the plaintiff has some residual earning capacity, as shown through her completion of a Masters degree and continuing to work for two years after the Collision. They submit a capital asset approach should be used to assess her future loss of earning capacity. The defendants submit the loss should be assessed at $2 million.

[160] I accept on the evidence there is a potential future event which could lead to a loss of earning capacity. The evidence is the plaintiff cannot currently work and may not be able to work in the future due to injuries from the Collision. There is a real and substantial possibility that the inability to work will cause a pecuniary loss. The third step is to assess the value of the possible future loss. This includes assessing the relative likelihood of the plaintiff being permanently unable to work due to injuries from the Collision. In this case, as the plaintiff has had a long work history, I find the earnings approach is more appropriate.

[161] I find on the evidence there is a high likelihood the plaintiff will not be able to work full time as a CEO of a non-profit organization. The experts are divided on whether her inability to work is permanent. The plaintiff's experts are of the view she cannot work in any capacity, and this is likely permanent. The defendants' experts

agree the plaintiff is currently disabled from working, but that if her headaches improve she may be able to work in some capacity.

[162] In assessing the plaintiff's residual earning capacity, I note the difficulty in corroborating pain and headaches. The experts agree pain is subjective and cannot be objectively verified. The medical experts have to rely on the plaintiff's self reports of headaches, nausea, dizziness and other cascading symptoms. Dr. McDowell's opinion is there is no organic reason for the headaches, and his view is the headaches are more likely a result of the psychological effects of the Collision. His opinion is if her headaches can improve, the plaintiff may be able to work. He recommended Emgality, and noted that it has been helpful for those with treatment resistant headaches. The evidence is the plaintiff did initially see some improvement when she started this treatment.

[163] In addition, I note the plaintiff has been able to complete her Masters degree and start a new non-profit for concussion information. The surveillance videos show the plaintiff being able to go shopping, walk the dog, and get ice cream, seemingly without difficulty. The plaintiff has a long work history, and there is no reason to believe she would not work to her maximum ability. In my view, with appropriate treatments, the plaintiff may be able to work in some capacity in the future. The evidence is there are part time CEO positions available for smaller organizations.

[164] The plaintiff's calculations for loss of earning capacity is based on assumptions that this Court does not accept. She based her calculations on working until age 70. While I acknowledge she testified that is when she believed she would have stopped working, I put little weight on that statement as it is without corroboration. There is no evidence from before the Collision that the plaintiff was planning to work until age 70, such as any financial retirement plans she had put in place. No witnesses testified the plaintiff's plan before the Collision was to retire at age 70. The plaintiff testified her husband is interested in retirement, and I find it likely the plaintiff may retire earlier if her husband has already retired. Further, her calculations are based on her reaching a salary of $230,000 in 2019, and then steadily increasing with a fixed rate for cost of

living, RRSP contributions, bonuses and other benefits annually. The evidence does not support such a consistent pattern of upward increases every year for the plaintiff. The evidence is she received a 2.5% increase every year for cost of living, not 4%.

[165] Also, as the typical pattern for CEOs in non-profit organizations is a life cycle of five to seven years, I find this translates into instability of employment. This is unlike a position at a company where someone can work for a lengthy period before retirement. If the plaintiff has to search for a new job every five years, this can lead to periods of unemployment when she is between jobs. That is what happened to her before she obtained her job at the CDA. She was working two part time jobs at the time. The evidence of her colleagues who work at non-profit organizations is that jobs in the non-profit sector are not always full time and not always continuous. Mr. Saravanamutto testified he took a nine-month sabbatical before he started his current job. Ms. Reddy was looking for a job when the plaintiff offered her the role at Concussion Central, which was not full time. Mr. Wharry was available to work for the CDA on a short-term contract in 2018.

[166] The evidence is that individuals choose to work in the non-profit sector for different reasons. Those motivations may not be financial. Individuals may take lower pay if it is a cause they believe in. The evidence is unlike the for-profit sector, people decide to stay or quit based on factors other than money. Further, it is likely the plaintiff may have chosen to work abroad. She testified she wanted to give her children an international experience. There is no evidence as to salary ranges internationally for CEOs in non-profit roles. Further, the plaintiff's calculations assume there is no salary cap. There is no evidence that salaries for non-profit CEOs will increase every year indefinitely. Mr. Reynolds' report indicated ranges of salaries based on the size of the organization. All of these factors show it is not a straight mathematical calculation based on fixed rates of increases annually. I find the evidence is likely that it will be a career with starts, stops and gaps in earning years.

[167] I will start with the plaintiff's calculations for loss of earning capacity to age 65. Based on her calculations, the net present value of the total loss is $4,774,912.91 to

age 65. However, in my view, that figure has to be discounted to account for negative contingencies. These include not obtaining a salary of $230,000 until some time after 2019; fluctuations in the amount of annual increases for cost of living; fluctuations in other benefits such as RRSP contributions; periods of unemployment or part time work; the plaintiff may accept a job with a lower pay for personal reasons; there may be a salary cap at the top of the range; and there may be interruptions in career due to international experiences. I find these factors show the plaintiff's figures ought to be reduced by 30% to account for these contingencies. This leaves a net present value of $3,342,439.04 as loss of future earning capacity.

[168] With respect to the plaintiff's residual earning capacity, I find this ought to be assessed at 10%. There is a low likelihood of her being able to return to work in some capacity. The medical experts do not all definitively state the plaintiff is permanently disabled from all work. Dr. Cheung's opinion was the plaintiff was permanently disabled from her job as CEO and any alternative employment. However, I place little weight on the last part of her opinion, that the plaintiff was permanently disabled from any alternative employment, as Dr. Cheung is not a functional capacity evaluator or an expert in vocational assessment. Dr. Cheung provided no basis for her sweeping conclusion that the plaintiff cannot work in any capacity. Dr. McDowell and Dr. Fung acknowledged the functional limitations of persistent headaches, but offered the view that if those headaches can be treated, the plaintiff may be able to return to some type of work. Whether the headaches can be treated of course remains to be seen, but I find there is evidence the Emgality treatment has been helpful for the plaintiff. Further, the evidence is the plaintiff continued to work for two years after the Collision. She continued her work travels, going to Tanzania and Vietnam. She completed her Masters degree. She developed her idea to start Concussion Central. In my view, the plaintiff's residual earning capacity is 10%. Reducing the $4.7 million by a further 10% brings the loss to $2,864,947.84. I will round this to $2.9 million.

[169] If we average this out for 12 years which brings the plaintiff to age 65, a loss of approximately $2.9 million works out to approximately $242,000 per year. In my view,

in the totality of the circumstances, I find this to be fair and reasonable. I assess the loss of future earning capacity to be $2.9 million.

Cost of Future Care

[170] When determining a cost of future care award, the court should try to restore the plaintiff, as best as possible with a monetary award, to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia,* 2012 BCCA 351 at paras. 29–30.

[171] The plaintiff seeks an award of $497,023.77 for cost of future care. These items are as follows:

1. Prism glasses and vision rehabilitation therapy as recommended by Dr. Loopeker to age 83, at a cost of $12,099.43.

2. Home exercise equipment and sessions with a kinesiologist, as recommended by Dr. Squire, at a cost of $3,000.

3. Massage therapy, cranial sacral therapy, chiropractic treatment, as recommended by Dr. Cheung and Dr. Squire, at four sessions monthly at $120 a session, to age 75, at a cost of $152,565. The plaintiff is seeking 72 sessions a year.

4. Botox injections for headaches every 10 weeks to age 83, as recommended by Dr. Cheung, at a cost of $114,500.80. Each round of Botox is approximately $1,000.

5. Emgality treatment for headaches, as recommended by Dr. McDowell and Dr. Cheung, to age 83 at a cost of $67,221.89. A one year trial of Emgality is approximately $8,117.16, with monthly costs of $676.43.

6. Migraine abortive medication, approximately $3,346.29 annually, to age 83, at a cost of $73,097.65.

7. Vitamins and supplements for her migraines at a monthly cost of $60, to age 83 at a cost of $15,727.96.

8. Antidepressants such as Cymbalta, at an annual cost of $702, for two years, at a cost of $1,404.

9. Psychological counselling once a month, as recommended by Dr. Ganesan, at $219 a session, to age 83 at a cost of $57,407.04.

[172] The defendants submit there should be an award of $22,700 to $28,300, based on the following items:

1. Psychological counselling for 16 to 20 sessions, at $50 a session, based on the plaintiff's invoice included with the special damages, for a cost of $800 to $1000

2. Emgality treatment at a cost of $700 to $800 a month for two years, for a cost of $16,800 to $19,200.

3. Vocational rehabilitation support, at a cost of $1,500 to $4,500.

4. One physiotherapy or massage therapy session per month for two years, at $115 a session, based on receipts submitted for special damages, for a cost of $2,760.

5. Vestibular physiotherapy for 24 sessions, at a cost of $135 a session, based on receipts submitted for special damages, for a cost of $840.

[173] The plaintiff claims most of her treatments until age 83, a period of 30 years. There is no medical evidence that the plaintiff will require all of these treatments for the next 30 years. I find the request for treatments for this duration to be unreasonable.

[174] Dr. Loopeker was not qualified as an expert witness. He provided evidence as a fact witness, and as such, his recommendations for prism glasses and vision therapy do not have medical justifications. I find there is no basis to allow these items under a cost of future care award.

[175] With respect to the cost of a home gym, I find there is no basis to allow this cost. The evidence is the plaintiff has always exercised. She is a Masters level swimmer. She rows, walks for fitness and engages in yoga. There was no evidence that she requires a home gym for optimal rehabilitation.

[176] With respect to massage therapy, cranial sacral therapy, chiropractic treatment, I find these should be awarded at two sessions a month for five years. Five years is a reasonable period of time to continue these treatments. The plaintiff's evidence is she does better when she can limit her medical appointments per month, so she is not overwhelmed. I accept the receipts the plaintiff submitted show an average cost of $115 a session, for an annual cost of $2,760. For five years of treatment, the total cost is $13,800.

[177] With respect to Botox, the medical evidence is the plaintiff has tried Botox treatment without significant improvement in her headaches. However, Dr. Cheung recommended that Emgality be added to Botox, and in my view, it is reasonable to allow for Botox treatments every ten weeks for five years (five sessions a year for annual cost of $5,000), at a cost of $25,000.

[178] With respect to Emgality, in my view, a reasonable expense is for five years. That will allow sufficient time to assess how effective it is, alone or together with the Botox, to reduce the migraines. The cost for five years is $40,600.

[179] With respect to migraine abortive medication, in my view, this cost for five years is reasonable. This is $16,750.

[180] With respect to vitamins and supplements for her migraines, this should be allowed for five years. At a monthly cost of $60, this is $3,600.

[181] The plaintiff claims antidepressants such as Cymbalta, at an annual cost of $702, for two years, at a cost of $1,404. There is medical evidence which supports the use of antidepressants for the plaintiff, and this cost is allowed.

[182] The plaintiff seeks psychological counselling once a month. In my view, this ought to be allowed for two years. If the headaches are decreased, the plaintiff's mental health may improve. At $219 a session, this cost is $5,256.

[183] The total award for cost of future care is $106,410.

Special Damages

[184] The plaintiff claims $19,987.05 in special damages. The defendants submit $19,058.51 should be awarded. The difference is $928.54.

[185] The defendants take issue with receipts for a massage from a spa, pilates and yoga. They argue these expenses are not related to any medical condition, but are aimed at general health and well being.

[186] In my view, these expenses are reasonable. The evidence is the plaintiff was engaging in massage therapy and exercise to recover from the injuries. There will be an award of $19,987.05 for special damages.

Failure to mitigate

[187] The defendants submit the plaintiff failed to mitigate by discontinuing her use of antidepressant and overusing Advil. The defendants argue the plaintiff decided on her own to reduce then discontinue the antidepressant. They argue the plaintiff continued to take too much Advil in an effort to reduce headaches, even after she had been warned by doctors that overuse can lead to headaches. The defendants argue this conduct by the plaintiff is unreasonable and if she had acted reasonably, her injuries could have been reduced.

[188] In my view, the defendants have not proven a failure to mitigate. There is no evidence that the plaintiff acted unreasonably by discontinuing her antidepressant. She testified it was not only reducing the bad feelings but also reducing the good

feelings. She testified she is open to trying a different antidepressant. With respect to taking too much Advil, there is no evidence that reducing the Advil would have improved her headaches. There is no evidence that continuing the antidepressant and not overusing Advil would have reduced or eliminated her injuries.

Conclusion

[189] The Court makes the following awards:

Non pecuniary damages:	$	200,000
Past loss of income	$	520,000
Loss of future earning capacity:	$	2,900,000
Cost of future care:	$	106,410
Special damages:	$	19,987.05
Total:		$3,746,397.05

[190] Unless there are matters the Court is not aware of, the plaintiff has been successful and she ought to have her costs at Scale B.

"Chan, J."