

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ellis v. Duong*,
2017 BCSC 459

Date: 20170322
Docket: M092862
Registry: Vancouver

Between:

**Natalie Ellis, an infant by her mother and litigation guardian, Vivian Ellis,
and the said Vivian Ellis**

Plaintiffs

And

**Eric Tieu Duong, Thi Oanh Nguyen, Shawn Philip Beaupre,
Linda Carol Humeniuk-Villella, Ronald James Yaroshuk
and Douglas Brent Ellis**

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice W. J. Harris

Reasons for Judgment

Counsel for Plaintiffs:

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ICBC:

P.J. Armstrong, Q.C.
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Place and Date of Trial:

Vancouver, B.C.
July 4-8, 2016
July 11-15, 2016
July 18-20, 2016
September 20-21, 2016

Place and Date of Judgment:

Vancouver, B.C.
March 22, 2017

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SUMMARY

INTRODUCTION

[1] The plaintiff, Natalie Ellis, has brought this action against the defendants for injuries and loss resulting from a motor vehicle collision which occurred on April 27, 2007 in Abbotsford. Ms. Ellis was a passenger in a vehicle owned and driven by her father, Douglas Brent Ellis, which was struck by another vehicle operated by the defendant Mr. Duong.

[2] Liability for the collision was admitted by the third party, ICBC, as it has breached the defendant Eric Tieu Duong. Mr. Duong was convicted of two counts of dangerous driving causing bodily harm under s. 249(3) of the *Criminal Code of Canada*. The action against the defendants Ms. Humeniuk-Villela, Mr. Yaroshuk, and Mr. Ellis was discontinued by the plaintiff. Mr. Beaupre will be released, by agreement with his counsel and the plaintiff, at the conclusion of the trial. Thi Oanh Nguyen is the mother of the defendant Mr. Duong and was the registered owner of the vehicle he was driving at the time of the collision. The plaintiff is claiming that Ms. Nguyen is vicariously liable.

[3] Ms. Ellis' mother acted on the plaintiff's behalf in the litigation when she was a minor. As Ms. Ellis is now an adult, Ms. Ellis is acting on her own behalf in the litigation.

BACKGROUND

[4] The following summary reflects the evidence that was generally not in dispute or which I

have found is supported by the evidence as a whole.

General

[5] Ms. Ellis is 25 years of age. Her date of birth is August 28, 1990. She is currently working as a receptionist at a spa salon. She lives in an apartment in Vancouver and is in a committed relationship with her boyfriend, Jethro Haines.

[6] She was born in Burnaby and raised in Abbotsford, where she lived with her mother, father and two siblings in a comfortable home. Her father worked for BC Hydro and, in his spare time, also worked as a musician. Her mother worked in the home taking care of the three children.

[7] She attended high school in Abbotsford. After graduation she attended the University of the Fraser Valley, and then Emily Carr University where she graduated with a bachelor's degree in communication design in June of 2013. This degree gave her training as a graphic designer. She has not yet been successful in obtaining employment as a graphic designer, despite her efforts.

Before the Accident

[8] Ms. Ellis had an active and happy childhood. She was engaged in a number of community and school activities as a child. She demonstrated a particular interest in art and attended a high school with a fine arts focus. She was also interested in music: she played the guitar and the flute in the school orchestra. She participated in physical activities and especially enjoyed figure skating and swimming. She was on a number of school sports teams. She was a good student academically, achieving A's and B's in most courses in high school.

[9] She had friends in the neighbourhood and socialized with them. She did not exhibit any worrisome behaviour as teenager. She occasionally babysat for family friends but otherwise did not have employment prior to the collision.

[10] She had no physical or mental health issues prior to the collision. This was confirmed by her family physician, Dr. Danescu. Her childhood friend, Ms. Novak, said that before the accident Ms. Ellis was an upbeat, happy and bright teenager and did not have any apparent emotional

problems or physical limitations.

The Collision

[11] The collision occurred in the evening of April 21, 2007. Ms. Ellis and her father have no recollection of the actual collision, but gave evidence of events before and after the collision.

[12] Ms. Ellis was 16 years old and in grade 11 at the time of the collision. She was a passenger in the front seat of her father's Chevrolet Nova when the collision occurred. She had been at Tim Horton's with friends and her father was driving her home, which took him along the Highway Bypass between Sumas Way and the Old Yale Road in Abbotsford. His car was in the curb lane travelling north. She and her father were wearing shoulder-lap seat belts.

[13] Just prior to the collision a Honda Prelude, driven by the defendant Mr. Duong was travelling at a speed well in excess of the speed limit in the southbound lane of the Highway Bypass. The police investigation determined his vehicle's speed was 110-114 km/hr. Mr. Ellis' vehicle was not speeding: the speed of the Chevrolet Nova was determined to be approximately 60 km/hr.

[14] Mr. Duong lost control of his vehicle as he tried to pass another southbound vehicle. He clipped the other vehicle, his car rotated, and crossed into the oncoming northbound lanes. Mr. Duong's vehicle crashed into the vehicle driven by Mr. Ellis.

[15] The collision caused extensive damage to both vehicles. The vehicle in which Ms. Ellis was a passenger caught fire. She was trapped in the vehicle and was pulled out of the window by persons attending at the scene, one of whom broke the window. She was laid on the ground approximately 20 feet away.

[16] Mr. Ellis was also trapped in the vehicle and the police could not initially get him out of the vehicle as the steering wheel was on top of his legs. The police had considerable difficulty putting out the fire. Eventually the police pulled Mr. Ellis out of the vehicle.

[17] Ms. Ellis has no recollection of the collision but recalls that she came to consciousness

while she was laying on the pavement, being attended to by a nurse who stayed with her until the paramedics arrived. She remembered being in excruciating pain, particularly in her chest and legs. She was airlifted to Royal Columbian Hospital. Ms. Ellis sustained serious injuries in the collision, as did her father. Her seat belt broke during the collision.

[18] Mr. Duong did not give evidence at the trial. Mr. Beaupre testified that he was driving ahead of Mr. Duong's vehicle. He stated that when Mr. Duong tried to change lanes to pass him, Mr. Duong narrowly missed a south bound truck in the center lane and then lost control of his vehicle - it shot across the highway into oncoming traffic, clipping an oncoming pickup before crashing into the Chevrolet Nova driven by Mr. Ellis.

Aftermath of Collision

[19] After the collision Ms. Ellis was admitted to Royal Columbian Hospital. She remained in the hospital for four months: approximately 2 months at Royal Columbian and then at MSA Hospital in Abbotsford. She was also at BC Children's Hospital for a brief period. She attended GF Strong Rehabilitation Center and Sport & Spine Physiotherapy in Abbotsford for rehabilitation therapy.

[20] Ms. Ellis testified that her stay in the hospital was very traumatizing and terrifying for her. Initially, she thought that she was going to die. She had three surgeries and numerous tests and other medical procedures, including the insertion of metal rods and screws in her legs and wire in her hand. She had hypoxemic respiratory failure and hypotension after surgery, resulting her being intubated and placed in the intensive care unit at Royal Columbian. She said that she recalls being intubated.

[21] She testified she had an intensive rehabilitation and had to re-learn to walk and use her right hand. She said the rehabilitation was difficult and very painful.

[22] When she returned home, she was still using a wheelchair and her home had to be accommodated in a hospital bed on the main floor as she could not use the stairs. Ms. Ellis testified that the first time she tried to walk up the stairs was in November of 2007. She finished her grade 11 while she was recovering in the hospital and at home.

[23] She returned to school in September of 2007 for grade 12, using a wheelchair. In January of 2008 she was able to walk with the assistance of crutches and then a cane. After the cane, she walked with an obvious limp. She graduated from high school in June of 2008 and attended university from 2008 to 2013. She worked in a number of part time jobs while at university. She needed to work to support herself.

Ms. Ellis' Injuries

[24] Ms. Ellis sustained a number of injuries in the collision. The physicians who testified described the nature of the injuries based upon the medical records and their own examination. A summary of the injuries is as follows:

- i. laceration to the forehead and brow with maceration and degloving;
- ii. mild traumatic brain injury;
- iii. right hand injury with fractures and dislocation of the carpal-metacarpal junctions;
- iv. mid-shaft fracture to femur; open fractures of the tibia and fibula bones and comminuted fractures of fibular head of the left leg; and fractures to the femoral condyles of the left leg; laceration of the peroneal nerve;
- v. fractures into the articular surfaces of the joints of the left and right knees and injuries to the lateral and posterior ligaments and patellar tendon of the left knee;
- vi. left foot fractures, metatarsal displacement, and ligamentous injury to the forefoot,
- vii. soft tissue injury to the left knee and left ankle;
- viii. mid-shaft fracture of the femur and lateral femoral condyle of the right leg;
- ix. fracture of the manubrium of the sternum and bruising to the chest and abdomen, including possible laceration or contusion of the spleen;
- x. seat belt abrasion across the pelvis; and

xi. scars to the forehead, shins, legs, right hand and thighs.

[25] The cognitive impairment resulting from the mild traumatic brain injury was described by the physicians as “minimal” or “mild”. She was also diagnosed with Post-traumatic Stress Disorder (“PTSD”), with anxiety and depression. In the opinion of the physicians and neuropsychologist called by the plaintiff, her psychological difficulties were caused by the collision. The defendant/third party did not call evidence disputing her psychological injuries.

[26] There was also evidence of chronic pain resulting from the collision. The plaintiff testified that she experienced pain daily, in her knees, low back, hips and groin area.

[27] The nature of her injuries is generally not disputed. There is some conflicting evidence with respect to the impact of her injuries on her life and the level of pain.

General Impact on Ms. Ellis

[28] It is not disputed that the collision has had a significant impact on Ms. Ellis’ life and will continue to do so. The extensive surgeries, procedures, and rehabilitation she underwent in the period following the collision are described in the medical history in the expert reports. The medical evidence was that her acute physical injuries have been surgically repaired and she is physically functioning relatively well. However, she will not be able to return to her prior level of functioning because of the residual effects of her injuries. These residual physical injuries, it is agreed, will affect her for the remainder of her life.

[29] Ms. Ellis has early onset osteoarthritis in her knees, which condition is progressive in nature, such that she may require joint replacement in her early 50s. She also has developed osteoarthritis in her left foot and right hand. She has weakness in her ankles and loss of sensation from the peroneal nerve injury. Her foot drops sometimes and she cannot curl her toes. She is unstable on uneven surfaces and has fallen on occasion. She is limited physically, for example, in walking, running, squatting, kneeling, standing and lifting for extended periods. She has lost some dexterity in her right hand and it fatigues with use.

[30] She testified that she cannot do the same type of recreational activities that she had done before the accident and would have liked to do as a young person. She said she is limited to low impact activities such as swimming, cycling and walking, but would like to, for example, skate, ski and snowboard. Her friend, Ms. Lee, gave evidence as to her unsuccessful attempts at yoga and at a dance class and her boyfriend, Mr. Haines, and her sister gave evidence as to her level of fatigue preventing her from engaging in activities.

[31] There was evidence as to the psychological impact of the injury on Ms. Ellis. She testified that when she returned to high school she felt people treated her differently and that she was “reduced to her disability”. When she worked part time while at university, she found being on her feet all day was very physically strenuous for her, particularly when she did not get breaks, and she found multi-tasking at work challenging. She said that she sometimes had problems focussing while at university.

[32] Ms. Ellis testified to having dark periods where she feels like she is weighed down and drowning and that it is hard to move forward. She said that she feels the sensation of death looming overhead. She also said that she deals with anxiety daily and worries about everything, and is sometimes irritable and anxious over small things. She described being fearful of driving cars and has not been able to get her drivers’ licence. She said that she is a “nervous wreck” about driving. Mr. Haines testified that he witnessed her panic and discomfort with driving and being in traffic.

[33] Ms. Ellis testified that she is sensitive to having scars, particularly the scar on her forehead. She tries to cover the scar with make-up but it does not fully cover it. She has also scars from the collision on her hand, upper thigh, knees, leg and foot.

[34] The plaintiff’s friend, Ms. Lee, testified that after the accident Ms. Ellis felt she had to be strong and soldier on because there was no one who could help her. Ms. Ellis’ father and Ms. Novak testified that the plaintiff is not a person to complain about herself.

[35] Ms. Ellis testified that she has daily pain from her injuries and that she is fatigued by the

end of the day. She said that she uses non-prescribed marijuana medicinally approximately twice a week for anxiety - to help her relax.

[36] Ms. Ellis has received little counselling since the collision. She received some counselling in 2015 with Ms. Petropolous at the suggestion of her father. In 2016 she has attended the Mood Disorder Clinic at St. Paul's, at the recommendation of Dr. O'Shaughnessy. She said that she did not go to counselling when it was recommended by Dr. O'Shaughnessy in December of 2010 because she was busy with university and her part-time work and could not afford to pay for counselling.

[37] She also said that, at 16 years of age, she was too young to know what she needed and that her parents were handling her care. She said that she hoped her symptoms of anxiety would go away. Once she began university she said she was busy with school and her part-time jobs and could not afford to pay for it. She also said that she finds it difficult to talk about the accident and does not like to ask for help.

[38] Ms. Ellis said she now realizes she needs treatment with someone qualified to deal with PTSD and wishes that her parents had recognized this when she was young.

WITNESSES TO THE COLLISION

Constable Schierling

[39] Constable Schierling was a member of the Abbotsford Police Force, who was on the scene of the collision on April 21, 2007 and identified the photographs of the collision.

[40] He testified that when he arrived at the scene he could see that the Chevrolet was engulfed in flames. He observed a female on the pavement, approximately 20 feet from the Chevrolet. Citizens were trying to help her. He also observed a male still in the driver's seat of the vehicle. The police officers on the scene had difficulty getting the driver out of the vehicle and extinguishing the fire.

Constable Joiner

[41] Constable Joiner is also a member of the Abbotsford Police Department and was one of the collision investigators. He examined the scene of the collision and prepared a report of his findings. He noted that the highway was oriented north/south with two lanes for each direction. Opposing lanes were divided by a painted doubled solid yellow line. North and south bound lanes had asphalt shoulders.

[42] He testified that, based upon his investigations, the point of impact was in the north bound car lane of the highway bypass. He concluded that the driver of the Honda Prelude was in the southbound lane and lost control of the vehicle. It crossed the southbound lanes, entered the northbound lane and clipped a Dodge Pickup Truck pulling a trailer. The Honda was then facing east in the northbound lane when it collided with the front of Chevrolet Nova.

[43] Constable Joiner gave evidence that the pre-impact tire marks, gouge mark on the curb, and damage to the Honda, indicated that it had rotated while crossing the highway lanes. The Chevrolet's passenger and driver seat belts broke during impact.

[44] He also gave evidence that the pre-impact speed of the Honda was 110-117 km/hr and a collision speed of 60 km/hr for the Chevrolet. The highway area of the collision had a posted speed limit of 70 km/hr. North-bound traffic travelled from a 50 km/hr zone into the 70 km/hr zone. Southbound traffic changed from a 70 km/hr to a 50 km/hr zone close to the point of impact.

Shawn Beaupre

[45] Mr. Beaupre gave evidence as a party adverse in interest. He testified that at the time of the collision on April 21, 2007 he had been driving for about one year and was 18 or 19 years of age. He knew the defendant Mr. Duong.

[46] Mr. Beaupre testified that he and Mr. Duong and other friends had been at the Agassiz Speedway that evening watching drift racing. Mr. Beaupre was driving a 240 SX sports car and Mr. Duong was driving a Honda Prelude.

[47] He confirmed his evidence from examination for discovery that he spoke with Mr.

Gauthier, a friend who was driving another SX sports car, approximately 15 minutes prior to the collision about Mr. Duong's "sporadic" driving. They discussed their concern for him and others driving on the roads. Mr. Beaupre said they discussed "that this guy is going to crash and be careful".

[48] Mr. Beaupre testified that the three cars arrived back in Abbotsford about the same time. Mr. Beaupre said he had been travelling over 100 km/hr.. He does not recall the exact speed, but it could have been up to 130 km/hr. He said he saw the collision in his rear view mirror.

[49] Mr. Beaupre gave evidence that he stopped his vehicle at the scene of the collision and helped remove Ms. Ellis from the Chevrolet. He said he saw that it was on fire, that the occupants were badly injured, and that the scene was "gruesome": Ms. Ellis was screaming and both of her legs appeared broken.

PLAINTIFF EXPERT WITNESSES

Dr. O'Connor

[50] Dr. O'Connor gave opinion evidence as an expert in physical medicine and rehabilitation. He prepared an independent medical report which is dated February 2, 2016.

[51] Based upon the medical reports and his examination, Dr. O'Connor opined as to the various injuries which Ms. Ellis sustained in the collision. In summary: she sustained significant laceration to the forehead and eyebrow which had separated from the scalp; mild traumatic brain injury; right hand injury with significant fracture dislocation; fractures to femur, tibia and fibular head of the left leg; damage to the peroneal nerve and injuries to the lateral and posterior ligaments and patellar tendon; soft tissue injury to the left knee; left foot fractures; soft tissue injury to the left ankle and ligamentous injury to the forefoot; mid shaft fracture of the femur and lateral femoral condyle of the right leg; fracture of the manubrium of the sternum and bruising to the chest and abdomen; possible laceration or contusion of the spleen; seat belt abrasion across pelvis; and cosmetic scarring to the forehead, shins, legs, hand and thighs.

[52] Dr. Connor reviewed the history of her treatment since the collision which involved a

number of surgeries, including the insertion of hardware in her legs and hand, and periods of hospitalization and rehabilitation.

[53] Dr. O'Connor stated that she was fortunate to be alive and that she is functioning relatively well, however, in his opinion, she will not return to her prior level of functioning due to limitations from the orthopaedic and neurological injuries, as well as the psychological difficulties she continues to experience.

[54] In respect of her orthopaedic injuries, Dr. O'Connor noted that she will not be able to engage in various recreational and vocational activities, and household duties, because of weakness, lack of stability, fatigue, pain and arthritis in her lower extremities. In his opinion her mobility is likely to decline further as she ages and she will require knee replacement surgery, including the removal of the hardware in her legs.

[55] Dr. O'Connor reported that she had a "prominent emotional response" to the accident, which had been largely untreated. She reported to him having flashbacks, nightmares, and low mood and despair. He testified that in his opinion she is going through a particularly low period, which he believed was connected with her having to relive the events of the collision in preparation for the trial. He noted that she reported being low at other times, when there were increased stressors. He said that it is not unusual for patients not to seek out psychological treatment, even when they would benefit from it.

[56] Dr. O'Connor agreed that the symptoms of psychological disorders, such as PTSD, can overlap with the symptoms of mild traumatic brain injury. He also agreed that most people recover completely from mild brain injuries. He said that Ms. Ellis' symptoms would not likely significantly change or improve - given the number of years that have elapsed since the collision.

[57] He testified that it will be important for her to maintain her physical activity and conditioning, however, he noted that she is limited by the activities she can tolerate in terms of pain and physical limitations resulting from the injuries.

[58] Dr. McKenzie gave evidence as an expert witness in the area of orthopaedic medicine. He conducted an independent medical evaluation of Ms. Ellis in 2011 and in 2016. His reports are dated April 20, 2011 and April 12, 2016.

[59] In his opinion the plaintiff sustained severe injuries in the collision. In the 2011 opinion, he provided his opinion as to the injuries resulting from the collision which included a fracture and dislocation of the carpometacarpal joints of the right hand; fracture of the right femur and lateral femoral condyle; fractures of the left femur, lateral femoral condyle, lateral tibial plateau and fibular head; injury to the posterior cruciate ligament and posterolateral corner of the left knee and patellar tendon; disruption of the peroneal nerve; and fracture of the left mid foot.

[60] He stated in his 2011 report that she was at risk for developing osteoarthritis in her right hand, knees, and left foot and may require knee joint replacement surgery and removal of the hardware. He testified as to the significance of the fractures having gone into the joints in both knees. In his opinion Ms. Ellis will have permanent and longstanding problems, particularly in her knees.

[61] In his subsequent 2016 opinion, Dr. McKenzie stated that although her fractures had healed well, she still had the problems in her knee joints which are progressive in nature and will increasingly continue to affect her functioning as she ages. He said that she is likely to continue to have soft tissue pain as a permanent consequence of the collision.

[62] With respect to her right knee, he reported that she continued to have pain and instability and the x-ray show some early osteoarthritis which he said would progress over time. Dr. McKenzie also noted osteoarthritis in her left knee, which he believes would also progress over time and may require joint replacement surgery.

[63] He stated that although knee replacement surgery is generally considered to be 80% successful, it depends on a number of factors. He said that he expected that the plaintiff would need such surgery by her early 50s and that, although the artificial joint can be replaced, there are more complications and a reduced lifespan for subsequent replacements. He recommended that

she be referred back to Dr. Stone for possible removal of the hardware (i.e. screws but not rods) which may alleviate some of the pain, although it would not stop the deterioration in the knee.

[64] Dr. McKenzie reported that the peroneal nerve palsy responded to repair but she still has weakness in her ankle and loss of sensation. In his opinion this condition is a permanent consequence of the collision.

[65] With respect to the fracture of the midfoot, he noted that she has stiffness but minimal pain. In his opinion, she is at increased risk of osteoarthritis in the mid-foot joint.

[66] He opined that the condition of her hand had plateaued. He stated that she would have ongoing stiffness in her hand but minimal pain.

[67] Dr. McKenzie testified that he tested for Waddell's non-organic signs but found no exaggeration of symptoms. In his opinion, the symptoms she reported were consistent with her diagnosed bone and joint problems.

[68] He testified that he recommended treatment using non-addictive analgesics for pain, keeping her weight down, and conditioning exercises, but avoiding activities which would aggravate her pain or accelerate the degeneration in her joints. He described her having limitations in walking, running, standing, lifting, carrying, kneeling or squatting and other activities which impact on her joints.

[69] His opinions mainly related to the plaintiff's musculoskeletal injuries. However, after interviewing her in 2016, he expressed concern about her mental health and, specifically, her apparent depression and suicidal thoughts. He immediately recommended, through the plaintiff's counsel, that she be seen by Dr. O'Shaughnessy. Dr. McKenzie noted that she did not report to him that she had anxiety or depression.

Dr. Cameron

[70] Dr. Cameron gave evidence as an expert witness in neurology. He conducted an independent medical evaluation of the plaintiff. His report is dated March 23, 2016.

[71] Dr. Cameron stated that he agreed with the other specialists that Ms. Ellis has suffered multiple soft tissue, musculoskeletal and orthopaedic injuries and peripheral nerve injuries in the collision. He considered that she suffered period of amnesia and a loss of consciousness at the time of impact.

[72] In his opinion, based on the clinical records, she met the diagnosis of a mild traumatic brain injury and that she had had symptoms of such injury after the collision such as decreased memory and concentration, sleep disturbance, and mood swings. He testified that her cognitive problems were mild in degree and ongoing symptoms are more likely due to chronic pain and discomfort from other injuries, as well as the development of psychological problems following the collision. In his opinion, the brain injury was not the main component of her difficulties.

[73] Dr. Cameron gave evidence that the plaintiff will have residual defects from the laceration of her peroneal nerve and contractures in her foot. Although it was surgically repaired, she will continue to have decreased sensation in her left foot and calf, and weakness in this foot. In his opinion, she will be at an increased risk of arthritis during her adult life and will probably require aids for walking at an earlier age than expected.

[74] In his opinion, the residual deficits from the nerve injury, combined with the multiple orthopaedic injuries sustained in the collision, will likely cause permanent significant physical limitations with respect to work activities, recreational activities and household chores.

[75] While he does not consider that these conditions will improve, in his opinion, rehabilitation and exercise are important to maintain her current level of functioning. He also recommended counselling, observing that she appeared to be minimizing the consequences of the collision, although he would defer to a psychiatrist and psychologist as to the nature and utility of counselling.

Dr. Gouws

[76] Dr. Gouws is a medical practitioner who gave evidence as an expert in the area of occupational medicine and fitness to work. He prepared a report which is dated April 6, 2016.

[77] Based upon his review of the medical records and examination of Ms. Ellis, Dr. Gouws concluded that the injuries she sustained in the collision, affecting her lower limbs, spine and right upper limb, left her with permanent functional impairments and significant emotional symptoms, including depressive and PTSD symptoms and anxiety.

[78] In his opinion the most significant impact from her injuries in terms of barriers to rehabilitation and occupational obstacles has been the extent to which her coping mechanisms have been reduced. She avoids stressful situations and has difficulty coming to terms with her losses. He considers that her ability to work in a competitive, time-sensitive environment has been compromised.

[79] Dr. Gouws gave evidence that she met most of the physical demands for her current job as a receptionist and for a graphic artist, although her chronic pain, impaired hand dexterity, and reduced tolerance for static body positioning, will impact her ability to work in a sustained and competitive fashion. He stated that teaching ESL would also be an appropriate job for her. He testified that, over time, her physical condition will further degenerate and affect her ability to work until retirement.

[80] In his view, although further medical treatment for her physical symptoms would be unlikely to improve her functionality, occupational, vocational and physical rehabilitation would assist her to maintain her strength and manage her symptoms. He observed that, while she does some walking and stretching, she does not currently have a physical fitness program designed by a kinesiologist: this would have been preferable, although he noted that from Ms. Ellis' perspective, may not have allowed her to normalize her life.

Dr. Schmidt

[81] Dr. Schmidt is a clinical psychologist and neuropsychologist who gave expert evidence at trial. His report is dated March 23, 2016.

[82] Dr. Schmidt opined that Ms. Ellis experienced a mild traumatic brain injury in the collision but he considers it unlikely that the brain injury has had any persisting cognitive effects. More

concerning, according to Dr. Schmidt, was that Ms. Ellis developed PTSD, with anxiety and depression, as a result of the collision. Dr. Schmidt testified that he considered her PTSD is chronic and is unlikely to resolve spontaneously. He stated that her depression and anxiety were in the clinical range and likely to affect her functioning.

[83] Dr. Schmidt testified as to the significance of her being in the adolescence/young adult phase of development at the time of the collision. In his opinion this is a demanding developmental phase in which an individual is developing their sense, identity and independence, as well as the ability to establish mature, stable and intimate relationships and to make career decisions and other long term plans.

[84] Dr. Schmidt concluded that her prognosis is uncertain, as she has not yet had appropriate treatment. He stated that she had not refused treatment in the traditional sense, but had not been “accessible” to it. In his opinion, like other young people, she tried to “power through” her symptoms in the hope that they would go away. He stated that he believed that she was now more accessible to treatment.

[85] Dr. Schmidt recommended cognitive behaviour therapy. He also recommended that she work with a psychologist to find ways to reduce the impact of pain on her life, as he noted that Ms. Ellis believes she has little control over her pain and sees herself disabled by it.

Dr. Anton

[86] Dr. Anton is a physician with a specialty in physical and rehabilitation medicine. He prepared an independent medical examination on Ms. Ellis at the request of the plaintiff. His report is dated October 12, 2010 and was admitted into evidence without cross examination.

[87] Dr. Anton described the injuries which, in his opinion, the plaintiff suffered in the collision. His description of her injuries is consistent with the description in Dr. O’Connor’s opinion, noted above. Dr. Anton noted that Ms. Ellis had no pre-existing relevant medical conditions.

[88] In his opinion, Ms. Ellis’ reports of pain, discomfort, weakness, and mobility limitations

related to her legs, knees, ankle and foot are in keeping with the residual effects of her injuries. He noted her increased risk of falling on uneven terrain and her difficulty squatting, running and going down stairs without support, which he ascribed to the injuries.

[89] In Dr. Anton's opinion, Ms. Ellis would probably have difficulty participating in work that required prolonged standing, climbing, repetitive impact, kneeling, bending and frequent and/or heavy lifting. Similarly, in his opinion, she would have difficulty with activities or household chores that have those demands. He stated that she may require further surgery and a right knee replacement. She is also at the risk of arthritis in her left knee and right hand.

[90] Dr. Anton stated that any cognitive deficits resulting from the collision are likely relatively mild. However, he expressed concern that Ms. Ellis may be minimizing the psychological effects resulting from the accident and recommended psychological testing and counselling. He also recommended an exercise program with a kinesiologist.

Louise Craig

[91] Louise Craig is a physiotherapist and functional capacity evaluator. Her reports on her assessment of the plaintiff's functional capacity and the costs of future care are dated March 3, 2016 and April 8, 2016, with an addendum report dated May 16, 2016.

[92] The functional capacity evaluation was based on the medical opinions and documentation provided and the functional capacity testing which Ms. Craig administered to Ms. Ellis. In Ms. Craig's opinion, Ms. Ellis has a number of physical limitations that reduce her ability to work at more physically demanding occupations and to perform physically demanding activities and chores. In her opinion, Ms. Ellis is only a partial match in respect of the job demands required of a receptionist, graphic designer and ESL teachers, and is not a functional match for elementary school teacher, laboratory technician, radiology technician, electrician, and nurse.

[93] The future care recommended and the projected costs of future care, as well as the professional recommending the care, are set out by Ms. Craig in her reports. Certain of these projected costs, such as the cost of child care, housekeeping, garden and handyman services

assistance, and a neuropsychological assessment, have been disputed by the defendant/third party.

Darren Benning

[94] Mr. Benning is an economist who gave evidence as an expert in relation to the plaintiff's future income loss and the present value of her future care costs. The reports he prepared in respect of these issues are dated April 15, 2016 and April 14, 2016, respectively.

[95] He projected the present value of the future income loss based upon the difference in earnings 'with the accident' and 'without the accident'. The 'without accident' estimate of loss assumed that Ms. Ellis would have retrained as a registered nurse, elementary teacher, medical laboratory technician, medical radiation technician, or journeyman electrician. The 'with accident' estimates of earnings are based on Ms. Ellis being a full time or one-half time graphic artist or ESL instructor. Mr. Benning took into account contingencies related to non-participation in the labour force, survival rates, and non-wage benefits, as well as the time required for retraining.

[96] Mr. Benning also calculated the present value cost of Ms. Craig's recommendations for future care, which he estimates would be \$526,349, over Ms. Ellis' lifetime, assuming she lived to an average age for women of 85 years.

Dr. O'Shaughnessy

[97] Dr. O'Shaughnessy gave evidence as an expert qualified in the areas of psychiatry and forensic psychiatry. He conducted an independent psychiatric assessment on Ms. Ellis in December of 2010 and again in February of 2016. His reports are dated January 12, 2011 and March 2, 2016.

[98] In his first 2011 report Dr. O'Shaughnessy diagnosed Ms. Ellis with PTSD and a concussion with possible Cognitive Disorder. In his opinion, these disorders were directly attributable to the April 21, 2007 accident. He clarified that the trauma she experienced related not only to the collision but to the events in the weeks immediately following the collision, in which she had to face life threatening injuries, surgeries and emotional distress in the hospital. He said that

she exhibited symptoms which are typical of individuals who have anxiety problems following trauma including intrusive memories of the accident which vary in frequency and intensity, frightening dreams, and panic attacks.

[99] Dr. O'Shaughnessy stated that she also had driving anxiety and anxiety regarding relationships, including fears of losing others and a sense of a foreshortened future. She did not perceive herself being able to sustain a marriage or have children and was pessimistic about her future. He stated that her age at the time of the accident meant that she did not have the maturity to process the consequences of the accident. He said that she had difficulty talking about the accident.

[100] He recommended psychotherapeutic intervention with a psychologist who had experience with anxiety and PTSD. He also recommended driving with supervision through Young Drivers. Dr. O'Shaughnessy said he told Ms. Ellis of his diagnosis and treatment recommendations. He said that he did not know if anyone had told her previously of her having PTSD symptoms.

[101] He noted that she had a good recovery from her physical and orthopaedic injuries and she had done well in some areas of psychological functioning: she had clear future goals and artistic interests and had the benefit of a supportive family. At the time of his first report, he said her prognosis was quite positive, although she remained at risk for worsening symptoms.

[102] When he examined her again in 2016, Dr. O'Shaughnessy stated that she continued to present with symptoms of PTSD, for example: driving fears, nightmares, intrusive memories, generalized anxiety, panic attacks, difficulty getting to sleep, periods of depressed mood, and low energy. He said there had been some improvement with frequency and intensity of certain symptoms but was concerned about her fear over being able to sustain relationships and having a foreshortened future. He stated that these ongoing symptoms were "quite substantial" and required ongoing psychiatric and psychological treatment as well as psychotropic medication. This was the first time it was recommended to Ms. Ellis that she take medication for her psychological symptoms.

[103] Dr. O'Shaughnessy reported that she was "highly reluctant" to talk about the accident or seek therapy, which he opined was primarily because "it invoked tremendous stress that she finds difficult to tolerate". He said that young adults do not generally want to see themselves as disabled and so do not disclose disabling conditions to others. He testified as to the importance of Ms. Ellis being taught the skills to manage her anxiety before therapy could be effective in challenging the "distortions" in her thinking. Dr. O'Shaughnessy explained that her subsequent failure to follow through with counselling was likely a consequence of her aversion to speaking about the accident because of the distress it caused her.

[104] In his opinion, Ms. Ellis' prognosis is uncertain. With treatment, he expects that her symptoms of anxiety would decrease, although her fear of driving may persist. He said that in his second interview with Ms. Ellis, she was receptive to therapy and said that she should have received it earlier.

[105] In 2016, as a result of the concern expressed by Dr. McKenzie to the plaintiff's counsel, Dr. O'Shaughnessy referred Ms. Ellis to the mood disorder clinic at St. Paul's Hospital on an urgent basis.

Dr. Powers

[106] Dr. Powers gave opinion evidence as an expert in the area of vocational rehabilitation. He conducted a vocational assessment of Ms. Ellis. His two reports are dated March 31, 2012 and March 9, 2016.

[107] In his 2012 report Dr. Powers expressed the opinion, based upon his interview, the vocational test results, and his review of the medical and related documentation provided to him, that Ms. Ellis' physical and cognitive restrictions are barriers to employment, that she is not competitively employable, and that she will likely be relegated to part-time employment. He stated that she will require, like other persons with disabilities, a supportive employer who is able to accommodate her medical condition. He testified that the vocational tests indicated that she was in the low average range compared to her cohort; particularly in her short-term and working memory,

although he acknowledged that the achievement tests did not test her artistic ability. He recommended the services of a vocational consultant to provide vocational counselling to determine career possibilities and provide a placement specialist vocational rehabilitation services to assist with obtaining employment.

[108] In respect of the vocational tests were administered in relation to the 2016 assessment, Dr. Powers reiterated his opinion that Ms. Ellis had a cluster of restrictions and functional limitations affecting her cognition, hearing, physical capacity, and mood that would limit her employment opportunities and “relegated” her to entry level type of positions. He said that her vocational future is likely to be “grim” and, therefore, recommended vocational services (i.e. vocation rehabilitation and occupational therapy) to assist her in sustaining employment.

Dr. Kester

[109] Dr. Kester is a plastic surgeon who was requested to provide a medical legal report by the plaintiff. Dr. Kester’s report is dated February 2, 2011. He was not required for cross examination.

[110] Dr. Kester referred to Ms. Ellis’ emotional discomfort with the appearance of the scars as well as reduced sensation in the area of the scars. In his opinion, the scars which she sustained in the injury are not amenable to further surgical or medical treatment.

Dr. Danescu

[111] Dr. Danescu was Ms. Ellis’ family doctor since 2004. His expert report is dated February 21, 2012. It was admitted into evidence without cross examination, with an agreement between counsel clarifying two paragraphs of the report.

[112] Dr. Danescu stated that Ms. Ellis had no medical history of note before the accident. He described the injuries sustained in the accident and the required operations, noting that her condition was complicated by the development of respiratory failure and hypotension secondary to pneumonia, requiring intubation.

[113] He first saw Ms. Ellis after the accident on August 24, 2007 and thereafter on various occasions from September 7, 2007 to February 16, 2012. In his report he referred to his own examinations and other physicians providing treatment, and what was reported to him regarding Ms. Ellis' participation in physiotherapy in 2008 and return to physiotherapy in 2010.

[114] Dr. Danescu stated that she had had a remarkable recovery but has sustained psychological "handicaps" from the 2007 accident including PTSD, anxiety, with minimal cognitive impairment from the concussion, and physical handicaps including chronic pain in right hand affecting, stiffness and discomfort in her legs, anxiety over scars, sensation loss in left leg and forehead, and probably early osteoarthritis in her joints. In his opinion her handicaps will "permanently represent a challenge to overcome if any need for change in her career".

DEFENDANT/THIRD PARTY EXPERT EVIDENCE

Dr. Hirsch

[115] Dr. Hirsch is a physician with a specialty in physical and rehabilitation medicine. He conducted an independent medical examination of Ms. Ellis. His report is dated January 6, 2011. He was not called for cross examination.

[116] Dr. Hirsch reviewed her medical history relative to the collision and described her numerous injuries, the number of operations to repair her physical injuries, and subsequent examinations, treatments and rehabilitation provided at Royal Columbian Hospital, BC Children's Hospital, GF Strong Rehabilitation Center, and the Fraser Ridge Hand Therapy Clinic.

[117] In Dr. Hirsch's opinion, Ms. Ellis sustained a traumatic brain injury at the mild end of the spectrum, which was resolved by 2011; lacerations leaving scars to her forehead, right and left legs; fracture of her chest bone which has healed; fracture of right hand metacarpal joints which have been surgically repaired but have left her with the risk of developing post-traumatic degenerative arthritis; fractures of her right femur and condyle which were managed operatively, but with continuing soft tissue irritation at the sight of the hardware; fractures of her left femur and tibia which have healed but have left her with the risk of post-traumatic arthritis in her left knee and

possible decline in function; instability in the left knee due to instability, pain and weakness; left foot fracture dislocation, which has left her with reduced mobility; and injury to the peroneal nerve which has been managed operatively, but has left some permanent weakness in her left ankle and foot.

[118] Dr. Hirsh stated that in his opinion Ms. Ellis has ongoing musculoskeletal impairments which will affect her activities such as walking, standing, climbing and descending stairs, kneeling and squatting - primarily because of her residual left knee impairment and worsening discomfort and pain from progressive degenerative arthritis. The worsening condition of the knee may require her to use mobility aids and possible knee replacement. He recommended physiotherapy.

[119] He noted that she reported experiencing nightmares after the accident but he did not consider that there appeared to be significant outstanding mental health issues.

[120] Dr. Hirsh reported that he did not observe any exaggerated illness behaviour by Ms. Ellis.

Janet Hunt

[121] Ms. Hunt is an occupational therapist who provided an opinion in response to the functional capacity evaluation prepared by Ms. Craig. She also provided cost of future care report. Ms. Hunt's reports are dated May 19, 2016.

[122] Ms. Hunt did not examine, interview or observe the plaintiff. She stated that it would have been preferable to have done so, but felt she was able to provide a critique of Ms. Craig's methodology based upon the medical and other information provided. Ms. Hunt was of the opinion that additional information on Ms. Ellis' ability to perform tasks and particular jobs should have been obtained in order to better assess her functional capacity.

[123] Ms. Hunt agreed with Ms. Craig that the plaintiff has a number of physical limitations which would prevent access to the full range of jobs that would have been available to her had the accident not happened. However, Ms. Hunt considered that Ms. Ellis is capable of full time work, such as a receptionist, graphic designer, ESL teacher or elementary teacher, with accommodations to address her physical limitations. Ms. Hunt did not offer an opinion on the emotional factors

affecting her employability. She identified limitations in respect of prolonged sitting, walking which requires balancing; low work postures, right arm/hand fatigue with use, reaching overhead, and heavier work.

[124] Ms. Hunt agreed with Ms. Craig that Ms. Ellis will require future care as a result of the accident, for example: ergonomic assessment and equipment; cognitive therapy; driver rehabilitation; physiotherapy; kinesiology; psychotropic medication; mobility aids and orthopedic equipment; aids for independent functioning; child care and home services; post-surgery support services; and vocational counselling.

[125] However, Ms. Hunt considered that the level of support will depend on various factors, for example: the type of home she has; whether she has a family member to assist; and whether ongoing psychological treatment is required. In Ms. Hunt's opinion, the plaintiff does not require a neuropsychological assessment. With respect to most of the services, Ms. Hunt's estimates of future care costs are lower than Ms. Craig's estimates. Ms. Hunt makes certain recommendations for care not made by Ms. Craig.

[126] The plaintiff disputes the weight which can be attributed to Ms. Hunt's reports as she did not examine Ms. Ellis.

Mark Szekely

[127] Mr. Szekely is an economist who gave expert evidence on the present value of the cost of future care recommended in the functional capacity evaluations and future income loss.

[128] With respect to the plaintiff's future care costs, Mr. Szekely used the costs which were recommended by Ms. Hunt in his calculations - using the low and higher costs to reflect whether the plaintiff would be living in an apartment/townhouse with and without help, or in a house.

[129] In respect of the plaintiff's future income loss, Mr. Szekely calculated the loss based upon both an earnings approach and the capital asset approach. He calculated, at the request of counsel, scenarios in which the plaintiff would work less than full time due to her injuries. He relied

on statistical information as to the total wages and benefits for a nurse, elementary teacher, medical lab technician, and medical radiation technician, as occupations she would have done absent the accident; and college/vocational instructor and graphic designer/illustrator, as jobs with the accident.

[130] His evidence was that an ESL instructor with a bachelor's degree would generally fall within the NOC classification for 'College and other Vocational Instructors'. The inclusion of ESL tutors or ESL instructors working at private language schools in a classification for college/vocational instructors earning \$75,000 a year is disputed by the plaintiff. The plaintiff's evidence was that ESL tutors are paid \$20 per hour.

LIABILITY

[131] Liability for the accident is not in serious dispute. Mr. Duong did not attend the trial. However, during the discovery he admitted he was driving the Honda Prelude that was involved in the collision on April 21, 2007. He also pled guilty to dangerous driving, which requires a degree of recklessness and a standard of proof beyond the test for negligence applicable in civil cases.

[132] There was other evidence that satisfied me that Mr. Duong caused the collision, including that of Mr. Beaupre who was an acquaintance of Mr. Duong and had been driving at a high rate of speed just ahead of Mr. Duong at the time of the collision and observed from his rear view mirror Mr. Duong losing control of his car and travelling into the oncoming lane. The police attending at the scene and involved in accident reconstruction also attested as to the trajectory of Mr. Duong's vehicle relative to that of Mr. Ellis' vehicle and its pre-collision speed of 110-117 km/hr, which corroborated the evidence of Mr. Beaupre that Mr. Duong's vehicle crossed into the oncoming lane of traffic at a high rate of speed and collided with Mr. Ellis' vehicle.

[133] I find that the Mr. Duong negligently drove his vehicle on the evening of April 21, 2007 causing the collision involving his vehicle and the vehicle in which Ms. Ellis was a passenger.

CREDIBILITY

[134] In *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, Madam Justice Dillon reviewed the factors to be considered in assessing credibility.

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[135] In this case, the defendant/third party does not contend that the plaintiff should not be believed, although it takes the position that she can do more than was reported by Ms. Craig in the functional capacity evaluation.

[136] I found Ms. Ellis to be thoughtful and measured in responding to the questions asked. Her accounts of the injuries sustained in the accident were found to be consistent with the medical findings of the physicians who treated or assessed her condition. The evidence supports that she had a tendency to understate rather than overstate the impact of the accident on her life. I accept her evidence, in cross examination, that she found it difficult to ask for help and did not want to admit to being vulnerable, hoping that the effects of the incident would "go away". Overall, I found that Ms. Ellis to be a stoical individual who has persistently pushed herself to try and obtain a sense of normalcy after the accident.

CAUSATION

[137] It is well established that the plaintiff must prove on the balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the only cause of the injury as long as it was part of the cause beyond the range of *de minimus*.

[138] The primary test to be applied in determining causation is commonly articulated as the “but for” test: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17. A plaintiff bears the burden of showing that “but for” the negligent act or omission of the defendant, the plaintiff’s injury would not have occurred.

[139] The “but for test” also applies where there is a psychological component to the injury, although consideration must be given to the question of "proximate cause" in law: *Yoshikawa v. Yu*, (1996), 21 B.C.L.R. (3d) 318.

[140] In this case, it is not disputed that the collision caused Ms. Ellis “grievous” injuries, including both physical and psychological injuries. It is also not disputed that before the collision, Ms. Ellis was a happy, active teenager who was engaged in various activities that she enjoyed such as skating, biking and hiking with her family. There was evidence that she no longer participates in such activities due to physical limitations, fatigue and anxiety.

[141] On the basis of the medical evidence of experts retained by both the plaintiff and defendants and the related clinical records, I accept that the collision caused physical injuries to Ms. Ellis including to both femurs, both knees, peroneal nerve, left foot, right shin, right hand, forehead and eyebrow, spleen, chest, pelvis, and brain. During her hospitalization she suffered respiratory failure and hypoxia secondary to developing aspiration pneumonia related to the injuries. I also accept that the collision caused psychological injury including a mild traumatic brain injury and PTSD with anxiety and depression. I find that she recovered from the mild traumatic brain injury but she continues to suffer from the symptoms of PTSD.

[142] It is also not disputed that certain of the physical injuries to Ms. Ellis required surgical repair and medical procedures including two surgeries in relation to her complex hand fracture and dislocation of the carpometacarpal joints; surgical repair of the peroneal nerve laceration; surgical repair of her mid-foot fractures, and surgical repair of fracture to femur, condyle and tibial plateau including the placement of locking hardware. Without detracting from the success of the surgical intervention in repairing her acute injuries, as noted, she continues to have residual physical and

psychological impairments from the collision. Specifically, I am satisfied that the medical evidence supports the conclusion that:

- i. she has osteoarthritis in her knees which will worsen over time, and will likely require a knee replacement in her early 50s and revision surgery thereafter;
- ii. she has osteoarthritis in her foot, which will also likely worsen over time;
- iii. she will likely continue to have a loss of sensation and weakness in her left lower leg and foot;
- iv. she will likely continue to have some restriction in dexterity and fatigue when using her right hand;
- v. she will likely continue to have difficulty with balance on uneven ground and with prolonged standing, squatting, walking, and kneeling;
- vi. she will likely have ongoing symptoms of PTSD, including anxiety and depression;
- vii. her facial and other scars cannot likely be revised with plastic surgery; and
- viii. her chronic pain in her hip area, thighs, knees and foot is not likely to improve further.

DAMAGES

Mitigation

[143] The defendant/third party submits that Ms. Ellis did not take reasonable steps to mitigate or reduce the loss allegedly suffered as a consequence of the accident, by failing to complete the recommended exercise/strengthening regime and by failing to obtain recommended psychological counselling. The defendant/third party is not alleging a general failure to mitigate as it was acknowledged that, according to the evidence, the plaintiff worked hard to mitigate her damages after the accident by participating in an intense rehabilitation program, for example, at GF Strong, Sport and Spine, Fraser Ridge Hand Therapy Clinic and Apollo Physiotherapy. The position of the defendant/third party is directed at the plaintiff's failure to follow recommendations for

exercise/conditioning and for counselling made in the medical-legal reports.

[144] In oral submissions, the defendant/third party focussed on the failure to pursue psychological treatment recommended by Dr. O'Shaughnessy in 2011 and not on the alleged failure of the plaintiff to engage in a physical rehabilitation program - although the latter was still included in its written submission.

[145] I must decide whether the plaintiff acted reasonably in the circumstances and, if not, whether the recommendations would have improved the plaintiff's condition. The burden of proof is upon the defendants to prove that Ms. Ellis did not do enough to mitigate: it must show that a reasonable person in the plaintiff's circumstances would have more than plaintiff to follow medical advice and that the failure to do so caused a material change in the likelihood of improvement or recovery for the plaintiff: *J.F.C. v. Ladolcetta*, 2012 BCCA 27. The plaintiff is not generally held to a high standard of conduct in mitigation. The law is satisfied if the plaintiff takes steps that a reasonable person would take in the circumstances to reduce the loss.

[146] The plaintiff responds to the allegations of failure to mitigate by referring to the medical evidence of Dr. McKenzie regarding the pain which restricts Ms. Ellis' ability to exercise and the attendant caution against aggravating pain or accelerating degenerative changes through impact activities and aggressive exercise. The plaintiff also refers to the evidence of Dr. McKenzie and Dr. O'Connor that Ms. Ellis was trying to be as normal as possible and, therefore, minimized the effect of the injury, which is common for young people who often try and manage on their own without seeking help. The plaintiff submits that the defendants have failed to show that Ms. Ellis' actions after the accident reflected a failure to meet the standard of a reasonable person in her circumstances or, further, that following the advice would have made a significant difference to her condition.

[147] In considering what a reasonable person would do in Ms. Ellis' circumstances, as the defendant/third party concedes, she has already undergone a number of surgeries and an intensive period of treatment rehabilitation following the accident, including learning to walk again and regain

the use of her hand. Although she had considerable pain from her injuries, she persevered to finish her high school and enrolled in university. She worked full time while at university in order to support herself.

[148] With respect to her psychological injuries, based upon the evidence I find that the first time counselling had been recommended to Ms. Ellis was Dr. O'Shaughnessy's recommendation in 2011. At that point in time it was already four years since the accident, she was 20 years of age living away from home, and supporting herself through part-time jobs. I accept the plaintiff's evidence that she did not have the funds to attend the psychological counselling and, in any event, according to the undisputed evidence of Dr. O'Shaughnessy, she was suffering from PTSD and, as is typical of this disorder, avoiding thinking or talking about the accident due to the emotional dyscontrol she experienced from such thoughts.

[149] In that regard, I also note the evidence of Dr. Cameron in response to a question put to him in cross examination suggesting that Ms. Ellis was able, despite her reports of mental and physical exhaustion, to go school full time and work at various jobs:

...you have to be careful about making a blanket statement like that because she's trying hard to go back to - I think when you sort of read through the notes of everybody who has assessed her, she's a typical young person. She is a minimizer basically. She wants all of this to go away. She just wants to be back to normal again, and she's emotionally trying to get herself there. She can't. She's never going to get there, but she keeps trying. So she minimizes her symptoms or her problems...

[150] Further, I note that there was no suggestion by the defendant/third party that her parents were aware of the emotional aftermath that follows a serious collision or that they facilitated Dr. O'Shaughnessy's 2011 recommendation for counselling. In that regard, her father was himself dealing with the effects of injuries sustained in the collision and the plaintiff's relations with her mother were strained. I observe that when her father did recommend counselling for his daughter, it was only after he had gone through a period of counselling in relation to the accident.

[151] Accordingly, in circumstances where the evidence supports that the plaintiff was mitigating her loss by working and returning to school, she was experiencing PTSD symptoms that included avoiding thinking or talking about the accident, she did not have the benefit of parental

guidance regarding the psychological counselling which was recommended, and she did not have the funds to obtain such counselling, viewed objectively, I am unable to find that the plaintiff acted unreasonably in not attending the specific counselling program recommended in 2011. I observe that she did attend counselling in 2015 with the counsellor her father had recommended but found it not helpful. It was acknowledged that this counsellor did not have expertise in cognitive behavioural therapy - which was the type of therapy needed to treat PTSD symptoms. I also observe that it was not recommended that she attend counselling again until 2016. Prior to the trial, following the intervention of Dr. O'Shaughnessy and Dr. McKenzie, I am satisfied that she has come to realize that she needs specialized counselling to deal with her PTSD and attended the Mood Disorder Clinic at St. Paul's Hospital.

[152] With regard to the defendant/third party's suggestion that the plaintiff failed to mitigate by not undertaking the kinesiology sessions recommended by Dr. Anton in 2010 and the conditioning programs recommended by Dr. Gouws and Dr. O'Connor in 2016, in my view, the same considerations that led her to avoid counselling were a significant factor in her not participating in the conditioning exercises recommended. Indeed, I note that Dr. McKenzie agreed with counsel in cross examination that the plaintiff was a "genuine woman who is genuinely trying to do the best with the injuries she has". I also note that Dr. McKenzie, in cross examination stated that:

...I think this lady is trying to be as normal as possible and to degree in some denial the effect that her injury is having. And just go back to work [sic], by the way, she's working full time. It's not affecting her work. But at the end of the day she is reporting significant difficulties.

[153] I accept that the plaintiff, having been so intensely involved in medical interventions, surgeries, and rehabilitation programs following the accident, wanted a sense of normalcy in her life. By the time she attended Emily Carr University she was trying to manage her painful symptoms on her own. She was doing some stretching exercises, walking and other activities that she could tolerate and that she had the energy to complete. I also accept that, in not asking for help, she was reacting in a manner that was typical of other young people in similar situations. Accordingly, I reject the suggestion that she did not act reasonably in the circumstances or that, had she undertaken a conditioning program recommended, her physical symptoms would have improved or

would have been appreciably different than they were.

[154] I do not accept that there was a failure to mitigate by the plaintiff in the circumstances of this case.

Non-Pecuniary Damages

[155] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and amenities. They are meant to encompass such damages suffered up to the date of trial and those that the plaintiff will suffer into the future. The compensation awarded should be fair and reasonable to parties, as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, 2012 BCSC 1704. Fairness is measured against awards made in comparable cases, although they serve only as a guide to appropriate compensation. Each case must be determined on a consideration of its own unique facts: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 145; *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[156] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Madam Justice Kirkpatrick outlined a non-exhaustive list of factors for consideration when assessing non-pecuniary damages: the age of the plaintiff; the nature of the injury; the severity and duration of pain; disability; emotional suffering, loss of impairment of life, impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism. A plaintiff's stoicism is a factor that should not generally penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54.

[157] Applying those factors to the instant case, the plaintiff submits that the evidence establishes that Ms. Ellis sustained severe, permanent and progressively worsening orthopaedic injuries, a mild traumatic brain injury and other physical and psychiatric injuries that fundamentally and irreversibly transformed her life from the age of 16 years. The plaintiff refers to Ms. Ellis' evidence that she continues to experience daily pain in her knees, hips and left foot and that this detrimentally affects her functioning on a daily basis. The plaintiff also refers to the evidence that, due to the osteoarthritis in her left knee, she will require knee replacement surgery in her early 50s and one or two further surgical intervention after 10 to 15 years and, further, there is a possibility of

knee replacement surgery in the right knee due to progressive osteoarthritis.

[158] The plaintiff emphasizes the longevity and chronicity of Ms. Ellis' pain and limitations and the significant and pervasive psychiatric problems that she continues to experience. The plaintiff notes that Ms. Ellis has been very stoical despite the injuries.

[159] Taking into consideration these factors and analogous cases, the plaintiff submits that a proper award for pain and suffering should be in the range of \$200,000 to \$275,000 for her pain and suffering and loss of enjoyment of life. The plaintiff relies on the following awards, adjusting the amount of the award to reflect its present 2016 value: *Alden v. Spooner*, 2002 BCCA 592 ; *Boyd v. Harris*, 2004 BCCA 146; *Dilello v. Montgomery*, 2005 BCCA 56; *Felix v. Hearne*, 2011 BCSC 1236; *Meghji v. Lee*, 2011 BCSC 1108; *Morrow v. Outerbridge*, 2009 BCSC 433; *Ricketts v. Johanson* [1983] B.C.J. No. 1171(S.C.); *Schmitt v. Thomson*, [1992] B.C.J. No. 1993 (S.C.); *Soligo v. Turner*, 2001 BCSC 205; *Stevanovic v. Petrovic*, 2011 BCSC 2; *Tompkins v. Bruce*, 2012 BCSC 266; and *Wright v. Mason*, [1991] B.C.J. 673 (S.C.).

[160] The defendant/third party acknowledges the severity of the injuries from the collision and that those injuries continue to cause her discomfort and disability today and into the future. The defendant/third party also acknowledges that Ms. Ellis suffered emotionally with symptoms of PTSD and that her ability to participate in certain recreational activities and vocational opportunities is impaired. It is conceded that Ms. Ellis has been very stoical in the years since the collision.

[161] However, the defendant/third party observes that Ms. Ellis was able to overcome her acute injuries such that she was able to graduate from high school and attend a trip with her classmates to Europe. She did not let her ongoing discomfort and psychological complaints hold her back from enjoying the opportunities available to her: she graduated from university, has a long term, stable relationship, works full-time, has been engaged in artistic pursuits, socializes with friends, and is now pursuing further education.

[162] Recognizing that there is no case which exactly matches Ms. Ellis' circumstances, the defendant/third party refers to cases at the high end of the spectrum (adjusted to between

\$315,000 and \$216,000): *Walker v. Ritchi*, [2003] O.J. No (S.C.). 18; *Izony v. Weidlich*, 2006 BCSC 1315; and *Wong-Lai v. Ong*, 2011 BCSC 1260, and to those at the lower end of the spectrum (adjusted to between \$140,000 and \$130,000): *Zicari v. Young*, 2001 BCSC 1549; *Farand v. Seidel*, 2013 BCSC 323; and *Kaiser v. Williams*, 2015 BCSC 646. Using these cases as benchmarks, it is submitted by the defendant/third party that an appropriate award for Ms. Ellis' non-pecuniary damages is \$175,000.

[163] I have considered all of the cases to which I was referred and they are helpful. However, in my view the cases of *Wright*, *Dilello*, *Walker*, and *Zicari* are the most similar comparators cited by counsel, to the extent that they all involved younger plaintiffs, who have incurred orthopaedic injuries requiring surgery, permanent partial disabilities and psychological difficulties. In *Wright*, the plaintiff was 18 years of age at the time of the collision; spent one-half months in hospital, had multiple injuries to his pelvis, knee and ankle; was left with unsightly scars; and had symptoms of PTSD, depression, and chronic pain. In that case, the plaintiff was awarded \$160,000 in non-pecuniary damages (for a 2016 adjusted amount of \$227,000).

[164] In *Dilello*, the Court of Appeal reduced a jury award for non-pecuniary damages to \$200,000 (for an adjusted amount of \$234,000) in the case of 19 year old plaintiff who had multiple fractures to the spine and neck, soft tissue injuries, and a mild traumatic brain injury - which resulted in cognitive deficits, memory difficulties, chronic pain, decreased dexterity and sensation, headaches, depression and emotional lability, scars, and arthritis. She was hospitalized for approximately one and one-half months. Although she finished high school, she had physical limitations which restricted her career prospects.

[165] *Walker* is a decision of the Ontario Superior Court of Justice in which a 17 year old high school student was awarded \$250,000 (for an adjusted amount of \$302,000) in non-pecuniary damages for her injuries including multiple fractures, multiple lacerations including to her forehead, and a severe traumatic brain injury. Following the accident she had a partial foot drop with difficulty walking; depression; emotional, cognitive and memory problems; impaired eye movements; speech difficulties; partial paralysis of her arm, hand and leg; and mild facial droop. She was in the hospital

for six months. She did not return to high school and her residual employability was likely limited to part time, minimum wage work.

[166] In *Zicari*, the plaintiff was somewhat older at 29 years of age, but she also had orthopaedic fractures which required two surgeries in her leg resulting in a lengthy scar and leg and knee pain. She was hospitalized for 17 days and had to use a wheelchair and crutches. As a result of the accident she suffered from PTSD; depression; fatigue; and a permanent partial disability primarily due to instability and degenerative changes in the knee. She was awarded \$110,000 for non-pecuniary damages (for an adjusted amount of \$139,000).

[167] In the instant case, the defendant/third party is correct to observe that the plaintiff has done much to help herself following the accident in terms of completing her high school, attending university, finding steady employment, and establishing a loving relationship with a partner. However, her ability to overcome certain of the challenges which she faced following the accident also has to be placed in its overall context of the effect of the accident on her life prior to trial and in the future. Following the collision Ms. Ellis was in the hospital for four months with multiple soft tissue, musculoskeletal and orthopaedic injuries, peripheral nerve injury and a mild traumatic brain injury. I accept her evidence that initially she thought she was going to die and indeed the medical evidence indicates that she experienced respiratory failure and hypoxia, requiring intubation, while she was in hospital. Ms. Ellis also had numerous surgeries and medical procedures following the accident to address comminuted and intra-articular fractures in her legs and dislocation and impaction of the articular joints of the hand. She had rods and screws placed in her legs and wire in her hand. She could not walk and had to use a wheelchair and then a walker and cane. She had a limp. She went through a period of intensive rehabilitation for her physical injuries.

[168] While she subsequently enrolled at university, in my view, this required that her focus was on her studies and the part-time employment that she needed to financially support herself. During the period she was at Emily Car University she did not have the benefit of parental direction to monitor and assist in her recovery. Although she recovered from her acute injuries, I find that her chronic pain and the residual physical and psychological effects from the accident substantially

affected her opportunity to fully enjoy her life: to participate in the range of activities and opportunities which would otherwise have been available to her. The severity of her feelings of despair and a sense of foreshortened future, coupled with chronic pain, were described by Dr. O'Shaughnessy, as well as by the plaintiff. I accept that she will require intensive therapy and medication to assist with the symptoms of PTSD, anxiety and depression caused by the aftermath of the collision. I find that, even with therapy and a reduction in symptoms, she is likely to continue to experience anxiety and other symptoms of PTSD in the years ahead.

[169] Further, it is not disputed that she will likely need further knee replacement surgeries in her left knee due to degenerative osteoarthritis in her 50s. I accept the evidence of Dr. McKenzie that she also has osteoarthritis in the right knee, which condition is also degenerative and may require surgery. Prior to such surgeries, her knees will become increasingly painful and unstable and her mobility will decline. I also accept the evidence of Dr. McKenzie that the injury to her hand causes it to fatigue and reduces her dexterity. Additionally, I accept the evidence of Dr. Cameron that the injury to her left foot has affected her stability and will lead to increased functional impairment, causing further instability and risk of falling in her later adult years. She also has a number of scars on her face and legs which cannot be remedied surgically, which I find have contributed to her negative perception of herself.

[170] I am satisfied that Ms. Ellis has physical and psychological impairments caused by the accident which have negatively affected and will continue to affect how she is able to live her life. She cannot enjoy the physical activities she participated in the past. Although Ms. Ellis has obtained a degree in fine arts after the accident and has developed positive relationships in her life, the daily pain, dark feelings and anxiety interfere with her ability to find her way forward. In my view, given the substantial disruption already experienced by Ms. Ellis in the nine years since the accident in terms of coping with the surgeries, pain and mental distress resulting from the accident and the likelihood of further substantial disruption in the years ahead due to the need for further surgeries, chronic pain, and ongoing symptoms of PTSD, I assess the amount of non-pecuniary damages for losses suffered up to the date of trial and for any such losses that Ms. Ellis will suffer

in the future at \$220,000.

PAST WAGE LOSS

[171] The plaintiff chose not to pursue the claim for past income loss.

FUTURE EARNING CAPACITY

[172] The legal principle that governs the assessment of loss of earning capacity is that, insofar as possible, the plaintiff should be put in the position she would have been in but for the injuries caused by the defendants' negligence: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. This involves a comparison of the likely future of the plaintiff if the accident had not occurred to her likely future working life in light of this occurrence. The task is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate*, (1995) 12 B.C.L.R. (3d) 248 (C.A.).

[173] Madam Justice Dardi in *Hunt v. Ugre*, 2012 BCSC 1704, at paras. 189-190, summarized the onus on the plaintiff to prove a future loss of earning capacity:

[189] The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the Court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y* at para. 183.

[190] As enumerated by the Court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, the principles which inform the assessment of loss of earning capacity include the following:

(i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

(ii) The Court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).

(iii) The Court must assess damages for loss of earning capacity and not calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley*

Estate (1995), 12 B.C.L.R. (3d) 248 at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[174] The plaintiff must prove a real and substantial possibility of loss. As recently noted by Madam Justice Ballance in *Suthakar v. Humble*, 2016 BCSC 155, at para. 77, the award cannot be based on speculation: *Rosvold v. Dunlop*, 2001 BCCA 1; *Perren v. Lalari*, 2010 BCCA 140. Where a real and substantial possibility of loss has been established, compensation is awarded based on an estimate of the chance that the event leading to such loss will occur: *Steward v. Berezan*, 2007 BCCA 150. The onus on a plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award: *Kim v. Morier*, 2014 BCCA 63.

[175] In this case, it is not disputed there is a real and substantial possibility that the plaintiff's future earning capacity has been impaired as a result of the injuries sustained in the MVA. As the defendant/third party acknowledges in its submission: "it is clear that some vocational opportunities will be closed to Ms. Ellis and she should be compensated for this loss". The question which remains is how should the loss be assessed and what amount should be awarded.

[176] The parties' respective estimates of Ms. Ellis' loss of future earning capacity are vastly different. The plaintiff submits that, whether assessed on an earnings approach or on a capital asset approach, based on the evidence and considering all future contingencies, the loss is in the range of \$1,000,000 to \$1,150,000. The defendant/third party estimates the loss at between \$187,000 and \$280,000.

[177] The plaintiff contends that the medical evidence overwhelmingly supports there being substantial barriers to Ms. Ellis' involvement in the work force. For example; Dr. Gouws' evidence was that Ms. Ellis has a "very high risk of occupational burnout" because of her physical restrictions from various activities, the degenerative changes affecting her ability to work and the cognitive distortions regarding her value as a person; Dr. McKenzie's evidence was that she would have to limit her walking and standing and could not do a job that has a significant physical component (e.g. lifting, carrying, kneeling or squatting) and that even though she is currently working as a

receptionist she will not tolerate that in the long term, particularly given the psychological components of her disability; Dr. O'Connor's evidence was that her permanent functional limitations in her lower extremities and right hand and psychological difficulties made her less competitive as an employee; and Dr. Cameron's evidence was that the plaintiff's accomplishments in obtaining her degree and working full time have to be tempered because the plaintiff's tendency to minimize her symptoms with a view to getting back to normal again - which, in his opinion, is realistically never going to occur.

[178] The plaintiff also refers to the vocational assessment of Dr. Powers, whose evidence was that due to Ms. Ellis' low academic test scores and physical limitations, that she would likely be limited to supportive employment settings and entry level, part-time positions: "she has a tough future ahead vocationally and is likely to struggle financially and emotionally due to employment challenges arising from her unresolved injuries". Further, in his opinion, she is more suited to short term training courses or on the job training.

[179] In considering Ms. Ellis' career trajectory had the accident not happened, the plaintiff submits that it is reasonable to assume that she would have trained in other occupations such as a teacher, laboratory or radiation technician, electrician or registered nurse - given the lack of jobs in graphic design. The plaintiff then compares the income she would have earned in those jobs relative to the income she could earn as an ESL tutor or instructor at approximately \$20 per hour and working one-half time. The plaintiff contends that it is probable that, given her physical and psychological impairments, she can only work on a part-time basis.

[180] The defendant/third party submits that the earnings based approach suggested by the plaintiff is fundamentally flawed as the evidence does not support there being a real and substantial possibility that Ms. Ellis would have trained in the particular occupations proposed. The defendant/third party also takes issue with the wage of an ESL tutor, which according to the labour market data, would fall in the occupational group that pays an annual salary of \$66,000.

[181] The defendant/third party asserts that the capital asset approach is more appropriate

given Ms. Ellis' young age at the time of the accident, rather than using hypothetical lost earning streams. The defendant/third party relies on the report of Ms. Hunt that Ms. Ellis is physically capable for full time work in various occupations including as an elementary teacher, with accommodations. Accordingly, it is proposed that, given Ms. Ellis' strong attachment to the workforce and absence of any established income loss in the 9 years since the accident, but recognizing that she may be more challenged physically and psychologically as she ages, a reasonable valuation of her loss is in the nature of \$10,000 - \$15,000 per year.

[182] I agree with the defendant/third party that it is not a real and substantial possibility that the plaintiff would work as a registered nurse, medical or radiation technician or as an electrician. However, I do not agree with the defendant/third party that the wage rate of an ESL tutor or instructor with a six week TESL certificate course from Vancouver Community College would earn the income of an instructor working in a College or Vocational Institute. While ESL tutors or instructors may nominally be included in the NOC category for college and other vocational instructors, I am not satisfied that the income for this occupational group reflects what Ms. Ellis could earn as a tutor. The nature of the workforce in colleges and vocational institutes is such that ESL instructors working in those institutions are likely to have significantly more training in teaching ESL than a 6 week certificate course. Accordingly, I do not accept the defendant/third party's assumption that Ms. Ellis would be able to earn \$66,000 to \$75,000 a year as an ESL tutor. I find that the evidence of Ms. Ellis that an ESL tutor earns approximately \$20.00 an hour is likely closer to the actual income which Ms. Ellis could earn in that position.

[183] I consider that, had the accident not happened, there is a real and substantial possibility that Ms. Ellis would have engaged in further training such as obtaining a Masters' degree in graphic design to become more competitive in that industry or returning to university to become an art teacher in light of her demonstrated interest and ability in art and design. However, I am also mindful that at the time of the accident Ms. Ellis was only 16 years of age and was not yet established in a career. The earnings approach is generally considered less reliable in determining what such a young person would have done in her career but for the accident, *Perren* at para. 12.

That said, I note that the capital asset approach and the earnings approach are not mutually exclusive in that they are different methods of assessing the future income loss: *Gillam v. Wiebe*, 2013 BCSC 565; *Simmavong v. Haddock*, 2012 BSCS 473, *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 27.

[184] The capital asset approach imports a consideration of such factors as: whether the plaintiff has been rendered less capable overall of earning income from all types of employment; whether the plaintiff is less marketable or attractive as a potential employee; whether the plaintiff has lost the ability to take advantage of job opportunities that would otherwise have been open; and whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). Negative and positive contingencies are to be reflected in the assessment.

[185] In this case, as noted above, the defendant/third party does not dispute that the plaintiff has fewer options available to her than she would have had available but for the accident, but suggests that a reasonable valuation of the loss would be \$10,000-\$15,000 a year.

[186] I find that the defendant/third party's estimate of the plaintiff's loss underestimates the value of her loss over the course of her working life. As noted above, Dr. Gouws, Dr. McKenzie, and Dr. O'Connor, as well as Dr. Schmidt and Dr. Powers, attest not only to the physical limitations which Ms. Ellis has, but to the impact of the cluster of physical, cognitive and emotional limitations which will impair her ability to be competitively employable. I find that the evidence supports the conclusion that there is a real and substantial possibility that the plaintiff will be increasingly restricted from occupations which have a significant physical component (e.g. prolonged sitting, standing, stooping, kneeling, crouching and right hand use) and, as significantly, because of the plaintiff's chronic pain, anxiety, depression, and sense of her own capacity, there is a real and substantial possibility that she will not be able to capitalize on the assets she has.

[187] That is not to say that the plaintiff will not be able to improve her capacity to earn an income beyond her wage rate as a receptionist. She has demonstrated a strong work ethic. At the

time of trial she had arranged to take the 6-week ESL course commencing in February 2017. There may be other work that pays more than what she currently earns as a receptionist that she may be able to obtain. However, I find that it is unlikely that Ms. Ellis will be able to successfully complete a graduate degree or other university academic program, given her below average vocational testing results, identified weaknesses in memory and attention, and continuing PTSD symptoms and chronic pain. While I have considered the evidence of Ms. Hunt that she has the capacity to work in other occupations such as an elementary teacher with accommodation, I note that Ms. Hunt did not conduct an assessment of Ms. Ellis and her evidence, in my view, does not give sufficient attention to the interrelationship between Ms. Ellis' physical and psychological impairment, as well as her chronic pain. The complexity of her condition was summarized by Dr. Gouws in his evidence:

Ms. Ellis continues to have difficulty coming to terms with her losses and in my opinion remains at significant risk of emotional decompensation, occupational burnout and ongoing relationship problems due to her altered view of self, her loss of confidence in the future and ongoing posttraumatic stress symptoms, chronic pain and associated comorbidities.

[188] I am satisfied from the evidence that there is a real and substantial possibility that Ms. Ellis' symptoms of PTSD such as depressed mood, sleep disruption and lack of energy and driving anxiety will continue and will negatively affect her vocationally. While I have considered that possibility the plaintiff may receive some benefit from cognitive behavioural therapy and medication for her anxiety symptoms and sense of a foreshortened future, I accept Dr. O'Shaughnessy's opinion that Ms. Ellis' "prognosis is difficult to predict" - noting the complexity of treating cognitive distortions in thinking which he stated were symptomatic of Ms. Ellis' PTSD. He observed that she has been highly reluctant to talk about the accident or seek therapy primarily because it invokes tremendous stress that she finds difficult to tolerate.

[189] I find that it is probable that Ms. Ellis will continue in relatively lower paid positions such as an ESL tutor or in other non-professional occupations and that, in the short term, she will continue to work on a full time or near full time basis, with accommodation. By middle age, there is a real and substantial possibility that she will not be able to work on a full time basis due to surgeries and deteriorating physical health. That said, I recognize that there are other negative contingencies affecting her participation in the workforce such as the possibility of her having

children.

[190] In summary, as result of the accident I find that Ms. Ellis has been rendered less capable of earning an income from all types of employment due to her physical impairments; she is less marketable as an employee to potential employers due her functional limitations; she has lost the ability to take advantage of all job opportunities which might otherwise have been open to her due her diminished sense of self; and she has come to view herself as less valuable as a person capable of earning income in a competitive labour market. Taking into account negative and positive contingencies, my assessment is that the sum of \$730,000 is the present value of a fair and reasonable measure of Ms. Ellis' loss of future earning capacity.

FUTURE CARE COSTS

[191] The plaintiff is entitled to compensation for the cost of future care based upon what is reasonably necessary to restore her to her pre-accident condition insofar as possible.

[192] The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at para. 172, aff'd (1987) 49 B.C.L.R. (2d) 99 (C.A.); *Spehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; *Gignac v. Rozylo*, 2012 BCCA 351 at para. 30.

[193] In *Prempeh v. Boisvert*, 2012 BCSC 304, Madam Justice Dardi noted:

[The] assessment is not a precise accounting exercise and ... adjustments may be made for 'the contingency that the future may differ from what the evidence at trial indicates': *Krangle* at para. 21; *X. v. Y.* [2011] B.C.J. No. 1378 at para 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or conversely the prospect that additional care may be required: *O'Connell v. Young*, 2012 BCCA 57 at paras. 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[194] The resulting award is to reflect what the reasonable or normal expectations of what the injured person will require and is to produce a result fair to both the claimant and the defendant: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22.

[195] In this case, the parties are in agreement that the plaintiff has future care needs, although they differ as to the type and amount of future care support she will require. As noted above, as Ms. Hunt did not conduct a functional capacity evaluation of the plaintiff, I generally prefer the evidence of Ms. Craig in respect of Ms. Ellis' functional capacity. That said, I found Ms. Hunt's opinion with respect to Ms. Ellis' future care needs was similar in many respects to that of Ms. Craig. I considered both the opinions of Ms. Hunt and Ms. Craig, as well as those of Mr. Benning and Mr. Szekely, in assessing future care costs.

Neuropsychological Evaluation

[196] In Ms. Hunt's opinion a neuropsychological evaluation is not required in light of the evaluation conducted by Dr. Schmidt and the vocational testing conducted by Dr. Powers. I note that Dr. Schmidt conducted a neuropsychological evaluation in 2016. He was equivocal as to whether it would be useful to see Ms. Ellis again and said that it "might be appropriate" if her condition changed significantly, and it "might be appropriate" to evaluate the nature of the change and reassess her diagnosis, prognosis and treatment needs. He also said he would be available to provide input to Ms. Ellis' treating personnel. In my view, there is insufficient basis to conclude that another full neuropsychological evaluation could reasonably be expected to be required. However, in my view, the latter suggestion by Dr. Schmidt would ensure that he would be able to provide advice regarding Ms. Ellis to the other professionals working with her. I award an amount of \$1,670 for that purpose.

Ergonomic Assessment

[197] The medical evidence of Dr. Gouws was that Ms. Ellis will require ongoing accommodations at work. Ms. Craig suggested that four ergonomic assessments be provided for to account for changes in work settings. Ms. Hunt considered that one to two assessments would be sufficient. I accept that Ms. Ellis will require ongoing accommodations and that the recommendation of four assessments over the course of her work life is reasonable given the likelihood that she will change jobs. I award \$772, as the present value of future assessments.

Cognitive Behaviour Therapy and Psychological Counselling

[198] Cognitive behaviour therapy was recommended by Dr. O'Shaughnessy, to address Ms. Ellis' symptoms related to PTSD. He recommended 20-30 sessions, noting the difficulty of treating persons with such symptoms and the severity of her condition. This treatment is not disputed by the third party/defendant - although it is noted that she has been resist to treatment in the past. I am satisfied from the evidence of Ms. Ellis that she now recognizes the need for ongoing therapy to address her PTSD, as is evident from her participation in a program recommended by Dr. O'Shaughnessy. I award the present value of cognitive therapy at \$2,920.

[199] With respect to ongoing psychological counselling, I accept the evidence of Dr. Schmidt and Dr. O'Shaughnessy that Ms. Ellis requires ongoing psychological intervention as an integral component of her future health. I award the present value of ongoing counselling at \$30,000. This amount would include counselling for her driving anxiety.

Physiotherapy / Kinesiology / Occupational Therapy

[200] Ms. Craig recommended weekly physiotherapy for rehabilitation post-surgery, as well as to address knee, back, shoulder and leg pain and hand function. I note that Dr. McKenzie's evidence was that she would likely need one or two knee replacement surgeries and Dr. Cameron and Dr. Gouws recommended a rehabilitation program for Ms. Ellis, working with physiotherapy to review multiple injury sites and areas of pain, a kinesiologist on her exercise program and an occupational therapist to assist with the behavioural component of rehabilitation.

[201] I consider that the evidence supports post-operative physiotherapy as well as ongoing physiotherapy and the establishment of a rehabilitation program under the guidance of a kinesiologist and an occupational therapist. Ms. Hunt also recommended the services of an occupational therapist in relation to her driving anxiety and lessons. In my view, the physiotherapy and kinesiology sessions for her various injuries proposed by the plaintiff could reasonably be consolidated. I award the present value cost of physiotherapy and kinesiology at \$26,147; \$2,716 for occupational therapy services; and \$3,250 for driving rehabilitation evaluation and lessons.

Gym Membership

[202] Dr. McKenzie recommended low impact exercises for Ms. Ellis to preserve her joint and

maintain endurance, flexibility and strength. I agree that Ms. Ellis would benefit from gym membership for her conditioning and other exercises and award the present value of the cost at \$12,000.

Medication

[203] The defendant/third party does not dispute the cost of Cymbalta and Effexor, which were recommended of Dr. O'Shaughnessy and Dr. Gouws. I accept the present value of the cost of the medication at \$33,312.

Mobility Aids and Maintenance and Orthopaedic Equipment

[204] The plaintiff seeks mobility aids based on the evidence from Dr. Cameron and Dr. McKenzie that she will require mobility aids at an earlier age than expected due to her osteoarthritis. Ms. Craig made recommendations as to the specific types of aids and their costs. Ms. Hunt agreed generally with the recommendations and costing for mobility aids, maintenance, braces and orthotics, except for custom orthotics. I accept the costing of Ms. Craig, but agree with Ms. Hunt that custom orthotics are not indicated. The evidence supports that mobility aids and orthopaedic devices are required for Ms. Ellis and award their present value at \$29,412.

Aids for Independent Functioning and Ergonomic Equipment

[205] Ms. Craig made recommendations on aids for independent functioning at home and ergonomic equipment for work, in light of Ms. Ellis' instability and increasing physical limitations.

[206] Ms. Hunt agreed that aids and equipment are required but differs as to the cost of certain items and the frequency for replacement. I note that Ms. Hunt made certain recommendations for aids not mentioned by Ms. Craig. I consider that Ms. Hunt's recommendations provide a fair and reasonable cost of aids for independent living but would add the cost of light weight vacuum and mop. I award a present value for these items at \$4,700.

[207] With respect to ergonomic equipment, Ms. Hunt and Mr. Craig agreed that Ms. Ellis requires items such as an ergonomic chair, work station and an assistive technology and ergonomic assessment. I consider that it is reasonable to include such items at the level of frequency proposed by Ms. Hunt and award future care costs for ergonomic equipment a present

value of \$9,511.

Household Help / Handyman / Child Care

[208] In Dr. Anton's report he referred, in general terms, to the difficulty Ms. Ellis will likely have with regular and seasonal household tasks requiring prolonged standing, climbing, kneeling, bending and frequent and/or heavy lifting. He also referred to her likely difficulty with the physical demands of caring for an infant or small child. Ms. Craig and Ms. Hunt made recommendations as to the type and cost of housekeeping, yard work and child care services.

[209] Ms. Ellis gave evidence with respect to the problems she encountered with certain household task. She did not give evidence with respect to her specific plans for having children - which I find is likely due to her sense of a foreshortened future and of the impermanence of the relationships in her life.

[210] The evidence supports the conclusion that Ms. Ellis will likely require an increasing amount of household help over the years. That said, in my view, the level of support recommended by Ms. Craig does not reflect Ms. Ellis' current living situation in an apartment or the prospect of her future life in Vancouver - where she is more likely to live in a townhome than in a detached home.

[211] What is at central to Ms. Ellis' loss is an inability to perform household tasks associated with the heavier work and tasks which would require prolonged work at lower and higher areas of the house. As she will have increasing level of impairment as Ms. Ellis ages, the cost of future care projections proposed by Ms. Hunt and Ms. Craig took into account her changing needs.

[212] With respect to child care, in my view, it was a real risk in the mind of a reasonable person in the position of the defendant that the plaintiff would need to care for a child and that an injury may affect her ability to care for a child: *Payne v. v. Miles*, 2013 BCSC 1545; *Carmichael v. Kwon*, 2016 BCSC 265. In this case, while there is an absence of evidence of the number of children the plaintiff may have, due to her PTSD symptoms, I consider that it is likely that Ms. Ellis will have at least one child and that she should be compensated for the cost of caring for the child to the extent that she is limited from the more physically demanding aspects of caring for an infant or pre-school child. In that regard, I observe that she is likely to have a child well before the

expected knee surgery. I also observe that the amount of compensation for her loss of caregiving capacity must take into account that homemaking services could be combined with child care during the periods when Ms. Ellis is receiving child care support.

[213] I award present value costs for household and yard work at \$32,900 and \$25,900 for child care support, as well as \$650 for childcare equipment.

Future Medical Care

[214] Dr. McKenzie’s evidence was that it is likely that Ms. Ellis will require two knee replacement surgeries and possibly surgical removal of hardware. I accept Ms. Hunt’s recommendation that Ms. Ellis will require homemaking support and personal care aids during these periods, as well as a transportation allowance. I award \$3,500 for these costs.

Vocational Support

[215] In my view, the evidence of Dr. Powers and others supports the need for vocational counselling for Ms. Ellis to assist her in future vocational path and job search. I consider that her psychological and physical injuries have presented obstacles to her finding suitable employment. I am not persuaded that she will reasonably require such counselling on an annual basis as proposed by Ms. Craig. I consider \$3,000 a reasonable award for vocational counselling.

SPECIAL DAMAGES

[216] The parties have agreed on the amount of special damages incurred to the date of trial is \$6,074.19, not including costs that Ms. Ellis incurred for treatment since the July 4, 2016 trial and not including Part VII benefits and other expenses covered by MSP.

SUMMARY

[217] In summary, the damages awarded to the plaintiff are assessed as follows:

Non-pecuniary damages:	\$ 220,000.00
Loss of Future Income Capacity:	\$ 730,000.00
Future Care Costs:	\$ 222,360.00
Special Damages:	\$ 6,074.19

Total:

\$1,178,434.19

“Harris, J.”