IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aarts-Chinyanta v. Binkley*,
2020 BCSC 392

Date: 20200317
Docket: M52039
Registry: Vernon

Between:

Susan Aarts-Chinyanta

Plaintiff

And

Harmony Premium Motors Ltd. dba Harmony Acura, and Quinn Binkley

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:	J. D. Cotter R. D. Irving
Counsel for the Defendants:	D. M. Darman R. L. Lagroix
Place and Date of Trial/Hearing:	Kelowna, B.C. October 7-11, 15-18, 2019
Place and Date of Judgment:	Vernon, B.C. March 17, 2020

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Introduction

[1] The plaintiff, Susan Aarts-Chinyanta, was 42 years old at the time of trial. She was involved in three motor vehicle accidents between July 27, 2012 and October 14, 2014 which are the subject matter of this claim. Ms. Aarts-Chinyanta was also involved in another motor vehicle accident in 2014 when she struck a deer, just prior to the second accident. She also fell down her stairs between the second and third accidents.

[2] In the first two accidents, Ms. Aarts-Chinyanta's vehicle was written off. This was also the case when she hit the deer in 2014.

[3] The defendants have admitted liability and have advised the court that there is no need to apportion of liability between them.

[4] The plaintiff claims injuries as a result of the accidents. From the first accident she claims that she suffered:

- whiplash associated disorder II / myofascial pain to her neck, upper back, and right shoulder;
- chronic posttraumatic headaches and associated nausea and dizziness;
- arm and hand injuries;
- exacerbation of a pre-existing (healing) right hand injury; and
- sleep disturbance.

[5] As a result of the second accident, the plaintiff claims she suffered:

- aggravation of whiplash associated disorder II / injury to her neck and upper back;
- aggravation of chronic headaches;
- aggravation of right shoulder and right arm injuries; and

- right lower leg and foot pain.

[6] The third accident was not as significant as the previous two. The plaintiff claims the third accident caused an aggravation of her previous injuries to her head and neck.

[7] Most significantly, Ms. Aarts-Chinyanta claims her physical injuries and headaches have resulted in psychological injuries. Ms. Aarts-Chinyanta claims that since the accidents she has, at times, met the criteria for a diagnosis of major depressive disorder. She claims to currently have adjustment disorder, somatic symptom disorder, and depressed mood.

Non-Expert Witnesses

[8] The following is a summary of the evidence of the plaintiff and the lay witnesses who testified at the trial. I set out their evidence in a general way, but leave certain details for discussion under the issues I address. Although I do not describe all aspects of the evidence, I have considered the totality of the evidence in reaching my conclusions.

Pre-Accident Function

[9] Ms. Aarts-Chinyanta testified that prior to the first motor vehicle accident she was an active and busy mother who worked full-time. She was raised in Vernon and her family moved to Lethbridge when she was 14. She gave birth to her older son, Quinzy, while still in high school but continued the school year and graduated valedictorian. She also received an honour as Citizen of the Year when she completed high school.

[10] Ms. Aarts-Chinyanta initially stayed with the baby's father who was not very supportive. Although she tried to go to Lethbridge College to take early childhood education, she was forced to drop out and found work at Burger King. She had a second child, Kenzel, and therefore worked limited hours.

[11] Ms. Aarts-Chinyanta eventually found a job at the Royal Bank and obtained full-time hours. After a period of time she and her partner separated. Ms. Aarts-Chinyanta met her current husband, Axel, who is from Africa. They were married in 2005. They eventually moved to Vernon to be closer to her family.

[12] Ms. Aarts-Chinyanta continued to work at the Royal Bank, but the Royal Bank in Vernon did not have a full-time position for her. Ms. Aarts-Chinyanta worked at several other jobs for a limited period of time.

[13] Ms. Aarts-Chinyanta started to work at Walmart in 2008. When she began she was making minimum wage. Over time her wages increased and she was earning $11.20 per hour in 2012. She worked in the inventory department between 11:00 p.m. and 7:00 a.m. Ms. Aarts-Chinyanta hoped to advance into management. She testified that her long-term plan was to return to school and pursue early childhood education. She testified she is creative and she likes to be around young people.

[14] Ms. Aarts-Chinyanta testified she loves to cook and cooked all her meals for the family from scratch. Quinzy testified that Ms. Aarts-Chinyanta learned to cook meals from many regions, including meals from Africa which Axel liked. She also learned to cook meat even though she herself is a vegetarian.

[15] In 2008, Ms. Aarts-Chinyanta's younger son Kenzel got ill. He was in and out of the hospital and was eventually diagnosed with a rare autoimmune disease called Henoch-Schönlein Purpura. This was obviously very stressful for Ms. Aarts-Chinyanta who eventually had to homeschool Kenzel because he was so sick. This affected her ability to work and she began missing shifts at Walmart. Kenzel did not go back to school until 2015 when he was in grade 10.

[16] In approximately 2008, Ms. Aarts-Chinyanta also injured her right hand in the palm area. It started swelling and dislocating, which resulted in significant pain. She had an x-ray but it did not show obvious damage. This was a difficult time for Ms. Aarts-Chinyanta as she and her husband had just separated due to his infidelity.

[17] Ms. Aarts-Chinyanta had surgery in July 2009 in an attempt to repair her hand. Unfortunately, the surgery made her hand worse. She could not use it. This was significant as she is right-handed. She could no longer work in inventory at Walmart and was off work on medical employment insurance. Kenzel was still very sick.

[18] Eventually Ms. Aarts-Chinyanta's employment insurance ran out and she applied for social assistance. Although she received social assistance, her child tax credit and the father's payments to her for child support were subtracted from it. She was forced to get a roommate and to go to the food bank. The roommate did not work out. She applied for disability benefits but she did not qualify. Her husband, Axel, from whom she was separated, helped the family sporadically.

[19] Ms. Aarts-Chinyanta testified that by 2010 she was having a very difficult time and she was anxious because she was separated from her husband and she had a son ill with an autoimmune disease whom she was homeschooling. She had received an eviction notice, was on social assistance, and was forced to go to the food bank. Her hand was worse rather than better after the surgery.

[20] Ms. Aarts-Chinyanta's family doctor, Dr. Boucher, assisted her in completing an application form for government housing for those with disabilities, which was successful. I discuss this form, and its implications, under causation.

[21] Ms. Aarts-Chinyanta testified that at this time she took some pain medications but no medication for depression. She denied being depressed at this time.

[22] Ms. Aarts-Chinyanta testified that prior to the motor vehicle accidents she would sleep on average four hours. Sometimes she would sleep again a little later in the day. She was also prescribed a medication to help her sleep. She testified she did not take this medication as she needed to be responsive to her younger son who was ill.

[23] Ms. Aarts-Chinyanta returned to work in July of 2010 as a greeter at Walmart. She worked four-hour shifts and was on her feet the entire time. She was only

receiving 15 hours a week at Walmart although she occasionally picked up extra shifts when another employee was unable to work. Ms. Aarts-Chinyanta testified that she hated her job as a greeter because she just stood outside the store. While working as a greeter, she slammed her hands in the shopping carts which was very painful. This caused her anxiety. She worked in this position for approximately two years.

[24] Ms. Aarts-Chinyanta testified that by 2011 Axel was starting to be more helpful. Kenzel was getting older and things were starting to ease up. She finally found a doctor who discovered a fracture in her hand at her fifth carpometacarpal joint. She underwent a second hand surgery on May 18, 2012. Dr. Brown, the surgeon, grafted some bone from her wrist to her right hand and placed a plate on the top right side of her hand.

[25] Ms. Aarts-Chinyanta testified she was excited post-surgery. Dr. Brown said the surgery went well and she would be fine. She was feeling optimistic and her son was slowly getting better. He had returned to playing soccer. Ms. Aarts-Chinyanta testified that she had no concerns about her hand although it was still sore due to the surgery and she was doing physiotherapy. She had an anticipated return to work date of August 2012.

[26] Ms. Aarts-Chinyanta testified that just before the first accident she planned to return as an inventory assistant at night at Walmart. She testified that she hoped also to return to school to pursue early childhood education, starting with part-time courses.

[27] A number of witnesses testified for Ms. Aarts-Chinyanta. They testified that she was very active prior to the accidents and was in very good shape. They testified that she played soccer, hiked, walked everywhere, and was very active with her children. This was before Kenzel became ill. Ms. Aarts-Chinyanta loved to camp. She had no physical limitations.

[28] In terms of her personality, the lay witnesses testified that Ms. Aarts-Chinyanta was spontaneous, feisty, and outgoing. They testified that she was an amazing mother, loving and kind. The lay witnesses did not recall any mental health issues before the accidents. They all denied being aware that she suffered from panic attacks in these years. Although they admitted that she was depressed during her separation from Axel, as well as anxious about Kenzel when he became sick, this was normal anxiety in the circumstances. Ms. Scheeler, a friend, testified that "she handled it like a pro." Ms. Aarts, Ms. Aarts-Chinyanta's sister, testified that although she was heartbroken that her child was sick, "Susan pulled herself together." Ms. Aarts-Chinyanta testified she was anxious and going through a "really tough time" but she denied being depressed prior to the first motor vehicle accident.

The First Motor Vehicle Accident

[29] At the time of the first motor vehicle accident, Ms. Aarts-Chinyanta was off work recovering from her successful May 18, 2012 hand surgery. She testified the accident occurred on July 27, 2012 when she was driving her son home from soccer camp ("MVA #1" or the "first accident"). She was stopped at an intersection when her vehicle was struck from behind by a minivan. The accident was "forceful". Her hands were on the steering wheel and her right hand "smashed" into the steering wheel. She had a brace on her hand at the time of the accident.

[30] Ms. Aarts-Chinyanta drove home from the accident but the vehicle was eventually written off.

[31] The day after the accident Ms. Aarts-Chinyanta began to feel nauseous and had a headache. She had upper back and neck pain. Her hand was throbbing from the pain and the pain radiated into her arm. At first the pain was mild but it increased every day. She went to a walk-in clinic on the Monday after MVA #1 as her doctor was on holidays. She was told to go to physiotherapy and was not given any medications.

[32] Ms. Aarts-Chinyanta saw her family doctor in mid-August. She was having bad headaches, pain in her upper back and shoulder, and she was feeling

nauseous. She felt pain in her right hand and into her fingers. Her fingers were tingling. The plate was “poking out of her hand”.

[33] Ms. Aarts-Chinyanta began going to physiotherapy two times per week. She continued to see her family doctor and was unable to return to work. Counsel for the defendants put a chart entry of Dr. Boucher to Ms. Aarts-Chinyanta in cross-examination. Counsel suggested she did not want to return to work as a greeter at Walmart because she was only being offered 15 hours. Ms. Aarts-Chinyanta responded that she could not go back to work in a sedentary position; she could not work at Walmart due to all the noise. She added that she was not physically able to work at that time due to her pain and her migraines.

[34] In November 2012, Ms. Aarts-Chinyanta switched from physiotherapy to seeing Dr. Grant, a chiropractor. She had not found physiotherapy to be helpful.

[35] In December 2012, Ms. Aarts-Chinyanta was prescribed Apo-Nortriptyline to help her sleep. Her symptoms did not improve. In the winter she started wearing sunglasses because she had light sensitivity in her right eye.

[36] Ms. Aarts, her sister, testified that she helped Ms. Aarts-Chinyanta find proper sunglasses because she worked in an optometrist office. Ms. Aarts-Chinyanta testified that she wears her polarized sunglasses every day. She also keeps the blinds closed in her house and has tinted her windows.

[37] In terms of her headaches, Ms. Aarts-Chinyanta had pressure at the back of her head which made her feel dizzy and nauseous. Noises and lights also made her feel sick. She was experiencing headaches every day. Ms. Aarts-Chinyanta testified that her migraines were different. When she has a migraine there is intense pain on the side of her face, into her jaw and around her ear. She gets flu-like symptoms and becomes nauseous and dizzy. Her migraines last three or four days.

[38] After the first accident, Ms. Aarts-Chinyanta had a shooting pain down her arm, from her neck and base of her skull, extending across her shoulder blades.

Nothing would make the pain go away but she would use ice and heat to relieve it. She also took Epsom salt baths and applied Vicks for comfort.

[39] Ms. Aarts-Chinyanta testified she did not go back to work due to her headaches and migraines. She could not handle the noise from Walmart. At home she was unable to do anything. She had a lot of support from her sons.

[40] With respect to her hand, her surgical site was a lot better but she had to get the plate removed in January 2013. Today it is tender but for the most part it is better.

[41] Ms. Aarts-Chinyanta had an occupational therapist come into her home to help her set things up. She saw a kinesiologist, started going to the pool at Meridian Rehabilitation, walked regularly, and did mirror therapy. She saw Dr. Donat, a headache specialist, who put her on Gabapentin and Topiramate for her migraines. He also suggested she change her diet. She cut out gluten, caffeine, and alcohol.

[42] Ms. Aarts-Chinyanta testified she saw Dr. Inkpen for her arm. He prescribed a Ketamine compound cream to help with the pain.

[43] In 2014 Ms. Aarts-Chinyanta testified that she had received some relief from her chiropractic and massage treatments but they did not last. She switched to physiotherapy and stopped massage and chiropractic treatments. Dr. Boucher, her family physician, tried prolotherapy (sugar water injections) but she did not find this treatment beneficial.

[44] Ms. Aarts-Chinyanta testified that she started seeing a psychologist, Deb Deeter, about once per week to discuss how she was feeling. She also took some courses at Meridian Rehabilitation. She did exercises at home that she had learned from her kinesiologist.

[45] In 2014 Ms. Aarts-Chinyanta got back together with Axel. This assisted because, although he travelled for work and was away most of the time, he sent money home for rent.

[46] Ms. Aarts-Chinyanta began seeing Dr. Steyn, a psychiatrist, because she was depressed. She was having difficulty coming to terms with not being able to do what she could before. He put her on an antidepressant. She started with a low dose and progressed to a higher dose. She testified that it helped her mood, especially with respect to “really down days”.

[47] Ms. Aarts-Chinyanta tried a number of different treatments for her migraines, including needling by Dr. Trow. She was provided with minor relief for about 10 to 20 minutes, but she did not find that needling made any significant change.

[48] Ms. Aarts-Chinyanta testified that her weight was still good in 2014 and she felt okay about her body. She was going to the pool two to three times per week.

[49] Ms. Aarts-Chinyanta was involved in another motor vehicle accident, when she struck a deer, just prior to the second accident. This occurred in August 2014. Although her vehicle was written off, she testified that she was not injured in this accident.

The Second Motor Vehicle Accident

[50] Ms. Aarts-Chinyanta testified the second motor vehicle accident occurred on September 2, 2014 when she was driving home from Calgary on Highway 1 just outside of Revelstoke (“MVA #2” or the “second accident”). She had stopped her vehicle due to an accident ahead of her. All of a sudden a truck, a “semi”, hit her from behind and pushed her into the van ahead of her. She testified that it was a “really big bump”. She felt her body go forward and backward.

[51] Ms. Aarts-Chinyanta was taken to the Revelstoke Hospital in an ambulance. After an examination and x-rays she was released. Her nephew drove her car home but it was later written off due to the damage.

[52] Ms. Aarts-Chinyanta testified she was very sick and in a lot of pain the few days after the accident. Her head hurt a lot. She could not lift her right arm due to

the pain. Her right foot was hurting and all her prior symptoms were heightened. Her shoulder movement was now restricted. The more she stood the worse her pain got.

[53] In terms of her mood, she felt defeated. She testified that all the recovery from her first accident was gone.

[54] She saw her family doctor and was referred to the CHANGEpain clinic in Vancouver where she saw Dr. Lam. He treated her with IMS and dry needling. She also enrolled in educational program to provide patients with coping skills to address pain.

[55] Ms. Aarts-Chinyanta testified that she began seeing Carrie Jones, a physiotherapist, who applied acupuncture and electric shocks. It did help relieve her left side which had been reactivated after the second accident.

[56] Between the second accident and third accident, Ms. Aarts-Chinyanta slipped on her stairs. She testified that she felt sore that day but after that it was better.

The Third Motor Vehicle Accident

[57] Ms. Aarts-Chinyanta testified that the third accident occurred on October 14, 2014 when she was a rear seat passenger in a taxicab driven by one of the defendants (“MVA #3” or the “third accident”). They were rear-ended by another vehicle. She had the taxi driver take her directly to the CHANGEpain clinic as she had been on her way there in any event. She saw Dr. Lam. Although there were no new injuries, everything felt worse.

[58] Ms. Aarts-Chinyanta testified that in 2015 her sleep was nonexistent. She saw a sleep specialist but since it was pain related, there was not much the specialist could offer her. She testified she falls asleep for approximately 15 to 20 minutes, a half-hour at the most, and then wakes up. She has to switch sides and keep her feet elevated. She testified she cannot sleep on her back due to her headaches.

[59] Ms. Aarts-Chinyanta stopped attending the CHANGEpain clinic in 2016 but saw Dr. Vestor at a pain clinic in Vernon. He also did some needling and IMS. Then he discontinued seeing her because he said there was nothing he could do to help her. She subsequently attended a pain clinic in Kelowna where they tried prolotherapy again. Although it made a temporary difference, her pain came back with force. It was “not the right fix for her”.

[60] At the end of 2015 Ms. Aarts-Chinyanta began seeing Kimberly, a physiotherapist. Kim was more hands-on than Ms. Jones. She helped her do movements and exercises. She did acupuncture at the end of the treatments. Ms. Aarts-Chinyanta experienced some benefit to her shoulder and arm area as well as the left side of her neck. Then her improvement “flat lined”.

Current Complaints

[61] Ms. Aarts-Chinyanta testified she continues to struggle with right side face pain which increases when she has migraines. Her migraines were described as “intense pain” and are often accompanied by nausea and dizziness. She has pain in the right side of her neck and her right arm. She has pain in her right foot and calf, but only at the end of the day. Her headaches have continued and she has pain in the whole back of her head and her right eye. She testified she is “not a minute without headaches.” She continues to get migraines three to four times per week. She suffers from sensitivity to light.

[62] Ms. Aarts-Chinyanta testified her hand is now tender but it is no longer painful. She says her grip is not good but she has healed from her surgery. She clarified in re-examination that her hand issues are from the accident, not her previous hand injury.

[63] Ms. Aarts-Chinyanta testified she continues to have sleep issues. She agreed in cross-examination that she had trouble sleeping prior to the first accident. She testified her current sleep issues are due to her head, neck, and shoulder pain.

[64] Ms. Aarts-Chinyanta was emotional on the stand and testified she saw Dr. Steyn, a psychiatrist, because she was feeling depressed. Dr. Steyn retired so Ms. Aarts-Chinyanta saw Deb Deeter, a counsellor, again in 2015. She saw Ms. Deeter to help her adjust to her new situation.

[65] In late 2017 or 2018, Ms. Aarts-Chinyanta stopped her various treatments because she was overwhelmed. She testified she felt she had tried everything and did not experience anything other than some temporary relief. She was both mentally and physically exhausted. She continues with her 15 to 20 minute walks and goes to the pool. Apart from taking her medications, she is not undertaking any other treatments such as massage therapy, physiotherapy, or chiropractic manipulation. She did not find these treatments helpful.

[66] Ms. Aarts-Chinyanta testified she has always been very particular about having a clean house. Her house was spotless prior to the accidents because she was a meticulous cleaner. Today she continues to clean but has to pace herself. She mops one day and the next day will wipe down things in a section of the house. This past summer she moved from her house into a townhouse with her nephew. At the time of trial, her nephew was no longer living with her.

[67] For the first time Ms. Aarts-Chinyanta is living on her own. Kenzel is going to college in Lethbridge; Quinzy lives in Vernon but no longer lives in the family home. He does help her out with groceries and other chores. She tries to see him for lunch at least once per week and he testified that she often drops into his store when she is downtown. She continues to drive a car.

[68] Ms. Aarts-Chinyanta testified that her social engagement is poor. She used to be very socially active but now has to cancel many plans. She has lost friends as a result of her current condition. She has gained over 50 pounds.

[69] The other lay witnesses testified that Ms. Aarts-Chinyanta is not the same person as she was prior to the accidents. They testified she has gained a lot of weight. They testified that Ms. Aarts-Chinyanta is more reserved than she was prior

to the accidents and she cannot tolerate large crowds. Her family members testified that she no longer attends all the family gatherings like she did prior to the accidents. Ms. Aarts-Chinyanta finds them to be too much for her and she cannot handle the noise. She needs to rest a lot.

[70] Ms. Aarts-Chinyanta's sons and nephew acknowledged that she still cooks but they testified that her meals are not as elaborate as they used to be. She also continues to walk the dogs.

[71] Ms. Scheeler testified that she no longer does any activities with Ms. Aarts-Chinyanta. They go for coffee but if someone walks by with perfume Ms. Aarts-Chinyanta reacts. If they meet at Ms. Scheeler's home she has to close the drapes. Ms. Aarts-Chinyanta is no longer outgoing. She is shy, closed off, and wants to hide all the time.

[72] Ms. Aarts-Chinyanta visited Ms. Tom, a friend, in Calgary this year on her way to Lethbridge. Ms. Aarts-Chinyanta did not call her the day they were supposed to meet which was unlike her. Apparently she had a massive migraine because the drive was too much for her. Ms. Tom testified that when she did see Ms. Aarts-Chinyanta she had no energy. She looked tired and defeated.

[73] Ms. Aarts-Chinyanta takes a number of medications each day. As plaintiff counsel outlined in final submissions:

> The plaintiff continues to take a host of medications on a daily basis to manage her pain. She takes Topiramate for her headaches. She takes Naltrexone three times daily for pain. She has a prescription for Emtec 30 (equivalent to Tylenol #3) on an as needed basis. She takes Gabapentin for pain twice daily (300 mg dosage). She takes the anti-depressant Effexor. She also utilizes two cream compounds for topical application: Diclofenac and a Ketamine compound.

[74] Ms. Aarts-Chinyanta has not undergone any cognitive behavioural therapy or other psychotherapy.

[75] Ms. Aarts-Chinyanta testified if she had not been in the motor vehicle accidents she would have finished college and be working full-time in a preschool

setting. She would have completed her two-year program and be making approximately $15.85 per hour.

[76] Ms. Aarts-Chinyanta testified she misses everything about her old life. She misses smiling, not wearing sunglasses, working, being outside, and having sun in her home. She said she misses her old self. She does not know who this new person is.

Expert Evidence

[77] The following is a summary of the evidence of the expert witnesses who testified at the trial and/or whose reports were filed as exhibits in this proceeding. I set out their evidence in a general way but leave a number of details for discussion under the issues I address. In reaching my conclusions, I have considered the totality of the evidence.

Dr. Michael Rocheleau

[78] Dr. Rocheleau, a physiatrist, was called by the plaintiff. He was qualified as a physical medicine and rehabilitation expert to opine on the diagnosis, prognosis, and treatment of muscular-skeletal injury and its sequalae. He was also qualified to opine on impairment, disability, and fitness to return to work. He was not qualified to opine on anxiety, depression, sleep disturbance, and post-traumatic nausea and dizziness. His report was dated December 8, 2015.

[79] Dr. Rocheleau opined that Ms. Aarts-Chinyanta sustained the following injuries from MVA #1:

1. Whiplash Associated Disorder II involving the neck and upper back region.
2. Exacerbation of symptoms related to pre-existing right wrist fracture and surgery.
3. Post-traumatic headache (cervicogenic) associated with neck pain and occipital sensitivity.

[80] In Dr. Rocheleau’s opinion, MVA #2 aggravated Ms. Aarts-Chinyanta’s injuries from MVA #1, including her pre-existing Whiplash Associated Disorder,

headaches, and neck, right shoulder, and right arm pain symptoms. In addition, he opined she developed some right lower leg and right foot symptoms from MVA #2. Dr. Rocheleau opined that MVA #3 exacerbated her previous symptoms related to her head and neck.

[81] Dr. Rocheleau opined that primary areas of impairment relate to the plaintiff's struggles with chronic pain and headaches.

[82] In terms of recovery, Dr. Rocheleau stated in his report that the chronic nature of the plaintiff's situation and her poor response to treatment indicate a poor prognosis. He stated that, "it is more likely than not that she will continue to have a similar pattern of complaints in the future."

[83] In his report, Dr. Rocheleau concluded the plaintiff was only suited to limited sedentary employment, and may be functionally unemployable:

> Ms. Aarts-Chinyanta has the complication of trying to find suitable work which will take into account her limitations as relates to her injuries and ongoing pain. At this point, she is best suited to sedentary employment of a limited nature, likely part-time. The work should not require lifting or carrying of objects, prolonged static postures, bimanual activities of a repetitive nature, or sustained reaching above shoulder level. Probably, she will require the support of a benevolent employer in order to find a role which would fit her needs. In my opinion, the likelihood of this is poor and she may very well be functionally unemployable.

Dr. Brenda Lau

[84] Dr. Lau testified for the plaintiff. Dr. Lau was qualified as an expert in anaesthesiology and pain medicine, including interventional pain practices and multidimensional pain care. She was qualified to opine in the area of chronic pain, including its cause and effect on treatment options and its prognosis. Dr. Lau was also qualified to opine in the areas of functional limitations and cognitive abilities as they relate to pain. Dr. Lau is the founder and medical director of the CHANGEpain Clinic, a multidisciplinary pain clinic in Vancouver.

[85] Dr. Lau's July 4, 2018 assessment of Ms. Aarts-Chinyanta was consistent with Ms. Aarts-Chinyanta's subjective reports:

- Mildly restricted and painful neck range of motion;
- Moderately limited arm range of motion and back extension;
- Hyperalgesia in the right frontal area, posterior head, right neck, right periscapular area, dorsum of hands, and right buttock;
- Hypoalgesia in the right arm, right palmar surface, and lateral and posterior aspects of the right lower leg; and
- Multiple areas of pain on palpation mostly on the right side.

[86] Based on her assessment, review of the records and interview with the plaintiff, Dr. Lau diagnosed the plaintiff as suffering:

i. New onset and persistent whiplash associated disorder type II resulting in headaches, neck pain, and limited range of motion.
ii. New onset and persistent multiple myofascial pain, especially affecting the whole right side most likely due to central sensitization.
iii. Reduced range of motion in the right arm, improved compared to previous appointments at CHANGEpain.
iv. New onset right arm pain in keeping with symptoms of right-sided functional thoracic outlet syndrome. Exacerbation of prior right wrist and hand pain.
v. Cervicogenic headaches due to multiple factors such as myofascial pain, tension headaches and ocular migraines.

[87] Dr. Lau opined that Ms. Aarts-Chinyanta's functional limitations were caused by MVA #1 and aggravated by MVA #2. MVA #2 caused her right foot pain. Ms. Aarts-Chinyanta's injuries were aggravated by MVA #3. She found it was difficult to discern what injuries were sustained in the accident with the deer and her fall down the stairs. Dr. Lau stated in her report that Ms. Aarts-Chinyanta's prognosis is poor.

Dr. Gordon Robinson

[88] Dr. Robinson's expert report was relied upon by the plaintiff. The defendants did not require that he attend for cross-examination.

[89] Dr. Robinson is an expert in neurology with a specialty in headache disorders. He can provide opinions with respect to the cause, diagnosis, prognosis, and treatment recommendations for headache disorders and underlying conditions

including soft tissue injury to the neck, shoulder, and upper back, and resulting sequalae.

[90] Dr. Robinson noted that prior to MVA #1, the plaintiff had pain affecting her right hand. She was eventually diagnosed with a “fracture and/or degenerative changes affecting her right fifth carpometacarpal joint.” She had a second surgery in May 2012. She was hoping to return to work in September 2012.

[91] Dr. Robinson stated in his report that the plaintiff sustained soft tissue injuries to her neck, shoulders, and upper back. He described her injuries as including a constant headache with “a sense of pressure affecting the right frontal, temporal and occipital regions.” He opined that her headaches are “moderate at the least and frequently incapacitating.” When incapacitating, Ms. Aarts-Chinyanta experiences severe pain on the right side of her head and behind her right eye. When her headaches are severe, Dr. Robinson stated that Ms. Aarts-Chinyanta develops gastrointestinal upset and stimulus sensitivity.

[92] Dr. Robinson does not believe that there has been any damage to Ms. Aarts-Chinyanta’s nervous system. Dr. Robinson did not find evidence of any structural spinal disorder resulting in nerve root or spinal cord compression which would explain her symptoms.

[93] MVA #2 and MVA #3 resulted in soft tissue injuries to her neck. These accidents aggravated her ongoing symptoms from MVA #1, including her headaches. Dr. Robinson accepted that Ms. Aarts-Chinyanta developed right foot discomfort after MVA #2. This improved over time.

[94] Dr. Robinson stated that many individuals recover within weeks or months of an accident. However there is “a substantial number that continue to have headache and neck pain years after the injury.” Dr. Robinson opined that the treatment of chronic headaches related to neck trauma is usually difficult. Physical therapy has not “been found to be curative.”

[95] In terms of prognosis, Dr. Robinson states that after almost seven years since the first accident, Ms. Aarts-Chinyanta continues to have a constant headache. In his opinion it is "more likely than not her posttraumatic headaches will not change in the future."

[96] Dr. Robinson states that it is possible but not likely that Ms. Aarts-Chinyanta will have an improvement in her headaches with treatment. He would encourage Ms. Aarts-Chinyanta to maintain an active lifestyle. Regular exercise may increase her sense of well-being and help her cope with her pain.

[97] While deferring to a psychiatrist or psychologist, Dr. Robinson believes that Ms. Aarts-Chinyanta's psychological issues (anxiety and depression) are significant aggravators of her posttraumatic headache difficulties.

[98] Dr. Robinson does not believe that Ms. Aarts-Chinyanta is employable in any capacity. In his opinion it is unlikely that she will be able to return to the workforce.

Dr. Mitchell Spivak

[99] Dr. Spivak, a psychiatrist, testified for the plaintiff. He was qualified to provide expert opinion evidence on the diagnosis, causation, treatment, and prognosis of psychiatric and mental health conditions.

[100] Dr. Spivak stated in his report that Ms. Aarts-Chinyanta did not have diagnosed mental health issues prior to the subject motor vehicle accidents. Her contact with mental health professionals "were brief and intermittent" and related "specifically to life stressors."

[101] In his report, Dr. Spivak diagnosed the plaintiff as follows:

> In the aftermath of the three motor vehicle accidents, Ms. Aarts-Chinyanta has gone on to develop chronic challenges with pain. … Her pain has impacted all aspects of her life. She now experiences limitations, an overall sense of hopelessness in the face of the pain and an overall reduced scope of functioning.
> …
> At times, Ms. Aarts-Chinyanta's symptoms may have reached a threshold for a major depressive disorder. She was assessed by a psychiatrist who

> provided this diagnosis. Potentially, her symptoms have remitted to some degree since that time, secondary to the psychotherapy she has received as well as from the medication. At present, she does not meet criteria for a diagnosis of major depression, but still evidently has significant symptoms compatible with the diagnosis, including dysphoria. Her current presentation would be more consistent with a diagnosis of an adjustment disorder with depressed mood.
>
> Ms. Aarts-Chinyanta meets the criteria for a diagnosis of a somatic symptom disorder with predominant pain. However, this diagnosis refers to an individual who is preoccupied by their pain and it affects all aspects of their functioning. While she meets criteria for this diagnosis, I am not suggesting that her preoccupation with her pain is causing her impairment, but instead is an evident outcome of her ongoing experience and challenges. Her life has been consumed and altered by her pain.

[102] Dr. Spivak opined the three motor vehicle accidents appear to be the cause of Ms. Aarts-Chinyanta's symptoms. Her symptoms are being driven by pain that began in the aftermath of the first accident. According to Dr. Spivak, "Given that her psychological/psychiatric symptoms correlate with her experience of pain caused by the accident, one can say that her psychiatric/psychological symptoms were precipitated by the same."

[103] Dr. Spivak noted the plaintiff has undertaken multiple modalities of treatment, including regular treatments at a pain clinic. Despite these interventions, the plaintiff perceives her pain as "unchanged and unremitting."

[104] In term of prognosis, Dr. Spivak concluded:

> Ms. Aarts-Chinyanta's prognosis is poor. Given the chronic nature of her pain and its unremitting nature in the face of a wide range of treatments, one would expect her to have ongoing challenges with the same. Despite her best efforts to cope with her pain and maintain a normal life, she still continues to struggle with a sense of dysphoria and hopelessness as a consequence of her pain. Regretfully, this will likely continue into the future, given the limited likelihood of there being a significant change in her experience of pain.

[105] In cross-examination Dr. Spivak was shown Ms. Aarts-Chinyanta's application for government housing for people with disabilities, which suggests that Ms. Aarts-Chinyanta suffered from psychiatric issues prior to MVA #1. He testified the form was inconsistent with the clinical records. He testified that family physicians often take on the role of an advocate for their patients.

[106] Dr. Spivak testified Ms. Aarts-Chinyanta has an adjustment disorder after the motor vehicle accidents due to her chronic pain, unrelated to any adjustment disorder as a result of her life stressors prior to the motor vehicle accidents.

Christina Peters

[107] Ms. Peters, an occupational therapist, testified for the plaintiff. She was qualified to conduct functional capacity evaluations and provide future care recommendations.

[108] Ms. Peters conducted a two-day assessment of Ms. Aarts-Chinyanta. There was a full day of testing at Ms. Peters' clinic and an assessment in the plaintiff's home the following day to observe her tasks in her home setting.

[109] In her summary, Ms. Peter found the plaintiff provided "varied effort during the Functional Capacity Evaluation completed on May 23, 2019." She demonstrated less than full effort in six areas indicating she "may be able to do more than what she demonstrated during testing."

[110] Ms. Peters noted that the plaintiff rated her level of pain very high and it was "not always congruent with the description of pain at that level as compared to the Functional Pain Scale despite repeated reminders of the Functional Pain Scale ratings." Ms. Peters gave the example of how the plaintiff rated her headache. She provided a 6/10 on the pain scale, which is beyond the point at which one would need to stop the activity. Ms. Peters noted Ms. Aarts-Chinyanta was able to proceed and completed the full 7 ½ hours of testing.

[111] Ms. Peters also noted minimal signs of discomfort other than Ms. Aarts-Chinyanta shaking out her hands. What Ms. Peters observed was not consistent with the high level of pain Ms. Aarts-Chinyanta reported.

[112] Ms. Peters found that the plaintiff's neck, shoulder, and wrist range of motion had only mild limitations and they were not barriers to performing sedentary or light strength category work. She had full functional range of motion in her trunk, hips,

knees, ankles, and elbows. Her strength was within functional limits for the major muscle groups that were tested. Her gait was slow but otherwise unremarkable.

[113] Ms. Peters noted that Ms. Aarts-Chinyanta had a mild loss of balance while standing and performing a medium dexterity test. Ms. Peters stated that at the home visit Ms. Aarts-Chinyanta climbed up and down her stairs without a problem when she went to do the laundry. When she was advised that she would be observed climbing her stairs, her walking climbing pattern was not as smooth and fluid as it had been earlier.

[114] Ms. Peters concluded:

> [The plaintiff] is best suited for seated work that still allows her the ability to change positions periodically throughout the day. However based on this evaluation, it is my opinion that Ms. Aarts-Chinyanta is not competitively employable or capable of part-time work at this time, due to her persisting headaches, light and noise sensitivity, and her persisting and intrusive neck, upper back, right arm and hand pain.

[115] Ms. Peters advised she had conducted an earlier Functional Capacity Evaluation on Ms. Aarts-Chinyanta, completed on February 1, 2013. She noted that Ms. Aarts-Chinyanta's status did not significantly change between 2013 and 2019.

Darren Benning

[116] Darren Benning, an economist, testified for the plaintiff. He was qualified to provide expert opinion evidence in the area of income multipliers and cost of future care calculations.

[117] Mr. Benning set out income multipliers that can be applied to an income stream from today's date to age 65. The actuarial multiplier only considers the contingency for early death. The economic multiplier considers early death and negative labour market contingencies such as the plaintiff may be unemployed, work part time, work part year, or voluntarily withdraw from the work force.

[118] I rely on Mr. Benning's income multipliers and cost of future care calculations later in this decision.

Dr. Joseph Wong

[119] Dr. Wong, a physiatrist, testified for the defendants. He was qualified to give expert opinion evidence in the areas of physical medicine and rehabilitation. Dr. Wong did not accept that Ms. Aarts-Chinyanta's right leg pain was a result of the accidents.

[120] Dr. Wong concluded that Ms. Aarts-Chinyanta has "myofascial injury to the right side cervical spine and right side thoracic paraspinal muscles." He noted the plaintiff complained of headaches after the first accident which he believed could be "cervicogenic in origin from her neck muscle strain." He explained that cervicogenic means muscle injury to the neck muscles which causes tightness. This tightness affects the cranial nerves, causing headaches.

[121] Dr. Wong testified that the plaintiff's psychological complaints and her severe headaches were outside his area of expertise. He would defer to the opinion of a neurologist.

[122] Dr. Wong stated the following regarding the prognosis for Ms. Aarts-Chinyanta:

> It is now more than five years after the first car accident, but the physical findings continue to be abnormal. I believe these impairments of the neck and upper back are permanent in nature and she will continue to have some residual pain in the neck and upper back areas as a result of the injury.

Dr. Louis Boucher

[123] Dr. Boucher testified as a fact witness for the defendants. He was the plaintiff's family doctor and has practised medicine in Vernon since 1997. He treated the plaintiff following all three motor vehicle accidents.

[124] Dr. Boucher was taken to the plaintiff's application for government housing for people with disabilities dated February 18, 2010. He agreed it was his signature on the document. Dr. Boucher testified that he wrote down the terms anxiety and depression based on his assessment and what Ms. Aarts-Chinyanta told him at the time. He also agreed his notation "severe anxiety causing poor sleep" was based on

his assessment and what Ms. Aarts-Chinyanta told him. He agreed that he prescribed Amitriptyline for depression. He did not know whether she took the medication. Dr. Boucher wrote that her hand was still painful and tender based on his assessment of Ms. Aarts-Chinyanta.

[125] In cross-examination, Dr. Boucher testified that there are assessment tools for depression and anxiety but sometimes he bases his assessment only on his discussion with his patient. In more serious cases he would refer the individual to a psychiatrist. He did refer Ms. Aarts-Chinyanta to a psychiatrist in 2014 but not when he filled out this form in 2010. In 2014 he also referred Ms. Aarts-Chinyanta to a neurologist for nerve conduction studies to determine if she suffered from compression and also to address her headaches. He also referred her to Dr. Inkpen, a physical medicine and rehabilitation doctor, and to an orthopedic surgeon for her shoulders.

[126] The plaintiff's Manulife Group Benefits form, dated February 17, 2010, was put to Dr. Boucher during cross-examination. Dr. Boucher acknowledged that he only referred to the plaintiff's right hand impairment and did not mention anxiety or depression. He testified this was because often patients do not want their mental health issues on their forms. If he only needed to refer to physical injuries, that is all he would put on the form. He did not deny that she had anxiety and depression at this time.

[127] On July 7, 2010, Dr. Boucher identified right hand pain as Ms. Aarts-Chinyanta's major barrier. He indicated this was temporary and indicated 6 to 12 months for Ms. Aarts-Chinyanta to recover.

[128] In re-examination, Dr. Boucher testified on October 9, 2014 he examined Ms. Aarts-Chinyanta's right foot. His examination did not reveal anything wrong with her foot. Ms. Aarts-Chinyanta could stand on her toes, there was no swelling, and she could walk.

Credibility

[129] The leading authority on credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398 aff'd 2012 BCCA 296. Justice Dillon summarized the key elements:

> [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.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
>
> [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.

[130] The court in *Sandhu v. Braich* (1991), 61 B.C.L.R. (2d) 273 (C.A.), (adopted more recently in *Samuel v. Chrysler Credit Canada Ltd*., 2007 BCCA 431 [*Samuel*]), addressed the principles to apply when medical experts rely on the subjective complaints of a plaintiff:

> 49 … It is trite law – although I note that what is trite law is frequently brushed aside – that in order for an expert to give an opinion the facts upon which he gives that opinion must be proven by the person who has personal knowledge of them: see *Enge v. Trerise*, (1960), 33 W.W.R. 577, 26 D.L.R. (2d) 529 (B.C.C.A.) and *Lenoard v. British Columbia Hydro & Power Authority* (1964), 50 W.W.R. 546, 49 D.L.R. (2d) 422 (Wilson, C.J.S.C.), in which that most distinguished judge said (at p. 548 [W.W.R.]):

> I now enter into an area in which I must consider subjective as well as objective evidence because both were placed before me without objection by counsel. All physicians must I think, rely to some extent on what their patients tell them. If, for instance, a patient had a pain in his neck and went to a doctor, mum, challenging him to find what, if anything, was the matter with him, then I think that doctor would be in almost as difficult a position as a lawyer would be if all his client told him was that he wanted to sue Tom Jones, and condescended to no further detail. When the doctor relates in court what his patient told him, he may be stating hearsay, but common sense in the courts has long ago rejected the idea that this evidence may not be heard and has accepted the idea that it should be listened to, not because it proves by itself the truth of the thing stated by the patient to the doctor, but because it defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence. It is closely allied to the hypothetical question often put to other expert witnesses where the witness is asked: "Well, granting the existence of such and such facts, what is your opinion?" The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to ejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established, having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[131] To summarize, if the plaintiff's account of her physical, mental, or emotional injuries as a result of the accident(s) is not persuasive, then the hypothesis upon which the expert opinions rest will be undermined: *Samuel* at paras. 15, 49–50.

[132] I am applying the principles from the above cases when assessing the plaintiff's evidence, as well as the lay and the expert opinion evidence tendered in this case.

Analysis

[133] The medical experts relied largely, although not exclusively, on Ms. Aarts-Chinyanta's subjective pain complaints. As candidly stated by Dr. Robinson:

> By their nature the symptoms of headache and neck pain are subjective. There are no objective measures such as a blood test or image that can document the presence, absence or magnitude of these complaints. However, this is almost universally true in patients with chronic headache disorders. The assessment of the headaches which includes diagnosis and impact can only be determined by self-report.

[134] Ms. Aarts-Chinyanta's credibility is therefore an important consideration in the evaluation of the nature of her injuries.

[135] While I have no doubt Ms. Aarts-Chinyanta has suffered since the three motor vehicle accidents, I have some concerns with her credibility. The following are some examples:

Medications

- Ms. Aarts-Chinyanta was questioned regarding the medications she took for depression and anxiety prior to MVA #1. She testified she filled the prescriptions but denied taking the medication. In cross-examination she was taken to her examination for discovery, conducted on March 22, 2018. At discovery she was asked: "but there were periods of time when you were on medication for anxiety and depression as early as 2010. Would you agree with that?" Ms. Aarts-Chinyanta replied: "Yes." She also testified at her examination for discovery that she tried the medication but she did not feel any different with it. She testified, "it just made me feel like I was weak."

- When these statements were put to Ms. Aarts-Chinyanta in cross-examination, she testified that she was only referring to medication for pain. There was no such qualification at her examination for discovery.

Other Accidents

- Ms. Aarts-Chinyanta slipped on her stairs between MVA #2 and MVA #3. She testified she felt sore that day but after that it was better. I question how she could tell it was better since she testified she is always in a lot of pain.

- Ms. Aarts-Chinyanta hit a deer in the summer of 2014. Her vehicle was written off yet she was unable to identify any injury as a result of this accident.

- It is possible but curious that her non-tortious accidents caused no injuries. This is in marked contrast to the three subject motor vehicle accidents.

Sunglasses

- Ms. Peters conducted a two day assessment of Ms. Aarts-Chinyanta. The first day the plaintiff was assessed at Ms. Peters' clinic and the second day was in Ms. Aarts-Chinyanta's home. Ms. Peters noted the plaintiff wore her sunglasses at the clinic but not in her home. Ms. Peters testified that she did not notice any difference in the lighting between the two settings. In testimony Ms. Aarts-Chinyanta denied that there was no difference between the lighting in the two settings. She testified that in her townhouse she uses curtains and has a tint on the windows.

- A photograph with her cousin was put to Ms. Aarts-Chinyanta in cross-examination. It is a relatively recent photo taken in Castlegar. Although it is bright out she is not wearing sunglasses. Ms. Aarts-Chinyanta explained that her sunglasses were in her hand because she hates having every photo with her sunglasses on. However, earlier she testified that light causes a sharp pain in her eye. This would be followed by pressure, and then she would get a stabbing pain in her eyeball. She wears polarized sunglasses to prevent that from happening. I query whether one photo would be worth this pain.

Exaggerated Testimony

- Ms. Aarts-Chinyanta testified that pre-accident her whole life centred around sports. Although I accept she was active, there was no evidence to establish that her whole life centred around sports.

- Ms. Peters found Ms. Aarts-Chinyanta exaggerated her pain levels throughout her testing and exhibited varied effort and at times less than full effort.

- Ms. Aarts-Chinyanta testified that she was "100% going to return to school" for early childhood education. However when questioned during her examination for discovery, she stated that she anticipated going back to school in some capacity but that it would depend on how her return to work went. She also agreed that it would depend on what was going on in her family life.

[136] In addition to these inconsistencies, in 2010 Dr. Boucher, on behalf of Ms. Aarts-Chinyanta, applied for government housing for people with disabilities. On the form he stated that Ms. Aarts-Chinyanta had severe anxiety causing poor sleep, she was unable to concentrate and be productive, she was having problems with her memory, and she suffered from depression. He testified he based these comments on what Ms. Aarts-Chinyanta told him, as well as his assessment of her at that time. Ms. Aarts-Chinyanta denied being depressed, being unable to concentrate or be productive, and having problems with her memory at that time. While she agreed she was having a tough time, she was anxious and having an "emotional disturbance", she denied she suffered from depression or anxiety in 2010. She also denied taking medications for depression or anxiety prior to MVA #1 despite her testimony at her discovery.

[137] I have no doubt that Ms. Aarts-Chinyanta has been significantly affected by the motor vehicle accidents. However, I find she exaggerated her symptoms from these accidents while downplaying her symptoms from the two non-tortious accidents. Moreover, I find Ms. Aarts-Chinyanta exaggerated her activity level prior to MVA #1. As the defendants pointed out, she was experiencing significant difficulties in her life prior to this accident. While she was active in her early twenties, her daily living activities in the years before the first accident were affected by her life circumstances. Her significant difficulties with her right hand caused her to be off work. She also had a very ill son who needed to be homeschooled and a husband who was unfaithful. She eventually separated from her husband. These were challenging circumstances for Ms. Aarts-Chinyanta and affected her previously active lifestyle.

[138] Ms. Aarts-Chinyanta's exaggerations may be partially explained by the fact that she perceives her injuries as more serious than they are. However, this does not explain her downplaying of the two non-tortious accidents or her denial of taking medications for depression prior to MVA #1. It does not explain Ms. Aarts-Chinyanta's varied or less than full effort during her Functional Capacity Evaluation.

[139] I must take these concerns into consideration when determining causation.

Causation

Legal Principles

[140] The law of causation is well established. Before assessing damages, the "plaintiff must establish a causal connection between the defendant's negligence and [the plaintiff's] pain": *Farrant v. Laktin*, 2011 BCCA 336 at para. 8 [*Farrant*]. The plaintiff bears the onus of proving that the defendant's negligence was the cause of her current symptoms: *Warkentin v. Riggs*, 2010 BCSC 1706 at para. 107.

[141] The generally accepted test for causation is the "but for" test: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–22. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*]; *Blackwater v. Plint*, 2005 SCC 58. Causation is found if the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8 [*Clements*].

[142] In the seminal decision of *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 324, the Supreme Court of Canada set out the test for causation, the hallmark of which is "a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion." The causation test does not demand scientific precision and should not be applied too rigidly. While proof of causation will often require expert evidence, common sense applies: *Athey* at para. 16; *Clements* at paras. 8–9.

[143] The plaintiff must establish a substantial connection between the tortious conduct and the injury: *Farrant* at para. 11. However, a robust and pragmatic approach to the "but for" test allows for there to be more than one cause of an injury. Where there is more than one cause of an injury, resulting in an indivisible injury, each tortfeasor is jointly and severally liable for the full loss, absent contributory negligence on the part of the plaintiff: *Bradley v. Groves*, 2010 BCCA 361 at

paras. 21 and 24, leave to appeal ref'd [2010] S.C.C.A. No. 337; *Khudabux v. McClary*, 2018 BCCA 234 at paras. 30–35.

[144] In *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) [*Yoshikawa*], Justice Lambert made the following comments regarding psychological injuries:

> 19 One of the most important principles, for the purposes of this case, is the principle that, for the purposes of assessing damages, a tortfeasor must take the person injured by the tort in the actual condition of that person at that time. This has been called the "thin skull" principle. In its application to psychological problems it has been called the "egg shell personality" application of the principle. In my opinion there is no basis for giving a more restrictive application to this principle in cases where psychological injuries are suffered than would be given in cases where only physical injuries are suffered. A predisposition to suffer psychological injury in circumstances such as those brought about in a particular case by a defendant's wrongful act does not relieve the defendant of the liability to compensate the plaintiff for the injuries represented by those psychological symptoms. Such relief could only occur, as I have said, if the psychological symptoms would have occurred in any event, even without the defendant's wrongful act, through an application of the cause-in-fact test….
>
> [Emphasis added.]

[145] In summary, the law does not draw a distinction between physical and psychological injuries, provided that the psychological injuries are established.

[146] When determining causation in this case, I must consider the thin and crumbling skull doctrines. As stated above, the thin skull doctrine requires tortfeasors to take their victims as they find them. If the plaintiff has a "predisposition to suffer psychological injury" so that the plaintiff's injury is unexpectedly severe, the defendant remains liable under the thin skull doctrine: *Yoshikawa* at para. 19; *Athey* at para. 34.

[147] In *Athey*, the Supreme Court of Canada discussed the need to take a pre-existing condition of the plaintiff into account:

> [32] … The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the Plaintiff is not to be placed in a position better than his or her original position.
>
> …

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

[148] Latent and pre-existing conditions must therefore be taken into account when assessing damages. The plaintiff is to be put back to their original position: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 [*TWNA*].

[149] The Court of Appeal in *TWNA* held that if the evidence demonstrates a "measurable risk" or a "realistic chance" that the plaintiff's pre-existing condition would have resulted in a loss regardless of the defendant's negligence, damages should be reduced. In other words, the defendant need not prove, on a balance of probabilities, the plaintiff's pre-existing condition would have caused a loss. The contingency that a loss would occur should be given weight according to its relative likelihood: *TWNA* at para. 48.

Analysis

[150] I accept that MVA #1 resulted in soft tissue injuries to Ms. Aarts-Chinyanta's upper back, neck, and right arm. She reinjured her right hand which was recovering from what appeared to be a successful surgery. She also began to suffer from headaches and increased sleep disturbances.

[151] Dr. Robinson opined that Ms. Aarts-Chinyanta's history and examination is consistent with "a diagnosis of persistent posttraumatic headache related to soft tissue injuries sustained in the first motor vehicle accident." Dr. Robinson explained that headaches are a common symptom following soft tissue injury to the neck. Ms. Aarts-Chinyanta's head pain may be migraines or tension type headaches. A

migraine is characterized by a throbbing discomfort which may be one-sided. He explained:

> Attacks are of moderate to severe intensity and may be associated with gastrointestinal upset and sensitivity to light and sound. Tension type headache is a generalized dull non-throbbing discomfort without associated features. The intensity is mild to moderate without incapacitating attacks.

[152] According to Dr. Robinson, research suggests there are "complex psychobiological factors" surrounding such injuries. These may be responsible for "changes in the neurological processing of sensory impulses within the pain system", resulting in pain in peripheral structures that do not have permanent tissue injury. In other words, chronic pain can lead to psychological issues. I find this is consistent with Ms. Aarts-Chinyanta's circumstances. As a result of her physical pain and headaches, she also began to experience anxiety and depression.

[153] MVA #2 aggravated the injuries from MVA #1. Ms. Aarts-Chinyanta also injured her right shoulder and right foot in this second accident.

[154] MVA #3 aggravated Ms. Aarts-Chinyanta's pre-existing injuries from the first two accidents.

[155] Today Ms. Aarts-Chinyanta's most significant injuries are headaches, including migraines, light and noise sensitivity, and poor sleep. She also suffers from anxiety and depression as a result of her chronic pain. She likely suffers from somatic symptom disorder, a preoccupation with pain. Ms. Aarts-Chinyanta's chronic pain is caused by the accidents yet none of her injuries alone explain her current level of disability. Her self-perception of her pain, caused by her psychological issues, impairs her functionality to a greater degree than her physical injuries would otherwise suggest. This was explained by both Dr. Robinson and Dr. Spivak.

[156] The problem is Ms. Aarts-Chinyanta suffered from psychological issues, including anxiety, depression, and sleep issues, prior to MVA #1. Ms. Aarts-Chinyanta did not have a predisposition to suffer psychological injuries as set out in *Yoshikawa*. Rather, she already suffered from psychological injuries prior to the first

accident. Two years before the first accident, Dr. Boucher filled out forms stating she suffered from anxiety and depression. He based this on what she described to him at the time. She was also prescribed medications for depression prior to the first motor vehicle accident.

[157] While the motor vehicle accidents certainly aggravated Ms. Aarts-Chinyanta's symptoms, they did not cause her psychological issues. There is a measurable risk Ms. Aarts-Chinyanta's psychological symptoms would detrimentally affect her, as they had in the past, even without the defendants' tortious conduct.

[158] Ms. Aarts-Chinyanta also had a pre-existing hand injury. Although she had successful hand surgery just prior to the first accident, there was a measurable risk that her right hand would continue to interfere with her function into the future without the accidents. Although she testified her hand had completely healed prior to the first accident, she could not know this with any certainty because she was still recovering. Dr. Rocheleau opined he was unable to determine "how much of her current impairment related to her right wrist is as a result of the previous injuries and surgeries which existed prior to the motor vehicle accident of July, 2012." However, in his opinion, the first accident did result in some additional damage to Ms. Aarts-Chinyanta's right hand, compromising her ability to use it.

[159] I find that Ms. Aarts-Chinyanta had pre-existing right hand impairment and psychological injuries prior to the first motor vehicle accident. Prior to the motor vehicle accidents, life handed Ms. Aarts-Chinyanta challenges that most individuals do not encounter, at least in such rapid succession. It is not surprising she developed psychological issues such as anxiety and depression prior to the motor vehicle accidents. However, as much empathy as I have for Ms. Aarts-Chinyanta, I do not accept the defendants alone caused her psychological conditions or her right hand injury. Rather, they significantly aggravated her pre-existing conditions.

Damages

[160] A fundamental principle of tort law is, to the extent a monetary award can accomplish it, a plaintiff should be placed in the same position they would have been

in had the accident not occurred. The plaintiff should not be placed in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[161] The defendants accept Ms. Aarts-Chinyanta suffers neck, upper back, and shoulder pain. They accept the accidents aggravated her pre-existing hand injury and that since the accidents she suffers from severe chronic headaches. However the defendants dispute the severity of her impairments.

[162] The defendants accept Ms. Aarts-Chinyanta has psychological symptoms, including sleep disturbances and possibly somatic symptom disorder. However, the defendants take the position that the plaintiff suffers from pre-existing conditions which should affect the amount of her damages.

[163] I agree Ms. Aarts-Chinyanta suffered from pre-existing psychological issues even if they had resolved in the year prior to the first accident. No evidence was called in this regard. Based on the evidence, there is a measurable risk that Ms. Aarts-Chinyanta would have suffered from psychological issues in the future without the accidents. The thin skull principle therefore does not apply. Instead, I must apply the crumbling skull doctrine and reduce the overall damage award. Ms. Aarts-Chinyanta is only to be returned to her position but for the accidents, not to a superior position.

[164] The contingencies that Ms. Aarts-Chinyanta would suffer from mental health issues in the future, and her continued pain and dysfunction in her right hand, must be given weight according to their relative likelihood: *TWNA* at para. 48. The goal is to put Ms. Aarts-Chinyanta in the position she would have been in if the accidents had not occurred. Therefore, Ms. Aarts-Chinyanta's award should be reduced by 15% for her pre-existing psychological conditions and 5% for her pre-existing hand injury.

Non-Pecuniary Damages

Legal Principles

[165] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life, and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100 [*Stapley*]. Non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases.

[166] As set out in *Stapley* at para. 46, common factors that influence an award of non-pecuniary damages include:

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.

[167] In *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, Justice Dickson (as he then was) stated that an award for non-pecuniary damages does not depend only on the seriousness of the injury, it also depends on the seriousness of the individual's loss:

> 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.).

[168] In determining non-pecuniary damages I have considered cases where a plaintiff suffers from chronic soft tissue injuries resulting in psychological injuries. I have paid particular attention to *Ahadi v. Valdez*, 2013 BCSC 714 and *Kristiansen v. Grewal*, 2014 BCSC 623.

Analysis

[169] Ms. Aarts-Chinyanta was a relatively active young woman prior to the motor vehicle accidents. She was a dedicated mother who did many activities with her children. She attended all their soccer games and hiked with them on weekends. She loved to cook the family meals. She enjoyed visiting with friends and family. Ms. Aarts-Chinyanta held a number of full-time jobs, most recently at Walmart as an inventory assistant on the night shift. This allowed her to be with her children before and after school.

[170] Despite these positive aspects of her life, Ms. Aarts-Chinyanta suffered financial difficulties as a result of a hand injury prior to MVA #1. She could not work after her first hand surgery in 2009. She also needed to care for her young son who was very ill in the years prior to the first accident, eventually homeschooling him. Ms. Aarts-Chinyanta became less active in the years leading up to the accidents due to these circumstances. She suffered from some anxiety and depression, likely as a result of her economic circumstances, the pressure to provide for her family, the stress of having an ill child, and her separation from her husband.

[171] Ms. Aarts-Chinyanta suffered soft tissue injuries in the motor vehicle accidents but today her most significant physical injuries are headaches, including migraines, and light and noise sensitivity. Ms. Aarts-Chinyanta also began to have

psychological problems due to her chronic physical injuries. She is now largely confined to her own house because noise and light negatively affect her and she has constant headaches. She cancels plans regularly; Ms. Aarts-Chinyanta's social life is a shell of what it was in the past.

[172] Today Ms. Aarts-Chinyanta is on a number of medications, has gained weight, and does little in the way of physical fitness. Her cousin described her as "very mono-tone". The accidents have significantly affected her life. Today her prognosis is bleak. Virtually all of the witnesses, including the experts, are of the opinion that she is functionally unemployable.

[173] Based on the above, I find that Ms. Aarts-Chinyanta is entitled to nonpecuniary damages of $165,000, reduced for her pre-existing injuries.

Past Wage Loss

Legal Principles

[174] The legal principles with respect to loss of income were helpfully explained by Justice Goepel in *Grewal v. Naumann*, 2017 BCCA 158:

> [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities…
>
> [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
>
> > [29] … What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
>
> …
>
> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine

> the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[175] The assessment of damages is not simply a mathematical calculation. It is the loss of capacity to earn income that is compensable, the "damage to the asset": *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. That said, economic and statistical data can be helpful in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

Analysis

[176] There is no real debate that Ms. Aarts-Chinyanta has suffered a loss of past earning capacity. The defendants accept this. As they stated:

> With respect to the Plaintiff's past loss of income, the Defendants submit an appropriate award taking into consideration the Plaintiff's pre – injuries and impairments arises from her employment working as a Walmart Greeter earning $11.20 per hour and working 15 hours per week. Accordingly, the Defendants' calculate the Plaintiff's net past loss of income to be $53,550 from the date of the first accident to the date of trial at an income tax rate of 15%. …

[177] The problem with the defendants' analysis is they are calculating Ms. Aarts-Chinyanta's past wages based on her income when her hand was preventing her from working full-time in the inventory department. I accept that just prior to the first accident Ms. Aarts-Chinyanta had what appeared to be a successful surgery on her hand and was on her way to recovery. I have acknowledged her hand may have continued to cause her problems in the future and have reduced her overall award for this contingency. However, I do not accept it would have forced her to continue to work part-time as greeter at Walmart indefinitely.

[178] I largely accept the plaintiff's analysis regarding past loss of earning capacity. It assumes that but for MVA #1 Ms. Aarts-Chinyanta would have resumed work in the fall of 2012, after she healed from her second hand surgery. I accept the following submission from her counsel:

> - [F]ollowing her hand surgery, she intended on returning to work in late August or early September 2012. It is accepted that she may have required a graduated return or modified duties as a greeter for a period. Assuming the plaintiff returned for a two-month graduated return, the loss for this period can be calculated as follows:
>
> Sept 1, 2012 – Nov 1, 2012 = 2 months at $1,180.00[1] = $2,360.00.
>
> - The plaintiff submits that, absent the first accident, by November 1, 2012, she would have been able to return to work fulltime in her inventory position with Walmart….
> - [A]ssuming she worked full time at any job [without an Early Childhood Development Diploma], her past wage loss could be calculated as follows based on minimum wage earnings[2]:
>
> $12/hr = $2,000.00 month x 86 months (from Sept. 1, 2012) = $172,000**.**

[179] The plaintiff calculated Ms. Aarts-Chinyanta's past loss of earning capacity to be $172,000 but this calculated the loss from September 1, 2012 when Ms. Aarts-Chinyanta would have been on her graduated return to work. I have therefore reduced this calculation by two months: $12/hr = $2,000.00 month x 84 months (from Nov. 1, 2012 to date of trial) = $168,000.

[180] I calculate the total past wage loss between the date of the accident and the date of the trial to be approximately $170,000, reduced due to Ms. Aarts-Chinyanta's pre-existing injuries. I leave it to the parties to make the appropriate adjustments to reach the net figure.

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[1] Based on her T4 income of $5,312 divided by 4.5 months.

[2] The minimum wage in BC is currently $13.85. It will rise to $14.60 on June 1, 2020. It was $12.65 from June 1, 2018 to May 30, 2019. The plaintiff stated $12 therefore represents a rough median. This is a reasonable assumption to make.

Loss of Future Earning Capacity

Legal Principles

[181] Damages for loss of earning capacity are characterized as compensation for a pecuniary loss: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32 [*Gregory*]. The object of an award is to restore the plaintiff to the position they would have been in but for the negligence of the defendant: *Lines v. W & D Logging Co. Ltd*., 2009 BCCA 106 at para 185, leave to appeal ref'd [2009] S.C.C.A. No. 197.

[182] In determining a claim for loss of future earning capacity, the court must consider two questions. First, has the plaintiff's earning capacity been impaired by his or her injuries? To answer this question in the affirmative, there must be sufficient evidence that there is a real and substantial possibility of future income loss. If so, second, what compensation should be awarded for the resulting financial harm that will accrue over time?: *Hoy v. Williams*, 2014 BCSC 234 at para. 153. As stated in *J.J. v. Barton,* 2017 BCSC 1196 at para. 57, "[t]he plaintiff is required to prove a real and substantial possibility of a future event resulting in a loss in order to recover damages for loss of future earning capacity."

[183] Like past earning capacity, the standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn,* 2003 BCCA 49 at para. 101; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

[184] In *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*], the Court of Appeal explained that there are two possible approaches to assess loss of future earning capacity: the "earnings approach", as applied in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), and the "capital asset approach", as applied in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Golaiy*]. Both approaches are correct.

[185] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133 [*Pololos*], Justice Voith summarized the applicable legal principles to consider when applying the earnings approach:

> f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
>
> g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[186] The earnings approach is more useful when the loss is more easily measurable. The capital asset approach is more useful when the loss is not as easily measurable. Either way, the plaintiff must prove that there is a real and substantial possibility of future events leading to an income loss: *Pololos* at para. 133; *Perren* at para. 33.

[187] If the quantification of the loss is to be proven on the capital asset approach, the well-known factors identified in *Golaiy* at 356 are considered:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> 3. 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. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labor market.

[188] The assessment of loss of future earning capacity must be based on the totality of the evidence and take into account both positive and negative contingencies: *Gregory* at para. 33. Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 at 15 (Ont. C.A.).

Analysis

[189] The question before me is whether or not there is a "real and substantial possibility of a future event leading to an income loss" for Ms. Aarts-Chinyanta: *Perren* at para. 33. I must consider Ms. Aarts-Chinyanta's pre-accident earning capacity and what diminution, if any, has she suffered in that capacity. I must also consider what future events or contingencies may impair her earning capacity.

[190] I find Ms. Aarts-Chinyanta has suffered a loss of future earning capacity as a result of the injuries she sustained in the accidents. As a result of her injuries there is a real and substantial possibility, in fact a near certainty, she will suffer an associated pecuniary loss.

[191] The defendants acknowledge that Ms. Aarts-Chinyanta is injured, affecting her earning capacity, but argue that she has exaggerated her pain and injuries. They take the position Ms. Aarts-Chinyanta has residual earning capacity. As the defendants put it:

> The Defendants' concede that the Plaintiff has suffered a loss of income, past and prospective, but maintain that the Plaintiff has the capacity to return to her position prior to the first accident as a Walmart greeter for 15 hours a week. Furthermore, it is the Defendants' position that with additional treatment as recommend by the Plaintiff's experts, it is a real and substantial possibility and not mere speculation the Plaintiff's residual earning capacity will improve in the future. …

[192] I have problems with this analysis. I do not accept that Ms. Aarts-Chinyanta is capable of working, even as a greeter at Walmart. Based on the medical reports, I do not accept that Ms. Aarts-Chinyanta has residual earning capacity.

[193] Drs. Lau, Robinson, and Rocheleau all opined that her headaches and sequalae mean Ms. Aarts-Chinyanta is functionally unemployable. They opined her prognosis is poor. They also opined her condition is not likely to improve with the passage of time. While I have found Ms. Aarts-Chinyanta exaggerates her pain, this is partially due to her psychological issues. I therefore do not find there is a real and substantial possibility that Ms. Aarts-Chinyanta will work in the future.

[194] Although Ms. Aarts-Chinyanta testified she always planned to return to school to obtain her early childhood education certificate, she never applied to college after her first attempt when she was very young. There were too many other issues in her life preventing her from pursuing higher education. She testified in 2012, when her hand was recovering from the successful surgery, she did not enrol in any college courses because she first had to return to work to pay for school. She testified at her examination for discovery that returning to school would depend on what was going on in her family life.

[195] I do not accept Ms. Aarts-Chinyanta would have gone back to college but for the accidents. In almost twenty years, she did not pursue any post-secondary education. She had many challenges and there is not enough evidence before me to conclude that there is a "realistic as opposed to a speculative possibility" that she would have pursued a diploma in Early Childhood Education. I agree with the defendants, there must be more than some vague plan to establish there is a realistic possibility she would have gone back to school.

[196] That said, the evidence established that Ms. Aarts-Chinyanta had a history of working full-time and she had a good work ethic. There is nothing to suggest she would not have continued to work full-time into the future, but for the accidents. She likely would have had some time off work due to the pre-existing injuries but I assume these absences would have been sporadic.

[197] Ms. Aarts-Chinyanta's loss is not easily measured. Ms. Aarts-Chinyanta established that she worked full-time in the years prior to the motor vehicle accidents. Ms. Aarts-Chinyanta has established she will suffer a loss of future earning capacity. The trickier question is whether there is a real and substantial possibility, beyond mere speculation, that Ms. Aarts-Chinyanta will earn beyond entry-level wages in the future.

[198] Ms. Aarts-Chinyanta's earning history prior to MVA #1 was based on a number of short-term positions and one longer position with Walmart where she earned just above minimum wage. She has no post-secondary training, diploma, or

degree. I have found she has not established she would have attended college to obtain her Early Childhood Education diploma. In these circumstances, I find that the evidence has not established a real and substantial possibility Ms. Aarts-Chinyanta would earn above entry-level positions in the future. Her damage award must reflect this finding.

[199] Relying on Mr. Benning's calculations, and assuming she would make $20 per hour in the future, the plaintiff argues that Ms. Aarts-Chinyanta is entitled to $500,000 for loss of future earning capacity. The defendants take the position that Ms. Aarts-Chinyanta is entitled to a much lower amount based on her residual earning capacity. Again, I do not accept that Ms. Aarts-Chinyanta has residual earning capacity.

[200] I assume Ms. Aarts-Chinyanta would make approximately $18.00 per hour after a few years at a lower hourly rate. Assuming she works 50 weeks per year, until age 65, and considering Mr. Benning's economic multiplier (which takes into account the contingencies of unemployment, part-time and part-year work, and voluntary withdrawal from the workforce), I find Ms. Aarts-Chinyanta is entitled to $480,000 for loss of future earning capacity to age 65. This award is to be reduced due to Ms. Aarts-Chinyanta's pre-existing conditions.

[201] Ms. Aarts-Chinyanta testified she received TTD benefits from ICBC of $623 per month. She may also have received other benefits. I leave it to the parties to adjust the award to reflect any income benefits she may have received that by law should be subtracted from her award.

Loss of Housekeeping Capacity

[202] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal addressed loss of housekeeping capacity. The court discussed the difference between a pecuniary award for loss of housekeeping capacity and the inclusion of damages as part of general award for non-pecuniary damages. The court's conclusion is summarized as follows:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[203] Ms. Aarts-Chinyanta testified she continues to do her own housekeeping although she has to pace herself. Based on the above principles, Ms. Aarts-Chinyanta's loss of housekeeping capacity is appropriately dealt with in the non-pecuniary award.

Cost of Future Care

[204] A plaintiff is entitled to compensation for costs of future care for the harm caused by a defendant's negligence. The law with respect to the appropriate approach to be taken in assessing future care costs is set out in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9:

> [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present costs of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
>
> [22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. …

[205] Future care items must be medically necessary. There must be an evidentiary link between the medical experts' assessment of disability and the recommended care: *Paur v. Providence Health Care*, 2017 BCCA 161 at para. 109.

Analysis

[206] Dr. Rocheleau opined he would encourage Ms. Aarts-Chinyanta to become involved in self-directed exercise with some community-based strategies such as yoga, pool exercises, and gentle aerobic conditioning (stationary bicycle, treadmill, elliptical trainer, etc.). In his opinion, additional counselling and treatment for her difficulties with anxiety, depression, and pain will likely be necessary to support maximal recovery.

[207] Dr. Spivak stated in his report that Ms. Aarts-Chinyanta benefited somewhat from psychotherapy and he suggested she restart it. At minimum, it would help her cope more effectively with her chronic challenges.

[208] Dr. Robinson does not believe that any further investigations will be helpful. He noted that CT imaging of Ms. Aarts-Chinyanta's head and neck have been unremarkable. He assumes that MR imaging of her brain or cervical spine would be normal. I repeat part of what he opined regarding treatments:

> - It is possible but not likely that triptan medications would be helpful in better controlling her more severe headaches.
>
> …
>
> - She has had trials of a number of medications including sertraline, nortriptyline, gabapentin, topiramate, cyclobenzaprine, venlafaxine and dantrolene. None of these medications appear to have given her any substantial headache relief.
> - She has had occipital nerve and medial branch blocking on the right side of her neck on at least two occasions without any decrease in headache or neck pain. Although I would defer to a pain management specialist, I doubt that there are any other interventional modalities that would be helpful to her.
>
> …
>
> - I believe the Botox would be a reasonable consideration for her.

[209] Ms. Peters recommended occupational therapy services, Botox treatment, a kinesiology program to update her exercise program, psychological counselling, and an assessment for medical cannabis.

[210] Ms. Peters made a number of other recommendations, some of which have already been implemented and some of which I do not accept. For example, Ms. Peters recommended home support services such as weekly housecleaning costs. I have already found that Ms. Aarts-Chinyanta can clean her own home. Ms. Peters also recommended the costs of six flights from Vernon to Lethbridge to visit her youngest son while he is in college. The evidence did not establish Ms. Aarts-Chinyanta would have travelled to Lethbridge six times but for the motor vehicle accidents.

[211] Dr. Lau recommended the following:

- medication simplification;
- MRI of the right shoulder to rule out pathology;
- biomarker testing;
- reduction of vitamins but probiotics for gastrointestinal health;
- reduce or cease taking naltrexone;
- intravenous lidocaine infusions;
- subcutaneous lidocaine infusions; and
- intravenous ketamine infusions.

[212] I find that many of the recommended treatments have been tried, unsuccessfully, by Ms. Aarts-Chinyanta. She does not want to try some treatments such as medical cannabis.

[213] As stated by Justice Silverman in *Ho v. Dosanjh*, 2010 BCSC 845:

> [91] I reject the notion that ongoing treatment that would provide the plaintiff with periodic temporary relief, but little to no additional improvement, should be something for which compensation should be paid for the rest of the plaintiff's life… [T]his loss has been considered as an aspect of non-pecuniary damages.

[214] Based on the above, and referring to Mr. Benning's present value cost of the recommended care items, I find that Ms. Aarts-Chinyanta is entitled to $20,000 for psychological counselling, $800 for kinesiology expenses to review her fitness program, $80,000 for the ongoing cost of her medications, and $6,000 for a trial of Botox treatments. This award will not be reduced for Ms. Aarts-Chinyanta's pre-existing conditions.

Special Damages

[215] The fundamental principle governing special damages is that of *restitutio in integrum*. The plaintiff is to be restored to the position they would have been in had the accident not occurred: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.).

[216] In *MacIntosh v. Davison*, 2013 BCSC 2264, Justice Davies held the following applies to the analysis of special damages:

> [127] Having reviewed all of the authorities to which I was referred, I have concluded that Saunders J.'s decision in *Redl* encapsulates the considerations which should bear upon the assessment of Mr. MacIntosh's special damages claims in this case.
>
> [128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.

[217] Ms. Aarts-Chinyanta claims $5,411 in special damages, plus $0.50 per kilometre for mileage. The defendant did not seriously dispute this amount. I therefore award $5,411, plus $0.50 per kilometre, in special damages. This award will not be reduced for Ms. Aarts-Chinyanta's pre-existing conditions.

Conclusion

[218] Ms. Aarts-Chinyanta is entitled to the following damages:

Non-pecuniary damages	**$132,000**
	($165,000 reduced by 20%)

Past wage loss	**$136,000** ($170,000 reduced by 20%)
Future loss of earning capacity	**$384,000** ($480,000 reduced by 20%)
Cost of future care	**$106,800**
Special damages	**$5,411**, plus $0.50 per kilometre
Total	**$764,211**

[219] I leave it to the parties to make any appropriate adjustments and to calculate pre-judgment interest on the award.

Costs

[220] Subject to relevant offers to settle, the plaintiff is entitled to costs. If the parties are unable to agree, within 45 days of this judgment either party is at liberty to file an application to determine costs.

"D. MacDonald J."