IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Howell v. Machi,*
2017 BCSC 1806

Date: 20171012
Docket: M147984
Registry: Vancouver

Between:

Veronica Howell

Plaintiff

And

Leon Anthony Machi, John Doe, Richard Roe and Insurance Corporation of British Columbia

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:	J. Rice H. MacDonald
The Defendant Leon Anthony Machi	In Person (for part)
Counsel for Insurance Corporation of British Columbia	D. Griffin M. Sull (for part) J. Kwang (for part)
Place and Date of Trial/Hearing:	Vancouver, B.C. April 24-28, May 1-5 and 8-12, 2017
Place and Date of Judgment:	Vancouver, B.C. October 12, 2017

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Introduction

[1] Veronica Howell, who was then 22, was injured in a hit-and-run accident at about 6:15 p.m. on January 20, 2014 (the "Accident"). She was crossing the eastbound lanes of East 1st Avenue, in the block west of the intersection at Commercial Dr., in Vancouver. She jaywalked between eastbound cars which had stopped for the red light at Commercial Dr. Westbound traffic was also stopped for the red light.

[2] Ms. Howell had safely navigated the two lanes of stopped eastbound traffic, but as she started to cross the clear westbound lanes, she was struck by a black pickup truck which was travelling eastbound in the westbound lanes. Ms. Howell was thrown up onto the hood of the truck, before landing on the ground unconscious and bleeding.

[3] To access the left turn lane on East 1st at Commercial Dr., the driver of the pickup truck must have travelled, at least in part, the wrong way in the westbound lanes on East 1st, and over a yellow painted traffic island.

[4] The driver of the pickup truck did not stop after striking Ms. Howell. He drove up the dedicated left turn lane and then, instead of turning left, turned right in front of the two lanes of stopped eastbound traffic, pulled over for a moment, then sped off.

[5] The parties agree that Ms. Howell suffered serious life-altering injuries in the Accident; one witness thought she had been killed. Her injuries included a skull fracture to the petrous aspect of her temporal bone and a complicated mild traumatic brain injury. Ms. Howell now has chronic pain,

or a Somatic Symptom Disorder, cognitive issues, and an aggravation of certain pre-existing conditions. Her life has changed dramatically.

[6] Ms. Howell alleges that the truck which struck her was a 2013 GMC Sierra, BC License Plate No. HG9 959 (the "Sierra"), owned and driven by Leon Machi, whose driver's license was suspended at the time.

[7] Mr. Machi denies that his Sierra struck Ms. Howell and/or that he was driving it.

[8] Ms. Howell filed and served her notice of civil claim naming as defendants both Mr. Machi and an unknown driver and owner of the vehicle. The Insurance Corporation of British Columbia ("ICBC") was added as a nominal defendant with respect to the claim against the unidentified owner and driver. ICBC filed a statutory third party notice with respect to Mr. Machi. In the event that I find that Mr. Machi was the driver involved in the Accident, ICBC has denied liability to indemnify Mr. Machi as he was driving without a valid BC driver's license at the time of the Accident. ICBC pursued its right to contest Mr. Machi's liability and the quantum of Ms. Howell's claims against him.

[9] Despite the issues on which the parties agree, they have widely disparate views of Ms. Howell's residual capacity and how her future will unfold.

[10] Ms. Howell is seeking non-pecuniary damages, special damages, damages for past loss of income, damages for loss of the capacity to earn income in the future, an award for the cost of future care, and her costs.

[11] On April 7, 2017, just before the commencement of this trial, Mr. Machi filed an assignment in bankruptcy.

[12] Mr. Machi, who was self-represented, only attended part of the trial. He was there for most of the first three days but, after being cross-examined on April 26, 2017, did not reappear. He advised me that he did not intend to call any witnesses but wished to cross-examine Ms. Howell. Ms. Howell gave evidence over a number of days, but Mr. Machi never attended to cross-examine her.

The Issues

[13] I must determine the following issues:

Procedural Matters

a) Should the stay of proceedings under ss. 69.3(1) and 70(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] be lifted?

b) Should Ms. Howell be permitted to amend her notice of civil claim to claim punitive damages?

Liability Issues

c) Was the Sierra involved in the Accident, and was Mr. Machi the driver of the Sierra?

d) Was Ms. Howell contributorily negligent? If so, to what extent?

Quantum Issues

e) What is Ms. Howell's long-term medical prognosis, and will her current condition improve?

f) What is an appropriate quantum of damages and what impact do Ms. Howell's pre-existing mental health conditions have on that quantum? Of particular significance to the quantum of Ms. Howell's damages are the issues of:

(i) the degree to which her lifetime income earning capacity has been affected by her injuries;

(ii) the extent of her ongoing care needs; and

(iii) whether she has mitigated her damages.

[14] Before turning to liability for the Accident and the quantum of Ms. Howell's damages, I will deal with the two procedural matters.

Should the stay of proceedings under ss. 69.3(1) and 70(1) of the Bankruptcy and Insolvency Act be lifted?

[15] At the commencement of trial, I heard Ms. Howell's submissions with respect to lifting the statutory stay of the proceedings against Mr. Machi in order to permit Ms. Howell to continue her action against him. I lifted the stay. These are my reasons for that decision.

[16] Section 69.3 of the *BIA* effects a stay of proceedings against a bankrupt. Section 69.4 of the *BIA* permits a creditor, or a person affected by the stay, to apply for a declaration that the stay no longer operates in respect of them. It provides two bases for the granting of such a declaration: a) the applicant is likely to be materially prejudiced by the continuation of the stay, or b) there are other equitable grounds on which to make such a declaration.

[17] Mr. Machi's trustee and ICBC did not object to the lifting of the stay. Although he was in attendance during Ms. Howell's submissions, and was given an opportunity to make his own, Mr. Machi made none.

[18] For the reasons which follow, I was satisfied that Ms. Howell would be materially prejudiced if the stay was not lifted.

[19] First, the issue of fault for the Accident must be decided if Ms. Howell is to obtain compensation from any insurance policies which might be available to her, including a third party liability policy or a first party hit-and-run or underinsured motorist policy.

[20] Second, Mr. Machi declared bankruptcy just weeks before the commencement of the trial. By then, preparation for the trial was almost complete. The parties had completed disclosure and examinations for discovery, retained a number of experts and served their reports, and attended a trial management conference. ICBC and Mr. Machi had filed trial adjournment applications which had been denied. Final trial preparation was all that remained.

[21] Third, I was satisfied that delay in determining the issues in this case might aggravate the psychological injuries Ms. Howell alleged as a result of the Accident and cause her financial hardship. This was, in part, why the trial adjournment applications were denied.

[22] Even if I had not concluded that there would have been material prejudice to Ms. Howell from not lifting the stay, I would have determined that there were other equitable grounds on which to do so.

[23] In Houlden, Morawetz and Sarra's *Annotated Bankruptcy and Insolvency Act*, 2016-17 edition (United States: Thomson Reuters, 2016) at 486, the authors suggest that the usual practice on applications to lift stays in motor vehicle actions is to grant leave to the injured party to bring or continue an action, and to permit an application to be made to add the trustee as a party defendant to the action. In this case, although initially indicating an intention to appear, the trustee did not appear to seek an order adding it as a defendant, and I did not make that order.

[24] Lifting stays of proceedings in motor vehicle actions involving bankrupts should rarely be refused as declining to do so might frustrate the timely and efficient determination of such cases, thereby frustrating access to a defendant's available insurance. The *BIA* should not interfere with a plaintiff's right to access the proceeds of insurance policies which may be available to cover personal or property damages and would not, in any event, be available to satisfy creditors.

Should Ms. Howell be permitted to amend her claim to seek punitive damages?

[25] At the commencement of trial, and while Mr. Machi was in attendance, Ms. Howell's counsel served an application and supporting materials, seeking leave to amend her notice of civil claim to seek both aggravated and punitive damages pursuant to Rules 1-3, 6-1 and 6-1(8) of the *Supreme Court Civil Rules* (the "Amendment").

[26] As set out in the application, the grounds for the Amendment were:

a) At the time of the Accident, Mr. Machi had been prohibited from driving for 12 months pursuant to ss. 98 and 99 of the *Motor Vehicle Act,* RSBC 1996, c. 318

[*MVA*];

b) Prior to the Accident, Mr. Machi had been prohibited from driving five times and had three convictions for Driving While Prohibited pursuant to ss. 89(1), 98 and 99 of the *MVA;*

c) Mr. Machi struck Ms. Howell and fled the scene without stopping to render aid or determine Ms. Howell's condition in violation of s. 68(1) of the *MVA*; and

d) Mr. Machi illegally and negligently pulled out and accelerated into the oncoming westbound lanes on East 1st Ave. to get around the stopped traffic before straddling the westbound traffic lane and the painted yellow traffic island for eastbound traffic in violation of s. 155 of the *MVA.*

[27] In closing submissions, Ms. Howell advised that she was no longer seeking to amend her notice of civil claim to seek aggravated damages but continued to seek punitive damages.

[28] ICBC objected to the Amendment on the basis that it was untimely. As Mr. Machi did not appear after the first few days of trial, he was not in attendance when the application was argued although he had notice of it.

[29] It was not clear that ICBC had any direct interest in Ms. Howell's claim for punitive damages which is a claim directed at Mr. Machi's behaviour. Punitive damages are not intended to be compensatory, and ICBC is not liable to compensate Ms. Howell for such damages if awarded. Nevertheless, I heard submissions from ICBC's counsel on the application as Mr. Machi was not there to oppose Ms. Howell's application.

[30] There is very little dispute about the principles to be applied on an application to amend pleadings. The decision to permit an amendment is discretionary, but that discretion must be exercised judicially considering a number of factors.

[31] In *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 10, the Court of Appeal set out the general principles applicable to all pleading amendment applications. Amendments should be permitted as necessary to determine the real issues between the parties; a party is not required to adduce evidence in support of a pleading before trial; on an application to amend, the facts alleged are taken as established; and the discretion is to be exercised judicially in accordance with the evidence adduced and the guidelines of the authorities.

[32] Amendments to pleadings may be permitted during trial and after its conclusion. In *Batyka v. Barber*, 2014 BCSC 769 at para. 24, Justice Funt explained that amendments should be permitted, after the close of evidence at trial, where the amendments:

a) are not inconsistent with the pleadings already filed by the party seeking the amendment;

b) are not inconsistent with the evidence already tendered by that party and his witnesses at trial and on discovery;

c) had they been sought at the outset of trial, would not have changed the course of the trial;

d) would not be unfair to the opposite party; and

e) are necessary for the purpose of determining the real issues raised or depending upon the proceedings.

[33] In *American Creek Resources Ltd. v. Teuton Resources Corp.,* 2015 BCCA 170, the Court of Appeal upheld the trial judge's decision to permit a pleading amendment, to claim punitive damages and special costs, after the close of evidence at trial. On behalf of the court, Justice Donald said:

> [60] The appellant submits that it was prejudiced by the amendments…. The argument is that the appellant was caught by surprise and was thereby denied the opportunity to call responsive evidence.
>
> [61] The respondent's answer, which I accept, is that because the subject matter came up on discovery and was raised again during trial, the appellant had to know that the respondent was making an issue of the postings and the appellant had ample opportunity to adduce whatever evidence it thought necessary to defend itself. In any event, the appellant was given the opportunity to call evidence during the costs hearing and did so.
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> [62] I do not consider the appellant to have been prejudiced by the amendment process in this case ...

[34] In dealing with late amendment applications in *Letvad v. Finley*, 2000 BCCA 630 at para. 29, the Court of Appeal adopted the following non-exhaustive list of factors to be considered in the exercise of discretion as set out in *Teal Cedar Products (1977) v. Dale Intermediaries Ltd.*, [1996] B.C.J. No. 234 (C.A.):

a) the extent of the delay;

b) the reasons for the delay;

c) any explanation put forward to account for the delay;

d) the degree of prejudice caused by the delay, and

e) the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[35] I am satisfied that, in the circumstances of this case, Ms. Howell should be permitted to amend her claim to seek punitive damages.

[36] Although, as the circumstances of Mr. Machi's alleged driving while under suspension became clear, an earlier amendment could have been sought, I accept Ms. Howell's counsel's explanation that not doing so earlier was his oversight.

[37] Despite the delay, no new facts are necessary to be pled or proven to support a claim for punitive damages. The damages, if any, will flow from the same factual findings necessary for reaching a conclusion about the circumstances of the Accident and liability for it. As a result, no

new disclosure, discovery, or expert evidence is required to support the amended claim. There is nothing that could have been asked of Ms. Howell, by way of disclosure or discovery, to enable Mr. Machi to know the case he had to meet with respect to the punitive damages claim.

[38] The course of the trial would not have changed if the amendment had been sought in advance of trial. The amendment sought merely permits Ms. Howell to argue that Mr. Machi's alleged behaviour is worthy of the retribution, deterrence, or denunciation that punitive damages achieve.

[39] In all of these circumstances, I conclude that the Amendment causes no prejudice to Mr. Machi and, I exercise my discretion to permit Ms. Howell to amend her claim to seek punitive damages.

The Trial Witnesses

[40] As both liability and quantum were in issue at this trial, a number of witnesses were called by Ms. Howell and by ICBC. Mr. Machi did not call any witnesses. As discussed below, Mr. Machi was called as an adverse witness as part of Ms. Howell's case. Before being examined by Ms. Howell's counsel, Mr. Machi gave a statement under oath.

Liability Witnesses

[41] In addition to Ms. Howell, I heard evidence from the following liability witnesses on her behalf:

a) Michael Bouchard, a pedestrian eyewitness to the Accident who chased after the pickup truck and provided the Vancouver Police Department ("VPD") with a statement and information about the license plate of the vehicle involved in the Accident;

b) Kristal Low, a driver who was stopped in the eastbound traffic on East 1st on the date of the Accident. Ms. Howell had crossed in front of Ms. Low's SUV just before the impact;

c) Constable Kyle Perlstrom, a VPD officer who, along with his partner Constable Ryan Bohm (who was unable to testify due to medical issues), attended at the scene of the Accident and conducted the preliminary investigation;

d) Constable Wayne Galvin, a detective in VPD's Hit and Run Squad, who followed up Constables Perlstrom's and Bohm's investigation; and

e) Kimberly Kenny, a forensic chemist employed by the RCMP Forensic Science and Identification Services Laboratory in Edmonton. Ms. Kenny was qualified as an expert forensic chemist in the area of examination, identification, and comparison of physical and trace evidence, including fibre analysis.

Lay Witnesses and Treatment Providers

[42] On behalf of Ms. Howell, I heard evidence from the following lay witnesses and treatment providers:

a) Sandra Howell, Ms. Howell's mother;

b) Aileen Aysa Hemsworth, Ms. Howell's current life partner;

c) Madeline Gorman, Ms. Howell's life partner on the date of the Accident;

d) Sarah Maitland, the co-founder and creative director of the Writer's Exchange, an organization at which Ms. Howell volunteered after the Accident;

e) Dr. Ronald Collette, Ms. Howell's treating family doctor. He was qualified to give an expert opinion on general and family medicine. Dr. Collette began seeing Ms. Howell shortly after the Accident. He prepared a report dated December 12, 2016;

f) Kristopher Kent, an occupational therapist working for J.R. Rehabilitation Services Inc. and who is Ms. Howell's treating occupational therapist. He assessed Ms. Howell in May 2015 and began treating her the following month;

g) Dr. Garth Kroeker, Ms. Howell's treating psychiatrist who was qualified to give expert evidence in the areas of diagnosis, treatment, and management of mental health issues. Dr. Kroeker prepared a report dated August 2, 2016; and

h) Dr. Laura Klubben, Ms. Howell's treating psychologist who was qualified to give expert opinion evidence in psychology. Dr. Klubben prepared a report dated March 6, 2017.

The Plaintiff's Medical and Other Experts

[43] I also heard evidence from a number of experts retained solely for the purpose of giving opinion evidence at this trial. On behalf of Ms. Howell, I heard from:

a) Dr. Andrew Travlos, a physiatrist who was qualified as an expert in physical medicine and rehabilitation. He conducted two independent medical examinations ("IMEs") of Ms. Howell and provided medical legal reports dated March 26, 2014, and August 19, November 9 and 23, 2016;

b) Dr. Vance Tsai, a doctor who was qualified as an expert in otolaryngology. He examined Ms. Howell and sent her for some additional testing. He provided reports dated June 2, 2014, and November 14, 2016;

c) Dr. Gordon Mackie, a neurologist with a specialty in headaches, who was qualified as an expert in the diagnosis, prognosis, and treatment of headaches. He conducted an IME of Ms. Howell and provided a report dated January 26, 2017;

d) Dr. Stephen Anderson, a psychiatrist, who conducted an IME of Ms. Howell. He provided a report dated December 7, 2016, and an addendum dated March 6, 2017;

e) Dr. Melvin Kaushansky, a neuropsychologist, who conducted an IME of Ms. Howell. He provided reports dated July 16, 2014, and January 5, 2017, and an addendum dated March 22, 2017;

f) Dr. Manraj Heran, who was qualified to give expert evidence in the area of diagnostic and therapeutic neuroradiology. He reviewed Ms. Howell's CT and MRI scans and opined on what they revealed about Ms. Howell's brain injury. He provided a report dated January 26, 2017;

g) Dr. Aaron MacInnes, a medical doctor and pain specialist who was qualified to give expert evidence in the area of diagnosis, prognosis, and treatment of chronic pain. He conducted an IME of Ms. Howell and provided a report dated December 13, 2016;

h) Louise Craig, a physiotherapist who specialized in conducting functional capacity evaluations. He conducted an evaluation of Ms. Howell and provided a report dated November 18, 2016; and

i) Vanessa Hanberg, who was qualified as an occupational therapist and life care planner. She prepared a future care needs and costs analysis report dated January 17, 2017, and an addendum dated February 6, 2017.

[44] Darren Benning, an economist who specializes in providing litigation support services, prepared expert reports dated January 25, 2017, on Ms. Howell's income loss claims and the present value of her future costs of care. Mr. Benning prepared an addendum to his present value of future cost of care report on February 7, 2017, and to his future income loss report on April 12, 2017. Mr. Benning was not required for cross-examination.

ICBC's Expert Witnesses

[45] On behalf of ICBC, I heard expert evidence from:

a) Dr. Derryck Smith, a psychiatrist who conducted an IME of Ms. Howell and prepared a report dated November 18, 2016, and an addendum dated February 20, 2017, which was admitted in redacted form. After argument, I concluded that parts of his addendum report were not

truly responsive and redacted those portions;

b) Dr. Rehan Dost, a neurologist who was qualified to give evidence in the field of neurology. Dr. Dost conducted an IME of Ms. Howell and prepared a report dated October 24, 2016. Dr. Dost prepared a second report dated March 28, 2017. I did not admit it as it was not filed within the 42-day deadline for responding reports set out in R. 11-6(4);

c) Dr. Noah Silverberg, a neuropsychologist, who was qualified to give evidence in the area of neuropsychology. In his report dated March 2, 2017, Dr. Silverberg commented on Dr. Kaushansky's reports and the testing he performed. Dr. Silverberg did not examine Ms. Howell; and

d) Philip Towsley, who was qualified as an occupational therapist and who reviewed and critiqued Ms. Hanberg's future care needs and cost analysis report and subsequently prepared his own cost of future care analysis. Mr. Towsley prepared reports dated March 6, 2017, and April 9, 2017 respectively.

[46] In addition, on behalf of ICBC, two reports from Dr. Gabriel Hirsch, a physiatrist, were entered into evidence. Dr. Hirsch conducted an IME of Ms. Howell and prepared a report dated January 10, 2017, and an addendum dated February 8, 2017. He was not required for cross-examination.

[47] Douglas Hildebrand, an economist who specializes in providing litigation support services for lawyers, prepared reports for ICBC on Ms. Howell's future loss of income and the present value of her costs of future care. Mr. Hildebrand was not required for cross-examination.

[48] I was also provided with a report from Mr. Ron Patrickson, an economist who reviewed Mr. Benning's report on Ms. Howell's future income loss. Mr. Patrickson was not required for cross-examination.

Was Mr. Machi's Sierra involved in the Accident, and was he the driver?

[49] For the reasons that follow, I have concluded that Mr. Machi was the driver of the Sierra which struck Ms. Howell. His denial that he was the driver was entirely unbelievable. Even if I had not reached that conclusion, I would have concluded that, as the registered owner of the Sierra, which I find was the vehicle involved in the Accident, he freely loaned the vehicle to a number of unnamed drivers, and was therefore vicariously responsible for the Accident.

Mr. Machi was the driver of the Sierra on January 20, 2014

Assessment of Credibility

[50] In assessing Mr. Machi's credibility, I have considered Justice Dillon's helpful summary of the factors a trier of fact ought to consider when assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras.186-187:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township*) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[51] Pursuant to R. 12-5(26) of the *Supreme Court Civil Rules*, Ms. Howell compelled Mr. Machi for cross-examination as an adverse witness. Before being cross-examined and after giving his sworn oath, he read a statement in which he denied driving the Sierra or that it was involved in the Accident.

[52] Mr. Machi acknowledged that his driver's licence had been suspended on three occasions for driving while prohibited. In particular, and in the period preceding the Accident, his licence had been suspended from March 7, 2013, to March 7, 2014, for driving while under suspension. He repeatedly denied driving his Sierra between March 2013 and the date of the Accident but testified that he kept his Sierra insured so that his co-workers, friends, and family could drive it.

[53] Mr. Machi's discovery evidence was put to him during his evidence at trial. He agreed that he had attended an examination for discovery on July 15, 2016, was then represented by counsel, delivered an oath, and answered questions put to him by Ms. Howell's counsel.

[54] At the discovery, Mr. Machi was shown and asked questions about photographs taken from video surveillance of a man shopping at the Home Depot at Terminal Avenue in Vancouver on the

day of the Accident. Ms. Howell's counsel mistakenly identified the time at which the photographs had been taken. Mr. Machi was told they were taken at about 5:53 p.m. on the day of the Accident. They were in fact taken that morning, at or about 6:52 a.m.

[55] Mr. Machi agreed that the photographs were of him.

[56] Mr. Machi was asked a series of questions about what he did on the evening of the Accident. He said that he had been driven to the Home Depot that evening in his Sierra by someone named "Michael" with whom he worked. He described Michael as about 25 years of age, 5 feet 10 inches tall, with a slim build-about 150 pounds, and with medium length brown hair.

[57] Mr. Machi did not know Michael's surname, contact information, or how to find him. He could not recall how Michael came to be driving his truck. He said that Michael had come to his home on East Pender and driven him directly to the Home Depot in the Sierra. He did not know how Michael had travelled to East Pender. He did not think that Michael had his own vehicle. He also did not think that Michael knew that Mr. Machi's license had been suspended.

[58] When Mr. Machi's discovery answers were put to him at trial, he said he had been "speculating" and could not "confirm today" that his answers at discovery were accurate. Nowhere in the discovery transcript does Mr. Machi suggest that his answers were speculative. In fact, he gave detailed answers to explain the photographs which he believed depicted him in the Home Depot on the evening of the Accident.

[59] I accept that the misidentification of the time at which the photographs had been taken might have led to some confusion on the part of Mr. Machi but, in any event, under oath at discovery, he was prepared to "speculate" and give a fulsome explanation for evidence which appeared to contradict his denial that he was the driver of the Sierra. If Mr. Machi was certain that he was not at the Home Depot at 5:53 p.m. on the day of the Accident, there was no need for him to "speculate" and provide an elaborate story of how he came to be photographed in the store. His explanations were improbable.

[60] The fact that Mr. Machi was prepared to speculate under oath during his discovery evidence means that his evidence at trial must be considered with caution.

[61] In addition, during his evidence at trial, Mr. Machi was shown the surveillance videos taken at the Home Depot at just before and after 7:02 a.m. (the "morning video") and just before and after 5:53 p.m. (the "evening video") on the date of the Accident. Receipts bearing the times of 7:02 a.m. and 5:53 p.m. had been found in Mr. Machi's Sierra when it was seized and searched by the VPD.

[62] Constable Galvin testified that the cash registers in the Home Depot are time and date

synchronized with the store's surveillance videos. Despite being asked about Constable Galvin's evidence, Mr. Machi maintained that it was a coincidence that receipts found by the VPD in his Sierra bore the same date and time as the surveillance videos which showed a Caucasian male of his size and height making purchases.

[63] Mr. Machi's evidence in that regard was not believable. The only credible explanation for the "coincidence" of the time on the receipts and the surveillance video is that someone, who was in the Sierra, made purchases at the Home Depot on January 20, 2014, and that person is depicted in the videos.

[64] Both the morning and evening videos depicted a person, driving a dark pickup truck, arriving at the parking lot at the Home Depot, leaving the driver's side of the truck and entering the store. They then depict a person making a purchase at a self-serve cash register, leaving the store, entering the driver's side of the dark truck and driving out of the parking lot.

[65] Mr. Machi denied that he was the person in the videos, despite having acknowledged, at his examination for discovery, that the still photographs, taken from what we now know was the morning video, were of him.

[66] The morning video appeared to show him walking towards the driver's side of a dark coloured truck and, on a balance of probabilities, I conclude that the video is of Mr. Machi driving the truck despite him avowing under oath that he never drove while his license was under the most recent suspension.

[67] I also conclude that, on a balance of probabilities, the evening video also depicts Mr. Machi. Although he was wearing different clothing than he was in the morning, the surveillance video is of a Caucasian man, of about the same height and weight as Mr. Machi. As I have said, there was no logical explanation for Mr. Machi to create the elaborate story about Michael at his discovery, if he was not at the Home Depot on the evening of the Accident.

[68] In this case, Mr. Machi had a motive to lie because if he acknowledged driving the Sierra, he would have been acknowledging doing so while his license to drive was suspended for driving during an earlier suspension. In addition, because he left the scene of the Accident, he was facing the possibility of criminal charges.

[69] Finally, during his evidence, Mr. Bouchard, an independent witness to the Accident, described how he ran after the pickup truck which hit Ms. Howell and yelled at the driver that he had killed her. He testified that he made eye contact with the driver and was 90% sure that Mr. Machi was that driver. Mr. Bouchard testified that Mr. Machi had shorter hair at the time of the Accident than he had at trial. His evidence in that regard was confirmed by the morning video

which shows Mr. Machi with shorter hair. I accept that there are some frailties in Mr. Bouchard's identification of Mr. Machi at trial but, even giving it limited weight, it is part of the overall evidence on this issue.

[70] In summary, there is no dispute that a cash register receipt date- and time-stamped January 20, 2014, at 5:53 p.m. was found in the Sierra after it had been seized by the VPD. The surveillance video from the Home Depot, which is linked by date and time to the date and time on the cash register receipt, shows a man, of Mr. Machi's height and physical description, leaving the Home Depot at 5:53 p.m., carrying a Home Depot shopping bag, getting into the driver's side of a dark pickup truck, and driving out of the parking lot. During the VPD's search of the Sierra, a Home Depot plastic bag was found on the floor of the passenger side of the vehicle.

[71] Further, a second receipt dated January 20, 2014, and time-stamped at 7:02 a.m. was found in Mr. Machi's car. Video taken of a man entering the store, paying for an item, departing the store, and getting into the driver's side of a dark pickup truck was filed as an exhibit at trial. Although at trial Mr. Machi denied that he was the man in the video, when confronted with a still photograph taken from it at discovery, he said it was him. It was this still photo which caused Mr. Machi to "speculate" at his discovery. I accept that the morning video is of Mr. Machi.

[72] It strains credulity to conclude that the two Home Depot receipts found in the Sierra were mere coincidence.

[73] Finally, if Mr. Machi was certain that he was not driving his vehicle on January 20, 2014, I would have expected him to have done what he could to assist the VPD and ICBC to identify which of his friends, family, or co-workers was driving his Sierra that evening. In particular, I would have expected him to assist the VPD and ICBC to locate Michael. He did not.

[74] For these reasons, I am satisfied, on a balance of probabilities, that Mr. Machi was driving his Sierra at the time of the Accident and that his evidence under oath was not credible.

The Driver of the Sierra had Mr. Machi's Consent

[75] Even if I had not concluded that Mr. Machi was the driver of the Sierra, I conclude, on a balance of probabilities, that his Sierra was the vehicle which struck Ms. Howell. I am also satisfied, on a balance of probabilities, that whoever the driver was, she/he had the express or implied consent of Mr. Machi to drive it and, pursuant to s. 86 of the *MVA*, was Mr. Machi's agent or servant. Section 86 provides:

> **Responsibility of owner or lessee in certain cases**
>
> 86 (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who

(a) is living with, and as a member of the family of, the owner, or

(b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,

is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

[76] In *Green v. Pelley*, 2011 BCSC 841, the court set out the test for a finding of implied consent where consent is given to one party and a vehicle ends up being driven by another:

> [39] The test for a finding of implied consent under s. 86, in situations where consent has been given to one person but the vehicle ends up being driven by a third party, is as set out in *Hartley v. Saunders* (1962), 33 D.L.R. (2d) 638 (B.C.S.C.), and in *Godsman v. Peck* (1997), 29 B.C.L.R. (3d) 37 (C.A.). The evidence must establish that the vehicle owner had both an expectation and willingness that a third party would drive the vehicle. Both an expectation and willingness must be shown. One without the other will not suffice: *L'Heureux v. Eustache*, 2003 BCSC 347 at para. 9.
>
> [40] The requirement that an owner have an actual expectation of a third party driving the vehicle is relaxed, where it is clear from the circumstances that consent would have been given, if sought, as a matter of course in the particular circumstances confronting the person who is in possession by consent: dissenting judgment of Porter J.A. in *Palsky v. Humphrey* (1963), [1964] 41 D.L.R. (2d) 156 (Alta. S.C. (A.D.)), as approved of and adopted by the Supreme Court of Canada on appeal, [1964] S.C.R. 580 at 662.

[77] It is not disputed that Mr. Machi's license was suspended on the date of the Accident.

[78] Mr. Machi testified that, at the time of the Accident, he owned and operated a small construction company, and his truck was used daily to haul materials, tools, and workers from job to job, and that it was not uncommon for someone different to drive his truck each day. He also testified that the Sierra was used to pick up his young son from the child's mother on Vancouver Island, but that he did not drive it.

[79] Thus, based on Mr. Machi's evidence, a number of unidentified friends, family members, employees, and acquaintances had Mr. Machi's express or implied consent to operate the Sierra on the day of the Accident. On his evidence, he expected there to be different, unnamed drivers, and he willingly permitted them to drive.

The Sierra Hit Ms. Howell

[80] Further, on the evidence, I conclude that Mr. Machi's Sierra was involved in the Accident. In its written submissions, ICBC acknowledged that there was "fairly strong circumstantial evidence" linking the Sierra to the Accident.

[81] That circumstantial evidence included the following.

[82] Mr. Bouchard testified that, as he ran after the vehicle which struck Ms. Howell, he attempted to record a video of it on his phone, but it had insufficient battery power to do so. However, just as the battery ran out, he was able to use his phone to make a note of Mr. Machi's license plate number. From memory, he gave the plate number to Constable Perlstrom at the scene. He described the vehicle as a black Ford F150. The plate number he provided from memory was incorrect as Mr. Bouchard had transposed some of the numbers. Later that evening, after Mr. Bouchard had recharged his phone and was able to access his note, he emailed Constable Perlstrom to provide the correct the license plate number.

[83] Constable Perlstorm testified that a search for the registered owner of the license plate led to Mr. Machi, the registered owner of a Black GMC Sierra.

[84] Constable Perlstrom testified that he attributed Mr. Bouchard's error about the make and model of the pickup truck to the heat of the moment, and I accept that to be the case.

[85] Constable Perlstrom testified that he then attended at Mr. Machi's residence to speak to him but was told that Mr. Machi was not at home. He found the Sierra parked on the street outside Mr. Machi's home. It had a cracked passenger-side headlight which led him to believe that the Sierra had been in an accident. It was the passenger side of the pickup truck which struck Ms. Howell.

[86] A vertical crack in the passenger headlight was evident when the headlight assembly was marked as an exhibit during Constable Galvin's evidence.

[87] After Mr. Machi's Sierra was seized and searched, Constable Galvin found a smudge or smear on its passenger-side front hood, in a location which lined up with the Sierra's broken headlight and was about where the eyewitness, Ms. Low, described Ms. Howell hitting the hood of the pickup after she was thrown up on to it.

[88] Constable Galvin took a swab of the smear and sent it to the RCMP forensic laboratory in Edmonton where a fibre analysis was conducted by Kimberly Kenny, a forensic chemist. Ms. Kenny was also provided with a fabric sample from the jacket Ms. Howell was wearing on the night of the Accident.

[89] Ms. Kenny's expert report was filed. She testified that she compared the fibres from the swab to the fibres from Ms. Howell's jacket and they were a match.

[90] Ms. Kenny's report opined that the "impacted orange-red nylon and pink-red cotton fibers" in the swab taken from the hood of the Sierra originated either from Ms. Howell's jacket or from another damaged textile source constructed of orange-red nylon fibers and pink-red cotton fibers having "indistinguishable" examined properties.

[91] I conclude that it is highly unlikely that fibres found on the hood of the Sierra, which were indistinguishable from fibres in the fabric of Ms. Howell's jacket, came from a source other than Ms. Howell's jacket. The only logical conclusion, on a balance of probabilities, is that the fibres came to be there because the Sierra was the vehicle which struck Ms. Howell.

[92] As a result, I conclude that the Sierra was the vehicle which struck Ms. Howell. Had I not concluded that the Sierra was driven by Mr. Machi, I would have concluded that it was driven by someone with his permission and knowledge and, as a result, Mr. Machi is vicariously liable for the Accident pursuant to s. 86 of the *MVA.*

The Circumstances Surrounding the Accident

[93] Much of the evidence about the circumstances of the Accident is not in dispute. As set out above, I heard evidence from two eyewitnesses, Mr. Bouchard and Ms. Low. Ms. Howell also testified about what she could recall. Because of Mr. Machi's denial that he was the driver, he did not provide any contrary evidence.

[94] The Accident occurred at approximately 6:15 p.m. on January 20, 2014. It was dark, and the roads were wet, although it was not raining.

[95] During rush hour traffic, Ms. Howell, who was wearing a burgundy jacket and a grey toque, walked between two lanes of stopped eastbound traffic on East 1st Ave. The traffic was stopped, waiting for the light at the intersection of Commercial Dr. to turn green. Ms. Howell was not in a crosswalk; she was about a block from the intersection, near a street light.

Ms. Low's Eyewitness Account

[96] Ms. Low was stopped in the left (northernmost) lane of stopped traffic when she saw Ms. Howell walk in front of her Toyota 4Runner ("SUV"). Ms. Low recalled that her SUV was stopped at just about the spot where a dedicated left turn lane opened up. She believes that Ms. Howell was looking to the left as she crossed in front of her SUV as Ms. Howell made eye contact with her. Ms. Low described Ms. Howell as walking at a "steady pace", Ms. Howell said she was walking quickly.

[97] Ms. Low thought Ms. Howell looked left toward eastbound traffic as she crossed in front of her SUV but testified that Ms. Howell was only looking to her right, toward westbound traffic, after she passed Ms. Low's SUV and approached the yellow line to its left. Ms. Low said that Ms. Howell had taken one or two steps past her vehicle when she was struck by a black pickup truck.

[98] Ms. Low testified that she was not sure where the black pickup truck had come from but that it was not the vehicle which was stopped directly behind hers. As a result, the black pickup truck

was at least two car lengths behind where Ms. Howell crossed. Ms. Low could not recall if she heard the pickup before it hit Ms. Howell. She estimated its speed to be approximately 40 kph.

[99] Ms. Low testified that Ms. Howell was struck by the right front of the pickup truck, on the passenger side, and was thrown up onto its hood before landing on her back on the ground. Ms. Low said that Ms. Howell was unconscious after the impact and that her shoes had been knocked off.

Mr. Bouchard's Eyewitness Account

[100] Mr. Bouchard has lived most of his life in the neighbourhood of the Accident. He was walking eastbound on the north sidewalk of East 1st Ave. when he heard a truck accelerating. He described hearing the truck "revving" or in "overdrive" for approximately three seconds. The sound caused him to look over his right shoulder, and he saw a black pickup truck driving over the painted yellow island and striking Ms. Howell. The vehicle did not slow down after hitting her.

[101] At trial, Mr. Bouchard estimated that the truck was travelling about 80 kph but agreed that, in an earlier statement, he had estimated its speed to be between 50-60 kph. I accept that Mr. Bouchard's recollection is likely to have been more reliable closer to the time of the Accident than his evidence at trial, some three years later. The VPD occurrence reports and the witness statements given on the date of the Accident do not indicate that speed was considered to be a factor.

[102] Mr. Bouchard testified that he had frequently seen pedestrians jaywalk in the area and had done so himself. He had never seen anyone struck. He testified that he had also previously seen vehicles drive over the painted yellow island in order to access the dedicated left turn lane, but that he had not seen anyone come from as far back as where he recalled Mr. Machi had come from.

[103] Although it was dark, Mr. Bouchard testified that there was a street light in close proximity to where Ms. Howell crossed.

[104] I have set out above Mr. Bouchard's evidence about chasing the driver and yelling at him, noting the license plate, and observing the driver turn right in front of the stopped traffic.

Ms. Howell's Recollection

[105] Ms. Howell also testified about what she could recall of the night of the Accident. She has little recollection of what happened immediately after she was struck.

[106] She left her home at the corner of East 1st Ave. and Cotton Dr., one block west of Commercial Dr., intending to go to the Super Value grocery store located on the north side of East

1st Ave., at the corner of Commercial Dr. She noted that the two eastbound lanes of traffic were stopped, and she walked quickly in front of two stopped cars. She believed that she had just stepped past the second car, which we know to be Ms. Low's, and into the start of the dedicated left turn lane when she was struck.

[107] Ms. Howell recalled seeing the lights of the pickup truck which struck her for a "split second" before she was hit and being stunned that a vehicle was approaching her from the east in the westbound lane.

[108] Ms. Howell, Ms. Low, and Mr. Bouchard all marked the approximate location at which Ms. Howell was struck on a Google map of the intersection. The locations marked were very similar.

[109] Based on the evidence of the eyewitnesses and Ms. Howell, I conclude that Ms. Howell was struck at about the location where the dedicated left turn lane opened up. Because Ms. Low said the pickup truck was not the vehicle directly behind her, before Ms. Howell was struck, Mr. Machi or his Sierra must have travelled, for at least two car lengths, the wrong way in the westbound lanes and/or partially in the westbound lanes and partially straddling the painted yellow striped island which is not intended to be crossed. Mr. Bouchard's evidence suggested that Mr. Machi or the Sierra had travelled further than two car lengths.

Contributory Negligence

[110] ICBC urges me to find Ms. Howell at least 50% at fault for the Accident. By contrast, Ms. Howell suggests that I should find no contributory negligence on her part, or that only a token apportionment of liability, of between 1-5%, should be attributed to her.

[111] The starting point for the apportionment of liability in this case is ss. 179, 180 and 181 of the *MVA*. As relevant to this case, those sections provide:

> **Rights of way between vehicle and pedestrian**
>
> 179 (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.
>
> (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.
>
> …
>
> **Crossing at other than crosswalk**
>
> 180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.
>
> **Duty of driver**

181 Despite sections 178, 179 and 180, a driver of a vehicle must

(a) exercise due care to avoid colliding with a pedestrian who is on the highway,

(b) give warning by sounding the horn of the vehicle when necessary, and

…

[112] A number of cases have considered the issue of the comparative fault of motorists and pedestrians who cross roadways outside of crosswalks. Justice Dickson, then a member of this Court, summarized the applicable cases and principles in *Hmaied v. Wilkinson,* 2010 BCSC 1074 at paras. 21-29:

> [21] [The provisions in the *Act*] do not amount to an exclusive code relating to the rights of way between pedestrians and vehicles. Rather, they supplement the common law duty of all highway users to exercise what constitutes, in all of the circumstances, due care …
>
> [22] When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way. Generally speaking, the party with the right of way is entitled to assume that other highway users will obey the rules of the road. In particular, drivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way.
>
> [23] Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards. Depending on the circumstances, from a driver's perspective one such hazard may be a jaywalking pedestrian. If it is reasonably foreseeable or apparent that a pedestrian will disregard the law and thus create a hazardous situation, a driver is obliged to take all reasonable steps to avoid a collision. In such circumstances, if the driver has a sufficient opportunity to avoid the collision, but does not take appropriate evasive action, the driver will be found negligent.
>
> [24] The standard required of drivers in responding to pedestrian-created hazards such as jaywalking is not one of perfection. …The applicable standard of care is one of reasonable prudence in all of the circumstances.
>
> [25] Pursuant to s. 180 of the *Act*, a pedestrian must yield the right of way to a vehicle when crossing a highway at a point that is not in a crosswalk. Pursuant to s. 181 of the *Act*, despite s. 180, a driver is obliged to exercise due care to avoid colliding with a pedestrian who is on the highway.
>
> [26] In *Funk v. Carter*, 2004 BCSC 866 (CanLII), Williamson J. held that where a pedestrian has clearly established prior entry to an intersection he or she need not surrender it to an approaching vehicle, even when not crossing at a crosswalk. In *Claydon*, *supra*, Baker J. cited *Funk*, *supra* with approval in the context of a case involving a jaywalking pedestrian and a speeding driver who failed to keep a proper lookout. In so doing, she found that both parties were negligent.
>
> [27] Where a plaintiff pedestrian and defendant driver both fail to meet the requisite standard of care and an accident ensues, the court may apportion liability between them. Before liability will be apportioned, however, the defendant must establish that the plaintiff's fault was a proximate, or effective, cause of the loss. …
>
> …
>
> [29] Each case is, of course, uniquely fact-driven. It may be helpful, however, to consider the liability apportionment assessed in other cases that involve similar factual

elements.

[Citations omitted.]

[113] Where there is more than one proximate cause of a loss, the *Negligence Act*, R.S.B.C. 1996, c. 333, s. 1(1) requires an apportionment of liability on the basis of "the degree to which each person was at fault". As decided in *Cempel v. Harrison Hot Springs Hotel Ltd.*, [1997] B.C.J. No. 2853 (C.A.) at para. 19, the apportionment must be made on the basis of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness.

[114] In this case, neither party had the right of way as both parties contravened the *MVA.* Thus, the focus is on whether, in the circumstances, each party took reasonable precautions in response to the potential hazards. I must therefore decide, in all of the circumstances, the extent to which Mr. Machi and Ms. Howell, both of whom contributed to the Accident, fell short of the standard of care required of them.

[115] In *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at para. 46. Justice Finch described the range of blameworthiness, as follows:

> Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[116] In the often-cited *Aberdeen v. Langley (Township),* 2007 BCSC 993, varied on other grounds, 2008 BCCA 420 at para. 62, Justice Groves summarized the factors courts have considered in assessing moral blameworthiness and contributory negligence. Those factors are:

1) the nature of the duty owed by the tortfeasor to the injured person;

2) the number of acts of fault or negligence committed by a person at fault;

3) the timing of the various negligent acts;

4) the nature of the conduct held to amount to fault;

5) the extent to which the conduct breaches statutory requirements;

6) the gravity of the risk created;

7) the extent of the opportunity to avoid or prevent the accident or the damage;

8) whether the conduct in question was deliberate or unusual or unexpected; and

9) the knowledge one person had or should have had of the conduct of another person at fault.

[117] A review of other cases involving jaywalking pedestrians or otherwise involving pedestrians and motor vehicles, courts tend to look at the following facts or circumstances when assessing the *Aberdeen* factors:

- whether the driver or pedestrian was keeping an adequate look-out for cars or pedestrians, including jaywalking pedestrians;
- whether the driver or pedestrian took reasonable precautions, such as modifying speed in areas where pedestrians might be or looking both ways before proceeding into a crosswalk;
- the speed of the driver compared to the speed limit and the conditions;
- whether the driver obeyed the rules of the road, such as signaling;
- whether the pedestrian or car was “there to be seen” including an assessment of the weather, time of day, state of traffic, use of headlights, light or dark clothing for pedestrians, and other visibility factors;
- the nature of the area where the accident occurred, such as whether it is a busy street or whether there are frequent jaywalkers;
- the presence of nearby crosswalks;
- where the pedestrian crosses, mid-block or nearer to an intersection where any reasonable adult might be expected to attempt to cross;
- whether the pedestrian was wearing headphones; and
- generally, what could reasonably be foreseen by either the driver or pedestrian.

[118] Applying the *Aberdeen* factors, in support of her argument for a token apportionment of liability, Ms. Howell relies on a number of acts of fault or negligence committed by Mr. Machi. In particular, Ms. Howell submits that Mr. Machi:

a) was driving with a suspended license;

b) pulled into oncoming traffic lanes to get around stopped traffic;

c) drove over the yellow painted island;

d) struck Ms. Howell when she was there to be seen;

e) fled the scene of the Accident; and

f) refused to cooperate with police or ICBC in their investigations.

[119] ICBC does not dispute that Mr. Machi was negligent on January 20, 2014, but submits that Ms. Howell failed to take reasonable care for her own safety. In particular, ICBC submits that Ms. Howell:

a) crossed East 1st Ave, a very busy area, during rush hour traffic, between stopped vehicles and not in a crosswalk;

b) was wearing a dark burgundy coat and a grey toque, at night time;

c) crossed in front of Ms. Low's SUV which would likely have obstructed both Ms. Howell's and Mr. Machi's view; and

d) only looked to her right before stepping out of the lane in which Ms. Low was stopped.

[120] Further, ICBC relies on the following evidence in support of its argument:

a) Ms. Low did not expect to see a pedestrian crossing at that location;

b) there was a crosswalk half a block up East 1st Ave.;

c) Ms. Low testified that Ms. Howell was walking at a steady pace and Ms. Howell described walking quickly as she was concerned that the light at Commercial Dr. might change;

d) Mr. Bouchard testified that he had seen other vehicles drive over the yellow painted island to get into the left turn lane;

e) Ms. Howell ought to have heard the truck approaching as Mr. Bouchard, who was across the street and further west on 1st Avenue, said he had heard it accelerating for three seconds prior to the impact and it caused him to look around;

f) Ms. Howell did not look to her left before stepping out from in front of Ms. Low's vehicle. Had she done so, she would have seen the truck approaching with its headlights on; and

g) Ms. Howell was struck near the beginning of the dedicated left turn lane where she ought to have anticipated vehicles could be travelling.

[121] Not surprisingly, based on their very different assessments of the appropriate apportionment of responsibility in this case, Ms. Howell and ICBC rely on different fact-specific cases in support of their positions.

Cases Relied on by Ms. Howell

[122] Ms. Howell relied on the following cases.

[123] In *Kuharski v. Inder*, [1986] B.C.J. No. 2762 (S.C.), the defendant was found 100% liable to a pedestrian, who crossed a street, not in crosswalk, but who had “gained so substantial a prior entry on to the highway that she had achieved the right-of-way.”

[124] In *Funk v. Carter*, 2004 BCSC 866, a pedestrian was attempting to cross an intersection on a dark rainy night. The intersection had marked crosswalks on three sides, but no markings on the side at which the plaintiff crossed. The defendant's car hit the plaintiff while making a left turn through the intersection. The court determined that where a pedestrian has clearly established prior entry into an intersection, they need not surrender it to an approaching vehicle, even when not crossing at a crosswalk. Liability was apportioned 90% to the defendant and 10% to the plaintiff.

[125] In *Anderson v. Kozniuk,* 2013 BCCA 46, the plaintiff pedestrian was initially crossing a roadway at an unmarked crosswalk in a well-lit intersection. After he started crossing, he veered diagonally across the road, leaving the unmarked crosswalk, to get to a bus stop. There was no evidence that the defendant tried to stop prior to the collision. The judge considered the plaintiff liable for failing to remain in the crosswalk, where he was more visible to traffic, and for not checking to make sure crossing outside the crosswalk was safe, but found the defendant liable for not maintaining a careful lookout and reducing her speed in an area where she should have known pedestrians were likely to be crossing. The court upheld the trial judge’s apportionment of liability 70% against the defendant, and 30% against the plaintiff.

Cases Relied on by ICBC

[126] ICBC relied on the following cases.

[127] In *Sandhu v. John Doe*, 2012 BCSC 1423, a pedestrian was on the sidewalk when a driver stopped in the curb lane and motioned for her to cross. The plaintiff began to cross, and after successfully navigating the curb lane, was struck by the defendant’s vehicle travelling in the centre lane. Liability was apportioned 75% to the plaintiff and 25% to the defendant. The Court determined that the plaintiff was negligent in attempting to cross the street where there was no crosswalk and by walking into the centre lane without determining whether a vehicle was approaching in that lane.

[128] In *Walter v. Plummer*, 2010 BCSC 1017, aff’d 2011 BCCA 335, the plaintiff was jaywalking near his secondary school in order to get to a bus stop. He was struck after he crossed three traffic lanes and stepped out from in front of a large truck that had stopped for a red light. The defendant driver was driving in the lane to the right of the truck. Liability was apportioned 60% to the plaintiff

and 40% to the defendant.

Conclusion on Contributory Negligence

[129] Taking into account the *Aberdeen* factors, and applying them to the circumstances of this case, I conclude that it is appropriate to find Mr. Machi 75% at fault for the Accident and Ms. Howell 25% at fault. My reasons are as follows.

[130] First, as I have concluded that Mr. Machi was driving the Sierra on January 20, 2014, he was doing so while his license to drive was suspended. To make matters worse, his license had been suspended for a year for the earlier offence of driving while under suspension. This was not Mr. Machi's first license suspension for driving while prohibited. His driving record revealed three driving while prohibited suspensions which he acknowledged during his evidence.

[131] Had Mr. Machi had any regard for the legal prohibition against him driving, he would not have been on the road on January 20, 2014, and would not have hit Ms. Howell. He was clearly in breach of a statutory obligation.

[132] I accept ICBC's argument that the blameworthiness assessment culminates with the Accident. The fact that Mr. Machi left the scene without stopping and did not cooperate with the police does not directly impact the apportionment of liability, but it is another example of Mr. Machi's disregard for the legal rules which apply to him and govern behaviour in a civil society.

[133] Second, if Mr. Machi had patiently waited in the stopped traffic until the vehicles in front of him moved forward so that he could legally and safely access the dedicated left turn lane, Ms. Howell would have safely made her crossing of East 1st Ave. She was not at risk from the stopped traffic eastbound; she had safely navigated across those two lanes of stopped eastbound cars. Further, she was not at risk from westbound traffic as westbound traffic was stopped at the red light. There was sufficient time for her to cross safely as, according to Mr. Bouchard's evidence, after Mr. Machi struck Ms. Howell, he still had time to drive up to the corner in a lane intended for left turners, and then turn right in front of stopped traffic.

[134] Ms. Howell, Ms. Low, and Mr. Bouchard all located the point of impact at a similar location, approximately at the start of the dedicated left turn lane. As Ms. Low's evidence was clear that Mr. Machi was not in the vehicle which was stopped directly behind her in the line of eastbound traffic, for Mr. Machi to have accessed the dedicated left turn lane, he must have driven, in part, the wrong way in the westbound lanes and then straddled the painted yellow island demarcated in the pictures filed in evidence. Doing so was a breach of the *MVA.*

[135] Mr. Machi was taking a risk in driving up the westbound lanes and straddling the painted yellow island. He had an extra responsibility to proceed carefully and slowly and to watch out for

pedestrians or other eastbound vehicles which might also try to get a jump on traffic and access the dedicated left turn lane.

[136] Dr. Heran's evidence, which I refer to below, confirmed that breaking Ms. Howell's skull, as depicted on her scans, required considerable force. Based on the evidence of the eyewitnesses, Mr. Machi was travelling at least 40 kph and possibly as fast as 60 kph. That is an excessive rate of speed in those circumstances.

[137] Third, Mr. Bouchard, who had lived in the area for most of his life, testified that it was not unusual for pedestrians to be crossing East 1st Ave. outside of a crosswalk. Mr. Machi should have been on the lookout for pedestrians in that location. In any event, as a result of Mr. Machi's denial that he was the driver, Mr. Machi did not put forward any evidence about the circumstances on the evening of the Accident. Ms. Howell's counsel could not examine him about the steps he took to avoid the Accident. As a result, there is no evidence from Mr. Machi on which I could reach the conclusions urged upon me by ICBC that he had no reason to anticipate a pedestrian at that location or that he had no chance to avoid the collision because Ms. Howell had only taken one or two steps before she was hit.

[138] During cross-examination, Mr. Machi acknowledged that Vancouver pedestrians jaywalk and that drivers need to keep an eye out for them. He also acknowledged that there are many of pedestrians at the intersection of Commercial St. and East 1st Ave. While Mr. Machi denied having seen jaywalkers in the specific location of the Accident, Mr. Bouchard, who had lived in the area for most of his life, testified that he often saw jaywalkers in that area and had jaywalked himself. Ms. Low indicated that she did not expect a pedestrian to cross in front of her vehicle; however, I found Mr. Bouchard's evidence the most reliable as to the neighbourhood pedestrian conditions because he was a life-long resident. As a result, in all the circumstances, Mr. Machi should have taken greater care and been aware of the possibility of jaywalking pedestrians.

[139] Fourth, Ms. Low testified that Ms. Howell was looking left as she passed in front of her SUV. She recalls seeing Ms. Howell's face. Ms. Howell testified that she made eye contact with Ms. Low. Ms. Low recalled Ms. Howell stopping or slowing down, and looking to her right before stepping forward over the yellow line. It was clear that Ms. Howell was not expecting a risk from the east as she could not have anticipated that Mr. Machi would drive in a manner that breached the *MVA.*

[140] While it was dark at 6:15 p.m. on January 20, 2014, Ms. Howell crossed East 1st Ave. near to a street light, and headlights from the stopped cars travelling eastbound would also have provided illumination.

[141] Ms. Howell's negligence included the fact that she was not crossing in a crosswalk, or at the

intersection, in busy traffic during rush hour. Second, she was wearing a burgundy jacket and a grey toque which made her less visible.

[142] Third, Ms. Howell did not recall hearing the pickup truck although Mr. Bouchard did so from further away and across the street. She did not look to her left before stepping forward from in front of Ms. Low's SUV which likely hid her from view of anyone approaching the dedicated left turn lane.

[143] Fourth, had Ms. Howell looked to her left before stepping out from in front of Ms. Low's vehicle, she would have seen Mr. Machi's pickup truck approaching as she testified that she was aware of his lights a split second before the collision.

[144] Finally, despite not being a driver herself, Ms. Howell should have been aware of the possibility that a driver might breach the *MVA* to access the dedicated left turn lane.

The Overall Credibility of Ms. Howell's Evidence

[145] Ms. Howell testified over the course of three days. Despite her brain injury, chronic pain, major depression, and ADD, she testified openly and honestly and responded to questions in cross-examination to the best of her recollection. She did not shy away from questions which were intensely personal and freely acknowledged her earlier life challenges and on-and-off depression.

[146] Ms. Howell was unable to tolerate testifying for consecutive days and, after cross-examination about her use of medication, which occurred at the end of a day of her evidence, she was very emotional and expressed her shame about the number of medications that she takes. At times, while giving her evidence, Ms. Howell appeared tired and short tempered; at others, she appeared engaged in the questioning. She had headaches which varied in intensity depending on the day, and sometimes during the course of the day. She demonstrated pain behaviours such as holding and supporting parts of her body. Nothing about her behaviour appeared contrived.

[147] Ms. Howell's evidence, and the evidence of those witnesses who knew her best - her mother, Ms. Gorman, Ms. Hemsworth, Ms. Maitland, and Mr. Kent - was all broadly consistent as to her difficulties and her capacity. Slight inconsistencies did not lead me to conclude that Ms. Howell was less credible. On occasion, Ms. Howell had poor recall for dates and the sequence of events, but the histories she provided to the various IME doctors were generally consistent.

[148] None of the experts who saw Ms. Howell concluded that she was malingering or exaggerating her conditions. All found her to be pleasant, honest and cooperative.

[149] ICBC did not attempt to impeach Ms. Howell's credibility during its cross-examination of her. The primary focus of its cross-examination related to her self-completed mental health

questionnaires, discussed below, and her misuse of her prescription medications after the Accident.

[150] Overall, I conclude that Ms. Howell was a credible witness even when her frank answers did not assist her.

Causation

[151] To justify compensation, Ms. Howell must establish a causal connection between Mr. Machi's negligence and her current disabling conditions.

[152] The long established test for causation, as set out in *Athey v. Leonati,* [1996] 3 S.C.R. 458 at paras. 13-17, is the "but for" test: "but for" the accident, would the plaintiff have suffered the disabling injuries?

[153] In *Athey*, the Court also said that a plaintiff need not establish that the defendant's negligence was the sole cause of the injury. If there are other potential non-tortious causes, the defendants will still be found liable if the plaintiff can prove that the accidents materially contributed to the disabling conditions, beyond the *de minimi*s range.

[154] In *Resurfice Corp. v. Hanke*, 2007 SCC 7, the Supreme Court affirmed that the "but for" test remained the test for determining causation, but redeveloped the concept of "material contribution" from *Athey.* The Court replaced or modified the *Athey* definition of "material contribution" to the plaintiff's injury with the concept of "a substantial connection" between the injury and the defendant's conduct. These developments were usefully summarized by Justice Smith, writing for the majority, in *Sam v. Wilson*, 2007 BCCA 622 at para. 109:

> "Material contribution", as that phrase was used in *Athey v. Leonati*, is synonymous with "substantial connection", as that phrase was used by McLachlin C.J.C. above in *Resurfice Corp. v. Hanke*. This causal yardstick should not be confused with the "material contribution test". As McLachlin C.J.C. explained in *Resurfice Corp. v. Hanke*, at paras. 24 - 29, the "material contribution test" applies as an exception to the "but for" test of causation when it is impossible for the plaintiff to prove that the defendant's negligent conduct caused the plaintiff's injury using the "but for" test, where it is clear that the defendant breached a duty of care owed the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury, and where the plaintiff's injury falls within the ambit of the risk. …

[155] As the Court of Appeal explained in *Farrant v. Laktin*, 2011 BCCA 336, in applying the "but for" test, a trial judge is required to consider not just whether a defendant's conduct was the sole cause of the plaintiff's disabling injury, but also whether the plaintiff has established a substantial connection between the accident and that injury, beyond the *de minimis* level.

Ms. Howell's Pre-Accident Life and Health

[156] Physically, Ms. Howell was in good health prior to the Accident. Although she had been diagnosed with a heart condition at a young age, it was monitored and had not impacted her life in any meaningful way. Prior to the Accident, she did not suffer from chronic pain or musculoskeletal injuries. She was an avid skateboarder.

[157] Psychologically, Ms. Howell had a pre-accident history of anxiety, depression and attention deficit disorder ("ADD") which was managed with medication. She was first treated for depression when she was 16 and experienced episodes of depression and anxiety while a student at the University of Waterloo ("UofW") and again in the spring of 2012 while at the University of British Columbia ("UBC"). She was first formally diagnosed with ADD in 2012 while at UBC.

[158] Ms. Howell's father was an alcoholic and although he was not physically abusive, she described him as being emotionally so.

[159] Between the ages of eight and ten, Ms. Howell was sexually assaulted by a family member. At the time, she did not tell anyone. She was hospitalized after a suicide attempt in Grade 9, when she was either 13 or 14, after which she received some psychological counselling.

[160] Despite describing childhood her as happy, Ms. Howell testified that she has been anxious and depressed most of her life although her depression waxes and wanes. At about the age of 16, Ms. Howell was prescribed anti-depressants for the first time. She has been treated for depression, with different medications, on and off since then.

[161] In her direct and cross-examination, Ms. Howell testified that her family has a history of mental health issues. Her brother has severe depression, which she assumed was bipolar disorder, and her sister has "mood issues". She also believed her grandfather was bipolar.

[162] Mrs. Howell testified that Ms. Howell's brother had never been diagnosed with bipolar disorder but has had depression. Mrs. Howell said that Ms. Howell's sister had anxiety when she was a teenager. As to Ms. Howell's grandfather, Mrs. Howell testified that he had never been diagnosed with a mental health condition but had up and down moods.

[163] Ms. Howell also testified that, as a child, she had difficulty focusing in school and has always had difficulties sleeping.

[164] At a relatively young age, Ms. Howell told her parents she was gay. During her evidence, she down-played the fact that she was bullied while at school, but I accept that she faced some social challenges as a result.

[165] Throughout her life, Ms. Howell has been a reader and book lover. She testified about her love of books and writing. She received encouragement from her high school English teachers to

pursue her interest. Mrs. Howell described her daughter as always having a book or comic book in her hand and said that she could often be found “around town” reading. She said Ms. Howell’s room was full of inspirational quotes from poetry and literature.

[166] Ms. Howell’s high school marks at Preston High School in Cambridge, Ontario were understandably lower in Grade 9, the year of her suicide attempt, but improved and, according to her mother, Ms. Howell graduated on the honour roll in 2009. Her grades were in evidence. To improve her chances of admission to a university English program, which both she and her mother testified was her life-long dream, Ms. Howell took a summer school class and upgraded her English mark to a 91%.

[167] As Ms. Howell was from a family of modest means, she testified that she took a gap year and worked full time at Research in Motion (“RIM”) in Waterloo, to earn enough money to attend university. Ms. Howell and her mother both testified that she always dreamed of attending UBC in Vancouver.

[168] Ms. Howell was accepted into UBC Okanagan, but was heartbroken that she had not been accepted into UBC Vancouver. Rather than attending UBC Okanagan, in the fall of 2010, she attended the Arts faculty at UofW and moved into student residence.

[169] While at UofW, Ms. Howell was being treated for depression. On May 25, 2011, she reported to a doctor at UofW Health Services that she was “crying all the time”. She also agreed that on April 4, 2011 she was a prescribed 300 mg. of Wellbutrin, an anti-depressant. That prescription was later reduced to 150 mg. because she was experiencing heart palpitations.

[170] Ms. Howell remained at UofW until the end of the winter term in 2011, achieving a grade point average of 3.5. Her marks ranged from a low of 73% to her two highest marks of 89%. Her average in her first year was 79%.

[171] In the summer after first year, Ms. Howell worked in a library on the UofW campus.

[172] Ms. Howell applied to UBC Vancouver as a transfer student and was accepted in June of 2011 to start in September. Ms. Howell moved to Vancouver, researched areas of the city and found a place to live. Her mother testified that when Ms. Howell was dropped off in Vancouver, she was “grinning from ear to ear”.

[173] Prior to the Accident, Ms. Howell was being treated for depression, anxiety and Attention Deficit Disorder (“ADD”) without hyperactivity. In the three years prior to the Accident, Ms. Howell was taking the anti-depressant medications Wellbutrin and Cipralex.

[174] On March 15, 2012, Ms. Howell attended UBC Counselling Services and reported thoughts

of “not wanting to be here - just going to sleep”. On the same date, she completed a Counseling Center Assessment of Psychological Symptoms (“CCAPS”) questionnaire on which she self-recorded her answers to whether statements were “not at all like me” or “extremely like me”. At the time, she indicated that the statements which were extremely like her included:

a) feeling isolated and alone;

b) feeling worthless, helpless, and sad all the time;

c) finding that she cried frequently;

d) finding that her heart raced for no good reason and being anxious that she might have a panic attack in public;

e) finding that her thoughts were racing and she was not able to concentrate as well as usual;

f) finding that it was hard to stay motivated for her classes and being unable to keep up with her school work.

[175] Ms. Howell also completed a PHQ-9 Personal Health Questionnaire on March 15, 2012. She scored 25, which, in his evidence, Dr. Travlos said indicated severe depression.

[176] Following her March 15, 2012 visit, and up to the date of the Accident, Ms. Howell confirmed visiting UBC Health Services on a number of occasions for assistance. She attended on March 26, 2012 and reported worsening mood, fatigue, sleep, concentration and memory for the prior three weeks.

[177] During a September 2012 appointment at UBC Health Services, Ms. Howell reported persistent difficulty concentrating and falling asleep. She was asked to complete an Adult ADHD Self-Report Scale Symptom Checklist and a Weiss Functional Impairment Rating Scale Self-Report.

[178] On the Adult ADHD scale, Ms. Howell self-reported that “often” or “very often” she:

a) had trouble wrapping up the final details of a project;

b) had difficulty getting things in order when doing a task that required organization;

c) had problems remembering appointments or obligations;

d) made careless mistakes when having to work on boring or difficult projects;

e) had difficulty keeping attention when bored or doing repetitive work;

f) had difficulty concentrating on what people said; and

g) misplaced or had difficulty finding things at home and work.

[179] On the Weiss Scale, Ms. Howell reported that in various aspects of her life she “very often” or “very much” experienced:

a) relying on others to do things for her;

b) problems performing required duties;

c) problems getting work done efficiently;

d) problems with her supervisor, keeping a job and with attendance;

e) problems taking on new tasks and receiving poor performance evaluations;

f) problems taking notes, completing assignments, with attendance and with inconsistent grades;

g) having problems getting to bed, with nutrition, sex and sleeping;

h) having problems keeping regular appointments with her doctor/dentist;

i) having problems keeping up with household chores and managing money;

j) getting into arguments, problems getting along with people, and making and keeping friends;

k) problems having fun and participating in hobbies;

l) saying inappropriate things; and

m) feeling frustrated with herself and discouraged.

[180] Ms. Howell was diagnosed with ADD and began taking Methylphenidate (Ritalin) for it.

[181] On October 12, 2012, Ms. Howell reported to UBC Health Services that her mood was declining and she wanted to restart anti-depressants. On November 21, 2012, she reported that her depression was a bit worse, she was crying in the morning and having difficulty getting up for an 11:00 a.m. class.

[182] On March 7, 2013, Ms. Howell reported to UBC Health Services that she had been feeling low for the previous one or two months, had poor motivation to go to class, and preferred to stay in bed. At the time, Ms. Howell attributed her symptoms to seasonal depression.

[183] ICBC and its experts rely on the questionnaires completed at least 15 months before the Accident, and on Ms. Howell's subsequent visits to establish what it submits are Ms. Howell's significant pre-existing problems with depression, anxiety, difficulty sleeping, and ADD. ICBC submits that Ms. Howell's symptoms were affecting her functioning, as reflected in the questionnaires she completed in 2012 and her reports of her mental health history to her treating professionals and experts. Ultimately, ICBC argues that this history must be taken into account when assessing the impact of the injuries Ms. Howell suffered in the Accident and her future capacity.

[184] I do not agree with the bleak picture which ICBC paints of Ms. Howell's pre-accident condition. It was belied by other available evidence.

[185] In cross-examination, Ms. Howell testified that, when she completed the questionnaires in March and September 2012, she had a very poor self-image and was unhappy with herself. When asked if she was depressed at the time, she reiterated that she has been depressed "on and off" since the age of 16. She also said that knowing how she now feels post-Accident, she would have completed the questionnaires differently.

[186] From the objective evidence in the record, some of her self-reporting was inaccurate. In particular, on the Weiss Scale, her reported problems at work are not substantiated by her actual work history prior to the Accident. As a girl of ten, Ms. Howell began hanging around a comic book store in her home town. She became such a fixture that the owner gradually gave her tasks to do and paid her with comics. Eventually, she began part-time work in the store. She then held jobs at various fast food and retail stores. There was no evidence that she had difficulty getting or keeping those jobs, or problems getting her work done efficiently, with attendance, or with her supervisors. There was no evidence of poor performance evaluations. In fact, this early work history demonstrates a young woman who consistently worked in a number of part-time jobs throughout public school and high school.

[187] In Ms. Howell's gap year, before starting at UofW, she worked for RIM, the maker of Blackberry cell phones. She testified that, when she left for UofW, she was told she was welcome to return to RIM after graduation. ICBC led no evidence to the contrary.

[188] In the summer before moving to B.C., Ms. Howell worked in a library at UofW. There was no evidence that while there, she had problems performing her duties, getting work done efficiently, with her supervisor, with attendance, or in performance evaluations.

[189] In September 2012, when she completed the Weiss Scale, she had just started working at Golden Age Collectibles, a comic book store, and it was too early in her tenure there for her to have experienced any of the difficulties she listed.

[190] Further, the UBC Health Services records document that, in Ms. Howell's visits on March 23, May 6, June 10, September 4, and November 18, 2013, she reported that her combination of drugs had been effective and her mood was stable. She did not report any problems on her then medication.

[191] Ms. Gorman described Ms. Howell as experiencing school stress like other UBC students, some of which she attributed to Ms. Howell's lack of confidence. However, she testified that Ms. Howell had a clear passion and goal and was "super motivated" which mediated her stress.

[192] Although ICBC submits that Ms. Howell had a history of ADD, on the evidence before me, prior to her diagnosis in September 2012, ADD was only raised as a possibility once, when Ms. Howell was in elementary school. Ms. Howell frankly admitted that she recalled having difficulty concentrating in elementary school, but there was no evidence that the school was concerned enough to have Ms. Howell tested for ADD.

[193] I conclude that Ms. Howell's answers to the self-directed questionnaires demonstrate her subjective feelings on the dates they were completed but, at least in part, are not supported by the objective evidence. As a result, they do not support the proposition urged upon me by ICBC that Ms. Howell's pre-existing mental health conditions were significantly affecting her function prior to the Accident.

[194] As discussed, Ms. Howell's actual functional performance after completing the questionnaires depicts a very different story. When this was put to Dr. Smith in cross-examination, he agreed that Ms. Howell was stabilized and doing well before the Accident.

[195] This history demonstrates that, while Ms. Howell was a vulnerable young woman given her childhood history of sexual assault and pre-existing mood difficulties, she was high-functioning and unrestricted physically or psychiatrically in pursuing her dream of studying English and literature with a goal of becoming a librarian or working in publishing. She showed awareness of her anxiety and depression and, when she needed help both at UofW and at UBC, she sought it from professionals.

[196] There was no evidence that, prior to the Accident, she required academic accommodation to be competitive with her peers. The evidence supports the finding that, despite her challenges, Ms. Howell was a resilient young woman who had clear future plans and goals and was taking the steps necessary to achieve them.

Ms. Howell's Accident Injuries

Ms. Howell's Medical Treatment Immediately after the Accident

[197] Ms. Howell was taken to Vancouver General Hospital after the Accident. The ambulance report indicated that she had a Glasgow coma scale of 14 out of 15 on two separate occasions. It was estimated that she lost consciousness for up to two minutes. She was unable to recall the Accident.

[198] Ms. Howell's immediate injuries included a fractured temporal bone in her skull, a left contrecoup injury to the temple area of the brain, a fracture of her right second rib, a temple laceration and blood/cerebral spinal fluid in her outer ear canal. A CT scan was taken of her head and chest, and an x-ray of her chest.

[199] After a few days, Ms. Howell was released from the hospital. She returned on January 27, 2014, reporting headaches, dizziness, light-headedness, vomiting, and reduced hearing.

[200] Ms. Gorman was Ms. Howell's primary caregiver after her release from hospital. She required assistance bathing and feeding for about a month. Ms. Gorman testified that she was in constant pain and unable to read or watch television. Ms. Gorman drove her everywhere. Ms. Gorman testified that after about six months, Ms. Howell was able to read comic books and, a few months later, started trying to read books but could not do so at her pre-Accident level.

[201] Initially, Ms. Howell expected to be able to return to school in a few months following the Accident but she was unable to do so.

[202] In late February or March of 2014, Ms. Howell began volunteering with the Writer's Exchange as a mentor working with children in Vancouver's downtown east side. She volunteered for about two hours, two afternoons a week in the Skateboard Club and the Homework Club.

[203] Ms. Howell worked with a boy who shared her love of comics and with whom she was able to communicate where others could not. Ms. Maitland, the creative director and co-founder of the Writer's Exchange, described Ms. Howell's ability to bond with children in the program through her love of reading.

[204] In January 2015, Ms. Howell started programming for a Comic Book Club. However, as a result of her unreliable attendance, in April 2016, she was told that unless she could be relied on, the Comic Book Club would be taken over by another staff member. Ms. Howell never returned to volunteer at the Writer's Exchange.

[205] Also in the spring of 2014, Ms. Howell returned to work at Golden Age Collectibles. She worked about three shifts in April and May.

[206] Ms. Howell was unable to return to UBC in the fall of 2014. She returned to Ontario to live with her parents. Her mother testified that, while there, Ms. Howell was in pain all the time. She

had a short attention span and was unable to recall things for any length of time. Mrs. Howell noticed a decline in her daughter's hygiene and said she did not want to get out of bed and when she did, returned to it after a short time. Ms. Howell was very unhappy about being at home.

[207] To earn enough money to return to Vancouver, Ms. Howell began working for Maricann, a licenced marijuana farm, as a plant trimmer. She lived at the farm but testified that she experienced great pain. Ms. Howell testified that she would take her breaks in the bunkhouse, lying on the ground, crying with pain, and trying to stretch to get relief. She was laid off for being too slow.

[208] Ms. Howell returned to Vancouver in January 2015. She lived alone throughout most of 2015.

[209] She worked as a boat cleaner with Decks Awash from approximately March to May of 2015, working five days a week and averaging eight to ten hours a day. She testified that she enjoyed the job as she was able to be outside and it helped remind her why she had chosen to move to Vancouver. She testified that she found the work physically painful.

[210] She then worked as a dishwasher and line cook at Storm Crow Tavern for eight-hour shifts, two to three days per week. As a line cook, her job was not as physically demanding and "didn't take much brain power". She also enjoyed being socially active. She implemented a new organizational system to simplify the customers' gaming experience at the Tavern.

[211] She occasionally did some copy editing work for her friend's website called chalk.com, including writing a "Ted Talk" on education.

[212] In the spring of 2015, she returned to UBC and enrolled in two courses. She received accommodation from UBC. She needed six months' additional time to complete one of her courses, in which she received an A and a B+. Two of the assignments she completed were in evidence and demonstrate her strong writing skills.

[213] She began a new relationship with Ms. Hemsworth in early 2015. Ms. Hemsworth testified that she met Ms. Howell on an online dating app and when they first began dating, they did "normal" dating activities such as going out for coffee or dinner. They eventually moved in together early in 2016.

Ms. Howell's Evidence about Her Condition

[214] In her evidence, Ms. Howell described her current medical condition following the Accident. She described her cognitive issues which manifested themselves in a lack of sense of time. She has difficulty sequencing events. She testified that she forgets what she has read and does not

recall making notes about what she has read. She forgets discussions with Ms. Hemsworth and accuses her of not doing things which she had done. She testified that this is affecting their relationship. She testified that in the six months following the Accident, she was frustrated all the time and screaming at people. She said that her temper has improved but she currently feels apathetic. She feels overwhelmed by organizational tasks.

[215] Ms. Howell testified that her sleep patterns are disturbed. She described a cycle of sleeping all the time and being unable to get out of bed, followed by going for a number of days without sleeping. She is working on establishing healthy sleeping routines.

[216] Ms. Howell testified about how she experiences constant headaches which worsen when she is required to concentrate on something like doing her taxes. Her headaches also worsen when her ADD medication is wearing off.

[217] She testified about the hearing loss she has suffered in her right ear and her ongoing tinnitus which varies between a hissing and high screeching noise. She testified that her balance has been affected which has meant that she is no longer able to skateboard and has difficulty walking in a straight line.

[218] Since the Accident, Ms. Howell testified that she has never felt physically comfortable. She experiences ongoing pain in her neck, back, shoulders and hips even when she is sedentary or lying in bed. She described how she “budgets” her energy.

[219] Ms. Howell testified about the effect of the Accident on her depression. Following the Accident, she wanted to feel happy to be alive but wondered why she had not been killed. She said that she is not the person she was before the Accident. She thought things would return to what they were but, after about a year, she realized that was not going to happen and felt hopeless. She testified that “everything she knew about herself” was gone. She was not “skateboarding, library Veronica” and no longer knows what she is.

[220] Both Ms. Hemsworth and Mrs. Howell testified about Ms. Howell losing hope as her recovery did not progress. Ms. Howell’s feelings of hopelessness were confirmed by Drs. Collette and Klubben.

[221] The various medical practitioners and experts confirm that, as a result of the Accident, Ms. Howell suffered the following injuries and *sequelae:*

a) an undisplaced skull fracture of the right temporal bone, which caused blood and cerebral spinal fluid to leak from her right ear;

b) imaged brain trauma including hematoma due to a left contrecoup injury to the temple area

of her brain resulting in intracranial bleeding and contusions;

c) axonal shear injuries to her brain;

d) a complicated traumatic brain injury with associated loss of consciousness, amnesia, and resultant concussion;

e) right second rib fracture;

f) right ankle contusion and plantar fascia injury;

g) chronic neck, shoulder, and upper, mid and low back injuries;

h) temple laceration;

i) post-concussive headaches and other post-concussive symptoms;

j) cervicogenic headaches;

k) chronic post-traumatic headaches;

l) tinnitus, mild conductive hearing loss, hyperacusis, and imbalance;

m) PTSD;

n) Major depression and anxiety with suicidality and aggravation of pre-existing anxiety and depression;

o) Aggravation of pre-existing ADD;

p) Insomnia and hypersomnia;

q) Chronic fatigue;

r) Impaired executive functioning including emotional lability, poor impulse control, disinhibition, poor motivation, apathy, and social withdrawal;

s) Cognitive impairments including impaired capacity to read, reduced concentration, and word finding and memory problems;

t) Somatic symptom disorder; and

u) Neurocognitive disorder.

Dr. Heran's Evidence about Ms. Howell's Brain Injury

[222] Dr. Heran, a neuro-radiologist, reviewed the CT scans and MRIs that were taken of Ms. Howell's skull and brain while she was in the hospital following the accident and again over two years later. He prepared a January 26, 2017 medical legal report. Dr. Heran described the following abnormalities and cranial structures apparent in Ms. Howell's CT scan performed on the day of the Accident:

> i. Undisplaced fracture involving the right temporal bone, in its squamosal and petrous portions, with the fracture plane extending into the right petrous osseous structures, resulting in mixed mastoid air cell opacification but no obvious injury to the ossicular chain.
>
> ii. Right-sided subgaleal hematoma at the superior margin of the above - described calvarial fracture, associated with an obvious skin laceration and a small amount of gas within this region of extracranial soft tissue injury.
>
> iii. Fluid within the right external auditory canal representing blood, cerebral spinal fluid, or both.
>
> iv. Foci of gas situated extra-axially, immediately beneath the right temporal calvarium, reflecting the communication with the right-sided mastoid air cells due to the above-described fracture.
>
> v. Left-sided inferior lateral hemorrhagic temporal hemorrhagic contusion.
>
> vi. Suspected very small tentorial subdural hematoma, layering along both leaflets, and along the left aspect of the falx cerebri posteriorly, primarily adjacent to the left aspect of the superior sagittal sinus.
>
> vii. High probability of right temporomandibular joint injury. Clinical correlation required.

[223] The skull fracture shown on the scans runs from Ms. Howells' right temporal bone to the top of her skull. Dr. Heran testified that that part of the skull is one of the strongest bones in the body and is difficult to fracture. Fracturing it would have required a "serious amount of force".

[224] From his review of Ms. Howell's August 9, 2016 brain MRI, Dr. Heran noted the following:

> i. Encephalomalacic changes associated with hemosiderin reflecting the hemorrhagic contusion involving the inferior aspect of the left temporal lobe, over the region of the petrous ridge, seen at the time of her presentation to Vancouver General Hospital.
>
> ii. Small focus of low signal on susceptibility weighted imaging, reflecting hemosiderin deposition, in the subcortical white matter of the right medial frontal gyrus. This is linearly oriented in a craniocaudal dimension, and is most consistent with a hemorrhagic axonal shear injury.
>
> iii. Additional white matter lesions are somewhat nonspecific in nature; however, the more prominent one situated in the right centrum semiovale, inferior to the suspected hemorrhagic axonal shear injury, may represent sequela of a nonhemorrhagic shear injury.

[225] Dr. Heran went on to say that Ms. Howell's brain injury would be classified as "complicated mild" or "moderate" and that the MRI findings suggest that a significant rotational force was applied to her brain, causing a resultant axonal shear injury. He wrote:

> Although the clinical significance of the above-described traumatic brain injury findings is best left to a clinician with expertise in brain injury and rehabilitation to discuss, it is clear

> that Ms. Howell suffered multiple injuries to her brain and skull, including a focal hemorrhagic contusion (in her left temporal lobe), post-traumatic extra-axial bleeding, as well as the right-sided calvarial fracture. As the CT imaging performed at the time of her presentation to Vancouver General Hospital reveals multiple intracranial post-traumatic findings, her TBI would be classified as at least "complicated mild" or "moderate", depending on the classification scale being used, and given her witnessed loss of consciousness, amnesia for the accident, and her GCS [Glasgow Coma Scale] being 15/15.
>
> However, very concerning are the additional findings on her MRI highly suggestive of a significant rotational force being applied to the brain, with consequent axonal shear injury (both hemorrhagic and non-hemorrhagic). Given Ms. Howell's age, the mechanism of injury, as well as her witnessed loss of consciousness and amnesia for the accident, the white matter abnormalities are unlikely to be due to anything other than TBI.

[226] Dr. Heran concluded by stating that axonal shear injuries are often underrepresented on MRI and other imaging studies and that there may be additional foci of axonal shear injury elsewhere in Ms. Howell's brain:

> … it is clear that [she] suffered a traumatic brain injury due to her accident on January 20, 2014. This consisted of multiple injuries, as outlined in the report above, with additional right-sided temporal skull fracture, traumatic injury to her right temporomandibular joint, as well as obvious extracranial soft tissue injuries overlying her skull fracture. Among these findings are those seen on the MRI examination performed at CMI on August 9, 2016, which demonstrate abnormalities consistent with axonal shear injury. As described above, there is one focus of hemorrhagic shear injury, and at least one (if not more) foci of non-hemorrhagic shear injury. These axonal shear injuries are often under-represented on conventional imaging studies, including MRI, and are very worrisome for there being additional foci of axonal shear injury elsewhere in the brain which the MRI examination may not [ably] demonstrate because of known limitations of the modality to resolve all of these changes.

[227] Dr. Heran testified that, based on the 2014 and 2016 scans and imaging, he could see that Ms. Howell had a fractured skull in an area that is difficult to fracture and that her brain had been severely shaken. He also described axonal injuries. He compared the axons in the brain to palm trees which sway in a wind but break at the stem in a hurricane. Axonal shear injuries appear on MRIs, including Ms. Howell's, as black areas. He expressed his opinion and concern that where there are axonal shear injuries, there are further brain injuries which may not be visible, caused by the "swaying" but not shearing of the axons.

[228] Dr. Heran also described at least one area in Ms. Howell's scan which showed a white matter lesion which, he testified, should not be visible in the brain of a 26-year-old. White matter lesions depict axonal shear damage without bleeding. He was concerned it showed another axonal injury because it was right beside a black dot area of clear axonal shear injury.

[229] Dr. Heran explained that the areas of observable damage were in Ms. Howell's frontal lobe which is the part of the brain which governs executive functioning including memory, cognition, and behavioural control.

Dr. Tsai's Evidence about Ms. Howell's Hearing Damage and Balance and Dizziness Issues

[230] Since the Accident, Ms. Howell has suffered from decreased hearing on the right side, tinnitus or ringing in her ear, and sensitivity to loud noises. Her injuries in this regard were assessed by Dr. Tsai, an otolaryngologist, on May 8, 2014. In his June 2, 2014 report, Dr. Tsai wrote that Ms. Howell sustained a significant skull bone fracture which caused these symptoms:

> … She has resulting persisting hearing loss, tinnitus and hyperacusis. Given the force of injury, it is surprising that she has not had further deficits. She did not complain of any significant otologic symptoms of note prior to this injury. This injury has caused her symptoms. This injury is confirmed on imaging. Symptoms, objective findings, and mechanism of injury do correlate.

[231] Ms. Howell has also complained of ongoing balance issues since the Accident and, on October 28, 2016, Dr. Tsai arranged for full neuro-otological testing at the Balance Unit of Vancouver General Hospital. On November 14, 2016, Dr. Tsai prepared an updated report in which he said that objective vestibular evoke myogenic potential testing suggested significant pathology in the otolithic portion of her vestibular balance system. He confirmed that Ms. Howell's balance issues were caused by the Accident. With respect to her tinnitus, hyperacusis, hearing loss, and imbalance Dr. Tsai said:

1. Tinnitus. She is coping rather well with this. Tinnitus can exacerbate her difficulties with concentrating, interfere with sleep and impair her enjoyment of leisure activities. I discussed further options including tinnitus masker, other coping strategies, and tinnitus retraining therapy. She will consider this and may proceed with this depending on progress. It is my experience that over the years, tinnitus can become less bothersome and, practically speaking, treatment options may be more trouble than they are worth. In terms of rehabilitation for tinnitus and hyperacusis, frequently counselling sessions ($150-$250/treatment session for 3- 5 sessions) and a hearing instrument/masker ($2000-$3000, to be replaced every 5 years) is advised.
2. Hyperacusis. It is difficult to treat this. This is likely permanent, but again, it is my experience that over the next few years this symptom may become more tolerable. She is currently coping by avoiding noisy environments and aggravating issues.
3. There is evidence of [mild] conductive loss in the right side. ... This is likely a reflection of the underlying injury. She does feel like hearing loss is significant on the right side. I reassured her that objectively, there is only minimal asymmetry. However, perception of asymmetric auditory input is often magnified. I do not think she would achieve practical substantial benefit through amplification at this point.
4. Imbalance. The reasons for her imbalance are likely multifactorial. Nonetheless, objective balance testing suggests significant post-traumatic pathology in her vestibular/balance system. This pathology, in and of itself, would likely cause significant balance issues.

[232] Dr. Tsai concluded that:

> Ms. Howell has suffered a significant injury. From the time of my original office assessment until now, there have been further medical, social and occupational issues. She is significantly delayed in finishing/continuing her studies at UBC. There has been a potential

suicide or self-harm episode after a relationship dispute. There have been difficulties maintaining employment. While these issues are no doubt multifactorial, the consequences from her motor vehicle injury have very likely played a significant role in catalyzing or exacerbating these problems. It would not be reasonable to insist that these issues have developed completely independently of the significant head injury and subsequent balance and mood issues directly attributable to the injury.

The Prognosis for Ms. Howell's Soft Tissue Injuries

[233] Dr. Collette, Ms. Howell's GP, first saw her on April 24, 2014. He testified that between that date and his more recent appointments, he had seen a decline in Mr. Howell's self-confidence, regulating behaviour and lability. He described her as drastically losing hope. He observed a decline in her care about her appearance. She regularly cancelled or missed appointments.

[234] In February 2016, after personal relationship difficulty with Ms. Hemsworth, Ms. Howell took an overdose of Zopiclone, a medication she had been prescribed to assist her sleeping.

[235] Dr. Collette gave the following guarded prognosis with respect to Ms. Howell's soft tissue injuries:

> With regard to the soft tissue injury to the neck, upper back and mid back it is my opinion that these injuries were of a high impact injury subtype (given the other injuries involved) and as such my prognosis is still guarded.
>
> Despite ongoing physiotherapy, active rehabilitation and massage therapy, in addition to her own stretching, isometric and resistance exercises that she performs on her own, she still continues to experience inappropriate soft tissue/muscle spasm and pain with overuse and prolonged positioning.
>
> As with most soft tissue injuries it is my opinion that these will heal over time however on some occasions despite ongoing active re-strengthening and rehabilitation these soft tissues can still go into an inappropriate spasm resulting in stiffness, soreness and resultant cervicogenic headaches.
>
> It has almost been three years since the subject accident and she still experiences these symptoms with overuse, prolonged positioning, viral illnesses, and cold weather and sometimes for no reason whatsoever. It is my opinion that given the length of time that this has persisted despite the ongoing activation therapeutic regimen that she will likely will continue to experience these issues for quite some time.

The Prognosis for Ms. Howell's Brain Injury

[236] Dr. Collette was similarly guarded with respect to the prognosis for Ms. Howell's traumatic brain injury and ongoing post-concussive syndrome symptoms:

> … Given the fact that this lady had definite evidence of traumatic bleeding in the brain as well as axonal shear injury of the brain there is no doubt she has experienced a brain injury. Prior to the subject accident she could attend to learning and although she had pre-existing ADHD this was considered quite stable and she was managing well.
>
> Subsequent to the brain injury from a left centre coup type injury mechanism to the temple area of the brain, resulting in traumatic bleeding, loss of consciousness and amnesia, this would indicate to me that the injuries incurred as a result of the subject accident are a direct

cause of her new onset cognitive difficulties post-subject accident.

> It has been my experience that with a post-concussive syndrome due to head injury that over time symptoms of agitation, decreased memory, sleep disturbance, anxiety, a sense overwhelming, headaches, nausea and dizziness usually will take anywhere from three to six months and occasionally up [to] a year to improve. This length of rehabilitation time is usually complicated more with recurrent head injuries or recurrent concussions; however this does not apply to this patient.
>
> Unfortunately in this patient's case she also experienced significant trauma to her brain tissue indicated with intra-cerebral and extra-cerebral bleeding. This lady continues to have problems with her memory as well as her sequencing and written output. She continues to have scheduling and memory problems as well as subtle cognitive difficulties and her executive functioning still are negatively affecting her performance in multiple areas in her daily life.
>
> She continues to have difficulties organizing appointments and compartmentalizing (allowing one's self to focus and not be bothered by external distractions). She continues to have difficulties with sustained attention and tends feels that she tends to be "much slower" in learning and processing information than pre-subject accident state.

The Prognosis for Ms. Howell's Ongoing Pain

[237] Dr. MacInnes, an anesthesiologist and pain management specialist, testified that the longer a patient has suffered from chronic pain, the less likely it is that their symptoms will resolve. In particular, once pain symptoms pass the two- to three-year mark, there is a low likelihood of improvement.

[238] Dr. MacInnes diagnosed that Ms. Howell suffers from cervicogenic headaches which are, in part, caused by injuries to the structure of her neck. He gave an overall prognosis for Ms. Howell's ongoing pain. He opined that she would continue to suffer from daily ongoing pain in some form:

> Given that the accident was greater than two years ago and Ms. Howell continues to suffer from symptoms with frequent exacerbations, it is my opinion that she will continue to suffer from daily ongoing chronic pain in some form from this point forward. It is my opinion that there is low possibility of complete resolution of her chronic pain symptoms and it is very likely that she will continue to have exacerbations of her pain in the future.
>
> Ms. Howell will need to continue to be monitored for her mood and anxiety symptoms as ongoing treatment will be imperative to the overall management of her chronic pain.

The Prognosis for Ms. Howell's Headaches

[239] Dr. Gordon Mackie, a neurologist, diagnosed Ms. Howell with a moderate to severe traumatic brain injury due to her skull fracture, air in her cranial vault, blood coming out of her ear, blood along the left temporal lobe, and a contusion of the temporal lobe. He diagnosed her with chronic, post-traumatic headaches. His prognosis with respect to Ms. Howell's continuing headaches was that they are unlikely to resolve:

> … the headache consequences of the injury have persisted and are unlikely to resolve, at

> this point, now three years from the injury. There are certainly additional risks that additional long-term consequences can occur after head injury including the persistent headache, cumulative risk from further injury and additional risk of neurodegenerative cognitive impairment.
>
> Her treatments should be directed for migrainous posttraumatic headaches, as a result of the MVA related injury that occurred January 20 2014. Treatments have been directed towards a combination nonpharmacologic and nonspecific pharmacologic treatment options. Despite treatments with several agents, minimal favourable response was achieved.
>
> Her prognosis for future recovery remains very guarded, after several treatment options. Based on the history provided, some favourable unsustained response to initiation of nortriptyline and attempted propranolol (which was not tolerated and would not be recommended) was achieved. In general terms the more prolonged the symptoms following injuries the more resistant to complete recovery.

The Prognosis for Ms. Howell's Psychiatric Symptoms

[240] Dr. Kroeker, Ms. Howell's treating psychiatrist, had been treating her for twenty months during which, he testified, she had many challenges, multiple symptoms and problems. She has often had difficulty attending appointments. He has observed her to be in pain and believed her when she reported pain. He described Ms. Howell's life situation as chaotic, unstable, and impoverished.

[241] Dr. Kroeker's prognosis was that Ms. Howell's psychiatric symptoms would likely be chronic and carry with them an increased risk of suicide:

> … My estimated prognosis is of likely chronic symptoms, probably lifelong, with mood symptoms, anxiety symptoms, cognitive problems, and physical pain. These are likely to impair her ability to flourish academically, socially, and financially.
>
> As with all my patients, I do have optimism that ongoing treatments and care will improve her quality of life. But improvements are likely to involve many years of work. The symptoms and other adversity caused directly by her injuries on January 20, 2014 are likely to make these improvements much more difficult to attain. With patients who have chronic depression, socioeconomic adversity, and physical pain, there is a significant risk of suicide. One of the purposes of ongoing care will be to reduce her suicide risk, in addition to helping her treat her other symptoms and improve her quality of life.

[242] Ms. Howell was also seen by Dr. Stephen Anderson, a psychiatrist, for the purposes of an IME. He testified that Ms. Howell's life revolves around her pain and that although enrolling in a pain clinic may help, three years after the Accident it was unlikely that her pain symptoms would change.

[243] Dr. Anderson testified that the factors which contributed to Ms. Howell's decline in function in 2016 were her poor insight and judgment as a result of her brain injury as well as her chronic pain and ongoing pain symptoms which contributed to her becoming more depressed and anxious and contributed to her poor emotional functioning.

[244] Dr. Anderson's long-term prognosis for Ms. Howell was poor. He concluded that she would likely be a chronic psychiatric patient requiring long term comprehensive mental health treatment:

> … In general, patients who have had psychiatric disorders lasting more than three years in duration continue to be symptomatic despite appropriate treatment. In Ms. Howell's case, she was emotionally vulnerable when the 2014 MVA occurred. Ms. Howell had a premorbid history of ADD, depressive symptoms and mild GAD. Even if the 2014 MVA had not occurred Ms. Howell would have likely continued to have symptoms on a long-term basis. As a result of the 2014 MVA, however, Ms. Howell had a complicated mild traumatic brain injury. MRI scanning has shown evidence of irreversible brain damage. Ms. Howell has developed a neurocognitive disorder (NOD). Patients with complicated MTBI tend to have similar prognosis to patients who have moderately severe brain damage. Any ongoing physical, cognitive or emotional difficulties due to the residual effects of Ms. Howell's brain injury would now likely be permanent.
>
> Although Ms. Howell had premorbid psychiatric symptoms, she developed a marked worsening of her anxiety and depressive symptoms following the 2014 MVA. Ms. Howell presently has a severe major depressive disorder and severe GAD. Ms. Howell has been treated appropriately with both psychotherapy and pharmacotherapy since the MVA occurred. The fact that her emotional functioning has not improved significantly over time bodes poorly for her long-term psychiatric prognosis. Ms. Howell will likely be a chronic psychiatric patient who will require comprehensive mental health treatment with both psychotherapy and pharmacotherapy on a long-term basis.

[245] Dr. Anderson was also concerned about Ms. Howell's long term emotional vulnerability which he opined could be at risk of deterioration if her pain worsened:

> Ms. Howell was only twenty-two years of age when the 2014 MVA occurred. Ms. Howell was therefore at a vulnerable stage of emotional development. Ms. Howell has not been able to establish a stable sense of her identity or purpose since the accident occurred. Ms. Howell will likely remain emotionally vulnerable on a long-term basis and be at risk of deteriorating emotionally if her pain should worsen as she ages or if she is exposed to new psychosocial stressors. Ms. Howell has become socially withdrawn and isolative and her suicide risk would likely increase significantly if her relationship with her present partner ended or if other significant psychosocial stressors occurred. If Ms. Howell has a further deterioration of her mood then she may require psychiatric hospitalization.

[246] Dr. Anderson concluded that Ms. Howell was not competitively employable:

> Ms. Howell is not likely competitively employable due to the nature and extent of her present physical, cognitive and emotional difficulties. Ms. Howell's symptoms fluctuate in nature and she would likely be an unreliable employee. Ms. Howell's pain, fatigue, cognitive impairment and emotional stability would likely affect her functioning at any job.

The Prognosis for Ms. Howell's Neurocognitive and Neurobehavioral Difficulties

[247] Dr. Mel Kaushansky first assessed Ms. Howell in June 2014. He observed her to have suffered a brain injury causing issues with cognition, memory, depression and changes in her personality. He next assessed her in November 2016. He commented on her depression and her presentation which he described as sloppy and unkempt.

[248] Dr. Kaushansky testified that the problems he observed in Ms. Howell's cognitive testing were likely due to a combination of factors including her brain injury, chronic pain, depression, and anxiety. He opined that Ms. Howell presented with neurocognitive and neurobehavioural problems attributable to frontal lobe/executive dysfunction, and that those problems, coupled with the physical and psychological consequences of her injuries, resulted in a poor prognosis:

> The indices around the time of the January/2014 accident included a skull fracture and intracranial hemorrhage which suggested the probability of Ms. Howell having sustained a "complicated mild" traumatic brain injury. Recent neuroimaging findings demonstrated lesions over the left temporal lobe, the left inferior temporal gyrus and at the grey/white matter junction in the right median frontal gyrus which were opined to be diagnostic of a hemorrhagic axonal shear injury. It remains my view that Ms. Howell sustained a "complicated mild traumatic brain injury" which functionally often manifests as a "moderate" traumatic brain injury. In my opinion, Ms. Howell is presenting with neurocognitive and neurobehavioural problems attributable to frontal lobe/executive dysfunction, coupled with the physical and psychological consequences (a reactive depression) of the injury itself. Given the time since the accident and the persistence of her problems Ms. Howell's prognosis is quite poor.

[249] He concluded that the trajectory of Ms. Howell's life had been significantly altered as a result of the Accident and she would, in his opinion, continue to experience many losses including:

> … diminished skills for independent living, the decreased likelihood of having long term nurturing relationships, the inability to enjoy academic accomplishments as she did previously, diminished executive skills that provide the scaffolding for effective implementation of her cognitive skills, the inability to work in her choice of profession/work setting, difficulties with daily functioning, diminished recreational/leisure choices as well as decreased enjoyment of these activities, and a life of chronic pain with fluctuating and likely moderate-severe issues of mood. As well, Ms. Howell will now require auxiliary support and medical personnel to keep her physically and psychologically safe over her life time.

[250] Dr. Kaushansky opined that, since the Accident, Ms. Howell was no longer a candidate for a university degree program, that he did not envisage her being competitively employable beyond entry level and short-term positions, and that she did not have the stamina or executive skills to maintain long-term employment:

> … she might take postsecondary courses for interest. In the absence of the trauma, Ms. Howell could have completed at least a four year undergraduate degree and likely a professional degree should she have wished.
>
> … Specifically, I do not believe that Ms. Howell has the ability over the long term to attend a job site when scheduled and stay for the shift; be able to interact appropriately with co-workers, supervisors, and if necessary, clients/customers; or be capable of completing job duties in an efficient and effective manner commensurate with the employment standards of the job at hand.

[251] While Dr. Kaushansky agreed that Ms. Howell might have periods of short-term employment, under the guidance of a what he described as a "benevolent employer", he opined that she would likely be unemployed for greater periods:

> Ms. Howell will require the support of a job coach to locate avocational settings and to monitor those settings over the long-term. There is sufficient experience with this patient group to recognize that volunteer settings typically do not endure for more than three years and thus the process of finding and maintaining Ms. Howell in a new work setting will be required over her working life. … It is likely that Ms. Howell will be unemployed for greater periods and as such locating daily activities to provide her with a sense of place and purpose will be a significant need.

[252] Finally, Dr. Kaushansky opined that Ms. Howell will require management of any funds she receives as a result of this litigation as her poor judgment and reasoning leave her vulnerable to be taken advantage of.

Ms. Howell's Psychological Injuries

[253] Dr. Laura Klubben is Ms. Howell's treating psychologist. Dr. Klubben first assessed Ms. Howell in August of 2015 over a four-day period involving three hours of clinical interviews and one hour of behavioural questionnaires. Dr. Klubben also interviewed Ms. Howell's mother. Dr. Klubben began treating Ms. Howell in December 2015.

[254] Dr. Klubben testified that Ms. Howell was often late for appointments or missed them entirely. She described that one of the challenges in treating Ms. Howell was that she had such "considerable apathy" about her life and "hopelessness about her future". Dr. Klubben testified that, based on the results of the behavioural questionnaires: Ms. Howell's depressive symptoms were elevated; her anxiety levels were quite high; her suicidal ideation scores were high, consistent with her feelings of hopelessness; she was having difficulty maintaining relationships and engaging emotionally in them; she was socially detached; and she had thought disorder consistent with difficulty focusing.

[255] Dr. Klubben diagnosed Ms. Howell with a somatic disorder with trauma pain. She testified that a somatic disorder refers to a person whose physical health becomes such a concern that it can impact their emotional and psychological wellbeing. They ruminate about their condition and have difficulty coping with pain.

[256] Dr. Klubblen explained that it was difficult to assess the severity of Ms. Howell's depression and anxiety before the Accident. To do so, Dr. Klubben looked at Ms. Howell's functioning immediately prior to the Accident and noted that Ms. Howell was: employed; in school; engaged in different recreational activities, skateboarding, reading and writing; and socially involved. After the Accident, she had significant issues maintaining that level of functioning.

[257] Dr. Klubben testified that she was working with Ms. Howell on cognitive behavioural therapy by trying to get her involved in activities which she found pleasurable, trying to lessen Ms. Howell's anxiety symptoms through relaxation strategies and exercises, and trying to regulate her sleep patterns.

[258] Dr. Klubben testified that, for about the first year after the Accident, Ms. Howell believed and hoped that her condition was going to improve but that, by about the time she started seeing Dr. Klubben, Ms. Howell recognized that her symptoms were more severe than she had thought and began experiencing feelings of hopelessness.

[259] Dr. Klubben's prognosis for Ms. Howell's psychological condition was guarded and contingent on the level of her physical improvement. Dr. Klubben opined:

> … The course of her long-term psychological recovery will be based on a number of factors, which include her physical improvement, the availability of psychological intervention and rehabilitation services to help her with respect to her emotional and physical recovery, resolution of her cognitive problems, and the absence of experiencing other traumatic events. If her physical and cognitive problems do not resolve, her psychological problems will likely be prone to relapse. A long-term prognosis of a positive psychological recovery is in part achievable, contingent on the availability of psychological intervention, Ms. Howell's engagement in treatment, as well as her progress in her physical recovery.

Ms. Howell's Global Functioning

[260] Dr. Andrew Travlos opined that Ms. Howell was going to be left with substantial long-term limitations in global functioning:

> … Unfortunately, Ms. Howell has not really made any gains forward in terms of her bigger picture. This is primarily due to a combination of her organic brain injury and her emotional health. Clearly, the brain injury has directly impacted on her emotional health, both due to environmental changes and due to the direct impact of the organic brain injury itself. Either way, Ms. Howell's bigger picture is not too dissimilar now to what it was when I saw her in March of 2014. This is very concerning, as we are well over two-and-a-half years since that time and the picture does not appear to be changing.
>
> It is my opinion that Ms. Howell is going to be left with substantial long-term limitations in global functioning. It is my opinion that she will be left with a somatic symptom disorder with predominant pain that will materially impact on daily functioning and activities, and will impact negatively upon her emotional health. It is my opinion that her emotional health will substantially drive her ultimate recovery. It is also my opinion that her brain injury has materially impacted upon her mental health, both directly and indirectly. I defer further comments regarding her mental health to my colleagues in Psychiatry.

Ms. Howell's Functional Capacity

[261] In her FCE report, Louise Craig said that Ms. Howell was unlikely to tolerate full-time work and was not competitively employable. Moreover, Ms. Craig thought it unlikely that she would be able to tolerate more than part-time sedentary work for the foreseeable future and that her current work capacity was in the range of 10 to 12 hours a week:

> In summary, during this functional capacity evaluation (FCE) Ms. Howell demonstrates reduced capacity for the physical demands of her pre-injury job as a Retail Salesperson (National Occupational Classification Number 6421). Ms. Howell's capacity is limited to sedentary to light part-time work at this time. Ms. Howell's capacity is limited by fatigue and pain increase in response to physical activity. She demonstrates reduced capacity for activity in general as well as to specific tasks, and her activity capacity lies in the range of

two to four hours (part of this must include seated activity as she would not tolerate more than occasional standing). As she presents today, based on her fatigue level in response to light physical activity and her slow symptom recovery following the assessment, she likely requires rest days between shifts should she return to part-time work.

Ms. Howell demonstrates poor recovery from activity (even when breaks are taken) that declines further with cumulative activity exposure. She fatigues progressively in response to activity, eventually leading to test cessation (due to both fatigue and pain increase). Based on her current physical capacity, she is most likely to tolerate sedentary to light, part-time work that allows for postural changes/rests as required and that does not have demands for sustained standing or walking. I have suggested treatments below that may improve her physical capacity to a small degree, but I do not expect that this will restore her functioning to her pre-injury level.

Ms. Howell is limited by fatigue, pain, reduced strength and lack of activity endurance. Ms. Howell demonstrates the capacity for short durations of sedentary to light work that allows for postural flexibility and frequent rest/recovery breaks from activity. I find Ms. Howell unlikely to tolerate full-time work and that she is not competitively employable at present. Without substantial functional gains, reduced fatigue levels and improved activity endurance, it is unlikely that Ms. Howell will tolerate more than part-time sedentary to light work now and into the foreseeable future. Ms. Howell states that when she has attempted to return to work, she was fatigued and it took a whole day for her to recover from each shift worked. I do not find her to be able to work consecutive days due to fatigue and pain aggravation and as such she is better suited to working with a break day in between shifts to allow for symptom recovery (such as working Monday, Wednesday and Friday for two to four hours). I find that Ms. Howell's current work capacity lies in the range of 10 to 12 hours per week.

Ms. Howell demonstrates limitations that reduce her ability to work at more physically demanding jobs. Occupations with light physical demands (although more in keeping with her current physical capacity) will require accommodation allowing for frequent positional and task changes and rests, regular stretching, short shift duration/part-time hours, and proper ergonomics to best manage symptom aggravation. As such the scope of occupations once viable from a physical perspective for Ms. Howell is reduced.

ICBC's Evidence with respect to Ms. Howell's Injuries

[262] ICBC does not dispute the evidence about Ms. Howell's brain injury, her hearing loss, and balance issues, or her ongoing pain and headaches. However, it is ICBC's position that the prognoses from Ms. Howell's treatment providers and experts, in particular with respect to Ms. Howell's ongoing cognitive and executive dysfunction, are not a result of her brain injury but a result of her depression and anxiety, which, it submits, have been improperly treated. In addition, or in the alternative, ICBC says that Ms. Howell's current condition is due to medication misuse.

Dr. Hirsch

[263] Dr. Hirsch, ICBC's physiatrist, evaluated Ms. Howell on January 10, 2017. He opined that:

> On balance of all the evidence, it is my opinion that Ms. Howell's abrupt decline in function and resultant educational, social, vocational and recreational activity limitations to the present are attributable to the subject motor vehicle accident.
>
> …

> … I think that currently Ms. Howell would find it very challenging to enroll in academic pursuits. From a musculoskeletal and neurologic perspective, I think she should be capable of performing tasks that are of sedentary, light and entry medium physical demands, possibly with some limitation in place. Ms. Howell has only limited work experience and transferrable skills, which therefore significantly curtail her present vocational prospects. According to today's displayed behaviours, I do not think that she is ready to re-enter the workforce at this stage. However, eventually I would expect her multi-site pains to improve to a degree that she should be able to physically tolerate at least part-time employment.

[264] Dr. Hirsch opined that Ms. Howell's cognitive difficulties were primarily related to her anxiety. However, he wrote:

> At this stage, it is challenging, if not impossible, to delineate a possible persistent neurocognitive impairment as a result of the complicated mild traumatic brain injury Ms. Howell sustained in the subject motor vehicle accident. I think that Ms. Howell has significant unresolved anxiety issues and mood dysfunction, which predated the subject motor vehicle accident and which were probably accentuated as a result of the motor vehicle accident in question. This is complicated by the fact that she had pre-existing attentional issues, which were assigned to the diagnosis of attention deficit hyperactivity disorder and which were managed with a psychostimulant prior to the subject motor vehicle accident.
>
> Ms. Howell stated that last year she underwent repeat neuropsychological assessment with Dr. Kaushansky. I think it would be difficult to extrapolate any noted cognitive deficits on neuropsychological testing to the effects of the complicated mild traumatic brain injury she sustained in the subject motor vehicle accident versus her pre-existing attentional challenges and adverse effects of insomnia, pain and unresolved psychiatric health issues, which are known to negatively affect cognitive function.

[265] In their reports, Drs. Derryck Smith, Noah Silverberg and Rehan Dost were more certain in their opinions that Ms. Howell's cognitive impairments are because of her depression and other mental health issues and not her brain injury.

[266] For example, Dr. Dost's opinion provides that:

> [T]he plaintiff at present has significant cognitive issues. These cognitive issues are due to non-brain injury factors of sleep alteration, psychological duress and alteration of sleep.

[267] However, on cross-examination, Dr. Dost clarified and narrowed this aspect of his opinion. He conceded that Ms. Howell had permanent brain damage. He testified that Ms. Howell's brain injury, and specifically the damage to her frontal lobes, in conjunction with her chronic pain, depression and insomnia, was likely responsible for Ms. Howell's "neuro-behavioural executive dysfunction".

[268] He also acknowledged in his report and on cross-examination that, irrespective of the label which was placed on Ms. Howell's cognitive issues, the best determinant of her future outcome is her demonstrated functional performance. He opined that her functional performance had been devastated since the Accident and that, as a result, her long-term functional outcomes could also

expect to be devastated.

[269] The format of Dr. Dost's opinion was not helpful to me. He opined that the outcomes for individuals with uncomplicated mild traumatic brain injuries are similar to those with complicated mild traumatic brain injuries. He did so by referring to a number of papers listed in an appendix to his report which he testified represented the most recent research-based evidence in that regard. That evidence was not outlined or summarized in the body of his report. Nor was there any attempt to apply that evidence to Ms. Howell's particular circumstances. This made his report difficult for me to meaningfully consider.

[270] In any event, Dr. Dost acknowledged that there will be a cohort of brain injury sufferers who fall outside of the norms. He made no attempt in his report, or in his evidence, to consider whether Ms. Howell was one of those who fell outside the norms.

[271] It was also apparent during his evidence that Dr. Dost had not reviewed Ms. Howell's post-accident medical records, including her imaged brain trauma, or the other expert medical legal opinions which had been provided to him. He did not conduct any analysis of whether the imaged damage to Ms. Howell's frontal lobes correlated to the documented cognitive and executive dysfunctions that other treatment providers and experts had recorded.

[272] Drs. Silverberg and Smith focussed on Ms. Howell's cognitive decline since the Accident, as demonstrated by her weaker neuropsychological scores in 2016 than in 2014. I accept that, absent an intervening trauma, Ms. Howell's brain injury would not have worsened.

[273] However, for the following reasons, I prefer the opinion evidence of Ms. Howell's treatment providers and experts to the opinion evidence of Drs. Smith and Silverberg. I will deal with each in turn.

Dr. Noah Silverberg

[274] There are inherent frailties in a report prepared by a neuropsychologist who did not examine Ms. Howell or conduct any independent testing of her executive and cognitive dysfunction.

[275] Dr. Silverberg acknowledged in cross-examination that his professional Code of Conduct contains rules restricting what is appropriate for a psychologist to include in an expert report which is responsive to another psychologist's report, and for which the psychologist has not seen or assessed the patient. He also acknowledged that there is good reason for the professional rules in that regard. Nevertheless, Dr. Silverberg's report diagnosed Ms. Howell and provided prognoses and treatment recommendations. He did not qualify the limits and frailties of his opinions except by a general statement that he had not seen Ms. Howell.

[276] Particularly, in light of the fact that Dr. Silverberg had not examined Ms. Howell, I was concerned that he had not reviewed most of the records or reports ICBC provided to him in advance of preparing his report. Presumably, ICBC considered those records and reports to be worthy of review as counsel forwarded them to him. If Dr. Silverberg believed it was unnecessary to his opinion for him to review the reports and records, I would have expected his report to say so or for him to clarify that in his evidence. He did not.

[277] I was particularly concerned that Dr. Silverberg relied significantly on the self-reporting questionnaires completed by Ms. Howell in 2012. He did so without considering the UBC Health Student Services chart notes, which post-dated the questionnaires and which indicated improvement in Ms. Howell's mood and stability. Nor did he appear to have considered Ms. Howell's academic performance, and success in other aspects of her life, following her completion of the questionnaires.

[278] As a result, Dr. Silverberg's report focussed on the snapshot Ms. Howell gave of how she was feeling on specific dates in 2012. As I have already noted, some of those self-reports, particularly the Weiss Scale, were objectively inaccurate. Without examining Ms. Howell, Dr. Silverberg was not in a position to evaluate their accuracy and his reliance on them had an evident frailty.

Dr. Derryck Smith

[279] Dr. Smith opined that the treatment Ms. Howell had received for her depression had not been ideal and that her ADD had not been well-managed.

[280] In his opinion, if these conditions were appropriately managed, her attention span would significantly improve and Ms. Howell would be able to return to either or both paid employment and/or academic studies. Dr. Smith also opined that with appropriate treatment of Ms. Howell's depression, her cognition would improve and she would feel better and do better at both academics and employment. He opined that there was a very good chance that Ms. Howell's general level of functioning would improve considerably if his treatment recommendations were followed.

[281] I had some overall concerns about Dr. Smith's evidence as, at times, he appeared to advocate for ICBC's position as opposed to meeting his obligation to assist the court. For example, when Dr. Smith was cross-examined about the fact that Ms. Howell had done well in her first year at Waterloo, he refused to acknowledge that an average of 79% indicated good academic performance. He commented that one of her courses was called "Superheroes" which did not appear to him to be an academic course. In giving that answer, Dr. Smith knew nothing about the course content or its difficulty or about the instructor and his or her expectations. Nevertheless, he

was prepared to discount the course.

[282] In addition, Dr. Smith was selective in the records he referenced. He too relied heavily on Ms. Howell's self-reporting questionnaires and did not refer to the subsequent UBC chart notes in which those treating Ms. Howell recorded that she reported being stable on her medications, experiencing improved mood, and having less difficulty with concentration. Dr. Smith also ignored the treatment records of Ms. Howell's occupational therapist, Mr. Kent, who had seen Ms. Howell between 37 and 40 times after his initial assessment in May 2015.

[283] Dr. Smith glossed over Ms. Howell's strong academic performance in the winter session of 2013/14 where she obtained marks of A-, A- and B+ in the three courses she had taken. Her academic performance in that term suggests that Ms. Howell's mood and focus issues were not affecting her.

[284] Dr. Smith was also argumentative at times. He testified that Ms. Howell functioned reasonably well after the Accident, citing as an example the fact that she had taken UBC courses and had done well. He was not aware that Ms. Howell received accommodation from UBC in those courses. When asked whether Ms. Howell could be academically competitive at UBC when, after the Accident, she required accommodation and handed in one paper six months after the deadline set for the class, he responded that he did not know, he would have to look at the records but that it was somewhat common for students to hand things in late. He said he had not had an opportunity to discuss that with her and had not seen records from UBC as to why she had accommodation. He speculated that it was equally possible that Ms. Howell may have received favourable and easy marking, which he had seen happen. Counsel put to him that his answer was pure speculation, and his response was that everything they were discussing about her performance was speculative because he had not discussed it with Ms. Howell or reviewed the UBC records.

[285] From the list of documents provided to Dr. Smith, set out in an appendix to his report, it appears that he did have Ms. Howell's UBC records which included the accommodation for her post-Accident courses in 2015. In any event, he had Mr. Kent's April 2016 occupational therapy report in which he wrote about the accommodation Ms. Howell had received in one of her courses:

> Ms. Howell was able to receive accommodations with her professor to complete a 3-page paper, instead of completing an exam (highly memory based) for an Old English course. However, despite support in planning, time management, encouragement, and organization, she did not submit the final paper, and demonstrated increased anxiety related behaviours (deep breaths, fidgeting, closing her eyes and rubbing her temples, and avoidance of the task without supervision and weekly check-ins) as the deadline approached.

[286] Overall, I conclude that Dr. Smith had a tendency to refer to and rely on information in the

record which supported his opinion and disregarded information which did not. He did, however, frankly acknowledge that, had he been aware of the Ms. Gorman's evidence about Ms. Howell's condition following the accident and the level of care she required, his opinion might have changed. He also acknowledged that, even if his treatment recommendations for Ms. Howell's depression and ADD were followed, Ms. Howell would still face significant ongoing chronic pain challenges.

[287] As a result, where Dr. Smith's opinion differs from Dr. Kroeker's, Ms. Howell's treating psychiatrist, or Dr. Anderson's expert report, I prefer their opinions over his. In fact, in cross-examination, Dr. Smith conceded that deference should be accorded to treating clinicians as they see and treat a patient over time and they have a "better look at the longitudinal view of her functioning". He testified that he put considerable weight on the opinion of treating physicians when forming his opinions. However, his report did not give that considerable weight to Dr. Kroeker who, as of the date of his report on August 3, 2016, had twelve clinical sessions with Ms. Howell between July 2015 and June 2016. Despite his criticism of Dr. Kroeker's treatment of Ms. Howell, Dr. Smith acknowledged in cross-examination that Ms. Howell was stabilized and was doing well before the Accident.

Conclusion on Ms. Howell's Ongoing Difficulties

[288] It is clear on the evidence that the etiology of Ms. Howell's ongoing cognitive and executive dysfunction is multi-faceted and is contributed to by a number of conditions working to combined, perhaps varying, and certainly hard to quantify, degrees. Those factors include:

a) Ms. Howell's organic brain injury, which is evident in the CT and MRI scans reviewed by Dr. Heran. The injury was to her frontal lobe which, all of the relevant experts agreed, governs executive "neuro-behavioural function";

b) Chronic musculoskeletal pain which has been described as somatic symptom disorder. The relevant experts agree that the chronic pain is real, present and disabling to Ms. Howell;

c) Severe sleep disturbance; and

d) The ongoing effects of depression, anxiety, ADD and PTSD.

In his submissions, Ms. Howell's counsel described these conditions as Ms. Howell's "constellation of injuries", and I adopt that term.

[289] The evidence of Drs. Collette, Travlos, Kroeker, Mackie, Klubben, Kaushansky, MacInnes, and Heran, each coming from their respective areas of medical or psychological expertise, and Ms. Craig, coming from her functional capacity expertise, all support the conclusion that Ms. Howell's

constellation of injuries are causing her severe cognitive and executive dysfunction. Mr. Kent's reports outline the day-to-day impact on Ms. Howell's functionality.

[290] Ms. Howell does not argue that her brain injury worsened between 2014 and 2016. She accepts that her poorer neuropsychological scores are not solely attributable to her brain injury. However, she submits that, rather than being solely attributable to her depression and ADD, as Drs. Smith and Silverberg suggest, her decline in cognitive mentation is a result of the cumulative effects of her constellation of injuries and symptoms, in the three and a half years since the Accident, including her chronic and intractable pain, post-traumatic headaches, lack of restorative or healthy sleep, and depression. Ms. Howell maintains that her executive dysfunction is largely attributable to the complicated mild traumatic brain injury she suffered. I agree that the evidence supports that conclusion.

[291] While I accept that there is evidence that Ms. Howell began misusing her medication in the year following the Accident, there is no evidence that she did so prior to the Accident. To the extent that she has been misusing her medication, I accept that it is in reaction to her constellation of injuries which so dramatically continues to impact her life more than three years after the Accident. I accept that Ms. Howell's initial optimism about her recovery has changed to feelings of hopelessness and apathy. That change is a result of her Accident injuries.

[292] I also accept that Ms. Howell had a period following the Accident when she returned to UBC, began volunteering, returned to work at various jobs, and commenced a new relationship. Ultimately, she was asked to withdraw from UBC, asked to step down from her volunteering position, and was unable to maintain employment.

[293] I accept that Ms. Howell's current prognosis suggests that she will struggle for the rest of her life as a result of her constellation of injuries. I do not accept that treating her depression and ADD will result in the improvements suggested by Dr. Smith.

Assessment of Ms. Howell's Damages

[294] In the often-cited case of *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.), rev'd on other grounds, [1987] B.C.J. No. 1833 (C.A.), Justice McLachlin, then a member of this Court, summarized the general principles governing awards of damages in personal injury actions. As those principles relate to the damage claims in this case, they are as follows:

> 170 1. The fundamental governing precept is restitutio in integrum. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.
>
> 171 2. For those losses which cannot be made good by money, damages are to be awarded on a functional basis to the end of providing substitute pleasures for those which

have been lost. This is the philosophical justification for awarding damages for non-pecuniary loss.

…

173 4. The plaintiff, in addition to cost of future care, is entitled to an award for lost future earning capacity. The amount is determined, where evidence permits, by comparing what the plaintiff would have earned had he not been injured with what he will earn in his injured state. Where evidence is not available, statistics as to average earnings, adjusted as necessary for the individual situation of the plaintiff, may serve as the basis of the award for lost earning capacity.

174 5. Actuarial and economic evidence is to be used to determine the proper amounts of the award for…lost earning capacity. Inflation must be considered and deductions made for present payment.

…

178 9. The plaintiff is entitled to damages for pain, suffering and loss of amenities. These non-pecuniary damages have as their purpose the provision of new amenities and pleasures in substitution for those which have been lost but cannot be replaced in se. ...

<u>Non-Pecuniary Damages</u>

[295] I deal first with Ms. Howell's claim for non-pecuniary damages.

[296] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal ref'd [2006] S.C.C.A. No. 100, the court set out the underlying purpose of non-pecuniary damages:

> … given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal,* supra, at 637 is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, Personal Injury Damages in Canada (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).
>
> [Emphasis added in *Stapley*.]

[297] At para. 46, the court set out a non-exhaustive list of the common factors which influence an award for non-pecuniary damages. Those factors, some of which may overlap, include the:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) disability;

(e) emotional suffering;

(f) loss or impairment of life;

(g) impairment of family, marital, and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (C.A.).

Ms. Howell's Position

[298] In this case, Ms. Howell seeks the rough upper limit for non-pecuniary damages in the amount of $371,000. She acknowledges that there are plaintiffs who have suffered worse injuries but submits that the Accident has taken what she describes as the "four pillars" of her self-identity from her. Those four pillars are her: independence and self-reliance; dignity and privacy; attachment to academia, education, and life-long learning; and her sense of belonging to a counterculture as a young gay woman who loved reading, comic books, and music and whose life revolved around that love.

[299] Although other cases are of some assistance in assessing a non-pecuniary damage award, no two cases are the same. Each person who endures a debilitating injury is unique, and the nature of a plaintiff's injuries and their life circumstances will rarely be identical: *Schubert v. Knorr,* 2008 BCSC 939.

[300] I have considered the cases relied on by Ms. Howell in which the plaintiffs have been awarded the rough upper limit and have concluded that, despite the significant and life altering impact of the Accident on Ms. Howell's life, her injuries do not reach the level at which an award at the rough upper limit is appropriate. For example, the brain injury Ms. Howell suffered does not reach the level of the "significant chronic cognitive dysfunction and impairment in all cognitive domains" suffered by the plaintiff in *Van v. Howlett*, 2014 BCSC 1404 at para. 26. Nor did her injuries reach the level of physical severity suffered by the plaintiff in *Wilhelmson v. Dumma*, 2017 BCSC 616. Ms. Howell has also not suffered injuries to the same extent as the plaintiff in *O'Connell v. Yung*, 2010 BCSC 1764.

[301] Ms. Howell's alternative position is that the floor for her non-pecuniary damages award should be $250,000.

[302] In support of that position, Ms. Howell relies on two decisions, *Roussin v. Bouzenad*, 2005 BCSC 1719, in which the damages award, adjusted to 2017, was $244,402 and *Sirna v. Smolinski,* 2007 BCSC 967, in which the damages award, adjusted for inflation to 2017, was $233,843.

[303] In *Roussin*, the plaintiff suffered a fractured skull, complicated mild traumatic brain injury, soft tissue injuries, and lacerations which left scarring. In most respects, she recovered from her physical injuries except for some neck, back, and wrist pain. She continued to be affected by her brain injury which caused her constant low grade headaches, loss of executive function, dizziness, vertigo and tinnitus. She left her job as a television producer and attended Douglas College where she obtained high marks as a part-time student. She also did some work for her husband's business.

[304] In *Sirna*, in addition to certain soft tissue injuries, the plaintiff suffered a mild traumatic brain injury which caused permanent functional deficits related to attention and memory, an impaired sense of smell, fatigue and depression. At the time of the accident, the plaintiff was working as a hospital cleaner. She was off work for about a year following the accident and then attended Camosun College to complete her prerequisites for becoming a dental hygienist. At trial, she worked as an administrative assistant to an investment adviser at a securities firm.

ICBC's Position

[305] With respect to assessing Ms. Howell's damages, ICBC submits that I must take into account her significant pre-existing mental health, ADD, and sleep issues which it says would have negatively affected her academic, social, and vocational pursuits to some extent regardless of the Accident.

[306] ICBC also submits that Ms. Howell's current cognitive difficulties are largely related to her mental health issues and likely contributed to by her overuse and misuse of her medications. It says that her mental health issues and misuse of medication can both be improved with appropriate treatment, which will have the effect of improving her cognition.

[307] ICBC also submits that Ms. Howell is deconditioned which may be contributing to her chronic pain symptoms and functioning. It says that improvement in her condition would likely result in decreased pain and increased functioning.

[308] ICBC submits that, in light of Ms. Howell's injuries and prognosis, an appropriate range for non-pecuniary damages is $175,000-250,000. It relies on a series of cases, including *Sirna* which was also relied on by Ms. Howell. In particular, ICBC relies on:

a) *Sundin v. Turnbull*, 2017 BCSC 15: A 28-year-old plaintiff suffered soft tissue injuries and a mild traumatic brain injury after being rear-ended and thrown from his motorcycle. At trial, he continued to suffer from chronic pain in his neck, shoulders and back and had ongoing psychological symptoms and cognitive issues from the brain injury, including memory loss, problems with sleep and mood, anxiety and headaches. From injuries to his jaw and teeth, he also suffered ongoing jaw pain and teeth sensitivity. As a result of his ongoing chronic pain, he developed psychological problems, including an adjustment disorder. The plaintiff's injuries impacted his ability to work full time as a firefighter and he was not able to do any physical work. He was awarded $175,000 in non-pecuniary damages.

b) *Watkins v. Dormuth*, 2014 BCSC 543: A 27-year-old plaintiff suffered injuries when her vehicle was struck by a passing police vehicle. Prior to the accident, she was working and completing a part-time bachelor of science degree. She was diagnosed with whiplash injuries to her back, headaches, sciatica and a mild traumatic brain injury resulting in cognitive difficulties. At the time of trial, the plaintiff continued to have problems associated with her head injury, including headaches, mood changes, anxiety, difficulty with memory, poor concentration, distractibility, fatigue, problems with balance, irritability, and noise intolerance. She also continued to suffer from painful and lingering physical injuries to her neck, back and shoulders. The trial judge held that it was unlikely that the plaintiff would be capable of full time employment of a type that would garner her the income she was capable of earning but for the accident, and awarded $175,000 in non-pecuniary damages. ICBC did not adjust the damage award to 2017 dollars. Based on the Bank of Canada's inflation calculator, I calculated the adjusted award at $182,247.

c) *Gabor v. Boilard*, 2015 BCSC 1724: The 29-year-old plaintiff was a graduate student who was involved in a motor vehicle accident in which she suffered soft tissues injuries to her neck, back, hip, wrists, and knee resulting in chronic pain. She also suffered a mild traumatic brain injury which resulted in permanent cognitive impairments and ongoing fatigue and was diagnosed with Adjustment Disorder consisting of depression, anxiety and the inability to cope with stress. The trial judge held that it was highly probable that the sequelae of the plaintiff's brain injury would continue to have a negative impact on many aspects of her life into the future. The once high-functioning and driven plaintiff had trouble with simple tasks and multi-tasking. She was not likely to perform a job that was cognitively demanding, but had residual capacity to work on a part-time basis. The trial judge held that the effects of the accident were "life-altering" for the plaintiff and awarded $200,000 in non-pecuniary damages. ICBC did not adjust the damage award to 2017 dollars. Based on the Bank of Canada's inflation calculator, I calculated the adjusted award at $205,040.

d) *Dikey v. Samieian,* 2008 BCSC 604: The 26-year-old plaintiff was struck by a vehicle while

standing in a roadway. He suffered a moderate traumatic brain injury, with continuing cognitive problems including limitations with memory, planning, attention, concentration, awareness, decision-making and calculations. He developed a mood disorder and PTSD. He also suffered injuries to his jaw, both wrists, and right knee along with soft tissue injuries of the neck and back. The trial judge held that the plaintiff's life had changed profoundly as a result of the accident as he was unlikely to work and had lost his self-esteem. The plaintiff was awarded $215,000 in non-pecuniary damages, equivalent to $248,000 in 2017.

Conclusion

[309] The first three cases relied on by ICBC involved mild traumatic brain injuries. All of the experts agree that Ms. Howell's brain injury was a complicated mild traumatic brain injury. Although Dr. Dost said in his report that, after a longer period of recovery, most people with complicated mild traumatic brain injuries are indistinguishable from those with mild traumatic brain injuries, he acknowledged on cross-examination that there are some individuals who do not follow that pattern. On the evidence, I conclude that Ms. Howell is one of those outliers.

[310] I have also concluded that Ms. Howell's current condition is a result of her constellation of injuries caused or exacerbated by the Accident.

[311] Having considered all of the cases relied on by the parties, and the *Stapley* factors as they apply to Ms. Howell, I conclude that she can be compensated by an award that is below the upper limit. However, the award must recognize that her constellation of injuries, arising from the accident, has in some way impacted almost every aspect of her life. As a result, I find that Ms. Howell is entitled to non-pecuniary damages in the amount $275,000.

Measurable Risk

[312] In *Athey v. Leonati*, [1996] S.C.R. 458, Justice Major explained what has been described as the "crumbling skull" doctrine:

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

[313] In *Gordon v. Ahn*, 2017 BCCA 221 at para. 33, the Court of Appeal explained that:

> [33] The use of the phrase “crumbling skull” to describe a plaintiff’s condition is, in any event, rarely helpful. As Major J. explained in *Athey*, there are no special rules or analyses that apply to claims made by plaintiffs who, before becoming victims of a tort, are affected by conditions that may deteriorate in the future. Damages are always to be assessed by reference to the situation that the plaintiff would be in but for the wrongdoing. Describing a plaintiff as coming within the “crumbling skull doctrine” does not eliminate the need for a complete analysis of the pain and suffering caused by the accident.
>
> [34] …Even in cases where a plaintiff is suffering from serious chronic depression, an aggravation of the symptoms attributable to a tort is compensable: *Sangha v. Chen*, 2013 BCCA 267.

[314] In *Sangha*, the Court of Appeal cited para. 78 of *Blackwater v. Plint*, 2005 SCC 58 on the issue of causation. The Supreme Court of Canada said:

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. …

[315] In Ms. Howell’s case, I accept that she had been treated for depression and anxiety prior to the Accident. She testified that she had been treated for depression “on and off” during her lifetime. I also accept that Ms. Howell was diagnosed with ADD in the fall of 2012 and started taking medication for it prior to the Accident. My task is therefor to decide to what extent those conditions might have adversely affected Ms. Howell in the future even if the Accident had not occurred.

[316] To make that determination, the past is the best predictor of the future.

[317] Ms. Howell’s history demonstrates that, given her childhood history of sexual assault and pre-existing mood difficulties, she was a vulnerable young woman. However, prior to the Accident, she was high-functioning and unrestricted physically or psychiatrically from pursuing her dream of studying university-level English and literature with a goal to becoming a librarian or working in publishing. She showed awareness of her anxiety and depression and, when she needed help while at UofW and UBC, she sought it from professionals.

[318] On the date of the Accident, Ms. Howell was attending UBC and working towards a Bachelor’s degree in English while working part-time at Golden Age Collectibles. She testified that after finishing that degree, she intended to pursue a Master’s degree in library and information studies. Her dream was to work as a librarian, ideally in a small town.

[319] There was no evidence that, prior to the Accident, Ms. Howell required accommodation to be competitive with her academic peers. She was taking a reduced course load, but her uncontroverted evidence was that she was doing so for financial reasons and because she was in no hurry to leave school. In fact, the evidence supports that, despite her challenges, Ms. Howell was a resilient young woman who had a clear future plan and goal and was taking the steps necessary to achieve it. But for the Accident, I conclude that Ms. Howell would have succeeded in her goals.

[320] Although she suffered from depression, anxiety, and ADD before the Accident, Ms. Howell's experts and Drs. Smith and Hirsch confirmed that those conditions have worsened as a result of the Accident.

[321] In 2015, Ms. Howell attempted to return to UBC when she enrolled in two courses. She did well in both but only with accommodation from UBC. In one of her courses, she required an additional six months to complete the required paper.

[322] As a result, I have concluded that, on the evidence, Ms. Howell's current condition was caused by the constellation of injuries she suffered in the Accident.

Loss of Future Income Earning Capacity

Legal Principles

[323] In *Rosvold v. Dunlop*, 2001 BCCA 1 at paras 8-11, the Court of Appeal summarized the approach trial judges should take in assessing damages for loss of income earning capacity:

> [8] … An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
>
> [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.
>
> [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, aff'd [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in [citations omitted]. They

include:

> [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
>
> [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[11] The task of the court 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.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal,* [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware, supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

[324] These principles were reaffirmed in *Perren v. Lalari*, 2010 BCCA 140, in which Justice Garson wrote on behalf of the Court of Appeal:

> [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229. These principles are:
>
> 1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
>
> 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
>
> ...
>
> [32] A plaintiff must <u>always</u> prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych,* that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

[325] The court's task is to *assess* damages, not to *calculate* them according to a mathematical formula. However, if mathematical aids are available and may assist, the court should start its analysis by considering them: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36-37:

> [36] This process is "an assessment rather than a calculation" and "many different contingencies must be reflected in such an award": *Barnes v. Richardson*, 2010 BCCA 116 at para. 18. "Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable": *Parypa v. Wickware*, *supra*, at para. 70.
>
> [37] With that said, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them. For example, in *Henry v. Zenith* (1993), 31 B.C.A.C. 223 at paras. 44-48, 82 B.C.L.R. (2d) 186 (C.A.), this Court held that a trial judge's failure to consider an economist's projections of a plaintiff's lost future earning capacity contributed to the judge committing an error in principle, which "resulted in a wholly erroneous estimate of the damages".

[326] There is an inherent difficulty in assessing awards for hypothetical events. That task is more complex when determining loss of capacity for a young person such as Ms. Howell, who, at the time of the Accident, had not established a career and had no settled pattern of employment.

[327] Two cases relied on by Ms. Howell helpfully illustrate the assessment of loss of capacity in young women with chronic injuries. In *Fox v. Danis*, 2005 BCSC 102, aff'd 2006 BCCA 324, Ms. Fox suffered chronic pain injuries that affected her ability to work as an office administrator. She had missed only minimal time from work in the six years that elapsed between the accident and the trial. She advanced herself in the office environment but exhausted herself as a result. After reviewing the plaintiff's injuries and other heads of damage, Justice Sinclair Prowse discussed the loss of income earning capacity:

> [102] As far as quantifying this loss is concerned, it is the loss of the capital asset of the capacity to earn income and not the lost earnings that is to be valued and compensated: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158 (C.A.). Specifically, it is the impact of the impairment on the Plaintiff's capacity to earn income, given her skills, education, and abilities, that is to be compensated.
>
> [103] It is recognized that this type of award cannot be calculated in accordance with a mathematical formula. Therefore, the task of the Court is to assess the damages rather than apply such a formula: *Rosvold v. Dunlop, supra*. In *Rosvold,* the Court held that one method of making this assessment was to compare the likely future income of the Plaintiff if the accident had not occurred with the likely future income of the Plaintiff now that the accident has occurred.
>
> ...
>
> [108] Using as a guideline the method suggested in *Rosvold*, without the accident, as a manager the Plaintiff was likely to earn $1,935,987 (being $1,639,067 in earnings and $296,927 in pension benefits). Now with the injuries the Plaintiff is likely to earn, as a part-time personal account associate, $763,740 (being $659,998 in earnings and $103,742 in pension benefits). The difference between these two incomes is $1,172 247.
>
> [109] The figures for the likely incomes are drawn from the Report of Mr. Taunton. They include a modest adjustment for such contingencies as unemployment and premature

death. They do not include any type of adjustment for various other contingencies such as permanent lay-offs, strikes, voluntary early retirement etc. Also, given the high regard that the Plaintiff's employer has for her, another contingency to be considered is the possibility that her employer will devise some alternative more lucrative part-time employment for her, albeit the possibility of such a contingency occurring is admittedly small.

[110] Furthermore, the figure for the part-time associate income, tendered in evidence, began in 2004. At least at the time of trial (April 2004), the Plaintiff was not working part-time, but rather was still working as an assistant manager on a full-time basis. Therefore, this figure may be too low.

[111] Upon considering all of these factors, I have concluded that damages for the Plaintiff's loss of capacity should be assessed at $750,000.

[328] In *Shapiro v. Dailey*, 2010 BCSC 770, aff'd with respect to diminished earning capacity and varied with respect to future care, 2012 BCCA 128, Ms. Shapiro was an administrative assistant working in her father's law firm. Justice Grauer discussed Ms. Shapiro's diminished earning capacity:

[96] It is, of course, impossible to calculate with any certainty what this has cost Ms. Shapiro in lost income. Taking into account her undoubted abilities … and the income expectations described by Mr. Meingast as typically achieved by his employees particularly after their first year, I conclude on a balance of probabilities that Ms. Shapiro would have been in a position to earn income in the range of $70,000 in 2007, and $130,000 over 2008 and the first quarter of 2009. This compares with actual gross earnings of $107,435.70 over the same period, yielding a loss of $92,564.30. I do not consider it probable that any loss was incurred over the six-month period of her employment in 2006.

…

[100] I have already concluded that, as a result of the collision, Ms. Shapiro has been left with a number of chronic and disabling conditions that will leave her with a lifetime of struggling with pain and fatigue. I found that on a balance of probabilities, nothing more than a modest improvement could reasonably be expected. In these circumstances, I have no hesitation in accepting Mr. Trainor's opinion that the accident has caused Ms. Shapiro to become less competitively employable than she was before.

...

[111] Mr. Carson gave a multiplier of $23,556 for each $1,000 annual loss to age 65, and $25,277 for each $1,000 annual loss to age 70. He employed no labour market contingencies, adjusting his discounting calculations to take into account only the mortality risk (probability of survival). He also took into account no positive contingencies, such as the fact that most persons attached to the workforce will earn considerably more in their 50s than they were earning in their 30s.

[112] Mr. Szekely provided a multiplier of $15,227 for each $1,000 annual loss to age 70. In addition to mortality risk, he applied a number of labour market contingencies including declining labour force participation based on the average for similarly educated females, and unemployment rates and part-time factors reflecting average earnings for similarly educated females.

[113] These are very helpful guidelines in attempting to determine, for instance, what an approximate annual loss of any particular amount will look like depending upon various contingencies. In my view, Ms. Shapiro would fall somewhere between these two figures, likely closer to Mr. Carson's. As I have indicated before, she would more accurately be

comparable to statistics for males of her education rather than those pertaining solely to females, and she certainly has displayed an attachment to the workforce that is well above average.

[114] More importantly, what these multipliers suggest to me is that Ms. Shapiro, given her pre-accident abilities and capabilities, had a lifetime earning capacity in the range of $3 million-$5 million on up. That capacity has been significantly impaired. Not only is she unable to devote the time required to maximize her earnings from her present employment in sales, but she is also unable to take advantage of other remunerative areas of potential employment, such as real estate. In addition, she is much more vulnerable to unemployment and under employment.

[115] The exercise, however, is not purely mathematical. Balancing all of the factors as best I can, and bearing in mind the need to be reasonable to both sides, I assess her loss of income earning capacity at $900,000.

Ms. Howell's Work Future

ICBC's Position

[329] ICBC submits that, prior to the Accident, Ms. Howell's career prospects were unknown. It accepts that she would likely have completed a Bachelor's degree at UBC and worked, in some capacity, in the field of literature. However, ICBC submits that her career goal of completing a Master's degree in library science was highly speculative and unrealistic as Ms. Howell's grades prior to the Accident were not high enough to meet the lowest entry grade requirements for that program at UBC.

[330] The admission requirements for the UBC School of Library, Archival and Information Studies were introduced into evidence. Briefly, the minimum admission standards required a candidate to have a four-year bachelor's degree with a minimum overall average in the B+ grade range (76% at UBC) in the third- and fourth-year courses and to show promise of superior professional performance as attested by letters of reference. The admission materials described what the Admissions Committee was looking for in a successful applicant. They focused on a candidate's academic transcripts, their three letters of reference, and their responses to questions demonstrating interest in, and passion for, the profession.

[331] In her direct evidence, Ms. Howell frankly acknowledged that admission to the UBC program required higher than the minimum average as she knew that even those with an 85% average might not be accepted into the program.

[332] In the summer 2013 session and the winter 2013/14 session, Ms. Howell had failed one of her science requirement courses and received a D in one of her language requirement courses. Ms. Howell needed these mandatory courses to graduate. Her then average was 72%.

[333] ICBC therefore submits that it is unlikely that Ms. Howell would ever have been accepted

into the Master's program and, even if she had been accepted, it submits that it is unlikely that she had the necessary skills to succeed in it. They rely on Ms. Howell's evidence that she had difficulty attending classes as an undergraduate, did poorly in math and language courses, and found UBC to be "a lot harder" than UofW had been.

[334] ICBC submits that it is far more likely that Ms. Howell would have completed her Bachelor's degree in English and then entered the workforce, particularly given her financial constraints.

Ms. Howell's Position

[335] Ms. Howell submits that, but for the Accident, she would have satisfied the admissions criteria for acceptance into a Master's program in library science given the trajectory of her improving marks and her exceptional marks in English literature-based courses, her passion and commitment to learning, and the likelihood that she would have obtained stellar letters of reference and authored compelling answers to the faculty's questions.

Conclusion

[336] Determining Ms. Howell's future at the time of the Accident is difficult, but her past outcomes are the best predictor of her then future outcomes. On the evidence, I conclude that, but for the Accident, Ms. Howell was likely to have achieved her goal of obtaining a Master's degree. She had demonstrated a past ability to survive challenges and set goals and the determination to realize those goals. The following examples from the evidence demonstrate her goal-setting and determination. Some of this evidence has been referred to earlier.

[337] Her modest financial background meant that Ms. Howell's family was not able to afford to buy her the books and comic books she loved. She regularly attended a children's club at her local library, reading everything she could. At the age of ten, in exchange for being able to read and buy comics, she began "volunteering" every day after school at a comic book store in Cambridge.

[338] Starting at about the age of fourteen, and up until the Accident, to support herself and her goal to go to university, she worked a number of part- and full-time jobs including at Dominos, Swiss Chalet and Frito Lay. Between high school and university, she took a gap year and worked full time as an assembly shift worker at RIM. In the summer after her first university year, she worked at a UofW campus library.

[339] Despite a poorer academic performance in Grade 9, the year of her suicide attempt, she graduated from high school on the honour roll. To ensure acceptance into a university English program, she went to summer school and upgraded her Grade 12 English mark to 91%.

[340] When she was not accepted into UBC Vancouver, she went to UofW and did well enough to

be accepted into UBC Vancouver as a transfer student. She researched and found a place to live in Vancouver and moved here knowing no one. Ms. Howell did not work when she first arrived in Vancouver. She testified that she wanted to focus on her studies, establish herself in a new city and get grounded. She began working two days a week at Golden Age Collectibles shortly after Labour Day in 2012. She made friends, and by the summer of 2013 had started a relationship with Ms. Gorman.

[341] She did not take a full course load at UBC. She testified that, for her, an ideal course load was three courses. She wanted to become acclimatized to Vancouver, needed to work to support herself, and was not in a hurry to complete her degree as she enjoyed education and learning.

[342] Her marks in the English and literature courses she took from Grade 12 until the Accident were all above average, including As and Bs. She did not perform as well in science, math or language courses.

[343] On the date of the Accident, Ms. Howell was attending UBC and working towards an undergraduate degree in English Literature, after which she intended to pursue a Master's degree in library science. She was studying at a reduced course load and based on that load, she would likely have completed her Bachelor's in April 2017 and, if accepted into the Master's program, would likely have concluded that degree no earlier than the spring of 2019, if she completed the program in two years. She was also working part time.

[344] Ms. Howell had demonstrated a dedication to learning and furthering her education, and her volunteer work indicated that she enjoyed engaging others in the love of reading. Her evidence, supported by her mother's, Ms. Gorman's, and Ms. Hemsworth's, was that she loved reading, literature and education. After completing her Master's, she dreamed of working as a librarian in a small town.

[345] Despite her challenges with depression and anxiety, when Ms. Howell needed help, she sought it. She did so when she was at UofW, and her marks indicated that, with stable medication, she did well academically. She also sought help from UBC Student Health Services in 2012 and again demonstrated that, with stable medication, as in the year before the Accident, and certainly from May 2013 onwards, her mood, anxiety, and ADD were all improving or stable.

[346] In the winter session of 2013/14, Ms. Howell obtained the following grades:

a) Engl 310 (3.0) History and Theory of Rhetoric: Classic Rhetoric: 80 (A-)

b) Engl 357K (3.0) RESTOR & CNT ST: 82 (A-)

c) Engl 364A (3.0) 19th CENT STDY: 77 (B+)

Her counsel described her marks in that term as the “best marks of her life”.

[347] Following the Accident, Ms. Howell volunteered with the Vancouver Writer’s Exchange, a charity dedicated to helping children learn to read. She also did some copy writing for a friend’s website: chalk.com. I accept that these activities, although not paid employment, demonstrated Ms. Howell’s interest in literature and reading. I also note that, during her evidence, Ms. Howell was more passionate about her love of reading, literature, and comics than when discussing anything else.

[348] After the Accident, and due to her unreliable attendance, Ms. Howell was asked to step down from a programmer position with Writer’s Exchange. However, Ms. Maitland testified that, despite Ms. Howell’s brain injury and attendance problems, she demonstrated talent, passion and gifts for the projects she undertook with underprivileged children. She worked one-on-one with a young boy who, prior to Ms. Howell’s involvement with him, had been difficult to engage in the program. Their mutual love of comics allowed Ms. Howell to reach him. There was nothing in the evidence to suggest that, but for the Accident, Ms. Howell would not have continued to excel at the Writer’s Exchange. Ms. Maitland testified that she would be welcome to return.

[349] The totality of this evidence demonstrates a young woman who was determined, resilient and goal-oriented. I accept that it was probable that Ms. Howell would have achieved her goal of obtaining a Master’s degree in Library Science and gone on to work in her chosen field.

Ms. Howell’s Submissions as to Her Loss of Income Earning Capacity

[350] In valuing Ms. Howell’s lifetime income earning capacity, but for the Accident, Ms. Howell submits that I must consider, as a starting point, the real and substantial possibility, probability and contingency that she would have:

a) completed her Bachelor’s degree by April 2017;

b) completed her Masters in Library Sciences by about April 2019; and

c) enjoyed average, lifetime earnings commensurate with those of an average Canadian female with a Master’s degree, until her retirement no later than the age of 70.

[351] Based on those assumptions, Mr. Benning, the economist retained by Ms. Howell, concluded that, but for the Accident and from April 2019 onwards, Ms. Howell’s life-time earnings, based on the average Canadian female with a Master’s degree, would have been $1,915,047 to age 65 and $1,949,338 to age 70.

[352] Ms. Howell also submits that in valuing her loss, I should also consider the real and

substantial possibility that, but for the Accident, Ms. Howell would have earned more than the average Canadian female with a Master's degree. I should also assess the contingency, which she submits is low, that she would not have obtained a Master's degree, and only earned income commensurate with a BC female with a Bachelor's degree. Mr. Benning puts those earning levels at $1,622,943 to age 65 or $1,657,437 to age 70.

[353] The approximate mid-point between an average Canadian female with a Bachelor's degree and one with a Master's degree is $1,768,995 to age 65 and $1,803,387 to age 70.

[354] However, Ms. Howell also submits that, on the facts of this case, employment of male-based earnings and labour market contingencies are a more appropriate comparator for her because she is gay. Unlike heterosexual couples, Ms. Howell and her partner would each have the capacity to carry, deliver, and nurse children or assume primary caregiver roles. To this extent, she submits that the labour contingencies typically applied to women for absence from the workforce due to child carrying or bearing, or maternity leave, are either halved or are only applicable to her partner and not her.

[355] In *Crimeni v. Chandra*, 2015 BCCA 131, Justice Willcock said, on behalf of a unanimous Court of Appeal:

> [23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach v. O'Brien*, 2011 BCCA 302.
>
> [24] It is certainly not an error, in my view, for a trial judge to recognize that the use of historical data can reflect such bias and, to the extent the circumstances giving rise to the bias may be expected to diminish, to view the evidence as conservative.

[356] Justice Morellato adopted such an approach in *Jamal v. Kemery-Higgins*, 2017 BCSC 213 where she declined to use female statistics in her analysis: see paras. 96-99.

[357] In this case, Mr. Benning has provided male statistics for average lifetime earning capacity based on both Bachelor's and Master's degrees as follows:

Master's Degree

Male based average individual earnings and LMCs: $2,988,191.

Male based top third quartile earnings and LMCs: $3,192,060.

Bachelor's Degree (Excluding Law)

Male based earnings and LMCs: $2,635,565

Male based top third quartile earnings and LMCs: $2,985,489

[358] The midpoint between average male individual earnings of those with a Bachelor's Degree (excluding a law degree) and those with a Master's degree is approximately $2.81 million.

[359] I agree that, based on the significant difference in male vs. female earnings, to rely on female earnings and female market contingencies in this case would be inappropriate as it would reinforce historical inequality and gender bias in average earning ability, which is not helpful in predicting Ms. Howell's future earning capacity. Female-based figures are even more inappropriate in Ms. Howell's case because, as a young gay woman, she and any eventual partner could decide between them how to share responsibility for child carrying and bearing, and the obligations of early infancy care.

[360] Ms. Howell says that Mr. Patrickson's analysis, set out below, represents the floor for the analysis of Ms. Howell's lifetime earnings but for the Accident.

ICBC's Position

[361] ICBC submits that Mr. Benning's analysis of the earnings of a Canadian female with a Master's degree is based on all Master's degrees, including those in business and engineering, which may increase the average salary statistics. Mr. Patrickson opined that a BC female with a Master's degree in English Literature would earn less than one with a business or engineering degree.

[362] In Mr. Patrickson's March 23, 2017 report he offers two "without accident" lifetime income scenarios for Ms. Howell. He says that if she were a Professional Librarian with a Bachelor's degree her lifetime earnings would be $1,481,150 and, if she were similarly educated, but a school librarian, her lifetime earnings would be $1,295,978.

[363] In Mr. Hildebrand's April 18, 2017 report he explains that High School Librarians are included in National Occupation Classification ("NOC") 5211 - Library and Public Archive Technicians. The description for this occupation group indicates that a college diploma in a related field is required for employment. NOC 5111 - Librarians indicates that a Master's degree in library science is required. However, notwithstanding this requirement, about 17% of Canadian females working in this occupational category report their highest level of education as a Bachelor's degree, and some report a lower level of education. He suggests that this may be because a lower level of education was formerly required for entry to this occupation, but that a Master's degree is now required.

[364] Based on NOC 5211, Mr. Hildebrand opines that applying the full-time, full-year earnings figures for Canadian females employed in this category, the present value of Ms. Howell's future earnings figure is $1,050,268. Adjusted for the BC earnings which were about 6% higher than the

Canadian average, Mr. Hildebrand opines that Ms. Howell's future earnings figure is $1,113,284.

Conclusion

[365] Having considered all of the available financial information and the evidence, I have concluded that Ms. Howell's loss of income earning capacity, without taking into account any residual earning capacity which I address below, should be assessed at $1,950,000. That figure is not based on a purely mathematical formula, but is arrived at by balancing the applicable factors and globally assessing the evidence. It is a figure which is in my view fair to the parties' competing positions.

[366] In particular, I was not persuaded that the calculations applicable to Ms. Howell should be based on the incomes earned by Library and Public Archive Technicians as suggested by Mr. Hildebrand. Both of the occupations under this category required different qualifications than those being pursued by Ms. Howell. According to Mr. Hildebrand's report, Library Technicians are usually college-educated in library and information technology while Public Archive Technicians are usually college-educated in archive and document management technology. By contrast, Ms. Howell was enrolled in a Bachelor's degree program at UBC. She would not be qualified for either of the positions relied on by Mr. Hildebrand.

[367] I agree with Mr. Benning's critique of Mr. Hildebrand's work that, given Ms. Howell's age and educational plans, it is more reasonable to estimate her lifetime earnings based on broad educational-based data, rather than restricting her to an occupational category which she was not pursuing.

[368] As I have said, I also do not think the assessment should be based on female-based labour market contingencies. While that would suggest that Ms. Howell's award should be closer to $2.8 million, which is the average between the male-based earnings for those with a Bachelor's and a Master's degree, I agree with Mr. Patrickson's critique of Mr. Benning's figures that the estimated earnings for degree holders is skewed upwards by the inclusion in the statistics of professional degrees such as engineering and business. As a result, I conclude that the earnings figures should be discounted to reflect that Ms. Howell would have been pursuing a degree in a field which, traditionally, does not earn the highest levels of income.

[369] The assessment I have made is, in my view, a fair compromise in between the parties' respective estimates.

Ms. Howell's Residual Earning Capacity

[370] I now consider whether Ms. Howell will have a residual capacity to earn an income.

[371] ICBC submits that, once she is treated appropriately, she will not be totally disabled from

working. Dr. Hirsch, who saw Ms. Howell on behalf of ICBC, opined that Ms. Howell was likely capable of sedentary work and she should eventually be able to work part-time. He wrote:

> According to today's assessment, I think that currently Ms. Howell would find it very challenging to enroll in academic pursuits. From a musculoskeletal and neurologic perspective, I think that she should be capable of performing tasks that are of sedentary, light and entry medium physical demands, possibly with some limitations in place. Ms. Howell has only limited work experience and transferrable skills, which therefore significantly curtail her present vocational prospects. According to today's displayed behaviours, I do not think she is ready to re-enter the workforce at this stage. However, eventually I would expect her multi-site pains to improve to a degree that she should be able to physically tolerate at least part-time employment.

[372] Dr. MacInnes, who saw Ms. Howell on behalf of her counsel, opined that Ms. Howell was unlikely to maintain full-time employment; however, she was capable of light sedentary work on a part-time basis and he believed that if there was improvement in her physical and psychological condition, she may be able to return to full-time light sedentary work with an accommodating employer.

[373] Dr. Smith opined that he was hopeful that Ms. Howell would be able to return to paid employment or studies once her psychiatric illness was appropriately treated. However, he acknowledged, in cross-examination, that with the combination of her challenges, predicting outcomes was challenging.

[374] Louise Craig, who conducted a functional capacity evaluation of Ms. Howell, concluded that her capacity was limited to sedentary light part-time work at this time.

[375] Dr. Travlos, the physiatrist who saw Ms. Howell twice, believed that she had some residual capacity.

[376] Ms. Howell submits that Mr. Machi has almost totally extinguished her capacity for competitive, gainful employment. Drs. Travlos, MacInnes, Mackie and Collette and Ms. Craig have all reported on Ms. Howell's significant physical limitations. Drs. Travlos, Hirsch, Kaushansky, Anderson, Collette, Klubben and Kroeker all outline significant emotional, psychiatric and cognitive symptoms and disabilities which make employment difficult.

[377] I accept that, based on the totality of the evidence and the possibility that Ms. Howell may make some physical, psychological and psychiatric, cognitive and emotional gains, Ms. Howell has some residual capacity to earn an income at part-time sedentary work.

[378] In his report, Mr. Hildebrand calculated residual capacity estimates based on annual incomes of $20,000, $25,000 and $30,000, adjusted for part-time work but not for labour market contingencies.

[379] There are some difficulties with Mr. Hildebrand's calculations. First, he assumed that Ms. Howell's post-accident earnings would start as of the trial date. The expert medical evidence, including that of ICBC's experts, did not support that Ms. Howell was currently capable of part-time work. In his report, Dr. Hirsch said that, according to his assessment, Ms. Howell was not ready to re-enter the workforce. However, eventually, he expected her "multi-site pains to improve to a degree that she should be able to physically tolerate at least part-time employment." He did not classify what he meant by "eventually". Dr. Smith said that, if the treatment program he recommended was implemented, he was "hopeful" Ms. Howell would be able to return to paid employment and/or academia. He did not suggest a timeframe for his hopeful outcome.

[380] There was also no evidentiary basis for concluding that Ms. Howell would then be capable of earning between $20,000 and $30,000 a year, the figures on which Mr. Hildebrand's calculations were based.

[381] Given Ms. Howell's ongoing symptoms and the poor prognosis for her improvement, and based on the treating reports and evidence from Kris Kent which documented her ongoing physical, cognitive and emotional challenges, I conclude that any residual earning capacity was more likely to be in the range of approximately $10,000 a year and that her entry into the workforce is likely to be delayed for a number of years. Taking all of the evidence into account, I assess Ms. Howell's residual income earning capacity at $175,000.

Further Deduction Based on Measurable Risk

[382] Finally, ICBC submits that Ms. Howell's award should be reduced based on a measurable risk that her future earnings would have been affected by her pre-existing mental health issues regardless of the Accident.

[383] It relies on the fact that she had three episodes of depression in the six years before the Accident, which suggests that there was a very real chance that Ms. Howell would have had trouble maintaining employment and would have experienced periods of unemployment or times during which she reduced her work to part-time due to her pre-existing condition.

[384] ICBC cites two cases in which this court reduced loss of earning capacity awards to take into account factors which would have reduced income earning capacity even without an accident. In *Tchao v. Bourdon*, 2009 BCSC 147, the award was reduced by 20% because prior to the accident, the plaintiff had required time off work for a pre-existing degenerative condition.

[385] In *Jokhadar v. Denkhodaei*, 2010 BCSC 1643, the award was reduced to one third because the plaintiff's worsening psychiatric prognosis was not the "sole factor leading to the plaintiff's relatively pessimistic prognosis for long term future employment" (para. 157). The plaintiff had two

previous hospitalizations for depression and bipolar disorder.

[386] In Ms. Howell's case, there was no expert or other evidentiary basis for concluding that Ms. Howell was likely to have had an interrupted work future even if the Accident had not occurred. Prior to the Accident, Ms. Howell had shown a strong attachment to the work force. Despite her pre-existing challenges, there was no evidence that she had required time away from her studies or from work. As I have said, her reporting of workplace problems when completing the Weiss scale was not supported by the objective evidence.

[387] As a result, I do not accept that Ms. Howell's future loss of income earning capacity should be reduced based on a measurable risk.

Conclusion

[388] As set out above, I have assessed Ms. Howell's loss of income earning capacity, without any residual earning capacity, at $1,950,000. I have also assessed Ms. Howell's residual earning capacity at $175,000. As a result, I award Ms. Howell an assessed loss of income earning capacity of $1,775,000.

Ms. Howell's Future Care Needs

The Legal Basis for the Claim

[389] There is no dispute about the legal basis for an award for the cost of Ms. Howell's future care, nor that that her future care needs are significant. There is a dispute between the parties about the scope of Ms. Howell's ongoing needs.

[390] In *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229 at 241, Justice Dickson explained the nature of a claim for the cost of future care. He wrote:

> In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

[391] In *Milina v. Bartsch*, [1985] B.C.J. No. 2762 (S.C.), Justice McLachlin, then a member of this Court, summarized the principles governing the assessment of damages in a personal injury case. With respect to the costs of future care, she wrote at paras. 170, 172-173 and 182:

> The fundamental governing precept is restitutio in integrum. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of

earning capacity, cost of future care and special damages.

…

The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

…

Restitution is accomplished by restoring to the plaintiff what he has lost.

[392] In *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30, the Court of Appeal restated the requirement from *Milina* that an award for the cost of future care is to be based on medical evidence about what goods or services are reasonably necessary to promote the mental and physical health of a plaintiff. See also *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[393] In *Gignac*, the Court determined that the trial judge had erred by failing to analyze each item or service sought by the plaintiff to determine whether there was the "evidentiary link" to support it. The Court rejected, at para. 41, a portion of the claim for future care based on the occupational therapist's "wish list" of household accessories because there was no evidence that the items listed were "reasonably necessary on the medical evidence".

[394] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39, Justice Garson stated:

> I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

[395] The standard of proof to establish a claim for future cost of care is the same as for any future pecuniary loss: "substantial possibility". All that has to be established is a real and substantial "risk" of pecuniary loss. It is not necessary for Ms. Howell to prove on a balance of probabilities that a future pecuniary loss will occur: *Athey v. Leonati* at para. 27. Thus, there must be a medical justification for claims for cost of future care and the claims must be reasonable.

[396] In *Harrington v. Sangha*, 2011 BCSC 1035 at para. 150, the trial judge said this about the cost of future care:

> The criterion to be used in addressing a claim for the cost of care is whether a reasonably minded person of ample means would be ready to incur the expense for which an award is sought. …While the courts should consider the medical justification for claims, the test is not "medical necessity".

[397] In *Langille v. Nguyen*, 2013 BCSC 1460, the 52-year-old plaintiff had suffered injuries of

chronic back pain, chronic shoulder pain and a brain injury in three motor vehicle accidents. Her symptoms were painful and constant and affected her ability to work, as well as her activities of daily living. She had difficulty with concentration, memory, and sleeping. At paras. 231-235, Justice Fitzpatrick summarizes earlier cases and provides a framework for analysis of damages under the cost of future care:

> [231] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. 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.); *Williams v. Low*, 2000 BCSC 345; *Sphehar et al. v. Beazley et al.*, 2002 BCSC 1104.
>
> [232] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.
>
> [233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
>
> [234] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required: *Tsalamandris* at paras. 64-72. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.
>
> [235] An assessment of damage for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Ms. Howell's Claim and the Evidence in Support of It

[398] As to her future care needs, and the analysis of their cost, Ms. Howell relies on a detailed report completed by Ms. Hanberg on January 17, 2017 (the "Report"), and an addendum report of February 6, 2017 (the "Addendum"). She also relies on Mr. Benning's January 25, 2017 calculation of the present value of Ms. Hanberg's Future Cost of Care report. Mr. Benning also prepared an addendum dated February 7, 2017.

[399] For the purpose of preparing her Report, Ms. Hanberg met Ms. Howell in her home on October 25, 2016, and reviewed the medical reports and records she sets out beginning at page 64 of her Report. She also interviewed Ms. Hemsworth and Ms. Howell's mother, both of whom have been Ms. Howell's primary supports since the Accident.

[400] At pages 7-17 of her Report, Ms. Hanberg sets out the facts and assumptions on which her

recommendations are based. At pages 18-26, she summarizes her functional findings and sets out Ms. Howell's activity limitations and participation restrictions. At pages 28-62, she sets out her specific recommendations for Ms. Howell's future care needs and the rationale for those recommendations by referring to the reports of Ms. Howell's treating clinicians and the experts who conducted independent medical examinations of her. She also sets out the cost of meeting the recommendations.

[401] In her Report, Ms. Hanberg used various abbreviations for the professional support persons recommended for Ms. Howell. I will use those same abbreviations in this decision. In particular:

- Case Manager (CM)
- Occupational Therapist (OT)
- Rehabilitation Support Worker (RSW)
- Personal Support Worker (PSW)

[402] The Report includes recommendations for the provision of the following services:

a) Case management services;

b) Medical needs and rehabilitation therapies;

c) Rehabilitation supports;

d) Personal care services and supplies;

e) Equipment, aids and devices;

f) Educational and vocational support services;

g) Housekeeping, home maintenance and handyman services; and

h) Transportation.

[403] The Report presented and costed of two different scenarios. The first involved Ms. Howell staying for three to five months in a residential centre for young adults with acquired brain injury, followed by a transition to community-based supports. The second involved a community-based team support. In this scenario, the rehabilitative approach would be supervised by an occupational therapist working with a rehabilitation support worker. At trial, I was advised that Ms. Howell was seeking the costs of future care based on Ms. Hanberg's first scenario. Ms. Howell testified that she would attend such a residential program.

[404] With respect to the cost of providing Ms. Howell with the services outlined in Ms. Hanberg's first scenario, and excluding the cost of lawn maintenance and snow removal, Mr. Benning estimated the net present value of Ms. Howell's future care expenses at $1,614,495.

[405] Adding the cost of Botox to the care recommendations in Ms. Hanberg's Report, excluding the cost of snow removal and lawn maintenance, Ms. Howell's total cost of care claim is approximately $1,780,000.

ICBC's Position

[406] ICBC acknowledges that Ms. Howell will require substantial future care to assist in getting her life back on a positive track. However, it disputes that she needs the level of care described in Ms. Hanberg's reports, which it says are excessive and duplicative. Further, it submits that Ms. Hanberg has assumed that Ms. Howell's current status and cognitive issues will not improve and that this assumption is not supported by the expert evidence.

[407] In response, ICBC filed two reports completed by Phil Towsley. His first report of March 6, 2017 was a review and critique of Ms. Hanberg's Report (the "Responsive Report"). He then conducted his own assessment of Ms. Howell's future care needs based on his functional testing and observation of Ms. Howell. On April 9, 2017, he produced a report analysing the cost of Ms. Howell's future care based on his assessment (the "Assessment Report").

[408] Mr. Towsley recommended ending case management, occupational therapy and rehabilitation support services, which were the significant items in the cost of Ms. Howell's future care, after three years.

[409] I have concluded that as a result of the following concerns, I can give very little weight to Mr. Towsley's reports or his evidence.

[410] Mr. Towsley relied heavily on his own one-day assessment of Ms. Howell as establishing Ms. Howell's level of sustainable physical, functional and cognitive capacities. He did so because Ms. Howell told him that the day on which he assessed her was a "normal" day.

[411] Mr. Towsley ignored, almost entirely, Mr. Kent's records. In cross-examination, Mr. Towsley said that he gave no weight to Mr. Kent's observations. As an occupational therapist, I would have expected Mr. Towsley to consider and refer to reports from Ms. Howell's treating occupational therapist who had observed Ms. Howell's capacity over almost 40 sessions. Mr. Kent's reports would have provided Mr. Towsley with a longitudinal view of Ms. Howell's capacity as opposed to a one-day snap shot. This was particularly concerning because Mr. Towsley repeatedly said on cross examination that, on the date of his assessment, he was surprised at the level of Ms. Howell's capacity which was greater than he had expected from his review of the medical evidence.

[412] Mr. Towsley also paid little attention to the records and opinions of Ms. Howell's treating doctors, preferring to rely on the experts who saw Ms. Howell for the limited purpose of preparing independent medical reports. Treatment providers have a longitudinal view which can be most helpful. As Dr. Smith said, treatment providers should, as a result, be given deference.

[413] I was also concerned that Mr. Towsley advocated for ICBC's position contrary to his responsibility to the court. For example, Mr. Towsley discounted the opinions of "experts for the Plaintiff", but also appears to have discounted the opinions of her treating doctors, including Drs. Collette, Kroeker, and Klubben.

[414] On cross-examination, Mr. Towsley acknowledged that he had not relied on the reports of Drs. Collette and Kroeker, Ms. Howell's general practitioner and treating psychiatrist, but had instead relied more on the independent medical experts. He also acknowledged that discounting the opinions of Ms. Howell's treatment providers in both his Responsive and Assessment Reports was an "oversight".

[415] He purported to weigh the competing opinions but, in doing so, minimized or mischaracterized the opinions of Ms. Howell's treating clinicians or independent medical assessors. On cross-examination, Mr. Towsley said that he was given information from "both sides" and that he saw his role as weighing and balancing the opinions. That demonstrated a misunderstanding of his role which was not to weigh the opinions or to balance them.

[416] On page 7, para. 2 of his Responsive Report, Mr. Towsley wrote:

> I note that the defense and plaintiff counsel have each sought expert opinions from a physiatrist, a psychiatrist, a neurologist and a neuropsychologist. This has allowed for a relative balance of opinions in each of the areas outlined above. I also note that the opinion related to Ms. Howell's function, provided through a Functional Capacity Evaluation and the actual cost of future care requirements were only performed through the plaintiff side of this case. That does not permit for a balance of opinions in these important areas. It is also important to note that the Functional Capacity Evaluation was incomplete and appeared to indicate a greater degree of disability than was actually present, based on the comparison between functional testing findings and the summary provided.

[417] It was not clear why Mr. Towsley thought it important to note that the only FCE was obtained by Ms. Howell. Nor was it clear why Mr. Towsley evaluated the quality of the FCE when he had not been retained to comment on it.

[418] An example of Mr. Towsley's selective use of Ms. Howell's expert medical reports can be seen at page 3, para. 6 of his Responsive Report. There, he quotes from Dr. Travlos' March 26, 2014 report (in error, Mr. Towsley referred to the report as having been prepared in 2017):

> It is very early in Ms. Howell's recovery and there is every expectation of significant further recovery. It is too early to make any definitive long-term prognostic opinions, but at this

> point there is every reason to expect her to continue to improve over the coming months and even years.

[419] When citing Dr. Travlos' November 9, 2016 report, Mr. Towsley did not include Dr. Travlos' observation that Ms. Howell "presented with tangential thoughts, rambling, and poor organization and structure. She does appear … to require much more supervised structure and organization in her life. In the absence of such fairly rigorous control, Ms. Howell will likely remain much as is."

[420] When citing Dr. Klubben's December 27, 2016 report, Mr. Towsley quoted only part of the prognosis. He did not include her opinion that if Ms. Howell's "physical and cognitive problems did not resolve, her psychological problems will likely be prone to relapse."

[421] I was left with an overall impression that in Mr. Towsley's Responsive Report, he was selective as to what he included. In doing so, he became an advocate for ICBC's position. In his Assessment Report he ignored relevant information which would have shed light on Ms. Howell's capacity.

[422] Mr. Towsley's advocacy was also apparent in his critique of Ms. Hanberg's recommendation that Ms. Howell required an induction oven or stove. Instead, he recommended that Ms. Howell be provided with a toaster oven. His Assessment Report said this:

> … [An induction oven or stove] would appear to be excessive when a toaster oven, an item that has improved in effectiveness substantially in recent years can be used to cook anything that a stovetop can and can be used to bake, roast and toast. A toaster oven also has an auto-off feature that shuts the oven off and provides an auditory alarm when cooking has completed. This eliminates the safety concerns related to cooking. …

[423] His recommendation ignored the possibility that Ms. Howell might want to heat things like soup or pasta. His proposal would not have put Ms. Howell in the position she would have been in if she had not been injured in the Accident. Putting her in that position entitles her to have access to a stove.

[424] Finally, I was concerned that Mr. Towsley chose dates on which to cut off many of Ms. Howell's supports without medical evidence in support of his proposed cut-off dates.

[425] For all of these reasons, I have concluded that Ms. Hanberg's reports are to be preferred over Mr. Towsley's.

[426] I turn now to assess the various services which have been recommended by Ms. Hanberg and their associated costs. I have rounded all of Ms. Hanberg's estimates to the nearest dollar. Where she provided a range of costing, I have averaged her figures.

Acquired Brain Injury Program

[427] As I have indicated, Ms. Hanberg's first scenario included Ms. Howell attending a residential brain injury program which was recommended by Dr. Kaushansky in his January 2017 report as follows:

> … the severity of Ms. Howell's brain injury and resultant functional problems are significant enough that she will require the initial support of a residential treatment center for brain injured adults where after a training period she could probably live o[n] her own but receive community-based support on an ongoing basis.

[428] I have determined that Ms. Howell's current medical condition is as a result of a constellation of conditions, including her brain injury. I am satisfied, on the basis of Dr. Kaushansky's evidence, that Ms. Howell would benefit from a stay in a residential brain injury program. Dr. Kaushansky expressed concern about Ms. Howell's reliance on her current partner, Ms. Hemsworth, which he said was not ideal for providing for Ms. Howell's long term needs. Both Mrs. Howell and Ms. Hemsworth, perhaps the two people who know Ms. Howell best, expressed grave concern about Ms. Howell's ability to live on her own, not eating or appropriately caring for herself, or making another impulsive decision to harm herself.

[429] In his report, Dr. Silverberg commented on the benefit Ms. Howell would obtain from a "nurturing partner" but that is not something that anyone can guarantee for Ms. Howell.

[430] In fact, Ms. Howell's relationship with Ms. Hemsworth is under strain. Dr. Anderson commented about that strain in his December 7, 2016 report and recommended couples counselling. Ms. Hemsworth testified about the strain she is feeling as a result of being responsible for Ms. Howell: cooking, cleaning and acting as her nurse. She testified that it has impacted their relationship, that she is burned out and struggling to keep up with the work the relationship requires and has thought of ending it. She is afraid that Ms. Howell will not be able to care for herself and does not know who will be able to take care of her. When Ms. Howell learned that Ms. Hemsworth had been unfaithful to her, she took an overdose of her prescription Zopiclone and was hospitalized briefly.

[431] Both Ms. Hemsworth and Ms. Howell testified that Ms. Howell requires encouragement to start and finish activities including self-care and eating regular meals. In his evidence, Mr. Kent also commented on Ms. Howell's challenges in starting and completing tasks. As explained by Ms. Hanberg in her January 17, 2017 report:

> There are benefits to Ms. Howell living in a supported residence with as-needed access to caregivers who are trained and experienced with working with individuals with brain injury [and who would] gradually teach Ms. Howell to re-engage in independent living skills and model appropriate social interactions.

[432] As a result, I conclude that Ms. Howell would benefit from the residential acquired brain injury program.

[433] Ms. Hanberg estimated the cost of a residential acquired brain injury program at between $31,025 - $48,666 based on $255 - $400 a day, for three - five months. I allow Ms. Howell $39,846, the midpoint of the costs estimated by Ms. Hanberg, for this cost of future care.

Case Management Services/OT/RSW and PSW

[434] Following Ms. Howell's stay in the acquired brain injury program, Ms. Hanberg recommends that a CM be assigned to assist with discharge planning and then to assist Ms. Howell annually thereafter. The CM would be responsible for ensuring that community-based health and support services are available for Ms. Howell. Both Drs. Anderson and Kaushansky recommended that Ms. Howell have a CM. Subject to my comments below about duplication of services, I accept that there is a medical justification for the cost of a CM.

[435] Ms. Hanberg estimated the costs as follows:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
CM Services – for discharge planning	Intervention & Travel: $94.50-$120.00 / hour	Intervention: 16-20 hours ($1,701.00-$2,160.00) Travel: ½ hour / round trip, 2 round trips / year ($94.50-$120.00)	25	25	$1,795.50 - $2,280.00
CM		Intervention: 20-25 hours / year ($2,126.25-$2,700.00 / year) Travel Time: ½ hour / round trip, 2-3 round trips / year ($118.13-$150.00 / year)	26	LE	$2,244.38 - $2,850.00
CM	Intervention & Travel: $94.50-$120.00 / hour	Intervention: 20-25 hours / year ($2,126.25-$2,700.00 / year) Travel Time: ½ hour / round trip, 2-3 round trips / year ($118.13-$150.00 / year)	25	LE	$2,244.38 - $2,850.00
1. Case Management (CM) Services Total:					
Fixed Cost					$1,795.50 - $2,280.00
Annual Cost – Age 26 to Life Expectancy					$2,244.38 - $2,850.00

[436] Ms. Hanberg has also recommended that Ms. Howell continue to receive ongoing OT services for assessment and intervention. She costed those services as follows:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
OT assessment and Intervention	Provided as part of the ABI program	She will spend approximately 4 months in the ABI program	25	25	Provided as part of the ABI program
OT assessment and intervention (transition after the ABI program)	Intervention & Travel: $101.00-$121.00 / hour	Assessment & Intervention: 2-3 hours / month for 3 months ($757.50-$907.50) Then, 8-10 hours for the next 5 months ($909.00-$1,089.00) Travel: ½ hour / round trip, 6 round trips ($303.00-$363.00)	25	25	$1,969.50 - $2,359.50
OT assessment and intervention		Intervention: 10-14 hours / year ($1,212.00-$1,452.00 / year) Travel: ½ hour / round trip, 2-3 round trips / year ($126.25-$151.25 / year)	26	LE	$1,338.25 - $1,603.25
2.5 – Occupational Therapy (OT) Services Total:					
Fixed Cost					$1,969.50 - $2,359.50
Annual Cost – Age 26 to Life Expectancy					$1,338.25 - $1,603.25

[437] Once an OT had assessed Ms. Howell's needs, Ms. Hanberg suggested that they could be provided by an RSW. Ms. Hanberg has recommended the following for an RSW:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
RSW	Intervention & Travel: $40.00-$55.00 / hour	Not required while she attends the ABI program	25	25	Provided as part of the ABI program
		Intervention: 8-10 hours / week for 3 months ($4,680.00-$6,435.00) Then, 6-8 hours / week for 22 weeks (approx. 5 months) ($6,160.00-$8,470.00) Travel: ½ hour / round trip, 105-140 round trips ($2,450.00-$3,368.75)	25	25	$13,290.00 - $18,273.75

		Intervention: 6-8 hours / week, 52 weeks / year ($14,560.00-$20,020.00 / year) Travel: ½ hour / round trip, 156-208 round trips / year ($3,640.00-$5,005.00 / year)	26	64	$18,200.00 - $25,025.00
3.1 – Rehabilitation Support Worker (RSW) Services Total:					
Fixed Cost					$13,290.00 - $18,273.75
Annual Cost – Age 26 to Age 64					$18,200.00 - $25,025.00

[438] After the age of 64, Ms. Howell's need for an RSW would decline, but she would have ongoing care needs. Ms. Hanberg has costed the services of a PSW for Ms. Howell for the rest of her life. Ms. Hanberg estimated that when Ms. Howell turns 65, she will need eight to ten hours of care from a PSW. She costed those services as follows:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
PSW – with aging	Regular rate: $25.75-$35.00 / hour Statutory Holiday rate: $38.63-$52.50 / hour	Regular rate: 2 hours / day, 355 days / year ($18,282.50-$24,850.00 / year) Statutory Holiday rate: 2 hours / day, 10 days / year ($772.60-$1,050.00 / year)	65	LE	$19,055.10 - $25,900.00
4.1 – Personal Support Worker (PSW) Services Total:					
Annual Cost – Age 65 to Life Expectancy					$19,055.10 - $25,900.00

[439] Ms. Hanberg said that as Ms. Howell entered later adulthood, she would likely need personal support but not the skill level of an RSW. She made this recommendation based on her expectation that with aging and declining neurologic reserves, combined with Ms. Howell's already reduced neurologic reserves as a result of her brain injury, she will live with ongoing needs which would likely increase with age.

[440] While the medical evidence does not support a conclusion that Ms. Howell's neurologic reserves will decline with aging, I accept that she will have ongoing needs beyond the age of 65 and perhaps up to her life expectancy. I also accept that Ms. Howell's care needs as she ages may well be met by a PSW. Ms. Howell has been provided with OT services since June 2015, working with Mr. Kent. According to his clinical notes, they meet approximately monthly and communicate by phone or email almost weekly.

[441] In his November 2016 report, Dr. Travlos recommended that Ms. Howell work with an OT in her home to assist in planning the activities that she needed to do to maintain her home. Dr. Anderson also recommended that Ms. Howell have more structure in her life and that she have regular involvement of rehabilitation aides under the direction of an OT. Dr. Kaushansky also wrote about Ms. Howell's need for structure and opined that, currently and into the future, issues of basic nutrition and self-care will require the ongoing support of community-based caregivers.

[442] I accept that there is medical evidence to support the need for community-based caregiving once Ms. Howell has completed the brain injury residential program. However, it is not clear on the evidence that the community-based care should include both an OT and an RSW at the levels recommended by Ms. Hanberg.

[443] With respect to the cost of OT, RSW and PSW services, Ms. Hanberg has recommended that Ms. Howell have the involvement of these three different supports for life. In particular, Ms. Hanberg suggested that Ms. Howell required six-eight hours a week of ongoing support from an RSW which, when she turns 65, would increase to eight-ten hours of care from a PSW.

[444] ICBC submits that Ms. Howell will only need these supports for a period of three years.

[445] In my view, the evidence does not support that Ms. Howell will have been taught the skills necessary for her to transition to independence within three years. While some of the medical reports suggest the possibility of improvement in Ms. Howell's condition, I am satisfied that, on the weight of the evidence, her constellation of injuries is such that it is probable that she will need community based supports for the rest of her life.

[446] I also accept, on the evidence, the need for Ms. Howell to have OT and RSW support to age 65 and that thereafter she will need some continuing support. I cannot find a medical justification for an increase in the hours of support post age 65 and would reduce the PSW provision thereafter to six-eight hours a week.

[447] As a result, and taking into account a reasonable level of care, I am prepared to award the cost of a CM, who, I understand, is likely to be an OT, as set out in Ms. Hanberg's report. Thus, I allow a fixed cost of $2,038 for the cost of CM services for discharge planning (including travel) and $2,547 per year from the age of 26 to Ms. Howell's life expectancy for ongoing case management support.

[448] I am also prepared to award the initial intervention and assessment by an OT as set out in Ms. Hanberg's costing above in the eight months following her discharge from the residential brain injury program. Thus, I award $2,165 for the fixed cost of an OT for two-three hours per month for three months following her discharge for an assessment of Ms. Howell's needs and intervention,

and eight-ten hours in total during the following five months. Thereafter, I would reduce the OT intervention hours to ten hours a year.

[449] Once an OT has provided assessment and intervention services, I conclude that Ms. Howell's needs can be appropriately met by an RSW. As Dr. Travlos said in his November 2016 report, Ms. Howell required much more supervised structure and organization of her life, in the absence of which she was likely to remain much as she was. By organizing her activities and her life, he thought it might be possible to get her to focus more and to be more active and productive. The structure he envisaged was meticulous daily, weekly and monthly structure including when to get up or go to bed, when to exercise and when to read or shop. He was of the opinion that, as she started to gain more confidence in herself, she might be able to maintain this over the long term without supervision, although he thought that was unlikely.

[450] Dr. Anderson also commented in his December 2016 report on the need for more structure in Ms. Howell's life, and he suggested that she have regular involvement of rehabilitation aides under the direction of an OT.

[451] I therefore award Ms. Howell the cost of an RSW for six-eight hours a week per year from the date of her discharge until she reaches the age of 65. Based on Ms. Hanberg's report, the cost of such a support is $23,345 a year based on the average of the two hourly rates.

[452] I also award Ms. Howell the cost of a PSW based on six-eight hours a week from age 65 to life expectancy.

Education and Vocational Support Services

[453] Ms. Hanberg recommended job coaching for volunteer placements to be provided by the RSW from age 25 to life expectancy.

[454] Although ICBC disputed Ms. Howell's need for an RSW at the level suggested in Ms. Hanberg's report, it acknowledged that Ms. Howell will likely need some educational support should she wish to resume her education, and some vocational support should she wish to undertake part-time sedentary employment. ICBC submitted that it would be reasonable to provide one-time support of up to $3,500 to include the cost of a vocational assessment and ten hours of vocational counselling.

[455] I have included, as part of the allowance I have made for RSW services, Ms. Howell's need for educational and vocational support.

Medications

[456] In her Report, Ms. Hanberg set out the increased cost of Ms. Howell's medications following

the Accident. For the cost of medications, she estimated:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Wellbutrin XL 300 mg - Cost Differential	Pre-PMVC Dosage: Wellbutrin XL 150 mg: $20.27 / 30 tablets Post-PMVC Dosage: Wellbutrin XL 300 mg: $29.48 / 30 tablets Cost differential: $9.21 / 30 tablets	1 tablet / day	25	LE	$112.06
Zopiclone 7.5 mg	$25.63 / 60 tablets	1-2 tablets / night	25	LE	$233.87
2.2 – Medications Total:					
Annual Cost – Age 25 to Life Expectancy					$345.93

[457] I allow those costs.

[458] In her Addendum, Ms. Hanberg outlined the cost of a reserve for the treatments recommended by Dr. Mackie for Ms. Howell's chronic post traumatic headaches:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Medications for chronic post-traumatic headaches					
Option 1					
Topiramate	25 mg: $19.16 / 30 tablets 100 mg: $26.42 / 30 tablets 200 mg: $34.00 / 30 tablets	Recommended dosage: 25-200 mg; 1-2 times / day (divided dosage)	25	TBD	$349.67 (Reserve) - $620.50 (Reserve)
Option 2					
Gabapentin	300 mg: $16.95 / 30 capsules 400 mg: $25.12 / 60 capsules 600 mg: $21.60 / 30 tablets	Recommended dosage: 300-2400 mg; 1-3 times / day (divided dosage)	25	TBD	$412.45 (Reserve) - $2,102.40 (Reserve)
Option 3					
Tizanidine 4mg	$55.66 / 60 tablets	Recommended dosage: 2-8 mg; 1 or 2 times / day (divided dosage)	25	TBD	$253.95 (Reserve) - $1015.80 (Reserve)
Option 4					

Botox A	$775.03 / 200 units vial	155-195 units / 3 months for 6 months	25	25	$1,356.30 (Reserve)
Medications for migraine exacerbations					
Maxalt 10 mg OR Almotriptan (Axert discontinued) 12.5 mg OR Zomig Nasal Spray 5 mg / spray	Maxalt 10 mg: $589.93 / 30 tablets OR Almotriptan 12.5 mg: $235.00 / 30 tablets OR Zomig Nasal Spray 5 mg: $105.73 / 6 vials	As needed (approximately 1 tablet / 1 spray / week)	25	TBD	$407.33 (Reserve) - $1,022.55 (Reserve)
2.2 – Medications Total:					
Medications For Chronic Post-Traumatic Headaches					
Option 1 – Annual Cost – Age 25 to End Age TBD (Reserve)					$349.67 - $620.50
Option 2 – Annual Cost – Age 25 to End Age TBD (Reserve)					$412.45 - $2,102.40
Option 3 – Annual Cost – Age 25 to End Age TBD (Reserve)					$253.95 - $1015.80
Option 4 – Fixed Cost (Reserve)					$1,356.30
Medications for Migraine Exacerbations					
Age 25 to End Age TBD (Reserve)					$407.33 - $1,022.55

[459] With respect to Dr. Mackie's recommendation that Ms. Howell try Botox for headache relief, Ms. Howell testified that she had a Botox trial and found it beneficial. Dr. Mackie opined that to maintain the benefit of Botox, it might need to be continued indefinitely. Dr. Travlos testified that if Botox is helpful to Ms. Howell, it would be administered every three months.

[460] Ms. Hanberg's Report provides evidence with respect to the cost of Botox but not the cost of administering it. She also does not estimate the cost of ongoing use every three months. The only evidence about the cost of administering Botox is in Mr. Towsley's Responsive Report. He estimates the costs to be between $800 and $1,000 with private site injection fees of $200 to $400. Assuming the midpoint of these estimates, and assuming Ms. Howell receives Botox injections four times per year, the cost would be $1,200 per session or $4,800 per year.

[461] In submissions, Ms. Howell indicated that she is advancing a claim for lifetime Botox injections, four times a year. Applying the multiplier from Mr. Benning's report, Ms. Howell's claim for the net present value of Botox is $164,073.60 and I allow that claim. There should also be a reserve for the additional medications suggested by the medical experts in the amounts set out in Ms. Hanberg's Report.

Psychological Counselling

[462] Ms. Hanberg recommended individual and couples psychological counselling. In her Report, she recommended that Ms. Howell have 30-36 one-hour individual psychological counselling sessions between the age of 25 and 26, and 12 one-hour sessions a year from the age of 27 to life expectancy. She also recommended a total of three to five one-hour sessions of couples counselling. The hourly rate for the cost of counselling was estimated to be $200 an hour.

[463] The experts and treatment providers agree about Ms. Howell's need for psychological assistance. However, given the evidence of Drs. Kroeker, Anderson, and Klubben, the UBC Student Health Services Records, and Ms. Howell's evidence about her history of depression and anxiety, she had periods of mental health symptoms prior to the Accident. She recognized that her mental health conditions waxed and waned with periods of stability and periods of crisis. As a result, notwithstanding the Accident, I accept that despite the Accident, Ms. Howell would have required some psychological counselling over her lifetime.

[464] I accept that Ms. Howell and her partner will need couples counselling. Thus, I accept Ms. Hanberg's following estimate of the cost of psychological services:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Individual Psychological Counselling	$200.00 / hour	1 hour / session, 30-36 sessions or more	25	26	Minimum of $6,600.00
		1 hour / session, 12 sessions / year	27	LE	$2,400.00
Couple's Counselling		1 hour / session, 3-5 sessions	25	25	$800.00
2.3 – Psychological Services Total:					
Fixed Cost					Minimum of $7,400.00
Annual Cost – Age 27 to Life Expectancy					$2,400.00

[465] I discount this award by 20% on the basis of the likelihood that Ms. Howell would have required psychological services regardless of the Accident.

Physical Therapy and Kinesiology Services

[466] Dr. Travlos opined that Ms. Howell needed to establish at least a four-days-a week exercise program for an hour and twenty minutes a day. He said that she would need to continue such exercise indefinitely to maintain strength, fitness and function, thereby reducing her pain complaints. He was also of the view that she needed a more structured walking program.

[467] Dr. Anderson recommended regular aerobic exercise which he believed might improve her mood, energy and sleep, provided that it did not cause increased pain. He recommended a

supervised exercise program under the direction of a kinesiologist or an experienced personal trainer.

[468] Dr. Travlos recommended a structured reconditioning program. He also recommended myofascial massage, intramuscular stimulation, and acupuncture to help Ms. Howell's physical activation.

[469] Ms. Craig recommended physiotherapy and intramuscular stimulation for Ms. Howell's neck and back pain.

[470] Dr. MacInnes recommended an active rehabilitation program of both land and water-based exercises to be monitored and advanced depending on how Ms. Howell tolerated it. Dr. MacInnes opined that there was a low possibility of complete resolution of Ms. Howell's chronic pain symptoms and that it was very likely that she would continue to have exacerbations of her pain in the future.

[471] Based on these medical opinions, Ms. Hanberg has recommended the following physical therapy and kinesiology services:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Physiotherapy	$60.00-$105.00 / session	12 sessions / year	25	26	$720.00 - $1,260.00
		40-50 sessions	27	LE	$2,700.00 - $4,725.00
Kinesiologist	$60.00-$100.00 / hour	1 hour / session, 24 sessions	25	25	$1,440.00 - $2,400.00
		1 hour / session, 6 sessions / year	26	30-35	$360.00 - $600.00
2.4 – Physical Therapy (PT) and Kinesiology Services Total:					
Scenario 1 - Fixed Cost					$4,140.00 - $7,125.00
Scenario 1 - Annual Cost – Age 25					$720.00 - $1,260.00
Scenario 1 - Annual Cost – Age 26					$1,080.00 - $1,860.00
Scenario 1 – Annual Cost – Age 27 to Age 30-35					$360.00 - $600.00

[472] ICBC did not dispute the need for these services. It submitted that the level of services recommended exceeded that suggested by Dr. MacInnes, a pain specialist, and Ms. Craig who conducted Ms. Howell's FCE.

[473] I accept that physical therapy and kinesiology services are medically supported. I conclude, however, that the level suggested by Ms. Hanberg exceeds that suggested by Ms. Howell's experts. Because I think that Ms. Howell will be able to perform some of the exercises she learns at the sessions at home and on her own, on a schedule established by her RSW, I have reduced

Ms. Hanberg's recommendations by half. I therefore award Ms. Howell fixed costs of $2,817 in the first year, annual costs of $495 for the partial year after Ms. Howell completes the residential program, $1,435 the following year and $240 a year thereafter to age 65.

Pain Management Program

[474] Ms. Hanberg has recommended that Ms. Howell attend a multidisciplinary pain management program. She estimates the cost as follows:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Pain Management Assessment & Treatment Program	Assessment: $2,500.00 / Assessment (includes report) Program: $10,800.00-$11,100.00 / program	Assessment: One-time cost ($2,500.00) Program: One-time cost ($10,800.00-$11,100.00)	25	30	$13,300.00 - $13,600.00
2.7 – Pain Management Program Total:					
Fixed Cost					$13,300.00 - $13,600.00

[475] Dr. Anderson described Ms. Howell's persistent somatic symptom disorder, or chronic pain disorder, which had, as of the date of his report in December 2016, lasted for approximately three years. The evidence disclosed that it continued at the time of trial. Dr. Anderson recommended that Ms. Howell be referred to a comprehensive multidisciplinary pain clinic for assessment and treatment.

[476] Dr. Kaushansky opined that Ms. Howell's pain should be considered chronic, and he too recommended a multidisciplinary pain clinic where she could learn coping and compensatory strategies.

[477] I accept that the medical evidence supports the need for such a program and award Ms. Howell the cost of $13,450.

Gym/Pool Membership

[478] Ms. Hanberg has recommended that, as Ms. Howell is no longer able to skateboard for recreation and physical therapy, she have access to a gym and pool to participate in an independent exercise program. She has costed such a membership as follows:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Membership for Recreation Centre with Pool - adult	$430.00-$732.00	Yearly	25	59	$430.00 - $732.00
Membership for Recreation	$341.45-$588.00	Yearly	60	LE	$341.45 - $588.00

Centre with Pool - senior					
3.2 – Health and Strength Maintenance Total:					
Annual Cost – Age 25 to Age 59					$430.00 - $732.00
Annual Cost – Age 60 to Life Expectancy					$341.45 - $588.00

[479] ICBC made no submissions with respect to this item of future care. I accept that it is reasonable and medically justified and allow Ms. Howell $581 annually from age 25 to 59 and $465 annually from age 60 to life expectancy.

Child Care or Nanny Services

[480] Ms. Hanberg's Report provides a rationale to support a reserve for child care or nanny services in the event that Ms. Howell has a child. For the purpose of calculating the reserve, Ms. Hanberg presumed that Ms. Howell would have one child and that, due to Ms. Howell's post-Accident persisting difficulties, Ms. Howell's partner would be the primary care parent. The reserve amount took into account that regardless of the Accident, if Ms. Howell became a parent, she would have incurred child care costs. Ms. Hanberg provided the following cost for a reserve:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Childcare	Regular rate: $17.00-$25.00 / hour Statutory Holiday rate: $25.50-$37.50 / hour	<u>Weekdays/Workdays:</u> 2.5 hours / day, 231 days / year ($9,817.50-$14,437.50 / year) <u>Weekends, Vacation:</u> 7 hours / day, 124 days / year ($14,756.00-$21,700.00 / year) <u>Statutory Holidays:</u> 7 hours / day, 10 days / year ($1,785.00-$2,625.00 / year)	28	32	$26,358.50 (Reserve) - $38,762.50 (Reserve)
		2-4 hours / week <u>Note</u>: Regular rate has been used, as it is unknown on which dates care will be provided	33	39	$2,652.00 (Reserve) - $3,900.00 (Reserve)
4.2 – Childcare and / or Nanny Services Total:					
Annual Cost – Age 28 to Age 32 (Reserve)					$26,358.50 - $38,762.50
Annual Cost – Age 33 to Age 39 (Reserve)					$2,652.00 - $3,900.00

[481] On cross examination, Ms. Howell testified that, because of the injuries she suffered in the Accident, she did not currently believe that she would ever be a parent.

[482] Given Ms. Howell's pre-existing conditions, ICBC submits that it was unlikely she would have had a child and, if she did, unlikely that she would have worked and cared for a child at the same time. Further, if she did work, she would have incurred child care costs in any event. Ms. Hanberg's suggested reserve takes into account that Ms. Howell would have incurred child care costs anyway and estimates only the additional support she will require as a result of the Accident.

[483] I accept that, based on Dr. Kaushansky's evidence, Ms. Howell would have difficulty independently parenting a child if she became a parent at some point in the future and that, as a result, a reserve allowance for this cost of future care is appropriate. Calculating such a reserve is inherently difficult because of the contingency that Ms. Howell might never have a child and her evidence at trial.

[484] Taking the contingency and Ms. Howell's evidence into account, I set the reserve at the low end of the range estimated by Ms. Hanberg and reduce it by a 50% contingency.

Equipment, Aids, and Devices

[485] Ms. Hanberg has recommended the following equipment, aids, and devices to assist Ms. Howell in her home:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Allowance for exercise equipment/pain and other symptom management aids (Theraband, Exercise ball, Foam roller, Relaxation CDs, Body pillow)	$250.00-$430.00	5 years	25	70	$50.00 - $86.00
Allowance for organization and memory aids Day planner, other memory aids like alarms or smartphone apps, wall calendar/cork boards, to do lists, file organization	$55.00-$80.00	Yearly	25	70	$55.00 - $80.00
Allowance for household equipment Non-slip bath mat, Grab bar installed in shower, Stool for work in kitchen, Anti-fatigue mat in kitchen, Step stool with handle to access higher levels, Wheeled cart for laundry or groceries, Ergonomic cleaning aids, stove guard	$2,030.00-$2,955.00	5-10 years	25	70	$270.67 - $394.00
Induction Range - Cost Differential	Induction Cooktop with Electric Range Unit: $1,759.91-$3,999.00	7-10 years	25	LE	$159.99 - $364.59

	Regular integrated Stovetop and Range: $399.99-$899.99 Cost Differential: $1,359.92-$3,099.01				
Pots and Pans for Induction Range	$299.99-$699.99	One-time cost	25	25	$299.99 - $699.99
Specialty Mattress (Queen Size)	$649.00-$3,999.99	10-15 years	25	70	$51.92 - $320.00
5. Equipment, Aids and Devices Total:					
Fixed Cost					$299.99 - $699.99
Annual Cost – Age 25 to Age 70					$587.58 - $1,244.59
Annual Cost – Age 71 to Life Expectancy					$159.99 - $364.59

[486] ICBC accepts that some costs for equipment should be allowed to the extent that they increase Ms. Howell's independence. However, it submits that exercise aids that Ms. Howell uses at the gym are not required for home and would be redundant. It also submits, and I agree, that some of the exercise equipment and symptom management aids recommended by Ms. Hanberg need not be replaced every five years. Thus, while I accept Ms. Howell's claim for exercise equipment and household safety equipment, I think it more reasonable to set a replacement schedule of every ten years.

[487] With respect to the memory aids Ms. Hanberg suggests, I agree with ICBC's submission that smart phones have the ability to replace most memory aids as they include calendaring and alarm features, and there is no additional cost for such applications. As a result, I disallow that part of her claim.

[488] With respect to the suggestion of a specialty mattress, ICBC submits that there is no medical justification for it. I agree with that submission. There was no evidence that Ms. Howell's sleep difficulties would improve with a specialty mattress. As a result, I disallow that part of her claim.

[489] With respect to an induction stove, ICBC disputes the medical necessity for it. Ms. Howell, Ms. Hemsworth, and Dr. Collette testified about how Ms. Howell had burned herself in April 2016 while working at the Storm Crow Tavern. If that had been the only incident which gave rise to a concern about Ms. Howell's safety, I would have concluded that the need for an induction stove was not medically supported. However, Ms. Howell testified that she has left the stove or oven on at home. Ms. Hemsworth also testified that Ms. Howell has left the stove and oven on overnight and that it really concerns her as Ms. Hemsworth works late into the evening. The medical evidence also commented on the fragility of Ms. Howell's relationship with Ms. Hemsworth, and it

is possible that Ms. Howell will not have her ongoing support in the future.

[490] I accept on the evidence that an induction stove will ensure that Ms. Howell is safe in her own home. Ms. Hanberg has costed the difference between the price of a regular stove and an induction one. She suggests that such a stove would need to be replaced every seven to ten years. I think a more reasonable replacement schedule would be every 15 years. I also accept that pots and pans for an induction stove are required. Ms. Hanberg has not costed the difference in price between such pots and pans and the cost of the ones Ms. Howell would have purchased in any event. I cannot see an additional need for a stove guard if an induction stove is made available to Ms. Howell. I would also set the replacement schedule for household equipment at ten years.

Housekeeping, Home Maintenance, and Handyman Services

[491] For housekeeping, home maintenance, and handyman services, Ms. Hanberg recommends:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Housekeeping Services	$20.00-$35.50 / hour	2-3 hours / cleaning, 1 cleaning / 2 weeks	26	80	$1,300.00 - $2,307.50
Heavy/Seasonal House Cleaning (Spring and Fall)	$120.00-$213.00 / cleaning	2 cleanings / year	25	75	$240.00 - $426.00
Snow Removal Services	$525.00-$900.00	Yearly 50% of cost	35	75	$262.50 (Reserve) - $450.00 (Reserve)
Lawn Maintenance	$875.00-$1,400.00	Yearly 50% of cost	35	75	$437.50 (Reserve) - $700.00 (Reserve)
Handyman Services	$30.00-$89.50 / hour	12-24 hours / year	35	75	$540.00 (Reserve) - $1,611.00 (Reserve)
Moving Assistance	Moving: $1,125.00-$1,437.50 / move Packing/unpacking: $1,350.00-$1,500.00 / move	2 moves 50% of cost	35	60	$2,475.00 - $2,937.50
7. Housekeeping, Home Maintenance and Handyman Services Total:					
Fixed Cost					$2,475.00 - $2,937.50
Annual Cost – Age 25					$240.00 - $426.00
Annual Cost – Age 26 to Age 75					$1,540.00 - $2,733.50
Annual Cost – Age 76 to Age 80					$1,300.00 - $2,307.50
Annual Cost – Age 33 to Age 75 (Reserve)					$1,240.00 - $2,761.00

[492] In submissions, counsel for Ms. Howell indicated that she is not advancing a claim for a reserve for snow removal or lawn maintenance services.

[493] Ms. Howell's experts have suggested that she will require help with heavy housework, and I accept that as a medically justified cost of future care; however, that evidence does not support that she needs assistance with regular house cleaning once every two weeks.

[494] In cross-examination, Dr. Kroeker confirmed that Ms. Howell told him that she liked doing laundry and vacuuming but not doing kitchen chores. Mr. Kent recorded in his report of June 11, 2015 that Ms. Howell told him that she was able to do meal preparation, shopping, laundry and cleaning but she got fatigued. On an assessment done by Mr. Kent, Ms. Howell scored her own ability as a 3 out of 4, meaning that she required equipment or additional time to complete the task safely or efficiently. As noted above, I have allowed her claim for household safety equipment which will assist with her house cleaning ability.

[495] I conclude that, with appropriate pacing, Ms. Howell would be able to regularly clean her apartment. I accept that she will need assistance with heavier cleaning and allow her the cost of two seasonal house cleanings in the spring and fall for a total of $345 a year.

[496] I also accept that Ms. Howell will require handyman services and moving assistance as set out in Ms. Hanberg's Report. I therefore allow a reserve of $1,346 a year for handyman services and 50% of the cost of two moves for a total fixed cost of $2,707.

Transportation Costs

[497] Ms. Hanberg has recommended that Ms. Howell be allowed transportation costs. Her Report suggests the following amounts:

Item / Service	Unit / Base Cost	Frequency	Start Age	End Age	Fixed or Annual Cost / Range
Taxi Transportation to: Pain Clinic	Start up: $3.03-$3.35 each way Per km: $1.75-$2.14 / km	6-16 km / round trip, 3 rounds trips / week, 8-10 weeks	25	30	$683.37 - $816.48
Taxi Transportation		20 km / round trip, 4-5 round trips / year	25	70	$184.77 - $222.75
8. Transportation Total:					
Fixed Cost					$683.37 - $816.48
Annual Cost – Age 25 to Age 70					$184.77 - $222.75

[498] In support of this allowance, Ms. Hanberg says that Ms. Howell now has physical impairments which limit her tolerance for walking or taking public transit, and that before the Accident, she had the physical capacity to walk and regularly take transit. Ms. Hanberg has also included an allowance for taxi transportation to the pain clinic.

[499] Ms. Howell testified in cross-examination that she took taxis before the Accident and, as a

non-driver, I conclude it is likely that she would have taken some taxis over her lifetime. There was no medical or other evidence to support that she requires additional taxi transportation because of her Accident injuries. As a result, I conclude that an allowance for taxi transportation is not reasonable or medically justified.

[500] In addition to the above noted costs of future care, Ms. Hanberg also provided for sleep assessment and treatment the cost of which is covered by MSP.

Conclusion

[501] As can be seen, I have reduced some of Ms. Howell's claims for the cost of future care and have disallowed some items entirely. On the evidence before me, it is not possible to calculate with any precision the adjustments to the fixed and annual costs for these items. I expect that, based on these reasons, and with the assistance of their economists, the parties should be able to agree on the appropriate amount. If they are unable to do so, they may seek to appear before me.

Failure to Mitigate

[502] ICBC submits Ms. Howell has failed to mitigate her damages. It says that she has not always followed the advice of her treating doctors and practitioners which has had a negative impact on her current condition. It says that Ms. Howell did not regularly attend recommended physiotherapy, rehabilitation or counselling sessions which would likely have decreased her symptoms. Further, it says that she has also not followed the recommended dosages of her medication which has likely compounded her sleep, memory and anxiety difficulties. She also declined assistance from Mr. Kent in searching for alternative employment.

[503] The leading case on failure to mitigate is *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, where the Supreme Court of Canada determined that the question of whether a person has been reasonable in refusing recommended treatment is for the trier of fact to decide. Mitigation is not a "duty" that a plaintiff owes to a defendant but failure to mitigate is a defence which reduces the amount of damages that a defendant is obligated to pay.

[504] In *Cassells v. Ladolcetta*, 2012 BCCA 27, Justice Lowry, writing on behalf of the Court, upheld the trial judge's conclusion that where it is found on the evidence that the effect of accident-induced injuries has been to inhibit substantially a plaintiff's capacity to make an objectively reasonable choice with respect to treatment recommendations, the court may take that into account in assessing the degree to which damages should be reduced for failure to mitigate. Justice Lowry said, at para. 26:

> I agree that if, by virtue of the injury sustained in an accident, a plaintiff is unable to make a reasonable decision about treatment, the plaintiff is in no different position with respect to mitigating the loss suffered than would be the case if, for other reasons unrelated to the accident, the plaintiff's capacity to make reasonable decisions about treatment was lacking.

> But I cannot accept that means the law prescribes a subjective test, modified or otherwise. *Janiak* is clear; the test is objective. I consider that if a plaintiff had the capacity to make the decision about treatment it is said ought to have been made, and the advice was sound, the mitigation question in each instance must be what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment. If, through no fault of his own, the plaintiff did not have the capacity to make the decision, or the advice was not sound, the question would not arise.

[505] That reasoning has been followed in a number of cases in which the court has rejected an argument that a plaintiff has failed to mitigate because they suffer from depression, lack of motivation or organizational skills, arising as a result of the accident. See, for example, *Yungen v. Fraser Health Authority*, 2012 BCSC 933 at para. 66 and *Wagner v. Newbery*, 2015 BCSC 894 at paras. 231-233. It is applicable to Ms. Howell.

[506] Ms. Howell satisfactorily explained why she did not attend the brain injury program at G.F. Strong as recommended by Dr. Travlos.

[507] Ms. Howell testified that the multiple and duplicative prescription refills she received from Drs. Collette and Kroeker, and others from time to time, were not a result of misuse of her medications over extended periods of time. She testified that she often lost or misplaced her medications or lost track of how much she had taken. Ms. Howell's evidence about the difficulty she had in managing her medications was corroborated by Ms. Hemsworth, Mr. Kent and Dr. Kroeker.

[508] Loss of medication was first reported by Mr. Kent in June 2015. Dr. Kroeker testified that he was aware that Ms. Howell frequently lost her medication despite the fact that he did not record that in his clinical records. Dr. Kroeker said that he had learned a lesson in that regard about his record keeping and acknowledged that he could have done a better job. Just before trial, Ms. Howell had been given blister packs to better manage her medication. Dr. Collette appeared alarmed when he was cross-examined about Ms. Howell's duplication of prescriptions.

[509] I accept, on the evidence, that Ms. Howell lost medication. I also accept that she forgot what medications she took and when. Based on the evidence, her medication misuse was more extensive than Dr. Kroeker or Dr. Collette was aware.

[510] However, I have concluded that, on all of the evidence, Ms. Howell's misuse of her medication is a direct consequence of Ms. Howell's feelings of hopelessness and apathy which flow from the Accident.

[511] On all the evidence, I conclude that ICBC has not established that Ms. Howell has failed to mitigate her damages. As a result, no reduction in Ms. Howell's damages is appropriate.

Past Income Loss

[512] Ms. Howell and ICBC have agreed that her claim for net past income loss is $14,000.

Special Expenses

[513] Ms. Howell and ICBC have agreed that her claim for special expenses should be allowed at $14,781.77.

Punitive Damages

[514] I allowed Ms. Howell's application to amend her claim to seek punitive damages, and she submits that I should make an award in the amount of $500,000 based on the combination of the egregiousness of Mr. Machi's actions combined with the severity of Ms. Howell's injuries.

[515] Punitive damages are not compensatory, but intended to address the purposes of retribution, deterrence and denunciation. They are limited to misconduct which markedly departs from decent behaviour: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36, and are reserved for wrongful acts that are so "malicious and outrageous that they are deserving of punishment on their own": *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 62. They should only be awarded in exceptional circumstances.

[516] At para. 33 of *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277, referring to *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, Justice Gerow reviewed the factors a court should consider when determining whether to award, and when setting the quantum of, punitive damages. In addition to the overall purpose of such damages, the relevant factors she outlined included that:

a) punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant;

b) punitive damages should take into account any other fines or penalties suffered by the defendant for the misconduct in question;

c) punitive damages should generally only be awarded where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation;

d) the purpose of punitive damages is to give the defendant her or his "just dessert", deter the defendant, and others, from similar misconduct, and to mark the community's collective condemnation of what has happened. Punitive damages are only awarded when compensatory damages are insufficient to accomplish these objectives;

e) punitive damages are awarded in an amount that is no greater than necessary to accomplish their purposes and are generally moderated; and

f) the court should assess whether the conduct of a defendant should be punished over and above the requirement to pay non-pecuniary, pecuniary and aggravated damages.

[517] Ms. Howell was unable to refer me to any case in which punitive damages had been awarded in a motor vehicle accident case involving a hit-and-run. However, in *Legualt v. Tiapis*, 2015 BCSC 517, Master Harper dismissed an application to strike a claim for punitive damages against a breached defendant for leaving the scene of an accident on the basis that she could not conclude that the punitive damages claim would prejudice or embarrass the fair trial of the proceeding. As that case did not proceed to trial, there is no authority for whether punitive damages are appropriate in a hit-and-run situation.

[518] Punitive damages have been awarded against defendants who have shown reprehensible conduct in causing motor vehicle accidents. For example, punitive damages have been awarded in the following cases relied on by Ms. Howell:

- In *McIntyre v. Grigg*, 83 O.R. (3d) 161 the Ontario Court of Appeal reduced a jury's $100,000 punitive damage award to $20,000 against a defendant driver whose blood alcohol level, at the time of the accident, was two to three times over the legal limit;

- In *McDonald v. Wilson,* [1991] B.C.J. No. 3137, Justice Hood awarded $5,000 in punitive damages and $1,000 in aggravated damages against a defendant driver who intentionally tried to strike the plaintiff. Similarly, in *Stevenson v. Vance*, [1988] N.S.J. No. 384, $2,500 in punitive damages was awarded against a defendant who intentionally ran over the plaintiff's legs after stealing from a store in which the plaintiff worked as a security guard; and

- In *Herman v. Graves*, 1998 ABQB 471, a plaintiff was awarded $3,500 in punitive damages arising from a road rage incident and, more recently, in *McCaffery v. Arguello*, 2017 BCSC 1460, I awarded $30,000 in punitive damages arising from a road rage incident.

[519] I have concluded that Mr. Machi's actions are worthy of denunciation and retribution beyond the compensatory awards I have made in favour of Ms. Howell. In particular, although I concluded that his failure to stop after striking Ms. Howell did not amount to further negligence on his part, it is relevant to the punitive damages analysis. I have also taken into account the fact Mr. Machi has repeatedly shown complete disregard for the suspensions of his driver's licence.

[520] In all the circumstances, I award Ms. Howell punitive damages of $100,000 against Mr. Machi.

Summary of Quantifiable Awards

[521] I have awarded Ms. Howell the following damages:

a) for punitive damages, the sum of $100,000;

b) for general damages, the sum of $275,000;

c) for past income loss, the agreed sum of $14,000;

d) for loss of income earning capacity, the sum of $1,775,000; and

e) for special damages, the sum of $14,781.77.

[522] Due to her contributory negligence, and with the exception of the punitive damages award, Ms. Howell's damages are reduced by 25%.

[523] I have concluded that the punitive damage award should not be reduced as it was awarded as a result of conduct for which Mr. Machi was solely responsible. It was not conduct contributed to by Ms. Howell. In that regard, I agree with Justice Sinclair Prowse's comments in *Logeman v. Rossa et al,* 2006 BCSC 693 at para. 14.

[524] I have left for the parties, and/or their experts, the determination of the present value of the cost of future care items which I have allowed. If the parties require directions or assistance from me in that regard, or on any issue arising from these reasons, they may apply to appear before me to address them.

Outstanding Issues

[525] There remain a number of outstanding issues. A hearing is or may be required to assess: the need for and present-day cost of management fees for the management of any damages awards received; income tax gross up; court ordered interest; and costs. On the issue of costs, I am not aware of any reason why Ms. Howell should not be entitled to her costs and, without the benefit of submissions, I am of the preliminary view that an award on Scale B is appropriate. However, there may be factors of which counsel are aware and I am not that should be considered with respect to a costs order. If the parties are unable to agree on any of these issues, they may contact scheduling to arrange for a further hearing date.

"MacNaughton J."