IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tench v. Sullivan,*
2025 BCSC 294

Date: 20250224
Docket: M212173
Registry: Vancouver

Between:

Leah Kathleen Tench

Plaintiff

And:

Eric Michael Sullivan

Defendant

And:

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Justice Morley

Reasons for Judgment

Counsel for the Plaintiff:	P. A. Venegas G. L. Canniff
Counsel for the Third Party:	R. Raymond J. K. Dhami K. A. Buecker
Place and Dates of Trial/Hearing:	Vancouver, B.C. September 9 - 13, 2024 September 16 - 19, 2024
Place and Date of Judgment:	Vancouver, B.C. February 24, 2025

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OVERVIEW

[1] The plaintiff Leah Tench suffers from chronic pain and a condition called traumatic bilateral thoracic outlet syndrome ("TOS"), an intermittent compression of nerves from tense scalene muscles. This results in chronic headaches, neck pain which radiates into her shoulders and shoulder blades, and intermittent symptoms of numbness, tingling and radiating pain in the arms going into the hands. These conditions cause Ms. Tench to suffer pain and tire easily. They have caused her emotional and psychological symptoms harm and have interfered with her career, her recreational, social and domestic activities, and her marriage.

[2] In one sense, it is no mystery what caused these conditions or the losses that have resulted from them. Ms. Tench has been very unlucky. She has been in three motor vehicle accidents, none of which were her fault:

a) On February 7, 2015, Ms. Tench's vehicle was hit from behind by a pickup truck (the "First Accident");

b) On February 16, 2018, a black SUV drove into the passenger side of her car (the "Second Accident"); and

c) On January 14, 2020, she was rear ended by a black Chevrolet driven by the defendant Eric Michael Sullivan (the "Subject Accident").

[3] But while there is no question that the three accidents, taken as a whole, caused Ms. Tench's injuries, it is not so easy to subdivide her suffering and limitations and attribute portions to each accident. This is, however, legally important to do.

[4] The First and Second Accidents (collectively, the "Prior Accidents") were the subject matter of *Tench v. Van Bugnum*, 2019 BCSC 1877 ("*Tench* #1"). The result of *Tench* #1 was that Ms. Tench was awarded damages for the Prior Accidents. Ms. Tench cannot be compensated for those same injuries again. But to the extent that the Subject Accident made them worse, she is entitled to a sum of money

representing the difference between her injuries as she has actually experienced them compared to what they would have been had the Subject Accident never happened. Determining what that difference is and how much money is appropriate as compensation is an inherently difficult process and was the subject matter of this trial.

[5] For reasons I discuss below, I award a total of $282,071.64 subject to adjustment for "benefits" under s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. This damage award represents the following:

a) No award for past earning loss because I find that the amount Ms. Tench has actually been able to work has been in keeping with the expectations that were the basis of Madam Justice Fleming's order in *Tench* #1;

b) $187,806.50 in future earning capacity loss, to reflect the increased risk that Ms. Tench will have to substantially reduce the amount of time she works as a teacher;

c) No specific award for loss of housekeeping capacity, other than to the extent reflected in the non-pecuniary damage award;

d) $40,000 in non-pecuniary damages to reflect how the Subject Accident has exacerbated the "shadow over all aspects of her life" that Madam Justice Fleming attributed to the Prior Accidents;

e) $49,986 for future costs of care; and

f) $4,279.14 for special damages.

[6] The parties have 14 days to arrange to speak to me about s. 83 adjustments and costs. If they do not, that award of damages will go with an award of regular costs to Ms. Tench assessed at Scale B.

BACKGROUND

Before the Subject Accident

[7] It is unnecessary for me to set out the facts prior to April 2019 in detail because they are related in *Tench* #1 at paras. 14-99. The parties have agreed that these findings, and all others in the *Tench* #1 decision, are adopted for the purpose of this action.

[8] Ms. Tench was born on June 30, 1989. She was thus 30 years old at the time of the Subject Accident and 35 at the time of trial. She was an academically-inclined child, and a top student at her high school. She particularly liked literature and drama. After high school, she worked at Rona as a cashier, a job she continued until 2016 with the exception of a year working in Europe and Africa. She began attending the University of the Fraser Valley in 2011 and graduated with a Bachelor Arts in English and Anthropology in December 2014. As a young adult, she had a bubbly, optimistic personality, had a wide circle of friends, abundant energy, and a number of passionate interests, including theatre. She was healthy and active and suffered from no particular physical limitations. She had a strong sense of cleanliness and was taught to do housework to a high standard. Ms. Tench met her now-husband in 2014 when she was acting in a play he had a role in directing. They began dating in the late fall of 2014, a few months before the First Accident.

[9] The First Accident occurred on February 7, 2015. Ms. Tench's car was hit from behind by a pickup truck. Her whole body lurched forward as a result of the collision and her neck snapped back. Immediately after this accident, she began to experience excruciating pain, especially in her neck and shoulder area, and tingling and numbness in the hands. In the longer term, the First Accident induced chronic symptoms of pain, physical limitations, fatigue and sometimes cognitive deficits. She suffered from emotional and psychological symptoms and poor sleep. As a result of the First Accident, Ms. Tench was unable to continue to work as she had before. Jobs involving lifting were no longer realistic. It significantly affected her energy and willingness to socialize, which put a strain on her (then new) marriage.

[10] In the three years following the First Accident, Ms. Tench's symptoms improved, although "not significantly": *Tench* #1 at para. 153.5. She found ways to manage her symptoms and her emotional distress improved. In the fall of 2015, Ms. Tench began teaching English as a Second Language ("ESL"). She started a graduate studies program at Simon Fraser University and working as a Teacher Assistant. She finished her master's program on time, but decided not to pursue a PhD and took a year off of academic pursuits. She married Mr. Smith on November 4, 2017.

[11] The Second Accident occurred on February 16, 2018. A black SUV leaving a parking lot drove straight into the passenger side of her vehicle, a Toyota Yaris. The entire car along with Ms. Tench's body jerked to the left. Immediately after this accident, all of her symptoms were sharp and fresh again, including pain in her back and shoulder area and pain down her arms and radiating up from her neck. She developed jaw pain she had not had after the First Accident. The Second Accident had a significant psychological impact on Ms. Tench. Her outlook became pessimistic and she was easily overwhelmed. She could not participate to the same degree in social activities and her educational activities were curtailed.

[12] The trial of *Tench* #1 was conducted in April 2019 and a decision was released on November 1, 2019. Ms. Tench, and her friends and family testifying on her behalf, were found to be credible witnesses.

[13] I will address Madam Justice Fleming's specific findings in relation to each head of damages later. For now, I will excerpt the following from her account of her essential factual findings at para. 153 of *Tench* #1:

> a) The First Accident caused soft tissue injuries to Ms. Tench's neck, shoulder girdle and back. She developed neurologic TOS, as a result of the ongoing spasm and tightness of the scalene muscles. Her condition involves significant sensory symptoms including numbness and tingling and some pain in her arms and hands. Her pain and TOS

symptoms improved somewhat but were chronic by the time of the Second Accident.

b) The First Accident caused Ms. Tench's emotional and psychological symptoms. These were not due to prior causes. The causal mechanisms likely included the impact of the accidents themselves, her ongoing pain and sensory symptoms and their consequences for her, including poor sleep.

c) Ms. Tench's physical symptoms interfered with her ability to work at a hardware store or at Starbucks. They limited how she carried out teaching roles. They also interfered with focusing, concentrating, reading and typing for sustained periods, with implications for academic work.

d) Ms. Tench's level of work at the time of the 2019 trial was as much as she could reasonably work, and left her with little energy for anything else, including her marriage and her relationships with family and friends.

e) The TOS symptoms improved somewhat, but not significantly, between the First and Second Accident. She became better at managing them and they caused less emotional distress and preoccupation. However, the Second Accident aggravated both TOS and chronic pain. At the time of trial, she was easily overwhelmed and her outlook was quite pessimistic. She suffered from low mood and high reactivity.

f) At trial, Ms. Tench was struggling to manage the demands of working part-time at three ESL positions while completing three prerequisite courses. Her functional capacity had declined since the Second Accident.

g) Botox injections and avoiding problematic activities was helpful, but Botox provided only temporary relief and the TOS and neck symptoms could only be managed.

h) Ms. Tench's prognosis was poor. Her chronic myofascial pain syndrome and chronic TOS were found to be "likely permanent". It was, however, probable that she would improve to where she was before the Second Accident. However, this outcome would still leave her with significant ongoing pain in her neck and shoulders, which would fluctuate in intensity based on her activities, and intermittent but significant symptoms of numbness and tingling in her arms and hands, along with some pain.

i) There was found to be a risk that her conditions would worsen. She was vulnerable to an aggravation of her TOS caused by further injury to her neck.

j) If she followed the treatment recommendations and worked less than full-time, Ms. Tench would be able to manage her conditions.

The Plaintiff After the 2019 Trial and Before the Subject Accident

[14] Ms. Tench's condition began to improve after the end of the 2019 trial, albeit modestly. She had begun Botox treatments with her physiatrist, Dr. Lisa Caillier in October 2018, not long before the trial, and they began to mitigate her TOS symptoms. As a result, she reduced her physiotherapy treatments.

[15] Ms. Tench's psychological state improved after the trial as well. Ms. Tench described her own psychological state between April 2019 and the beginning of 2020 as "cautiously optimistic". Both she and Mr. Smith said their relationship improved after the trial. They began to go out to the theatre more (a mutual passion) and socialize more with friends and family. She inadvertently stopped taking her anti-depression medication and found that she did not feel different. She discontinued use.

[16] In September 2019, Ms. Tench began her Bachelor of Education ("B. Ed.") program at the University of the Fraser Valley ("UFV"). Rylie Matson, who met her there, testified that while Ms. Tench was unable to sit for long and would need to lean on a wall during classes, she appeared to be "happy", "bubbly" and "driven". I find that while this was something she could sustain for a while in social settings, she continued to find doing so tiring and that her overall mood was more complex and darker than might have appeared to Ms. Matson. Nonetheless, Mr. Smith corroborated that she was happier at this time than she had been prior to the trial of *Tench* #1. When the *Tench* #1 decision was released, both Ms. Tench and Mr. Smith say her mood improved and her level of optimism increased further. Ms. Tench found the result "enormously validating".

[17] Ms. Tench was an active participant in the B. Ed. Program at UFV. She found the work less academically challenging than her Master's degree and found her experience teaching ESL useful. She played a leadership role in her program, helping fellow students to organize homework schedules. Her feedback from instructors and during her initial practicum was generally positive.

[18] Ms. Tench recalls an incident just before the Christmas break in December 2019. She and her husband were attending a matinée. She and her other classmates realized an assignment due at "12" that day was due at noon, rather than midnight. Her laptop battery was dead. She went into a coffee shop, finished the assignment, and then attended the matinée. She says this incident stands out for her because she does not think that she could do the physical tasks involved and then sit through a performance today.

[19] The Insurance Corporation of British Columbia ("ICBC") did not take aim at Ms. Tench's credibility, in the sense of her truthfulness. It expressed some questions about her reliability, in the sense of her ability to accurately perceive, remember and relate the extent of the difference in her pain and functional limitations between the 2019 period and the time after the Subject Accident, pointing both to her testimony at the trial in *Tench* #1 in which she emphasized her pain, low mood, tiredness and

cognitive limitations and some post-Subject Accident clinical records in which she expressed herself as doing better.

[20] I accept that hardly anyone is a fully reliable “pain historian”, and Ms. Tench is no different. There is always some degree of subjectivity about these assessments and since expert opinion in these areas is based on self-reporting, there is no way out of this altogether. I accept that, completely without any desire to deceive, people can remember and even experience pain and related conditions differently in different contexts.

[21] Further, as I will explain later, I accept the evidence of the plaintiff’s occupational therapist that Ms. Tench exhibits some level of kinesiophobia (psychologically-based fear that exertion that may be painful will be truly harmful). As I will also explain, this kinesiophobia is the result of the Accidents and thus, to the extent it was exacerbated by the Subject Accident, it is compensable. At the same time, it renders Ms. Tench less reliable (as opposed to credible) about the extent of her objective functional limitations.

[22] That being said, I find that Ms. Tench was careful not to overstate the difference between the 2019 period and her post-Subject Accident condition. She acknowledged that she was suffering from pain and fatigue before the Subject Accident. During pre-Subject Accident lessons in her program, she would lean on a wall and stand up and move around. She used a heating pad. Her husband continued to do most of the domestic tasks, including cooking and cleaning. It is common ground of all the experts that even if the Subject Accident had never happened, she would have suffered from pain, fatigue and its attendant limitations for the rest of her life.

[23] I find that Ms. Tench was generally accurate and reliable in her account and memory of how she was feeling before the Subject Accident, and I accept her testimony that her pain, fatigue and mood all improved after the 2019 trial and that the limitations on her recreational and family life mitigated somewhat. To be sure, to the extent she relates her functional limitations after the Subject Accident, I accept

ICBC's point that it is not, on its own at least, a reliable indicator of her objective level of injury.

[24] I conclude that the improvement in Ms. Tench's *objective* level of injury after the 2019 trial was modest. However, her subjective well being improved substantially, both as a result of the trial being completed and the validation the decision in *Tench* #1 represented. This in turn would have had a positive impact on her sleep and level of activity, which would have objective benefits. I accept as well that the Botox injections had an objective benefit.

The Subject Accident

[25] The Subject Accident occurred on January 14, 2020 in the morning. It was a snowy day. Ms. Tench was driving eastbound on Highway 1 to get to her B. Ed. program at the University of the Fraser Valley. At the time, she drove a white Nissan Versa.

[26] On the stretch between Clearbrook and McCallum roads, Highway 1 has two lanes. Ms. Tench was driving in the right lane. Although the snow was starting to clear up, the traffic was moving haltingly. Ms. Tench testified that she was driving unusually slowly because of the weather conditions. Although her driving anxiety from the previous accidents had mitigated somewhat, she was still a very cautious driver.

[27] While she was braking because of a slowdown in the traffic ahead of her, Mr. Sullivan's vehicle collided with the rear of her car.

[28] Ms. Tench testified that she could tell from the force of the impact that Mr. Sullivan's vehicle was moving fast. When they spoke after the collision, he expressed concern about being late for work. Ms. Tench's perception of Mr. Sullivan's vehicle's momentum was confirmed by the impact on the Versa, which had to be written off completely.

[29] Ms. Tench pulled over and sat in her car for a few minutes. Her hands were numb and her arms were subject to “pins and needles”. She recalls a single thought, “Oh my God, it happened again”. Mr. Sullivan parked behind her and came up to her driver door. After exchanging information and attempting to drive away, Ms. Tench realized her back tire was rubbing on the wheel well, which had been deformed by the collision. She pulled into a Wendy’s parking lot and texted her classmates. One of them came and took her to the school.

[30] She did not attend classes and saw her family physician later that day.

Symptoms After the Subject Accident

[31] Immediately after the Subject Accident, Ms. Tench suffered from pins and needles in her arms and hands, stiff shoulders and neck, and intense pain. She says she started feeling pain in places where she had not experienced it before, especially in the skull. While the immediate intensity of the pain subsided, she visited health professionals much more frequently and she recalls her sleep being much more disrupted.

[32] Ms. Tench continued through her B. Ed. program. She testified that she struggled through her “long practicum”, which began in February. In March 2020, the Provincial Health Officer declared a provincial health emergency as a result of the Covid-19 pandemic. This provided an additional week of what would otherwise have been spring break and, after that, classes were taught online. Ms. Tench attributes her ability to continue through the long practicum to the pandemic.

[33] Ms. Tench described all of her symptoms – her pre-existing chronic neck, upper back and shoulder girdle pain, her pre-existing headaches, her TOS symptoms, her fatigue and pain radiating into her arms, her emotional and psychological health symptoms, her sleep disruption, her loss of conditioning, and her difficulties participating in activities at home, work or recreationally – as getting worse. She conceded that none of these symptoms were new, but the Subject Accident made them worse, at least relative to where they were at the end of 2019. She described what appears to have been a new level of piercing pain into her skull.

[34] In cross-examination, clinical records from some of Ms. Tench's visits to her physiotherapist were put to her. They show that Ms. Tench has had better and worse times since the Subject Accident, with her pain, fatigue and cognitive barriers tending to become worse when she has more work or is otherwise stressed. However, I do not think they are inconsistent with the Subject Accident exacerbating her symptoms.

[35] There is no question that Ms. Tench's symptoms of pain, fatigue and feeling overwhelmed have been made worse by the psychological impact of the Accidents, which has led her to develop kinesiophobia. This is supported by the expert psychiatric evidence of Dr. Muir, who diagnosed Ms. Tench with "adjustment disorder", which is defined in the Diagnostic and Statistical Manual (DSM-5) as "the development of emotional or behavioral symptoms in response to an identifiable stressor occurring within three months of the stressor". Dr. Muir opined that Ms. Tench had untreated adjustment disorder at the time of the Subject Accident, which was exacerbated by the Subject Accident and her incredulity at being in a third, undeserved, accident, a belief that clearly became a focus of fixation after the Subject Accident, undermining the psychological progress after the 2019 trial.

[36] In my view, while there was some level of objective exacerbation of Ms. Tench's pre-existing chronic pain and TOS conditions as a result of the Subject Accident, of even greater significance was that the unfairness and arbitrariness of suffering from a third, similar, accident, became a focus of negative thinking and rumination and greatly increased the level of adjustment disorder, which was spontaneously improving before the Subject Accident, albeit without diagnosis and therefore without any program of treatment. I conclude that in addition to a higher level of pain, this exacerbation of her adjustment disorder was a major source of mood problems and made her symptoms more overwhelming and cognitively challenging.

Treatment After the Subject Accident

[37] Ms. Tench was receiving physiotherapy treatment before the Subject Accident. She increased its frequency, with an interruption during 2020 as a result of Covid-19 restrictions. She continued to receive Botox treatments every 3 months, but now received injections into her suboccipital muscles as well to address headaches.

[38] Ms. Tench saw a psychiatrist for the first time as a result of this litigation. Dr. Muir, who provided an expert report, strongly recommended therapy to address what he considers to be chronic adjustment disorder, leading to periodic depression and anxiety. As a result of the trial and of this recommendation, Ms. Tench has begun to see a therapist. She has also resumed anti-depressants, which she stopped taking early in 2019. It is too soon to say whether Ms. Tench will find it psychologically possible to pursue therapy as far as she can, or how successful it will be.

Prognosis After the Subject Accident

[39] Dr. Caillier, Ms. Tench's treating physiatrist since August 2018, gave testimony as an expert witness. Dr. Caillier opines that the Subject Accident led to a "worsening or aggravation of her symptoms including her back and shoulder pain as well as headaches and bilateral TOS symptoms." According to Dr. Caillier, these symptoms continued to be at an elevated level, relative to the end of 2019, four years after the Subject Accident. Dr. Caillier's opinion is that the worsening/aggravation of the pre-Subject Accident symptoms further restricted Ms. Tench in her activities at home, work or recreationally.

[40] Dr. Caillier testified that it would have been unlikely that Ms. Tench's symptoms would ever have disappeared, even if the Subject Accident had never happened. But the Subject Accident has made the long-term outlook worse. Dr. Caillier's current prognosis is that she is unlikely to get back to where she was in 2019, as Dr. Caillier had predicted in *Tench* #1. The goal is long-term management

of her symptoms, which she says requires “part-time work” and an ergonomic set-up of her classroom with the ability to take breaks when needed.

[41] ICBC’s expert physiatrist, Dr. Dhineskumar Sivananthan, opined that active rehabilitation would improve Ms. Tench’s symptoms, although he agreed that maximum recovery in motor vehicle accidents usually occurs by the end of the second year. He was, however, of the view that “there are no medical restrictions for her to continue her vocational, avocational or recreational demands” and that her subjective reports were not based on objective findings beyond some tightness during range of motion in the cervical spine.

[42] I cannot give Dr. Sivananthan’s report the same weight as Dr. Caillier both because he was not the treating physician and because he failed to find any TOS in his testing, notwithstanding that both parties agreed that Madam Justice Fleming’s finding of a permanent TOS condition in *Tench* #1 is correct and binding on me.

[43] I accept Dr. Caillier’s evidence that Ms. Tench’s prognosis for recovery to the level “before the Second Accident” is no longer operative as a result of the Subject Accident.

Psychological Impact of the Subject Accident

[44] Both parties and all the experts agree that Ms. Tench’s physical prognosis might be better if she successfully addresses the psychological impact of the Accidents, including the Subject Accident. This is an obstacle to physical recovery as well because she has developed a fear of the kind of movement and exertion that might cause some pain, but would not be permanently harmful, and the exercise necessary to improve things would require more willingness to take risks in this regard.

[45] I find that the Subject Accident had a significant and long-lasting psychological effect, over and above Ms. Tench’s pre-existing and untreated adjustment disorder. The trigger for this effect was that it seemed particularly arbitrary and unfair that she had a *third* accident that was not her fault. Ms. Tench

was particularly susceptible to this overwhelming feeling, but it was the Subject Accident that triggered it. Her rumination on the repetition of this previous trauma conflicted with Ms. Tench's values from her personality and upbringing, her foundational sense that she could always address her problems with hard work and discipline. Her native optimism, restored by the results of the first trial, was fatally undermined. After the Subject Accident, Ms. Tench found it impossible not to fixate on her pain and limitations, notwithstanding that she would "power through" this fixation to get her work done. She did this, but at the expense of other parts of her life, during which the dissonance, pain and fatigue would become overwhelming.

[46] Dr. Muir recommended anti-depressants and medication to assist sleep, both of which would help. But Dr. Muir strongest recommendation is for psychotherapy, which he said is the key treatment for overcoming trauma. This had only just begun at the time of trial. In his prognosis, Dr. Muir expressed concerned that Ms. Tench is much less resilient to future stressors than she would have been without the Accidents in general and the Subject Accident in particular. Therapy would probably improve her psychological injuries and make her more resilient, with a key concern being whether the avoidance that is typical for adjustment disorder resulting in therapy being abandoned or less effective than it could otherwise be. Dr. Muir considers that Ms. Tench has found ways of compensating for the unresolved trauma associated with the Accidents at work, but this trauma creates a higher degree of non-vocational disability, associated with increased social isolation and decreased interest in pleasurable activities and overall reduction in quality of life.

[47] Dr. Muir was unable to precisely attribute what aspects of Ms. Tench's adjustment disorder was caused by the Prior Accidents as opposed to the Subject Accident. Because therapy had not been fully explored at the time of trial, there is a guarded positive prognosis. "Positive" because therapy can be expected to help; "guarded" because Ms. Tench's personality and adjustment disorder make it hard to know whether she will be able to get the maximum benefit from it.

Work After the Subject Accident

[48] Ms. Tench completed her B. Ed. program and became a certified teacher.

[49] In September 2020, Ms. Tench started working as a teacher on call in Langley. Initially, Ms. Tench worked once or twice per week, increasing to 3-to-4 days per week by October 2020. In November 2020, she received a term contract with the Langley School District with an end date of January 2021, on the basis of 57% of full-time ("0.57 FTE"). In February 2021, Ms. Tench had a contract lined up for a 1.0 FTE temporary position until June 2021. She in fact only taught a quarter of the time, but this was due to Covid-19, rather than her diminished capacity to work as a result of the Accidents.

[50] In the 2022-2023 school year, Ms. Tench obtained a 0.857 FTE continuing position at Langley Secondary School, where she still works. Ms. Tench took on an extra class in January 2024, so that she was working full-time. This proved to be unsustainable, and she is now back to 0.857 FTE.

[51] Ms. Tench now works at Langley Secondary School, teaching English and Social Studies. The evidence before me is that she is a very good teacher, respected for her intellect. As a result of her conditions, she is unable to participate as much as other teachers in extra-curricular activities and the normal socialization at work.

[52] Ms. Tench has stated that she would prefer to work less and I accept this. However, she did not testify that she was *unable* to work at her current level, if accommodated, and if she does not take part in the extra-curricular activities that there is a social, but not job, expectation that her colleagues engage in. She clearly needs more consistent accommodation from her employer in reducing her need to move between classrooms and ensuring she always has appropriately ergonomic equipment.

[53] Dr. Caillier and Ms. Simone Szarkiewicz, a registered occupational therapist, opined that Ms. Tench should only work 3-4 hours per day, evidence that was

disputed by ICBC. I am, however, unable to rely on this evidence because it became clear that neither expert had a clear sense of what Ms. Tench was in fact doing at work. As I will explore, Dr. Caillier in particular gave inconsistent answers about her understanding in this regard and Ms. Szarkiewicz relied on her. I find that Ms. Tench has generally worked at about an 80% level, and her attempts to work effectively full-time proved unsustainable. I find that there is a significant risk that she will be unable to work at that level in the future, but that risk has not yet manifested.

Ms. Tench's Home Life After the Subject Accident

[54] In *Tench* #1, both Ms. Tench and Mr. Smith testified that their relationship was strained because of the Prior Accidents. Ms. Tench was not able to do as much housework, but continued to have very high standards. This led to a dynamic in which Mr. Smith felt that she was very hard on him, demeaning and belittling at times. This wore on his patience and self-confidence. Their physical relationship was diminished; even cuddling on the couch became painful. They rarely did recreational activities together and had an extremely reduced social circle. Ms. Tench and Mr. Smith fought more and were not communicating well. Both Ms. Tench and Mr. Smith testified that this improved after the trial. Ms. Tench became more optimistic. Both she and Mr. Smith recommitted to their relationship. They went out to the theatre occasionally.

[55] After the Subject Accident, this progress was lost. Ms. Tench became more focused on her pain and more socially withdrawn. She lost the optimism she had gained as a result of the trial and the partial success of the Botox treatments. At the time of trial, it appeared that Ms. Tench and Mr. Smith's relationship had broken down irretrievably, largely for the kinds of reasons that were anticipated in Madam Justice Fleming's decision. Mr. Smith had decided to separate and was no longer interested in pursuing marital counselling or other means of reconciliation.

[56] Clearly, there was some risk that this would have happened even if the Subject Accident had never taken place. It is ordinary human experience that improvements in failing relationships occur and then the underlying problems

re-emerge. The strains of the Covid-19 pandemic were an alternative source of deterioration after the relatively better period in 2019. At the same time, there can be no doubt that the Subject Accident negatively affected Ms. Tench's level of pain, patience, resilience and optimism, as well as her concrete ability to share household tasks and participate in joint activities, which likely contributed to the breakdown of the relationship.

[57] With respect to socializing with extended family and friends, the situation is comparable to, but worse than, it was prior to the Subject Accident. Even in 2019, Ms. Tench was unable to engage in lengthy socializing without feeling pain. She points to a few occasions when she socialized happily, including her 30th birthday. This has not been the case since the Subject Accident. Some of this effect may have been as a result of the Covid-19 pandemic and the pressures of beginning a new career – pressures that were greater as a result of her injuries, but would have existed to some extent in any event. Still, I find that she reduced her socialization activities compared to what they would have been if the Subject Accident had never happened. I find that this is partly because of increased objective pain, but mostly because of the exacerbation of her adjustment disorder.

[58] Ms. Tench testified that before the Subject Accident, she could wipe the counters in her home, but she now finds that difficult to do to the standard she would like, because of greater fatigue. Before the Subject Accident, she would sweep and dry mop, an activity that would involve moving chairs. Now she finds it too hard to get behind chairs. This has been mitigated to some extent by the purchase of a robot vacuum.

[59] She used to do the dishes, but now finds lifting and returning items to cupboards leads to pain and numbness. She now puts dishes in the dishwasher that she might previously have hand washed. While she would not do a deep clean of a refrigerator, she would remove expired items and mop up spills. Now she finds that overwhelming and, prior to trial, would leave it to Mr. Smith.

[60] In 2019, Ms. Tench would go grocery shopping with Mr. Smith once per month. She could not push a cart or take heavy items from shelves, but she would pick up small items. Ms. Tench now orders groceries online and has the clerk put them in her vehicle when she goes to pick them up. Mr. Smith will take heavier bags into their home.

[61] Ms. Tench says one of the biggest changes has been her ability to fold and hang up laundry. She now has piles of laundry that build up. She cooks less often. In general, Ms. Tench has simply accepted a less tidy home than she did before the Subject Accident. She is tired more often and overwhelmed more often.

[62] I find that the most significant impact of the Subject Accident on Ms. Tench's ability to perform housework is that she is now more easily overwhelmed. This is not entirely a matter of psychology, but in my judgment that is the most significant element. Ms. Tench was better able to find an equilibrium between her loss of capacity and her internal drive for perfection between the trial and the Subject Accident than she has been since then. I find that while it is possible that this loss of equilibrium would have happened anyway as a result of the impact of Covid-19 and the launching of her career as a teacher, the dominant cause was the Subject Accident and the retraumatization that it represented because it has generally led her to be more easily overwhelmed and to focus more on pain and her fear of re-injury.

Recreational Impacts

[63] Literature has always been important to Ms. Tench. While she continues to be a reader, she says she now reads "fluff" by comparison to what she read in her twenties prior to the Subject Accident and the demands of her career. She attributes this to the greater cognitive demands put on her by working through her pain and fatigue. After the Subject Accident, Ms. Tench acquired a dog, who gives her a lot of joy. She engages in gardening. Mr. Smith would help her by carrying large bags of soil, but that will no longer be possible once they separate. I find that while Ms. Tench has sources of joy, they have all been affected by the Subject Accident.

[64] Before any of the Accidents, Ms. Tench had a passion for doing her nails. She testified that she has a closet full of nail polish that now goes to waste. She now rarely uses any makeup, other than concealer. Some of this change had already happened prior to the Subject Accident, but there were instances where she would engage in her older routines in 2019. She has stopped doing that now. Ms. Tench's interactions with family and friends have become less frequent, to the point where she is in danger of becoming socially isolated.

ANALYSIS

Mr. Sullivan is 100% Liable for the Subject Accident

[65] Ms. Tench asks for a finding that the defendant Eric Sullivan was 100% at fault in the underlying accident. ICBC did not concede liability, but elected not to call any evidence on it.

[66] A reasonable driver following another motor vehicle leaves enough distance to stop safely in the event of an unanticipated stop by the vehicle or vehicles he or she is following and pays attention to see if that vehicle or those vehicles have braked. Where there has been a rear-end collision, therefore, the presumption is that the following driver was at fault: *Robbie v. King*, 2003 BCSC 1553 at para. 13; *Cue v. Breitkreuz*, 2010 BCSC 617 at para. 15; *Park v. Abd El Malak*, 2015 BCSC 223 at para. 12.

[67] There is no evidence capable of overcoming that presumption here. There is also no evidence of contributory negligence on Ms. Tench's part. I have no difficulty finding that the Subject Accident was entirely the fault of Mr. Sullivan. He hit her from behind when traffic was moving slowly. I infer that he was driving too close behind Ms. Tench's car for the road conditions and his level of attention. His inability to brake safely as a result was the reason the accident happened.

[68] Damages must thus be assessed on the basis Mr. Sullivan was 100% at fault.

Approach to Analyzing Damages

[69] Ms. Tench is entitled to be compensated for all, but only, the damages that can be appropriately attributed to the Subject Accident, but her injuries were contributed to by all three Accidents. What are the legal principles that govern in these circumstances?

[70] With inapplicable exceptions, the test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that but for the defendant's negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant's negligence was necessary to bring about the injury; in other words, that the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at paras. 8-9.

[71] But while the accident must be *a* necessary condition of compensable injuries, it does not matter if there are *other* necessary conditions. It may be that “but for” something else – a pre-existing condition or earlier accident – the injury would not have manifested either. This makes no difference: the “but for” test applies only to the subject accident. Pre-existing conditions do not negate causation if they are *necessary* for the damage to materialize, but only if they are *sufficient* for it to have done so. It does not matter if a plaintiff would not have suffered as much, or at all, if she did not have the pre-existing condition: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [*Athey*].

[72] In *Athey*, the plaintiff had a pre-existing non-disabling disc herniation. He then experienced two motor vehicle accidents, which exacerbated the disc herniation, but did not suffer lasting pain and went back to work quickly. An accident at a gym triggered painful and debilitating symptoms. The trial judge found that this debilitating pain would not have occurred without the natural disc herniation, which was no one’s fault, and also would not have occurred without the accidents, which were. She apportioned the damages between the accidents and the prior ones. But the Supreme Court of Canada held that this was an error. While the pre-existing condition had made the plaintiff particularly sensitive to a disabling injury, none of

the compensable injuries would have occurred without the subject accident and that was enough to make the defendants responsible for the final accident 100% liable for all the damage that unfolded. *Athey* makes clear that this principle applies equally to pre-existing conditions that are no one's fault ("non-tortious") and to those that are the result of torts that have already resulted in compensation or for some other reason are not the subject matter of a current civil action.

[73] At the same time, a corollary of the "but for" principle is the principle against double recovery. If a plaintiff has already been compensated for losses as a result of another accident, then those already-compensated-for losses cannot be recovered again: *Dhillon v. Jaffer*, 2014 BCCA 215 at para. 29. What matters is whether the accident that is the subject of the litigation was a "but for" cause of the injury: if it was, then whoever is responsible for that accident is responsible for the damages flowing from the injury. On the other hand, those injuries which would have occurred, even if the subject accident had not, are not compensable.

[74] Lawyers illustrate this with the distinction between a "think skull" (which leaves a plaintiff particularly vulnerable to a head injury) and a "crumbling skull" (which, at least in legal examples, implies injury will happen with a delay but regardless of external events). In "thin skull" cases, a previous accident or condition makes a plaintiff more susceptible to injury, but this has no effect on the amount of damages, even if the previous injury was *jointly* necessary with the tort for the extent of the injuries that ultimately materialize. By contrast, in "crumbling skull" cases, the injury (or part of it) would have happened after the date of the subject accident even if the subject accident had never occurred. Those injuries therefore occurred *after* the subject accident but are not *caused* by it. If the prior condition was caused by someone else's fault, it would offend the rule against double recovery to give the plaintiff compensation for everything that they currently suffer from, since those earlier-caused injuries either were or could have been the basis of a settlement or successful lawsuit; if the prior condition was nobody's fault, then compensation can be sought, if at all, only through social insurance. The tort system has nothing to do with it.

[75] The plaintiff characterizes her injuries as a result of the Subject Accident as primarily a “thin skull” case: while the Prior Accidents undeniably made her vulnerable to the injuries she has suffered, they are greater than they would have been if only the Prior Accidents had occurred. ICBC, by contrast, characterizes this as primarily a “crumbling skull” case, arguing that most of the injuries Ms. Tench refers to were ones that were already compensated for in *Tench* #1.

[76] In reality, Ms. Tench’s injuries have aspects of both. Ms. Tench’s situation can be classified, at least in part, as a “crumbling skull” case since Madam Justice Fleming found that the Prior Accidents had created a permanent disability and would lead to damage for an indefinite future. To the extent her pain, suffering and pecuniary losses between the Subject Accident and trial, or in the future, were part of what the damage award in *Tench* #1 provided compensation for, Ms. Tench is not entitled to those damages again. On the other hand, the Subject Accident also caused new losses and damages, for which she is entitled to compensation.

[77] At one level, this is not in dispute. Ms. Tench acknowledges that she would have suffered from chronic pain and TOS even if the Subject Accident had never happened, and that she is therefore not entitled for compensation for that portion of her injuries that can be attributed to the Prior Accidents. And ICBC, for its part, concedes that there has been some exacerbation of her conditions, particularly psychologically, and that damages therefore have to be assessed.

“Indivisibility” Is Not the Right Approach

[78] But while the parties agree in general that the thin skull/crumbling skull distinction applies and that double recovery must be avoided, the two parties have proposed different methodologies for assessing damages.

[79] The plaintiff says I should make findings under each head of damage about the *additional* loss that she has suffered by comparing the expert and lay evidence about what she is now suffering with what Madam Justice Fleming found in *Tench* #1, and evaluate these losses in money terms in accordance with the standard principles found in personal injury cases. For example, under

non-pecuniary loss, I should try to determine what part of the loss and damage Ms. Tench is currently suffering that would not have occurred if the Subject Accident had not happened, and then compensate for that (and so on for each of the heads of damages claimed).

[80] ICBC, by contrast, argues that the Subject Accident is "indivisible" from the Prior Accidents. It therefore wants me to proceed by making an overall award for all three accidents and then deduct the amount awarded by Madam Justice Fleming for the Prior Accidents.

[81] In principle, these two methodologies should produce the same result. Either way, I must subtract the damage that would have occurred if the Subject Accident had never happened from what Ms. Tench has in fact suffered. "Indivisibility" is just one methodology for avoiding double recovery. It is really a matter of what is the better way to get at the distinction between those injuries and losses that were caused because of the Subject Accident and those that would have occurred anyway.

[82] In the case law presented to me, "indivisibility" comes up in two contexts. In the first context, there is a *single trial* involving multiple defendants responsible for different accidents. Strictly speaking, based on the *Athey* principle, each defendant is liable for the amount of damages caused by each accident multiplied by their portion of liability for that accident. However, where it is impracticable to try to make these distinctions, it may make more sense not to quantify damages separately for each accident but come to a global award and then apportion the overall damage based on fault: *Bradley v. Groves*, 2010 BCCA 361.

[83] But in these multiple-accident-one-trial cases, the indivisibility approach is a practical one to avoid difficulties of proof. It is a "second-best" approach. To the extent it is possible to show that one defendant caused one injury (for example, to a hand) and the other defendant caused a different one (for example, to a foot), then the appropriate principle is that damages for each injury should be assessed

separately and each tortfeasor should be liable for all and only the injury they caused: *Athey* at para. 24.

[84] The test for “indivisibility” in a multiple-accident-one-trial situation is therefore whether it is possible on the available evidence to determine the plaintiff's baseline condition immediately prior to the later accident: *Uppal v. Judge*, 2016 BCSC 642 at para. 86. Where there is a single trial after multiple accidents, there will typically be one set of expert reports and there may not have been separate evaluations of the state of the plaintiff’s injuries between each accident, or at least not in accordance with fairness to both parties.

[85] By contrast, here there are two separate trials, with separate sets of expert reports. Madam Justice Fleming made detailed findings about what the damage and losses attributable to the Prior Accidents were and would be in the future. All the evidence at this trial was about the losses Ms. Tench experiences now, after the Subject Accident. This is not a case in which there is only one hearing in which all or even most of the evidence is generated after all the accidents.

[86] The second situation is where there has already been some compensation for an earlier accident and then a trial on a subsequent accident which has exacerbated the original, compensated, injury. If it is difficult to establish a “baseline” for the later accident, it may make sense to assess the plaintiff’s overall damages and then deduct the already-obtained compensation.

[87] An example of such a case is *Saidy v. Louzado*, 2019 BCSC 281 [*Saidy*]. That case involved two prior accidents, which had been settled, and five accidents that were the subject of the trial. In *Saidy*, expert reports from the first, settled, civil action were made exhibits, but there was a four-year period between the original accidents and the ones that were the subject of the trial. Justice Giaschi found that the injuries were “indivisible” and deducted the amount settled from his award. The gross award reflected the condition of the plaintiff overall.

[88] In my view, in the *Saidy* type of case, “indivisibility” is also a second-best approach based on the difficulties of evidence. In this case, there is a very clearly delineated baseline in Madam Justice Fleming’s decision. It would not make sense for me to try to assess Ms. Tench’s overall injuries without regard to this decision and then deduct her award.

[89] There is a practical difficulty as well. The quantification of non-pecuniary damages requires comparing the situation of the plaintiff to other “comparator” cases and then adjusting for the differences. For me in this trial, the best comparator for Ms. Tench’s non-pecuniary losses would be *Tench* #1. To make the comparison, I would have to assess what the differences are between Ms. Tench’s current injuries impacting her non-pecuniary interests and those she would have suffered in any event. In other words, I would have to engage in precisely the inquiry that the “indivisibility” approach is supposed to avoid.

[90] In my view, “indivisibility” is not the appropriate approach here. Since damages are for the plaintiff to prove, it is reasonable that the plaintiff should have some flexibility in how to go about doing that. Moreover, given what the evidence and Madam Justice Fleming’s determinations tells us, “indivisibility” will make a fair damage assessment more difficult. If the plaintiff can prove her damages in accordance with the methodology she proposes to use, she is entitled to do so.

General Comments on the Injuries Attributable to the Subject Accident

[91] Before addressing specific heads of damages, it will be useful to make some general findings regarding the additional impact of the Subject Accident (i.e. over and above what would have been had only the Prior Accidents occurred).

[92] For this purpose, it is important to distinguish between the impact of each accident on Ms. Tench’s pain, mobility and energy, on the one hand, and the impact on her psychological well-being on the other. Both are compensable, but the mechanisms of causation may be different. It is also important to distinguish between the short-term (in the sense of up-to-two years) and long-term impacts.

[93] The First Accident caused soft tissue injuries to Ms. Tench's neck, shoulder girdle and back, resulting in acute and significant pain in those areas. It also had the secondary effect of triggering TOS as the result of the trauma to the scalene muscles, leading to sensory symptoms including numbness and tingling and some pain in her arms and hands, and a more generalized chronic pain. The TOS and the chronic pain have been permanent. Ms. Tench's pain improved somewhat between the First and Second Accident, and she leaned to manage them better, but both the pain and TOS symptoms were aggravated again when the Second Accident occurred.

[94] Madam Justice Fleming found that Ms. Tench's prognosis was poor and that her chronic myofascial pain syndrome and chronic TOS were likely permanent. She accepted the evidence that well-established TOS, such as Ms. Tench developed after the First Accident, is never "cured": *Tench* #1 at para. 109. However, she found that these would likely improve to the level they were at the time of the Second Accident. In other words, the level of pain, and restrictions on mobility and energy at the time just before the Second Accident was, on Madam Justice Fleming's findings, permanent, while the exacerbation as a result of the Second Accident was such that with appropriate treatment, it would subside in the long term after appropriate treatment.

[95] While ICBC acknowledges that the Subject Accident exacerbated Ms. Tench's injuries, it submits that the situation has not changed very much. It points out that in the course of the Subject Accident, Ms. Tench did not strike any part of the interior of her vehicle and her airbags did not deploy. She did not lose consciousness and was able to exit the vehicle unassisted. She did not need emergency assistance. At the same time, her vehicle was struck with enough force that the vehicle was declared a total loss.

[96] The immediate physical effect of the Subject Accident was a feeling of "pins and needles" and extreme pain that lasted for hours. There is no question in my

mind that, at minimum, the Subject Accident exacerbated Ms. Tench's pain, energy and mobility issues in the short term to a similar degree as the Second Accident.

[97] The more difficult question in this respect is the extent to which the Subject Accident changed Ms. Tench's *long-term* prognosis for pain, lack of energy and lack of mobility.

[98] In this respect, Dr. Caillier opined both that Ms. Tench's symptoms "remain at an elevated level […] four years later" relative to how they were before the Subject Accident and that "she is unlikely to return to her pre-January 14, 2020 functional and symptoms level." This latter prognosis can be contrasted with the opinion she gave at the time of the 2019 trial in relation to the long-term impact of the Second Accident, since at that time her prognosis was that Ms. Tench's symptoms and functional level would ultimately converge with what it had been prior to the Second Accident, although it was unlikely to get better than that. This is a materially different long-term prognosis.

[99] As I read *Tench* #1, it would appear that while the First Accident may have had a greater *objective* impact, the Second Accident may have had a bigger effect on Ms. Tench's personality and mental health. I find that this was the case with respect to the Subject Accident, relative to the Prior Accidents taken together. The experience of *repetition* of trauma and the *return* to a position from which there was some recovery shook Ms. Tench's self-conception more than the First Accident did. The Subject Accident undermined the psychological progress she had made since the trial of *Tench* #1. She could not help but fixate on the unfairness of it, and of having to go through the same experience of increased pain and limitations. This has exacerbated her pessimism and her fear of movement. This in turn interferes with reaching maximum physical improvement.

[100] In my view, there is a real prospect that if Ms. Tench takes to therapy as she has taken to other challenges in her life, she will be better able to process the trauma of the Subject Accident. That will not put her in the same position she would have been in if the Subject Accident never occurred, since she is still likely to have a

long-term level of pain and functional impairment that will be worse than what existed right before the Second Accident. It is her best hope. I have to take into account, however, the paradox that is precisely her personality strengths that might lead to avoidant behaviour that undermines the effectiveness of therapy. I have to take that into account in any assessment of what is likely to happen in the future.

Past Wage Loss

[101] I agree with ICBC that there is no persuasive evidence that Ms. Tench has suffered any past wage loss as a result of the Subject Accident. She earned what Madam Justice Fleming expected her to earn in *Tench* #1, if not somewhat more. I also agree with it that any reduction in her future capacity to earn has not actually occurred as of yet: she can, at least for now, work 80% of the time and I believe it is most likely that she will be continue to be able to do so until retirement age if she undergoes appropriate psychological and physical treatment and is appropriately accommodated by her employer. However, I find that there is a substantial possibility that this will happen and that some compensation must therefore be ordered, albeit appropriately discounted for probability.

[102] At the time of *Tench* #1, Ms. Tench's career in teaching was still in prospect. Madam Justice Fleming awarded a 20% impairment for future capacity. She found that Ms. Tench would have been able to work full-time as a teacher if the Prior Accidents had not happened, but this would be unlikely in the future as she could project it at that time.

[103] Ms. Tench's vascular surgeon had testified that in his experience patients in the same situation that Ms. Tench found herself after the Prior Accidents are only able to work part-time, "taking frequent breaks each day and often longer mid-week breaks to recover and have therapy": *Tench* #1 at para. 119. Madam Justice Fleming found that this evidence was not undermined on cross-examination and relied on it: *Tench* #1 at para. 121.

[104] This means that even if the Subject Accident had never happened, Ms. Tench would not have been in a position to work full-time (as a 1.0 FTE) on a *sustainable*

basis. This not only diminished the amount of money she could make in the direct sense that she could not earn full-time wages, but also in the sense that she had to find part-time work, which could be more difficult and would result in less seniority. The 20% impairment finding, and the subsequent award of future income capacity loss reflected that reality, and thus she has already been compensated for it.

[105] Reviewing her actual history of earning up to trial, it has been consistent with what Madam Justice Fleming projected as future earnings. At the time of the Subject Accident, Ms. Tench was completing her final practicum for her teaching certification. She finished her course and practicum in the time line that was expected at trial. I accept that doing this was more difficult than it would have been if the Subject Accident had not occurred, and that the intervention of the Covid-19 pandemic made things somewhat easier than they would otherwise have been. But while this may be significant for *non*-pecuniary losses, it does not affect Ms. Tench's pecuniary losses.

[106] Ms. Tench's job path after she became a certified teacher is consistent with the basis for the future earning capacity award in *Tench* #1. It took her a while to get the amount of work where her physical limitations were the constraint. I accept that this may, in part, have been because it is easier to find continuing positions if one is able to work full-time. However, this was part of the basis for the *Tench* #1 award.

[107] I accept Ms. Tench's evidence that she did not want to take on a full-time course load in January 2024 and I find that this was not sustainable for her. Ms. Tench and her experts say that 0.857 FTE is more than she can sustain. I will address that under my analysis of a future earning capacity award. However, it is clear that so far, sustainably or not, Ms. Tench has either worked at the 80% level that was the premise for Madam Justice Fleming's award or the reasons for not working had nothing to do with her injuries. As a result, I will not make an award for past wage loss.

Future Earning Capacity

[108] Ms. Tench argues that the evidence establishes that she is not able to durably work an 0.857 FTE schedule and instead must reduce to a 0.57 FTE. On this basis, Ms. Clark, who is the plaintiff's expert witness with an expertise in economics, estimates $674,956 in loss of earnings to age 65 and $76,270 in loss of employer pension contributions, for a total of $751,226.

[109] Ms. Tench points to what she characterizes as regular use of sick days to manager her pain and the consequences of her collision injuries.

[110] ICBC disputes that there is any evidence of an inability to work full-time, let alone at a 0.857 FTE schedule. ICBC notes that Ms. Tench has earned more than 80% of full-time full-year earnings for a teacher in BC with a master's degree so far. ICBC says that with active rehabilitation, therapy, anti-depressants, learning about "hurt vs harm" and getting further ergonomic accommodations, it is likely she will be able to continue to work a 0.857 FTE durably into the future.

[111] ICBC disputes Ms. Tench's assertions that she is struggling with her position or that she is losing significant time due to injuries. ICBC points out that her principal is not aware of any complaints and that the evidence is that Ms. Tench is a conscientious and effective teacher.

Analysis of Future Earning Capacity

[112] There are two ways for Ms. Tench to succeed in obtaining an award for loss of future earning capacity as a result of the Subject Accident. She could try to establish, on a balance of probabilities, a past event that means Ms. Tench cannot earn what Madam Justice Fleming found she was likely to earn as the basis for the award in *Tench* #1. Alternatively, she could try to establish a "real and substantial possibility" that she will not be able to earn that much as a result of the Subject Accident. In the latter case, the amount of compensation for this (new) negative contingency would have to be discounted by the probability that it would in fact occur.

[113] Either way, it is important to start with the baseline, which is provided by the findings in *Tench* #1. At paras. 202 and 203, Madam Justice Fleming laid out the assumptions behind her award for loss of future earning capacity. In a nutshell, she assumed that Ms. Tench could not work full-time as a classroom teacher, but would be able to do up to 80% of a full-time classroom teacher. She found that Ms. Tench might have to work more than that initially, in order to put in the investment any new teacher must make in additional preparation, marking and report card writing time compared with more experienced teachers. She took that into account in coming to the 80% figure.

[114] It is important to observe that the baseline found by Madam Justice Fleming in *Tench* #1 was 80% of the work done by a typical classroom teacher. This would include not only instructional time, but also preparation time, marking time, parent-and-teacher interviews and so on.

[115] I do not accept Dr. Caillier or Ms. Szarkiewicz's evidence to the extent it is interpreted as demonstrating that Ms. Tench cannot work more than a 4-5 hour day. In the first place, this is not what Dr. Caillier says in her written report, which constitutes her evidence-in-chief. In the report, Dr. Caillier recommended that Ms. Tench *teach* "3 out of 4 blocks per day". A 0.857 FTE teaches three classes per semester, so this is not itself a recommendation to reduce teaching time from the status quo. In cross-examination, Dr. Caillier clarified that she was not sure the exact length of a block in each school district, and she was recommending about 3 hours of teaching time per day. However, since a standard block at Langley Secondary School is 70 minutes, this is not materially different. Dr. Caillier did *not* provide a consistent opinion that a substantial reduction in instructional time was a medical recommendation.

[116] To be sure, this recommendation went together with Ms. Tench's continued participation in physiotherapy, the ability to alter her body position and stretch at work, an ergonomic work station and the ability to take breaks as required. However, at least in her report, Dr. Caillier's recommendations were consistent with

Ms. Tench's current work schedule, as well as with Madam Justice Fleming's expectations for future earning capacity in *Tench* #1.

[117] Ms. Szarkiewicz, who provided a functional capacity evaluation based on her expertise as a registered occupational therapist, opined as follows concerning the amount of time Ms. Tench could sustainably work:

> I concur with Dr. Caillier's opinion [i.e. of teaching 3 out of 4 blocks per day], based on the results of current functional capacity testing and in line with updated medical opinion provided, it is my opinion that Ms. Tench does not possess the capacity for full-time durable employment as a secondary school teacher.

[118] However, Ms. Szarkiewicz goes a bit further, and proposes a reduction to a "4-5 hour day", which seems to include non-instructional time:

> Ms. Tench continues to struggle with fatigue and symptom aggravation and has limited to no energy for completing domestic tasks when she returns home. This further points to her current working hours [i.e., as of May-June 2024] being above and beyond what she has the capacity for. It is my opinion that Ms. Tench is better suited to working a 4-5 hour day […]

[119] It is not clear what "better suited" means precisely. To the extent it is taken as an opinion that Ms. Tench cannot reasonably work more than 4-5 hours per day, on average and including non-instructional time, I do not accept it. Ms. Szarkiewicz did not indicate anything within her area of expertise that could sustain that conclusion.

[120] Ms. Tench herself testified that she found full-time teaching "completely unsustainable." She says that her total work day, including non-instructional time and getting to work, averages 7 hours per day. She would like to work 2 or 3 blocks per day, saying that would enable her to be a better teacher and participate more in extra-curricular activities and administration around the school, as well as giving her more energy for recreational and domestic activities.

[121] I accept that Ms. Tench should not be expected to sacrifice everything else in her life in order to work at 80% capacity – and if the Subject Accident had put her in a position where this was her choice, then she would have established that she cannot *reasonably* work that much. However, Ms. Tench is not required to

participate in extra-curricular activities or socialize with her colleagues to make a living. It would be double compensation to include the Subject Accident's impacts on her ability to do recreational and domestic activities as part of non-pecuniary damages and also provide an award for loss of earning capacity on the basis that less work time would make those aspects of her life easier.

[122] I accept that Ms. Tench is genuinely stressed beyond her sustainable limits. However, this is not because she cannot work at 80% capacity, but because she has worked beyond that, has had serious marital problems and has not come to grips with the psychological impact of the Subject Accident. These are real losses and need to be addressed, but not under the head of future income earning capacity.

[123] Ms. Tench cannot sustainably work full-time. I find that when she did so, it was because she was asked and felt obligated to agree, and that this was a mistake. However, Ms. Tench has not proven, on a balance of probabilities, that the Subject Accident has in fact reduced her below the 80% capacity that was the basis of the award in *Tench* #1. If Ms. Tench successfully addresses her adjustment disorder through counselling, if she continues a program of physiotherapy, if her employer properly accommodates her workplace needs, and if she does not face yet another traumatic shock to her body, then she will likely be able to work at about 80% until retirement.

[124] Those are a lot of "ifs", however. So while I do not think Ms. Tench has shown, on a balance of probabilities, that the Subject Accident has *in fact* reduced her earning capacity relative to the baseline set by the award in *Tench* #1, I must consider whether she has shown that there is *a real and substantial possibility* that this will happen – either because she is not properly accommodated, because her efforts to address her mental health challenges are unsuccessful or because she suffers another event that exacerbates her condition.

[125] As Madam Justice Fleming noted, in *Tench* #1 neither party had made submissions about positive or negative contingencies and she made no findings about contingencies: *Tench* #1 at para. 203.

[126] Dr. Caillier in her report in this action had a more pessimistic view of the level to which Ms. Tench can come back than she did in her report in *Tench* #1. At that time, she thought Ms. Tench could return to the level she was at before the Second Accident. She no longer thinks that. Further, Dr. Muir persuades me that each accident has cumulatively worn away at Ms. Tench's resilience. Another accident or traumatic event has the potential to interfere with her ability to earn a living. This may not be more-probable-than-not, but it is a real and substantial possibility.

[127] While these negative contingencies might have occurred even if the Subject Accident had not happened, it made them more likely. One reason is that it exacerbated her physical condition. The more significant reason, in my view, is that being hit again for the third time drained her considerable resources of resilience. While she may have had pessimistic impulses before the Subject Accident, they were diminishing as a result of the decision in *Tench* #1 and they came back with a vengeance.

[128] The expert evidence indicates that Ms. Tench is unlikely to really make progress unless she confronts the cognitive dissonance between her self-image, as someone who is always competent and controlled, and the reality of her condition. Doing this, as Dr. Muir has testified, requires therapy, and Ms. Tench has started on that path. But, as Dr. Muir has also pointed out, adjustment disorder makes it difficult to successfully complete therapy, because one of the symptoms is avoidance. I find that the Subject Accident had a disproportionate impact on her adjustment disorder. Since the resulting avoidance is one of the major stumbling blocks for controlling her symptoms going forward, I find that the Subject Accident added to probability that something would happen such that she would have to reduce her workload to something like the 0.57 FTE level. There is definitely a substantial possibility that this will happen.

[129] Having found a real and substantial possibility, I must try to determine the probability that it will happen. I set this negative contingency that she will have to further reduce her work hours as having a probability of 25%.

[130] Ms. Tench called Christiane Clark as an expert witness with an expertise in economics. Ms. Clark opined that Ms. Tench's future income loss if she goes from her current level of employment to 0.57 FTE to be $751,226, inclusive of pension. One quarter of that is $187,806.50, which I would therefore set as the value of lost future earning capacity as a result of the Subject Accident if I accept Ms. Clark's conclusions.

[131] ICBC makes two criticisms of Ms. Clark's methodology. One is that she used full-time earnings for teachers as the statistical baseline from which to make deductions based on part-time earnings, rather than the average of all teachers. There is no merit to this criticism, since the baseline assumption if Ms. Tench had not been injured at all is that she would have been able to work full-time. If ICBC wanted to argue in favour of a negative contingency at the first trial or here, then the onus was on it to do so.

[132] The second criticism is that ICBC says Ms. Clark "disagreed that if a plaintiff was previously disabled before the subject accident, then the average would actually overestimate their loss". I do not agree that Ms. Clark made any such mistake. Her expertise is not to determine how disabled Ms. Tench or any other plaintiff is, but to make a valuation given various assumptions. Her answer was correct in light of her role. In the absence of any competing evidence from ICBC, I accept Ms. Clark's opinion for this purpose.

[133] As a result, I make a loss of earning capacity award, based on a 25% negative contingency that the Subject Accident will ultimately require Ms. Tench to work below the 80% level used by Madam Justice Fleming in her assessment, of $187,806.50.

Housekeeping Capacity

[134] The Court of Appeal has recently clarified the law on when a separate award for loss of housekeeping capacity should be made and when it should form part of non-pecuniary damages: *McKee v. Hicks*, 2023 BCCA 109, paras. 93-115 [*McKee*]. Where a person is incapacitated from performing household tasks by an accident

and either hires someone to do so or obtains the gratuitous services of family members who would otherwise not perform those tasks, then pecuniary damages either will, in the first case, or may, in the second case, be awarded. However, pecuniary awards are “not appropriate” when a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering, and loss of amenities: *McKee* at para. 112.

[135] In this case, there is no question that Ms. Tench obtained gratuitous services from Mr. Smith or that she is entitled to hire someone to replace those services after his departure. However, to the extent the services Mr. Smith or a paid provider performed were covered by the award in *Tench* #1, they have already been compensated for.

[136] The analysis prescribed by the Court of Appeal in *McKee* must be applied to the *new* housekeeping demands as a result of the Subject Accident. I find that *its* impact on Ms. Tench’s ability to do housework is better characterized as adding difficulty and frustration than as requiring new paid or unpaid services. She is more easily overwhelmed and has abandoned doing things she would have done in 2019. That is, at least in part, a result of the discouragement and additional load of pain and fatigue caused by the Subject Accident. However, I do not find that the difference is such as to justify a pecuniary award for housekeeping capacity, but should rather be considered as part of a non-pecuniary award.

Non-Pecuniary Loss

[137] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. A non-exhaustive list of factors was set out by the British Columbia Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [*Stapley*], as follows:

a) age of the plaintiff;

b) nature of the injury;

c) severity and duration of pain;

d) disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital and social relationships;

h) impairment of physical and mental abilities; and

i) loss of lifestyle.

[138] The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff.

[139] Non-pecuniary loss is the increase or decrease (depending on which direction is negative) in each of these factors. In this case, the issue is (for example) the increase in severity of pain or impairment of family, marital and social relationships, relative to the baseline set by Madam Justice Fleming's assessment of Ms. Tench's situation in *Tench* #1. For each of the *Stapley* factors, there was at least some loss as a result of the Prior Accidents. I have found that Ms. Tench's pain is more severe now, she has some level of greater disability, and her relationships, most clearly her marital relationship, have been further impaired or lost. Her lifestyle has been affected, as she has had to further curtail her recreational and social life and she has had to accept a level of household disorder that she would not otherwise have accepted.

[140] Ms. Tench puts forward, as comparable cases, *Hartman v. MMS Homes Ltd.*, 2021 BCSC 2165 ($150,000 in non-pecuniary damages) [*Hartman*], *Mallier v. Falcomer*, 2021 BCSC 1827 ($120,000) [*Mallier*], and *Iampietro v. Leung*, 2019 BCSC 1750 ($125,000) [*Iampietro*]. ICBC put forward *Holt v. McLatchy*, 2022 BCSC 1421 ($130,000), and *Close v. Tigas*, 2022 BCSC 2065 ($160,000) as comparable for the *total* non-pecuniary loss from all three Accidents.

[141] ICBC's "comparable" cases are not particularly helpful in light of my rejection of its "indivisibility" approach to damage assessment.

[142] Turning to Ms. Tench's proposed comparables, *Hartman* is not really apposite because the pre-existing injuries in that case had far less impact on the plaintiff than the subject accident. The plaintiff in *Hartman* had some fibromyalgia and had suffered from a previous accident, but the injuries in the previous accident had largely resolved and the fibromyalgia did not interfere with an active social and physical life, while the subject accident meant the plaintiff had to massively curtail many parts of her life. This is quite different from the relationship between Ms. Tench's current and pre-existing injury.

[143] The facts in *Mallier* have some analogy in this case. In *Mallier*, the subject accident, which exacerbated a pre-existing injury, did not create significant objective disablement, it did create an enormous psychological toll on the plaintiff, leading to "her sense of self worth, in her social and volunteer activities, at work, and most significantly, in her marriage": *Mallier* at para. 55. However, *Mallier* can be distinguished to some extent by the fact that in Ms. Tench's case, there was also a substantial psychological impact of the Prior Accidents, including on her marriage, and this was considered by Madam Justice Fleming. While I accept that the Subject Accident here reversed the amelioration of those effects in 2019, and also caused more pain, and Ms. Tench was twenty years younger than the plaintiff in *Mallier* at the time of their respective accidents, I do not think a pecuniary award as high is warranted.

[144] I also do not think the pre-existing injury in *Iampietro* (i.e. a herniated disc) had an impact comparable to the Prior Accidents in this case. In *Iampietro*, according to Madam Justice Matthews at para. 111, by the time of trial the disc herniation was much reduced and the plaintiff's chronic pain and somatic symptom disorder could all be attributed to the accident.

[145] Ms. Tench has clearly had non-pecuniary losses, relative to the baseline set in *Tench* #1. A marriage that was facing difficulties now appears to be at an end.

She sees fewer plays and has a smaller social circle than she did. She is more easily overwhelmed. In addition, there must be some compensation for her symptoms immediately after the Subject Accident: while they did not prevent her from completing her program, she suffered as a result.

[146] In my view, an award of $40,000 for non-pecuniary damages is appropriate. This would be 1/3 of the non-pecuniary damage award in *Tench* #1, which, in my judgment, reflects the extent to which the *Stapley* factors have been exacerbated by the Subject Accident by comparison with the Prior Accidents.

Costs of Future Care

[147] An award for costs of future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff. This is just the application in the context of future care of the principle that the injured person should be restored to the position they would have been in had the accident not occurred, insofar as this can be done with money: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33), 1985 CanLII 1979 (S.C.) at p. 78.

[148] It is not necessary that a physician testify to the medical necessity of each and every item claimed, but there must be an evidentiary link drawn between a physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39. If, on the evidence, the plaintiff will not use the services, an award ought not to be made: *Chai v. Greenwood*, 2020 BCSC 1294 at para. 135.

[149] It is common ground between the parties that treatment or services already provided for in the award in *Tench* #1 should not be part of an award of costs of future care here, whether or not Ms. Tench would benefit from them.

[150] Ms. Tench reported an increase in use of Advil after the Subject Accident from 4-6 tablets per month to 3-4 times per week. Ms. Szarkiewicz estimates this as an increase of $17.28 to $21.60 per year. There is an evidentiary link to increased

pain and so this modest amount should be permitted in an award. I will use $20 per year for life, which has a net present value of $625 based on Ms. Clark's multiplier of annual lifetime costs.

[151] Future medical care, testing and diagnostics is thought to be covered by Medical Services Plan, and therefore is not part of any award.

[152] While Ms. Szarkiewicz includes Botox treatments in her costs of future care, on the evidence the total amount of Botox treatment is the same as it was before the Subject Accident, and therefore this should not be allowed. Active rehabilitation and kinesiology for 3-4 years was provided for in the *Tench* #1 award. Ms. Tench may not have pursued this as a result of the Subject Accident and her psychological reaction to it. If she does in the future, it will most likely be because of successful therapy. However, it would be double recovery for me to order it in this trial. Similarly, occupational therapy was ordered in *Tench* #1 based on similar recommendations.

[153] I accept the following therapeutic interventions from Ms. Szarkiewicz's report are linked to the Subject Accident:

a) An additional 18-20 physiotherapy sessions per year, to be reduced at retirement age to 10-12. Ms. Tench testified that she increased her physiotherapy as a result of the Subject Accident, providing the requisite evidentiary link. The evidence is that there is an annual cost range that begins at $1,640 in the pre-retirement years and $900 in the post-retirement years. I accept Ms. Clark's calculation that the present value would be $36,188 until retirement and then $8,273 to the life expectancy period, for a total of $44,461.

b) Psychological interventions of 20 sessions. This amounts to $4,900.

[154] I agree with ICBC that the requested costs of future care for ergonomic assessment, ergonomic equipment and housekeeping are duplicative of what was ordered in *Tench* #1.

[155] I therefore award $49,986 for costs of future care.

Special Damages

[156] Ms. Tench claims the following amounts for special damages (net of payments already received either from ICBC or through employment):

a) $2,512.56 for physiotherapy appointments (above the rate at which she was attending in 2019);

b) $17.71 for prescriptions;

c) $140 for counselling;

d) $282.87 for Advil, reading glasses, foot roller, Releaf Stick, ergonomic footrest and melatonin; and

e) $1,326 for medical mileage.

[157] ICBC concedes it owes special damages, but denies the physiotherapy amounts. I find that Ms. Tench is entitled to the amounts reflecting her increased attendance at physiotherapy since this would not have been necessary “but for” the Subject Accident.

[158] For the purposes of assessing *special* damages, it does not matter that Ms. Tench did not use the total amount of physiotherapy considered as part of the calculation of cost of future care damages in *Tench* #1. She may well have eventually used up the 12 physiotherapy sessions ordered if the Subject Accident had not happened, but she is now attending physiotherapy more regularly and the evidence is that this is because of the Subject Accident. In any event, a personal injury plaintiff is not obliged to spend money on actual care precisely as assessed in a future cost of care award. What matters, for the purposes of assessing special damages, is whether the expenditures were made and were causally attributable to the tort, and I find that both elements are met here.

[159] I therefore award the entire amount of special damages claimed or $4,279.14.

JUDGMENT

[160] I therefore make the following declarations, orders and directions:

1. A declaration that the defendant Eric Michael Sullivan is 100 percent at fault in the collision of his motor vehicle with that of the plaintiff Leah Kathleen Tench on January 14, 2020.

2. Subject to para. 4, an award of damages to the plaintiff, payable by the defendant, in the amount of $282,071.64.

3. An award of interest as determined under the *Court Order Interest Act*.

4. A direction that the third party Insurance Corporation of British Columbia may request a further hearing on adjustment of the award for costs of future care under s. 83 of the *Insurance (Vehicle) Act* if the request is received by the Victoria Registry by 4 p.m. 14 days after the date of this order.

5. An order that, if there is no request for adjustment under s. 83 of the *Insurance (Vehicle) Act* within the time provided in para. 4, there shall be no adjustment under s. 83 of the *Insurance (Vehicle) Act*.

6. A direction that either party may request a hearing on costs of this action if the request is received by the Victoria Registry by 4 p.m. 14 days after the date of this order.

7. An order that, if no request for a hearing is received within the time provided in para. 6, costs shall be to the plaintiff at Scale B.

"J. G. Morley, J."
The Honourable Justice Morley