

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oliver v. Loewen*,
2024 BCSC 604

Date: 20240411
Docket: M46281
Registry: Penticton

Between:

Billie-Jo Karen Oliver

Plaintiff

And

Edith Joan Loewen

Defendant

Before: The Honourable Justice Forth

Reasons for Judgment

Counsel for Plaintiff:

M.D. Brooke

Counsel for Defendant:

H. de Loi

Place and Date of Trial:

Penticton, B.C.
January 17-19, 22-24, 2024

Place and Date of Judgment:

Penticton, B.C.
April 11, 2024

INTRODUCTION 3

ISSUES..... 4

THE WITNESSES..... 4

CREDIBILITY AND RELIABILITY OF WITNESSES..... 6

MS. OLIVER – BEFORE THE ACCIDENT 9

CIRCUMSTANCES OF THE ACCIDENT 10

**ISSUE 1: WHAT IS THE NATURE AND EXTENT OF THE INJURIES SUFFERED
IN THE ACCIDENT? 10**

 Position of the Parties 10

 Plaintiff’s Position..... 10

 Defendant’s Position 10

 Applicable Law 11

 Summary of the Evidence 11

 Ms. Oliver’s Evidence 11

 Evidence of Lay Witnesses..... 13

 Expert Witnesses..... 14

 Dr. Donald Cameron - Neurologist 14

 Dr. Raymond Ancill - Psychiatrist 14

 Dr. Dhineskumar Sivananthan - Physical Medicine and Rehabilitation
 Specialist..... 16

 Findings..... 17

**ISSUE 2: WHAT IS THE APPROPRIATE AWARD OF GENERAL DAMAGES FOR
PAIN AND SUFFERING?..... 17**

 Applicable Law 17

 Analysis and Findings of Fact..... 18

**ISSUE 3: WHAT IS THE APPROPRIATE AWARD FOR LOSS OF FUTURE
EARNING CAPACITY? 24**

 Relevant Evidence 24

 Evidence of Ms. Oliver 24

 Evidence of Johnston Meier..... 25

 Evidence of Mr. Kiley 26

 Expert Evidence..... 27

 Applicable Law 28

 Position of the Parties 30

 Plaintiff’s Position..... 30

Defendant’s Position 31

Analysis 31

 Post-Trial Without-Accident Earning Capacity 32

 Post-Trial With-Accident Earning Capacity 33

Assessment of Loss 34

ISSUE 4: WHAT IS THE APPROPRIATE AWARD FOR FUTURE COSTS OF CARE..... 34

 Applicable Law 34

 Analysis 35

 Pain Management Program 35

 Occupational Therapy..... 35

 Massage/Physiotherapy..... 36

 Kinesiology 37

 Psychological Counselling 37

 Assistive Devices 37

 Seasonal/Periodic Housekeeping Assistance..... 38

 Yard Maintenance..... 39

 Medications..... 39

 Award of Future Care Costs 39

CONCLUSION..... 40

Introduction

[1] The plaintiff, Billie-Jo Oliver, was struck as a pedestrian in a marked crosswalk in Penticton, British Columbia on May 4, 2019 by a motor vehicle driven by the defendant (the “Accident”). Liability for the Accident is admitted. The sole issue in dispute in this action is the appropriate quantum of damages.

[2] Ms. Oliver was 46 years old at the time of the Accident and was 51 years old at trial. She claims that because of the Accident she suffers from ongoing headaches, hip, neck, shoulder, and back pain. These injuries continue to impact her life and make many aspects of daily living a challenge. She has been able to continue to work but at great sacrifice. At the time of the Accident, Ms. Oliver and her husband were looking forward to being “empty nesters” but the ongoing effects

of the Accident have dramatically and permanently altered her life for the worse. She seeks an award of damages of \$1,385,000.

[3] The defendant concedes Ms. Oliver suffered some degree of soft tissue injuries which have given rise to ongoing and chronic symptoms but dispute the severity of the symptoms and the scale of their impact on her capacity. The defendant says that the damages claimed are not based on the evidence but merely upon the plaintiff's worries and speculations about the future. The defendant says that an appropriate award should be in the range of \$90,000 to \$190,000.

[4] For the reasons that follow, I conclude that Ms. Oliver is entitled to damages totalling \$602,685.

Issues

[5] Since liability is admitted, the only issues relate to the assessment of damages. The following issues will be addressed:

1. What is the nature and extent of the injuries suffered by Ms. Oliver in the Accident?
2. What is the appropriate award for general damages for pain and suffering?
3. What is the appropriate award for loss of future earning capacity?
4. What is the appropriate award for future care costs?

[6] Before addressing each of the above issues, I will provide an overview of the witnesses called at the trial, the credibility and reliability of the witnesses, the evidence of Ms. Oliver's pre-Accident state, and the circumstances of the Accident.

The Witnesses

[7] In addition to Ms. Oliver, the following lay witnesses testified at trial:

- a) Rose Anne Oliver – her mother;

- b) Michael Kiley – her current boss;
- c) David Koopmans – a friend;
- d) Joy Koopmans – a friend;
- e) John Miller – a friend;
- f) Heather Bernard – a former co-worker and friend; and
- g) George Sajna – her husband.

[8] I qualified the following individuals who provided reports and testified as expert witnesses:

- a) Dr. Donald Cameron, an expert in neurology, qualified to give opinion evidence in the areas of brain injury and other neurological disorders, including the assessment, investigation, recommendations, and treatments of these disorders;
- b) Wendi Wright, an expert occupational therapist, qualified to perform functional capacity evaluations, to provide opinion evidence on care and assistance recommendations and the costs of future care; and
- c) Dr. Raymond Ancill, an expert in psychiatry, qualified to give opinion in the areas of brain injury and related disorders, psychiatric and psychological disorders, chronic pain, and the diagnosis, prognosis, and treatment of these disorders.

[9] In addition, the plaintiff obtained an expert report from Dr. Dhineskumar Sivananthan, physical medicine and rehabilitation specialist, dated August 8, 2023. The plaintiff served the report on the defendant. The defendant did not seek to cross-examine Dr. Sivananthan at trial and his report was marked as an exhibit at trial. From my review of Dr. Sivananthan's *curriculum vitae*, I accept that he is a

physiatrist qualified to give opinions on the diagnosis, prognosis, and treatment of physical injuries including musculoskeletal and neurological issues.

[10] I will include my findings of facts from the lay and expert witnesses in my analysis of the issues when discussed below.

Credibility and Reliability of Witnesses

[11] The factors to be considered when assessing the credibility of witnesses were summarized by Justice Dillon in the well-known decision in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

[11] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[12] Further, in my view, para. 10 of Justice Dickson's (as she then was) decision in *Hardychuk v. Johnstone*, 2012 BCSC 1359 is of assistance in this case:

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[13] The defendant submits that there are significant discrepancies in the plaintiff's evidence which "should give this court pause". Specifically, the defendant argues that Ms. Oliver's evidence regarding her pre-Accident retirement intentions and about whether she had turned down an employment offer as a result of the limitations arising from her injuries was inconsistent. The defendant submits that the significance of the discrepancies in the plaintiff's evidence on these points renders her evidence as not reliable. I am not persuaded by this submission.

[14] The plaintiff testified in chief that she was probably going to work until the age of 65. During cross-examination, her evidence was that at the date of the Accident she and her husband did not yet have any exact timeline on when they wanted to retire and that she thought she would work to at least 65 or 67 years old. The plaintiff's discovery evidence was put to her:

478 Q Right. And you said that – I want to be correct on this. You said prior to the accident you had the intention of retiring at 65, but now because of your injuries you're concerned whether you'll make it past 55: is that right?

A Yes

[15] The plaintiff explained that her original intention was to work until at least the age of 65, but she and her husband had not discussed exactly how to figure it out financially or made concrete plans regarding an exact age or date of retirement.

[16] This is not a significant discrepancy and, in my view, did not impeach the plaintiff's credibility.

[17] The second issue raised was whether the plaintiff testified during her examination in chief that she had an offer of employment made to her in 2023 when Deanna Adams of Johnston Meier Insurance ("Johnston Meier") attended at the office of Underwriters Insurance Brokers ("Underwriters"), where Ms. Oliver worked and continues to work. For context, as will be discussed later in these reasons, Johnston Meier purchased Underwriters in June 2022.

[18] I note that the plaintiff agreed to an Agreed Statement of Facts which set out the conversation that occurred when Ms. Adams attended at the office. In light of this agreement, there could be no confusion on what took place.

[19] In her examination in chief, Ms. Oliver testified that Ms. Adams came to the office and asked her about her future plans and whether she would be willing to look at a regional management position. Ms. Oliver said she could not “at this time” because it was not “physically feasible”. She testified that there was no further conversation about the matter with Johnston Meier. I could not locate any evidence during the plaintiff’s examination in chief in which she asserted that there was a job offer made to her. In cross-examination she agreed no formal offer was made but Ms. Adams brought up the possibility of her moving into a management position and asked if she was “willing”. In my view, Ms. Oliver’s evidence was consistent. This challenge to Ms. Oliver’s credibility is without merit.

[20] It is my view that Ms. Oliver was a credible witness. I have every confidence in the reliability of the evidence she provided. She testified in a forthright, honest, and straightforward manner. I noted during the first day of her testimony she was able to sit without much apparent discomfort in the witness box; however, the second day of her testimony, it was clear that she was in a great deal of discomfort. She had trouble standing and then sitting again. She was fidgeting and clearly having difficulties with the amount of pain she was in. I accept Ms. Oliver’s evidence on how the Accident has changed her life.

[21] Mr. Sajna was an equally impressive witness. The sincerity of his concern for his wife was evident. He was fair in his description of the state his wife has been in since the Accident. Mr. Sajna is devoted to his wife and will continue to support her, but he also accepts that their life together has changed.

[22] All of the other lay witnesses testified in an equally credible manner. I find that the four medical experts provided helpful and useful evidence and assisted in my decision-making role.

[23] The defendant had some criticism of Ms. Wright for her failure to conduct a visit to the plaintiff's workplace. I see no merit in this criticism since it is up to the counsel to decide whether a workplace visit is mandated and will be funded. I note in this case the plaintiff was not asserting any inability to do any work but only that she needed some accommodations and she was exhausted by the end of the work day.

Ms. Oliver – Before the Accident

[24] Ms. Oliver testified that at the time of her Accident she had been married for over 20 years and had three adult children.

[25] According to the report of Dr. Cameron, Ms. Oliver was in a motor vehicle accident when she was 16 years old. She was diagnosed with a traumatic brain injury. She missed some school but her cognitive function was normal. She also has a past medical history of Guillain-Barre syndrome when she was 20 years old. As a result, she was left with some residual intermittent numbness of her hands.

[26] Ms. Oliver graduated from high school in 1990. She started in the insurance industry in 1993 and has worked in it ever since.

[27] The evidence of Ms. Oliver, her husband, her mother, and friends was that, before the Accident, Ms. Oliver was very active, had tons of energy, and was very outgoing. Her mother described her as being "exuberant" and the "life of the party". Her husband described her energy level as like the "Energizer Bunny" and described her as being "smart as a whip". Ms. Oliver enjoyed a wide variety of physical activities including golfing, volleyball, wallyball, hiking, camping, and dancing. She loved to garden. She was physically very strong and excelled at sporting activities.

[28] Ms. Oliver testified that she had an amazing memory and could remember specific details about her clients. She never had to write things down to remember them. Her husband described how his wife could remember things that happened long ago and that he joked that she was his "brain".

[29] Ms. Oliver had no physical restrictions and was in great health. She suffered from “natural normal headaches” that would go right away and were not often. She had no history of anxiety or sleep issues.

Circumstances of the Accident

[30] Ms. Oliver, was going to deliver a loaf of home-baked bread to a friend and was crossing at the intersection of Wade Avenue and Ellis Street in Penticton. She was in a marked pedestrian crosswalk when the defendant’s vehicle struck her. She was hit on her left side and ended up on the hood of the car. While on the hood, her knees and shins were being hit by the bumper. She managed to hold onto the hood so that she would not fall under the vehicle while it was moving. She was on the hood for about 35 feet. When the car braked she was thrown to the ground landing on her right hip.

Issue 1: What is the Nature and Extent of the Injuries Suffered in the Accident?

Position of the Parties

Plaintiff’s Position

[31] As a result of the Accident, Ms. Oliver claims she suffered soft tissue injuries to her neck, shoulders, hips, upper and lower back, left arm, and knee. She suffered some bruising to her lower limbs that resolved, as well as headaches and dizziness. She has further developed somatic symptom disorder and ongoing post-concussion syndrome.

[32] She claims she still suffers from chronic neck, shoulder, back and hip pain, headaches, difficulty sleeping, and cognitive symptomology caused by the Accident.

Defendant’s Position

[33] The defendant concedes that Ms. Oliver suffered soft tissue injuries as a result of the Accident and there has been some decrease in the quality of her life. She argues that Ms. Oliver overstates her complaints relative to any objective assessment. She accepts that Ms. Oliver was unable to work for about a month after

the Accident and then had a gradual return to work. She returned to full-time work within a couple of months of the Accident.

Applicable Law

[34] In order to establish that the Accident caused her injuries, Ms. Oliver must prove on a balance of probabilities that but for the Accident, she would not have suffered the injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8.

[35] A defendant need not put the plaintiff in a better position than her original position and should not compensate the plaintiff for any damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58 at paras. 78–81.

Summary of the Evidence

Ms. Oliver's Evidence

[36] Prior to the Accident, Ms. Oliver was physically healthy. She had no restrictions on her ability to participate in work, home, or recreational activities. The initial pain has improved since the first month after the Accident but she has been left with chronic pain, that impacts her ability to sit, stand, and participate in sporting and recreational activities. Her husband has taken over most of the household activities including cooking and cleaning.

[37] She continues to experience daily pain, headaches on a weekly basis, a loss of energy and fatigue, and wakes up at night due to pain.

[38] Ms. Oliver testified that she continues to suffer from pain in her neck, shoulders, hips, although predominantly her left hip, and back. The pain ebbs and flows depending on the activities she performs. If she does too much she suffers the next day. She says it is very rare that her left hip does not bother her.

[39] She also finds that her left arm continues to bother her particularly when it is cold out.

[40] Her life has changed as a result of the ongoing symptoms. She has given up golfing, volleyball, wallyball, and modified her hiking and camping experiences. She has taken up paddle boarding, but as her husband describes, she mainly sits or kneels while doing it. Her social life has changed in that she continues to want to see her friends and socialize but she is no longer the “life of the party” and spends more time watching the activities than participating in them.

[41] She testified that since the Accident she has become more irritable and gets angry quicker. She has snapped on some of her employees.

[42] Ms. Oliver testified to how her sleep has been impacted. She wakes up due to the pain in her hips when she sleeps on her side.

[43] She says that, post-Accident, her memory “sucks”. She no longer trusts her head anymore and she has to write things down to keep track of them. She finds it harder to concentrate and gets tired faster. She cannot multi-task to the same degree as she could before.

[44] Ms. Oliver tried a number of different therapies including massage, kinesiology, and physiotherapy. She finds having a massage every week and physiotherapy every two weeks keeps her functioning.

[45] Ms. Oliver is not one to complain and continues to try to keep a positive outlook. In my view, she is to be commended for her perseverance in trying to recover and her determination to continue working. She should not be penalized for her stoicism: *Giang v. Clayton*, 2005 BCCA 54 at paras. 54-55.

[46] She finds that her life is getting worse and it is harder to push through work. She is unable to enjoy the weekends and misses out on socializing with friends. She feels that her life revolves around being able to get through work, but as she puts it, “life should not be a struggle to just to make it through work”.

Evidence of Lay Witnesses

[47] Before considering the medical evidence, I will briefly consider the evidence of the plaintiff's husband, mother, boss, and friends.

[48] The evidence of the lay witnesses all support the struggles that Ms. Oliver now has. They all testified that Ms. Oliver had no restriction in any physical activities prior to the Accident. She was able to perform household chores and gardening without any problems. Her personality was described as outgoing and "bubbly".

[49] Her mother has noted the differences in her daughter's memory. Physically, her daughter is slower when she gets up and appears tired. She described the "drawn look" in her daughter's face.

[50] Her husband testified his wife's memory is not as good, she is quick tempered now, and her energy is a lot less than it use to be. He described how her pain has impacted their physical relationship. Her sleep patterns have been disrupted and she will stay up late or wake up in the middle of the night. His observation is she is getting worse and the pain is wearing her out. She has to pick and chose what she can do. He is worried about losing friends and becoming socially isolated since they decline a lot of invitations due to Ms. Oliver's symptoms. She puts on a "brave face" but, as he described it, the "excitement and enjoyment" has just about gone. He says they will do the best they can and he will continue to support her, but that they will have to continue to make lifestyle adjustments to accommodate her declining health.

[51] Her friends testified to Ms. Oliver appearing to be in pain and having to cut social engagements short. Some testified to how she now struggles when playing cards and keeping track of the score. They witnessed her being grumpier or getting agitated faster which has impacted their relationship with her. They noticed a change in her energy level and the activities she participates in.

[52] I turn now to a summary of the medical evidence.

Expert Witnesses**Dr. Donald Cameron - Neurologist**

[53] Dr. Cameron, neurologist, provided a report and testified at trial on behalf of the plaintiff. Dr. Cameron assessed Ms. Oliver on May 9, 2023 and prepared a report dated May 20, 2023. Dr. Cameron opines that Ms. Oliver suffered a concussion in the Accident and probably meets the criteria to make a diagnosis of mild traumatic brain injury (“MTBI”). He believes that she probably has developed symptoms of post-traumatic brain injury syndrome, also known as post-concussion syndrome. The symptoms have improved but had not resolved at the time of his assessment of her. He opines that she has developed post-traumatic headaches and chronic pain in her neck and back.

[54] On physical examination, Dr. Cameron noted that her neurological examination was essentially normal.

[55] Dr. Cameron further explains that since Ms. Oliver had suffered a previous traumatic brain injury she was at an increased risk of a repeat traumatic brain injury. She has likely suffered prolongation of recovery and is at a risk of incomplete recovery of symptoms. His prognosis is that Ms. Oliver will probably remain permanently partially disabled due to the residual adverse effects of the physical injuries she has suffered. His opinion was that the accommodations or modifications provided at work will probably be permanent.

Dr. Raymond Ancill - Psychiatrist

[56] Dr. Ancill, psychiatrist, provided a report and testified at the trial on behalf of the plaintiff. Dr. Ancill assessed Ms. Oliver on April 11, 2023 and conducted a telephone interview of her husband, Mr. Sajna, on June 12, 2023. He prepared a report dated June 16, 2023. He concurs in the view that Ms. Oliver suffered a concussion (an MTBI) and continues to suffer from post-traumatic headaches. He describes it as a “significant” concussion. He opines that Ms. Oliver satisfies the ICD-11 criteria, being the World Health Organization Internal Classification of Diseases, for having sustained a “Concussion with loss or diminution of

consciousness due to an injury”. Dr. Ancill also agrees that Ms. Oliver is suffering symptoms consistent with her having persistent post-concussion syndrome. He opines that since the post-concussive symptoms have continued for more than four years post-injury, they are likely to be permanent. His view is that since Mr. Oliver’s headaches continue, the prognosis for a sustained recovery is poor.

[57] Dr. Ancill provides a further diagnosis that Ms. Oliver meets the DSM-5 criteria for a minor neurocognitive disorder, being described as a modest cognitive decline from a previous level of performance in one or more cognitive domains. The cognitive deficits do not interfere with the capacity for independence in everyday activities.

[58] In respect to her psychological injuries, Dr. Ancill found that Ms. Oliver was not currently depressed, but she remains vulnerable to the emergence of a Major Depressive Disorder. He opined that this vulnerability will be lifelong. He found that she met the DSM-5 criteria for Adjustment Disorder with Anxiety, of the chronic type, given that her stressor, exposure to traffic and crossing roads, is enduring. I note that while other witnesses testified that Ms. Oliver appears anxious or did not have the same confidence when crossing the road, such as her mother and husband, however, Ms. Oliver did not testify that this is an ongoing issue for her.

[59] Dr. Ancill found that Ms. Oliver suffers from somatic symptom disorder, with predominant pain, which Dr. Ancill explains is a chronic disorder with neurophysiological and neurochemical pathology. It is not a psychological disorder although it frequently presents with psychological complaints, such as anxiety and/or depression, which results from the disorder and are not the cause.

[60] Dr. Ancill also believes Ms. Oliver is suffering from benign positional paroxysmal vertigo. He agreed that since he assessed Ms. Oliver over Zoom he did not perform any physical tests, such as the Dix-Hallpike Test, the Romberg Test, or the tandem walking test. Dr. Ancill agreed he would defer to a neurologist and an ear, nose, and throat specialist to talk more about the issue of vertigo.

[61] Ms. Oliver reported to Dr. Ancill that she had recovered overall by about 75%. Dr. Ancill testified that one of the reasons he speaks to a collateral is to confirm the information and the husband did not think she had improved by that much. Mr. Sajna reported that he thought she had improved by “maybe 50%”.

Dr. Dhineskumar Sivananthan - Physical Medicine and Rehabilitation Specialist

[62] As already noted, Dr. Sivananthan was retained by the defendant to prepare a report dated August 8, 2023. He assessed the plaintiff on July 7, 2023. As noted above, his report was served by the plaintiff and Dr. Sivananthan did not testify.

[63] Ms. Oliver reported to Dr. Sivananthan that she had made a 60% improvement in her symptoms since the Accident.

[64] Dr. Sivananthan opines that the Accident caused Ms. Oliver to sustain strain/sprain injuries of the cervical, thoracic and lumbar spine, and headaches. Dr. Sivananthan characterized Ms. Oliver’s presentation following the Accident as:

1. Cervical strain/sprain with chronic cervical myofascial impairment;
2. Thoracic strain/sprain with chronic thoracic myofascial impairment;
3. Lumbar strain/sprain with chronic lumbar myofascial impairment; and
4. Headaches – will defer to neurology to comment.

[65] He notes that being that it is now four years after the Accident, her overall prognosis is best listed as guarded and the likelihood of complete resolution at this late date is unlikely.

[66] He further noted that the “degree of impairment reported is beyond what is expected”.

Findings

[67] Based on the evidence, I find that Ms. Oliver suffered soft tissue injuries to her neck, shoulders, hips, predominantly her left hip, lower back, left arm, and lower limbs. She also developed post-traumatic headaches. She has ongoing pain and discomfort. She continues to suffer from sleep disturbances due to pain. She suffers from fatigue. She has some mild ongoing cognitive challenges. She had no pre-existing conditions.

[68] Ms. Oliver did give some evidence that after the Accident she felt her head spinning and has had some balance issues. I do not find that she suffers from benign positional paroxysmal vertigo as diagnosed by Dr. Ancill. I note that Dr. Cameron did not diagnose any type of vertigo nor did Dr. Sivananthan. Dr. Cameron conducted a neurological examination and found that her coordination testing, balance testing, gait, stance, and tandem walking were normal. Dr. Sivananthan conducted a musculoskeletal examination and found that she was able to complete toe walking, heel walking, and tandem gait. In addition, Dr. Sivananthan reported that her Romberg's test was normal.

[69] In respect to the diagnosis of Adjustment Disorder with Anxiety by Dr. Ancill, this was in relationship to crossing roads. Ms. Oliver did not testify that she has ongoing issues relating to anxiety while crossing the road. When specifically asked about her mental health she did not describe any anxiety relating to crossing roads as being an issue. As such, I do not find this diagnosis has been proven.

Issue 2: What is the Appropriate Award of General Damages for Pain and Suffering?

Applicable Law

[70] A plaintiff is entitled to reasonable damages for pain and suffering. The plaintiff should be placed in the same position she would have been in if the Accident had not occurred, but not in a better position.

[71] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties. Fairness is measured against awards made in comparable cases, although such cases serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[72] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages, which include the: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss of impairment of physical and mental abilities; impairment of relationships; loss of lifestyle; and a plaintiff's stoicism: at para. 46.

[73] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Analysis and Findings of Fact

[74] Ms. Oliver seeks an award in the amount of \$235,000. The defendant submits that an award of general damages should be \$90,000 to \$100,000.

[75] Ms. Oliver relies predominantly on the case of *Grabovac v. Fazio*, 2021 BCSC 2362, where Chief Justice Hinkson awarded \$350,000 in non-pecuniary damages to a 26-year-old plaintiff who was involved in two accidents. She submits that the quotation of Ms. Grabovac at para. 229 mirrors much of her own life. She also cites the decision of Justice Watchuk in *Timms v. Lucaben*, 2023 BCSC 1119 as being in the range of what she should be awarded. The non-pecuniary award in *Timms* was \$235,000.

[76] I turn first to consider the *Grabovac* case and the self-description of the plaintiff statement, cited by the Chief Justice:

[229] The plaintiff described her present circumstances to Dr. Anderson in the following terms:

I was so happy before. I felt very fulfilled. I loved my job, apartment, travelling and friends... I wish I'd died in the accident. My life is so hard now... It flipped my life upside-down. I'm dependent. I have no money. My relationships are strained. I can't travel. I've lost my sense of identity. The things that make me happy I don't care about anymore. I don't care about anything. I've lost my self-confidence. My self-worth is down the drain. I don't care as much about my appearance. I'm not wearing any makeup. I have to wear flat shoes. I have to bring a stool to a dance floor now. It's like my life is over. I feel hopeless. I feel like an old lady now. I'm stuck at home. I used to love snowboarding. My pain is so bad all the time. People don't understand. My own sister doesn't understand how I feel physically and emotionally. I've lost a lot of friends. I worry my pain will get worse as I get older.

[77] It is my view that there are significant distinguishing features of the injuries and their impact on Ms. Grabovac when compared to Ms. Oliver. Ms. Grabovac had more extensive rehabilitation treatments, including: attending at a specialized hospital for several weeks for comprehensive investigations and treatments; psychological counselling for chronic pain; depression, and anxiety with a trial of cognitive behavioural therapy ("CBT"); corticosteroid injection; use of prescription medications, including Celexa, Pregabalin, Lyrica, and Wellbutrin; and an ongoing treatment regime of physiotherapy, massage, active rehabilitation, counselling, and occupational therapy: *Grabovac* at paras. 33, 51,54–55, 58, 60, 67.

[78] Ms. Grabovac had more significant symptomology, including: chronic pain in her neck, back, right shoulder, arm, hips and left knee; symptoms of tinnitus and anxiety, a painful left leg with numbness and weakness requiring the use of crutches and then a cane; persistent tremor in her right hand making it difficult to use a spoon or pencil, right upper extremity ongoing numbness, tingling, and constant weakness; throbbing headaches occurring daily, bilateral jaw pain, difficulties with memory and communicating due to "brain fog", diagnoses of severe major depressive disorder, severe generalized anxiety disorder, panic disorder, obsessive-compulsive disorder, and moderately severe post-traumatic stress disorder; severe somatic symptom disorder with predominant pain, significant fatigue that required napping, sleep disturbance, and vision loss: *Grabovac* at paras. 41, 44, 48, 132, 160, 202, 270.

[79] The impact on activities of daily living for Ms. Grabovac outweigh that of Ms. Oliver. Ms. Grabovac's injuries caused difficulty in performing self-care activities such as bathing and her ongoing symptoms of chronic pain and dysfunction impacted every aspect of her daily functioning: at paras. 45, 63. She was completely disabled from working and although she wanted children the Court found she would not be able to carry to term: *Grabovac* at paras. 74–75, 77, 300.

[80] Finally, I note the age difference of Ms. Grabovac being 26 years old at the time of the decision and Ms. Oliver being 51 years old.

[81] I turn to consider the *Timms* decision. Mr. Timms was 47 years old at the time of the accident and 50 years old at trial: at para. 8. He suffered from ongoing back pain, neck pain, nausea, and daily headaches. About three to four times a year his headaches were so painful he would vomit violently: at paras. 35, 169. He describes his back pain as akin to feeling like “broken glass poking out of the skin”: at para. 36. His balance was terrible and he often fell backwards when he looked up. He veers left when he walks unless he is looking at the ground: at para. 38. His memory and his sense of direction were also terrible: at paras. 38–39. He experienced severe frustration with himself and referred to himself as a “fucking retard”: at para. 40. He no longer was having sex, dirt biking, or hiking: at para. 41. He gave up on cleaning and doing yard or house maintenance. He is “more of a hermit”: at para. 42. He underwent concussion therapy, physiotherapy, and counselling. The pills he took for depression made it worse and increased his suicidal ideation: at para. 44.

[82] The medical evidence in *Timms* supported that Mr. Timms suffered a MTBI, post-concussion syndrome, chronic migraines, post-traumatic vestibulopathy, and post-traumatic vision syndrome: at para 103. The Court found that in addition to these diagnoses, Mr. Timms also had soft tissue injuries, chronic pain, and chronic fatigue: at para. 153. The Court found that Mr. Timms was significantly impaired. He was unlikely to be competitively employable and any future work will require significant accommodations to him to remain safe and functional: at para. 173. The Court described him as a “shell of the person he used to be”: at para. 174.

[83] In my view, the injuries and impact on Mr. Timms exceeds what Ms. Oliver has endured. However, there are a number of similarities including their stoicism and determination to keep trying.

[84] The defendant relies on the following cases in support that the non-pecuniary damages should fall within the range of \$90,000 to \$100,000:

a) *Arvanitis v. Cleave*, 2023 BCSC 672 (\$90,000 in non-pecuniary damages):

The plaintiff was a 50-year-old female as of the date of trial. She was involved in two accidents. She was age 42 in the first accident and age 44 in the second: at para. 198. She was found to have suffered cervical, thoracic, and lumbar soft-tissue injuries, as well as a right hip injury. The injuries resulted in emotional pain as well as chronic pain. The injuries negatively affected her ability to enjoy activities she had prior to the accidents.

The Court found that the plaintiff's evidence could not be accepted at face value and her evidence of her functional limitations should be viewed with caution. The plaintiff's demonstrations of disability or functional limitations were demonstrably inconsistent with objective observations of other witnesses. A number of the medical experts found that the plaintiff displayed inconsistencies in her presentation, suggestive of amplification of pain and limitations on assessment. As noted by the Court: "The evidence before me demonstrates a pattern of exaggerations, gaps in the evidence, and internal and external inconsistencies in her evidence and reports to her treating physicians": at para. 39.

b) *Prasad v. Ross-Smith*, 2023 BCSC 513 (\$95,000 in non-pecuniary damages): The plaintiff was a 42-year old female injured in one accident. She experienced dizziness for two weeks and headaches which resolved in approximately three months. She continued to experience neck, left shoulder, left arm, mid back, and jaw pain. She agreed she had recovered by 70 to 80%. The Court found that the plaintiff had relatively minor, yet

ongoing, pain symptoms that caused some limitations on her ability to perform household tasks and work. The Court found she was not entitled to any future loss of earning capacity.

- c) *Sandhar v. McCowan*, 2022 BCSC 437 (\$90,000 in non-pecuniary damages): The plaintiff was a 24-year-old female injured in two accidents. She suffered from myofascial strain injuries of the cervical, thoracic, and lumbar spine that resulted in chronic pain in her neck, headaches, and associated anxiety and depressed mood. Her headaches and chronic pain would continue indefinitely although treatment could be undertaken that may reduce these symptoms.
- d) *Krepiski v. Valenciano*, 2023 BCSC 2089 (\$100,000 in non-pecuniary damages): The plaintiff was a 37-year-old female at the time of trial. She suffered chronic pain stemming from soft tissue injuries to her back (improved by 70 to 80%), neck, associated migraines and headaches. She further had accident-related emotional and psychological symptoms such as depression, irritability and anxiety. The Court found that the plaintiff was probably able to do most work and housework.

[85] In my view, the nature and impact of the injuries in the cases cited by the defendant were not as significant as those of Ms. Oliver. Further, in *Arvanitis* the award was impacted by the credibility and reliability of the plaintiff's evidence.

[86] While all of these cases are helpful to provide a general framework, as noted in *Stapley* at para. 45, the impact on Ms. Oliver as an individual is the key.

[87] Ms. Oliver testified that she continues to suffer ongoing pain, fatigue, memory issues, and personality changes. She manages her discomfort at work with breaks and stretching. She has to go for walks. At the end of the day, she has to go home and rest and use her heating pad. She relies on her husband to make dinner. She tries to assist with some dishes depending on how she is feeling.

[88] She has worked hard to recover and tried a series of different therapies including physiotherapy, massage therapy, and kinesiology. The therapies have helped and she finds that weekly massage therapies allow her to make it to work the next week and helps her get out of bed.

[89] The injuries have impacted her ability to engage in all of her recreational activities. She has had to give up a number of sports and she is less active. She can no longer golf and play volleyball or wallyball; camping, hiking and gardening are now limited. As a result, she has significantly gained weight. She has become more impatient, irritable, and short-tempered with her spouse, friends, and co-workers.

[90] Her husband does more home responsibilities including outdoor maintenance and chores. Her ongoing discomfort and pain have impacted her romantic relationship with her husband. She is not interested and is in pain.

[91] When asked about her mental health, Ms. Oliver summed up what she has endured, stating: "I try not to think about it and wallow in it and live in that spot... but does it affect me? Yes. Do I try to let it? No. But...I am a different person ...it's a different personality... It affects all the relationships in life and... I try to be as positive as possible, but sometimes I just can't."

[92] I find that as a result of the Accident, Ms. Oliver suffered soft tissue injuries to her neck, shoulders, hips, lower back, and left arm. She continues to have headaches. She has been left with residual pain and stiffness that impacts her on a daily basis. She continues to have trouble sleeping. She has been able to work full-time but her future is uncertain. She has lost the ability to enjoy most of the recreational activities she engaged and thrived in. Her relationships have suffered. She continues to struggle with some minor cognitive issues.

[93] In all of the circumstances of this case, I am of the view the appropriate award for non-pecuniary damages is \$185,000.

Issue 3: What is the Appropriate Award for Loss of Future Earning Capacity?

Relevant Evidence

Evidence of Ms. Oliver

[94] Ms. Oliver has worked in the insurance industry since 1993. She graduated high school in 1990, obtained a BA diploma from Spratt Shaw College in approximately 1992 and her Canadian Association of Insurance Brokers (“CAIB”) Level 2 insurance licence.

[95] From 2001 to 2005 she worked as a commercial assistant for Johnston Meier. From 2005 to 2011 she worked for Underwriters. She left Underwriters to work for another insurance company for four years but returned to Underwriters in 2014. At the time of the Accident, she was the personal assistant to Mr. Jamieson and Mr. Kiley. She did all the administration, took care of payroll and accounts, and processed the commercial files. In approximately 2019, Mr. Jamieson was diagnosed with cancer and passed away in June 2020. As a result, Mr. Kiley, the co-owner, took over operations. Mr. Kiley is her immediate supervisor now.

[96] Ms. Oliver agreed that after Mr. Jamieson got sick she took on more duties. She also took on further responsibilities helping with the sale of the business.

[97] Ms. Oliver says that prior to the Accident, she wanted to take on management roles and keep working for Underwriters.

[98] In June of 2022, Underwriters was purchased by Johnston Meier. Ms. Oliver is currently employed as a commercial insurance agent/assistant office manager for Johnston Meier. She was and is well-respected throughout the insurance industry.

[99] After the Accident, Ms. Oliver was off work for a month and then entered a gradual return to work. She did not lose any income since Mr. Jamieson agreed to pay her salary. Since returning to work full-time, Ms. Oliver has had to take time off work due to her pain. She has taken all of her sick days. She testified that when she gets home at the end of the work day her hip is throbbing and aching, her neck is tight, and her head feels heavy. She has to sit in her recliner with a heating pad.

[100] She has a modified work station and takes walks in the morning and afternoon. She is not confined to her desk. She finds she is not keeping up and is making errors.

[101] As discussed above, Ms. Oliver testified that prior to the Accident, her intention was to work until at least age 65. Her husband confirmed that was the plan. She testified that she is currently struggling to work to the age of 55 since she is “at the end of [her] rope”.

[102] She testified that now she finds she cannot physically keep up at work. She has tried to figure out how to go down to four days a week but there has been no one to help with the workload. As she put it “there is no end in sight and no solution in sight and my body [is] starting to tell me I am done”.

[103] In 2018, the last full year of work prior to the Accident, the plaintiff earned approximately \$65,000. Her income in years following the Accident has been:

- 2019 - \$70,195
- 2020 - \$83,068
- 2021 - \$99,612
- 2022 - \$95,257
- 2023 - \$89,644 (based off paystub dated December 29, 2023)

Evidence of Johnston Meier

[104] Deanna Adams, the General Manager of Johnston Meier, did not testify but the parties agreed to the following as set out in the Agreed Statement of Facts and Chronology:

10. Deanna Adams, the General Manager of Johnston Meier Insurance, visited the Ellis St. office in Penticton shortly after Johnston Meier purchased Cumming Jameson Insurance, and she spoke with most of the Penticton staff to introduce herself and to get an idea of what they did in the office, which was her standard practice.

11. When Ms. Adams spoke with the plaintiff, one of her questions was whether the plaintiff would ever be interested in managing the Ellis St. office, if and when Mickey Kiley, the present manager and past partner wanted to step down, and possibly, down the road, would she be interested in considering the “area manager” job currently held by, Gayle Clingwall, the manager of the Penticton Martin St. office. Ms. Clingwall has been a long- term employee and Ms. Adam’s understanding is that she will continue in her present role and, as far as Ms. Adam’s knows, Ms. Clingwall has no immediate plans to retire.
12. When Ms. Adams meets staff of a new office that Johnston Meier has purchased, part of her conversation with them, especially employees that are in a supervisory or management position, is to find out what their plans and goals may be and to ascertain any changes they feel would be beneficial to the office.
13. This is what happened when Ms. Adams met with the plaintiff, however the plaintiff advised Ms. Adams that she was not in a position to look at taking on anything more.
14. The earnings of an insurance manager with Johnston Meier begins anywhere from \$85,000 to \$100,000 a year. Such decisions are made on a case-by-case basis with the amount of compensation dependent on a variety of factors. Such factors include (but are not limited to) certification level, experience, demonstrated ability, the size of the office and number of staff, level of income the location produces, and the potential for growth in that particular area.

Evidence of Mr. Kiley

[105] Mr. Kiley was the former co-owner of Underwriters. He is now the manager at Underwriters Johnston Meier. Mr. Kiley has known the plaintiff since 2005. She worked for him since 2005 with the exception of a period of time between 2011 and 2014 when she worked for another insurance company.

[106] Mr. Kiley confirmed that he is a CAIB-3 property and casualty agent. In any insurance office someone must have a level 3 designation.

[107] Mr. Kiley described Ms. Oliver as his assistant and “almost co-manager”. She has free rein to do all the administrative work, they copy each other on all emails, and she will initially handle any new clients. He described her level of importance to him as “critical” and the “second in command”. He described her as a hard worker, knowledgeable, good with people, and very organized. As he put it, she knows how

to get the job done. Prior to selling to Johnston Meier, Mr. Kiley was looking to bringing Ms. Oliver in as a partner.

[108] Mr. Kiley testified that his understanding was that prior to the Accident Ms. Oliver planned to work to age 65. He described her as a “good industry employee” who could work anywhere.

[109] Mr. Kiley is currently 60 years old and plans to retire in four or five years.

[110] Since the Accident, Mr. Kiley has noted that Ms. Oliver appears in pain and is grumpier. He has seen her rubbing her left hip and observed that she gets tired more easily. She is making more frequent mistakes and her work is “more sloppy”.

[111] When Underwriters was sold to Johnston Meier, Mr. Kiley’s salary was reduced from \$72,000 to \$36,000, which does not include his commission income.

[112] Mr. Kiley testified that he would anticipate that Ms. Oliver could make around \$150,000 a year if she took over his job. He noted that she was his “natural successor”. He further testified that at Johnston Meier there is a whole level of middle management and a lot of long-term senior employees. He agreed that the ultimate decision on any promotion of Ms. Oliver would be by Johnston Meier.

Expert Evidence

[113] Dr. Sivananthan opines that based on his examination and the medical reports, there were no musculoskeletal conditions identified that would limit Ms. Oliver from completing the demands of her prior employment or any other career.

[114] Dr. Cameron opines that Ms. Oliver would continue to need, on a permanent basis, accommodations at work including a sit/stand desk and the ability to take several breaks during the day.

[115] Dr. Ancill notes that Ms. Oliver's injuries undermined her ability to work at the level she was working at prior to the Accident, but he would defer to functional or vocational experts to comment further.

[116] Ms. Wright, an expert occupational therapist, performed a functional capacity evaluation and opines that Ms. Oliver fully meets the criteria for the light to medium range for material handling. Ms. Wright states that Ms. Oliver was bested suited to working part-time to reduce the likelihood of pain exacerbation associated with sustained static positioning. A part-time schedule would likely result in a lower rate of absenteeism and better work sustainability. I note that there was no evidence of how many days Ms. Oliver took off from work except that she said she testified that she took some days off for pain and used all of her sick days.

[117] There was no expert evidence tendered that supported that Ms. Oliver needed to take early retirement.

Applicable Law

[118] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by her injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?

[119] An award for loss of future earning capacity represents compensation for pecuniary loss. Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened.

Accordingly, the central task for the Court is to compare the plaintiff's likely future working life with and without the accident: *Rattan v. Li*, 2022 BCSC 648 at para. 145, citing *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157.

[120] The proper approach to assessing damages for loss of future earning capacity was clarified by the Court of Appeal in the trilogy of *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The approach to this assessment post-trilogy was aptly summarized in *Rattan* as follows:

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[121] In *Rab* at para. 47, the Court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring?

See *Rattan* at para. 148, citing *Rab* at para. 47.

[122] The third step 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. The capital asset approach is appropriate where the plaintiff suffered a loss of earning capacity, a capital asset, rather than a loss of

income. It is also helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff's potential future: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 16–17. Where the capital asset approach is used, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72, citing *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) at para. 43; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[123] In *Dornan*, Justice Grauer stated that in undertaking the analysis of positive and negative contingencies, courts are required to assess what happened to the plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to a plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities: *Dornan* at para. 94.

[124] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

Position of the Parties

Plaintiff's Position

[125] Ms. Oliver advances a claim for loss of future earning capacity on the basis that, but for the Accident, she would have secured a higher paying management job and she would have worked to at least age 65. She submits there is a real and substantial possibility that she will retire earlier due to chronic pain and fatigue.

[126] She claims that as a long-term employee she would have reaped the financial benefit of assuming the helm upon Mr. Kiley's retirement or she would have been hired within Johnston Meier as a regional manager. She argues that her chronic pain obstructs her in taking on any further management jobs that will come available.

[127] The plaintiff submits that she will somehow manage to work until age 55, or another four years, and at that time she will retire. She argues that using Mr. Kiley's

figure of \$150,000 per year is a reasonable approach. Since she would have worked an additional 10 to 12 years, to age 65 or 67, the present value of \$150,000 over 10 years is \$1,383,330 and over 12 years is \$1,636,125. The plaintiff submits after considering various contingencies a fair and reasonable assessment for the loss of future capacity is \$1 million.

Defendant's Position

[128] The defendant submits that there is no evidence of a future loss of earning capacity or income loss; the plaintiff has not proven a real and substantial possibility of a future event leading to a future loss of income. None of the experts gave any opinion that the plaintiff was unable to accept a promotion or the possibility of Ms. Oliver having to retire early because of Accident-related injuries. The defendant points out that the plaintiff has demonstrated her ability to work full-time post-Accident, even with a higher workload and a number of other stressors ongoing in her life. The plaintiff's tax returns since the Accident do not reflect a tangible loss that might aid the plaintiff's claim under this head of damages.

[129] In the alternative, the defendant submits any award should be based on the loss of capital asset approach, using the plaintiff's current salary of \$80,000 and limited to a one-year loss.

[130] In the further alternative, if the court determines she will have to retire early because of the Accident and would have otherwise held a management position, any future loss should not be calculated based on \$150,000 a year, but on the range of salaries set out in the Agreed Statement of Facts for an insurance manager at Johnston Meier being \$80,000 to \$100,000.

Analysis

[131] I am satisfied that the evidence before me discloses potential future events that could give rise to a loss, namely that the plaintiff's injuries will prevent her from achieving a promotion to a management position. I am satisfied that there is a real

and substantial possibility that this loss will cause the plaintiff pecuniary loss in the future.

Post-Trial Without-Accident Earning Capacity

[132] I agree that there is a real and substantial possibility that but for the Accident, Ms. Oliver would have advanced into some type of management position, likely tied to the eventual retirement of her current supervisor, Mr. Kiley. Her appointment to his position was not guaranteed but in light of his high respect for her ability and his evidence that she was his natural successor this is a real and substantial possibility.

[133] It is clear that Ms. Oliver loved her job, was devoted to it, and excelled at it. She clearly has the confidence of Mr. Kiley, who described her as the “second in command”. This plaintiff has no history of taking time away from work prior to the Accident. She was a hard worker. She demonstrated her commitment to her career.

[134] Accordingly, I find that had she not been injured in the Accident, she would have likely obtained a promotion to management and worked to age 65. I reject that she would have worked to 67 in light of her husband’s age and already semi-retired status.

[135] The plaintiff uses the figure of \$150,000 a year as her potential income. I note in the Agreed Statement of Facts that the earnings of an insurance manager with Johnston Meier begins anywhere between \$85,000 to \$100,000 per year. In light of this plaintiff’s extensive experience I accept she would likely have started at a higher salary range (between \$140,000–\$150,000).

[136] I estimate Ms. Oliver’s post-trial, without-Accident earnings to be approximately \$1.3 million. This is based on her being promoted to a management position with a salary range of between \$140,000 to \$150,000 four years from now. In my view, it would be fair to take a 15% reduction reflecting a risk that in light of the change in ownership to Johnstone Meier, Ms. Oliver may well have been in competition with other potential candidates. As Mr. Kiley testified, Johnston Meier had a lot of middle management. This also reflects that Ms. Oliver may not have

immediately earned the \$140,000 to \$150,000 in the first years after being promoted.

[137] This would result in a net present value of approximately \$1,105,000.

Post-Trial With-Accident Earning Capacity

[138] I am not prepared to find that the plaintiff is entitled to compensation based on the loss of ten years of full-time work at a salary of a manager.

[139] The plaintiff says she will have to stop working at age 55. She claims she will have to stop working completely. I am not persuaded that is the case. There is no medical evidence that supports that she needs to stop working and take an early retirement. She has been able to work full-time for the past five years while taking on more responsibilities both at work and in her personal life. She has managed to increase her pay every year since the Accident. All of these support that she will be able to continue to work to age 65 with the current accommodations she has at work.

[140] However, I am persuaded that with the ongoing chronic pain the plaintiff has along with the cognitive issues she continues to suffer she will not be able to move into a higher management position. This accords with not only the plaintiff's evidence but also with Mr. Kiley's evidence that she makes more mistakes now. I accept that with the ongoing struggles Ms. Oliver has to perform her current job she is unable to take on the added responsibilities, extra hours, and stress of a manager.

[141] One approach to assessment of the loss of future earning capacity is to compensate for the loss of the management salary at approximately \$50,000 for ten years. Using the CIVJI multiplier of 9.2222, this equates to a present value sum of \$461,000. The same 15% risk contingency should be applied since Ms. Oliver is now in competition with other Johnston Meier managers so she may not have succeeded in getting a management position or it may not have occurred immediately when Mr. Kiley retires. This reduces the amount to a present value loss of \$391,000.

[142] I am persuaded that Ms. Oliver has suffered a loss of capital asset. If the loss of capital asset approach is used then I would calculate that loss equivalent to three years of her present salary. Using a figure of \$100,000 (an approximate value of her current salary) that would equate to \$300,000.

Assessment of Loss

[143] In my view, the appropriate loss of future earning capacity should be assessed at \$350,000. I consider this as a fair and reasonable assessment. This accounts for the real and substantial possibility that Ms. Oliver would have obtained some type of promotion but will not be able to obtain one now. This number accounts for the risk that Ms. Oliver might not have obtained the management position immediately when Mr. Kiley retired in light of the potential competition from other middle managers at Johnston Meier.

Issue 4: What is the Appropriate Award for Future Costs of Care

Applicable Law

[144] An award for cost of future care is intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70. The court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64–72. The standard of proof for assessing cost of future care is real and substantial future possibility: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.

[145] In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the Court noted that common sense should inform awards for cost of future care.

[146] In addition, I would add the following principles, helpfully summarized by Justice Kent in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- ...
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- ...
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

Analysis

[147] Ms. Oliver advances a claim for cost of future care of \$150,000. The plaintiff places reliance on the future cost of care assessment of Ms. Wright.

[148] The defendant says that funding should be provided for the OT assessment of her work place and a heating pad.

[149] I will address each of the claims advanced.

Pain Management Program

[150] The plaintiff seeks funding for a pain management program at a cost of \$2,500. No medical doctor makes this recommendation. It is not clear to me what benefit this program would have for this particular plaintiff. I do not award any amount for this program.

Occupational Therapy

[151] The plaintiff seeks funding to have an occupational therapist attend at her home for two visits for a total of five hours to assess cleaning tasks and make recommendations for a cost per visit of \$135 to \$195 per hour plus travel time, for a range of \$810 to \$1,170. I am not persuaded that this is a necessary expense.

[152] She further seeks funding for an occupational therapist for job site visit and job coaching for two visits for a total of three hours at the same rates for a range of \$540 to \$780. The defendant agrees that a work assessment would be of assistance. I agree in light of my assessment that the plaintiff is capable of working full-time but needs accommodations. A work place assessment may well assist in adjusting her workspace that can further assist the plaintiff. I award the sum of \$660 for this assessment.

Massage/Physiotherapy

[153] The plaintiff seeks funding for 72 sessions of passive therapy annually, or six passive treatments a month, using a figure of \$85 to \$110 per treatment. This differs from the recommendation made by Ms. Wright in her report. She recommended eight to 18 sessions of passive therapy annually but noted that “this is not recommended as a regular treatment (e.g., once per month). Ms. Wright recommends funding from \$645 to \$1,980 annually. The plaintiff seeks funding for \$6,120 to \$7,920 per year. Dr. Sivananthan noted that “Active therapy has long-lasting benefits over passive modalities such as massage”.

[154] The plaintiff’s evidence is that it is the massage and physiotherapy treatments she receives that keep her able to work. I accept for this particular plaintiff the treatments that have been the most beneficial to her have been the passive therapies. However, in my view the level of therapies is excessive and these therapies should only be provided while the plaintiff continues to work. I do not accept that she is entitled to these therapies after she has retired from work.

[155] I have assessed the future loss of earning capacity on the basis that the plaintiff will continue working to age 65. I accept that she is entitled to attend four passive treatments a month of massage or physiotherapy to age 65. Using an average cost of \$98 per session this amounts to approximately \$4,700 annually. The present value amount over the next 14 years (using the CIVJI multiplier of 12.1062) equates \$57,000, which is awarded to her.

Kinesiology

[156] Ms. Oliver seeks kinesiology for three months of weekly sessions and three additional sessions for a total of 15 sessions, for a range of \$1,125 to \$1,496.25 plus GST. The purpose would be for Ms. Oliver to have active therapy with a kinesiologist. Ms. Oliver testified that she had attended kinesiology in the past and a program was set up for her. Dr. Sivananthan recommends active therapy with an aggressive stretching and strengthening program focused on improving strength, flexibility, and endurance for the musculature of the neck and back. In my view, it is reasonable to allow for some funding to ensure that the plaintiff's current exercise regime is optimizing her therapy routine. Since the plaintiff has already had kinesiology I am not persuaded that she needs as many sessions as Ms. Wright has recommended. I would award a total of eight sessions at an average cost of \$87 per session. This amounts to \$700.

Psychological Counselling

[157] The plaintiff seeks funding for 10–12 sessions of CBT for a range of \$1,050 to \$2,820. She also seeks funding for ongoing future counselling sessions for a range of \$420 to \$1,410 annually. Ms. Wright makes this recommendation based on the report of Dr. Ancill.

[158] I am not persuaded funding for CBT treatment should be awarded since the rationale provided by Dr. Ancill for this treatment would be the plaintiff's anxiety crossing the road. The plaintiff did not testify to any ongoing anxiety of crossing the road. When asked about any mental concerns she did not identify anxiety as an ongoing issue she was dealing with. Dr. Ancill did not recommend CBT for management of chronic pain. As such, I see no basis to make any award for psychological counselling.

Assistive Devices

[159] A claim is advanced for the following assistive devices:

- Cervical and body pillow – at a one-time cost of \$316.88 to \$498.88 plus PST and GST;
- Ergonomic cleaning aids – at a one-time cost of \$43.65 to \$80.62 plus PST and GST;
- Heat therapy – for a heating pad to be replaced every 3–5 years at an initial cost of \$25.75 to \$55.99 plus GST and PST and an annual cost of \$5.15 to \$18.66 plus GST and PST; and
- Snowblower – for a snowblower to be replaced every five to ten years at an initial cost of \$198 to \$299 and an annual cost of \$19.80 to \$59.80.

[160] I accept that the plaintiff uses her heating pad more frequently than an uninjured individual. I will fund for the replacement of heating pads while she is working. I have assessed that at \$400.

[161] I am not persuaded that the other assistive devices are necessary on the evidence before me.

Seasonal/Periodic Housekeeping Assistance

[162] The plaintiff seeks 3–4 of housecleaning 2–3 times per year at a cost of \$222 to \$600 annually. The plaintiff testified that she struggles to complete many aspects of housecleaning and she has to pace herself.

[163] In my view, in light of my finding that she should be continuing to work full-time to age 65, I am of the view that it is reasonable to fund for some housekeeping assistance. The average costs per hour provided in Ms. Wright’s report was \$41.75 per hour. Ms. Wright recommended a range of 6–12 hours of cleaning per annum. I accept that ten hours per annum would be reasonable, which equates to an annual cost of \$417.50. I would only provide this funding during the period that Ms. Oliver is working. This amounts to a present value sum of \$5,055.

Yard Maintenance

[164] Ms. Wright recommends 4–5 hours of yard assistance each fall and the spring to assist with the collection of leaves, yard waste, and general clean up of the flowerpots and beds. Ms. Oliver testified that she struggles to complete the gardening tasks she did before. As a result, she has changed some of the landscaping to reduce the amount of weeding that is required. I am persuaded that during the period Ms. Oliver continues to work full-time that she has some yard assistance for the heavier cleaning tasks. I will fund for eight hours a year over her working years. Using the 12.1062 CIVJI multiplier, this amounts to \$320 annually with a present value amount of \$3,870.

Medications

[165] Ms. Oliver testified that she only takes Tylenol for headaches. She testified that she does not like taking Tylenol since it is hard on her stomach. She is currently using Celebrex which is a prescription medication. There was no information on how much Celebrex costs. She also uses CBD gummies. She testified that she does not take much of them. I am not prepared to make an allowance for medications on the evidence that was presented.

Award of Future Care Costs

[166] The following is awarded for future care costs:

a) OT work assessment	\$660
b) Massage/Physiotherapy	\$57,000
c) Kinesiology	\$700
d) Assistive devices	\$400
e) Periodic housekeeping	\$5,055
f) Seasonal yard maintenance	\$3,870
Total:	\$67,685

Conclusion

[167] The plaintiff is awarded the following damages against the defendant:

a) Non-pecuniary damages	\$185,000
b) Loss of future earning capacity	\$350,000
c) Cost of future care	\$67,685
Total:	\$602,685

[168] As the successful party, the plaintiff is presumptively entitled to her costs from the defendant, at Scale B. If any party seeks an alternative costs order, they shall advise the registry of this within 30 days of the date of this judgment. I will then direct a schedule for written submissions.

[169] The parties have leave to appear before me to address any issues arising from this assessment.

“The Honourable Justice C. Forth”