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1. *Bhatti (Litigation guaridan of) v. Ethier, [2018] B.C.J. No. 3409*

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# Bhatti (Litigation guaridan of) v. Ethier, [2018] B.C.J. No. 3409

British Columbia and Yukon Judgments

British Columbia Supreme Court

New Westminster, British Columbia

F.E. Verhoeven J.

Heard: April 30, May 1-4, 7-8, 2018.

Judgment: October 16, 2018.

Dockets: M162340, M162342

Registry: New Westminster

**[2018] B.C.J. No. 3409** | *2018 BCSC 1779*

Between Amandeep Kaur Bhatti by her Litigation Guardian Amar Kaur, Plaintiff, and Robert Leo Ethier also known as Robert L. Ethier, Mohni Bhatti and Bhagwant Singh, Defendants And between Amandeep Kaur Bhatti by her Litigation Guardian Amar Kaur, Plaintiff, and Joan Agnes Kozak also known as Joan A. Kozak also known As Joan Kozak, Mohni Bhatti, and Bhagwant Singh, Defendants

(145 paras.)

## Case Summary

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Head injuries — Headaches — Psychological injuries — Cognitive impairment — Depression — Action by Bhatti for damages for personal injuries sustained in two motor vehicle accidents when she was 16 years old allowed in part — The defendants admitted liability — Bhatti's psychological injuries were more significant than her physical injuries — Before the accidents, she had the potential to become a nurse or a medical doctor — She was now unlikely to achieve either of those occupations — Bhatti was awarded $925,000 for loss of earning capacity, $30,900 for future care, and $10,531 in special damages — The $200,000 award for non-pecuniary loss was reduced to $180,000 for failing to mitigate.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Non-pecuniary loss — Action by Bhatti for damages for personal injuries sustained in two motor vehicle accidents when she was 16 years old allowed in part — The defendants admitted liability — Bhatti's psychological injuries were more significant than her physical injuries — Before the accidents, she had the potential to become a nurse or a medical doctor — She was now unlikely to achieve either of those occupations — Bhatti was awarded $925,000 for loss of earning capacity, $30,900 for future care, and $10,531 in special damages — The $200,000 award for non-pecuniary loss was reduced to $180,000 for failing to mitigate.**

**Damages — Assessment of damages — Limiting factors — Duty to mitigate — Action by Bhatti for damages for personal injuries sustained in two motor vehicle accidents when she was 16 years old allowed in part — The defendants admitted liability — Bhatti's psychological injuries were more significant than her physical injuries — Before the accidents, she had the potential to become a nurse or a medical doctor — She was now unlikely to achieve either of those occupations — Bhatti was awarded $925,000 for loss of earning capacity, $30,900 for future care, and $10,531 in special damages — The $200,000 award for non-pecuniary loss was reduced to $180,000 for failing to mitigate.**

Action by Bhatti for damages for personal injuries sustained in two motor vehicle accidents. The first accident occurred in November 2012 when Bhatti was a front seat passenger in a vehicle driven by her mother. The vehicle collided with the defendant Ethier's vehicle at an intersection. The airbag in front of Bhatti deployed, striking her in the face and causing facial injuries. The second accident occurred in December 2012 when Bhatti was once again a front seat passenger in a vehicle driven by her mother. The second accident was much less forceful and severe than the first accident. The defendants admitted liability for causing the accidents. At the time of the accidents, Bhatti was 16 years old and enrolled in grade 11. She was healthy prior to the first accident. Some of her physical injuries had become chronic. Her mental or psychological injuries were more significant than her physical injuries. Bhatti took the position that but for her injuries she would have become a medical doctor, a registered nurse, or a nurse practitioner, and would have earned incomes commensurate with those occupations. She was seeking damages for loss of earning capacity of $1,750,000 or $1,588,584. She was also seeking $225,000 in non-pecuniary damages, $38,700 for the cost of future care, and $11,283 in special damages. The defendants took the position that Bhatti's loss of earning capacity was not as profound as she submitted. The defendants contended that her career aspirations had merely been delayed. The defendants further submitted that Bhatti had failed to mitigate her loss and that all of her damage claims should be reduced by between 25 and 30 per cent.

HELD: Action allowed in part.

Bhatti had struggled with academic studies since the accident, largely due to her injuries. Prior to the accidents, she had the potential to become a nurse or a medical doctor. She was now unlikely to achieve either of those occupations, although she likely remained capable of achieving a university degree. Bhatti was awarded $925,000 for loss of earning capacity. The effects of Bhatti's injuries on her life had been profound. She had chronic pain and even if there were some improvement, her cognitive functioning and her psychological condition would not return to their pre-accident state. Damages for non-pecuniary loss were assessed at $200,000. However, that amount was reduced by 10 per cent to $180,000 as Bhatti had failed to mitigate her loss. She had refused to accept some important medical advice and treatment options. Bhatti was awarded $30,900 for the cost of future care and $10,531 in special damages.

## Statutes, Regulations and Rules Cited:

Rules of Court, Rule 9-1

## Counsel

Counsel for the Plaintiff in both actions: ***K.D. Cowan*** and B. Yu, Articled Student.

Counsel for all Defendants in both actions: D.R. Lewthwaite.

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**Reasons for Judgment**

## F.E. VERHOEVEN J.

### I. Introduction

**1** The plaintiff claims damages for personal injuries suffered in two motor vehicle accidents that occurred November 4, 2012 and December 28, 2012. The defendants admit liability for causing the accidents. Although the second accident was relatively minor as compared with the first, the defendants acknowledge joint and several liability, and no party seeks apportionment of damages.

**2** At the time of the accidents the plaintiff was a 16 year-old high school student, enrolled in Grade 11 at Abbotsford Senior Secondary School. At trial in April and May 2018, she was 21 years of age.

**3** The main issue in the case is the extent to which the accident injuries have or will affect her career. The plaintiff contends that but for her injuries she would have become a medical doctor, or alternatively, a registered nurse, or a nurse practitioner, and would have earned incomes commensurate with these occupations. Although she personally has not given up her hopes, on her behalf, counsel contends that in all likelihood she will now earn an income commensurate with high school graduates generally. She claims damages for future loss of earning capacity of $1,750,000 or alternatively $1,588,584.

**4** The defendants contend that the plaintiff's loss of earning capacity is not as profound as the plaintiff submits. The defendants contend that her career aspirations have merely been delayed. The defendants contend that an award

of $250,000 for loss of future earning capacity is appropriate. The defendants also allege that the plaintiff has failed to mitigate her loss, in failing to accept medical treatment, primarily in resisting use of mental health treatment such as anti-depressant medication, and psychological treatment, and that all of her damage claims should be reduced by between 25% and 30%.

**II. Background**

**A. The Accidents**

**5** On November 4, 2012, the plaintiff was seated in the right front passenger seat of her father's 1997 Acura sedan, which was being driven by her mother. The Acura collided with the defendant Ethier's 1994 Buick sedan at the intersection of Marshall Road and Primrose Street in Abbotsford. The Buick attempted to make a left hand turn from eastbound on Marshall Road onto Primrose Street. The Buick collided with the Acura, which was proceeding westbound on Marshall Road. Photographs of the Acura show very extensive damage to the vehicle, particularly on the front right (passenger side) corner of the vehicle. The windshield was smashed, although the mechanism of damage to the windshield is not in evidence. The plaintiff was using the seatbelt. The airbag in front of the plaintiff deployed, striking her in the face, damaging her eyeglasses, and causing facial injuries.

**6** The plaintiff may have briefly lost consciousness. Her mother did not testify at the trial, however the entirety of her examination for discovery transcript on examination by counsel for the plaintiff is in evidence. Her mother testified through a Punjabi interpreter. Her mother states that her daughter was almost losing consciousness. She helped her daughter exit the vehicle. The plaintiff does not recall exiting the vehicle but recalls sitting on the pavement, and speaking to the ambulance personnel, who transported her to the hospital, which was nearby. She recalls that she had difficulty breathing. Her eyes, nose, and cheeks were swollen and she had difficulty opening her eyes. She was frightened and in pain, in her face, and her chest, neck, and back.

**7** The ambulance crew report states that she indicated that she had briefly lost consciousness. The hospital triage assessment indicates possible brief loss of consciousness. X-rays of her neck were taken, and showed no fractures. She was discharged after several hours.

**8** She saw her long time family doctor, Dr. Mohan Gill, the next day, November 5, 2012. The plaintiff reported a two minute loss of consciousness to Dr. Gill, but he noted that her mother, who accompanied her, was less clear about this.

**9** Dr. Gill noted that she had discomfort in her mid and lower back, anterior chest pain, and a throbbing headache. She had discomfort in her eyes, and had difficulty opening them. Examination showed what appeared to be chemical burns over her face as well as a superficial laceration on her left cheek, swelling and redness around both eyes, especially on the right. She had tenderness on palpation of her anterior chest wall, and of the paracervical and paralumbar muscles on both sides. She had a normal straight leg raise to 90degree bilaterally. She was diagnosed with soft tissue injuries. She was given eyedrops and Dr. Gill prescribed pain relief medications. Dr. Gill saw her again on November 8, 2012. He saw no evidence of neurological injury. He noted what appeared to be cervical strain. On November 15 her neck and back pain was improving. Her facial lesions had improved. On November 30, 2012 on examination she was unchanged but she reported that she was having increased neck and back pain, predominantly neck pain.

**10** The plaintiff returned to school in late November after an absence of about two or three weeks. She had some further absences in December, before the winter break in late December. She had difficulties at school, due to headache, persisting pain, difficulty in sitting, and with stairs.

**11** She began physiotherapy on referral from Dr. Gill in late November. She continued with physiotherapy about three times per week until mid March 2013, and completed a total of about 54 sessions. She testified that the physiotherapy was helpful but she was only about 20% recovered within three months of the first accident. She had a further set of eight physiotherapy sessions in October and November 2013.

**12** The second accident occurred December 28, 2012, while the plaintiff was off school for the winter break. It was much less forceful and severe than the first accident. Once again the plaintiff was seated in the right front (passenger) seat of a vehicle (Mazda Tribute) being driven by her mother. She was wearing her seatbelt. The defendant Kozak's 1998 Ford Taurus sedan exited from a mall parking lot, striking the Mazda on the driver's side as it proceeded southbound on Gladwin Road. The damage to the vehicles was relatively minor. No police or ambulance attended. The plaintiff's mother drove the Mazda home. Both vehicles were repaired. The plaintiff testified that she felt a jolt, and felt shaken up. She became nervous about travelling in a vehicle. She was seen by Dr. Gill about the second accident on January 7, 2013. She complained then of headaches, blurry vision, increased lower back pain, and difficulty concentrating and focusing on her studies.

**13** The plaintiff was also involved in a third motor vehicle accident on February 5, 2016. The vehicle she was in was struck from the rear by another vehicle. Although the plaintiff testified that she was shaken up in this accident and that her injuries were aggravated, plaintiff's counsel advised me that there is no allegation in these proceedings that she suffered an injury arising from this accident. There is no reference to the third accident in Dr. Gill's report. Dr. R. Miller mentions this accident on page 7 of his report, as it occurred while she was on her way to see him for a defence IME. Clearly it was not significant.

**14** She was healthy prior to the first accident.

### B. Treatment and Course of Recovery

**15** The plaintiff has continued to be treated by Dr. Gill to the present. He provided a single medical legal report, dated January 6, 2018, and he testified at the trial. The evidence of Dr. Gill is primarily helpful in relation to succinctly summarizing her condition and treatment over time.

**16** Some of the plaintiff's physical injuries have become chronic. The plaintiff's mental or psychological injuries are more significant than her physical injuries.

**17** In 2013, Dr. Gill referred her to a physiatrist, Dr. Reebye. He diagnosed soft tissue injuries with anxiety. He recommended non-narcotic pain medication, stretching exercises and relaxation techniques. He also recommended that she see a psychologist or counselor regarding her anxiety.

**18** She saw a kinesiologist several times in late 2014 and early 2015.

**19** In January 2013, Dr. Gill noted symptoms of anxiety and depression, and that she appeared to have post traumatic stress disorder (PTSD). He suggested that she see a psychologist, but she did not follow up on this suggestion. By November 2013, she was "feeling quite despondent about losing her life dreams and plans and goals". She was having difficulty overcoming obstacles and had thoughts of harming herself. Dr. Gill referred her to a psychiatrist, Dr. Zaghloul. She first saw Dr. Zaghloul several months later on March 26, 2014. In the meantime, Dr. Gill prescribed anti-depressant medication, Cymbalta. She complained of nausea with that medication, and so Dr. Gill prescribed another anti-depressant, Cipralex. The plaintiff saw Dr. Zaghloul nine times over the course of almost two years, to February 1, 2016. His consult reports to Dr. Gill are in evidence for factual purposes, by agreement of the parties, and Dr. Gill refers to Dr. Zaghloul's diagnosis in his report. Dr. Zaghloul testified at trial.

**20** Dr. Zaghloul diagnosed Adjustment Disorder with Anxious, Depressed Mood, or Major Depressive Disorder, features of Post-traumatic Stress Disorder, and perfectionist traits. By August 21, 2014, Dr. Zaghloul noted that the plaintiff was much improved. She had more realistic plans for her future and seemed to be motivated. She was reluctant to utilize psychiatric medications prescribed by Dr. Zaghloul. Notwithstanding this, overall, Dr. Zaghloul noted slow but steady improvement in her condition. On her final visit with him, February 1, 2016, she complained of poor short-term memory and difficulty with concentration, but described her mood as generally good. Overall, the report is quite positive.

**21** The plaintiff failed to show for her next scheduled visit with Dr. Zaghloul on May 20, 2016.

**22** The plaintiff has not followed advice to see a counsellor or psychologist. As noted, Dr. Gill discussed seeing a psychologist with her January 22, 2013. Drs. Gill and Miller noted that in 2013 Dr. Reebye suggested that she see a psychologist or counselor regarding her anxiety. This or similar recommendations were made on several occasions by Dr. Zaghloul (March 26, 2014; April 14, 2014; and February 1, 2016.) She was assessed on separate occasions by a psychologist and a registered clinical counsellor, but there is no evidence that she obtained such treatment.

**23** At the time of her February 1, 2016 visit with Dr. Zaghloul, the plaintiff had started nursing courses at the University of the Fraser Valley (UFV). She reported to Dr. Zaghloul that she was coping well with her subjects. However, she subsequently failed one of courses she was taking at the time, HSC 111 or Human Anatomy and Physiology I. This resulted in UFV removing her from its Bachelor of Science in Nursing (BSN) program in May 2016. In order to obtain re-admission to the program, she retook the course through an online program with Thompson Rivers University (TRU) and passed, achieving a B+ grade, despite only achieving 50% on the final exam. The TRU credit is transferable to UFV. But as of trial she had not been able to successfully complete the next course, Anatomy and Physiology II. She has failed this course twice. She has taken the course for a third time and was scheduled to write the final exam shortly after the end of the trial.

**24** As of August 2017, UFV advised her that she was permanently removed from its BSN program. At trial, she hoped to successfully pass the Human Anatomy and Physiology course and enter the BSN program at Kwantlen Polytechnic University, (KPU) which had been her second choice, after UFV. However she was pessimistic about her chances of success there, or anywhere else.

**25** As of December 5, 2017, the most recent attendance with Dr. Gill prior to the date of his report, she had discomfort in her left scapular region, and chronic pain and headaches.

**26** At trial, the plaintiff testified that she has or had the following conditions:

1. upper left back or shoulder blade area - which bothers her quite a bit and appears intermittently. A localized, sharp stabbing pain. Triggered by activities;
2. lower back pain - much improved.
3. headaches - now two or three times per week, for about 30 or 40 minutes which is brought on by stress;
4. appearance - significant weight gain, and residual minor scarring on her face;
5. sleep - OK, but variable;
6. focus and concentration - still having difficulties. Easily distracted.
7. anxiety with driving;
8. personality change - formerly she was outgoing, motivated, determined, strong willed. Now, she becomes tearful easily, is easily flustered, is anxious, and irritable. She feels that her relationship with her family has been negatively affected. She is no longer the "reliable, perfect child" that she was before;
9. intrusive thoughts - thoughts of, "why did this accident happen to me?", and "it's not fair", triggering depression. During her testimony about this, and about her relationship with her family, she was tearful.
10. in the past, she had nightmares;
11. in the past, she had suicidal thoughts. This has not continued.

**27** The trial was short for a case of this nature, and there is not a great deal of collateral evidence from other witnesses. However the plaintiff was a credible witness. Her own description of her condition is reliable. Her former teachers corroborated her pre-injury high level of achievement, which is well documented. Her 16-year-old brother testified as to the effects of the injuries to his sister. His evidence was generally in line with her own evidence, but tended to be conclusory in nature. Nevertheless, I place some weight on it. He described her as being devastated by her failure at university. In the context of all of the other evidence, I have no difficulty accepting this.

**28** Her mother testified on her examination for discovery that her daughter was always a hard working student, but that since the accident, she has had to work and study much more than she did before. There was no opportunity for cross examination of her mother, and in another case that could result in little or no weight being given to evidence introduced in this manner. In this case, however, there is no reason to doubt this evidence.

**29** The immediate post accident photos show significant facial injuries. However, the plaintiff's residual facial scarring is quite minimal, if there is any at all. She testified that the scars remain visible but cannot be seen if she wears make-up. I was unable to observe any scarring in court, from a close distance. No photographs of residual scarring are in evidence. Dr. Tarzwell noted that although she stated that she sees her face as scarred every time she looks in the mirror, he was unable to perceive any scars on her face. Dr. Gill testified on cross-examination that her lesions had healed and that there was no visible scarring. I conclude that the residual scarring is very minor and is essentially only noticeable by the plaintiff herself.

**30** There has been improvement in her physical condition. On her examination for discovery in May 2016 she testified her neck pain and her mid back pain was 80% improved. She did not complain of neck or mid back pain at the trial. She testified that her lower back was 80% improved. At trial, as noted above, she testified that her lower back was much improved.

**31** As to driving, she was able to drive to and from court each day of the trial from her home in Abbotsford to New Westminster, a not inconsiderable journey, considering the typical weekday traffic conditions for the route.

**32** Vocational test results administered by a vocational psychologist, Dr. D. Powers, on October 5, 2015, showed diminished cognitive faculties especially in concentration and short term memory. Her academic fluency scores were also in the low to average range.

**33** The most relevant medical reports from the point of view of the assessment of damages are those of two psychiatrists, Dr. R. Tarzwell and Dr. R. Miller. They largely agree with each other although there are some significant differences in their opinions.

**34** At the request of her counsel the plaintiff saw Dr. Tarzwell, for medical-legal purposes on October 2, 2017. His report is in evidence and he testified at the trial. Dr. Tarzwell grouped her difficulties into three areas: physical, cognitive, and emotional. The physical complaints he was advised about are similar but more severe than the plaintiff testified to at trial. As for her cognitive difficulties, Dr. Tarzwell noted the plaintiff's self-described difficulties with distractibility, decision-making, reading comprehension, memory, and verbalization. He administered a brief cognitive test, the Montreal Cognitive Assessment (MOCA), on which she scored 24/30. A normal score is 26 or more, thus she was within a mildly abnormal cognitive range. Emotionally, Dr. Tarzwell noted that the plaintiff reported an obsessive fixation on the accident. She indicated that she was unable to "get over it." She weeps regularly, and asks her mother, "why did this happen to me?" While she is intellectually aware that she needs to move past the accident, she cannot, psychologically. He added:

> She resents the loss of her previous ability to conquer academic topics with ease, and she is angry that she "should" be finishing university now, while in reality she cannot complete first year science. She has become estranged from friends, whereas she used to be involved in the community: fundraising, teaching dance, volunteering. By contrast, her only interest at present is walking her dog. She has angry outbursts toward her mother or brother once a month, complaining that what happened to her is unfair, wanting to

> know why it happened. ...She exhibits high resistance to exploring her emotional world, and she responds to efforts at focusing the inquiry with a broad array of defence mechanisms, some of which appear self-defeating, such as a pronounced capacity to ruminate on the unfairness of the accident and its consequences... She scores 66 on the Post-traumatic Disorder Checklist, well above the clinical cut-score of 35. She scores 46 on the Beck Anxiety Inventory and 34 on the Beck Depression Inventory, both in the Severe range.

**35** The plaintiff's testimony at trial was similar to her comments to Dr. Tarzwell.

**36** Dr. Tarzwell diagnosed (1) mild Traumatic Brain Injury (mTBI); (2) mild Neurocognitive Disorder Secondary to Traumatic Brain Injury; (3) Post-traumatic Stress Disorder, and (4) Chronic Pain with Central Sensitization.

**37** At the request of the defendants the plaintiff saw Dr. Miller, on February 5, 2016. His report was written much later, on January 16, 2018, thus when he wrote his report he had the benefit of subsequent information such as the report of Dr. Tarzwell, and the reports of Dr. Zaghloul, including his final two reports, which for some reason Dr. Tarzwell did not have. Dr. Miller did not testify at the trial.

**38** Dr. Miller's diagnosis is similar but not identical to that of Dr. Tarzwell. He diagnosed: (1) minor TBI [but he agrees with Dr. Tarzwell's diagnosis of "mild" TBI, so these descriptors are not different, apparently]; (2) major depressive disorder; (3) post-traumatic stress disorder; (4) Somatic Symptom Disorder with predominant pain. He was uncertain about Dr. Tarzwell's diagnosis of Neurocognitive Disorder Secondary to Traumatic Brain Injury. He observed that most cases of mild traumatic brain injury resolve within a few months, although a small minority do not. He suggested a neuropsychological assessment in order to help distinguish whether the plaintiff's subjective symptoms and her low score on MOCA was caused by neurocognitive disorder or other factors, including low mood, anxiety and persisting pain. Dr. Miller agrees with Dr. Tarzwell that the plaintiff describes chronic pain symptoms, but states that the diagnosis listed by Dr. Tarzwell of Chronic Pain with central sensitization is not a DSM-5 diagnosis, and that the DSM-5 diagnosis of Somatic Symptom Disorder with predominant pain is probably applicable.

**39** Dr. Miller suggests trials of anti-depressant medications and cognitive-behavioural psychotherapy.

**40** Like Dr. Miller, Dr. Tarzwell suggests further investigation in order to help determine the cause of her problems, so as to enable appropriate treatment. He suggests that she undergo a PET scan in order to assess her brain function. This could lead to treatment approaches for her cognitive function problems. He also suggests ongoing psychotherapy for one to two years to help her move past her severe rumination. He adds that unless she is able to progress on her substantial ruminations and her resentment, she is likely to remain stalled in her ability to move forward in recovery from her PTSD. He noted her resistance to utilizing antidepressant medications, as reported by Drs. Gill and Zaghloul. He suggested that she have "rational pharmacological support for her brain injury" and then she might benefit from cognitive rehabilitation therapy. In summary, he suggests treatment for her PTSD, cognitive deficits, and her chronic pain. He suggests that she attend a chronic pain clinic.

### C. Prognosis and Treatment Recommendations

**41** The plaintiff acknowledges perfectionistic tendencies, which she became aware of in about grade six or seven. She commented that her class notes had to be perfect or she would re-write them. She recognizes that her perfectionism and high standards have both positive and negative consequences. Dr. Tarzwell noted that her pre-accident character structure appears to include obsessive traits, such as perfectionism, and those obsessive traits likely contribute to her obsessive ruminations around why the accident happened to her. He added that they also likely contribute to her significant resistance to emotional exploration, a notable preoccupation with medication side-effects, and a tendency to exert strong controlling tendencies in treatment situations, even when doing so is against her own interests abandoning therapies against medical advice that could impact her recovery.

**42** Dr. Tarzwell's opinion is that the plaintiff's neurocognitive disorder is permanent. Improvement may be possible,

but complete recovery is unlikely. He adds that her PTSD is quite entrenched because of her ruminative resentment, and she has so far been resistant to treatment with medication. He states that the prognosis for her pain is difficult to assess, as she has not attempted any specific pharmacological treatment for chronic neuropathic pain. While the condition itself is likely permanent, there could be substantial relief available with the use of evidence-based approaches, such as those that might be utilized within a chronic pain program.

**43** In Dr. Miller's opinion, if neuropsychological and neurological assessments reveal that the plaintiff has suffered persisting neurocognitive injury, then further recovery in neurocognitive function is unlikely. Dr. Tarzwell agrees. Dr. Miller states that the prognosis for recovery from PTSD is poor, although he supports psychotherapy. He states that the prognosis for recovery of her anxiety and depression is guarded, and is probably related to persistence of her pain symptoms.

**44** Dr. Gill states that the plaintiff has been left with chronic symptoms of neck and back pain, and that, as he says, more significantly, she is left with significant cognitive decline. Dr. Gill states that she has difficulty with focus and concentration and experienced a significant decline in her academic functioning. As Dr. Gill did not administer cognitive tests, his comments regarding her problems with concentration and cognitive decline appear to be based only on the comments of the plaintiff herself and the reports of others such as Dr. Tarzwell and Dr. Powers. Dr. Gill's report includes several conclusory remarks regarding how her injuries will affect her career prospects. For example, Dr. Gill states that because of her academic challenges, her vocational future is very limited. As I advised counsel during the course of the trial, I can put no weight on these comments. They have minimal independent medical basis, exceed the scope of Dr. Gil's expertise, and trench inappropriately on the issues that are for me to decide.

**45** Dr. Gill agrees with the recommendation of Dr. Tarzwell for a PET scan. He reviewed Dr. Tarzwell's recommendations with the plaintiff on December 5, 2017, several months before the trial.

**46** As noted, the plaintiff resisted following some but not all medical advice for treatment. Dr. Gill agreed he had an ongoing struggle with her regarding the use of anti-depressant medication. She resisted psychotherapy or counselling. The reports of Dr. Zaghloul support these same issues. Dr. Tarzwell's evidence is that the plaintiff appears to have been quite reluctant to engage with psychiatric treatments regularly altering and invariably stopping them against medical advice, while complaining of side effects, even though they are documented at multiple points as helpful. By the time he met her, she had completely devalued medication. As quoted above, he also noted that she exhibits "high resistance to exploring her emotional world" and "she responds to efforts at focusing the inquiry with a broad array of defence mechanisms, some of which appear self-defeating, such as a pronounced capacity to ruminate on the unfairness of the accident and its consequences." I interpret the comment about "high resistance to exploring her emotional world" as being linked to her reluctance to engage in psychotherapy or counselling.

**47** The PET scan recommended by Dr. Tarzwell and the neuropsychological testing recommended by Dr. Miller have not yet occurred. The plaintiff has also not yet engaged in Drs. Tarzwell and Miller's other treatment recommendations including neurological assessment, psychotherapy, further pharmacological treatment, and attendance at a chronic pain clinic.

**48** Dr. Gill endorses the therapeutic value of active rather than passive rehabilitation in line with the recommendations of Dr. Reebye to the plaintiff, and as noted in the report of Dr. Tarzwell. Although the evidence on this point is very limited, it appears to me that the plaintiff has not been able to engage in much exercise. She mentioned that she does stretches in the morning, and walks her dog.

**49** Overall, the prognosis for complete recovery is poor, but there are considerable uncertainties. There are viable treatment options which could provide significant benefit. Recommended treatment options have not yet been undertaken, and could refine the diagnosis and potentially improve the prognosis.

**50** However, according to Dr. Tarzwell, treatment will not improve her cognitive deficits if they are caused by the MTBI. The opinion of Dr. Miller is essentially the same, in saying that if neuropsychological and neurological

assessments indicate that she sustained persisting neurological injury, then recovery of neurocognitive function is unlikely. If her cognitive deficits are caused by her pain or other emotional and psychological issues, then improvement may be possible. Barring effective treatment, her cognitive deficits are permanent. Even with treatment, it is not likely that she would fully recover to her pre injury cognitive or emotional condition.

**51** Although the plaintiff has certainly cooperated with medical treatment to a significant degree, she has also consistently resisted some important recommended treatment options. On the evidence, these options remain open to her now. The chances that treatment could alleviate her symptoms is relevant to the assessment of damages.

**52** The plaintiff's emotional and psychological health is closely related to her academic and career progress, which remains very uncertain at present.

## III. Analysis

### A. Loss of Earning Capacity

#### 1. Legal Principles

**53** As I did in *Mullens v. Toor*, *2016 BCSC 1645*, aff'd *2017 BCCA 384*, I adopt my own summary of the relevant legal principles to be applied to the assessment of past and future loss of earning capacity as set out in *Sendher v. Wong*, *2014 BCSC 140*, at paras. 158 - 163 (past) and 171 - 177 (future), as follows:

> [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, *2010 BCCA 10* (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, *2009 BCCA 106* (CanLII), at para. 153; *X. v. Y.*, *2011 BCSC 944* (CanLII), at para. 185.
>
> [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.
>
> [160] In *Smith v. Knudsen*, *2004 BCCA 613* (CanLII), at para. 29, Rowles J.A. stated:
>
> 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.
>
> [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, *2010 BCCA 140* (CanLII), at para. 32; *Falati v. Smith*, *2010 BCSC 465* (CanLII), at para. 41, aff'd *2011 BCCA 45* (CanLII).
>
> [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.
>
> [163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; Lines, at paras. 152-186.
>
> ...
>
> [171] The Court's essential task is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: Gregory, at para. 32. Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines, at para. 185.

[172] The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), *1985 CanLII 149* (BC SC), *26 B.C.L.R. (3d) 353*; *Pallos v. Insurance Corp. of British Columbia* (1995), *1995 CanLII 2871* (BC CA), *100 B.C.L.R. (2d) 260*; *Pett v. Pett*, *2009 BCCA 232* (CanLII).

[173] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, *2001 BCCA 1* (CanLII), at para. 18.

[174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos* and the "capital asset approach" in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, *2010 BCCA 140* (CanLII), at para. 12.

[175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert*, *[2011] B.C.J. No. 1931* at para. 233.

[176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert*, at para. 233.

[177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, *2003 BCCA 49* (CanLII), at para. 101:

> [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, *1996 CanLII 183* (SCC), *[1996] 3 S.C.R. 458* at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133* at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), *1985 CanLII 179* (BC SC), *49 B.C.L.R. (2d) 33* at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, *2001 BCCA 1* (CanLII) at para. 11; *Ryder v. Paquette*, *[1995] B.C.J. No. 644* (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), *1995 CanLII 1971* (BC CA), *12 B.C.L.R. (3d) 248* (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. ...
>
> [Emphasis added.]

**54** 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: *Grewal v. Naumann*, *2017 BCCA 158* at para. 49, citing *Dunbar v. Mendez*, *2016 BCCA 211* at para. 21.

**55** As I will explain, in this case the capital asset approach is applicable. The following comments of Savage J.A. in *Villing v. Husseni*, *2016 BCCA 422* are relevant:

> 18 Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, *2013 BCCA 305*:
>
> > [56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in Brown in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to

earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

19 In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:

(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 labour market.

20 The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

**2. Background**

**56** The plaintiff's parents are immigrants from India. The plaintiff was born in Canada, although she took English as a Second Language courses in elementary school. The language at home is Punjabi.

**57** Her parents have two children, the plaintiff and her younger brother. Her father is a lead hand at a mink farm, and her mother is a homemaker. She testified that her parents encouraged their children to work hard and get a good education. It is clear that the plaintiff accepted this advice and has tried very hard to follow it.

**58** Before the accidents the plaintiff was a very dedicated, high achieving, successful student. She enjoyed school. In grade six she earned a mix of A's and B's. In Grade seven she achieved straight A's on her final grades. The report card notes that she was a dedicated, hard-working student with a positive attitude about her education. She was nearly a straight A student in each of grades eight, nine and ten, the three academic years prior to the accidents.

**59** In grade eight she was named to the Principal's List for each term. Her final grades included five A's and two B's. She was awarded the Student Leadership Award. Her grade eight teacher, Ms. Landry, testified at the trial. She testified that she achieved this award because she exemplified what it meant to be a student leader. She managed to overcome a 43 day absence during the school year, when she was in India with her family.

**60** In grades nine and ten she achieved the Principal's Honour Roll. This requires marks of 91% or better. One of her teachers in grades 9 to 12, Ms. Janzen, testified at the trial. She testified that the plaintiff was diligent student who stood out from the others. She would almost describe her as an overachiever. She continued to exhibit leadership skills. Based on her academic performance she was able to enroll in challenging International Baccalaureate (IB) courses in grade 11, the year during which the accidents occurred. Due to the accidents the plaintiff was forced to drop the two IB courses she was enrolled in, as she had fallen too far behind.

**61** Ms. Landry testified that she was aware that her goal was to be a nurse. She was not asked to clarify if she obtained this understanding before or after the accidents.

**62** The plaintiff has regularly volunteered her time to help others and the community. She continues to do so. Before the accidents she volunteered to help younger students at school. She mentored younger students. She organized school events, and was active in charitable fundraising. She volunteered with a Sikh youth summer camp

in 2010 and 2011, and 2013. She helped her younger brother with his homework. From February 2013 to February 2015 she was a high school volunteer with the Abbotsford Regional Hospital. She volunteered a total of 134 hours. In January 2017 she resumed this work as an adult volunteer at the hospital, and she continues to do so. As of trial she had volunteered for a total of 270 hours, and she intends to continue.

**63** Her academic success did not come without significant effort. She testified that even in elementary school she made to do lists and crossed off items as they were completed. She continued doing so in high school. In high school she worked on homework for three to four hours per day.

**64** She took great pride in her schoolwork and her accomplishments. She enjoyed school. After the accidents, school has become a burden and a source of frustration and disappointment.

**65** She testified, very insightfully in my view, that the whole process of the accident litigation has been very intrusive. It may be that conclusion of the litigation will allow her to focus more on her recovery.

**66** At trial, the plaintiff presented as an intelligent person, with a good memory, who was notably articulate, and who seemed to have no stamina problems during the course of her testimony.

**a) The Plaintiff's Position**

**67** The plaintiff relies on the report of an economist, Darren Benning, as a basis for the assessment of damages for loss of earnings capacity.

**68** Pursuant to the plaintiff's instructions, Mr. Benning postulated four scenarios:

1. In the absence of the accidents, the plaintiff would have competed a 4-year Bachelor of Nursing degree program by Year 1 (coinciding with the commencement of the trial, April 30, 2018) and subsequently, she would have pursued a career as a Registered Nurse (RN) in the BC public health system, until her retirement no later than age 60 years;
2. The plaintiff would have worked as an RN in the BC public health system until September 1, 2021, at which time she would have commenced a two year Master of Nursing program as a Nurse Practitioner (NP). Subsequently, starting from Year 6 (i.e., April 30, 2023), she would have pursued a career as a NP, until her retirement no later than age 65 years;
3. The plaintiff would have worked as an RN in the BC public health system until September 1, 2021, at which time she would have commenced a three-year Medical Doctor (MD) degree program. Subsequently, for the period of July 1, 2024 to June 30, 2026, the plaintiff would have participated in a two-year residence program. Thereafter, the plaintiff would have pursued a career as a Family Physician (GP) from July 1, 2026 through to her retirement no later than age 65 years.
4. With the accident, the plaintiff will achieve employment earnings corresponding with her level of education, i.e., the average BC female High School Graduate (HSG), until her retirement no later than age 65 years.

**69** Mr. Benning calculates the career earnings of the plaintiff under these scenarios as follows:

1. Registered Nurse: $2,214,909
2. Nurse Practitioner: $2,603,302
3. Family Physician: $3,651,055
4. HSG: $852,852.

**70** Thus, losses can be calculated by subtracting the assumed HSG income the plaintiff will earn from each of the other three scenarios as follows:

1. Registered Nurse: $2,214,909 - $852,852 = $1,362,057 loss
2. Nurse Practitioner: $2,603,302 - $852,852 = $1,750,450 loss
3. Family Physician: $3,651,055 - $852,852 = $2,798,203 loss

**71** Mr. Benning's calculations take into account negative labour market contingencies based upon broad statistical averages applicable to females of the plaintiff's age and assumed level of education: (1) Non-Participation in the Labour Force; (2) Unemployment; (3) Part-Time Work; (4) Part-Year Work. They also take survival contingencies into account.

**72** The tables prepared by Mr. Benning utilize the following amounts for total employment income: (1) registered nurse: $86,391, in year one (2) nurse practitioner: $126,870, in year 6; (3) physician: $182,144, in year 10 (4) high school graduate: $28,783, in year one.

**73** As his report states, Mr. Benning recognizes that his calculations are only illustrations intended to assist the court in assessing the loss.

**74** Mr. Benning assumed no loss of past earnings. This makes sense. On the scenarios he utilized, the earnings loss begins with the date of trial, as even without the injuries the plaintiff would have taken four years from high school graduation in 2014 to achieve the BSN degree.

**75** The plaintiff herself continues to seek to work towards becoming an RN. She is pessimistic about her chances but is determined and has not given up.

**76** As noted, on her behalf, plaintiff's counsel argues that she is not likely to achieve her current goal of becoming and RN, and that her future earnings will be in the range of those for an HSG. Counsel argues that absent the accident, the nurse practitioner scenario would have been the most likely, and therefore the award for loss of future earnings capacity should be assessed at $1,750,000.

**77** Counsel for the plaintiff argues that on the evidence the plaintiff is unlikely to achieve a university degree. Counsel argues that if, contrary to this, she succeeds in achieving a university degree, there will be a substantial delay in attaining it. On this basis, as an alterative assessment of loss of earning capacity, counsel submits that the court should utilize the present value of a six-year delay in the plaintiff achieving an income of an RN, submitted to be the amount of $388,588.00. This amount is the present value of earnings of the plaintiff as an RN for six years, 2018 to 2023, based upon the Benning report tables. Counsel submits that to this amount $1,250,000 should be added for general diminished earning capacity. No specific calculations are provided to justify that amount. The alternative calculation totals $1,638,588.

**78** The plaintiff does not claim a separate award for loss of past earning capacity.

**b) The Defendant's Position**

**79** The defendants rely upon the evidence of Mark Gosling, an economist.

**80** Pursuant to instructions, Mr. Gosling provided earnings estimates for the plaintiff based upon more optimistic educational attainment scenarios beyond a HSG, as follows:

| Education | Labour Market Entry | Present Value of Future Earnings |
|---|---|---|
| 1 High School Diploma | At Trial | $852,846 |
| 2 College Diploma: 3 Months to < 1 | 01-Jul-19 | $920,541 |
| 3 College Diploma: 1-2 Years | 01-Jul-20 | $980,047 |
| 4 Bachelor's Degree (Excluding Law) | 01-Jul-22 | $1,218,594 |

**81** So for example, based upon the scenario that the plaintiff earns a Bachelor's Degree (Excluding Law), one could compare her lifetime earnings of $1,218,594 with Mr. Benning's calculation of the earnings of an RN of $2,214,909. The difference would be $996,315. If she earns a two year college diploma, the difference is $1,234,862.

**82** Mr. Gosling did not provide estimates of future incomes based upon any specific occupation. Thus, the only data available to me are the statistical averages, and the occupational earnings data provided by Mr. Benning. There is no evidence as to any other potentially realistic occupation for the plaintiff.

**83** Mr. Gosling notes that full-time, full-year earnings of female general practitioners are on average 13% lower than the average for males and females combined.

**84** The defendants argue that the plaintiff has not given up on her pre-injury goals, and that based upon the evidence it cannot be said with confidence that she will fail vocationally, or that she will be unable to earn a university degree. The defendants argue that the plaintiff's injuries have merely delayed her career goals by several years, and that future loss of $250,000 should be awarded on this ground. The defendants also argue that pre trial (past) loss of earnings should be assessed at $50,000, based upon the chances that her injuries prevented her from seeking summer or part time work while as a student. As noted, the plaintiff did not advance a claim based on that specific scenario.

### 3. Assessment - Loss of Earning Capacity

**85** Mr. Benning's calculations do not account for any chance that the plaintiff would not have achieved the occupations indicated, that is, Registered Nurse (RN), or Nurse Practitioner (NP), or Family Physician (GP). In other words, his calculations assume that the plaintiff would have achieved the occupations indicated as a certainty. This is no criticism of his work, of course. He developed the statistical and numerical scenarios he was instructed to provide.

**86** The evidence shows that the plaintiff has struggled with academic studies since the accident. I accept that this is largely due to her injuries.

**87** As noted, the two MVAs occurred when the plaintiff was in grade 11. She missed a substantial amount of school days, and struggled with physical pain and concentration issues. She dropped her IB program courses. With hard work and teacher support, she "rallied" as Ms. Janzen testified, and achieved mixed grades for the year. She achieved B's in Psychology 12 and Chemistry 11, and A's in French 11, English 11, Physics 11, and Social Studies 11. She was permitted to re-do assignments in French 11. She had to get a tutor to help her with Chemistry 11. She had never needed a tutor before. She struggled with the concepts. In the second semester (all post accidents) she took Chemistry 12 and did very poorly. She received a C-, which means "minimally acceptable performance." Her teacher noted that she has difficulty with the material but appeared to be trying. Overall, she achieved Honour Roll standing for the year with 84.75%, but not, as before, Principal's Honour Roll.

**88** The record of marks for grade 12 (2013 - 2014) are incomplete. There was a lengthy teacher's strike at the end

of the school year. In the first semester (the first two terms of the year, concluding January 24, 2014) she had mixed success. She received A's in Law 12 and Social Justice 12, and a C in Physics 12.

**89** Her marks in science courses such as chemistry, physics and math are very relevant to her health care career goals.

**90** In 2014 and 2015, she took a variety of courses, with mixed results. In the fall of 2014 she took Introduction to Psychology at UFV, and obtained a C+ grade. At Bakerview Centre she began retaking Chemistry 11 but did not complete it. She took it again later at a summer school and improved her grade from 85 to 95%. She obtained A's in English 12 and Math 12. She re-took Chemistry 12, and improved her grade from C- to C+ (68%). In the fall of 2015, she took Introductory Statistics at UFV. She was doing poorly and withdrew as she wanted to avoid receiving a failing grade. She scored 7 out of 24 on a mid-term exam. She unsuccessfully appealed to the institution to avoid a "withdrawal" appearing on her transcript. However she did very well in Academic Writing at UFV in the fall of 2015 obtaining an A. She testified that she only took the two UFV courses in the fall of 2015 as that was all she could manage.

**91** She was accepted for both UFV and KPU for the BSN program commencing in January 2016. UFV was her first choice, and so she attended there. As noted previously, she failed a required course, HSC 111 or Human Anatomy and Physiology I. However, she did relatively well in two other nursing courses, earning a B in Professional Nursing and a B+ in Foundations of Health and Wellness. She re-took HSC 111 at TRU through an online program and passed it with a B+. However, as noted, she has so far been unable to pass the next course, Anatomy and Physiology II, which she has now failed twice. She also failed Pharmacology Principles at TRU. She did well in two biology lab courses at TRU in the summer of 2016. These required her attendance in Kamloops. UFV removed her from its BSN program permanently in August 2017.

**92** The academic record supports her own testimony that since the MVAs she has struggled cognitively. Her own evidence about this is credible. The record shows persistent determination on her part in continuing to pursue her goals, but she has not succeeded. Dr. Tarzwell and Dr. Powers noted significant cognitive difficulties. I conclude that but for the accident injuries she would have had the ability to complete the BSN program, and that it is now highly unlikely that she will be able to do so.

**93** She testified that she had wanted to be a medical doctor from about grade eight. At some point, she developed a plan to proceed to nursing first, then use that as a stepping stone to becoming a GP.

**94** I accept that pre-accident she also had realistic (in other words, real and substantial) chances of pursuing the other career options referred to in the evidence; that is, nurse practitioner, or GP. The October 2015 opinion of the vocational expert, Dr. Powers, is that unless her medical condition were to improve substantially her career plans in either registered nursing or medicine were unlikely to be fulfilled. The plaintiff's academic performance since then supports this view, which I accept.

**95** However, whether her medical condition improves or not, I do not accept that her career prospects are as bleak as Dr. Powers suggests. In my view her residual earning capacity is much better than his opinion suggests.

**96** Dr. Powers states that "...it is likely that she will be able to undertake employment that includes short formal training programs" and she was only employable part-time at the time of his report, and for the foreseeable future. He also states that re-examination of the plaintiff to update her progress would be helpful. This did not happen. I do not accept that the plaintiff is only employable part-time. The evidence does not support this conclusion. Dr. Powers is the only expert to suggest this. The plaintiff herself does not say this or submit this.

**97** Dr. Powers provides no specific alternative career options, other than referring to the plaintiff's expressed interest in customer service or administrative positions. "Administrative positions" would cover a wide range of occupations, I infer. He states that wages in such occupational areas are in the $15 to $18 per hour range, significantly lower than the amount she could earn as a nurse or doctor.

**98** The evidence does not allow me to assess the loss on the earnings approach. There is too much uncertainty on both sides of the question: what she would have been capable of earning but for her injuries, and what she is now capable of earning.

**99** Because she has been a student at the material times, her very limited work history provides no guidance. At age 15 she worked for two weeks in the summer at a berry processing facility. Pre accidents she tutored some younger students. She once worked at a mink farm for 2.5 weeks and did not enjoy it. She has had a couple of other short term jobs.

**100** Her volunteer work is relevant. She has committed much time to the hospital volunteer job. She has been involved in many student and community activities. These endeavours support her evidence that she enjoys helping others and would be suited by nature to work in the health care field.

**101** As noted, Mr. Benning's calculations assume as a certainty that the plaintiff will achieve the occupations he refers to in his report. However, there is no proper basis in the evidence to allow me to assess what the plaintiff's chances would have been of becoming an RN, NP, or GP. No evidence was adduced to assist me to determine that. There is no evidence of even the most basic kind, such as the number of persons working in these occupations in the Province of BC. I might guess that there are several times as many RNs employed in BC as there are medical doctors, and therefore all other things being equal her chances of becoming an RN would be greater than her chances of becoming a GP. However even that kind of basic information has not been provided. The lack of any such evidence makes it impossible to adequately weigh the probabilities that the plaintiff could have been employed in these occupations. For example, there is no evidence as to how many persons who aspire to these occupations (for example those who begin training in these fields) actually go on to work in them, or the reasons they do not do so. It is not possible for me to assess beyond speculation whether the plaintiff was a strong, average, or weak candidate for these occupations. I observe that the plaintiff has the burden of proof, and at least some such evidence could have been provided.

**102** It is clear that the plaintiff was a bright, industrious and motivated student prior to the accident. But many young persons with these qualities do not go on to achieve the career aspirations they have in mind at 16 years of age, for a multitude of reasons. It is not unusual for students who do well in high school to find that they struggle at university where the environment is not as supportive, (as the plaintiff noted in her evidence), and the demands are much greater. It is also not unusual for students to find that they do not do as well in some university courses as they had expected, and perhaps do better in others, or not. Post-secondary students frequently re-assess their career plans in light of their academic experience and evolving interests. The plaintiff was perfectionistic by nature, and so it seems to me that it is particularly plausible that some other academic or life obstacle could have disturbed her path.

**103** It is possible that the plaintiff's strong pre-injury academic performance depended to some degree on her exceptional level of effort, and that she could have begun to struggle as the challenges would have increased. There is no evidence of formal pre-injury cognitive assessments.

**104** There is uncertainty as to the chances are that her medical condition including her cognitive ability will improve. She has not yet undertaken recommended treatment options that offer some prospect of improvement. She can do so now. Although innate characteristics have made it difficult for her to fully accept treatment advice in the past, she has the capacity to accept such advice and to act on it. She struck me as intelligent and insightful.

**105** Overall, her academic record since the accidents has been mixed. She has struggled with science courses such as Anatomy and Physiology, Pharmacology, and Statistics. She has had success in other courses. Despite the obstacles, she has shown admirable determination. She remains a hard-working, motivated and ambitious young person. Her courtroom presentation also supports this impression.

**106** I consider it likely that the plaintiff will be able to achieve a university degree, although the nursing degree is

unlikely. There is a very strong likelihood that she can obtain a college diploma of some type. I see little chance that she could become a GP. I do not accept that she will earn only the average of high school graduates. That would be a worst-case scenario, which I consider unlikely. On the other hand, a best-case scenario could involve achieving a university degree of some kind, and going on to some other skilled occupation, perhaps in health care, or perhaps another field. As I mentioned, there is no evidence before me as to earning potential for other occupations that might be achievable, other than as suggested by Dr. Powers.

**107** Sandra Gallagher, a qualified vocational consultant, provided a critique of the report of Dr. Powers. Her overall opinion is that the report of Dr. Powers lacks sufficient detail regarding the plaintiff's post-accident employment and educational endeavours to provide a definitive conclusion about her post-accident potential. This comment has some merit, although a "definitive" opinion would not likely be possible, of course. Dr. Powers was handicapped by not having more recent and up to date information. In general, the expert evidence is very thin as to the plaintiff's residual employment capacity.

**108** In the circumstances, the assessment must be based on the capital asset approach, as referred to in *Perren*, at para. 176, quoted above. As *Grewal* makes clear, the use of statistical evidence assists in determining what is fair and reasonable in the circumstances, but does not convert the assessment into a calculation. The economists' data can still provide some guidance and a useful basis for analysis.

**109** It is fair to say that the plaintiff's projected loss at its highest as set out in Mr. Benning's third scenario previously mentioned, based upon the combined RN/GP career path, compared with lifetime earnings as an HSG, which is the most pessimistic scenario. That amount is $2,798,204. A lesser amount of loss is reflected in comparing the lifetime RN earnings with HSG earnings. That amount is $1,362,057. Another lower amount is $996,315, based upon Mr. Gosling's numbers relevant to RN earnings compared with university graduates. This is a reasonable scenario, on the footing that she could have become an RN, but now will not be able to do so, and will not recover sufficiently to allow her to do so, either, but she will achieve a university degree.

**110** At the other end of the scale, if she obtains treatment, makes a substantial recovery, and goes on to earn amounts equivalent to the earnings of an RN, then her loss could fall in the range of $400,000, based on loss of the present value of six years earnings (2018-2023) had she become an RN in 2018. This is a very optimistic scenario and therefore would equate to a very low assessment of her loss.

**111** Another essentially similar approach is to consider what the losses would be as a percentage of the amounts the economists derived. For example, a 33.33% chance that she has lost the capacity to become a GP ($2,798,203), and will earn HSG income, is $932,642. A 50% loss of the NP earnings ($1,750,450) compared with HSG income is $875,225. A 75% loss of the chance to make RN earnings ($2,214,909) compared with what she may earn with a college diploma ($980,047) is $926,147.

**112** Other amounts can be considered based upon a simple multiplier approach. For example, at age 40, as an RN, she would earn $77,866 after labour market contingencies. As an average university graduate at age 40, she would earn $43,908 (Mr. Gosling's Report at 9). The difference in that year is $33,958. The present value of the loss of $1,000 per year for her working life is $19,831. So the present value of the loss of $19,831 in every year is $673,421. (The income differential between an RN and a university graduate narrows with time.)

**113** As the cases emphasize (*Reilly v. Lynn*, *2003 BCCA 49*, quoted above), the task of the Court is to assess the losses, not to calculate them mathematically. In this case mathematical calculation is not possible in any event.

**114** All of the four factors set out in *Brown v. Golaiy* apply to the plaintiff in this case:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment: specifically in the health care professions to which she has aspired and continues to aspire to;

2. the plaintiff is less marketable as an employee, in that she has cognitive deficits, and other persisting injuries affecting her ability to work. Her emotional and physical problems are and will be detrimental in the employment market;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured. I have discussed this at length; and
4. the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market. Specifically relevant here is the plaintiff's loss of confidence in her abilities.

**115** The *Brown v. Golaiy* factors must be considered in the context of the facts of the case. In this case, they are likely to have substantial consequences, therefore a substantial award of damages is warranted. The economists' data and scenarios assist in capturing a fair and reasonable range of quantification for the plaintiff's pecuniary loss. I must account for all relevant probabilities and possibilities in making an assessment.

**116** I have accepted that pre-injury the plaintiff had the potential to become an RN, NP, or GP. The evidence does not allow me to assess her chances of achieving these occupations with any degree of precision or confidence. I accept that she is now unlikely to achieve any of these occupations, due to her accident injuries. However she likely remains capable of achieving a university degree.

**117** Bearing in mind all relevant factors and contingencies, I assess the damages for the plaintiff's loss of earning capacity both past and future at $925,000. This amount is similar to the amount that I mentioned earlier, based upon a 75% loss of the chance to make RN earnings compared with what she may earn with a college diploma. However the amount I have assessed necessarily reflects a balance that takes into account all other possible contingencies that I have referred, and the *Brown* factors.

**B. Non-Pecuniary Loss**

**118** As in *Mullens* at para. 196, I adopt my comments concerning the applicable legal principles relating to the assessment of non-pecuniary loss in *Gillam v. Wiebe*, *2013 BCSC 565* at paras. 68-71, and do not need to repeat them in full here. There I referred at some length to *Stapley v. Hejslet*, *2006 BCCA 34*, a decision upon which the plaintiff relies.

**119** The plaintiff submits that non-pecuniary damages should be assessed at $225,000.

**120** In addition to *Stapley*, the plaintiff relies on the following authorities as guidance to the appropriate amount of damages:

1. *Felix v. Hearne*, *2011 BCSC 1236* ($200,000);
2. *Danicek v. Alexander Holborn Beaudin & Lang*, *2010 BCSC 1111* ($185,000);
3. *Cikojevic v. Timm*, *2010 BCSC 800* [*Cikojevic*] ($160,000).

**121** The defendants submit that the appropriate award for general damages in this case is $100,000. The defendants submit that the relevant authorities suggest a range of $80,000 to $105,000. They rely on these authorities:

1. *Viner-Smith v. Kiing*, *2009 BCSC 1387* ($80,000);
2. *Shallow v. Dyksterhuis*, *2013 BCSC 1761* ($85,000);
3. *Villing v. Husseni*, *2015 BCSC 1604*, aff'd *2016 BCCA 422* ($85,000);
4. *Bricker v. Danyk*, *2015 BCSC 2404* ($100,000);

5. *Miller v. Marsden*, 2014 BCSC 2331 ($105,000).

**122** In submissions, the plaintiff emphasizes these factors:

1. the plaintiff is now 21 years of age and has been suffering from her injuries for more than five years;
2. She is youthful, thus absent improvement, she will continue to suffer consequences of her injuries for a very long time;
3. The medical prognosis is generally negative;
4. She is now socially isolated, and has lost confidence;
5. Her career goal for which she worked diligently for many years are likely lost to her; and
6. Her future career prospects likely include work that will be less challenging, interesting and rewarding for her.

**123** I agree that these factors are all applicable.

**124** I have reviewed all of the authorities cited, and referred to above.

**125** The cases cited by the defendants are not comparable. None of them involve consequences to the plaintiffs in those cases that are nearly as profound as those suffered by the plaintiff in this case. Although every case is different, and must be assessed on its own facts, the most similar decision cited to me is *Cikojevic*, where N. Brown J. awarded $185,000, eight years ago. The prognosis was more definitively negative.

**126** In this case the plaintiff was an outgoing, socially active young woman before the accidents. The effects of her injuries on her life have been profound. She justifiably took great pride in her scholastic achievements for which she received many awards. She enjoyed school and was a confident student. School is now a burden, and she has lost the confidence she had. She was (and remains) ambitious. Her former career goals were achievable. Now they are not likely to be fulfilled. She has chronic pain. Even if there is some improvement, her cognitive functioning and her psychological and emotional condition will not return to their pre-accident state.

**127** I assess damages for non-pecuniary loss in the amount of $200,000.

**128** As I will explain, this amount is reduced by 10% for the plaintiff's failure to mitigate loss. Thus the net non-pecuniary award is $180,000.

**C. Defendants' Failure to Mitigate Argument**

**129** I adopt my comments regarding the applicable principles relating to failure to mitigate as set out in *Mullens*:

> 102 The defendants bear the onus of establishing that the plaintiff failed to take reasonable steps that would likely have reduced her damages, as explained in *Graham v. Rogers*, 2001 BCCA 432, leave to appeal ref'd [2001] S.C.C.A. No. 467 (QL) at para. 35.
>
> 103 Questions of mitigation often arise when the plaintiff fails to undergo certain medical treatment or therapies. The test in those circumstances was explained in *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 56 (see also *Chiu v. Chiu*, 2002 BCCA 618 (CanLII) at para. 57):
>
> I would describe the mitigation test as a subjective/ objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment... [Emphasis in original.]

> 104 In determining the reasonableness of a refusal of medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 SCR 146, 1985 CanLII 62 (SCC), at para. 31 (cited to CanLII).
>
> ...
>
> 106 It is important in conducting the mitigation analysis not to confuse or conflate the issues of causation and mitigation; an assessment of any failure to mitigate and any consequent reduction of the applicable heads of damage occurs after causation is complete: see *Wahl v. Sidhu*, 2012 BCCA 111 at para. 58; *Yoshikawa v. Yu* (1196) 21 BCLR (3d) 318; 1996 CanLII 3104 (BCCA), para. 12.
>
> 107 It is appropriate to consider the issue of mitigation separately in respect of each head of damage: *Zawadzki v. Calimoso* 2011 BCSC 45, at para. 164.

**130** In *Chiu v. Chiu*, 2002 BCCA 618, Low J.A. stated, for the court:

> 57 The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippoli*to, [1985] 1 S.C.R. 146.

**131** The first of these issues (whether the plaintiff acted unreasonably in eschewing the recommended treatment) depends upon an evaluation of past facts, which must be proven on a balance of probabilities. However the second issue (the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably) depends on past hypothetical events, which the court will weigh according to their relative likelihood, provided the possibility is real and substantial: *Gao v. Dietrich*, 2018 BCCA 372, at para. 39; *Gill v. Lai*, 2018 BCSC 101, at para. 73; *Evans v. Keill*, 2018 BCSC 1651, at para. 121.

**132** The extent to which treatment the plaintiff refused to undertake would have been effective cannot be established with certainty. I observe that doctors offer treatment recommendations when they believe the treatment has some reasonable prospect of benefiting the patient. A cost versus benefit analysis is generally built into the recommendation. However doctors do not typically make confident predictions about the likelihood that a particular treatment will be effective, and are naturally wary of overpromising.

**133** The medical evidence supports that the plaintiff has refused to accept some important medical advice and treatment options, although she has not completely rejected medical advice and treatment, either. She attended with Dr. Gill regularly. By and large, she followed his advice. She attended physiotherapy. She saw Dr. Reebye (twice) and Dr. Zaghloul, on several occasions, over a considerable length of time, and some benefits were achieved. She attempted the use of anti-depressant medication at times. She complained of side-effects. She ought to have been more compliant. Her youthfulness and pre-existing personality characteristics have been barriers, although in my view despite her youth and inherent characteristics, she could have and should reasonably have followed the treatment advice she received. The consistency of the recommendations is some indication of their potential value to the plaintiff.

**134** On the medical evidence, there is a real and substantial possibility that had the plaintiff accepted psychological treatment, such as counselling and psychotherapy, and consistently utilized anti-depressant medications as recommended, her current condition would have been improved.

**135** However the evidence as to likelihood of benefit is weak. The medical evidence is largely not directed to this question. As I interpret the evidence, if the plaintiff's cognitive problems stem from neurocognitive injury then treatment would not have improved her cognitive problems, which is her main compliant and affects her other concerns. There is a greater chance that she would have improved emotionally and perhaps physically.

**136** As noted, the recommended treatments remain open to her now. Double counting must be avoided. I have already addressed the question of the chances that successful treatment may reduce the damages in future, and factored that into the assessment of the losses.

**137** In the circumstances of this case, balancing the relevant possibilities, a relatively small deduction against the non pecuniary loss is appropriate. I assess this at 10%.

**138** I am not satisfied the any reduction against the award for loss of earning capacity has been established. The claim is essentially for future loss. As I have said, the medical treatment advice she has received remains open to her to follow now, and the chances that it will be successful in ameliorating the loss has already been factored into the award. I am not persuaded that an additional deduction is warranted.

**D. Costs of Future Care**

**139** The plaintiff seeks costs of future care of $38,700, for the following items:

1. Pain clinic: $24,000.00;
2. Psychotherapy, two years, at $150 per hour, 12 sessions per year: $13,800.00; (the arithmetic is not clear to me. I infer that each session is expected to be just short of four hours);
3. Vocational counselling; four to six hours at $150 per hour; $600.00 - $900.00.

**140** The defendants submit that costs of care should be allowed at the sum of $25,000, as follows:

1. Psychological therapy: $5,000; and
2. Pain clinic: $20,000.

**141** There is no cost of care report. There is no estimate in evidence as to the costs of the pain clinic or the psychotherapy. The defence quite fairly concedes the amount of $25,000 despite this. The pain clinic expense will be allowed at $20,000. With respect to psychotherapy, $5,000 would allow for only 33 hours at $150 per hour, which seems to reflect a reasonable hourly rate. The medical evidence supports the potential benefit of psychotherapy. It seems to me that $10,000 is reasonable for this claim. In view of my conclusions, the vocational counselling claim of $900 is reasonable. Costs of care are allowed at $30,900.

**E. Special Damages**

**142** The plaintiff claims special damages of $11,283.25. The defence disputes $3,755.27 of this amount. The plaintiff contends that these claims are for tuition for a course she failed and had to re-take at TRU. The defendants dispute that the plaintiff has established that her course failures are due to her accident injuries. I accept that they are, on a balance of probabilities. However, $751.30 is claimed for two lab courses, which the plaintiff passed, and should not be included in the claim. Special damages are therefore allowed at $10,531.95. I observe more broadly that the plaintiff is likely to be required to pursue some other course of study, in which she will incur other tuition expenses. The plaintiff has not presented claims on this ground. Therefore the tuition claim is also supported on this ground.

**IV. Conclusion**

**143** The plaintiff's claims are allowed in accordance with these reasons.

**144** The plaintiff requests leave to make submissions as to tax gross up and management fees. The parties may make arrangements to address these matters if necessary.

**145** The plaintiff is entitled to costs, subject to the possible application of Rule 9-1.

F.E. VERHOEVEN J.

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