

Citation: *Trainor v DeArcos*, 2024 NBKB 158

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

MC-159-2016

BETWEEN:

MEGHAN TRAINOR,

PLAINTIFF,

-and-

SEBASTIEN DeARCOS,

DEFENDANT.

DECISION

BEFORE: Justice Maya Hamou

DATES OF HEARING: January 22, 23, 24, 25, 26, 29, 30, 31 and February 8, 2024

DATE OF DECISION: October 31, 2024

APPEARANCES: Michael B. Murphy, K.C., counsel for Meghan Trainor (assisted by Moira Kelly and Shane Scott, Law Student)
Louis-Martin Boudreault, counsel for Sebastien deArcos

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OVERVIEW

1. Meghan Trainor, a young woman entering adulthood, was involved in a motor vehicle accident at a pivotal moment in her life.
2. At the time of the accident, Meghan was 20 years old and living with her parents in Moncton. At the time of trial, Meghan was 30 years old and living with her parents.
3. In this case, the Court is asked to determine whether the accident caused Meghan's injuries and whether it engaged legal entitlement to indemnification, and, if so, to quantify the damages that flow from those injuries.
4. The main question to resolve in this decision is whether the accident altered the trajectory of Meghan's life and whether this gives rise to indemnification.

Accident

5. On March 27, 2014, Meghan was the passenger in her mother's Dodge Caravan ("Trainor Caravan") heading southerly on the Causeway between Moncton and Riverview.
6. Sebastien DeArcos was driving his Chevrolet Silverado truck ("DeArcos Truck") heading northerly on the Causeway.
7. DeArcos' Truck crossed the center line, colliding with the Trainor Caravan and hitting the front passenger side and swinging around to hit the driver's side.

Injuries

8. Meghan described the accident which she recalled with vivid clarity. After the impact, Meghan immediately noticed her mother, Jane, slumped over the steering wheel, unresponsive. Meghan called 911 and her mother came to a few minutes later.
9. Jane believed the vehicle would catch fire and urged Meghan out of the vehicle. As soon as Meghan placed her right heel on the ground, she knew there was a problem. She could not bear weight on her right leg.
10. Meghan started to panic, and anxiety set in, from the moment she heard the ambulance sirens. The ambulance took Meghan and her mother to the hospital. Meghan was strapped to the gurney. She was concerned for the wellbeing of her mother who seemed drowsy and had a dry mouth.

11. Jane suffered a fractured wrist and a few cracked ribs.
12. Meghan felt like the wind was knocked out of her by the deployment of the airbag. Her chest was bruised and hurt for approximately three weeks. Meghan had difficulty breathing, coughing, and laughing without pain.
13. Meghan also suffered a hairline fracture on her left hand. The hand fracture healed and did not cause further problems.
14. Meghan's most important injury was a broken heel bone. A soft cast boot was placed on her right foot.
15. Meghan and her mother were discharged from the hospital, later in the evening, that same day.

Expert Testimony

16. At trial, the Court heard 15 witnesses, 10 of whom were qualified as experts on consent of the parties. The individuals providing expert testimony included medical doctors, an actuary, and health-related professionals.
 - i. Dr. Alison Power was Meghan's family doctor. Dr. Power was qualified as an expert and provided opinion evidence in the field of family medicine.

Dr. Power provides primary care to patients as part of her family practice, which she shares with other doctors and a nurse practitioner. Dr. Andrea Burry practiced with Dr. Power and Dr. Burry left family medicine in 2015 to work at the Trauma Healing Center. Dr. Power also worked with Dr. Parisa Ghassemi Kakroodi and Dr. Katharine Reddin Sleigh, both of whom met with Meghan on occasion as part of Dr. Power's family practice.
 - ii. Dr. Sarah Pakzad was Meghan's psychologist. Dr. Pakzad was qualified as an expert and provided opinion evidence in the field of clinical psychology and neuropsychology.
 - iii. Dr. Will Allanach was Meghan's orthopedic surgeon. Dr. Allanach was qualified as an expert and provided opinion evidence in the field of orthopedic surgery.
 - iv. Dr. Terry Foreman was Meghan's dentist. Dr. Foreman was qualified as an expert and provided opinion evidence in the field of dentistry.

- v. Dr. Laeeq Tahir was Meghan's psychiatrist. Dr. Tahir was qualified as an expert and provided opinion evidence in the field of psychiatry and psychiatric medicine.
- vi. Linda Stanley was qualified as an expert and provided opinion evidence on the assessment and costing of future care, past care, life care plan, and loss of valuable services.
- vii. Joann Thompson-Franklin was qualified as an expert and provided opinion evidence in the field of physiotherapy.
- viii. Jessie Gmeiner was qualified as an expert and provided opinion evidence in the field of actuarial science.
- ix. Dr. Erica Baker was qualified as an expert and provided opinion evidence in the field of clinical psychology and neuropsychological assessments.
- x. Dr. Darren Kerr was qualified as an expert and provided opinion evidence in the field of orthopedic surgery and arthroplasty.

ISSUES

17. This decision addresses the concepts of causation and damages; however, those concepts are more appropriately broken down into the following questions which the Court was required to address in the context of this trial, in addition to other questions raised by the parties.

PART 1 – CAUSATION

Pre-Accident Profile

What was Meghan's pre-accident profile?

Post-Accident Profile

What was Meghan's post-accident profile?

Other Accidents

Did the two other accidents occurring in 2016 break the causal link between the first accident and the injuries?

Expert Testimony

What are the findings of the experts with respect to Meghan's condition?

Adverse Inference

Should the Court draw an adverse inference from the absence of testimony from Dr. Brunet, Dr. Dumais and Dr. Burry?

Causation in Fact

Was the accident the cause of Meghan's injuries?

Causation at Law

Were Meghan's injuries a reasonably foreseeable consequence of the accident? Were the injuries too remote to warrant recovery?

Meghan's Credibility

Was Meghan's testimony credible in the sense that the Court believes she is suffering from chronic pain?

PART 2 - DAMAGES*Crumbling Skull and Thin Skull*

In the alternative, the Court's determination that Meghan's chronic pain, TMD and additional surgeries related to the right leg femoral derotational osteotomy were not caused at law by the accident, are these injuries the result of the doctrine of thin skull or the doctrine crumbling skull? If so, what is the impact on the assessment of damages?

General Damages

What general damages are recoverable by Meghan for the broken heel bone in Meghan's right foot, the bruised chest, the hairline fracture in her left hand, and the PTSD arising from the accident?

Special Damages

Can Meghan recover special damages for past and future loss of income, past and future loss of housekeeping capacity, past and future cost of care (including cannabis), and loss of medical and health benefits? Additionally, can Meghan recover a management fee applicable to the recoverable damages?

Expert Testimony

What are the findings of the experts with respect to the quantification of damages recoverable by Meghan?

PART 3 – OTHER

Section B - Cox and Carter

Is a *Cox and Carter* Order appropriate in the circumstances of this case with the information available to the Court?

Costs

What costs may the successful party recover?

PART 1 - CAUSATION

18. Meghan alleges her physical and psychological injuries were caused by the accident. DeArcos concedes that Meghan suffered injuries but deny that the accident caused all the injuries. In its Statement of Defence, DeArcos suggests Meghan’s injuries are too remote and not causally connected to the accident and that they are the result of a prior, subsequent, or wholly unrelated incident, accident, illness, calamity or event for which DeArcos claims it is not liable in law.
19. As noted by the New Brunswick Court of Appeal, “[i]n most cases dealing with unintentional torts, the contentious aspects of causation are fact-driven” (*Day & Ross Inc. v Randall and Estate of Jean-Claude Gagnon*, 2001 NBCA 39 at paragraph 17).
20. A thorough review of Meghan’s pre-accident and post-accident profiles assists the Court in this fact-driven determination. The pre-accident and post-accident profiles include Meghan’s physical, psychological, educational, and employment status, in addition to a description of Meghan’s participation in social, sporting, and cultural activities.

Pre-Accident Profile

What was Meghan’s pre-accident profile?

21. At trial, Meghan testified as to her pre-accident and post-accident profiles. While Meghan’s recollection of dates was poor, the documentary evidence assisted in supporting the chronology of events.

22. Jane Trainor and Peter Trainor testified at trial about Meghan's pre-accident and post-accident profiles and addressed Meghan's participation in household tasks. Jane and Peter are both retired schoolteachers. In terms of career ambitions for their daughter, both Jane and Peter believed Meghan would pursue a career related to voice, such as opera. Jane and Peter were quite emotional when speaking about the daughter they once had and her ability to thrive in the theatre and musical world. Seeing her now, struggling with pain, understandably breaks their hearts.
23. Meghan's past employers from Peoples Park Tower, Lisa Day, and from InterAction School of Performing Arts, Chuck Teed, also testified at trial.
24. In addition, from a medical perspective, Dr. Power, Dr. Pakzad, Dr. Tahir, Dr. Allanach and Dr. Foreman testified at trial. These doctors were involved with Meghan's medical care over the years.

Physical

25. Meghan suffered from a physical issue she described as "knock kneed". While running, Meghan's knees would knock together and bruise. This condition is referred to, in medical terms, as a femoral anteversion.
26. In 2011, Meghan was referred to Dr. Allanach, an orthopedic surgeon, for a femoral anteversion. In July of 2011, Meghan underwent a femoral derotational osteotomy, a major surgery, on her left leg. Dr. Allanach performed the surgery with another doctor from the IWK Health Centre as this was the first time this type of surgery was performed in New Brunswick.
27. During a femoral derotational osteotomy, the femoral bone is cut, rotated, and a metal rod is inserted in the bone. Pins are placed at the top of the femur near the hip and at the bottom of the femur near the knee.
28. Meghan was hospitalized for one week and the surgery was described by Dr. Allanach as having gone perfectly.
29. Jane was concerned with Meghan's ability to attend university a month or so after the surgery, but Dr. Allanach did not see a medical impediment to her attendance. Meghan attended her first year at university, spent frosh week on crutches, and experienced some difficulty taking part in all the activities.

30. During her first term in university, Meghan's social activities were limited. However, by the second term, she was walking without assistance, without a cane, without crutches, and was even running on a treadmill at the gym.
31. Jane and Peter described Meghan's recovery from the 2011 femoral derotational osteotomy as long and significant, yet they acknowledged that by the end of the year Meghan was exercising and running on a treadmill.
32. According to Dr. Allanach, a femoral derotational osteotomy on the right leg was recommended, but the plan was modified. A decision was made to hold off on the surgery to the right leg as Meghan was doing well. Once the right leg started causing Meghan pain, the surgery would be scheduled. Prior to the accident, Dr. Allanach expected a similar surgical result on the right leg as observed on the left leg post surgery.

Education

33. Jane was an art teacher at Birchmount School, a school Meghan attended from K to 8.
34. In 2009, while in Grade 11 at Harrison Trimble High School, Meghan was diagnosed with dyslexia and dyscalculia after failing an English Language Proficiency Assessment. Meghan's reading comprehension was impaired by her inability to read letters and words in the correct order. Meghan had similar issues with respect to numbers, reversing and inverting them. At the time, there were not a lot of accommodations available for these issues and Meghan was placed in a classroom with several special needs children; a place where she felt she did not fit in.
35. Meghan's dyslexia and dyscalculia went undiagnosed for several years as she was a good student and adapted to the challenges presented by these conditions.
36. Meghan graduated high school with honours and on time.
37. In her admission tryout for the Mount Allison University music program, Meghan performed with top marks during the oral singing test but performed very poorly on the musical theory entrance examination. Meghan was admitted to the Mount Allison University music program.
38. Meghan started attending Mount Allison University in September of 2011 but struggled academically. She struggled to navigate in this new world while dealing with dyslexia and dyscalculia. In addition, during her first term, Meghan was using crutches, making it difficult for her to get around. Meghan did not complete her first semester and did not attend the

second semester of her first year at university as she struggled with depression and anxiety following a breakup.

39. Dr. Tahir, who began seeing Meghan in 2011, advocated to Mount Allison University to accommodate Meghan in April of 2012, given that she had not completed her first-year courses.
40. Meghan returned to university for a second year but continued to struggle academically.
41. Early in the second school year, Dr. Tahir advocated for educational funds to be released to Meghan, despite her poor performance in the first year, citing an “illness which took a heavy toll on her”. In addition, around this same time, Dr. Tahir advocated for the school to accommodate Meghan’s learning disabilities.
42. In January of 2013, Dr. Tahir met with Meghan who was struggling with sleep and the stress of university. Meghan had plans to transfer her course credits to another university. In July of 2013, Dr. Tahir noted that university was not proceeding well. Meghan, at that point, decided to transfer to religious studies and philosophy for her third year.
43. By January 3, 2014, Meghan decided to formally withdraw from university. Meghan referenced her mental health as the reason for her departure from university.

Psychological and Psychiatric

44. Meghan described herself as a closeted sad girl in high school. She claims to have been suffering in silence, unmedicated and without therapy.
45. Meghan’s struggles with psychological issues began in high school when a boyfriend cheated on her. At the time, Meghan took Advil and Tylenol, to, as she describes it, “end things” as she was “having an episode” and was “emotionally down at the time”. Meghan claims nothing further occurred after ingesting the Advil and Tylenol; she did not attend the hospital, she did not have her stomach pumped, nor did she disclose the incident to others.
46. While at university, in her first semester, Meghan dealt with another incident of suicidal ideation after finding out that her boyfriend had also been dating her best friend. Meghan was admitted to the Sackville Hospital for treatment and was referred to Dr. Tahir.
47. In October of 2011, Meghan began seeing Dr. Tahir, a psychiatrist. Dr. Tahir suggested Meghan should work with Dr. Pakzad on her anxiety and depression. In March of 2012,

- Meghan began seeing Dr. Pakzad, a psychologist, to address her depression and anxiety. Meghan received medication and started therapy as she began her healing journey.
48. In April of 2012, Dr. Tahir diagnosed Meghan with: (1) major depression with comorbid anxiety and ADD, and (2) borderline personality disorder.
 49. According to Dr. Pakzad, borderline personality disorder should be treated by psychology and psychiatry; it is known to be a lifelong mental health issue. Dr. Pakzad clarified that borderline personality disorder does not necessarily create a disability or have a significant impact on a person's life, such as depression and anxiety. In combination with other diagnoses, borderline personality disorder may affect a person's perception and may occasion ups and downs. Meghan described her borderline personality disorder as having "very big feelings", "intense and overwhelming feelings". Her diagnostic in this regard did not change after the accident.
 50. Dr. Pakzad shared that when she first met Meghan, she appeared bubbly, but the underlying anxiety and depression were soon uncovered. Dr. Pakzad saw Meghan once a week at first, followed by every two weeks, every month, and subsequently, every two months. Dr. Pakzad explained that through treatment she started to see a change in Meghan's pattern of thoughts and that Meghan seemed to be more in control of her thoughts. Meghan began finding comfort in using the tools provided by Dr. Pakzad and he started seeing her less and less.
 51. According to Dr. Pakzad, Meghan was beginning to take control of her life and was very close to normal before the accident. Dr. Pakzad prepared a report in April of 2012 in which she noted that Meghan was responding well to medication and was starting to feel better. While acknowledging that Meghan struggled in university, with the high expectations and feelings of helplessness and hopelessness, Dr. Pakzad observed that Meghan fared much better during the summer months. Dr. Pakzad's assessment that Meghan was progressing well prior to the accident was based on her administration of standardized tests administered to Meghan, tests which were not presented to the Court.
 52. In reviewing a psycho-educational assessment completed in 2009, Dr. Pakzad noted that Meghan had a learning disability in processing/memory/attention with dyslexia and dyscalculia, which are neurological disfunctions. Dr. Tahir also reviewed the 2009 psycho-educational assessment and qualified Meghan's learning disability as quite severe.
 53. By August of 2012, Dr. Tahir observed that Meghan was in a better mood and had improved cognitive functions. Meghan was responding well to medication, was back to normal and Dr.

Tahir was pleased with her progress. By the end of 2013, however, Meghan's psychological condition declined, leading to her withdrawal from university.

54. After withdrawing from university in early 2014, Meghan explained that, psychologically, she started to feel great. Dr. Pakzad noted that Meghan was doing well in the months preceding the accident and Meghan told Dr. Pakzad that she loved her job. Meghan felt relieved without the expectations to succeed, the family pressure, the school pressure, and the pressure from teachers.
55. Dr. Tahir's report, prepared prior to the accident on March 14, 2014, outlines Meghan's diagnoses as: (1) major depression with comorbid anxiety and ADD, in partial remission; and (2) borderline personality disorder. Dr. Tahir noted that he believed Meghan would be a client that he would be treating for a medium term before sending her back to her family doctor.
56. It was evident from the testimony of Dr. Tahir and Dr. Pakzad that they both care deeply for their patient, Meghan. Both are adamant that Meghan was doing well before the accident and their testimony was frank and genuine.
57. However, given Dr. Tahir's report of March 14, 2014, it is difficult to accept that Meghan was doing "great" psychologically given the diagnosis of major depression with comorbid anxiety in partial remission. The Court accepts that Meghan was on a path to remission, but also concludes that Meghan's psychological condition at the time of the accident made her particularly vulnerable as was confirmed by one of the psychological experts at trial, Dr. Baker.

Medication

58. Starting in 2012, Dr. Tahir prescribed various medications to address Meghan's anxiety, depression, and concentration issues. As explained by Dr. Tahir, finding the proper medication to address psychiatric issues is a process. In Meghan's case some of the medication caused paranoia, auditory hallucinations, and visual hallucinations. Adjustments to Meghan's medication were made approximately 10 times from 2012 to 2014.
59. Dr. Tahir's report from April 2012 referenced Meghan's use of cannabis. Meghan claims that at this point in her life, the cannabis was used socially, at parties. Dr. Tahir counselled Meghan against the use of cannabis given the potential damage to cognitive functions of the brain and its negative impact on anxiety and depression. Meghan claims not to have used cannabis as a form of treatment for anxiety and depression.

60. In November of 2013, Meghan had stopped taking some of her medication and had lowered her cannabis consumption. Meghan advised Dr. Tahir that she would resume her medication given the decline in her psychological condition.
61. In the months prior to the accident, Dr. Tahir was confident that Meghan was responding well to the medication.

Disability Tax Credit

62. In late 2013 and early 2014, Meghan and her mother, Jane, completed a Disability Tax Credit application outlining Meghan as a dependant of her mother. The form Jane completed stated Meghan was “unable to look after herself independently without our assistance”. Peter confirmed that Jane completed the paperwork in the hopes of obtaining financial assistance. Jane confirmed that during this time, Meghan’s mental health was improving, and that Meghan was working.
63. Dr. Tahir submitted a medical assessment of Meghan’s impairment for the Disability Tax Credit application, indicating in the section related to diagnosis: “(1) major depression comorbid anxiety ADD, and (2) borderline personality disorder”. Dr. Tahir also checked the box stating that the impairment was expected to last for a period of at least 12 months. Dr. Tahir also noted being unaware of the long-term duration of the impairment.
64. Dr. Tahir specified that this Disability Tax Credit refers to Meghan’s cognitive impairment, not to a physical disability (as was the case after the accident). Dr. Tahir states that many of his clients have cognitive impairments but can sustain employment. The range of diagnoses covered by the Disability Tax Credit is broad.
65. Dr. Pakzad, when presented with Dr. Tahir’s notations on the Disability Tax Credit application, without saying she disagrees with Dr. Tahir’s diagnosis made in early 2014, suggested that before the accident Meghan was employed and able to function.

Employment

66. Meghan worked as a waitress in the dining room at Peoples Park Tower, an independent living complex with a restaurant available to residents. She started working there while in high school doing weekend and after-school shifts.

67. The job involved taking orders and bringing out drinks and food orders to clients. Meghan also punched in orders and got the dining room ready between meal services. She would serve approximately 20 clients at a time.
68. In the summer, following her first year at university, Meghan worked at Peoples Park Tower as a waitress from April to July and subsequently worked at Camp Wildwood for approximately one month. While caring for the children at the camp, Meghan would run around and play games but testified that she mostly did secretarial work in the office. Dr. Tahir's file notations show Meghan left this job after one month as she felt unneeded and unimportant.
69. In January of 2014, Meghan again began working as a waitress at Peoples Park Tower from 11am to 7pm three to five days a week. Meghan was hoping to obtain a more permanent position within a few months, thereby making her eligible for benefits. Meghan was not assigned to deal with cash as she claims this task would have been difficult for her to perform. According to Meghan, the staff at Peoples Park Tower played to her strengths. As she returned to work at Peoples Park Tower, the interaction with people made Meghan smile and made her feel glad to be back.
70. Lisa Day, the Food and Retail Services Manager at Peoples Park Tower, provided some background on the functioning of the restaurant. She explained that there were 19 tables in the restaurant with four to five seats per table. For breakfast there were approximately 30 residents (with three servers), 80 residents for lunch (with four servers) and 120 residents for supper (with five servers). Lisa confirmed that servers are on their feet for six to seven hours a day serving, setting tables and cleaning. Lisa explained there was little cash involved with this waitressing job as most residents had a meal card. Guests eating in the restaurant would pay cash.
71. Lisa confirmed that Meghan was an excellent employee. As a part-time employee she would have worked 10 to 30 hours per week at a salary of \$10.50/hour. It was expected that Meghan would access full time hours by May of 2014. Full time hours are approximately 30-35 hours per week, up to a maximum of 44 hours. By working full time hours, Meghan would have been eligible for benefits (half covered by the employer) including short-term and long-term disability, health, prescription, and dental. In the context of this job, there were few gratuities – approximately \$10 to \$12 every two weeks.

72. In terms of future employment prospects, prior to the accident Meghan was in the process of getting back on her feet. Meghan did not believe she would work at Peoples Park Tower forever.
73. Jane believes Meghan loved working at Peoples Park Tower, recounting that Meghan would sing to the patrons and “they loved that and they loved her”. Peter confirmed the same. According to Jane, Meghan got a sense of responsibility from the work and the people were great.
74. Dr. Tahir recognized that Meghan may not have completed a university degree given some of her cognitive limitations. However, Dr. Tahir believed Meghan could complete community college and hold gainful employment in the future.
75. Dr. Pakzad opined that Meghan had no limitations or restrictions in terms of her career. Dr. Pakzad noted that she would have recommended a college course which she believes was within Meghan’s capabilities. Dr. Pakzad opined that Meghan had proven an ability to control her mood.

Social, Sporting and Cultural Activities

76. Meghan described her pre-accident activities while in middle school at Birchmount and in high school at Harrison Trimble.
77. While in middle school, Meghan played softball for two to three seasons. Meghan also played ringette for four to five years. According to Jane and Peter, Meghan was a very good athlete and played competitively.
78. Meghan’s family and extended family were very involved in music. Meghan participated in piano lessons and voice lessons. Meghan struggled with the formalities of piano but had a real talent for voice and became very good at performing music by ear.
79. According to Jane, high school was a time in Meghan’s life where “she felt very successful”. Peter described that Meghan was in her element when doing musicals in high school. Leaving aside sports due to scheduling conflicts, Meghan thrived in theatre, participating in several musicals, plays, and drama fests throughout the years.
80. Prior to the accident, Jane suggests Meghan had a good social life and maintained friendships from childhood.

Post-Accident Profile

What was Meghan's post-accident profile?

Physical

81. In the accident, Meghan sustained a broken heel bone in her right foot. As treatment, Meghan's foot was placed in a soft cast boot.
82. Meghan also suffered a hairline fracture in her hand near her pinky. At the time, the injury was not a main concern and not much attention was paid to this particular injury. Meghan did not experience further issues with respect to this injury although she mentioned it in passing during her assessment with Dr. Kerr.
83. During the accident, Meghan additionally suffered a chest injury. Nothing was broken but Meghan's chest was bruised from the airbag which knocked the wind out of her. The area was tender for three to four weeks. Meghan did not experience further issues with respect to this injury.
84. Meghan first saw her family doctor, Dr. Power, a few weeks after the accident in April of 2014.
85. Meghan consulted with her family doctor's office again in July of 2014, once the soft cast boot was removed. After three months on crutches, Meghan began walking on her heel and noticed something did not seem right; she was walking with a limp. Meghan's concerns, at that point, were that she could not stand or walk for long periods of time.
86. Dr. Power reviewed the notes of Dr. Burry and confirmed that in September of 2014, Meghan appeared to be experiencing pain in her left leg. Dr. Burry made a referral for an assessment to Dr. Allanach due to Meghan's complaints of pain in the left hip and leg. Dr. Burry noted the issue may have stemmed from the irritation of a screw placed during the femoral derotational osteotomy performed on her left leg.
87. Dr. Power reviewed the notes of Dr. Burry from October of 2014 which remarked that Meghan was still unable to work and that she was experiencing pain in her left hip. The notes described Meghan's inability to walk or sit for long periods of time and concluded she was most comfortable when laying horizontally.
88. One month later, Dr. Burry again noted that Meghan had pain in her left hip which caused her difficulties when walking and sitting for extended periods of time.
89. Dr. Power noted in May of 2015 that Meghan was experiencing ongoing pain in her right heel and was awaiting the removal of hardware in her left hip. Dr. Power noted Meghan was

having pain in her right foot which was affecting her gait. Given the pain, Meghan walked on the outside of her right foot. Dr. Power sent Meghan for X-rays and requested that Dr. Allanach consult with Meghan on the issue.

90. A year and a half after the accident, Meghan was experiencing mobility issues due to her right heel. Meghan was struggling with pain in her heel and was compensating with her other leg which affected her gait and created problems with her left leg and hip. According to Jane, the pain progressed and got worse and worse, noting that eventually, Meghan's mental health was significantly impacted.
91. Dr. Allanach confirmed that Meghan would benefit from surgery to her right heel. In January of 2016, Dr. Allanach was prepared to proceed with the heel surgery, but Dr. Tahir asked that the surgery be postponed due to Meghan's depression and PTSD. Dr. Allanach outlined his view that Meghan was dealing with some pain coupled with a psychiatric overlay. At this point, Meghan was walking more and more on her right foot which seemed to alleviate the pain in her left hip. Dr. Allanach however noted that Meghan never walked with a proper gait after the accident.
92. In January of 2016, Meghan saw a doctor at her family physician's office and complained of neck, jaw, and ear pain. In April of 2016, Dr. Foreman, a dentist, noted that Meghan was grinding her teeth. Dr. Foreman had been Meghan's dentist since she was four years old.
93. In July of 2016, Meghan underwent surgery to her right heelbone fracture in the joint (the heel had suffered a compression injury). Dr. Allanach performed this surgery. During this surgery, Dr. Allanach noted some degenerative changes to Meghan's right heel. Dr. Allanach noted that Meghan presented as a different person in 2016 from the person he had met in 2011.
94. Prior to the heel surgery, Meghan experienced changes to her gait which affected her left hip and back and caused her knee pain. She also experienced pain in the side of her right foot.
95. According to Meghan, the surgery went as well as could be expected however, her right heel will never be the same. Meghan sometimes experiences flareups; sometimes the flareups are bad and sometimes they are tolerable. Dr. Allanach saw Meghan again in September of 2016 and was pleased with the results of the heel surgery.
96. If post-traumatic oostoarthritis develops, a surgery may be required on Meghan's heel to fuse three heel bones. Dr. Allanach and Dr. Kerr believe this is a realistic probability in Meghan's case but could not speak to the timelines involved.

97. Dr. Allanach suggests the mental state of a patient plays a role in their recovery. Usually, he would not expect such an amplified response to surgery. Orthopedically, Meghan recovered very well from a big surgery in 2011, but in 2016, she struggled with the heel surgery. Dr. Allanach does not believe Meghan is dealing with a nerve issue resulting from the heel surgery as this type of pain would be more localised.
98. Dr. Power reviewed the notes of Dr. Ghassemi Kakroodi from November of 2016 which noted that Meghan was experiencing femoral pain, back pain, neck pain and many other types pains. It was noted that the pain was affecting her mental health. At the time, Meghan was on several medications for anxiety, depression, and a personality disorder. At the time, Meghan was also consuming cannabis. Meghan was referred to Dr. Dumais at the Pain Clinic by Dr. Ghassemi Kakroodi in November of 2016 to address her chronic pain. Dr. Ghassemi Kakroodi believed Meghan was a good candidate for multi-group pain management.
99. In November of 2016, the reason for a visit with Dr. Power is noted as “upper back pain”. The notes of the visit indicate Meghan complained of many types of pains (back pain, pain in the middle of the back and neck pain).
100. By December of 2016 things were not going well. Meghan visited with Dr. Allanach approximately six months after the surgery on her right heel. At that time, she complained of pain in her entire body – back, hips, left thigh, head, neck and TMD pain. She developed this generalised pain approximately two and a half years after the accident. These were all new symptoms in addition to the pelvic obliquity which was present before the heel surgery. The symptoms experienced by Meghan are not symptoms that Dr. Allanach would have expected to see after the heel surgery.
101. Dr. Power agreed that chronic pain and mental health can play off each other suggesting that, at times, mental health problems can make the situation worse.
102. Meghan met with Dr. Foreman on December 21, 2016, and shared with Dr. Foreman that she had chronic pain and had suffered from pain in her back and neck for the past six months. Dr. Foreman does not have the ability to speak as to the origin of the TMD (tempo mandibular disorder) but believes that it was related to pain occasioned by the grinding of teeth. Meghan consulted Dr. Foreman for TMD two and a half years after the accident. According to Dr. Foreman, these types of issues can creep up two to three years after an accident.
103. Meghan consulted Dr. Foreman with respect to pain in her head, neck, and jaw. Meghan has had an orthotic (also referred to as a bite plate or bite plane) to prevent her from grinding

and chipping her teeth due to pain. The first orthotic broke within two weeks, the second broke as well, and now the third has a crack in it. Meghan is going to get her fourth orthotic from Dr. Foreman. According to Meghan, the TMD is worsening. According to Dr. Foreman, orthotics are supposed to last approximately 10 years, but Meghan is already on her fourth orthotic. Orthotics are effectively a band-aid used to address ongoing dentistry issues.

104. Dr. Foreman believes the issue will create some degeneration over time. There is a possibility of fixing the issue more permanently, but the cost would be between \$5,000 and \$10,000. Dr. Foreman does not believe Meghan currently requires this more permanent solution – the TMD is only a small portion of Meghan’s pain issues. Dr. Foreman believes yearly maintenance can cost \$200 to \$2,000 per year. Notably, section B coverage approved the expense of an orthotic for Meghan in the last few years.

105. Dr. Foreman described Meghan as a person with a big, vibrant personality, but she is now a “shell of herself”.

106. In late November of 2017, Meghan consulted with Dr. Power’s clinic for asthma. At the time, Meghan was fighting a cough and had stopped smoking tobacco 6 days prior. Meghan was also vaping cannabis at the time and it was discussed with her that vaping could trigger her asthma and that she may need to stop.

107. In December of 2017, Meghan underwent a femoral derotational osteotomy on her right leg. At that point, due to the pain, postponing was not an option. Meghan was apprehensive of the surgery and after the surgery, the pain was unbearable. Meghan described the surgery as having gone as well as could be expected but her body had already suffered a lot of trauma. In addition, Meghan noted that she could feel the pins placed during the surgery on the outside of her knee which was causing her some discomfort. Dr. Allanach suggests the surgery went well but noted the bone was softer on one side.

108. During the three years that followed, things only got worse; the pain which started in Meghan’s knee and back then became widespread on her skin, her arms, and her legs. Dr. Tahir posited to Meghan that the pain may be attributable to nerve damage.

109. In August of 2018, Meghan underwent surgery to take out pins from the side of her right knee. Dr. Allanach told her the pins could be removed post operation. Meghan could not lie on her right side as she felt the pins protruding through her skin. While medical evidence was provided to support the statement, Meghan suggests that during this procedure there was a complication with the anesthesia. At the time, the anesthesiologist did not wish to

place her under general anesthesia due to contraindications with medication. As a result, she was administered valium and a spinal anesthetic. Meghan stayed horizontal for four days after and suggests the hole where the needle was inserted in her spine did not close.

110. In November of 2018, Carolle Nazair, a Nurse Practitioner at Dr. Power's office, referred Meghan to physiotherapy. She noted that Meghan had not yet undergone physiotherapy and had general muscle weakness.

111. In January of 2020, Meghan appears to have booked an appointment to see Dr. Reddin Sleigh to discuss "fibro". The doctor's notes refer to the chronic nature of Meghan's pain.

112. Dr. Power explained that chronic pain is pain experienced over several years. Chronic pain is not a precise diagnosis, it is a vague, umbrella designation, that covers several ailments. Fibromyalgia is a specific diagnosis which would need to be confirmed by a rheumatologist.

113. Meghan was referred to the pain clinic with Dr. Dumais but, as she describes it, she "was not accepted into the program" as there was nothing further that could be done for her.

114. Meghan met with Dr. Reddin Sleigh in January of 2020 and referred to fibromyalgia. It appears the notation in the file arises from a comment made by Meghan. There is no indication that Meghan underwent testing for fibromyalgia which would have been completed through a rheumatologist.

115. Meghan claimed that a lot of doctors believed she had fibromyalgia because of the sequence of events. She admitted to googling the term and "self diagnosing" with fibromyalgia. Meghan refers more frequently to her pain as "chronic pain", stating that her most important problem is "chronic pain". The chronic pain appears to be documented starting in July of 2016. Meghan claims that her chronic pain is the reason she is unable to be independent and that the pain has prevented her from accomplishing a lot of things.

116. Meghan attended Dr. Kerr's office for a two-hour conversation and disclosed to him that her primary concern was "fibromyalgia". Dr. Kerr's report indicates that Meghan developed and was diagnosed with fibromyalgia approximately two years after the accident. Meghan reported that her entire body felt bruised however, she denied indicating that she felt a burning sensation as documented in Dr. Kerr's report.

117. Meghan reported to Dr. Baker that she had shooting pain down both her legs, pain in her right foot and that everywhere else, she felt pins and needles. Meghan confirmed at trial that

this description remains accurate to this day. Dr. Baker's notes indicate that Meghan mentioned different doctors have said she exhibits symptoms of fibromyalgia.

118. From the family's perspective, Jane testified that the pain in the last five years has changed. Peter describes Meghan's pain as leg, back and neck pain, and states the pain has not diminished over the years. Some days are terrible, and some days Meghan cannot get out of bed. Peter explained that Meghan didn't seem to get better after the accident. It seemed to him that her heel injury cascaded into other issues. Peter stated that in the last five years, Meghan's pain is constant, she vapes periodically, takes Epson salt baths, and showed some mental improvement. Peter states that Meghan is always optimistic but claims the pain remains constant. Peter also explained the importance of routine for Meghan and that changes in her routine take a toll on her.

119. Meghan is unable to engage in physical exercise. Swimming hurts her legs when she kicks, and walking is the only activity she can engage in for about 15 minutes. She fears walking too far and not being able to make it back home. It happened to her on one occasion that she walked too far and had to call her mother to pick her up.

120. Meghan described using a heating pad every time she is in bed. The heating pad, as she described, is always on. Meghan can't sleep without the heating pad, which causes burn marks on her stomach and back.

121. Meghan believes that because of her limited mobility she's gained weight, going from 120 lbs in her university years to approximately 200 lbs by the time of trial. Meghan also attributed it to other causes such as Covid, the stress of the court case, and the fact that she was overwhelmed and stressed by the situation.

122. Meghan's description of her generalized chronic pain can be found in several reports and file notes:

- In her report, Linda Stanley referenced the symptoms described by Meghan as "significant pain in her right foot, left leg, hips, knees, upper and lower back, neck and TM joints".
- In her report, Dr. Baker referenced the symptoms described by Meghan as "shooting pain down both my legs, pain in my right foot and everywhere else pins and needles – in my face, neck, arms and back".

- In his report, Dr. Kerr noted that Meghan’s main concern was “widespread fibromyalgia” developed two years after the accident, describing her whole body as feeling bruised, burning, tingling, and numbness with unpredictable intensity and duration. Dr. Kerr noted that Meghan reported minimal discomfort in her right heel.
- In his report, Dr. Allanach noted that Meghan’s concern was “serious pain with her entire body” and that she “has got chronic pain in her back and hips and left thigh, as well as the back of her head and neck”.
- In his file notes, Dr. Foreman noted on December 21, 2016, that Meghan stated that “for the past six months” “everything hurting, neck back and TMJ”.

Physical - Functional Capacity Assessment – Sylvie Blanchard Crowley

123. Meghan attended a Functional Capacity Evaluation in May of 2017 with Sylvie Blanchard Crowley. The evaluation was spread out over two days (one and a half hours one day and two hours on the second day).
124. Meghan stated she experienced anxiety and pain during the testing; on the second day of testing, Meghan declined to complete lifting, carrying, pushing, and pulling tasks, citing increased overall pain and anxiety symptoms.
125. Of note, on the first day of the assessment, Meghan was exhausted from singing in three Broadway review shows in which she performed one number while sitting as her legs strained too much.
126. Ms. Crowley was unable to perform a physical functional level assessment as Meghan did not complete the manual handling portion of the evaluation. It was recommended at the conclusion of the functional capacity assessment that Meghan complete a pain management program and access psychological services for pain management and anxiety.

Physical - Functional Capacity Assessment – JoAnn Thompson Franklin

127. Meghan participated in a second Functional Capacity Evaluation with JoAnn Thompson Franklin in December of 2019 and Ms. Thompson Franklin issued a Functional Capacity Evaluation Report in January of 2020.

128. Ms. Thompson Franklin testified at trial and was qualified as an expert in physiotherapy, on consent of the parties and provided expert opinion evidence in this field. For most of her career, spanning over 40 years, Ms. Thompson Franklin worked around chronic pain management. Over the last 15 years, Ms. Thompson Franklin focussed on motor abilities and the interplay of the nervous system and orthopedics. While Ms. Thompson Franklin references chronic pain management as part of her experience generally, Ms. Thompson Franklin identified no specific training or expertise in the field of chronic pain management.
129. Ms. Thompson Franklin's assessment focused on Meghan's ability to perform duties associated with her prior employment as a waitress and as a voice instructor, and on Meghan's ability to carry out regular activities of daily living. Ms. Thompson Franklin performed a global assessment of Meghan's endurance, stamina, tolerance, and movement, putting her through a series of tests.
130. Ms. Thompson Franklin reviewed Meghan's history prior to the assessment and was satisfied that Meghan dealt with chronic pain in the sense that Meghan experienced pain lasting longer than three to six months, and that the pain affected her sleep patterns, her enjoyment of life and her ability to function.
131. Ms. Thompson Franklin posited that Meghan's description of her pain and capabilities was credible and honest. Ms. Thompson Franklin believed Meghan worked to her capabilities and found the results of the testing to be reliable.

Overall test findings, in combination with clinical observations, identify Ms. Trainor's subjective reports of pain and the associated disability to be reliable as they matched demonstrated abilities.

132. Ms. Thompson Franklin explained that, as part of the assessment, she assessed Meghan's body mechanics. Ms. Thompson Franklin would stop Meghan once she noticed a loss of control in her body mechanics.
133. In her testimony at trial, Ms. Thompson Franklin made a comment about Meghan placing her fingers on the treadmill from the start of the walking test. Ms. Thompson Franklin concluded that this showed a vestibular or balance issue. Shortly after, Ms. Thompson Franklin referred to a test performed on an elliptical and described that Meghan was petrified of falling and experienced anxiety and fear of falling which resulted in her outright refusal to embark on the elliptical. It is incoherent to suggest an imbalance in one test and a fear in the other; these findings are inconsistent.

134. In assessing Meghan's pain, Ms. Thompson Franklin noted that immediately after the exercises Meghan's pain was more moderate due to the endorphins and that it increased subsequently. Yet, Ms. Thompson Franklin assessed that by the end of the day, Meghan had scored 10/10 on the McGill Pain Index. Meghan identified the areas of pain and based on her drawing, Meghan fell in the 99th percentile of people experiencing pain. On one hand, it is suggested the pain was lowered by endorphins and on the other hand, it is suggested the pain level is at the maximum level. These findings and conclusions are inconsistent.
135. With respect to employment capacity, Ms. Thompson Franklin concluded that Meghan could not be a waitress as her demonstrated abilities did not match the demands of the job. Ms. Thompson Franklin also concluded that Meghan could not be a voice coach given her difficulties concentrating due to pain, fatigue, and discomfort. She stated that Meghan could not lift, carry, or move around a space for even a short duration. Ms. Thompson Franklin observed Meghan's body collapsing while she carried items. She also stated that Meghan struggled to concentrate through the pain.
136. With respect to activities of daily living, Ms. Thompson Franklin concluded that Meghan could tolerate light homemaking activities such as hanging clothes on a line, sweeping, and light meal preparation, activities which do not require lifting. Meghan cannot carry more than 10 pounds whereas for most people, 20 pounds is the capacity they can carry. Ms. Thompson Franklin also concluded that Meghan was independent with respect to her personal care; she was able to dress, put on makeup, and shower without assistance. Ms. Thompson Franklin recommended that Meghan complete a pain education, community-based, exercise program and psychological counselling.
137. During her testimony at trial, Ms. Thompson Franklin explained that after suffering an injury, based on age and the area of the body that's affected, other areas of pain or disfunction may arise. Ms. Thompson Franklin concluded that Meghan's nervous system was slow to heal from the accident and she concluded that Meghan was dealing with centralized generated pain.
138. The Court is unable to accept this diagnosis and the conclusions reached by Ms. Thompson Franklin. The Court may rely on expert opinion evidence in its determination of questions before the Court; that said, the expert testimony must be based on the scope of the expert's qualification. Ms. Thompson Franklin's assessment in this regard, and her final conclusions, were centered around a finding of centralized generated pain which falls outside the ambit of her expertise on mobility and motor function. The Court finds that Ms. Thompson Franklin's

assessment is of limited value given the interplay between Ms. Thompson Franklin's conclusions on Meghan's functional abilities and her determination that Meghan is afflicted with centralized generated pain.

139. Dr. Allanach reviewed the Functional Capacity Assessment conducted by Ms. Thompson Franklin and was quite surprised to see the extent of Meghan's limitations. While he expected to see issues with Meghan's foot, he was surprised by the repercussions noted in the report. The Court agrees Ms. Thompson Franklin's report contains the hallmarks of exaggeration and overstatement of Meghan's situation.

Psychological and Psychiatric

140. For six months following the accident, Meghan experienced nightmares. She would relive the accident and dream that her mother had died, and she was at the funeral. Jane confirmed that Meghan would wake up screaming and still has some nightmares to this day.

141. Dr. Pakzad performed Cognitive Behaviour therapy on Meghan (as she had prior to the accident). Dr. Pakzad concluded that Meghan had PTSD and generalized anxiety disorder. She treated Meghan for her PTSD with Cognitive Behaviour therapy sessions to help Meghan develop and rebuild her emotional and cognitive capacities and help her cope with the trauma from the accident and the severe chronic pain at the root of her depression and anxiety.

142. Meghan's PTSD arose from the accident and is being treated by Dr. Pakzad. Meghan becomes anxious in vehicles, especially in bad weather, with oncoming traffic, or when passing vehicles. After 10 years, Meghan explained that she developed coping mechanisms, coping skills, and breathing techniques to help with the anxiety. She described it "as akin to grief. It's not "better" but you learn to live with it and handle it". At times, Meghan takes Clonazepam to calm her anxiety before going for a drive in a vehicle, given her PTSD.

143. Dr. Pakzad described generalized anxiety disorder as a worry that is always present and which affects the entire body; it manifests physically and psychologically. Dr. Pakzad explained that 90% of the population will experience an episode of depression, however it doesn't mean they will develop major depressive disorder. Most of the time, depression manifests as feelings of disappointment and sadness, feelings of guilt, and dysregulation of sleep and appetite. Anxiety can be at the root of depression. Having anxiety for long periods of time can lead to feelings of hopelessness and helplessness.

144. Meghan described a constant struggle with anxiety since the accident. When in a vehicle, the situation is worse; she plays out the accident in her head and has panic attacks. Her anxiety is starting to settle now but she has had to train herself. Meghan explained that her fear of being in vehicles was pre-existing; as a teenager, she was always nervous. She never obtained a driver's licence as it did not interest her and conveniently, she had access to drives when going places.
145. Dr. Pakzad stated that Meghan was already vulnerable and that the pain of the accident had made everything worse. Dr. Pakzad posited that the accident led Meghan to lose control of her life. According to Dr. Pakzad, Meghan's physical pain and physical limitations are affecting her anxiety and depression. Dr. Pakzad provided Meghan with some psychotherapy tools to assist her in handling her pain. Dr. Pakzad noted that Meghan's anxiety increased significantly because of the pain which she associates with the accident.
146. The Court agrees with Dr. Pakzad, the accident altered the trajectory of Meghan's life, however, the accident did not cause Meghan's difficulties while attending school; there were pre-existing learning disabilities which would inevitably have caused Meghan's educational difficulties.
147. Dr. Pakzad observed Meghan's physical limitations on several occasions – walking with a cane, facial expressions exhibiting pain, crying, shaking, and becoming tired and irritable. At times, Meghan could not tolerate the pain from sitting during their sessions – when this happened, Dr. Pakzad would accommodate Meghan or stop the therapy session. Dr. Pakzad explained that Meghan's PTSD and generalized anxiety disorder manifested in anxiety and panic attacks in vehicles, nightmares, and being significantly distraught when recounting the details of the accident.
148. Both Dr. Pakzad and Dr. Tahir suggest the anxiety Meghan experienced prior to the accident was easier to address than the serious anxiety she's faced after the accident. It was more difficult to calm Meghan's anxiety after the accident. Dr. Tahir suggested this was the reason Meghan turned to cannabis.
149. In March of 2016, Dr. Pakzad prepared a report in which she noted that Meghan was not psychologically or emotionally fit for gainful employment because of the impact of her physical limitations and the direct impact on her mood.
150. Dr. Tahir confirmed that the PTSD and pain symptoms arose after the accident.

151. Dr. Tahir met with Meghan a few months after the accident. Dr. Tahir recalls this meeting with Meghan and her mother. Dr. Tahir stated that Meghan had difficulty speaking about the accident and was very distraught. This was different from her previous demeanour; Meghan was in a state of panic and fear associated with her PTSD.
152. After that meeting, Dr. Tahir continued to meet with Meghan every few months.
153. In the fall of 2016, Meghan was still struggling with anxiety, pain, and PTSD. Meghan was also struggling with panic attacks. In November of 2016, Meghan emailed Dr. Tahir and suggested she needed help because she had pain all over.
154. About six months later, Dr. Tahir met with Meghan again. Meghan was struggling with depression and was still quite anxious. Meghan started dealing with chronic pain which she associated with the injuries from the accident. Dr. Tahir prescribed a new combination of medication to address the PTSD, the chronic pain, and the anxiety issues. In November of 2016, Meghan's PTSD was increasing her pain which then increased her anxiety. Meghan wanted an increase in pain medication, but Dr. Tahir was concerned that the medication had been used to its limits.
155. In January of 2017, Meghan was doing better; she started using medical cannabis and had a good disposition.
156. In August of 2017, Meghan was dealing with some anxiety due to increased pain. Meghan ran out of cannabis and was struggling. However, her mental health seemed to be faring well at this time.
157. In February of 2018, Meghan was walking with a cane and using medical cannabis with no other pain medication.
158. Dr. Baker, a psychologist, conducted a neuropsychological and neuropsychic-vocational assessment on Meghan on January 14, 2020. Her prognosis, according to Dr. Baker, is as follows:

Prognosis: Ms. Trainor had a number of pre-existing diagnoses. However, it appears that in the months before the MVC she had made substantial gains and was functioning better than she had been in the previous 2 years. Just prior to the MVC, Ms. Trainor was working, her mood was good, her relationships were positive and she was reportedly functioning well. Post-MVC, it appears that Ms. Trainor experienced increased stressors and obstacles including PTSD, chronic pain, increased symptoms of depression and anxiety, increased cognitive problems, inability to return to work, reduced recreational activities, and impacted social relationships.

Each of these factors can contribute to decreased quality of life. Although Ms. Trainor was provided with numerous therapeutic and pharmacological interventions post-MVC, and there has been some improvement with time, many symptoms have persisted.

In my opinion, it is likely that the 2014 MVC triggered the onset or exacerbation of physical, emotional, sleep and cognitive symptoms. Ms. Trainor had some challenges pre-MVC, however, as a consequence of the 2014 MVC she became more vulnerable and less capable of coping with additional stressors. Since the time of the MVC there does not appear to have been an opportunity for Ms. Trainor's symptoms to fully resolve.

Ms. Trainor continues to experience physical, emotional, sleep and cognitive symptoms, which are causing ongoing functional impairment occupationally, socially and recreationally. Given that it has been over 5 years since the MVC we are guarded with respect to prognosis. It is likely that Ms. Trainor will not experience significant additional improvement in symptoms.

159. Dr. Pakzad reviewed Dr. Baker's assessment and agreed with Dr. Baker's inquiries and diagnosis. Dr. Tahir also agreed with Dr. Baker's recommendations.
160. Dr. Power shared that a number of her patients were living with chronic pain and observed that chronic pain can have an impact on their anxiety and nervous dispositions. Someone with "less refined coping skills" would probably be impacted more significantly by chronic pain. Similarly, having a learning disability can also play a role but it is highly individualized.
161. Meghan was seeing Dr. Tahir every six weeks while she was seeing Dr. Pakzad as needed, situationally, as things arose.
162. Dr. Tahir suggests that, even now, Meghan does not have basic living skills despite being mentally better. Dr. Tahir believes Meghan could take a course, with the assistance of occupational therapy, to improve her daily living and employment skills.
163. Meghan's PTSD is still present but her mental and cognitive aspects have come a long way. Dr. Tahir noted that Meghan's PTSD is now in the range of mild to moderate level. The physical limitations seem to trigger Meghan's PTSD which in turn triggers her anxiety. While Meghan is much better mentally, Dr. Tahir suggests that she is not the same person she was prior to the accident.
164. Meghan claims that her depression has become more challenging because of her current situation and pain level. The situation requires a lot of Meghan's energy and it is getting worse as all she can think about is the pain. It is taking its toll on her emotionally.

165. Dr. Pakzad both noted that there were no changes in the diagnosis of borderline personality disorder after the accident.

Medication and Cannabis

166. Shortly after the accident, Dr. Tahir prescribed Cymbalta and Lyrica to address the chronic pain exacerbating Meghan's depression. In addition, Dr. Tahir prescribed Clonazepam and Abilify to address Meghan's anxiety.

167. In January of 2016, Meghan had increased her cannabis consumption. Dr. Tahir was looking to wean Meghan off the Lyrica and put her on synthetic CBD called Nabilone. Meghan did not benefit from the Nabilone and was referred to the Trauma Healing Center in March of 2016 for a cannabis prescription. Dr. Tahir was concerned with the high THC content in "street cannabis" rather than "medically prescribed cannabis".

168. Megan was prescribed cannabis to alleviate her pain (prior to the October 17, 2018, legislative changes). At the time, she was prescribed 120 grams of medical cannabis per month. Prior to the accident, Meghan claims she would only consume cannabis on a recreational basis.

169. Meghan prefers to use cannabis to Advil, given the risk of ulcers. Further, she prefers to take cannabis rather than opioids or narcotics as she fears becoming addicted.

170. According to Meghan, her doctors, Dr. Tahir and Dr. Pakzad, do not like that she consumes cannabis due to its effects on the brain but suggests it is the lesser of two evils. Neither doctor advised Meghan to use cannabis and, more importantly, neither prescribed cannabis to address Meghan's symptoms. Dr. Pakzad stated that some patients use cannabis for anxiety, depression, and pain; in Meghan's case, she used it for pain.

171. On February 8, 2017, an insurance company representative met with Dr. Ghassemi Kakroodi and asked questions with respect to cannabis, chronic pain, and activity. Notably, Dr. Ghassemi Kakroodi noted that she had referred Meghan to Dr. Burry at the Trauma Healing Center in the event a cannabis prescription could be of more assistance than narcotics, which Meghan was weaning off. Meghan did better, mood wise, and saw a positive effect from using medical cannabis, however, Dr. Ghassemi Kakroodi noted that she had not performed any follow up and that Meghan was supposed to see Dr. Burry with respect to her cannabis consumption. Dr. Burry had left Dr. Power's family medicine practice and started working at the Trauma Healing Center.

172. Dr. Burry did not testify at trial. Aside from the original prescription in October of 2018, there is no indication that Meghan's continued use of cannabis was advised or prescribed.
173. Dr. Power was unable to confirm the reason for Meghan's use of cannabis, whether it be for pain, mental health, or for other reasons.
174. Dr. Power noted that Dr. Ghassemi Kakroodi seemed to be in favour of the long-term use of cannabis, but Dr. Power was unable to comment on Dr. Ghassemi Kakroodi's views. Dr. Power noted that she does not prescribe cannabis in her practice despite patients consuming it with her knowledge.
175. Meghan vapes cannabis two to three times a day from 30 minutes to one hour for pain relief. Meghan claims the cannabis allows her to tolerate the pain and calms her muscles and body. Meghan uses the cannabis to address her generalized chronic pain.
176. Since the legalisation of cannabis consumption, Meghan has purchased her cannabis at the Cannabis NB store. Meghan stated she gets "what she needs" as her cannabis consumption is not monitored. Meghan consumes various forms of cannabis. She believes she is consuming less cannabis now, however, this is difficult to objectively verify. According to Meghan and Jane, Meghan's cannabis consumption is limited by Meghan's financial means.

Disability Tax Credit

177. A second application for a Disability Tax Credit was prepared in 2020 based on Meghan's borderline personality disorder and her physical limitations and struggles with chronic pain. Jane explained that at first, in early 2014, prior to the accident, the application had been submitted as she was helping Meghan manage her money and make good decisions. The second application in 2020 was based on Meghan's chronic pain.

Employment

178. Chuck Teed, former manager of InterAction School of Performing Arts (now a teacher), testified at the hearing. He explained that the school was a private facility operating evenings and weekends. The school offers theatre and voice instruction to students from 3 to 18 years old. In 2017, one of the school's main instructors was going on leave when Mr. Teed met Meghan at a wedding (she was singing at) and offered her the job.

179. The job offered to Meghan consisted of an after-school program and a Saturday program for young children (three to seven years old). Part of Meghan's responsibilities involved leading groups of children through warmups and theatre exercises in a large space. The lessons involved groups with approximately 30 children.
180. Meghan explained the hours were from 3 pm to 8:30 pm five days per week and a few hours on Saturday mornings. Mr. Teed on the other hand explained that the job started with limited hours (10 to 15 hours per week at \$26 per hour) but it was expected that Meghan would be able to pick up contracts for one-on-one sessions and find other opportunities within the organization. According to Mr. Teed, Meghan did not take advantage of the available opportunities while she was working there; she did not grow her clientele or work beyond her assigned hours.
181. During this time, Meghan resided in Saint John and walked three blocks to the school for work. At the time, Meghan was waiting for surgery, a femoral derotational osteotomy on her right leg, and was in a lot of pain.
182. Jane explained that Meghan liked the job in Saint John but found it difficult to walk to work and it was difficult for her physically. She does not recall discussions about Meghan returning to do that job as it was a struggle for her.
183. Mr. Teed explained that Meghan struggled the entire time she worked at InterAction School of Performing Arts. She appeared to be in pain regularly and tired easily. At times, Mr. Teed witnessed Meghan sitting during class and once even noticed her lying on a bench. Mr. Teed would have to replace Meghan approximately once a week as she would be too sick to attend work during the two and a half months she worked with them.
184. Meghan left this employment to have the femoral derotational osteotomy performed on her right leg. Meghan did not return to work in Saint John due to the leg pain and generalised pain that followed her right leg femoral derotational osteotomy.
185. Since working for InterAction School of Performing Arts, Meghan has not pursued other employment and could not follow through with further employment opportunities. Meghan claims her inability to pursue employment opportunities is linked to her generalized chronic pain.
186. Meghan claims to be horizontal for 90% of the day and has learning disabilities which would prevent her from counting cash. Further, Meghan is concerned that most employers would not allow her to vape or be under the influence of cannabis while at work.

187. Meghan advised Dr. Kerr that her dream job would be to work in a flower shop, however such a job would require her to be on her feet all day.

Social and Daily Routine

188. After the accident, Meghan would spend a lot of time in bed and off her feet. She did not have a particular routine. She would, at times, spend time with a boyfriend or playing music.

189. Since the Covid-19 pandemic ended, Meghan has very high social anxiety. Meghan needs to prepare all day when going out, wearing her orthotic and resting all day.

190. Her favorite activity is to go to jazz night with friends. Meghan had a brief romantic relationship in 2019 which was short lived.

191. In her circle of friends, Meghan claims to be the disabled one. She cannot walk for extended periods, needs to get rides or take cabs, and generally cannot keep up with her friends.

192. Meghan claims that during the Covid-19 pandemic she stayed in for the most part given her mother's nervousness surrounding Covid.

193. Meghan described a typical day as waking up and going downstairs around 11 am (at times she wakes up at 5 am). Meghan explained that her sleep is disturbed as she wakes up every 40 minutes to one hour. Meghan gets up and makes herself coffee, watches TV, goes to the garage to vape cannabis and goes back to bed around 11 am to 12 pm. She takes long naps during the day and often feels tired. At night, before bed, Meghan uses a cannabis spray to assist with sleep.

194. Jane confirmed that Meghan gets up and vapes after taking her morning coffee. At times, she will have breakfast, go back for a nap, and vape some more. Every day she takes a bath in Epson salts and exposes her face to a UV light to help with depression. Jane also confirmed that Meghan uses a heating pad in bed 24/7. According to Meghan, Epson salt baths make her pain 3% better while cannabis makes her pain 5% better.

195. Jane confirmed that Meghan does not exercise save and except for the occasional walk around the block. Occasionally, Meghan will go to jazz night. Jane has observed that if Meghan walks too much, she pays for it the next day.

196. Meghan described the feeling of having wasted 10 years of her life. She spent the first decade of her adult life in her family home and finds it hard that she cannot grow into the adult she is supposed to be.

197. Meghan claims that if it had not been for the accident, she would have her own place, have a partner, freedom, and happiness. Meghan confirmed that generalized chronic pain is the reason she is not living the life she imagined for herself.

Other Accidents

Did the two other accidents occurring in 2016 break the causal link between the first accident and the injuries?

198. After the 2014 car accident, which is the subject of this action, Meghan was involved in two other car accidents.

199. In the second accident, in June of 2016, the vehicle in which she was a passenger was rear ended. Meghan was in the rear seat on the passenger side. Meghan hit her head on the head rest in front of her and on the head rest behind her. She experienced some pain in her neck and head and went to the hospital for an assessment. The emergency room report notes “MVC whiplash injury” as a provisional diagnosis.

200. The day following the second car accident Meghan once again visited the hospital with complaints of headaches. On that date, the emergency room report notes “concussion” as the provisional diagnosis.

201. As noted by Dr. Power, provisional assessments contained in emergency room reports are best guesses based on a first assessment. Dr. Power confirmed, from her review of Meghan’s medical file, that following the emergency room visits on the day of the second car accident and the following day, nothing further came from the second car accident.

202. Meghan experienced pain for a couple of weeks but experienced no effects on her hips, legs or back. Meghan’s PTSD was triggered in the second car accident and claims it “didn’t help” with the existing PTSD.

203. In July of 2016, Meghan was in a third car accident which occurred a month or so after the second one. The third car accident was minor in nature; as Meghan describes, it was more of a fender bender. Meghan was not injured in this accident. While Meghan’s PTSD was triggered in the third car accident, Meghan does not believe the PTSD worsened.

204. There are no objective indications that Meghan’s PTSD was exacerbated by the two subsequent motor vehicle accidents. While the TMD and the chronic pain arose in Meghan’s medical records after the other accidents, the description of the accidents and the scope of

the injuries documented at the time are insufficient to conclude they would have triggered or contributed to the TMD or chronic pain.

Expert Opinions

Dr. Erica Baker

205. Dr. Baker provided expert evidence with respect to clinical psychology specializing in neuropsychology. As part of her practice, Dr. Baker focuses on neuropsychological assessments which examine brain functioning; it is an objective, standardised assessment of cognitive ability. More specifically, Dr. Baker assesses physical, cognitive, and emotional functioning and their impact on brain function.

206. In the context of her assessment, Dr. Baker examined Meghan's psychological and physical history. Dr. Baker interviewed Meghan and her mother to hear their point of view and compared it with the documentary record.

207. During the interview, Dr. Baker observed that Meghan seemed uncomfortable while seated.

208. Dr. Baker measures truthfulness and the effort of the patient through five different measures of effort. She categorized this assessment as very important in a neuropsychological assessment. In this case, based on the results, Dr. Baker had no reason to doubt the information Meghan provided or her performance.

209. In reviewing Meghan's psychoeducational assessment, Dr. Baker explained that in Meghan's case her working memory and processing speed were pulling down her performance scores due to the dyslexia and dyscalculia. The pragmatic effect of these issues is that Meghan had difficulty dealing with finances.

210. Dr. Baker is familiar with the Disability Tax Credit application for learning disabilities where persons are struggling with some aspects of daily life, requiring assistance. In addition, Dr. Baker also sees these types of applications after MVAs for cognitive and physical limitations. According to Dr. Baker, there are various forms of the Disability Tax Credit.

211. Prior to a neuropsychological assessment, a questionnaire is completed by the patient to help assess current problematic areas. The only information Dr. Baker did not obtain was the date of the onset of issues.

212. Dr. Baker administered close to 15 tests focussing on academics.

213. Dr. Baker examined Meghan's ranking vis-à-vis the general population of a similar age for her cognitive functioning. The areas examined included verbal comprehension (70th percentile), perceptual reasoning (8th percentile), working memory (9th percentile), and processing speed index (4th percentile). In terms of comparison with Meghan's 2009 psycho-educational assessment, Dr. Baker noted the results were generally consistent except for the perceptual reasoning. In 2009, Meghan's perceptual reasoning was measured on a child scale versus on an adult scale in 2020, which consequently could show a decline since 2009.
214. Dr. Baker agreed that Meghan's employment at Peoples Park Tower was likely a great fit for Meghan given her strengths and struggles.
215. In terms of executive functioning and attention, there would have been no testing in the 2009 psycho-educational assessment and therefore no comparison can be made. According to Dr. Baker, PTSD and pain can exacerbate issues with executive functions.
216. In terms of psychosocial functioning, Dr. Baker relied upon Dr. Pakzad and Dr. Tahir, Meghan's treating physicians. Dr. Baker confirmed Meghan was dealing with major depressive symptoms, extreme anxiety, and borderline personality disorder. Dr. Baker relied upon the other medical professionals to outline Meghan's pre and post accident conditions.
217. Dr. Baker concludes that Meghan, because of the accident, performed more poorly in perceptual reasoning and executive functioning. Dr. Baker suggests this was attributable to the PTSD and pain.
218. Dr. Baker concluded that while Meghan had some pre-existing diagnoses, the accident triggered and exacerbated physical, emotional, sleep, and cognitive symptoms.

In my opinion, it is likely that the 2014 MVC triggered the onset or exacerbation of physical, emotional, sleep and cognitive symptoms. Ms. Trainor had some challenges pre-MVC, however, as a consequence of the 2014 MVC she became more vulnerable and less capable of coping with additional stressors. Since the time of the MVC there does not appear to have been an opportunity for Ms. Trainor's symptoms to fully resolve.

Ms. Trainor continues to experience physical, emotional, sleep and cognitive symptoms, which are causing ongoing functional impairment occupationally, socially and recreationally. Given that it has been over 5 years since the MVC we are guarded with respect to prognosis. It is likely that Ms. Trainor will not experience significant additional improvement in symptoms.

219. Dr. Baker opined that Meghan's preexisting psychological diagnoses made her more vulnerable to the perception of pain and affected her ability to manage pain. Meghan's

depression, anxiety and borderline personality disorder were an important contributor to Meghan's experience of pain.

In summary, Ms. Trainor had pre-existing psychological conditions that pre-MVC were reasonably well managed. These pre-dispositions likely put her at higher risk for experiencing acute pain that would transition to a chronic pain condition post-MVC. The MVC resulted in the onset of pain and PTSD which caused stress that activated and exacerbated her pre-existing semidormant characteristics resulting in diagnosable psychopathology, and increasing functional deficits including physical difficulties, poor coping skills and kinesiphobia (fear of pain due to movement). Ms. Trainor's predispositional vulnerabilities along with biological, psychological and social factors have acted together making her conditions particularly difficult to manage.

220. In terms of treatment, Dr. Baker suggests the following treatments for Meghan:

- An interdisciplinary team of professionals for treatment in various fields but working together.
- Ongoing psychiatric and psychological treatment. Ongoing use of cannabis, if beneficial, provided it is monitored by Dr. Burry and the Trauma Healing Center.
- Occupational therapy is recommended to improve cognitive and academic skills.
- Engaging in physical activity under the guidance of health care professionals.
- Referral to a sleep specialist to address continued sleep difficulties.

221. Dr. Baker did specify that the use of cannabis to address pain may improve cognitive function and executive functioning. Dr. Baker did specify that some studies have also found that the prolonged use of cannabis can affect executive functioning over the long term.

222. In terms of re-entering the workforce, Dr. Baker did opine that without post-secondary training, Meghan will struggle to find employment. Many of the employment opportunities available to Meghan, with the training and transferable skills she has, are physical in nature.

223. In terms of post-secondary educational opportunities, Dr. Baker suggests it is possible that Meghan could attend community college with significant supports in place and some accommodations.

224. In terms of the impact of the accident, Dr. Baker opined that “but for” the accident, Meghan would be working and would have been living independently with continued support from Dr. Pakzad and Dr. Tahir. While this may be Dr. Baker’s medical conclusion, it remains that the Court will assess causation from a legal standpoint.
225. Dr. Baker acknowledged that with respect to voice lessons, it would have been difficult for Meghan to find clients and plan lessons, given her cognitive limitations.
226. Dr. Baker opined that Meghan would benefit from assistance in managing any funds awarded by the Court given her concerns with Meghan’s impulsivity, planning, and mathematical skills.
227. Dr. Baker presented a very detailed report in which she was able to speak with ease and which provided ample supporting information. Dr. Baker provided testimony within her area of expertise and her conclusions from a medical standpoint are sound. It remains that the Court needs to assess causation through the lens of the applicable legal tests.

Dr. Darren Kerr

228. Dr. Kerr provided expert evidence with respect to orthopedic surgery and arthroplasty. Dr. Kerr has not performed surgery in the field of femoral anteversion and has not been exposed to these types of cases.
229. Dr. Kerr performed an independent medical evaluation of Meghan in July of 2022. Dr. Kerr met with Meghan in his Saint John office. Dr. Kerr examined her current symptoms and previous treatments.
230. Dr. Kerr learned of Meghan’s femoral anteversion in both legs. First, the surgery on the left leg in July of 2011, and the operation on the right leg in July of 2017. Both surgeries produced successful results. In August of 2018, Meghan had pins removed from her right leg which were bothering her.
231. According to Dr. Kerr there was no link between the surgeries on the right leg and the accident.
232. In terms of the accident, Dr. Kerr observed that Meghan underwent a minor foot injury (the fracture of the heel bone with fragments in her joints). Dr. Kerr agrees that the walking boot, used for several weeks or months, was the appropriate treatment at the time. Unfortunately for Meghan, she did not become asymptomatic as might be expected. After an X-ray, it was determined that a surgery on Meghan’s right heel was required. Dr. Kerr agrees that the

indication of improvement was realistic. Objectively, Dr. Kerr noted Meghan's foot was a little thicker which caused Meghan some subjective perception of discomfort.

233. Dr. Kerr does not believe the surgeries were necessary but defers to the patient and doctor discussions that would have taken place at the time. Dr. Kerr acknowledges it is possible the surgery on the right leg may not have been needed.

234. Dr. Kerr refrained from commenting on the psychological impacts of the accident. In her meeting with Dr. Kerr, Meghan was also complaining of fibromyalgia, stating that her body felt bruised and that her skin burned.

235. Dr. Kerr noted his concern with the appearance of symptoms two years after the accident and opined that these symptoms could not be medically causally related to the accident (except as it relates to conditions arising from the heel fracture).

236. Dr. Kerr opined that the pain identified in the foot was linked to the accident. Dr. Kerr does not believe the fibromyalgia or pain in Meghan's legs and back were related to the accident unless there was some psychological component to which he could not speak. In his opinion, there was no causal link between these symptoms and the accident.

237. Dr. Kerr opined that, up to a year after the operation on her heel, Meghan would have been expected to be able to walk a few hundred meters and be able to sit for extended periods of time.

238. With respect to medical cannabis, Dr. Kerr accepts that it can be useful in certain cancer diagnoses. However, Dr. Kerr is not currently aware of any reasons to issue medical cannabis in orthopedic situations. Dr. Kerr would be concerned about a contraindication of medical cannabis for patients with mental health issues. That said, Dr. Kerr deferred to the treating psychologist or psychotherapist as persons more capable of speaking to this issue.

239. With respect to the ability to complete home tasks, Dr. Kerr is unaware of any reason for Meghan's inability to perform those tasks.

240. Dr. Kerr did acknowledge that Meghan's foot may bother her in the future, suggesting there could be some osteoarthritis in her foot moving forward. Dr. Kerr agreed with Dr. Allanach that a requirement for another surgery in the future is possible.

241. Dr. Kerr does not see a link between the injury and the chronic pain that Meghan is dealing with. Dr. Kerr states he is not an expert in chronic pain, however he does agree that a person experiencing unidentifiable pain for years can constitute chronic pain.

242. In coming to his opinion, Dr. Kerr reviewed several documents in 2022. Dr. Kerr did not review the extensive evidence from the mental health field to which he defers. He agrees with Dr. Tahir that mental health problems are challenging in the face of chronic pain.
243. Dr. Kerr believes bipolar disorder and fibromyalgia were important to mention as they appeared in the documentation provided to him for review. Dr. Kerr suggests it is important to consider all the information on a patient – to paint a more accurate and broader picture of the situation. Dr. Kerr did suggest a psychiatric evaluation would be helpful to qualify Meghan’s health status.
244. Dr. Kerr acknowledged that all patients respond to surgery differently depending, in part, on their psychological makeup.
245. Dr. Kerr acknowledged that Dr. Allanach had performed more derotational osteotomies and was more learned in the field. Nonetheless, Dr. Kerr relied on medical principles in his field of work and provided direct answers and understandable information. On many of the medical points discussed, Dr. Kerr and Dr. Allanach agreed. During examination and cross-examination, on a few occasions, Dr. Kerr answered the questions of counsel and nuanced his answers, noting that some points may be outside of his expertise in orthopedic surgery; he was very clear about the limits of his expertise. For these reasons, the Court finds Dr. Kerr’s testimony, as it dealt with orthopedic surgery, credible and reliable.

Adverse Inference

Should the Court draw an adverse inference from the absence of testimony from Dr. Brunet, Dr. Dumais and Dr. Burry?

246. Meghan’s counsel requests that the Court draw an adverse inference from DeArcos’s failure to call Dr. Brunet as an expert witness. Dr. Brunet, a psychiatrist, conducted a psychiatric assessment of Meghan at the request of DeArcos. Counsel for DeArcos advised that Dr. Brunet did not produce a report due to “personal and family issues”. DeArcos acknowledges that no report was received, noting that in accordance with Rule 36.07 of the *New Brunswick Rules of Court*, a copy of Dr. Brunet’s report would have been provided to Meghan’s counsel if such a report had been prepared or received.
247. The general rule and the rationale regarding adverse inferences was summarised by the New Brunswick Court of Appeal in *Doiron v Haché*, 2005 NBCA 75 at paragraphs 106 to 110. An adverse inference may be drawn against a party that fails to call a witness with evidence

material to the case. However, an adverse inference is not automatic and results from an exercise in judicial discretion depending on the specific circumstances of the case.

248. As noted in cases referred to by Meghan's counsel, the Court may consider a number of factors in determining whether to draw an adverse inference (*Singh v Reddy*, 2019 BCCA 79 paras 8 to 11 and *Buksh v Miles*, 2008 BCCA 318 paras 28 to 35):

- Whether there is a legitimate explanation for failing to call the witness;
- Whether the witness is within the exclusive control of the party or is equally available to both parties; and
- Whether the witness has key evidence to provide or is the best person to provide the evidence in question.

249. In this case, based on the information provided by both counsel, there is no reason to believe, and no reasonably reliable evidence was submitted, to suggest Dr. Brunet's failure to produce an expert report and DeArcos's decision not to call Dr. Brunet as a witness, was based on anything more than the "personal and family issues" cited. In the Court's assessment, this constitutes a legitimate explanation for failing to call a witness and as such there is a basis for refusing to draw an adverse inference.

250. In addition, the Court, as it did in *Doiron v Haché*, considered whether the witness was in the exclusive control of one party or equally available to be called as a witness by both parties. The Court finds that Dr. Brunet was not in the exclusive control of DeArcos; Meghan's counsel could have called Dr. Brunet as a witness but chose not to.

251. In the case at hand, the Court declines to draw an adverse inference from DeArcos's failure to call Dr. Brunet as an expert witness.

252. Additionally, the Court is left with some questions with respect to the absence of Dr. Richard Dumais and Dr. Andrea Burry and draws an adverse inference from their absence.

253. Meghan was referred to the pain clinic with Dr. Dumais but, as she describes it, "was not accepted into the program" as there was nothing further that could be done for her. The lack of further information with respect to this conclusion leaves the Court with more questions than answers as it relates to Meghan's pain.

254. Meghan was prescribed medical cannabis by Dr. Burry, however aside from the initial prescription, the Court has little information on the medical basis for this continued prescription and consumption. Again, this leaves the Court with several questions.

Legal Principles

255. In this negligence action, DeArcos acknowledged liability for the accident but disputes causation and damages.

Causation in Fact

256. Meghan bears the onus of proving on a balance of probabilities that the accident caused or contributed to the injuries for which she seeks compensation. The evidence must establish in fact and in law that the accident caused the injuries.

257. The causation analysis was explained by the Supreme Court of Canada in *Nelson (City) v Marchi*, 2021 SCC 41. First, the accident must be the cause of Meghan's injuries (causation in fact) and second, Meghan's injuries must be a reasonably foreseeable consequence of the accident (causation in law).

[96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). **First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test** (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

[97] **Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote** (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). **The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct** (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). **Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury** (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[Emphasis added]

258. Justice LeBlond summarised the test for causation in *Edmondson et. al. v Edmondson et. al.*, 2022 NBCA 4 at paragraphs 68 to 70.

[68] I therefore turn to the fourth element: causation-in-fact. It is, of course, trite law to state that, at a minimum, the defendant's conduct must cause some of the plaintiff's loss; otherwise, there is no liability regardless of how negligent the conduct may have been. However, causation-in-fact is not to be confused with proximate cause, often referred to as causation-at-law. That notion deals with the extent of the defendant's liability and engages the legal doctrine of remoteness. Again, that is the fifth element noted above, which I discuss in the next section of these reasons.

[69] The classic test for determining causation-in-fact is the "but for" test established by the Supreme Court in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102 (QL). It posits that, but for the defendant's breach of his standard of care, would the plaintiff have suffered some injury?

[70] If the harm would have resulted regardless of the defendant's negligence, the latter cannot be said to be a cause of the loss. In other words, the defendant's negligence must have made a difference in order for liability to flow from it.

[Emphasis added]

259. To determine whether the accident is the cause of Meghan's injuries (causation in fact), "[t]he 'but for' causation test must be applied in a robust common-sense fashion" (*Clements v Clements*, 2012 SCC 32, para 9).

Causation in Law

260. To determine whether Meghan's injuries were a reasonably foreseeable consequence of the accident (causation in law), the Court must determine if the injuries are too remote to warrant recovery. In *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, the Supreme Court of Canada examined the legal principles underlying this determination in a case involving mental injury.

12 The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).

13 Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful

standard for the application of reasonable foreseeability. **The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.* (1966), [1967] 1 A.C. 617 (P.C.), at p. 643).**

14 The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. **One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."**

15 As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in *Vanek*, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

16 To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability

"is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

17. I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha's particular sensibilities.

18. It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan's negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do. The only evidence was about his own reactions, which were described by the medical experts as "highly unusual" and "very individual" (C.A. judgment, at para. 52). There is no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle; indeed the expert witnesses were not asked this question. Instead of asking whether it was foreseeable that the defendant's conduct would have injured a person of ordinary fortitude, the trial judge applied a subjective standard, taking into account Mr. Mustapha's "previous history" and "particular circumstances" (para. 227), including a number of "cultural factors" such as his unusual concern over cleanliness, and the health and well-being of his family. This was an error. Mr. Mustapha having failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury, it follows that his claim must fail.

[Emphasis added]

261. In *Mustapha v Culligan of Canada Ltd.*, at paragraph 16, the Supreme Court of Canada addressed the necessity of balancing the interests of the plaintiff and the defendant, noting that the role of negligence law is not that of "an insurer". The test, as it relates to compensation for psychiatric injury following the *Mustapha v Culligan of Canada Ltd.* decision, is whether it was reasonably foreseeable that the conduct would result in injury to a person of "ordinary fortitude".

Negligence and Mental Injury

262. More recently, in *Saadati v Moorhead*, 2017 SCC 28, the Supreme Court of Canada brought a fresh approach and reframed the negligence analysis, particularly as it concerns mental

injury. While the *Saadati v Moorhead* decision dealt more specifically with removing the necessity of expert evidence of a psychiatric illness to recover damages for mental injury in a negligence action, the Supreme Court of Canada reiterated the safeguards in place to ensure unmeritorious claims of mental injury do not proceed to indemnification.

13. Liability in negligence law is conditioned upon the claimant showing (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach (*Mustapha*, at para. 3). At issue here is the third element. As they argued at the Court of Appeal, the respondents say that the trial judge erred by awarding damages for mental injury that did not correspond to a proven, recognized psychiatric illness. More specifically, the Court must answer the narrow question of whether it is strictly *necessary*, in order to support a finding of legally compensable mental injury, for a claimant to adduce expert evidence or other proof of a recognized psychiatric illness.

[...]

21. It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury.
[...]

[Emphasis added]

263. One of the safeguards referenced in the *Saadati v Moorhead* decision of the Supreme Court of Canada was the robust approach proposed in its decision of *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, where the Court concluded that the mental injury in question was not caused in law by the defendant's negligence.

19 [...] in *Mustapha*, recoverability of mental injury was viewed (at para. 3) as depending upon the claimant satisfying the criteria applicable to any successful action in negligence — that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true "damage" qualifying as mental injury, which is "serious and prolonged" and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury (*Mustapha*, at para. 9); and **not all mental injury is caused, in fact or in law, by the defendant's negligent conduct.**

20 Indeed, the claim in *Mustapha* failed on that last element: the claimant's damage was not caused in law by (that is, it was too remote from) the defendant's breach. *Mustapha* thus serves as a salutary reminder that, even where a duty of care, a breach, damage and factual causation are established, there remains the pertinent threshold question of legal causation, or remoteness — that is, whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16). And, just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in *Mustapha* was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence.

[Emphasis added]

264. Similarly, the Supreme Court of Canada addressed the assessment of a plaintiff's credibility as a way of analysing the subjective nature of symptoms and any concerns of feigned or exaggerated claims. The Supreme Court of Canada concluded that the Court's assessment of credibility was the mechanism by which concerns about the subjective nature of symptoms could be assessed.

22 Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms (R. Stevens, *Torts and Rights* (2007), at p. 56). **Certainly, concerns about "subjective" symptoms or about feigned or exaggerated claims of mental injury are — like most matters of credibility — questions of fact best entrusted to the good sense of triers of fact, upon whose credibility determinations of liability and even of liberty often rest.** In short, such concerns should be resolved by "a vigorous search for the truth, not the abdication of judicial responsibility" (Linden and Feldthusen, at p. 449; see also *Toronto Railway Co. v. Toms* (1911), 44 S.C.R. 268 (S.C.C.), at p. 276; Stevens, at p. 56).

[Emphasis added]

Analysis

Causation in Fact

Was the accident the cause of Meghan's injuries?

265. From a physical standpoint, the contemporaneous medical evidence supports the conclusion that Meghan, because of the accident, suffered a broken heel bone in her right foot, a bruised chest, and a hairline fracture in her left hand.

266. The broken heel bone led Meghan to walk with crutches for three months and wearing a soft cast boot for some time thereafter. Ultimately, Meghan required surgery in July of 2016 to remove a piece of bone in her heel that was causing her some pain and discomfort. This injury caused Meghan some significant mobility issues for several years. This injury, as suggested by Dr. Allanach and Dr. Kerr, will likely require surgery to fuse Meghan's heel bones in the future.
267. From a psychological standpoint, the contemporaneous medical evidence supports the conclusion that Meghan, because of the accident, suffered from PTSD.
268. Dr. Tahir and Dr. Pakzad both contemporaneously observed that Meghan's PTSD and pain arose very shortly after the accident. The expert in psychiatry and psychology agree that Meghan's PTSD was directly caused by the accident.
269. Additionally, Meghan experienced chronic pain, TMD, and underwent two additional surgeries to her right leg in the years following the accident. In the causation in fact analysis, the Court is satisfied, on a balance of probabilities, that these injuries were sufficiently linked to the accident. These injuries form part of a causal chain sufficient to meet the "but for" test.
270. As noted by the New Brunswick Court of Appeal, to establish causation in fact "[t]he defendant's negligence does not have to be the 'sole' cause of all the harm sustained. It need only be a cause of 'some' of the harm for tort liability to attach (see *Athey; Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 24-25.)" (*Edmondson et al. v Edmondson et al.*, 2022 NBCA 4 at para 71).
271. Based on the foregoing, the Court finds that factual causation has been established with respect to Meghan's injuries, however the question remains as to whether the chronic pain, TMD, and additional surgeries to Meghan's right leg, relating to the femoral derotational osteotomy, were a reasonably foreseeable consequence of the accident and whether they are too remote to warrant recovery.

Causation at Law (also known as Foreseeability, Remoteness or Proximity)

Were Meghan's injuries a reasonably foreseeable consequence of the accident? Were the injuries too remote to warrant recovery?

272. There is no question that Meghan suffered some direct injuries from the accident, notably the physical injuries to her heel, chest, and hand in addition to a psychological injury in the form

of PTSD. These injuries are directly linked and are not too remote to warrant recovery; they were a direct result of the accident.

273. The contentious question is whether the chronic pain, TMD, and additional surgeries on the right leg (excluding the heel surgery) were a reasonably foreseeable consequence of the accident and whether these injuries are too remote to warrant recovery (*Nelson (City) v Marchi*, 2021 SCC 41 at paragraph 97).

274. To state the question differently, was the accident sufficiently related to the injuries Meghan sustained to justify liability? The key concepts to answer this question can be summarised as follows:

- The degree of probability required to satisfy reasonable foreseeability is a “real risk” which would occur to the mind of a reasonable man; it is not too far-fetched (*Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, para 13, *Edmondson et al. v Edmonson et al.*, 2022 NBCA 4 at para 78).
- The assessment, in this context, is an objective assessment looking at a person of “ordinary fortitude” (*Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, para 14).
- “[...] unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.” (*Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, para 15).

275. With respect to the surgeries to perform the right femoral derotational osteotomy and to remove the pins close to the right knee, the evidence does not support a conclusion that they were a foreseeable consequence of the accident and the evidence supports they are too remote to warrant recovery. While the injury to Meghan’s heel and the subsequent surgery to her heel altered her gait, it remains that Dr. Allanach had previously recommended the right femoral derotational osteotomy. Prior to the accident, Dr. Allanach had altered the original surgical plan; a decision was made by Meghan and Dr. Allanach to hold off on the femoral derotational osteotomy to the right leg and to proceed with that surgery only once the right leg started causing Meghan pain. The surgery to the right leg was always on the horizon; the accident and the consequential modification of Meghan’s gait simply moved up an eventual surgery. Dr. Allanach, in his testimony, did not unequivocally state that the surgery would not have taken place “but for” the accident. His testimony on this point was

timid, hesitant, and nuanced by his prior determination that the surgery would have been warranted with time.

276. Additionally, Dr. Kerr opined there was no link between the surgeries on the right leg and the accident, except for the right heel surgery. Dr. Kerr does not believe the surgeries were necessary but acknowledges it is possible the femoral derotational osteotomy on the right leg was pursued to provide Meghan with some potential relief from pain.

277. The evidence of both orthopedic surgeons supports the conclusion that the surgeries on the right leg (the femoral derotational osteotomy and the subsequent removal of pins) were not caused in law by the accident.

278. With respect to the TMD, Dr. Foreman observed that Meghan was grinding her teeth around April of 2016 (over two years after the accident) and noted Meghan's description of pain in her head, neck, and jaw. Dr. Foreman diagnosed TMD which he believes arose when Meghan was grinding her teeth as a result of the chronic pain she was experiencing at the time. By all indications, the root of the TMD, therefore, is the chronic pain Meghan experienced.

279. Turning to the possible sources of chronic pain in Meghan's case, there was much discussion by the medical experts working in various fields. All experts, without exception, addressed the interplay between chronic pain and mental health and addressed the link between chronic pain and Meghan's pre-existing mental health conditions. The key components of the evidence from the medical professionals on the question of chronic pain, which are relevant to the analysis of causation at law, can be summarised as follows:

- Dr. Power explained that chronic pain is defined as pain experienced over several years. Dr. Power agreed that chronic pain and mental health can play off each other, suggesting that at times, mental health problems can make a situation worse. In dealing with several patients who suffer from chronic pain, Dr. Power observed that chronic pain can have an impact on the anxiety and nervous disposition of patients, stating that a person with "less refined coping skills" would probably be impacted more significantly by chronic pain. Similarly, Dr. Power stated that a learning disability can also play a role but that such an assessment would be highly individualized.
- Dr. Allanach outlined his view that Meghan dealt with some pain from the accident, coupled with a psychiatric overlay. Dr. Allanach recommended

surgery on the right heel believing it might alleviate some of Meghan's pain. Approximately six months after the surgery on her heel, Meghan complained of pain in her entire body – back, hips, left thigh, head, neck, and TMD. These were all new symptoms in addition to the pelvic obliquity which was present before the heel surgery. The symptoms experienced by Meghan are not symptoms that Dr. Allanach would have expected to see after the heel surgery. Dr. Allanach stated that he would not have expected such an amplified response to the surgery. Orthopedically, Meghan recovered from a big surgery very well in 2011 but in 2016 she struggled with the heel surgery. Dr. Allanach specified that he does not believe Meghan is dealing with a nerve issue associated with the surgeries as this type of pain would be more localised.

- Dr. Kerr raised concerns with the appearance of symptoms of generalized chronic pain two years after the accident and opined that these symptoms could not be medically and causally related to the accident. Dr. Kerr opined that the pain identified in the right foot is linked to the accident but does not believe the chronic pain, also described as fibromyalgia, in Meghan's legs and back are related to the accident. Dr. Kerr acknowledged that there may be some psychological components that are beyond his expertise. Dr. Kerr opined that up to a year after the operation on her heel, Meghan would have been expected to walk a few hundred meters and sit for an extended period of time.
- Dr. Tahir suggested during his testimony that Meghan's pain was attributable to nerve damage, however there was no factual or medical underpinning for this comment. The comment was not more fully explored by either party.
- Dr. Pakzad stated that Meghan was already vulnerable and that the pain of the accident made everything worse. Dr. Pakzad posited that the accident made Meghan lose control of her life. According to Dr. Pakzad, Meghan's physical pain and physical limitations continue to affect her anxiety and depression, noting that Meghan's anxiety increased significantly because of the pain associated with the accident.

- Dr. Baker acknowledged that Meghan had several pre-existing diagnoses. Dr. Baker concluded that the accident “triggered the onset or exacerbation of physical, emotional, sleep and cognitive symptoms”. Dr. Baker recognized that Meghan had some challenges before the accident but noted that “as a consequence of the 2014 MVC she became more vulnerable and less capable of coping with additional stressors”.
- Dr. Baker opined that Meghan’s pre-existing psychological diagnoses made her more vulnerable to the perception of pain and could affect her ability to manage pain. Meghan’s depression, anxiety, and borderline personality disorder were an important contributor to her experience of pain.

280. From a physiological perspective, both the family doctor and the two orthopedic surgeons could point to no physiological cause for the continuing physical pain and ongoing chronic pain.

281. Most convincing on the point of causation at law was the assessment of Dr. Baker who found that Meghan “had pre-existing psychological conditions that [...] were reasonably well managed” before the accident and “these pre-dispositions likely put her at a higher risk for experiencing acute pain that would transition to a chronic pain condition” after the accident.

282. While Meghan’s pre-existing psychological conditions were well managed at the time of the accident, it is those pre-existing psychological conditions that took the pain from Meghan’s physical injuries, directly sustained in the accident and the psychological PTSD directly sustained in the accident, to an unforeseen level of injury. Localised pain was a foreseeable consequence of the accident as were the injuries sustained, yet the acute reaction in Meghan’s case, which transformed into generalized chronic pain all over her body, close to two years after the accident, was not a foreseeable consequence of the accident or the injuries sustained. While generally chronic pain may be caused at law by an accident such as the one sustained by Meghan, it remains that, in this case, the generalized chronic pain Meghan developed several years after the accident is not a foreseeable consequence of the accident and its resulting injuries. The chronic pain all over Meghan’s body arose years later and cannot be reasonably foreseeably linked to the injuries sustained in the accident.

283. In contrast, the Ontario Superior Court in *Degennaro v Oakville Trafalgar Memorial Hospital*, 2009 CarswellOnt 3882, [2009] OJ No 2780 (confirmed by the Ontario Court of Appeal, 2011

ONCA 319) found, based on the evidence of chronic pain experts, that chronic pain arising immediately after a fall was a foreseeable consequence of a fall sustained by the plaintiff. The Court, in the current case, faces different facts with respect to the timing and nature of the chronic pain and heard no expertise with respect to chronic pain.

284. The Court concludes that Meghan had an acute reaction to localized pain which caused unusual and extreme continued impairment in her ability to function due to pre-existing psychological diagnoses.

285. As such, the chronic pain, TMD, and additional surgeries to Meghan's right leg to address the femoral derotational osteotomy were not a reasonably foreseeable consequence of the accident and are too remote within the causation at law analysis to warrant recovery.

Meghan's Credibility and Mental Health Injuries

Was Meghan's testimony credible in the sense that the Court believes she is suffering from chronic pain?

286. As is common in cases involving chronic pain, DeArcos attacked the credibility of Meghan's complaints of chronic pain in the absence of objective findings to determine the existence and extent of the injury.

287. While Meghan "appeared" functional without exhibiting discomfort when sitting in the witness box for over two days, it remains that the Court has been cautioned on the over reliance on demeanor evidence in assessing credibility (*L.A.J.K. v R.*, 2023 NBCA 71 at paragraphs 18 and 19).

288. As it relates to credibility, the evidence of medical professionals is ample and convincing. Those who treated Meghan in the years before the accident and the years after the accident observed a distinct change in Meghan's disposition. The medical professionals testifying at trial provided observations of objective signs of pain and discomfort in Meghan, which support her allegations of chronic pain. In addition, these observations were bolstered by the observations of Peter and Jane who live with Meghan.

289. The Court sees no reason to doubt that Meghan is afflicted by chronic pain; a pain that stems, at its root, from pre-existing psychiatric conditions and which was not caused at law by the accident.

PART 2 - DAMAGES

290. Meghan seeks compensation in the form of general damages and special damages for the past and future loss of housekeeping capacity, past and future cost of care, loss of medical benefits, past and future loss of earnings and a management fee.

291. DeArcos disputes the scope of damages sought by Meghan.

292. The basic principle for the issuance of damages is that they must place the plaintiff in the position they would have been in “but for” the conduct of the defendant (*Blackwater v Plint*, 2005 SCC 58 paras 78-79 and 81). The assessment of damages considers the original position of a plaintiff, as the defendant need not put the plaintiff in a better position than his original position (*Athey v Leonati*, [1996] 3 SCR 458 at paragraph 32). The information with respect to Meghan’s original pre-accident condition and her current post-accident condition assist in determining the loss and resulting damages to which Meghan is entitled at law.

Crumbling Skull and Thin Skull

In the alternative to the Court’s determination that Meghan’s chronic pain, TMD, and additional surgeries related to the right leg femoral derotational osteotomy were not caused at law by the accident, are these injuries the result of the doctrine of thin skull or the doctrine crumbling skull? If so, what is the impact on the assessment of damages?

293. If the Court erred with respect to its analysis on causation at law, it remains that the doctrine of crumbling skull comes into play in determining the damages to which Meghan is entitled because of the accident.

294. As mentioned in the causation at law portion of this decision, reasonable foreseeability of mental injury is a necessary threshold for liability. The Supreme Court of Canada has distinguished causation at law from the concepts of thin skull (or eggshell skull) and crumbling skull which are concepts applicable to the assessment of damages (*Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27 at para. 16)

[16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a

person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

295. The doctrines of thin skull and crumbling skull and their impact on damages was discussed by the Supreme Court of Canada in *Athey v Leonati*, [1996] 3 SCR 458 at paragraphs 34 and 35. In summary, the thin skull doctrine makes the defendant liable for the plaintiff's injuries even if the injuries are more severe than expected due to an existing, but stable, condition. The defendant takes the plaintiff as they find them, with their weaknesses and predispositions, and he is liable even if the plaintiff's losses are more dramatic than they would be for the average person. The crumbling skull doctrine deals with a plaintiff that has an unstable pre-existing condition. The defendant need not compensate the plaintiff for the effects of their pre-existing condition, which they would have experienced in any event, even without the defendant's conduct. The defendant is liable for additional damage, but not the pre-existing damage. Where there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, it can be taken into account in reducing the overall award of damages.

34 [...] The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position *better* than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: [...] **Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award:** [...]. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis added]

296. Chief Justice Drapeau (as he then was) in *Wallace v Thibodeau*, 2008 NBCA 78 at paragraphs 47 to 49 explained the implications of “thin skull” versus “crumbling skull”. In doing so, while referencing the thin skull doctrine, Chief Justice Drapeau specifically referenced the responsibility of a wrongdoer for the “injured claimant’s proximate injuries and losses”, reinforcing the need for the injuries to meet the threshold for liability before turning to the assessment of damages.
297. Meghan was not dealing with weaknesses or predispositions which would have engaged the thin skull doctrine. This is not a case of a latent weakness or susceptibility which did not form an active source or cause the damages.
298. Rather, Meghan was dealing with pre-existing conditions which were triggered and aggravated by the accident, engaging the crumbling skull doctrine. None of the experts pointed to a physiological cause for Meghan’s generalised chronic pain all over her body arising close to two years after the accident; the cause was pre-existing psychological conditions. Dr. Baker described Meghan as having pre-existing psychological conditions which were reasonably well managed but placed her at a greater risk for experiencing acute pain that could transition to chronic pain. The Court concludes that Meghan had an acute reaction to localized pain which caused unusual and extreme continued impairment in her ability to function due to pre-existing psychological conditions.
299. Meghan’s medical history prior to the accident showed the ups and downs occasioned by these psychological conditions – showing some difficulties coping, dropping in and out of school and showing some difficulties in maintaining employment for a sustained period. The Court is satisfied, on a balance of probabilities, that Meghan’s pre-existing mental health conditions would have affected her overall health and employability in the future. The Court is also satisfied that Meghan’s pre-existing femoral anteversion would have affected her overall health in the future; in fact, Dr. Allanach had recommended the femoral derotational osteotomy surgery for Meghan’s right leg prior to the accident.
300. Thus, DeArcos is not liable for portions of damages arising from the chronic pain, TMD, and additional surgeries relating to Meghan’s femoral anteversion.
301. This Court has determined that, from a causation at law perspective, liability for the chronic pain, TMD, and additional surgeries related to Meghan’s right leg femoral derotational osteotomy were not a reasonably foreseeable consequence of the accident, and that alternatively, the crumbling skull doctrine precludes recovery for these elements.

302. The New Brunswick Court of Appeal recently directed that it is not only prudent but the responsibility of the trial judge to provide a provisional assessment of costs (*Young v Dr. Bandyayera*, 2022 NBCA 18 at paragraph 38 and *Algo Enterprises Ltd. v Repap New Brunswick Inc.*, 2016 NBCA 35 at paragraph 50). As such, under each of the damages headings that follow, a provisional assessment of costs is provided in the event the Court erred in its determination of causation at law and, alternatively, the application of the crumbling skull doctrine.

General Damages

What general damages are recoverable by Meghan for the broken heel bone in Meghan's right foot, the bruised chest, the hairline fracture in her left hand, and the PTSD arising from the accident?

303. Meghan seeks \$175,000 to \$225,000 in general damages while DeArcos asserts Meghan is entitled to \$75,000 in general damages.

304. Justice Lavigne in *McLaughlin v Levesque*, 2009 NBQB 85 provided guidance on the determination of applicable general damages awards. First, suggesting that in comparing cases, common factors between the cases should be identified. Second, highlighting that compensation should be awarded for loss of amenities and enjoyment of life. Third, noting that general damages are subjective in nature and based on the plaintiff's experience of pain and suffering. And fourth, that general damages awarded by comparison to other cases should be adjusted for inflation.

163 When comparing cases, we must search for common factors that influence the awards, such as, the age of the plaintiff, the nature of the injury, the relative severity and duration of pain, disability, emotional suffering, and loss or impairment of enjoyment of life. The award must also be adjusted for inflation.

164 The award does not depend only on the gravity of the injury. Compensation should be awarded for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss. It should provide a fund of money to enhance the situation of that plaintiff. It must be remembered that non-pecuniary damages are awarded on a functional basis to the end of providing substitute pleasures for those which have been lost in order to ameliorate the plaintiff's condition and make his or her life more bearable.

165 General damages assessments are subjective in nature and are based on the plaintiff's own experience of pain and suffering. It must manifest the individual plaintiff's particular situation.

[...]

167 In order to achieve uniformity and predictability, a comparative approach is to be used to determine the appropriate conventional award for cases involving similar injuries or impairment. However, this comparison is to be adjusted with regard to inflation and to the specific circumstances of the plaintiff. The principle aim is to achieve a fair and adequate award.

305. In terms of guidance on general damages, Meghan's counsel referred the Court to several decisions to provide a range of general damages. Summaries of these decisions follow.

McDonald v Kwan, 2010 ONSC 5861 – General damages of \$140,000 (\$188,079.58 adjusted for inflation), reduced to \$98,000, to account for a 10% and 20% reduction for the impact of other accidents. The Plaintiff was involved in a motor vehicle accident and was subsequently involved in two further motor vehicle accidents. The Plaintiff was diagnosed with chronic pain to the neck and back, cervicogenic headaches and PTSD because of the accident. The Plaintiff was a model employee but was forced to go on disability one year after the accident. The Plaintiff was later diagnosed with a cervical facet joint injury which required surgery.

McLaughlin v Levesque, 2009 NBQB 85 - General damages of \$130,000 (\$177,096 adjusted for inflation) awarded. The Plaintiff, aged 41, initially appeared to have suffered few injuries in the accident. Intense pain and cognitive impairment developed later. The Plaintiff was assessed by a neurologist, a psychologist, a neuropsychologist, a neurosurgeon, a psychiatrist, and others. Diagnoses ranged from mild traumatic brain injury to post-traumatic stress disorder to chronic pain. The Plaintiff suffered from depression, anxiety, and stress in somatic form.

Roberts v Safadi, 2018 ABQB 165 - General damages of \$140,000 awarded (\$163,596.69 adjusted for inflation). The Plaintiff, a 26-year-old heavy equipment operator, suffered injuries because of an assault. The Defendants were noted in default. The Plaintiff was struck by a baton in the legs approximately 8 to 10 times; he suffered fractures to his tibia and fibula in one leg, requiring open reduction surgery with the insertion of nails, pins, and screws. As a result of the physical injury, the Plaintiff developed back problems and connected psychological problems. The Plaintiff could no longer participate in sporting activities and experienced ongoing pain. The Plaintiff would suffer to some degree for the rest of his life and could require surgery on his back.

Russell v Turcott, 2009 ABQB 19 - General damages of \$115,000 (\$156,662 adjusted for inflation) awarded. The Plaintiff, who was injured in a motor vehicle collision, suffered from pre-existing depression and anxiety. While the Court found that this made her susceptible to the

development of pain disorders, it did not reduce her damages. Following the collision, the Plaintiff suffered severe whiplash injuries, stiffness, headaches, a restricted range of motion in her jaw, and significant anxiety as well as TMJ pain. The Plaintiff eventually developed chronic pain syndrome and fibromyalgia. She underwent numerous treatments including chiropractic treatments, massage therapy, pain clinic counseling, physiotherapy, acupuncture, narcotic medications, and psychological and psychiatric counseling. She had been unable to work since the accident and continued to suffer from chronic pain at the time of trial.

Khairati v Prasad, 2002 BCSC 360 - General damages of \$125,000 awarded (\$196,284.13 adjusted for inflation). The Plaintiff, aged 40, suffered mild to moderate soft tissue injuries to her neck, shoulders and back due to an MVA. As a result of the accident, the Plaintiff developed a somatoform pain disorder and major depression. She was highly susceptible to pain, which, at the time of the trial, was no longer caused by her soft tissue injuries, but rather by her psychological condition. At the time of the trial, the Plaintiff was extremely deconditioned, she had constant left-sided pain, used a cane to walk, spent most of her time in bed, had lost her senses of smell and taste, looked older than her age and was unable to drive or go anywhere by herself. Her condition was not expected to improve. Before the accident, the Plaintiff had worked as a freight forwarder/cargo agent, a job that she enjoyed. She resigned for health reasons less than two years after the accident and had not worked since. She would be unable to work in the future.

Powell (Litigation Guardian of) v Leger, 2003 NBQB 105 – General damages of \$235,000 awarded. The Plaintiff, a 16-year-old, suffered from injuries following an MVA which caused severe head trauma. The MVA rendered the Plaintiff totally disabled mentally and physically which led to some behaviour problems and violent behaviour requiring supervision 24 hours a day, 7 days a week. The Plaintiff was not employable.

Higashi v Chiarot, 2021 ONSC 8201 – General damages of \$225,000 awarded. The Plaintiff's injuries included cognitive, psychological, and physical impairments with headaches, balance issues, noise and light sensitivities, word finding issues, slower thought processing and short-term memory problems. The Plaintiff also suffered from chronic pain in the back, neck, and jaw, post-traumatic stress disorder and adjustment disorder with primary depressed mood. The Plaintiff returned to work for about five years after her accident but was then unable to continue working.

Fraser v Persaud, 2023 ONSC 1449 – General damages of \$175,000 awarded. The Plaintiff's injuries following an MVA included pain in her left shoulder, lower back, headaches, and depression. The Plaintiff was diagnosed with ongoing chronic pain, fibromyalgia, major depressive disorder, post-traumatic stress disorder, somatic symptom disorder, and a mild head injury. Three years after the MVA she went off work on disability. The Plaintiff had suffered soft tissue injuries in a previous MVA three years prior to the MVA associated with this claim – the previous MVA caused prior injuries and prior mental health issues.

Taylor v Zents, 2024 ONSC 166 – General damages of \$250,000 awarded. The Plaintiff's injuries, following an MVA, included a mild-traumatic brain injury with persistent post-concussive symptoms, an exacerbation of a pre-existing left knee injury, and a new injury to the right knee. The Plaintiff was diagnosed with eyesight issues, problems with dizziness and balance, and an adjustment disorder which presented as depression and anxiety. The Plaintiff had returned to work but eventually became incapable of meeting the demands of the job; the Plaintiff was unemployable.

Morris v Prince, 2023 ONSC 3922 – General damages of \$330,000 awarded. The Plaintiff suffered injuries following an MVA which included a serious head injury with multiple skull fractures. The Plaintiff underwent brain surgery shortly after the collision and was placed in a medically induced coma. The Plaintiff sustained permanent and irreversible injury to his brain which left him with cognitive problems, tinnitus, emotional and behavioral issues, and seizures. His recovery involved 10 weeks in a hospital and a residential rehabilitative care setting. The Plaintiff did not return to work. In addition, the Plaintiff suffered from pain in his jaw, right elbow, right knee, and back, and was diagnosed with chronic pain syndrome, depression, and chronic fatigue.

Rolley v MacDonell, 2018 ONSC 6517 – General damages of \$190,000 awarded. The Plaintiff's injuries following an MVA included a mild traumatic brain injury. The Plaintiff suffered from somatic symptom disorder, adjustment disorder, post-traumatic headaches, cognitive issues, post-traumatic vision syndrome, and an exacerbation of pre-existing chronic pain.

306. Meghan and DeArcos both referred the Court to the decision of *Natasha Poirier v Bruce Randolph "Randy" Van Horlick*, 2022 NBQB 54. In that matter, the plaintiff, a nurse, sued a defendant after being assaulted by him in her workplace and suffering the following injuries: brain injury, headaches, dizziness, sensitivity to light and sounds, a deviated septum requiring surgery, tenosynovitis, severe whiplash, chronic pain, anxiety and nervousness, tinnitus, and PTSD. The plaintiff was awarded \$150,000 in general damages. The injuries were described as life altering and rendered the plaintiff disabled. DeArcos suggests that considering the savagery of the attack on the nurse, the damages in Meghan's case, particularly considering the pre-existing injuries and the injuries unrelated to the accident, should be reduced by half to \$75,000.

307. Given the nature of the injuries included in the cases provided by the parties, the Court suggests a different line of cases should be consulted. For example, some of the cases presented involved traumatic brain injuries or significant physical injuries requiring significant hospitalisation and a lengthy recovery period, and all the cases reference some form of chronic pain.

308. The Court references the following cases which more accurately mirror the injuries sustained by Meghan and for which general damages were recoverable. Namely, from a physical standpoint, the broken heel bone in Meghan's right foot, a bruised chest, and a hairline fracture in her left hand, and from a psychological standpoint, the PTSD. Because of the broken heel bone, Meghan walked with crutches for three months and wore a soft cast boot for some time thereafter. Meghan also required surgery on her heel in July of 2016 to remove a piece of bone in her right heel which was causing her some pain and discomfort. The injury to the right heel caused Meghan some significant mobility issues for several years and it appears to still cause Meghan some mobility issues to this day. Both Dr. Allanach and Dr. Kerr concur: the right heel injury will likely require surgery in the future to fuse the heel bones once osteoarthritis develops.

Fuller v Schaff et al, 2009 YKSC 23 - \$135,000 in general damages awarded to the Plaintiff who suffered several severe splinter fractures in both heel bones and fractured his ankle in an MVA. The heel fractures healed but were misaligned and required surgeries. The Plaintiff was left with diminished mobility, scarring, and weakness. The Plaintiff could no longer return to his occupation due to the discomfort and pain. It was likely the Plaintiff's discomfort and pain would increase due to progressive degenerative arthritis.

Wozniak (Next Friend of) v Alexander, 2009 ABCA 353 - \$120,000 in general damages awarded to the Plaintiff who suffered injuries in a boating accident. The Plaintiff was seriously injured when her foot was nearly severed in two by the propeller of an outboard motor. The Plaintiff had a compound fracture in her heel and she required an ankle fusion and screws to hold the fractures in place. The Plaintiff suffered excruciating pain and had long term pain in her foot. As a result of the accident, the Plaintiff could not walk properly, stand, or walk for long periods of time.

309. Considering the injuries Meghan sustained, for which damages flow, and considering the line of cases identified by the Court, the loss of amenities and enjoyment of life, and the pain and suffering Meghan experienced, the Court concludes general damages of \$150,000 are recoverable. The Court finds the impact of Meghan's injuries, at such a young age, are akin to the injuries and impacts detailed in *Fuller v Schaff* and *Wozniak (Next Friend of) v Alexander*.

310. In the alternative, the Court provisionally assesses general damages at \$200,000, falling in line with the findings in *Fraser v Persaud*, 2023 ONSC 1449.

311. The Court awards \$150,000 in general damages.

312. If the Court erred in its findings on causation at law and alternatively erred in its findings on crumbling skull, the Court provisionally assesses general damages at \$200,000.

Special Damages

Can Meghan recover special damages for past and future loss of income, past and future loss of housekeeping capacity, past and future cost of care (including cannabis), and loss of medical and health benefits? Additionally, can Meghan recover a management fee applicable to the recoverable damages?

313. Meghan also seeks special damages for past and future loss of valuable services (housekeeping capacity), past and future cost of care, loss of medical benefits, and past and future loss of earnings.

314. The New Brunswick Court of Appeal in *Scott v Renton*, (1999) 215 NBR (2d) 263 specified at paragraph 33 that assessing damages for prospective losses prominently features actuarial and statistical evidence. The Court of Appeal directs that where the underlying assumptions are proven to the Court's satisfaction, actuarial calculations should be used to assess the quantum of damages.

Expert Testimony – Life Care Plan – Linda Stanley

What are the findings of the experts with respect to the quantification of damages recoverable by Meghan?

315. While most of the expert testimony focused on the physical and psychological assessment of Meghan's conditions prior to and following the accident, a few other experts provided evidence to assist the Court in its assessment and calculation of special damages.

316. Linda Stanley, a registered social worker, started preparing Life Care Plans in 2002. She has prepared over 900 reports and testified as an expert in court proceedings over 10 times. On consent of the parties, Ms. Stanley was declared an expert in the area of assessment and costing of future care, past care, life care plans and loss of valuable services.

317. Ms. Stanley described the nature of the Cost of Future Care Report and the process involved:

The Cost of Future Care report provided a comprehensive study of the goods, services and related costs that may be required by an Individual who has experienced serious or catastrophic injury or has chronic health needs, The objective of the report is to identify those items and services required

to minimize complications, maintain health, maximize independence and promote safety and quality of life.

In determining Ms. Trainor's future care needs, the writer has relied on information obtained from the following source medical reports, an in-home interview and observation of Ms. Trainor's physical environment.

318. Ms. Stanley met with Meghan and her mother on two occasions, once in March of 2017 and once in September of 2018 at their residence.

319. Ms. Stanley's 2017 report included four categories for future costs of care:

- Category 1 – projected therapeutic modalities – represent the actual provision of future therapeutic services for Meghan focussing on health-related professional services and transportation to the services.
- Category 2 – aids and services for independent function – aids and services designed to allow Meghan to function more independently.
- Category 3 – drug and supply needs – detailed list of pharmaceuticals, non-prescription drugs, supplies utilized.
- Category 4 – household services – including home maintenance and upkeep costs, both interior or exterior maintenance

320. The charts reproduced below, outlining the various categories, are taken directly from Ms. Stanley's report.

Item or Service Name	Rate	Unit Cost	Multiplier	One Time Cost	Expected Need	Annual Costs
Category 1 - Projected Modalities						
Physiotherapy Treatment	1 Week	\$85.00	52.170000		Unknown	\$3,391.05
Transport to Physiotherapy	1 Week	\$2.26	52.170000		Unknown	\$117.90
Bowen Therapy	2.5 Weeks	\$86.25	20.860000		Not defined	\$1,799.18
Transport to Bowen Therapy	2.5 Weeks	\$2.26	20.860000		Not defined	\$47.14
TMJ Treatment	Once	\$3,500.00	1.000000	\$3,500.00	Once	
Psychotherapy	1 Month	\$300.00	12.000000		Unknown	\$3,800.00
Transport to Psychotherapy	1 Month	\$3.62	12.000000		Unknown	\$43.44
Vocational Assessment	Once	\$750.00	1.000000	\$750.00	Once	
Vocational Counseling	10 Sessions	\$105.00	10.000000	\$1,050.00	10 Sessions	
Ergonomic Assessment	Once	\$350.00	1.000000	\$350.00	Once	
Total for Category 1				\$5,650.00		\$8,998.71
Category 2 - Aids and Services						
Yoga Program	1 Month	\$86.25	12.000000		5 Years	\$1,035.00
Molst Heating pad	2 Years	\$120.00	0.500000		Life Expectancy	\$60.00
Heated Blanket	2 Years	\$45.00	0.500000		Life Expectancy	\$22.50
Travel Allowance	1 Week	\$60.00	52.170000		Life Expectancy	\$3,130.20
Wall Mounted Grab Bars (2)	10 Years	\$69.98	0.100000		Life Expectancy	\$6.00
Safety bath mat	2 Years	\$21.99	0.500000		Life Expectancy	\$11.00
Supportive Footwear	1 Year	\$100.00	1.000000		Life Expectancy	\$100.00
Custom Orthotics	2 Years	\$400.00	0.500000		Life Expectancy	\$200.00
Perching Stool	5 Years	\$144.99	0.200000		Life Expectancy	\$29.00
Upright sweep set	5 Years	\$34.99	0.200000		Life Expectancy	\$7.00
Long Handled Toilet Brush	1 Year	\$13.99	1.000000		Life Expectancy	\$13.99
Long Handled Duster	2 Years	\$6.99	0.500000		Life Expectancy	\$3.50
Laundry Cart on Wheels	5 Years	\$57.48	0.200000		Life Expectancy	\$11.50
Differential Rental cost	1 Month	\$125.00	12.000000		Life Expectancy	\$1,500.00
Total for Category 2				\$0.00		\$6,129.67

Item or Service Name	Rate	Unit Cost	Multiplier	One Time Cost	Expected Need	Annual Costs	
Category 3 - Drug and Supply Needs							
Sandoz-Duloxetine	Monthly	\$43.76	12.000000		Life Expectancy	\$525.12	
Abilify	Monthly	\$56.29	12.000000		Life Expectancy	\$675.48	
Saphris	Monthly	\$4.60	12.000000		Life Expectancy	\$55.20	
Trintellix	Monthly	\$117.13	12.000000		Life Expectancy	\$1,405.56	
Clonazepam	Monthly	\$1.46	12.000000		Life Expectancy	\$17.52	
Medical Cannabis	Monthly	\$643.00	12.000000		Life Expectancy	\$7,716.00	
Total for Category 3				\$0.00		\$10,394.88	
Item or Service Name	Frequency	Hours	Rate/hour	Multiplier	Expected Need	Annual Costs	
Category 4 - Household Services							
Housecleaning	1 Month	10.0	\$12.00	12.0	Life Expectancy	\$1,440.00	
Cleaning Oven/Refrigerator	1 Year	30.0	\$12.00	1.0	Life Expectancy	\$360.00	
Grocery Shopping Assistance	1 Month	6.0	\$11.30	12.0	Life Expectancy	\$813.60	
Fall / Spring Cleaning	1 Year	32.0	\$12.00	1.0	Life Expectancy	\$384.00	
Total for Category 4						\$2,997.60	
Total of Category 1				\$5,650.00		\$8,998.71	
Total of Category 2				\$0.00		\$6,129.67	
Total of Category 3				\$0.00		\$10,394.88	
Total of Category 4						\$2,997.60	
Total of All Categories							
				First Year / One Time Costs	\$5,650.00	Annual Costs	\$28,520.86

321. Ms. Stanley acknowledged that Meghan was using medication to address her anxiety and depression prior to the accident. Ms. Stanley also acknowledged that Meghan developed physical and psychological injuries after the accident. To craft her report, Ms. Stanley relied upon the findings of Ms. Thompson Franklin and her Functional Capacity Assessment, and the recommendations of Dr. Baker, Dr. Foreman, Dr. Tahir, and Dr. Pakzad. That said, there were several reports from Dr. Tahir and Dr. Pakzad that pre-dated the accident which were not provided to her for the preparation of her reports. Ms. Stanley also acknowledges there were several reports that followed the accident which were not provided to her.

322. Ms. Stanley, as part of her underlying assumptions, stated that she took care to delineate items and services that are reasonably justifiable and accident related, noting that the trier of fact will determine any apportionment attributable to pre-existing conditions. However, in testimony Ms. Stanley clarified that it is not within her scope of expertise to delineate the items and services attributable to Meghan's pre-accident issues and conditions. Ms. Stanley

relied upon Meghan's self reporting of pain and disability which Ms. Stanley assumed arose from the accident.

323. In addition, in terms of the underlying assumptions in the preparation of her reports, Ms. Stanley assumed Meghan would be responsible for a dwelling and for ongoing expenses and maintenance related to that dwelling. Ms. Stanley confirmed the information came from Meghan, who stated that, had it not been for the accident, she would now be living in her own place. As characterised by counsel for DeArcos, this was a hope, and perhaps a dream, that Meghan held. Objectively this assumption is difficult to support given the evidence of Meghan's dependency on her parents prior to the accident and after the accident. Meghan did not drive and had difficulty managing her financial affairs as evidenced by the Disability Tax Credit application submitted prior to the accident. In addition, Ms. Stanley acknowledged that she was not aware of Meghan's dyslexia and dyscalculia when she prepared her reports.
324. Ms. Stanley also quantified a rent differential of \$1,500 annually, suggesting Meghan could only reside on the first floor of a rental apartment because of her limited mobility. As previously noted, the Court does not accept that the evidence shows Meghan would have lived in an apartment independently. Further, the Court finds this specific evidence speculative and fails to account for elevators. If the Court erred in its refusal to award damages under this category, Ms. Gmeiner's calculations suggest a lifetime cost of \$90,274 for the rent differential (\$1,500 with a 39.3696 multiplier, and a 25.3% tax gross up and a 22% management fee).
325. Ms. Stanley specifically addressed Meghan's prescription for custom orthotics (or supportive footwear) because one of her legs was shorter than the other; Dr. Power's notes confirm this as the reason for the prescription. While orthotics can address gait or other mobility related issues, no evidence was presented to suggest Meghan needed orthotics for these other reasons. This prescription was not accident related.
326. In terms of housekeeping capacity, the rationale was that Meghan had some limitations when bending, kneeling, crouching, and lifting. Ms. Stanley believes these limitations were caused by the accident; she indicated that she relied on Meghan's self-reporting of symptoms.
327. In terms of medication, Ms. Stanley provided the list of medications used by Meghan. The list included medication for depression and medication to treat a mood disorder. Ms. Stanley understood the need for this medication to have arisen due to the accident; this is incorrect. Ms. Stanley included the medication in her report, despite the medication prescription

predating the accident. Ms. Stanley did not, at the time, have the detailed charts of Dr. Tahir which would have accounted for the changes in the medication. Ms. Stanley suggests there are often variations in the dosage or that medication needs to be adjusted when dealing with depression and mood disorders.

328. As it concerns cannabis, Meghan was first prescribed medical cannabis on December 14, 2016, as a means of pain control to address widespread chronic pain. Ms. Stanley was aware that Dr. Tahir and Dr. Kerr did not believe cannabis was indicated however, where cannabis was prescribed, Ms. Stanley would include it in her report. Ms. Stanley acknowledges that Meghan used cannabis for pain management but also used it recreationally prior to the accident.

329. Ms. Stanley prepared a second report to account for the costs of the femoral derotational osteotomy to Meghan's right leg. Ms. Stanley was advised this second surgery was accident related and that all items purchased were because of this second surgery. As previously explained, the Court disagrees that these costs are accident related and disagrees that they are recoverable by Meghan.

330. Ms. Stanley prepared a third report to account for the costs of the operation to remove the hardware in Meghan's knee resulting from the femoral derotational osteotomy. Ms. Stanley was advised this third surgery was accident related. The Court disagrees that these costs are accident related and disagrees that they are recoverable by Meghan.

Expert Testimony – Actuary - Jessie Gmeiner

What are the findings of the experts with respect to the quantification of damages recoverable by Meghan?

331. Jessie Gmeiner was qualified as an expert and provided opinion evidence in the field of actuarial science. Ms. Gmeiner provided the Court with two reports in which she explained the components of multipliers which can translate past and future financial losses into current amounts. The first report is dated January 2019 and the second report is dated January 2024.

332. Ms. Gmeiner used several decremental assumptions in her calculations, including:

- Average mortality rate for a female of 54.7 years.
- Retirement age of 65 years.
- Limiting age for loss of future housekeeping capacity set at 75 years.

- Calculations provide for full time employment with no contingency for unemployment.
- Interest rates used for past financial losses is 1.5% (7.37% interest adjustment factor to the date of trial).

333. Ms. Gmeiner acknowledged that the discount rate for future pecuniary damages is set at 2.5% per year in the absence of evidence to the contrary (*Rules of Court of New Brunswick*, Rule 54.10(2)). This rate represents the difference between estimated investment and price inflation rates. Ms. Gmeiner suggests that a discount rate of 0% per year for the first 15 years and 2.5% per year thereafter more accurately reflects current and expected future economic conditions. Given, Ms. Gmeiner's experience and expertise, the Court accepts the discount rate of 0% per annum for the first 15 years and 2.5% per annum thereafter.

334. Ms. Gmeiner explained that the income tax gross up applies to future loss of housekeeping capacity and future cost of care in the amount of 3.4% per year, however, it does not apply to future loss of earnings. The tax gross up is added after the determination of the present value of the loss and is meant to recognize the plaintiff's tax liability.

Management Fee

335. Meghan seeks a management fee; a percentage of the total damage award to administer and invest the funds. Guidance from the Supreme Court of Canada on this issue provides that a management fee should be awarded where there is evidence the management fee is necessary, where the evidence suggests investment advice is necessary, and where there is evidence of the cost of such services (*Mandzuk v Vieira*, [1988] 2 SCR 650, [1988] SCJ No 100 at para. 5).

336. Ms. Gmeiner noted in her report that no provision had been made for the calculation of any investment management fees.

No provision has been made in our calculations for any investment management fees, as we understand that the courts in New Brunswick infrequently make awards for such expenses. Note that by investment administration or management fees, we mean the cost of administering and investing the fund which would have to be set aside in order to generate the required series of future payments. However, in view of the *Townsend v. Kroppmanns* decision of the Supreme Court of Canada in 2004, we note that it may be appropriate to include provision for such services.

337. Ms. Gmeiner suggested the investment management fee should be 13% for future loss of earnings, 17% for future loss of housekeeping capacity, and 22% for future loss of care costs.
338. Dr. Baker opined that Meghan would benefit from assistance in managing any funds awarded by the Court given some concerns with Meghan's impulsivity, planning, and mathematical skills. These issues pre-dated the accident and form part of the reason Jane originally applied for a Disability Tax Credit on Meghan's behalf in late 2013 and early 2014.
339. The Court concludes that Meghan does require a management fee on any damages awarded given her inability to manage any funds awarded.
340. Based on the above consideration, the Court accepts that a management fee for future loss of earnings (13%), future loss of housekeeping capacity (17%), and future loss of care (22%) is recoverable if such damages are recoverable.

Past and Future Loss of Earnings

341. Meghan claims past loss of earnings in the amount of \$183,206 and future loss of earnings in the amount of \$1,683,954.80 (including the management fee). These values were presented based on the assumption that Meghan would have been a waitress until January 1, 2020, and then gone to community college and obtaining full time employment in a related area of work.
342. DeArcos acknowledged a past loss of income of \$36,826 up to the time Meghan began to work as a voice instructor. This amount is based on Ms. Gmeiner's report (\$7,627 + \$10,461 + \$11,349 + \$7,389 (9 months of loss of income (\$9,852 divided by 12 = \$821) X 9)). DeArcos stopped their calculation in September 2017 which corresponds to the date Meghan began to work as a voice instructor – a job she would have maintained, according to DeArcos, had it not been for the onset of generalized chronic pain which was not caused by the accident. DeArcos takes the position that Meghan is not entitled to future loss of earnings as it is based on generalized chronic pain which was not caused by the accident.
343. Ms. Gmeiner provided an actuarial report and provided her expert actuarial opinion on the value of the past and future loss of earnings in several scenarios. The Court accepts Ms. Gmeiner's calculations with respect to past loss of earnings. Ms. Gmeiner accounted for the provisions of section 265.4 of the *Insurance Act*, RSNB 1973, c I-12 requiring the deduction of weekly section B indemnity benefits received and accounted for applicable income tax.

344. Ms. Gmeiner provided values for four employment scenarios: (1) waitress, (2) voice coach, (3) community college degree all workers, and (4) community college full time. The difference between community college degree “all workers” and “full time” accounts for some unemployment and some underemployment in the “all workers” category.
345. For past loss of earnings, Ms. Gmeiner provided actuarial values for three scenarios: (1) assuming Meghan remained a waitress for the entire period up to the trial (\$121,632), (2) assuming Meghan remained a waitress until January of 2018 when she became a voice coach (\$181,782), and (3) assuming Meghan remained a waitress until January of 2020 and obtained a job following community college training, falling into the “all workers” category corresponding to an annual salary of \$39,908 (\$183,206). Ms. Gmeiner suggested the present value multiplier of 28.7289 for future loss of earnings which the Court accepts.
346. While Ms. Gmeiner provided laser focused values accounting for a series of factors, it remains that Meghan’s life could take several paths. As previously explained, the chronic pain, the TMD, the subsequent surgeries to perform the right leg femoral derotational osteotomy and the removal of pins, were not caused (at law) by the accident and alternatively, for the purpose of assessing damages, formed part of Meghan’s crumbling skull disposition. The Court is satisfied these issues would have arisen with time; the question is not if, but when they would have arisen. The unknown is the timing of these other issues, if it had not been for the accident, and their consequential impact on past and future loss of income. At the time of the accident, Meghan was in one of the biggest transitions of her life, passing into adulthood. There are various paths her life could have taken but also, each of these paths could and would have been influenced by her pre-existing mental health diagnoses.
347. On a balance of probabilities, the Court accepts that Meghan could not continue to work as a waitress at Peoples Park Tower due to her heel injury. Dr. Power confirmed that Meghan worked as a waitress and was unable to stand or walk for long periods of time; as a result, she was put off work following the accident. The Court further accepts the proposition that Meghan would, on a balance of probabilities, have accessed community college training within a few years and obtained employment in this area (under the “all workers” category, accounting for underemployment and periods of unemployment). Speaking to Meghan’s capacity, and based on his assessment, Dr. Tahir posited that Meghan could achieve community college training and related employment.

348. Balancing all the possible scenarios and the timing, the Court accepts that Meghan would have worked as a waitress for a few years until such time she would have sought out community college training and employment. The Court is satisfied that Meghan would have reintegrated the workforce before trial and would have remained in the workforce. The portion of past loss of earnings for Meghan, attributed to the accident, is set by the Court at \$100,000. The Court concludes Meghan may recover \$100,000 for past loss of earnings.
349. For these preceding reasons, the Court also declines to award compensation for future loss of earnings.
350. If the Court erred in its findings on causation at law and alternatively erred in its findings on crumbling skull, the Court assumes Meghan would have remained a waitress until January of 2020 and obtained a job following community college training, falling into the “all workers” category.
351. Ms. Gmeiner did not factor in general disablement rates given Meghan’s perceived “stable condition” at the time of the accident. Ms. Gmeiner acknowledged that multipliers would need to be adjusted to account for a mental health condition which may have an impact in the future. Ms. Gmeiner’s report was prepared with the assumption that Meghan has no vulnerabilities that would affect her ability to earn in the future.
352. The Court provisionally assesses past loss of earnings at \$183,206 and future loss of earnings at 60% of \$1,289,716.30 (including the management fee). The 60% value, giving an amount of \$773,829.78, accounts for Meghan’s pre-existing psychiatric vulnerabilities which would undoubtedly have impacted her ability to earn (*McDonald v Martin*, 2019 NBQB 91 at para 89). While the Court acknowledges that a modification to the multipliers would be a preferable approach, this option is not available to the Court.
353. The Court awards \$100,000 for past loss of earnings and no damages for future loss of earnings.
354. If the Court erred in its findings on causation at law and alternatively erred in its findings on crumbling skull, the Court provisionally assesses past loss of earnings at \$183,206 and future loss of earnings at \$773,829.78.

Past and Future Loss of Housekeeping Capacity

355. Meghan claims past and future loss of housekeeping capacity including replacement costs of services and benefits provided to her gratuitously by Jane and other members of her family. Meghan seeks \$68,737 for past loss of housekeeping capacity and \$163,628.82 for future loss of housekeeping capacity.
356. DeArcos acknowledges Meghan's entitlement to some form of compensation for the loss of housekeeping capacity as it relates to Meghan's broken heel bone. DeArcos suggests the amount of \$20,000 represents an accurate valuation of these amounts.
357. The New Brunswick Court of Appeal set out the general rule as it concerns claims for loss of housekeeping capacity, otherwise known as loss of valuable services, in *Furlotte v Elward*, 2011 NBCA 95.

[16] As a general rule, a claim for loss of capacity to perform valuable services should be allowed as special damages (for the pre-trial period) **only if the plaintiff establishes on a balance of probabilities: (1) he or she was disabled by an accident-related condition from performing the task for which a claim is made; (2) but for the accident, the plaintiff would have performed the task in question; and (3) what it would have cost to have a professional service provider perform the task** (see *Fobel v. Dean*, 1991 CanLII 3965 (SK CA), [1991] S.J. No. 374 (C.A.) (QL), endorsed by this Court in *Boucher v. Doiron*, 2000 NBCA 18, 230 N.B.R. (2d) 247). Generally speaking, it makes no difference that the task was not performed, or that it was performed *gratis* or at a special discount rate by a family member or a friend. The award is designed to fairly compensate the plaintiff for his or her loss of capacity to perform the task in question.

[Emphasis added]

358. It is under this lens that the past and future loss of housekeeping capacity is assessed with a focus on the accident-related limitation.
359. The key factual elements to consider in assessing the past and future loss of housekeeping capacity are the following:
- Immediately after the accident, Jane and Peter tended to Meghan who could not walk or do much on her own.
 - Dr. Power reviewed the notes of Dr. Burry, from October of 2014, which remarked that Meghan was still unable to work.

- Meghan explained that prior to the accident, she would vacuum, sweep, do laundry and put her clothes away. After the accident, Meghan explained that it was difficult to care for herself – stating that she was not able to care for herself alone. Meghan became completely reliant on her parents.
- Meghan underwent a heel surgery in 2016 and would have encountered some mobility limitations until that time.

360. Ms. Stanley outlined in her report the cost of valuable services provided by Jane since the accident for a total cost of \$19,004 up to April 3, 2017.

Service	Time	Duration	Rate /hour	Total
Assistance with housekeeping	1.5 hours / week	152 Weeks	\$12	\$2736
Driving to appointments	3 hours / week	152 Weeks	\$14	\$6384
Companionship/supervision	5 hours / week	152 Weeks	\$11	\$8588
Completing paperwork submissions for insurance	2 hours / month	36 months	\$18	\$1296
			Total	\$19,004

361. The Court accepts that up to the time of the heel surgery in 2016, and for several months following that surgery, Meghan would have encountered issues which would have continued to require the housekeeping services Jane provided. The Court recognises damages for past loss of housekeeping services up to April 3, 2017, in the amount of \$19,004 but not after that date as any limitations Meghan experienced after that date would not have arisen from the accident. With interest, the total amount recoverable by Meghan for past loss of valuable services is \$20,929.11 ($\$19,004 \times 10.13\%$ (which represents 1.5% per year for a total of 6.75 years between April 3, 2017, and January 1, 2024)). The Court concludes Meghan may recover \$20,929.11 for past loss of housekeeping capacity.

362. For future loss of housekeeping capacity, Meghan confirmed in her testimony that her inability to perform household tasks is currently attributable to her generalised chronic pain. As the Court has determined that the chronic pain was not caused at law by the accident, or that, alternatively, it falls within the crumbling skull doctrine, this significantly reduces the quantum of damages recoverable. The Court declines to award damages for future loss of housekeeping capacity.

363. If the Court erred in its findings on causation at law and alternatively erred in its findings on crumbling skull, the Court assumes Meghan would have sustained some limitations to her ability to perform housekeeping services.
364. For the past loss of housekeeping services, Ms. Gmeiner utilized the present value multiplier of 28.7289 up to the date of the trial which the Court accepts. Ms. Gmeiner, in her report and testimony, outlined the accumulation of past housekeeping services until January 1, 2024, plus interest for an amount of \$68,737 based on the data from Ms. Stanley's report.
365. For the future loss of housekeeping services, the annual future loss of housekeeping services was quantified by Ms. Gmeiner at \$3,611 in 2024 (from the value provided by Ms. Stanley of \$2,997.60 annually in 2017). Ms. Gmeiner used the present value multiplier of 32.6284 for future loss of housekeeping capacity, which the Court accepts. In addition to these amounts is the tax gross up (18.7%) and the management fee (17%) providing a future loss of housekeeping capacity of \$163,628.92.
366. The Court awards \$20,929.11 for past loss of housekeeping capacity.
367. If the Court erred in its findings on causation at law and alternatively erred in its findings on crumbling skull, the Court provisionally assesses past loss of housekeeping capacity at \$68,737 and future loss of housekeeping capacity at \$163,628.82.

Future Cost of Care

368. Meghan claims \$858,626.99 for future cost of care (excluding cannabis). Ms. Stanley's report broke down the future cost of care into three categories: (1) projected modalities, (2) aids and services, and (3) drugs and supply needs. Cannabis is addressed separately, in the next section, given the scope of the amounts sought.
369. Ms. Gmeiner provided the following breakdown of one-time and annual costs as it relates to the future cost of care. The following chart is taken from Ms. Gmeiner's report:

SCHEDULE 3						
LOSS OF VALUABLE SERVICES & FUTURE CARE COSTS FOR THE PLAINTIFF						
VALUABLE SERVICES		PAST LOSS	INITIAL OUTLAY	ANNUAL COSTS		
	ITEM					
Category 4 - Household Services						
	Housecleaning			\$1,440.00		
	Cleaning Oven/Refrigerator			360.00		
	Grocery Shopping Assistance			813.60		
	Fall / Spring Cleaning			364.00		
Past Replacement of Valuable Services (Provided by Mother)						
	Assistance with Housekeeping; 1.5 hours per week for 249 weeks @ \$12.00 per hour	\$4,482.00				
	Driving to Appointments; 3 hours per week for 249 weeks @ \$14.00 per hour	10,458.00				
	Companionship/Supervision; 5 hours per week for 249 weeks @ \$11.30 per hour	14,069.00				
	Completing Paperwork Submissions for Insurance; 2 hours per month for 57 months @ \$18.00 per hour	\$2,052.00				
	TOTAL	\$31,061.00	\$0.00	\$2,997.60		
FUTURE CARE COSTS AND OTHER EXTRAORDINARY EXPENSES		PAST COSTS	INITIAL OUTLAY	LIFETIME ANNUAL COSTS	UNKNOWN DURATION	COST FOR FIVE-YEARS
Category 1 - Projected Modalities						
	Physiotherapy Treatment				\$3,391.05	
	Transport to Physiotherapy				117.90	
	Bowen Therapy				1,799.18	
	Transport to Bowen Therapy				47.14	
	TMJ Treatment		3,500.00			
	Psychotherapy				3,600.00	
	Transport to Psychotherapy				43.44	
	Vocational Assessment		750.00			
	Vocational Counselling		1,050.00			
	Ergonomic Assessment		350.00			
Category 2 - Aids and Services						
	Yoga Program					1,035.00
	Moist Heating Pad; replace every 2 years		120.00	60.00		
	Heated Blanket; replace every 2 years		45.00	22.50		
	Travel Allowance			3,130.20		
	Wall Mounted Grab Bars (2); replace every 10 years		59.98	6.00		
	Safety Bath Mat; replace every 2 years		21.99	11.00		
	Supportive Footwear			100.00		
	Custom Orthotic; replace every 2 years		400.00	200.00		
	Perching Stool; replace every 5 years		144.99	29.00		
	Upright Sweep Set; replace every 5 years		34.99	7.00		
	Long Handled Toilet Brush			13.99		
	Long Handled Duster; replace every 2 years		6.99	3.50		
	Laundry Cart on Wheels; replace every 5 years		57.48	11.50		
	Differential Rental Cost			1,500.00		
Category 3 - Drug and Supply Needs						
	Sandoz-Duloxetine			525.12		
	Abilify			675.48		
	Saphris			55.20		
	Trintellix			1,405.56		
	Clonazepam			17.52		
	Medical Cannabis; initially was \$643 per month, now \$1,691 per month			20,292.00		
Additional Care Required Following December 8, 2017 Surgery						
	From December 14, 2017 to March 14, 2018, inclusive	\$8,554.00				
	Additional Equipment/Non-Prescription Medications Needed Following Surgery	685.00				
	Pain Management Program (\$9,500 plus transportation costs of \$960)		10,460.00			
Additional Care Required Following August 22, 2018 Surgery						
	From August 22, 2018 to October 2, 2018 (Includes \$250 physio consult)	8,086.00				
	TOTAL	\$17,325.00	\$17,001.42	\$28,065.57	\$8,996.71	\$1,035.00

370. With respect to future cost of care for Category 1 items, DeArcos acknowledges Meghan's entitlement to a vocational assessment (\$750), vocational counselling (\$1,050) and

ergonomic assessment (\$350). DeArcos denies Meghan's entitlement to TMD treatment and TMD orthotics (\$66,201 including the tax gross up and management fee), psychotherapy, Bowen therapy, and physiotherapy (and associated transportation). As previously indicated, the TMD is directly linked to the chronic pain and is not recoverable. The Court agrees with DeArcos that psychotherapy, Bowen therapy, and physiotherapy fall outside the scope of recoverable damages resulting from the accident. Further, some of these treatments (such as physiotherapy) were prescribed to Meghan but never pursued.

371. The Court finds that Meghan can recover for a vocational assessment (\$750), vocational counselling (\$1,050), and ergonomic assessment (\$350). Based on Ms. Gmeiner's calculations, Meghan is entitled to recover \$2,590.75 ($\$2,150 \times 1.205$ (to adjust to 2024 dollars)) for the Category 1 – projected modalities.
372. With respect to future cost of care Category 2 items, DeArcos accepts the wall mounted grab bars and the safety bath mat as reasonably related to the heel injury (initial amount of \$81.97 and annual amount of \$17 up to age 75 (\$446.56)). The other items in the list include a yoga program, moist heating pad, heated blanket, travel allowance, supportive footwear, custom orthotics, perching stool, upright sweep set, long handled toilet brush, long handled duster, laundry cart on wheels, and the differential rental costs. The Court accepts that the wall mounted grab bars and the safety bath mat form part of the recoverable damages; all other items fall outside the scope of recoverable damages as a result of the accident.
373. In accordance with Ms. Gmeiner's calculations and assessment of the lifetime annual cost for the items, Meghan is entitled to recover \$1,232.84 ($(\$6 \text{ per year (grab bar), } \$11 \text{ (safety bath mat)} = \$17) \times 1.205$ (to adjust to 2024 dollars) $\times 39.3696$ (multiplier mixed discount rate) $+ 25.3\%$ (tax gross up) $+ 22\%$ (management fee)) for the Category 2 future cost of aids and services.
374. With respect to future cost of care Category 3 items, DeArcos does not accept that any of the claimed prescribed medications (\$139,985 including the tax gross up and management fee) relate to the accident. On this point, the Court finds that Dr. Tahir prescribed Clonazepam and Abilify to address Meghan's anxiety following the accident; Meghan specifically takes Clonazepam to curb the symptoms of her PTSD. Therefore, Meghan can recover the costs of this medication to treat the PTSD arising from the accident; the other medications were previously prescribed or used to treat pre-existing conditions.

375. Therefore, in accordance with Ms. Gmeiner's calculations, Meghan is entitled to recover \$50,135.95 ((\$693 annually X 1.205 (to adjust to 2024 dollars)) X 39.3696 (multiplier mixed discount rate) + 25.3% (tax gross up) + 22% (management fee)) for the Category 3 future cost of prescription medication.
376. The Court concludes Meghan may recover \$2,590.75 for Category 1 projected modalities, \$1,232.84 for Category 2 aids and services, and \$50,135.95 for Category 3 medication excluding cannabis for future cost of care for a total of \$53,959.54.
377. If the Court erred in its findings on causation at law and alternatively erred in its findings on crumbling skull, the Court provisionally assesses future costs of care at \$2,590.75 for Category 1 projected modalities, \$260,686.16 for Category 2 aids and services (excluding yoga and differential rent cost), and \$139,985 for Category 3 medications (excluding cannabis).

Past and Future Cost of Care - Cannabis

378. Meghan sought \$46,537.50 for the past cost of cannabis (after amounts covered by section B benefits) and \$1,214,006 for the future cost of cannabis, as part of her claim for past and future cost of care.
379. Dr. Burry prescribed medical cannabis to Meghan following the accident. While the Court was provided the initial prescription script and invoices for subsequent purchases, the Court was provided no further information on the medical basis for this continued prescription and consumption. It is noteworthy that the prescription went from 60 grams per month to 120 grams per month.
380. The absence of testimony from Dr. Burry concerning the cannabis prescription leaves the Court with significant gaps in the evidence. The prescribing physician, capable of providing a basis for the cannabis prescription which forms a large portion of the monetary claim sought, did not testify. It is unclear whether Dr. Burry continued to prescribe and monitor Meghan's cannabis use through the years. While not explicitly opposed to Meghan using cannabis, the other medical professionals providing evidence at trial seemed concerned about the consequences of cannabis use while acknowledging some of the potential relief Meghan obtained from its use. Meghan confirmed her continued use of cannabis is related to her chronic pain.

381. Therefore, the Court declines to order past and future cost of care for the cost of cannabis for Meghan.

Loss of Medical and Health Benefits

382. Meghan claims \$61,404.77 for the loss of medical and health benefits to which she would have been entitled had she been able to continue her employment at Peoples Park Tower.

383. The factual underpinning for this amount was not established in evidence. Meghan had not yet reached full time employment status and was not yet eligible for medical benefits prior to the accident. No value was provided with respect to the costs or the employee portion of medical benefits at Peoples Park Tower. Further, the evidence suggests Meghan would only have worked at Peoples Park Tower for a period of a few years as she moved towards college education and related employment. Entitlement to medical benefits with another employer after a college education is highly speculative.

384. The Court concludes Meghan cannot recover compensation for loss of medical benefits.

PART 3 - OTHER

Cox and Carter - Section B benefits

Is a Cox and Carter Order appropriate in the circumstances of this case with the information available to the Court?

385. DeArcos, in its pre-trial brief, referenced a request for a *Cox and Carter* Order with respect to weekly indemnities for loss of income. *Cox and Carter* Orders are not limited to indemnities for loss of income; they must be deducted from the entire damages award (*McIntyre v Matthews*, 2020 NBCA 52 at paragraph 37).

386. A *Cox and Carter* Order provides that any section B payments made to the plaintiff by their insurer is held in trust for the insurer of the defendant. The goal of a *Cox and Carter* Order is to avoid a double recovery by the plaintiff through a payment of section B benefits from their insurer and an award for the payment of damages from the defendant. This concept is contemplated in section 263(2) of the *Insurance Act*.

263(2) Where a claimant is entitled to the benefit of insurance referred to in section 256 or 257 this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant of any claim

against the person liable to the claimant or the insurer of the person liable to the claimant.

387. While referencing the request of DeArcos's counsel in closing arguments, Meghan's counsel sought a severance of the question of damages from any question relating to a *Cox and Carter* Order. Counsel alternatively suggested the matter could be dealt with by way of a motion after the issuance of the Court's decision (through Rule 60.03(4) of the *Rules of Court*).

388. Meghan's counsel also sought the production of documents from DeArcos relevant to a *Cox and Carter* Order. Counsel for DeArcos objected to this request and suggested that the time for bringing such a motion had passed. The Court agrees with DeArcos's position on this point; the time for production of documents has passed.

389. However, the Court also agrees with Meghan's counsel that this issue should be addressed separately, later, if necessary. During the trial, the Court received little evidence with respect to section B loss of earnings benefits received by Meghan. In the absence of concrete evidence on the section B benefits Meghan received, the Court is reluctant to grant a *Cox and Carter* Order without a better understanding of its impact.

Costs

What costs may the successful party recover?

390. Meghan seeks to recover costs and is entitled to costs as the successful party at trial.

391. Considering Meghan's entitlement to damages in the amount of \$324,888.65 she is entitled to costs based on Tariff "A" and Scale 3 of Rule 59 representing an amount of \$14,121.66 (\$7,375 on the first \$100,000 and \$6,746.66 representing 3% on the remaining \$224,888.65) plus HST and allowable disbursements plus HST.

DISPOSITION

392. The Court Orders that Meghan is entitled to the following compensation.

- General Damages – \$150,000
- Special Damages
 - i. Past loss of housekeeping capacity - \$20,929.11

ii. Future cost of care – \$53,959.54

iii. Past loss of earnings - \$100,000

393. The Court orders that Judgment be entered against Sebastien DeArcos in favour of Meghan Trainor in the amount of \$324,888.65 with costs of \$14,121.66 plus HST and allowable disbursements plus HST.

DATED at Moncton, New Brunswick, this 31st day of October 2024.

Justice Maya Hamou
Court of King's Bench of New Brunswick