

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Matei v. Wu*,
2022 BCSC 107

Date: 20220124
Docket: M199721
Registry: Vancouver

Between:

Deliana Matei

Plaintiff

And

Zeren Wu and Openroad Auto Group Limited

Defendants

Before: The Honourable Justice Fleming

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.
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Introduction

[1] In this fast track action, the plaintiff Deliana Matei claims damages for injuries sustained in a motor vehicle accident that occurred on May 11, 2018 in Vancouver when her vehicle was hit from behind (the “Accident”). The defendants have admitted liability for the Accident.

[2] Ms. Matei alleges that the Accident caused soft tissue injuries to her neck and low back, headaches, sleep disruption and mood symptoms and she continues to suffer from low back pain and mood symptoms.

[3] A highly ranked competitive tennis player and a full-time radiological technician at the time of the Accident, Ms. Matei alleges that her ongoing symptoms have and will prevent her from playing tennis and working overtime.

[4] Ms. Matei claims non-pecuniary damages as well as damages for lost past income and loss of future earning capacity, loss of housekeeping capacity, cost of future care and special damages, all of which are opposed by the defendants either as to the amount or on the basis she has failed to establish an entitlement.

Summary of the Evidence

[5] The evidence in this case includes an agreed statement of facts (“ASOF”). In addition to her own evidence, Ms. Matei relies on the testimony of friends Benta Rybinski and Emil Stratila, the expert opinion evidence of physiatrist Dr. Raphael Chow and the fact and expert opinion evidence of her family physician Dr. Helen Vorobeychik. The defendants’ evidence includes the expert opinion evidence of physiatrist Dr. Tonya Ballard.

[6] The main factual disputes include the extent of Ms. Matei’s ongoing low back pain and the cause and extent of her mood symptoms, as well as the cause and impact of left knee and hip pain that developed about two years after the Accident.

[7] Credibility is not a contested issue. Although some of their submissions turn on ignoring or disputing the accuracy of some of Ms. Matei’s testimony, the

defendants conceded that she was a credible witness. The defendants also did not dispute the credibility of her friends' evidence.

[8] The proper approach to assessing the truthfulness of the testimony given by any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[9] The factors identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 not only inform the assessment of whether the evidence of a witness is truthful, but also accurate or reliable.

[10] Applying the approach in *Chorny* and having considered the *Stenner* factors, I find that Ms. Matei tried her best to provide accurate evidence and was an honest witness. Polite, straightforward, reasonable and attentive throughout direct and cross-examination, Ms. Matei's testimony was also internally and externally consistent. She readily acknowledged circumstances that were not in her interest and I was never concerned she was exaggerating her symptoms. Clearly stoic, particular aspects of her direct evidence lacked detailed. On occasion her responses were elicited in response to leading questions, which reduces the weight they can be given.

[11] The discussion of the evidence that follows includes findings of facts based on undisputed and uncontradicted evidence and admissions. Disputed facts are also discussed but for the most part, dealt with later on in these reasons.

Background

[12] Ms. Matei is 51 years old. Born and raised in Romania, she had a happy and active childhood. Ms. Matei began playing competitive tennis at a young age. After high school Ms. Matei received a bachelor's degree in electronics. In 2002, she immigrated to Canada on her own. Wanting to upgrade her education and work in healthcare, she completed a three-year program in medical radiography at BCIT. Ms. Matei received a diploma in Radiological Technology in 2008 and then completed additional training. Certified as an X-ray and CT scan technician, she found two positions as a medical radiation technologist, one of them at Eagle Ridge Hospital, where she has continued to work, employed through Vancouver Coastal Health.

[13] At some point Ms. Matei purchased a condominium in Coquitlam.

[14] After she completed her training she joined the Coquitlam Tennis Club and became involved in competitive tennis. In 2014, based on tournament results that placed her in the top five nationally for her age group, she was offered an elite membership at the Jericho Tennis Club ("JTC") in Vancouver. Ms. Matei described JTC's facilities as far superior. It also offered her the opportunity to be surrounded by higher level players. Passionate about tennis, and wanting to become the best player she could, she joined the JTC. In 2015, Ms. Matei rented out her condominium and moved to an apartment located a few minutes away from the JTC so she could train and play tennis more often. This meant, however, that she had to commute about an hour each way to and from work.

[15] In 2017, Ms. Matei qualified for Canada's national team, based on her tournament results in 2016, and played in the world seniors' championship in South Africa. Primarily a singles player, Ms. Matei also played doubles matches, because one of the other team members became ill. She found it very tiring, but satisfying, and testified she had no physical issues during the tournament. Ms. Matei also qualified for the national team again in 2018. Prior to the Accident she won the women's singles in the first masters' tournament of the season.

[16] Asked what tennis meant to her before the Accident, Ms. Matei testified that it was a big part of her life and her priority. Playing four or five times per week for eight to 10 hours, she found tennis invigorating and energizing. She also enjoyed socializing and relaxing at the JTC, where she had made good friends and felt a part of a small tennis community, and travelling to compete in tennis tournaments.

[17] Ms. Matei indicated that she was active in other ways too. Outgoing and friendly, she spent time with friends outside the JTC, some of them members of the Romanian community. She enjoyed moderate hikes and long walks, swimming at the club and travelling apart from tennis.

[18] Starting in 2008, Ms. Matei was involved in some prior motor vehicle accidents, none of them serious. During the first she struck and injured a pedestrian. Upset emotionally and troubled by nightmares about the accident that resolved without treatment, Ms. Matei was not physically injured.

[19] In a 2015, Ms. Matei was in another accident that did cause some soft tissue injuries to her right shoulder and neck. However, Ms. Matei missed no time from work and continued to play competitive tennis, modifying aspects of her play for a period of time. She attended treatment and recalled her injuries being completely resolved by 2017, except for the occasional headache which she treated with over-the-counter medication.

[20] Some years before the Accident, Ms. Matei acquired a permanent .7 “hybrid” grade three position at Eagle Ridge Hospital, doing X-rays and CT scans. Grade three is the highest level for a radiation technician who was not also a supervisor. The position had a four day on, four day off schedule. All of the shifts were from 4:00 p.m. to midnight. She worked full-time by “picking up” an extra shift each week on one of her days off, as well as some overtime shifts.

[21] Ms. Matei described her job as physically demanding, and much more so after 7:30 p.m., when there are no porters available and less staff to assist. Her work tasks include equipment and patients transfers, which involve assisting and

supporting patients in moving from wheelchairs and stretchers onto the table and back again, sometimes using slings. Patients also have to be positioned on the table. In the evenings, Ms. Matei also has to push patients in wheelchairs and stretchers within the hospital. Equipment transfers involve moving and positioning equipment that is quite heavy and difficult to maneuver. Altogether, there is a lot of fairly heavy pushing and pulling, as well as bending and being on her feet.

[22] Ms. Matei maintained that before the Accident she had no difficulty performing any aspect of her job, working full-time as well as occasional overtime, or working a double shift which included the night shift if a colleague called in sick. She did begin taking Zopiclone because she had trouble sleeping due to the shift work and to help her adjust to times changes when she travelled.

[23] In January 2018, Ms. Matei took a leave from her permanent position and started a full-time temporary position. The temporary position paid \$3 less per hour because it was only grade one, but the work schedule was Monday to Friday and involved day shifts three out of four weeks. Ms. Matei testified to making the change because her tennis training and tournaments were mostly in the evenings and on weekends. She also said that despite all the tennis she was playing, she was still able to take overtime shifts when they were offered.

[24] Ms. Matei indicated that before the Accident her plan was to play as much competitive tennis as she could for five years. After that, she intended to slowly transition to less competitive or recreational tennis so she could focus on work and maximizing her income until she retired at 65. Having come to Canada later in life and being on her own, Ms. Matei said she needed to earn as much as possible during that period to ensure she had a decent pension.

The Accident

[25] On May 11, 2018, which was a Friday, Ms. Matei was commuting to work from Vancouver to Port Moody. Her vehicle, a 2012 Honda CRV, was hit from behind by the defendant Zeren Wu, who was driving a 2016 Porsche. Ms. Matei explained that while she was turning left from 2nd Avenue onto Main Street she had

to stop suddenly when a pedestrian stepped into the crosswalk. The Porsche struck the right rear corner of Ms. Matei's vehicle. Photographs show significant damage to the left front corner of Mr. Wu's Porsche and some damage to the right side and right rear of Ms. Matei's Honda.

[26] Ms. Matei described her body moving forward and then back and her head hitting the headrest during the Accident. Although in shock, she did not feel any pain right away. Ms. Matei and Mr. Wu stepped out of their vehicles, decided to clear the intersection and then exchanged information and took photographs.

After the Accident

[27] Ms. Matei carried on to work that day. A few hours later, she said, she started feeling pain in her neck and low back on the right side. She also developed a headache. After finishing her shift, Ms. Matei had the weekend off. She said that she went to her family physician that Sunday because the pain in her neck and low back was worse. Dr. Vorobeychik recommended over-the-counter pain medication, physiotherapy, and five days off from work. Ms. Matei followed her recommendations. She started physiotherapy on May 26, 2018 and then later, on September 14, 2018, massage therapy.

[28] Ms. Matei indicated that she could not sleep properly for the first weeks after the Accident. She also had nightmares about driving.

[29] When Ms. Matei returned to work on May 28, 2018, she was still feeling sore, especially after a few hours. The extent of her pain varied and depended in part on how much lifting, bending, and pushing she had to do. During day shifts there was more staff around and porters to help with transfers and lifts, but in the evenings and at night she was essentially on her own. She found her low back hurt more. She also had neck pain and headaches at work.

[30] Ms. Matei testified that commuting to and from work after the Accident really aggravated her back pain. She also felt fearful every time she drove, anxious that something might happen, something she had never experienced before.

[31] Ms. Matei also gave evidence that her mood was affected by her pain, and the fact that she was not sleeping well.

[32] After the Accident Ms. Matei stopped playing tennis completely. She recalled that in July 2018 she started a “gentle return” to tennis, playing much less intensely and less frequently. Already selected to play on the national team at the world championships in October 2018 and hoping she would feel better by the, she tried to keep active by playing doubles, although primarily a singles player. At the world championships she was unable to play singles due to her low back pain and played only one or two doubles matches. Ms. Matei was very disappointed, upset and frustrated by her performance.

[33] Ms. Matei has not played any competitive tennis since the 2018 world championships. Until May 2019, she played “light tennis” only, which was mostly doubles once or twice per week.

[34] Ms. Matei continued to work full-time, however, taking vacation and some sick days to deal with her ongoing pain symptoms. She said she tried to avoid taking sick days because she did not want to get “flagged” and hauled into the manager’s office. She explained that employees who take too many sick days are forced into a “program” and then onto disability. Ms. Matei emphasized that a disability leave was not an option for her financially and not working would make her feel even worse. On one occasion Ms. Matei was questioned by her manager when she took a sick day after working an overtime shift. Describing herself as a private person, and someone who does not like to complain, she told her manger that she was working with pain, any details.

[35] In February 2019, Ms. Matei moved back to her condominium in Coquitlam, stating her low back pain had gotten worse and she could not tolerate the long commute to and from work. Unlike in the past, she said, she hired a moving company because she could not lift the heavy items.

[36] In May 2019, Ms. Matei underwent a hysterectomy and took twelve weeks off after the surgery, using nine weeks of sick time and three weeks of vacation. Ms. Matei testified that during the first eight to nine weeks of recovery, when she was lying down all the time, her low back pain increased. With the gradual re-introduction of activity, it returned to what it was before the surgery.

[37] When Ms. Matei returned to work in the fall of 2019, she did not resume playing tennis. She said she found work was very depleting and she had little energy left for anything else. She spent the weekends resting and relaxing to cope with her low back pain. Ms. Matei testified that she began to feel very disappointed, frustrated and depressed. She had hoped that after the surgery, and so much time off, her low back pain would have improved. She also described not feeling herself. No longer going to the JTC to play tennis or socialize because of pain and the fear she experienced while driving. Ms. Matei also withdrew from her other friends.

[38] In direct and cross-examination, Ms. Matei readily acknowledged that she did not tell anyone about her low mood for quite some time. She described finding it hard to admit even to herself. She also felt it would go away because she is a strong person. With respect to driving anxiety, she acknowledged it never prevented her from driving, emphasizing that she drove out of necessity, but was always in fear. Ms. Matei also reiterated that she moved back to Coquitlam due to her fear as well as her ongoing back pain. Eventually she realized she needed professional help and spoke to her family doctor, who recommended counselling.

[39] In October 2020, Ms. Matei started counselling with Olga Barrows, a Registered Clinical Counsellor.

[40] Ms. Barrows gave fact evidence about Ms. Matei's counselling, which focused initially on her fear of driving, but has broadened to address how the Accident has affected her mood, and techniques for coping with chronic pain. Ms. Barrows described using a variety of treatment approaches including cognitive behavioural therapy and mindfulness.

[41] On January 21, 2020, Ms. Matei started active rehabilitation sessions where she has learned a variety of strengthening and stretching exercises and techniques and tips for performing tasks at work. She avoids bending and uses her core whenever she does a transfer or helps a patient up from sitting position. She has continued attending sessions which are now once per week and intends to continue as long as they remain helpful.

[42] In or about July 2020, Ms. Matei tried jogging, wanting to do more than walks and increase her cardio. She stopped due to pain in left knee and hip as well as her back. She denied having prior knee or hip pain. Asked in cross-examination whether she injured one of her knees in 2014, she said it was possible, but she did not remember this happening. Relating to left knee and hip pain, Ms. Matei testified briefly to what a particular treatment provider told her about his observations and treatment which is not admissible for its truth.

[43] In response to her complaints of hip and knee pain, her family physician suggested medication, rest and an elliptical for cardio. Ms. Matei bought an elliptical which she has used when her knee and back are not hurting. She also bought a knee brace that she finds really helps with walking and standing. Ms. Matei testified that her knee pain has improved a lot with physiotherapy.

[44] In October 2020, Ms. Matei started attending acupuncture sessions regularly which she described as very helpful. She said she intends to continue.

[45] Referred by her family doctor due to ongoing low back pain, in June 2021, Ms. Matei was assessed and treated by physiatrist and sports medicine specialist Dr. Cabrita. Ms. Matei testified that Dr. Cabrita treated her with trigger point injections in the low back, left hip and left buttock. According to Ms. Matei she also recommended some exercises for the low back and hip and to continue active rehabilitation and physiotherapy. Dr. Cabrita gave her another set of injections at her second appointment in September 2021 which she found helpful. Ms. Matei has a further appointment scheduled for January 2022.

Work Since 2020

[46] In January 2020, Ms. Matei experienced some changes at work. The temporary position she had been filling was posted. Ms. Matei applied, despite the lower salary, because of the daytime shifts. However, the successful candidate was another employee with more seniority. Ms. Matei was required to return to her permanent .7 grade 3 position. She testified to finding the transition back to evening shifts difficult, because of the increased physical demands. Ms. Matei explained there are no light duties available in her position. Cross-examined about whether she had asked to be accommodated, Ms. Matei said she had requested an additional staff person on statutory holidays but her manager told her the extra “ftes” were not approved. She also sent several emails to her manager and upper manager but nothing happened. More recently, she pursued what I understand was a grievance along with other employees through the union that relates to porters not being on shift after 7:30 p.m., which is under discussion.

[47] Not surprisingly the Covid-19 pandemic has had a significant impact on Ms. Matei’s work. She testified that staff shortages resulted in mandatory overtime. In addition, there have continued to be one or two voluntary overtime shifts available per week.

[48] Required to work mandatory overtime, Ms. Matei indicated she has also accepted some voluntary overtime shifts because of staff shortages and one or two additional overtime shifts were available each week, but she could not work any more than she did because of low back pain. Ms. Matei added that she has tried to help out as much as possible, knowing when a colleague does not show up for work everyone suffers. By August 2021, she was exhausted and burnt out by the long hours and overwhelmed by her low back pain.

[49] The ASOF attaches a schedule of Ms. Matei’s work attendance from May 2019 through September 16, 2021 that identifies all of her overtime, vacation and sick time. With reference to the schedule, Ms. Matei testified to taking 15 hours of vacation time during the pay period ending August 5, 2021 because she needed to

recuperate due to her back. She gave the same explanation for taking 7.5 hours of sick time and 22.5 hours of vacation time during the pay period ending August 12, 2021, and 45 hours of vacation time during the pay period ending September 2, 2021.

[50] Asked about overtime pay, Ms. Matei explained that if she works extra hours after a full shift, she is paid 1.5 times her regular hourly rate for the first two hours and then double time after that. Any shifts in addition to the 10 shifts per two week pay period is also paid at double time, which amounts to approximately \$600 for a 7.5 hour shift.

[51] In 2020, Ms. Matei's T4 earnings were \$98,862 a significant increase from \$73,229, which she attributed to the higher salary she earns in her .7 position and the fact she works statutory holidays in that position, which pay a higher rate.

Current Symptoms and Function

[52] Ms. Matei identified persistent low back pain as her main ongoing symptom. Her neck pain has largely resolved. She now experiences only an occasional ache or discomfort. Her headaches are also only occasional and the same as before the Accident. With respect to her mood symptoms, Ms. Matei said she still feels frustrated and disappointed that she has to work with pain and is not back to playing tennis. When she is in pain, she does not "feel good at all", she is withdrawn, does not go out and is less talkative. Ms. Matei said she finds the counselling helpful and intends to continue, specifying it helps her cope with work. She is also having fewer and fewer nightmares about the Accident and her sleep and use of Zopiclone are back to the way they were before the Accident, meaning she uses the medication to deal with the effects of shift work.

[53] Asked in direct and cross-examination about the extent of her low back pain, Ms. Matei testified that generally she has some pain everyday and it gets worse when she works. On good days her back hurts less or not at all, but this does not happen very often. She may have a day without back pain after she has been resting and had two days off in a row or is on vacation. On bad days her back hurts

a lot. Lifting and pushing at work aggravates it. The intensity of the pain also varies with the amount of standing and sitting she does, working longer hours and housework. Bending, vacuuming, cleaning the bathtub, carrying heavy stuff and lifting items from the floor all worsen her low back pain. She tries to be careful when she does housework, as well as at work, by kneeling instead of bending for example. Although she can cook for herself, she does it less often than before and freezes meals.

[54] Ms. Matei also gave evidence that she continues to experience left knee pain once or twice a week when she stands for too long at work or walks too fast, and hip pain. Her left knee pain flared and she had low back pain when she tried playing tennis a few times in January 2021. However, Ms. Matei denied that either knee or hip pain has interfered with completing work tasks or prevented her from accepting overtime shifts. She also denied taking sick or vacation days due to knee pain although she has continued to take them to manage her low back pain.

[55] Despite her ongoing low back pain Ms. Matei believes she can continue working in her permanent .7 position by working the extra shifts required to make it full-time. Asked to explain, she said it is physically possible for her to carry on with this schedule but doing so uses all of her energy. In order to have energy for other things she would have to work less. She also worries about her ability to sustain “this type of work” until she retires. If the size of her pension was not such a concern, Ms. Matei indicated the ideal amount of work for her would be the .7 schedule, that is four days on and off.

[56] With respect to tennis, Ms. Matei indicates she hopes that one day she can play recreationally. Since trying to play in January 2021 she has not tried again. Just driving to the JTC in Vancouver feels like too much, given the impact on her low back and her driving anxiety.

[57] Ms. Matei emphasized that she needs to continue ongoing treatment. She said without it her back hurts more and she would not be able to work.

Observations of Friends

[58] Ms. Rybinski is a friend from the JTC, who has known Ms. Matei for about seven years. The two actually met before Ms. Matei joined the club. Ms. Rybinski remembered how excited she was when she became a member and then moved so close she could walk to JTC after work. Ms. Rybinski testified she used to see Ms. Matei a few times per week at the JTC, often playing tennis with men. Ms. Rybinski described Ms. Matei as “a lion” on the tennis court, a great player, and someone who laughed a lot while she played. Ms. Rybinski also described Ms. Matei as really fun, vibrant and full of life. In addition to socializing at the JTC, Ms. Matei and Ms. Rybinski also played tennis together about once a month just for fun, because her level is much lower. She was never aware of Ms. Matei having any physical limitations or mood issues.

[59] Ms. Rybinski testified that Ms. Matei did not tell her about the Accident until this past year. Other than saying she was rear-ended while commuting, Ms. Matei has still not shared a lot of details. Describing Ms. Matei as very private, Ms. Rybinski noticed she became withdrawn and was not herself. They have met only twice since the Accident, once for a drink and once to try and play a little tennis. Ms. Matei was wearing a tensor on her knee and said it was really bothering her. Ms. Rybinski observed that Ms. Matei was moving slowly, and seemed unhappy.

[60] Mr. Stratila has known Ms. Matei for longer, about twelve years. He too indicated Ms. Matei was a very happy, outgoing person. Before the Accident they would get together three or four times a month, mostly on weekends, to do a variety of activities, including long walks, hikes and sometimes bike rides. Mr. Stratila was aware that tennis was Ms. Matei’s priority, describing her joy and excitement at being selected for the national team. Since the Accident, Mr. Stratila has not seen Ms. Matei as often. When he calls her, she tells him she does not feel like going out. She also complains of pain and fatigue. Mr. Stratila described her mood as not good. He does visit her at her home and notices she moves “a little bit slow” and carefully. He also commented that after the Accident she asked him to watch her drive which he did at one point.

Medical Evidence

[61] As indicated, Ms. Matei relied on the expert opinion evidence of psychiatrist Dr. Raphael Chow who is also a certified functional capacity evaluator, and the fact and expert opinion evidence of her family physician, Dr. Vorobeychik. The defendants rely on the expert opinion evidence of psychiatrist Dr. Tonya Ballard.

Dr. Chow

[62] In addition to being a psychiatrist, Dr. Chow is a certified functional capacity evaluator. He met with and evaluated Ms. Matei on January 21, 2020. His report is dated January 31, 2020.

[63] He opined that the Accident caused soft tissue injuries to Ms. Matei's cervical and lumbar spine. He identified her residual Accident-related conditions as chronic low back pain and sleep disturbance involving interrupted sleep. Noting she had a history of neck and right shoulder pain but no ongoing symptoms, he concluded Ms. Matei did not have a pre-existing condition that was aggravated by the Accident.

[64] His examination findings included pain free and normal range of motion in her cervical and thoracic spine, but pain in all directions and some limitations in extension and lateral flexion in her lumbar spine. He also found Ms. Matei had tenderness in the paraspinal muscles of her lumbar spine on the right side.

[65] Dr. Chow expressed the view that the tenderness finding is more reliable because he measured it using an algometer and the measurements were consistent on repeat testing. Further there was no tenderness when he used the algometer at a much higher-pressure threshold in a non-painful area. Ms. Matei's hips and knees were pain free.

[66] I note there are no inconsistencies between Dr. Chow's account of what Ms. Matei reported to him about her symptoms and their impact and her evidence, other than she did not mention "driving phobia" or anxiety. She did report other mood symptoms include feeling emotional, irritable and bad-tempered when she has pain.

[67] In terms of her low back pain, he wrote that Ms. Matei has intermittent pain over the right lumbosacral area, rated 2 to 3 on average, which in cross-examination he agreed was mild. But he also wrote that her low back pain can get up to 5 out of 10. Further, Ms. Matei described her low back pain as sharp, dull and tight, and aggravated by activities at work and housework including bending and lifting.

[68] According to Dr. Chow, Ms. Matei also reported that pain was interrupting her sleep once or twice a week, which was not a circumstance she identified as ongoing during her testimony.

[69] His report sets out the following opinions about Ms. Matei's functional status:

She continues to have low back pain with various normal life activities including personal care, housekeeping, recreational, social and vocational tasks. Excessive force or load on a lumbar spine would continue to aggravate her symptoms. This would include prolonged sitting, standing, walking, repeated or prolonged bending, twisting and heavier physical demand tasks that would include carrying, lifting, pulling, pushing more than 10 to 20 lbs.

...

Currently she is able to do her job, but with pain. She will require help when she has to carry or lift heavier items. She will need to pace her activities as tolerated. She will not be able to return to her training as a competitive tennis player until her back pain resolves.

[70] Dr. Chow also expressed the view that Ms. Matei still has the potential to improve and her prognosis is good, indicating she will likely show further improvement with recommended treatment, which he clarified was for both pain control and maximizing if not restoring function. His recommendations include:

- education by an occupational therapist regarding “self-care routine in addition to proper body biomechanics when doing functional tasks, workload division and pacing strategies, task and work ergonomics, jobsite and workstation ergonomic assessment, in addition to in-home assessment to determine her current housekeeping needs;
- continuing active rehabilitation to progress in her core strengthening “program” for her back and endurance fitness program to maximize her function and fitness level;
- related to this a gym membership
- a weight reduction program;
- continuing with over the counter medication for pain as needed;

- continuing with Imovane (sic) for sleep disturbance;
- a cognitive behavioural or mindfulness program for pain control.

[71] During his testimony, Dr. Chow indicated that physiatrists deal with “whole body function” including psychological symptoms because psychological issues affect pain and sleep. He emphasized the importance of obtaining a detailed history of the person’s condition and symptoms, pointing to the impact of sleep and psychological issues on pain and their effect on each other.

[72] He also testified that Ms. Matei needs to avoid activities that bring on pain and work within her tolerance, explaining the reduced ability of injured tissue to withstand the same loads and forces as normal tissue. He identified pain during activity that lasts more than 30 minutes as “aggravational” pain that prevents recovery or healing and creates ongoing pain. He also explained that Ms. Matei must use proper body mechanics to avoid putting her injured soft tissues under strain and aggravating her back symptoms.

[73] Dr. Chow’s opinions were not undermined in cross-examination.

Dr. Vorobeychik

[74] Dr. Vorobeychik has been Ms. Matei’s family physician since 2005. In her first report dated January 10, 2021, she summarized Ms. Matei’s reported symptoms, her examinations findings, her treatment and her recommendations since the Accident. Her report indicates that although Ms. Matei continued to complain of low back pain, Dr. Vorobeychik had found the range of motion in her lumbar spine normal since June 2019.

[75] Her report sets out the following impression:

Ms. Matei was involved in a motor vehicle accident on May 11, 2018, as a result of which she sustained a soft tissue injury to her neck and back and developed headaches. Her symptoms improved by now, but she still complains about lower back pain and developed insomnia and driving-related anxiety. Her prognosis is guarded. She will need [to] adjust her activities to accommodate her symptoms and to continue rehabilitation and psychotherapy for some time in [the] future.

[76] Dr. Vorobeychik's second "addendum report" dated July 24, 2021 is essentially an updated summary of her clinical records. Her summary for June 28, 2021 includes a description of Dr. Cabrita's diagnosis of Ms. Matei, which is not admissible for its truth, as well as her treatment and her recommendations. During her testimony Dr. Vorobeychik indicated that she referred Ms. Matei to Dr. Cabrita because of her ongoing low back pain although she also addressed her left knee and hip pain.

[77] In her addendum report Dr. Vorobeychik repeats the impression set out in her first report, with the addition of: "[s]he may need functional capacity evaluation to determine her ability to resume pre-accident duties at work. She may also need to join a chronic pain clinic after the legal issues are resolved."

[78] In cross-examination she confirmed her clinical records do not refer to Ms. Matei reporting driving anxiety until September 2020.

Dr. Ballard

[79] As indicated Dr. Ballard is a physiatrist retained by the defendants to provide an independent medical evaluation. She assessed Ms. Matei on November 20, 2020 and provided a medical legal report dated December 15, 2020.

[80] Addressing Ms. Matei's current status, Dr. Ballard wrote that she reported constant pain in the right lumbar region with an intensity of two out of 10, aggravated by "physical activity, bending, and lifting". She also wrote that Ms. Matei reported relief with therapy, rest, and medication. In cross-examination, Dr. Ballard was not able to identify the context for Ms. Matei's two out of 10 estimate, apart from saying she usually asks patients how they would rate their pain on average.

[81] In direct examination, Dr. Ballard identified two out of 10 pain as minimal, also stating at this level the person can feel pain, but it does not impede function typically. She added that Ms. Matei's estimate was likely fairly accurate. Dr. Ballard's commented in cross-examination that she thought Ms. Matei was being honest because she sees a lot of people sitting comfortably reporting 10 out of 10 pain.

Asked to agree some people over report pain and others under report, Dr. Ballard indicated that they usually over report.

[82] Dr. Ballard's report also states that Ms. Matei reported intermittent left hip pain rated at 2 out of 10, aggravated by hip movement and relieved by therapy, and left knee pain rated at 3 out of 10, with no aggravating factors and relieved by medication, use of a brace and ice.

[83] Dr. Ballard was cross-examined about her "intake" procedure or history taking. Her notes include an "intake template" form that her assistant completed and she "verified" during what she estimated was a 30 minute interview with Ms. Matei. The form includes brief notes next to subheadings such as initial complaints, current complaints and "improvement in symptoms? If yes, % improvement", hours worked per week, job duties, job demands and again current complaints. Next to "improvement in symptoms? If yes, % improvement", the response reads: 80%. There are no responses next to the subheading medical specialist referrals, and under the heading course of treatment, no treatments listed other than massage therapy and physical therapy up to December 2019. I note the defendants did not provide Dr. Ballard with clinical records dated after the fall of 2019.

[84] When queried about eliciting the information necessary to complete her evaluation, Dr. Ballard seemed to fault Ms. Matei for any gaps.

[85] Her report sets out the opinion that from a "strictly musculoskeletal perspective", Ms. Matei's Accident related injuries include lumbar spine sprain/strain, facet mediated. Dr. Ballard also opined that further recovery is probable and the prognosis remains optimistic, with reference to the reported 80% improvement and the usually favourable prognosis for soft tissue injuries.

[86] Addressing Ms. Matei's function, Dr. Ballard concluded she had no disability related to her occupation, based on her report that she worked regular hours plus up to eight hours of overtime per month. She also concluded Ms. Matei had no significant disability with housework, based on her report she completes housework

and grocery shopping on a paced basis. It is apparent there was no detailed discussion about whether and to what extent particular work and housework tasks effected Ms. Matei's pain symptoms.

[87] Regarding tennis, Dr. Ballard wrote:

Although it remains to be seen if she returns to the competitive level of tennis she enjoyed prior to the accident, she will probably return to some level of competitive tennis, and this disability will probably be temporary. Given the physical requirements of playing tennis at a competitive level, with the recommended therapy, it is possible this disability will be resolved within one year.

[88] Unaware that Ms. Matei had been attending active rehabilitation since January 2020, Dr. Ballard recommended 12 one hour weekly sessions before transitioning to self-directed program that includes appropriate strengthening and conditioning program with a focus on core musculature and sports specific exercise to aid in resuming tennis.

[89] Dr. Ballard also recommended a short course of Arthotec in place of Advil to be taken as needed. Finally, if a CT scan of Ms. Matei's lumbar spine identified facet arthropathy, she recommended radiologic guided injections of cortisone into the involved facet joints for pain palliation, commenting however that Ms. Matei's pain is quite mild.

[90] In cross-examination, Dr. Ballard's prognosis and opinions regarding disability were challenged on the grounds that she had not elicited or received sufficient information and failed to consider relevant circumstances, including for example:

- a) The severity of Ms. Matei's low back pain on bad days, particularly at work and after work and its impact; and
- b) Ms. Matei's mood symptoms and their impact.

[91] Dr. Ballard agreed that she did not consider emotional factors or sleep in providing her prognosis. She commented a number of times that emotional (or psychological) factors are outside the scope of her practice, although she agreed

that pain can cause mood and sleep issues and sleep issues can impact pain. She clarified that her prognosis was based on treating Ms. Matei's low back with active therapy and acknowledged that if Ms. Matei had been receiving appropriate treatment and still had not recovered, the prognosis would be more guarded.

[92] Ultimately, I was left unpersuaded by the optimistic prognosis set out in Dr. Ballard's report. In my view it reflects an incomplete and narrowly focused evaluation of Ms. Matei's ongoing pain symptoms and their impact, a failure to consider the potential interaction between her mood and pain symptoms, and a lack of awareness regarding her involvement in multiple, intensive treatments including active rehabilitation.

[93] Dr. Ballard was also cross-examined at some length about her causation opinion regarding Ms. Matei's left hip and knee symptoms based in part on a clinical record that she reviewed but is not in evidence. Dr. Ballard would not concede they were indirectly caused by the Accident. I do not intend to discuss this issue any further because as I have already indicated the only fact evidence suggesting a causal link to the Accident arises from Ms. Matei's remark about her understanding of the observations and treatment provided one of her physiotherapists.

[94] In contrast to Dr. Ballard, I am satisfied Dr. Chow's opinion evidence arises from a thorough investigation of Ms. Matei's condition. I accept his opinions with the exception of his prognosis, given it is two years old and since then Ms. Matei's low back pain has persisted and she has returned to a work schedule that involves evening shifts and much less support in performing the physically challenging aspects of her job.

Findings of Fact

[95] Based on my assessment of the evidence as a whole, my findings regarding Ms. Matei's pre and post Accident condition are as follows:

1. Prior to the Accident, Ms. Matei had no physical limitations. Very fit and fully capable of performing all aspects of her job and also played very high

level competitive tennis many days and hours each week. She experienced occasional headaches managed with non-prescription pain medication and some difficulty sleeping related to shift work managed with Zopiclone. Neither had any impact on her functioning. Ms. Matei was happy, outgoing and very fulfilled by her life.

2. The Accident caused soft tissue injuries to Ms. Matei's low back and neck, resulting in significant pain and headaches. Pain as well as nightmares disturbed her sleep for a period of time. I also accept the Accident resulted in a fear of driving.
3. Initially, pain symptoms prevented Ms. Matei from playing tennis altogether. Already selected for the Canadian national team, she started playing "gentle tennis" in July 2018 in an effort to prepare for the world championships in October 2018. At the world championships, Ms. Matei's low back pain prevented her from playing more than one or two doubles matches due to her pain. After that, Ms. Matei played recreational tennis only, and not very often, until May 2019, when she stopped playing altogether, other than a brief attempt in January 2021.
4. Overtime Ms. Matei's neck pain largely resolved. Her headaches and sleep difficulties returned to the way they were before the Accident, leaving her with low back pain. I accept that commuting to and from work, before she moved back to Coquitlam in February 2019, was difficult driving aggravated her low back pain and given her fear of driving.
5. Ms. Matei has attended medical appointments and participated in multiple forms of treatments related to her injuries and symptoms since the Accident. Since January 2020 she has regularly, if not frequently, attended active rehabilitation. I am satisfied she has complied with the recommendations regarding exercises, equipment and other strategies to reduce her pain and increase her function. For example, she has modified

how she performs physically demanding tasks at work and housework to avoid aggravating her low back pain.

6. Following her hysterectomy in May 2019, Ms. Matei spent 12 weeks recovering. For the first eight to nine weeks her low back pain increased, before returning to the way it was before the surgery. In response to her ongoing low back pain and perhaps her fear of driving, Ms. Matei developed mood symptoms in the fall of 2019. These mood symptoms included feelings of depression, irritability as well as frustration and disappointment.
7. In July 2020 after jogging, Ms. Matei also developed left knee and hip pain that I am not able to find were caused by the Accident. Just as she had with her Accident related symptoms, she complied with her family physician's recommendation regarding her knee and hip pain. In addition, she has worn a knee brace. I accept that her knee pain improved with physiotherapy.
8. Accepting Ms. Matei's evidence about her current symptoms, I find that she has near constant mild low back pain that worsens or intensifies when she works and does housework. I find that the low back pain is aggravated by physical tasks that involve bending, pushing and lifting, as well as prolonged sitting and standing. Occasionally, after resting during days off or when on vacation, she may have a day where she experiences no low back pain. I accept that when it intensifies or is aggravated, her low back pain increases to at least moderate.
9. Turning to Ms. Matei's mood symptoms, I find that since beginning counselling in October 2020, her driving anxiety has improved somewhat and she is learning to cope psychologically and emotionally with her ongoing pain. I also find, however, that she has ongoing mood symptoms associated with her ongoing low back pain that worsen when her pain

worsens. Both her pain and mood symptoms have undermined her desire to socialize and she has withdrawn from her friendships.

10. Ms. Matei's knee and hip pain are also ongoing. I accept that she experiences knee pain once or twice a week when she stands for too long at work or walks too fast. I also accept that her left knee pain flared and she had low back pain when she tried playing tennis a few times in January 2021.

11. With respect to the future, I find it is unlikely Ms. Matei's low back pain will improve significantly, given its duration and the extent of her participation in multiple forms of treatment including active rehabilitation. At the same time, I accept that further counselling is likely to facilitate improvement in her mood symptoms and her ability to manage and cope with her low back pain.

Damages

Non-Pecuniary Damages

[96] Ms. Matei claims \$140,000 in non-pecuniary damages and submits an appropriate award is in the range of \$120,000 to \$150,000. The defendants take the position that \$40,000 is fair.

[97] Non-pecuniary damages are awarded to compensate a plaintiff for the pain and suffering, loss of enjoyment of life and loss of amenities caused by a defendant's negligence.

[98] The amount of the award is not determined by the nature or seriousness of the plaintiff's injuries alone. Additional factors include the plaintiff's age; the severity and duration of their pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An appreciation of the plaintiff's loss is the key: *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 1981 CanLII 35 (S.C.C.) at 637.

[99] Compensation for non-pecuniary losses must also be fair and reasonable to both parties. Fairness is measured against awards made in comparable cases, recognizing they offer rough guidance only because there are unique aspects to each plaintiff's circumstances: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[100] The parties rely on a number of cases.

[101] Ms. Matei's cases include:

- a) *Sawires v. Paris*, 2021 BCSC 240;
- b) *Martin v. Frederickson*, 2021 BCSC 1424;
- c) *Kelly v. Kalra*, 2019 BCSC 1305;
- d) *Lensu v. Victorio*, 2019 BCSC 59; and
- e) *Verjee v. Dunbrak*, 2019 BCSC 1696;

[102] The defendants provide the following:

- a) *Baracco v. Mallinson*, 2021 BCSC 156;
- b) *Parker v. Martin*, 2017 BCSC 446;
- c) *Erwin v. Buhler*, 2017 BCSC 362;
- d) *Pitcher v. Brown*, 2015 BCSC 1415;
- e) *Rabiee v. Rendleman*, 2015 BCSC 595; and
- f) *Rasmussen v. Blower*, 2014 BCSC 1697.

[103] The defendants' cases are not comparable enough to be of assistance as either: the injuries sustained did not impact the plaintiff's employment (*Baracco*; *Rabiee*; *Parker*); there was an absence of objective evidence or medical records (*Parker*; *Erwin*); the evidence provided was inconsistent with the plaintiff's proposed

injuries (*Erwin*); the injuries were not primarily caused by the accident (*Pitcher*); or the plaintiff failed to mitigate injuries (*Rasmussen*). Among Ms. Matei's cases, *Sawires* and *Martin* are the most analogous.

[104] In *Sawires*, the plaintiff was awarded \$110,000 in non-pecuniary damages (para. 100). Much younger than Ms. Matei, he too sustained soft tissue injuries to his neck and back, leaving him with chronic right sided low back pain. Highly athletic, the plaintiff was no longer able to play hockey and soccer, two of his most important sports. Like Ms. Matei, his ongoing symptoms and their impact on his lifestyle had affected his emotional health (para. 2). However, his low back injury and resulting pain had also resulted in a herniated disc that caused shooting pain and tingling into his right leg (para. 47). Further, the effect of his injuries and symptoms on his personality and his emotional functioning was much more significant (para. 84).

[105] In *Martin*, the plaintiff was awarded \$120,000 in non-pecuniary damages based on similar, but in several ways more serious, circumstances than Ms. Matei's (para. 56). Again much younger, the plaintiff had been a national level biathlete and remained active at the time of the accident (para. 3). Unlike Ms. Matei, in addition to soft tissue injuries, the plaintiff suffered from concussion like symptoms and frequent migraine headaches for a period of time. Similar to Ms. Matei, constant neck pain had become chronic. The plaintiff also suffered from worse low mood and depressive symptoms than Ms. Matei. In addition, she continued to not sleep well and after access to treatments was restricted by Covid-19, her condition deteriorated a few months prior to the trial (para. 55). Although she had continued working as an LPN, the plaintiff spent most of the rest of her time at home sleeping (para. 29). Her poor mood and reduced energy had significantly strained her relationship with her spouse as well as friendships. Both her spouse and her children had taken on significant aspects of the housework that she had previously done (para. 39).

[106] Applying the *Stapley* factors to the circumstances here, I accept that before the Accident Ms. Matei had a rich and fulfilling life. She was a happy, outgoing person who socialized regularly at the JTC and with other friends. A high level

competitive tennis player, tennis was her priority and her passion. Striving to play to the best of her ability and being apart of a competitive tennis community was fundamentally important to Ms. Matei and her sense of identity. Ms. Matei also enjoyed her work as an X-ray and CT technologist. Very fit and healthy, she had no trouble commuting the long distance from home to work, working full-time and some overtime and playing tennis eight to 10 hours per week.

[107] I accept that Ms. Matei's Accident related injuries and her ongoing symptoms, which include near constant low back pain that fluctuates from mild to moderate, driving anxiety, and increased mood symptoms when her pain increases, have significantly impacted most aspects of her life. As she says, she works in pain, she cleans in pain, and she has little energy left for anything else. In response to her ongoing pain, mood symptoms and fear of driving, Ms. Matei has withdrawn from her friends and stopped socializing at the JTC. Although her driving anxiety has improved, she remains quite socially isolated. Currently, she spends much of her "down time" resting and recovering. In the future, and as discussed below with respect to her claim for loss of future earning capacity, when Ms. Matei is no longer required to work overtime, she will have more time off and likely, more energy. The combination of more time off, more energy, the improvement in her mood and ability to manage her pain that I have predicted, makes it likely in my view that she will return to some physical activities and socializing.

[108] An important aspect of Ms. Matei's non-pecuniary loss arises from the impact of her injuries and symptoms on her ability to play tennis. Since the Accident, apart from struggling to prepare and then playing very few doubles matches at the 2018 world championships, she has not been able to play competitive tennis. Since May 2019 she has not played recreationally, apart from a brief attempt in January 2021. I accept that the combination of her return to the schedule attached to her .7 permanent position in January 2020, the increase in hours due to the pandemic, her ongoing low back pain, mood systems, and driving anxiety prevented her from playing recreationally at the JTC. After July 2020, however, I accept her left knee

pain, which flared when she tried to play in January 2021, also contributed to her inability to play.

[109] I also recognize that this aspect of Ms. Matei's non-pecuniary loss is limited by her pre-Accident plan to transition to less competitive or recreational tennis in order to focus on maximizing her income for about ten years before retiring at 65. In other words, competitive tennis as her priority was only temporary. I say this without intending to diminish the emotional pain of losing those years during which she would have continued playing high level competitive tennis. I accept that with increased time off and improvements in her mood, her ability to manage her low back pain and her energy, there is a significant chance she will be able to play some recreational tennis. That said, I also accept the extent of her participation will continue to be tempered by low back pain, as well as knee pain.

[110] Bearing in mind all of the circumstances affecting the assessment of her non-pecuniary loss, I conclude an award of \$90,000 is fair and reasonable, which includes compensation for the pain and suffering associated with housekeeping since the Accident and into the future. In my view this is most appropriately addressed as a non-pecuniary loss, given she has continued to perform all of her own housework by taking longer and enduring the pain.¹

¹ *McTavish v. McGillivray*, 2000 BCCA 164 suggests the loss of housekeeping capacity should be treated as non-pecuniary where the plaintiff is still able to perform household tasks with difficulty or has decided they need not be done. More recently in *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34, the Court of Appeal returned to the question of how to properly characterize and value a loss of housekeeping claim, concluding:

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.

Past and Future Loss of Earning Capacity

[111] Ms. Matei seeks awards for past and future loss of earning capacity, which are subject to many of the same legal principles. Both involve claims for the loss of the value of the work the plaintiff would have performed but was, or will be, unable to perform because of the injuries caused by the defendant's negligence (see: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45).

[112] The court's central task in determining past and future loss of earning capacity is to compare the plaintiff's working life if the Accident had not occurred with their working life after the Accident.

[113] The plaintiff is required to demonstrate that their accident related injuries have impaired their capacity to earn income, resulting in a past or a real and substantial possibility of a future pecuniary loss. Once this threshold is met, the plaintiff must prove the extent of the loss of earning capacity.

[114] While actual past events must be proven on a balance of probabilities, hypothetical events including what would have happened in the past absent the accident, and what would have and will occur in the future, will be considered, where there was or is a real and substantial possibility of them occurring. Hypothetical events are then given weight according to their relative likelihood: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44–48.

Loss of Past Income/Earning Capacity

[115] Ms. Matei claims \$102,837.50 in past loss of employment income (gross). There are two components to her claim. The first is undisputed. It is comprised of the income she lost when she missed five days of work after the Accident. As per the ASOF, the net loss of wages for those five days totals \$1,457.30.

[116] The second component, which is opposed, is based on the following:

- from the date of the Accident to December 2019, the difference of \$3 per hour in pay between the grade 1 and the grade 3 position (\$9,225);
- from January 2020 to the date of trial, the loss of overtime pay from an average of 1.5 shifts per week, calculated at \$600 per shift (\$81,000); and
- from the date of the Accident to present, the amount received in accident-related sick days, which she is required to pay to her employer based on their subrogated claim. The employer claims \$25,112.50. This includes what she was paid during nine weeks of sick time taken after her hysterectomy. Ms. Matei calculates this amount at \$12,500. Once deducted that leaves \$12,615.50 in sick time that she says she must repay.

[117] I turn first to the \$9,225 claimed based on the \$3 per hour wage difference between Ms. Matei's temporary and permanent .7 positions, which she returned to in January 2020. She argues she suffered this loss because she remained in the temporary position with its daytime Monday to Friday schedule, until compelled to return to her permanent position, due to her injuries and ongoing pain.

[118] The assessment of her past loss of income, however, requires me to compare and quantify the difference between what she would have earned absent the Accident and what she actually earned. I am satisfied that absent the Accident, Ms. Matei would have continued in the temporary position until the same point in time, to accommodate her competitive tennis schedule. Consequently, in comparing the trajectory of her past working life with and without the Accident, her hourly rate would have been the same. She is therefore not entitled to the \$9,225 she claims.

[119] In my view, the most significant part of her past wage loss claim, \$81,000 in overtime income, based on an average of 1.5 overtime shifts per week from January 2020 onward, also significantly overestimates her loss. Again, I am satisfied that absent the Accident Ms. Matei would have continued to play high level competitive tennis until the trial, which involved practicing and playing eight to 10 hours per

week, as well as playing in tournaments on weekends and travelling to play in tournaments. She testified she has been required to work mandatory overtime and has also worked some voluntary overtime, during the pandemic due to the pandemic, without specifying how much. The particulars of her work schedule attached to the ASOF also do not assist. Further, the increase in her T4 income for 2020 also reflects the higher hourly rate attached to her permanent position and the higher pay on statutory holidays. Finally, although I accept Ms. Matei's evidence that she never took sick time because of left knee pain, I am less confident that left knee pain did not contribute to working additional voluntary overtime.

[120] Of course, absent the Accident, Ms. Matei would have faced the same requirement for mandatory overtime, which would have reduced her time off and the amount of time she had available to accept additional optional overtime. There is no evidence about how the pandemic would have limited Ms. Matei's ability to play competitive tennis. Nor did the parties make submissions on the point.

[121] Based on all of these considerations, I am satisfied that \$40,000 for loss of overtime pay is fair and reasonable.

[122] Turning lastly to her employer's subrogated claim and Ms. Matei's estimate that she has been paid \$12,615.50 in Accident related sick time. Again, Ms. Matei arrives at this amount by deducting the amount paid for nine weeks of sick time post surgery, which the evidence establishes. Ms. Matei testified to taking some, but limited, sick time due to her Accident related symptoms and specific time with reference to pay periods starting in August 2021. There is no evidence that she took sick time for any other reason apart from her surgery in May 2019. Accepting her evidence that left knee pain never caused her to take sick time, I am satisfied that her past wage loss properly includes \$12,615.50, based on her employer's subrogated claim.

[123] In summary, leaving aside the subrogated component, I award Ms. Matei the net amount based on \$40,000 (gross) for the loss of overtime pass plus \$1,457.30

(net wage loss) for her past loss of earning capacity. I leave it to counsel to agree on the calculation of the net amount.

Loss of Future Earning Capacity

[124] Ms. Matei seeks \$300,000 in damages for a loss of future income earning capacity. The defendants take the position that she has failed to establish an entitlement to any award based on her ability to work full-time and some overtime since shortly after the Accident, as well as the security of her position as a unionized highly skilled health care employee.

[125] As indicated, to establish a claim for future loss of earning capacity, a plaintiff must first prove there is a real and substantial possibility of a future event leading to a loss of income based on their accident-related injuries: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Very recently, in *Rab v. Prescott*, 2021 BCCA 345, the Court of Appeal articulated this as the first and second steps in a three-step process. As stated by Grauer J.A. said at para. 47:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras 93–95.

[126] As indicated, if the plaintiff discharges their burden at the first and second steps, then the loss must be assessed also taking into account all realistic negative and positive contingencies.

[127] Both the earnings approach and the capital asset approach have been used to assess a loss of future earning capacity, although the distinction was not emphasized in *Rab*. The earnings approach, which has been viewed as appropriate when the future income loss is more easily measured, typically involves a

determination of the plaintiff's estimated annual income loss, multiplied by the remaining years of work, which is then discounted to reflect current value. The capital asset approach, most often applied when the loss is not as easily measurable, involves considering a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been available to them, and is less valuable to themselves as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, [1985] B.C.J. No. 31 at 356 (S.C.).

[128] Under either approach the court is required to quantify the future financial harm to the plaintiff, grounded in the evidence and factual findings and taking into account the relevant and realistic contingencies by weighing possibilities and probabilities of future events: *Pett v. Pett*, 2009 BCCA 232 at para. 19; and *Dunbar v. Mendez*, 2016 BCCA 211 at paras. 20–21.

[129] Ms. Matei takes the position there is a real and substantial possibility that future events will result in a pecuniary loss because her ongoing symptoms, namely low back pain, will prevent her from accepting available overtime between now and her retirement. She also relies on what I accept was her plan before the Accident to focus on competitive tennis temporarily and then maximize her employment income until age 65, to ensure her pension provided adequate retirement income.

[130] Ms. Matei suggests two approaches to quantifying the loss. The first involves a version of earnings approach. Based on her evidence she has been turning down one to two shifts of overtime each week, her estimate that the amount of available overtime will decrease to two to four shifts per month when the pandemic becomes less of a concern, and \$600 per shift, she estimates her total loss at \$216,000 to \$432,000. Relying secondly on the capital asset approach and the *Brown* factors, awards in other cases based on two years salary, and her 2020 earnings of

approximately \$100,000, she suggests \$200,000 is an option. Considered together, she proposes the amount of \$300,000.

[131] I have no trouble accepting Ms. Matei has established an entitlement to an award for loss of future earning capacity. My findings regarding her ongoing low back pain and past loss of income, based on the loss of overtime income in particular, demonstrate there is a real and substantial possibility of a future event leading to pecuniary loss. Again, I have found that her near constant mild low back pain worsens when she works and is aggravated by some of the physical aspects of her job such as bending, pushing and lifting. As a result she has been spending much of her down time, as well as some sick and vacation days, resting and recovering. Further, I have found significant improvement is unlikely. Based on these findings, I also accept that working as much as she has during the pandemic due to mandatory overtime and some voluntary overtime is not sustainable. I largely share her view that the impairment of her capacity will limit her over the long term to working full-time hours constituted by her .7 schedule plus some additional shifts.

[132] The more difficult issue involves estimating the amount of overtime that will be available in the future, or her potential future loss.

[133] Ms. Matei gave vague evidence that the amount of overtime available in the past was quite limited, more has been offered for the last few years and it has increased significantly during the pandemic due to a shortage of staff. She also testified more specifically that one or two overtime shifts per week have been available more recently, but she could not do more than that due to pain.

[134] Accepting there will be a reduction in available overtime in the future, based on her limited evidence about its availability in the past, as well as the significant increase due to the pandemic, I consider an estimate of approximately two available overtime shifts per month to be reasonable starting point for the assessment of her loss. Noting she has 14 not 15 years left until she expects to retire, I estimate her total potential loss based on available overtime at \$202,000. Turning to consider realistic contingencies, in my view some deduction must be made to account for the

chance that Ms. Matei's ongoing left knee pain will and would have contributed to her inability to accept overtime in the future. Similarly, given the physical demanding nature of her job and the effects of aging, there is also a chance that absent the Accident, Ms. Matei would have found it difficult to continue working overtime, or as much overtime, after the age of 60. On the other hand, I agree with her submission that no deduction should be made for the possibility of early retirement given her strong work ethic and her financial need *vis a vis* retirement income. Based on my estimate of the total potential loss and the assessing the realistic contingencies as requiring a 20% deduction, I conclude an award of \$161,600, for loss of future earning capacity to be fair and reasonable. The parties have leave to address any requirement for a present value calculation, if they are unable to agree on this issue.

Cost of Future Care

[135] Ms. Matei claims \$26,700 for the cost of future care.

[136] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore them to their pre-accident condition, insofar as that is possible, and to preserve and promote their mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, *aff'd* 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[137] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be reasonable and medically justified, not medically necessary, to be recoverable: *Milina* at para. 212. An evidentiary link between the “physician’s” assessment of pain, disability and recommended treatment and the care recommendations of a qualified health care professional is required: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[138] To establish her claim, Ms. Matei relies on the recommendations of Dr. Chow and Dr. Vorobeychik, the ASOF regarding the cost of the treatment she has

attended to date, and her evidence she finds various treatments helpful and necessary to keep working. She proposes a lump sum amount of \$4,500 for five years which would provide for paramedical treatments that include active rehabilitation, physiotherapy, massage, acupuncture and counselling, based on expenses for treatments included in the schedule of special of damages. In addition, she claims the cost of a gym membership for the remainder of her working life, which she estimates at \$25 per month.

[139] Dr. Chow recommended Ms. Matei continue with active rehabilitation to maximize her function and an endurance fitness program and a gym membership but also said she will not require passive treatment unless she has a flare-up, in which case a six to eight week course of physical therapy will be required.

[140] Dr. Vorobeychik recommends that Ms. Matei continue with rehabilitation and psychotherapy for the foreseeable future, without specifying what constitutes rehabilitation.

[141] Although I accept that Ms. Matei has found acupuncture helpful, there is no evidence of it being recommended. The special damages schedule indicates Ms. Matei has attended massage therapy only once since November 29, 2019. In recent months she has participated in active rehabilitation and attended physiotherapy three or four times per month. Her counselling attendance has been about once per month.

[142] Giving greater weight to Dr. Chow's opinion regarding passive treatment, I accept the cost of some physical therapy to treat future flare-ups is medically justified. At the same time, I accept that Ms. Matei's ongoing attendance up to now has helped her manage ongoing pain. Although I accept they will occur, it is therefore difficult to predict to what extent or how often she will experience flare-ups, but I accept they will occur. Attempting to integrate the medical justification with Ms. Matei's evidence as best I can, I assess the cost of four sessions of physiotherapy per year for a total of five years, which may or may not be in the next five years, as reasonable. I have calculated the cost of physiotherapy sessions

based on the average cost of Ms. Matei's previous sessions as set out in the ASOF (\$73.70). Based on four sessions per year for a total of five years, I award \$1,474 for physiotherapy subject to a present value calculation that I leave to counsel.

[143] I also accept that the cost of some ongoing active rehabilitation and counselling is medically justified. Both have been helpful to Ms. Matei in addressing and managing her pain and mood symptoms. Through active rehabilitation she has also learned how to manage the physical demands of work more effectively.

[144] In my view monthly sessions of active rehabilitation for the next three years is reasonable, and award \$3,060.96, based on the average cost of past sessions as per the ASOF (\$85.86) subject to counsel's present value calculation

[145] Accepting that 11 sessions of counselling has resulted in some improvement in Ms. Matei's driving anxiety and ability to cope with her pain symptoms, in my view, the cost of a further 12 sessions is reasonable. Based on the ASOF, the average cost per counselling session is \$126.52. Therefore, I award \$1,518.24 for this item.

[146] Although Ms. Matei has not provided a cost estimate for the gym membership recommended by Dr. Chow, I am satisfied her proposal of \$25 per month is entirely reasonable. I also accept the gym at the JTC is located too far away given her work schedule, the location of her work and home and the effect of driving on her back pain, to be accessible. Ms. Matei will need to continue to maintain her core strength and fitness level to manage her ongoing low back pain. Accordingly, I grant her an award of \$25 per month until her expected retirement in 14 years time, \$4,200 which again will require a present value calculation that I leave to counsel.

[147] In summary, I award a total of \$10,253.20 (subject to present value calculations for Ms. Matei's future care.

Special Damages

[148] Ms. Matei claims \$8,598.29 in special damages. The defendants agree she ought to receive \$3,498.29. They dispute her entitlement to \$697.20 in moving

expenses and \$5,100 in monthly dues at the JTC from May 2019, when she stopped playing tennis, to the present.

[149] 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* at para. 182. The standard is reasonableness of the expense in the *context of the injuries suffered*: *MacIntosh v. Davison*, 2013 BCSC 2264 at para. 127.

[150] Absent specific authority, and while I appreciate she has not had any benefit from paying her monthly dues at the JTC, I am not able to conclude they are recoverable as special damages, because they are an expense she would have incurred in any event. In other words, they were not incurred in the context of the injuries suffered. I accept, however, that her moving expenses are justified by her injuries and were reasonable.

[151] I award \$4,195.49 in special damages based on the agreed amount of \$3,498.29, plus \$697.20 in moving expenses.

Conclusion

[152] I leave the issue of pre-judgment interest for counsel to resolve.

[153] Ms. Matei is entitled to her costs. If the parties cannot agree, or if there are circumstances of which I am unaware, they have leave to schedule a brief cost hearing before me.

“Fleming J.”