IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gustafson v. MacFarlane,*
2022 BCSC 1872

Date: 20221026
Docket: S199677
Registry: Vancouver

Between:

Sharlene Gustafson

Plaintiff

And

Doreen MacFarlane

Defendant

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:	J.S. Stanley T. Chandler E. Emery (September 21 only)
Counsel for the Defendant:	J.A. Doyle T.C. Hinkson
Place and Dates of Trial:	Vancouver, B.C. September 12, 13, 20-23, 26-29, 2022
Place and Date of Judgment:	Vancouver, B.C. October 26, 2022

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Introduction

[1] Sharlene Gustafson suffered catastrophic injuries when she was struck and run over by a motor vehicle driven by Doreen MacFarlane. She claims compensation for her injuries.

[2] Ms. Gustafson was 57 years old at the time of the accident in July 2019. She lived in a rented 100-year-old farmhouse with her common law husband, Donald Blanes. Their relationship was settled and secure. They shared the house with Mr. Blanes' brother and two of his sons. Mr. Blanes had taken early retirement from a career as a line mechanic and was living on a pension. Ms. Gustafson was a widow. She had health issues including diabetes, hypothyroidism, high cholesterol, anxiety, and depression. She worked part time in a post-office booth contained in a drug store and was a receipt of a modest survivor's pension from her marriage to her late husband. Ms. Gustafson and Mr. Blanes both had children and grandchildren, whom they doted upon during visits to the farmhouse.

[3] The farmhouse occupied by Ms. Gustafson and Mr. Blanes was located on a 40 acre farm property. The owner and their landlady was the defendant, Ms. MacFarlane. Ms. MacFarlane lived in a more modern house on the other side of the property. The tenancy agreement was informal. Ms. MacFarlane was recently widowed. Her late husband, Norm MacFarlane, had been friends with Mr. Blanes, and the rent was very reasonable. In the spring and summer of 2019, Mr. Blanes was mowing the lawn and performing yard work in exchange for a reduction in the rent.

[4] On July 14, 2019, Ms. Gustafson, Mr. Blanes, and his son, Ryan Blanes, were engaged in trimming a large holly bush close to the farmhouse. The trimming produced a quantity of leaves and branches on the ground that were to be taken away to a burning pile elsewhere on the property. Once the trimming was complete, Ms. MacFarlane arrived driving a small utility vehicle known as a "Gator", and began to help with the clean-up. She took loads of trimming debris to the burning pile. At the time of the accident, one more pile of debris remained to be taken away.

[5] Before she was struck, Ms. Gustafson was behind the Gator, preparing to load the remaining debris into a bin at the back. Ms. MacFarlane was at the wheel. Suddenly, she drove the Gator backwards into Ms. Gustafson, pushing her along the ground for a distance, then running her over with both rear and front wheels while travelling down a slope. Ms. MacFarlane brought the Gator to a stop at the foot of the slope and then drove it forward up the slope, past Ms. Gustafson, to park it close to the pile of debris. None of this is disputed.

[6] Ms. Gustafson came to rest on the ground with broken bones in her neck, ribs, sternum, and pelvis. She suffered a spinal cord injury ("SCI"), liver laceration and a collapsed lung. When Mr. Blanes rushed to her side, she told him that she could not feel her legs. Shortly afterwards, she lost consciousness and went into cardiac arrest, and Mr. Blanes performed CPR until emergency responders arrived.

[7] The consequences have been terrible for Ms. Gustafson. Because of her SCI, she has lost the use of her legs. She has partial use of her arms and hands, such that she is able to operate a powered wheelchair, but is very limited in what she can do with them. She requires ongoing treatment to maintain the use of her hands. She has some sensation in her lower body and experiences pain and cramping. She has endured various surgical procedures, including a colostomy and the insertion of a suprapubic catheter to facilitate the elimination of feces and urine. She is at risk of autonomic dysreflexia ("AD"), a condition that necessitates that she have access to 24 hour care to address unpredictable and life-threatening increases in blood pressure. She cannot adjust her position in bed, and has suffered and is at risk of pressure sores. She requires assistance and special equipment to move between her bed and her wheelchair at the beginning and end of the day.

[8] Ms. Gustafson was discharged into Mr. Blanes' care at their home in November 2019. They continue to reside in the farmhouse, which suited them well until the accident. Now they are managing but, given her condition, it is common ground that this is not suitable accommodation for Ms. Gustafson. The house is not well insulated, the room that has become her bedroom is not particularly private, and

she can only access parts of the house in her wheelchair, and those with difficulty. In addition, it is awkward and uncomfortable that Ms. MacFarlane remains their neighbour and landlady.

[9] To this point, Mr. Blanes has provided Ms. Gustafson with virtually all the round the clock care she requires at home. This has been demanding and he is physically and emotionally exhausted. It is an arrangement that cannot be sustained for much longer.

[10] There are issues both as to liability and damages. Ms. Gustafson maintains that she was injured as a result of Ms. MacFarlane's negligence, and only Ms. MacFarlane's negligence. Ms. MacFarlane weakly denies that she was negligent. Alternatively, she contends that Ms. Gustafson was contributorily negligent, and that Mr. Blanes was also at fault.

[11] As to damages, Ms. Gustafson seeks an award of approximately $8.2 million (plus a tax gross-up and management fee), and Ms. MacFarlane says that her damages are less than half that. Nevertheless, there is a good deal of common ground. The parties agree that Ms. Gustafson is entitled to an award of general damages at the rough upper limit of $435,000 and to special damages of $89,670.36. There is no dispute as to Ms. Gustafson's injuries or as to her life expectancy. The parties disagree as to the amount of an award to which Ms. Gustafson is entitled under each of the following heads of damage: the cost of future care, an in-trust award in respect of care provided by Mr. Blanes since the accident, and loss of past and future earning capacity.

[12] The parties have agreed to postpone for later consideration Ms. Gustafson's claims for a management fee, a tax gross-up, and a claim under the *Health Care Costs Recovery Act,* S.B.C. 2008, c. 27, in respect of health care services provided to Ms. Gustafson by the government of British Columbia.

Liability issues

Background

[13] The Gator is a four-wheeled, off-road farm utility vehicle. It can seat a driver and one passenger on a bench seat beside the driver. It has an engine in front and a bin at the back. The cab is open to the air. The driving controls are uncomplicated: a steering wheel, a gearshift offering two forward gears, a neutral position, and a reverse gear, and accelerator and brake pedals on the floor. There is also an emergency brake.

[14] In July 2019, Ms. MacFarlane was 75 years old and had been living on the farm for more than 20 years. She used the Gator regularly when she was working on the property. Although the witnesses describe the property as a farm, farming was not Ms. MacFarlane's principal occupation. She was working full time in an accounting capacity for a local business.

[15] The holly bush is located west of the southwest corner of the farmhouse. To the north and west of the holly bush, the ground slopes down towards a creek. Judging from an aerial photo in evidence, the distance from the holly bush to the creek is in the order of three to five car lengths, or 45 feet, travelling due west, to 75 feet, travelling northwest.

[16] July 14, 2019 was a Sunday. The accident took place in daylight between 7:30 and 8:00 pm. The trimming of the holly bush took place earlier that day. Ms. MacFarlane was not involved in the trimming, only the clean-up. There is a dispute in the evidence as to how she came to assist with the clean-up, and whose idea it was to use the Gator as opposed to a tractor that was on-hand, but nothing turns on it.

[17] Prior to the accident, Ms. MacFarlane took at least two loads of debris to the burning pile. In collecting these loads, Ms. MacFarlane stopped and got out of the Gator, and she and Ms. Gustafson loaded the Gator together.

[18] The last debris pile was located to the north or west of the holly bush, probably not too far from it. Ms. Gustafson was standing beside the pile. Ms. MacFarlane approached with the Gator to pick it up, as she had previously. She backed the Gator toward the debris pile from the south east. Until just before the accident, Ms. MacFarlane could see Ms. Gustafson.

The witnesses

[19] There were four persons present at the time of the accident, all of whom testified. Three of them are able to describe the accident: Mr. Blanes, Ryan Blanes, and Ms. MacFarlane. The fourth is Ms. Gustafson. She has no memory of anything that occurred from a time well before the accident until well afterwards.

[20] In my view, through no fault of their own, none of the witnesses is able to provide a complete and entirely reliable account of the accident. It was an unexpected, violent, and distressing event of brief duration. Each witness' account contains elements of reconstruction, as the witness has struggled to make sense of what he or she saw, and fit it into a coherent narrative. In addition, there are difficulties idiosyncratic to each witness.

[21] When the accident occurred, Mr. Blanes was standing on a verandah of the farmhouse, rolling up an extension cord. He was positioned so that he could see Ms. Gustafson, Ms. MacFarlane on the Gator, and the pile of debris. He recalls that his attention was caught by the sound of the Gator's engine revving, and then he saw the Gator knock Ms. Gustafson down and, as he put it, "plow her" a considerable distance before running her over. I infer that he had a general awareness of but no reason to pay close attention to the Gator's approach to Ms. Gustafson and the pile before he heard the engine noise.

[22] Ryan Blanes had been working in the yard and then went into the house. He returned and recalls that he watched the Gator strike Ms. Gustafson just as he was coming down the stairs from the porch back to the yard. He would not have had an opportunity to observe the early stages of the Gator's approach to Ms. Gustafson

and the pile, and he had no particular reason to be paying close attention to them as he walked across the porch and descended the steps.

[23] As the driver of the Gator, Ms. MacFarlane should be in the best position to recount what happened, and why. However, she is vague as to how she came to accelerate and run over Ms. Gustafson, and perhaps understandably defensive in her description of the positioning and events that immediately preceded the collision. She says, and I accept, that she was unaware that she had struck Ms. Gustafson until she saw Ms. Gustafson's body rolling in her wake, at the foot of the hill.

[24] Fortunately, fitting the evidence of these three witnesses together against the backdrop of photographs taken that day, it is possible to determine how the accident happened.

How did the accident happen?

[25] I will set out my findings and then explain how I have derived them from the evidence. I find as follows.

[26] Ms. Gustafson was standing either directly behind or behind and just to the side of the Gator's line of approach as Ms. MacFarlane approached. She and Ms. MacFarlane made eye contact and Ms. Gustafson motioned Ms. MacFarlane to come closer. Ms. MacFarlane approached slowly and cautiously. She could not see the leaf pile on the ground and relied on Ms. Gustafson's gestures.

[27] Ms. MacFarlane stopped with her foot on the brake. Ms. Gustafson was satisfied that the Gator was now close enough for easy loading. She bent down to pick up the debris and begin loading it into the Gator. Ms. MacFarlane could no longer see her.

[28] At this point, Ms. MacFarlane's foot unintentionally slipped from the brake to the gas pedal. The Gator was still in reverse gear and it accelerated backwards, striking Ms. Gustafson. Ms. MacFarlane was caught by surprise and did not immediately understand what was happening. She found herself travelling

backwards rapidly down the hill, and only took control of her vehicle again at the foot of the hill, braking it so that she would not run into the creek. It was then that she saw Ms. Gustafson on the ground and began to realize what had happened.

[29] I turn to an explanation of how I have come to these findings.

[30] All of the witnesses agree that Ms. Gustafson was standing either directly behind or behind and just to the side of the Gator's line of approach as Ms. MacFarlane approached. Ms. MacFarlane says that it was directly behind, and that made her nervous, but Ms. Gustafson motioned her to continue backing up. I accept Ms. MacFarlane's evidence that Ms. Gustafson was motioning to her because she was in the best position to observe, remember, and recount this part of the story, and because it is plausible in the circumstances.

[31] I also accept Ms. MacFarlane's evidence that she approached slowly and cautiously, relying on Ms. Gustafson's hand gestures. This evidence makes sense in light of her explanation, which I accept, that she could not see the pile of debris once she was within 10 or 15 feet of it. Mr. Blanes recalls that the pile was low to the ground; he says that it was the size of a large salad bowl, and that the rim of the bin at the back of the Gator is about 3.5 feet off the ground. Ms. MacFarlane is only 5 feet 3 inches tall.

[32] Mr. Blanes recalls that the Gator came to a full stop and Ms. Gustafson bent down to pick up debris from the pile. Ms. MacFarlane says that she was stopping and starting and cannot recall whether she came to a full stop immediately before the acceleration that resulted in her hitting Ms. Gustafson. She recalls that she looked for Ms. Gustafson and could not see her. Ryan Blanes recalls that Ms. Gustafson was bent over when she was struck.

[33] A finding that Ms. Gustafson bent over, out of sight of Ms. MacFarlane, before she was struck is consistent with all three accounts of the event. I accept Mr. Blanes' evidence that the Gator had come to a complete stop before Ms. Gustafson bent over because this is by far the most likely sequence of events

and Ms. MacFarlane is unable to say otherwise. Ms. Gustafson had been in communication with Ms. MacFarlane, making eye contact and gesturing her to come closer to the pile of debris. It would make no sense for Ms. Gustafson to bend over until the reason for the communication and the communication itself had ended. She was bending over to load the bin because the Gator was now in a position and ready to be loaded.

[34] I find that Ms. MacFarlane's foot accidentally slipped from the brake pedal to the gas because that is the only reasonable explanation for what happened next. I accept Mr. Blanes' evidence that he heard the engine rev loudly. It is what drew his attention to the Gator, as it moved and struck Ms. Gustafson. Ms. MacFarlane does not recall doing anything, but she does recall moving fast down the hill under the influence of both the accelerator and the downhill slope.

[35] Quite apart from Ms. MacFarlane's admission that she had her foot on the gas, the initial rapid acceleration of the Gator as it struck Ms. Gustafson and "plowed" her before running her over could not be explained by the slope alone. There is a conflict in the evidence as to where the slope began, vis-à-vis the Gator and the pile of debris. Mr. Blanes says that the slope was maybe 25 feet away. Ms. MacFarlane says that she was right on the edge of the slope. While the slope is difficult to judge from the photographs in evidence, it is at least clear that it was not notable in the immediate vicinity of the pile and the holly bush and did not result in the rapid, uncontrolled descent of the Gator described by Ms. MacFarlane in her evidence.

[36] I rely on Ms. MacFarlane's evidence for my finding that she took control of her vehicle at the foot of the hill, to avoid going into the creek, and it was only then that she saw Ms. Gustafson on the ground and realized that she had run her over.

Who was at fault?

[37] Ms. MacFarlane concedes that she owed Ms. Gustafson a duty of care to exercise reasonable care not to injure her while operating the Gator. I find that Ms. MacFarlane failed to exercise reasonable care by failing to attend to what she

was doing with her feet, causing the Gator to abruptly accelerate backwards. Having watched and made eye contact with Ms. Gustafson as she backed up, and knowing that Ms. Gustafson's purpose was to pick up the debris she was backing towards, she ought to have known that Ms. Gustafson was in her path. She was negligent, and Ms. Gustafson has suffered grievous injuries as a result of her negligence.

[38] Ms. MacFarlane submits that she was not negligent because the accident resulted from a sudden emergency, namely, that the Gator was beginning to move down the hill, out of control, and that it was only then that she accidentally pressed the accelerator. I reject the factual premise of this argument. The Gator was not beginning to move out of control until Ms. MacFarlane took her foot off the brake and pressed the gas pedal by mistake.

[39] Ms. MacFarlane submits that Ms. Gustafson was contributorily negligent because she positioned herself behind the Gator and crouched down, out of sight, at a time when it had not come to a complete stop. I reject the factual premise that the Gator had not come to a complete stop. But Ms. MacFarlane says that, even on that basis, exercising reasonable care, Ms. Gustafson should have waited until Ms. MacFarlane had confirmed her stop by shutting down the engine or shifting into neutral and setting the emergency brake, all in preparation for getting out so that they could load the bin together, as they had done previously.

[40] Contributory negligence arises where a plaintiff has failed to take the steps that a reasonable and prudent person would take to avoid reasonably foreseeable harm to herself; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210 at para. 76. Applying this test, in *Araujo v. Vincent,* 2012 BCSC 1836 at paras. 73-87, Griffin J. (as she then was) rejected an argument that a pedestrian was contributorily negligent where she run over by the defendant as he reversed out of a parking space in his pick-up truck. The plaintiff pedestrian had stooped to pick up a dropped cellphone and Griffin J. found that it was not foreseeable that the truck would have reversed in the moment it would have taken

her to pick up the phone. A contrasting case is *Dechev v. Judas,* 2004 BCSC 1564 at para. 25, where Boyd J. made a finding of contributory negligence on the part of a stooped pedestrian hit by a reversing motorist precisely because she knew or ought to have known that the truck was about to reverse and she was putting herself out of the truck's line of vision.

[41] In this case, I find that it was not foreseeable to a reasonable person in Ms. Gustafson's position that Ms. MacFarlane was about to accelerate rapidly towards her. She had been making eye contact with Ms. MacFarlane. She knew that Ms. MacFarlane was aware of her presence. She knew that Ms. MacFarlane's purpose was to facilitate the collection of debris from the pile at her feet. Ms. MacFarlane had no reason to accelerate towards her. The acceleration was a development she could not reasonably have anticipated.

[42] It follows that Ms. Gustafson was not contributorily negligent.

[43] Finally, Ms. MacFarlane submits that the accident also resulted from negligence on the part of Mr. Blanes. Mr. Blanes is not a party to this action. Absent contributory negligence on the part of Ms. Gustafson, it is irrelevant to Ms. Gustafson's claim against Ms. MacFarlane whether or not Mr. Blanes was at fault; *Leischner v. West Kootenay Power & Light Co. Ltd.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.); *Alragheb v. Francis,* 2021 BCCA 457 at paras. 25-29. However, in case I have erred in my conclusion that Ms. Gustafson was not contributorily negligent, I should address the argument that Mr. Blanes was at fault.

[44] Ms. MacFarlane submits that Mr. Blanes breached a duty of care owed to Ms. Gustafson either at common law or under the *Occupiers Liability Act,* R.S.B.C. 1996, c. 337, s. 3(1).

[45] Mr. Blanes was a tenant, and therefore an occupier of the farmhouse under an extremely simple written agreement made on June 6, 2013. The agreement does not create a tenancy of the land surrounding the farmhouse. I think that Mr. Blanes acquired, with the tenancy, a right to pass over and make use of the surrounding

land for purposes incidental to his tenancy of the farmhouse, but that would not necessarily constitute him an occupier of that land. Ms. MacFarlane submits that he could be considered an occupier by reason of his assumption of responsibility for activities undertaken in the vicinity of the holly bush, including pruning activities, citing *McKay v. Corporation of District of North Vancouver* (21 December 1990), Vancouver C885753 (B.C.S.C.); *Goldmanis v. Mador,* [1991] B.C.J. No. 3049 (S.C.), 1991 CanLII 710; and *Chamberlain v. Jodoin,* 2011 BCSC 739 at paras. 17-34, aff'd 2012 BCCA 108 at paras. 28-34.

[46] I need not decide whether Mr. Blanes owed Ms. Gustafson a duty of care as an occupier or at common law, because I am satisfied that he did not breach any duty of care he may have owed.

[47] The breach alleged by Ms. MacFarlane is a failure to supervise by taking reasonable steps to protect persons to whom a duty is owed from an objectively unreasonable risk of harm. She cites *Woo v. Crème de la Crumb Bakeshop & Catering Ltd.,* 2019 BCSC 1752 at paras. 115-116, aff'd 2020 BCCA 172, which relied on *Agar v. Weber,* 2014 BCCA 297 at para. 32.

[48] Ms. MacFarlane's argument fails because Mr. Blanes was not confronted by activities posing an objectively unreasonable risk of harm that would have led a reasonable person to intervene prior to the moment when Ms. MacFarlane's foot slipped onto the gas pedal. The activities that Ms. Gustafson and Ms. MacFarlane were engaged in were not unreasonably risky. Ms. MacFarlane was an experienced operator of the Gator. All motor vehicles are potentially dangerous, but their ordinary operation gives rise to risks that all of us accept, every day. Up to the moment when Ms. MacFarlane's foot slipped from the brake to the gas pedal, what I have found to have occurred was not unusual. Ms. MacFarlane was backing cautiously towards Ms. Gustafson, under Ms. Gustafson's direction. Then she stopped. A reasonable person in Mr. Blane's position was not called upon to intervene, to tell Ms. MacFarlane and Ms. Gustafson – his landlady and his wife respectively – to do it differently.

[49] I conclude that Mr. Blanes was not at fault for the accident.

Conclusions as to liability

[50] Summarizing, for the reasons I have given, I find that Ms. MacFarlane was negligent and entirely to blame for the injuries suffered by Ms. Gustafson in the accident.

Damages issues

[51] Dr. Gillian Simonett, a physiatrist, assessed Ms. Gustafson on April 27, 2021 and prepared a report dated May 14, 2021. Her evidence is not contentious.

[52] Nazneen Chow, an occupational therapist and certified lifecare planner, assessed Ms. Gustafson's needs in light of her injuries in June and August 2021 and prepared a report and recommendations dated November 10, 2021. The defence challenges some of Ms. Chow's recommendations and I will deal with those challenges in the course of these reasons.

Ms. Gustafson's condition and medical needs since the accident

[53] Immediately following the accident, emergency responders took Ms. Gustafson in an ambulance to the Royal Columbian Hospital in New Westminster. In light of the nature and severity of her injuries, she was transferred to the Vancouver General Hospital ("VGH") where she underwent surgeries to address her spinal injury and stabilize her broken pelvis. She remained at VGH until September 6, 2019, when she was transferred to G.F. Strong Rehabilitation Centre of in-patient rehabilitation. She was discharged from G.F. Strong on November 28, 2019.

[54] Ms. Gustafson experienced various medical issues during her hospitalization, some of which remained problems for her after she went home and all of which bear on her continuing care. She has what both Dr. Simonett and Ms. Chow describe as complex care needs.

[55] Ms. Gustafson had suffered from irritable bowel syndrome prior to the accident and experienced great difficulty establishing a workable routine for voiding her bowel afterwards. This was eventually treated by a colostomy in April 2021. Her bowel now voids into a bag that must be emptied regularly by a caregiver.

[56] Ms. Gustafson also suffers from a neurogenic bladder, a condition which has been managed by regular botox injections and the insertion of a suprapubic catheter. She excretes urine through the catheter into a bag that must be regularly emptied by her caregiver, and the catheter must be replaced from time to time. Dr. Simonett notes that "Ms. Gustafson will have life-long increased risk of complications including increased risk of urinary tract infections, incontinence, stones, kidney dysfunction, cancer, etc.".

[57] Persons with SCIs are at risk of pressure ulcers or, colloquially, bedsores, which may result from causes that can include insufficient turning or adjustment of the body's position in a bed or chair, and poor positioning while the individual is being moved in a sling. Ms. Gustafson suffers from spasticity – that is, uncontrolled movement – of the muscles in her legs, causing her pain, and further contributing to the risk of injuries to the skin and pressure ulcers. Pressure ulcers can be life threatening where they result in an infection, and can take weeks to years to heal.

[58] Ms. Gustafson had two ulcers when she was discharged from G.F. Strong. One of them, a small mark on her thoracic spine, subsequently grew into a 3 cm x 5 cm infected wound, despite regular care from a wound nurse and a course of antibiotics. Dr. Simonett noted that it had shrunk to 1.5 cm x 2 cm during her assessment of Ms. Gustafson five months following discharge. Both ulcers have now healed. Ms. Gustafson has not suffered further pressure ulcers recently, but she will always be at risk of them and requires adequately trained caregivers to minimize that risk.

[59] Ms. Gustafson has a limited ability to cough, because of her SCI. If she acquires a respiratory infection, such as a cold, her caregiver may have to assist her by pushing on her diaphragm while she tries to cough.

[60] Ms. Gustafson has had multiple episodes of AD and will be at risk of AD for the rest of her life. An episode of AD can constitute a medical emergency. The risk of AD is a consequence of Ms. Gustafson's SCI, which impairs the ability of her autonomic nervous system to control her blood pressure. A spike in blood pressure may be triggered by an obvious stimulus, such as a full bladder resulting from a blocked catheter, or by a subtle stimulus such as a hangnail. The symptoms of AD include sweating, headaches, and nausea. AD can result in confusion rendering the sufferer unable to explain or address the problem. Moreover, Ms. Gustafson's physical impairments usually render her unable to address an episode of AD on her own.

[61] Ms. Gustafson cannot be left alone, without an attendant to intervene in the event of an episode of AD. Dr. Simonett summarizes and elaborates on her caregiving needs in the following passage from her report:

> Given her level and her risk of autonomic dysreflexia, Ms. Gustafson will have to be under supervision at all times. She will need a full-time caregiver as she is fully dependent. This will be both for caregiving as well as house chores (chores such as cooking, laundry, etc.). She is currently dependent on her wheelchair, transfer, bowel and bladder routine, dressing, and brushing her teeth. With setup she is able to feed herself with her right hand. She can participate in some face washing. Otherwise, she is fully dependent.

[62] Ms. Gustafson's hands do not work well. They tend to clench up. This makes it difficult for her to hold things and to operate her motorized wheelchair. Since 2021, she has received quarterly botox injections to control the clenching. Part of her nightly routine involves the placement of splints to hold her hands open while she sleeps.

[63] Ms. Gustafson was receiving treatment for depression and anxiety before the accident. Unsurprisingly, that is still the case. Her prescriptions have not changed. Ms. Chow testifies that Ms. Gustafson's mood issues are more challenging to manage as a result of the accident, because there is a more limited range of possible therapeutic interventions. For example, Ms. Gustafson cannot be advised to be more physically active.

[64] Since Ms. Gustafson's discharge from G.F. Strong in late 2019, Mr. Blanes has been her primary caregiver. He empties her colostomy bag and her bladder bag multiple times every day, and has replaced her suprapubic catheter on occasion. Before the colostomy and the suprapubic catheter, he changed her diaper. He participated in caring for her pressure ulcers and gets up in the small hours of the morning to reposition her, to avoid further ulcers. He gets up when she calls in the middle of the night. When necessary, he helps her cough. He cuts her nails, cleans her ears, and helps her blow her nose. He monitors her blood pressure and trouble shoots the cause when it spikes. He showers her every three days.

[65] Getting Ms. Gustafson out of bed and into her wheelchair every day is important for her physical and mental health. The transfer requires the use of a powered hoist and a sling. In the mornings, two care aides from the Fraser Health Authority come to the house to perform this manoeuvre. At night, they could come back, but Ms. Gustafson and Mr. Blanes have refused that assistance for reasons I will discuss, and Mr. Blanes performs the transfer by himself.

[66] Mr. Blanes is a capable individual. By dint of his experience caring for Ms. Gustafson over the last three years and through unstinting effort, he has become a highly competent caregiver to Ms. Gustafson. I accept his evidence, and the evidence of Ms. Gustafson and Ryan Blanes, that the effort has exhausted him.

Cost of future care

[67] Ms. Gustafson's claim to be compensated for the cost of future care is the largest of her claims. Some elements of the claim are conceded. The elements that are contested are:

a) A claim for the cost of personal support workers, 24 hours a day. The defence says that the claim should be limited to the cost of personal support workers for 12 hours a day;

b) A claim for accommodative housing. Ms. Gustafson claims for the cost of a house in the Abbotsford area, where she lives, plus an allowance to

renovate it to meet her needs. The defence accepts that an allowance for accommodative housing is warranted, but objects to funding the purchase of an expensive capital asset for Ms. Gustafson and her heirs. The parties disagree as to how this loss should be valued;

c) A claim for a full-size van to accommodate Ms. Gustafson's motorized wheelchair. The defence says that a less expensive van is all that is required;

d) A claim compensating for home maintenance services that Ms. Gustafson can no longer perform herself; and

e) Claims for physiotherapy, occupational therapy, and counselling services that the defendant says are excessive in amount, considering the expert evidence.

General legal principles

[68] An award for the cost of future care is an award to compensate a plaintiff for pecuniary loss. Non-pecuniary loss is compensated by an award of general damages offering solace to the plaintiff. In a case such as this involving catastrophic injuries, general damages are capped, and compensation for pecuniary loss is not. Accordingly, the purpose of an award for the cost of future care is not to provide compensation for expected out-of-pocket loss, not solace; *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229 at 261-262.

[69] *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) is a leading case frequently cited for the proposition that an award for the cost of future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia,* 2012 BCCA 351 at para. 30. Put another way, it is to ensure that the plaintiff will not be out-of-pocket for medically justified expenses that an individual of ample means would reasonably incur; *Andrews* at 245; *Bystedt v. Hay,* 2001 BCSC 1735 at paras. 162-163.

[70] Expert evidence is necessary because the care in question must be medically justified; *Milina* at paras. 198-199. Medical justification does not necessarily require the evidence of a medical doctor. The care recommendations of a rehabilitation therapist or other qualified health care professional may suffice, provided that the evidence connects a physician's assessment of pain, disability, and recommended treatment with the therapist's care recommendations; *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at paras. 38-39.

[71] That an award for the cost of future care is compensatory in nature is fundamental. It follows that the court will not make an award in respect of future costs that will not be incurred; *Coulter (Guardian ad litem) v. Leduc,* 2005 BCCA 199 at paras. 84-86; *O'Connell v. Yung,* 2012 BCCA 57 [*O'Connell BCCA*] at paras. 68-70, varying 2010 BCSC 1764 [*O'Connell BCSC*]. For the same reason, the court will not make an award in respect of future costs that would have been incurred in any event; *Dzumhur v. Davoody,* 2015 BCSC 2316 at para. 244.

[72] If there is doubt as to whether future costs will be incurred, in principle the court should evaluate the possibility in the same way as it addresses all hypothetical events for the purpose of assessing damages: first, by determining whether the event is a real and substantial possibility; and if it is, by assessing the likelihood of the event and discounting it accordingly; *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 27; *Grewal v. Naumann,* 2017 BCCA 158 at paras. 48-49. This is the approach taken by the court in *O'Connell BCCA* at paras. 55-56 and 72.

[73] While it is necessary to assess whether medically justified costs of future care will reasonably be incurred, it is not a question of determining what the plaintiff will do with the court's award; *Townsend v. Kroppmanns,* 2004 SCC 10 at para. 21. The latter is a practical inquiry that would trench on the plaintiff's autonomy.

[74] Ms. Gustafson advances some legal propositions that are inconsistent with these principles.

[75] First, accepting that it is necessary to assess whether a future cost will be incurred, she submits that the question should be addressed on the basis that "an item may be declined or reduced if there is compelling evidence that it will not be used". I do not agree that the analysis focuses on the presence or absence of compelling evidence. The court must do its best with the evidence at hand, not beginning with a presumption that recommended treatments or services will be used. In *Lo v. Matsumoto,* 2015 BCCA 84 at para. 20, Newbury J.A., speaking for the court, explained that:

> … a plaintiff must prove his case, both in terms of need and the likely utility of the item sought; see *O'Connell v. Yung,* 2012 BCCA 57 at para. 68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners.

[76] Next, Ms. Gustafson submits that the court "should be cautious before declining to award an item that is otherwise medically justified as the assessment of future care is a paramount consideration for catastrophically injured plaintiffs and there is to be a focus on full compensation for this head of damage". I do not think that the analysis is different in the case of a catastrophically injured plaintiff than in any other case involving a claim for the cost of future care. The fundamental principles governing the determination of compensation for pecuniary loss are unaffected by the fact that the injuries are catastrophic. That said, there is a potential difference involving the availability of factual inferences. As Newbury J.A. observed in the passage I have quoted from *Lo*, care recommendations may be accepted without further evidence where the costs claimed are "matters of absolute necessity", and absolute necessity may be more easily inferred in a case involving catastrophic injuries than would otherwise be the case.

[77] Ms. Gustafson further submits that "it is important not to conflate lack of use with provision of a service by a family member as family members may not be used to subsidize the cost to tortfeasors". This submission touches on a point of central importance in this case having to do with the effect on the claim of the care that may continue to be provided by Mr. Blanes. I will address it below in the context of my

consideration of Ms. Gustafson's claim to recover the cost of personal support workers.

Uncontested elements

[78] The parties agree that Ms. Gustafson's damages are to be assessed on the basis of a life expectancy of 12.7 years as of the commencement of the trial. Expert economists have provided reports that are largely in agreement. Several elements in Ms. Gustafson's claim for the cost of future care are not contested, or not seriously contested.

[79] The parties are agreed that Ms. Gustafson should recover the following amounts for the present value of the cost of her future care justified by her injuries:

a) $23,726 in respect of the anticipated future cost of medications;

b) $12,391 in respect of future nursing services;

c) $74,552 to replace her powered wheelchair;

d) $4,130 to maintain her powered wheelchair;

e) $3,636 to replace her wheelchair cushion;

f) $12,073 to replace her backup manual wheelchair;

g) $263 to remove and replace the track and lift system used to transfer Ms. Gustafson between her bed and her chair;

h) $7,330 to replace the lift apparatus used in the transfers;

i) $756 to maintain and repair her hospital bed;

j) $13,518 for a rotating low air mattress;

k) $9,348 for a standing frame to be utilized by Ms. Gustafson;

l) $9,175 for a shower commode;

m) $1,033 for mounts and device holders; $1,342 for abdominal binders and pressure stockings;

n) $13,902 for a backup diesel generator for use in the event of power outages;

o) $2,481 to service and repair the generator;

p) $5,473 for maintenance of a van; and

q) $2,432 for gas for the van.

[80] In addition, the parties are almost agreed on several other items. Ms. Gustafson claims $817 for lift battery replacements and $2,246 for to replace the sling in which she is transferred from time to time. The defence proposes $779.50 and $2,142.50 to cover these costs. Based on the evidence of the plaintiff's economist, Mr. Benning, I accept the $817 figure. As to the anticipated future cost of the sling, it appears that the parties and Ms. Benning have misread Ms. Chow's report. They have assumed that the sling will have to be replaced every two years, but Ms. Chow recommends replacement every three years. Making that adjustment, I allow $1,569 for the sling.

[81] Ms. Gustafson claims a total of $58,051 for bladder management, bowel management, and colostomy supplies. The defence would allow $57,961. The reasons for the discrepancy were not addressed in argument. I allow $58,000.

[82] Finally, Ms. Gustafson claims $827 for hand splints and the defence would allow $808. Based on Mr. Benning's evidence, I accept the $827 figure.

[83] The items I have just listed total $258,774.

Personal support

[84] Ms. Gustafson claims an allowance of $4,188,080 for the services of personal support workers who would be available 24 hours a day for the rest of her life. The defence proposes an allowance of $1,700,000. The defendant's calculation

proceeds on the basis that Ms. Gustafson will only use the services of personal support workers for 12 hours a day, and applies a 20% contingency discount.

[85] The parties do not disagree as to the cost of personal support services provided under contract. They agree, and I find, that Ms. Gustafson requires round the clock care. Their essential dispute is as to whether it can be assumed that contracted personal support services will be used beyond 12 hours a day in view of the possibility that Ms. Gustafson will be content to have Mr. Blanes care for her by himself at least half of the time.

[86] I return to the argument I noted above at para. [77]. Ms. Gustafson submits that it is wrong in law to take any services that may be provided by Mr. Blanes into account.

[87] Ms. Gustafson points to *Vana v. Tosta et al.,* [1968] S.C.R. 71 at 75, where the issue concerned an award compensating an injured plaintiff for the cost of future housekeeping he would be unable to perform himself. The trial judge had awarded the plaintiff $20,000 under this head, and the Court of Appeal had reduced the award to $10,000. The Supreme Court restored the trial award, commenting that the Court of Appeal had erred in taking into account services provided by the plaintiff's mother and mother-in-law. Speaking for the majority, Spence J. stated:

> It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle.

[88] Later, in *Andrews*, the Supreme Court held that a catastrophically injured plaintiff should receive an award that would compensate him for the future cost of contracted personal care that would enable him to live independently, rather than in an institution. Speaking for the Court at 243, Dickson J. stated:

> Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis.

[89] Thus, the defendant's argument raises a question that pits in opposition two legal propositions. On the one hand, there is the proposition, derived from the fact that an award for the cost of future care is compensatory in nature, that there should only be an award in respect of medically justified costs that will probably be incurred. On the other hand, where the reason that the costs will not be incurred is that medically justified personal services will be gratuitously provided by a family member, there is the proposition that a defendant should not obtain a benefit from the family member's unpaid labour.

[90] There are at least two British Columbian cases that establish that the second proposition does not override or qualify the first. These are cases where the court found that a plaintiff receiving care at home would rely on care freely provided by family members rather than purchasing personal care services, and made an award for the cost of future care based on the anticipated expenditure, not the cost that would have been incurred if family members were not involved. The cases are *O'Connell BCCA,* and *James v. James,* 2018 BCSC 603*.*

[91] In *O'Connell,* the plaintiff was a 58-year-old woman who had suffered a brain injury. As with Ms. Gustafson, following her discharge from the hospital, Ms. O'Connell was cared for at home by her husband, in large part because she was distressed by the presence of strangers in the home. Her needs were less intense than those of Ms. Gustafson in that, while she usually required supervision, she could be left alone for a few hours at a time. She did not suffer a medical condition equivalent to AD, requiring that a caregiver always be on hand.

[92] The trial judge accepted that Ms. O'Connell would, in the future, accept recommended personal support services; *O'Connell BCSC* at para. 122. Citing *Vana* and *Andrews*, she rejected a defence submission that the award for the cost of future care should be reduced to take into account the husband's role providing supervision and guidance, holding that "the law does not permit the defendants to pass off their responsibility to provide appropriate care by suggesting that Ms. O'Connell can and should rely on her husband to take care of her"; paras. 124-

125. She therefore held that "it must be assumed that all of Ms. O'Connell's medically required care is to be provided by paid caregivers", though the court could take into account an assumption that she would continue to live with Mr. O'Connell; para. 128. The trial judge concluded that the cost of future care award should be assessed on the basis that Ms. O'Connell required 16 hours of contracted care daily, excluding the night-time hours when Mr. O'Connell would be present; paras. 170-171.

[93] The Court of Appeal held that the trial judge erred in law in this reasoning. The error lay in the judge's conclusion "that future care costs are payable whether or not they may be incurred in the future"; *O'Connell BCCA* at paras. 63 and 68. It was mistaken to assume that the services provided by Mr. O'Connell during day-time hours must be ignored. Speaking for the Court, Kirkpatrick J.A. stated:

> [70] In arriving at the amount of the personal care award, the judge must have assumed that Ms. O'Connell was entitled to 16 hours of care per day from the date of trial whether or not the cost was likely to be incurred. As the authorities make clear, the award must reflect what may reasonably be expected to be required. The evidence established that, at present, the O'Connells do not want outside care and, by inference, will not incur the expense.

[94] Justice Kirkpatrick went on to address the likelihood that Mr. O'Connell would not continue to provide unpaid personal care in the future. Although 16 hours of daily paid personal care were not required at the time of trial, there was a significant possibility that such care or even more would be required in the future; paras. 70-71. Justice Kirkpatrick addressed this possibility by awarding an amount based on 16 hours of daily paid personal care less 20%; para. 72.

[95] In *James,* the plaintiff suffered an SCI similar to Ms. Gustafson's. Ms. James was 71 years old at the time of the accident, and 75 at the time of trial. Justice Betton described her as an incomplete quadriplegic. She required 24 hour daily care, though of lesser intensity than Ms. Gustafson because she had some ability to stand and walk with assistance, a sensory bladder and bowel, and seems not to have been at risk of AD. Following her discharge from hospital, Ms. James and her husband were able to travel from British Columbia to Palm Springs for the winter.

As with Ms. Gustafson and Ms. McConnell, Ms. James' husband was her primary caregiver. Ms. James could afford to hire private care, but she and her husband had chosen to do so on only for limited periods; para. 99.

[96] Justice Betton considered that the case was governed by the reasoning in *O'Connell*. He stated:

> [98] To determine what future care costs are reasonably likely to be incurred, I find the analysis in the *O'Connell* decision and appeal most helpful. I must consider whether the parties are likely to engage outside care, or whether the defendant will continue to provide care, and how much care. Further, given the age of the parties and the uncertain nature of continuing health, a future care award must consider for how long the defendant may continue to care for his wife.

[97] Justice Betton found as a fact that Ms. James would eventually pay for 24 hour outside care, but not immediately because there were times of the day when she and her husband would probably not accept outside care, finding that it would interfere with their quality time together; paras. 113-115. He awarded an amount based on 24 hour paid personal care, less a 20% contingency.

[98] The defence submits that *James* is wrongly decided or unique to its own particular facts, noting that "the decision does not reference any authorities establishing the proposition that a family member cannot be called upon to provide care". I disagree. The reasoning in *James* features close consideration of both decisions in *O'Connell*, and *O'Connell* is a case in which the proposition that a family member cannot be called upon to provide care was central to the reasoning in the trial court which was overturned on appeal. *O'Connell* was binding authority in *James,* and it binds me.

[99] I conclude that the law requires me to ask whether there is a real and substantial possibility that Ms. Gustafson will not make use of 24 hour paid personal care by reason of the unpaid personal care that is available to her from Mr. Blanes. If there is, I must value that contingency. I must take into account that Mr. Blanes is not required to provide personal care and that, in the future, he may choose not to, or Ms. Gustafson may refuse to receive personal care from him.

[100] I turn to the evidence bearing on the existence and magnitude of this contingency.

[101] Ms. Gustafson and Mr. Blanes are not persons of ample means. The arrangement that they have fallen into under which Mr. Blanes has been Ms. Gustafson's full-time caregiver is a product of circumstance. For the most part, I infer that it has not seemed to them that they had an alternative. Mr. Blanes loves and cares for Ms. Gustafson. He believes that, if their roles were reversed, she would do the same for him.

[102] There are two instances where they have refused in-home care made available by the Fraser Health Authority. I accept their evidence that the refusals were based on the particular conditions under which the care was offered. They are not a marker of a disinclination on the part of Ms. Gustafson and Mr. Blanes to accept outside caregivers into their home or to refuse privately contracted care, if they could afford it.

[103] The first instance involves Ms. Gustafson and Mr. Blanes' decision to refuse the assistance of care aides for the evening transfer of Ms. Gustafson from her wheelchair into her bed for the night. Several considerations went into the refusal. Having received this assistance for some time, Mr. Blanes observed that the care aides who were showing up kept changing and he was not satisfied that the new ones were well trained. This was the last stop for the care aides at the end of their working day, and he worried that they were tired, careless, and making mistakes. He was concerned with the risk of skin damage and a fresh pressure ulcer resulting from a botched transfer. Ms. Gustafson had a particular concern, shared by Mr. Blanes, that the evening care aides were arriving at their house having been in intimate contact with other patients in the middle of the Covid-19 pandemic. Ms. Gustafson has an acute fear of getting Covid, which is understandable in light of her respiratory difficulties. Finally, the schedule for the evening transfers was inflexible, and sometimes inconvenient, if Ms. Gustafson and Mr. Blanes had it in mind to stay up a little later, especially during the summer months.

[104] The second instance involves Ms. Gustafson and Mr. Blanes' refusal of two weekly four-hour blocks of respite care. This was in October 2020. The sticking point in this case was a disagreement concerning the presence of Ms. Gustafson's dog, Honey, who snuggles with her and offers her comfort. As Mr. Blanes describes it, Fraser Health insisted that the respite care would only be made available if the dog were not around the house. Mr. Blanes says that he has heard care workers tell him of houses they have attended where they tolerate dogs. He viewed the health authority's position as bureaucratic, and would not accede to it. It is not clear that the offer of respite care was ever renewed.

[105] I suspect that the standoff over the dog's presence in the house could have been managed and resolved in a way that would have provided respite care that Ms. Gustafson and Mr. Blanes have desperately needed. It may be that Mr. Blanes was stubborn, or bureaucratically unsophisticated. Nothing about this episode leads me to think that Ms. Gustafson and Mr. Blanes would be disinclined to hire respite careworkers through an agency, if they had the funds to do so.

[106] Ms. Gustafson testifies unequivocally that she does not wish for Mr. Blanes to continue as her caregiver. She is embarrassed by the things he has to do for her, and she wants to re-establish her relationship with him as an intimate companion and friend. She describes Mr. Blanes' transformation into her full-time caregiver as the worst thing about being a quadriplegic.

[107] Mr. Blanes' evidence on this point is more nuanced. In cross-examination, he was asked whether, if they were to get more assistance, it was his intention to stop providing care for her. He responded that he wanted a relationship with Ms. Gustafson, not to be her full-time caregiver. He said that he was not enjoying his life right now. He is exhausted. He said that he would have to have a discussion with Ms. Gustafson as to what they would do. He would continue to do what had to be done. He thought that, most likely, he would still be involved in caring for her at night. He doubted that an outsider was going to wait up to turn her over at night. He

stated firmly that he will do what he has to do to care for her. Right now, that includes monitoring her AD and her medications.

[108] Clearly, if Ms. Gustafson and Mr. Blanes had ample means, they would hire personal caregivers. They would have a decision to make as to the hours of care they would contract for. In my opinion, the defence scenario that Ms. Gustafson and Mr. Blanes would hire personal caregivers to provide care for only 12 hours a day or less is unrealistic in light of the intensity and extent of her needs and their mutual desire that he cease to fulfill his present role. In view of Mr. Blanes' evidence, I do not think it is clear that they would necessarily choose to have a caregiver living with them overnight. It is not something they have discussed. It is a decision they have yet to make.

[109] In my view, there is a real and substantial possibility that Ms. Gustafson would ultimately decide to forgo paid overnight care. What has to be done at night is not particularly onerous. Mr. Blanes is competent and used to doing it. It would involve a substantial additional cost. It would secure to them a private period every night.

[110] Accordingly, the possibility that Ms. Gustafson might only hire personal careworkers for 16 hours as opposed to 24 hours daily is a contingency I must take into account. The difference between 16 and 24 hours would represent one-third or 33% of an award based on 24 hours of daily care. The discount must be less than that because it is not at all certain that Ms. Gustafson would opt for the 16 hour option. It is only a possibility, not a certainty. I must further take into account the risks that, with the passage of time, Ms. Gustafson's condition will deteriorate, so that she requires further care, or that Mr. Blanes' health will deteriorate, so that he cannot take responsibility for overnight care, or that their relationship will deteriorate, so that Mr. Blanes is no longer willing to provide care. I should say that, in view of Mr. Blanes' commitment to caring for Ms. Gustafson over the past three years, this last possibility seems remote, but it cannot be ignored.

[111] In *James,* Betton J. discounted the cost of 24 hour care that would otherwise have been required, were it not for the personal care provided by Mr. James, by 20%. Ms. Gustafson's needs, and the strain and responsibility imposed on her caregiver, are more substantial than in that case.

[112] In my view, taking everything into account, a 10% discount is appropriate in this case. Accordingly, I award Ms. Gustafson 90% of the cost of 24 hour paid personal care, or $3,770,000 (rounded).

Housing

[113] The parties agree that the farmhouse is not suitable accommodation for someone with Ms. Gustafson's needs, and an allowance for accommodative housing is appropriate. Ms. Gustafson proposes an award of $2 million to permit her to purchase and renovate as necessary a house in Abbotsford. The defence submits that an award of $200,000 to $250,000 is all that is required to enable Ms. Gustafson and Mr. Blanes to either rent a suitable apartment or renovate a house they might decide to purchase. The defence submits that it would not be appropriate to include in an award an amount that would represent the cost of a substantial capital asset that is unlikely to deteriorate.

[114] I agree with the parties that an allowance for accommodative housing is warranted. I have already described the deficiencies of the farmhouse in light of Ms. Gustafson's needs. In particular, the lack of insulation is a problem for her in the winter because her SCI limits her ability to regulate her body temperature, and her hands seize up when they are cold. Dr. Simonett testifies that Ms. Gustafson and Mr. Blanes will need to have access to "an accessible living scenario that will include one level, access to in and out of the home, and an accessible bathroom". Ms. Chow elaborates on the need for a residence permitting secure access to living areas, kitchen and bedroom with a wheelchair and including a bathroom that permits barrier free shower access for a wheeled commode.

[115] Unfortunately, while the evidence establishes Ms. Gustafson's loss and a need in this regard, the evidence does not offer a sound foundation for the determination of an award.

[116] Ms. Gustafson relies on the expert evidence of a quantity surveyor, Evan Stregger. Mr. Stregger's expertise extends to analyzing, understanding, and forecasting the development of construction costs and he has experience costing the adaptation of homes for persons with disabilities. On a *voir dire* as to qualifications, I did not qualify him as an expert in the valuation of real estate, either to purchase or to rent. Though his report touches on his understanding of Ms. Gustafson's needs, I did not qualify him as an expert in this regard either, and I treat those portions of his report as assumptions.

[117] Mr. Stregger's expert report addresses two questions:

1. The cost of renovating the farmhouse to make it reasonably suitable to Ms. Gustafson's needs; and

2. The cost of purchasing and renovating a similar or suitable home in the Abbotsford area.

[118] Ms. Gustafson's counsel, Mr. Stanley, concedes that the first question is irrelevant. I agree, because Ms. MacFarlane owns the farmhouse and Mr. Blanes and Ms. Gustafson occupy it under a month to month tenancy. It would not make sense for Ms. Gustafson to pay to renovate it, I cannot assume that Ms. MacFarlane will renovate it, and I cannot order her to renovate it.

[119] I am not satisfied that I can place any weight on Mr. Stregger's answer to the second question. He opines that the cost of purchasing a suitable home that can be renovated to meet Ms. Gustafson's needs is in the neighbourhood of $1.6 million. The problem lies with his opinion of the cost to purchase. Although the defendant did not object to his report on this basis, my doubt as to his expertise to value real estate causes me to approach his analysis with scepticism from the outset. His methodology confirms my concerns. He comes to his conclusion through an

examination of property listings in Abbotsford. He examines only listing prices, not sale prices. He limits his search to Abbotsford, though it would be reasonable for Ms. Gustafson and Mr. Blanes to consider other locations in the Lower Mainland in reasonable proximity to her care providers, including Langley, Surrey, and possibly Chilliwack. Mr. Stregger identifies only three properties, each on a large lot. He conceded in cross-examination that any of them would represent a huge upgrade from the farmhouse.

[120] The purpose of expert evidence is to assist the trier of fact in drawing inferences to come to conclusions the trier would be unable to reach unaided. Mr. Stregger's opinion and reasoning do not lead me to any conclusions as to the likely cost to purchase suitable accommodation for Ms. Gustafson.

[121] Mr. Stregger is qualified to opine upon the cost of renovating a house to satisfy Ms. Gustafson's needs, as they are established by the expert evidence of Dr. Simonett and Ms. Chow, and his report is helpful to this limited extent. However, without reliable evidence of the cost to purchase, his evidence of the cost to renovate is of no assistance.

[122] Mr. Stregger was not asked to address the availability of suitable rental accommodation, nor is this a question that falls obviously within his expertise as a quantity surveyor. In the course of his report, he estimates the cost of renting replacement accommodation in Abbotsford at $5,000 to $7,500 a month. His report does not state the basis of this estimate and, when he was asked while giving evidence, he replied only with a general reference to his experience. The depth, extent, and content of his experience with the rental market in Abbotsford, and how it led him to his conclusion, are not in evidence.

[123] The defendant led no evidence addressing the cost of accommodative housing. In argument, she relies on Mr. Stregger's $5,000 to $7,500 estimate of the cost of renting an accessible replacement house. She submits that, if that is the cost of renting a house, the cost of renting a suitable two or three bedroom apartment would be smaller, say $3,000 a month. That is approximately $2,000 a month more

than Mr. Blanes is paying to rent the farmhouse, leading the defendant to propose an accommodation allowance based on this additional monthly cost for the rest of Ms. Gustafson's life.

[124] The foundations of this argument are speculative. I give little weight to Mr. Stregger's $5,000 to $7,500 estimate of the cost of renting an accessible house, and I have no basis at all to come to any conclusion as to the cost of renting an accessible apartment.

[125] As Grauer J.A. observed in *Dornan v. Silva,* 2021 BCCA 228 at para. 134, the factual premises of a damage assessment must be tethered to the evidence. Any award I would make on the record before me would be an exercise in speculation, and I do not think I should do that. Because it is conceded that Ms. Gustafson has suffered a loss and that there should be an award under this head, I think that the only just course of action is to give the parties leave to reopen their cases to present further evidence and argument limited to this head of damage. I raised this possibility with counsel in argument. Neither objected in principle, though Mr. Stanley submitted that, in view of the defendant's failure to lead evidence, it should no longer be open to the defendant to argue in favour of anything other than a scenario under which Ms. Gustafson would purchase a house. I am not going to impose such a restriction.

[126] For the assistance of counsel going forward, I offer the following comments to focus the issue.

[127] What Ms. Gustafson requires is an amount of money that is reasonably sufficient to allow her to pay for the extra housing cost she will incur for the rest of her life by reason of her injuries. Dr. Simonett and Ms. Chow have described her housing needs. In principle, those needs might be met in an accessible house, townhouse, or an apartment, that is, in owned or rented accommodation. They might be met elsewhere in the Lower Mainland than in Abbotsford. It is possible, but not obvious, that appropriate rental accommodation is simply unavailable, so that Ms. Gustafson will be forced to purchase, but I cannot assume that. If the real

estate market offers both appropriate rental accommodation and suitable houses to purchase, it would not be fair to the defendant to require her to pay the higher cost.

[128] There are cases involving catastrophic injuries in which courts have included the purchase price of a home in an award for the cost of future care, among them: *Thornton v. School District 57 (Prince George),* [1978] 2 S.C.R. 267 at 281-282; *Stevenson v. Hunter,* [1981] B.C.J. No. 357 (S.C.) at paras. 32-38; *Dennis v. Gairdner,* 2002 BCSC 1289 at paras. 102-104 and 111; and *Aberdeen v. Township of Langley, Zanatta, Cassels,* 2007 BCSC 993 at paras. 220-234. There are other cases in which equivalent claims have failed, such as *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273 (S.C.), at para. 24, aff'd (1988), 33 B.C.L.R. (2d) 290 (C.A.). In my view, these cases turn on the evidence as to the plaintiff's age, needs, what housing options are available, what those options will cost, and the potential for overcompensation by funding the acquisition for the plaintiff and her heirs of an appreciating capital asset (noted by the Court of Appeal in *Scarff*). For example, in *Thornton,* the plaintiff was a young man and the trial judge accepted evidence that the cost to purchase a home ($45,000) was much less than the expected cost of renting an apartment for the rest of the plaintiff's life ($117,342). In *Stevenson,* at paras. 35-37, Paris J. considered expert evidence that apartments appropriate to the plaintiff's needs were extremely difficult to find and concluded, on that basis, that there was no reasonably available alternative to a house for the plaintiff. The question of whether it is better to posit purchased or rented accommodation for the purpose of valuing a just allowance for accommodative housing cannot be answered in the abstract. At present, I do not have an evidentiary basis to answer it in this case.

Van

[129] At present, Ms. Gustafson and Mr. Blanes make use of a 2005 Dodge Caravan to take her to appointments and on social outings. The van has been adapted to fit Ms. Gustafson's powered wheelchair by the installation of a ramp and the removal of all the passenger seats but one at the very back. The van is 17 years old, the shock absorbers are worn out, and the ride is uncomfortable. The parties

agree that Ms. Gustafson requires an allowance, as part of the award for the cost of future care, for a newer van. The issue is as to the van to be acquired and, accordingly, the cost.

[130] Based on cost estimates provided by Ms. Chow, Ms. Gustafson claims $117,594 for the cost of purchasing and adapting a full-size van, to be replaced in seven years' time. The van itself would cost $74,000 and the cost estimate is reduced by $30,000 to allow for the transportation Ms. Gustafson would purchase in any event.

[131] The defendant submits that an economy van, at an initial cost of $30,000 prior to adaptation, is all that is required, and that the van need not be replaced in seven years' time. The $30,000 amount is not taken from the evidence. It is counsel's suggestion. Ms. Chow was not cross-examined on her recommendation of a full size van.

[132] I find that Ms. Chow's van recommendation is medically justified and reasonable. It is good for Ms. Gustafson's physical and mental health that she be able to go on outings that include her grandchildren. That will only be possible with a full-size van.

[133] Accordingly, I award Ms. Gustafson $118,000 (rounded) under this head.

Home maintenance

[134] Ms. Chow observes that Ms. Gustafson has lost the ability to perform home maintenance tasks such as yard clean-up, raking, gardening, shovelling, and basic household repairs. She recommends an allowance for the cost of obtaining handyman services at a rate of $70 per hour for 24 to 36 hours per year, equivalent to an annual cost of $1,680 to $2,520. As part of her claim for the cost of future care, Ms. Gustafson claims a more modest allowance of $530 annually, or $5,473 in total.

[135] I do not think that the proposed allowance for handyman services is medically justified, because I do not see how these services will promote Ms. Gustafson's physical and mental health. It is not justified as part of an allowance for the cost of future care.

[136] This kind of claim might well have been presented as a part of a distinct pecuniary claim for the loss of housekeeping capacity; *O'Connell CA* at paras. 65-67. However, Ms. Gustafson has not presented and pursued her home maintenance claim, and the defendant has not responded to it, on that basis. Having regard to the basis on which the claim is presented, it is rejected.

Rehabilitation services: physiotherapy and occupational therapy

[137] Ms. Gustafson claims for rehabilitation services to be provided by physiotherapists under two headings: treatment services totalling $37,644 and aquatic rehabilitation at a cost of $99,128. The defendant submits that some physiotherapy is justified, but not in these amounts. The defendant would allow for only 25% of the claim for physiotherapy treatment, or $9,411, and 50% of the claim for aquatic rehabilitation, or $49,564.

[138] Ms. Gustafson claims for treatments and case management to be provided by occupational therapists in the amount of $41,255. Again, the defendant's objection is as to the amounts. The defendant would allow 50% of the claim, or $20,628.

[139] Finally, Ms. Gustafson claims for the services of a rehabilitation assistant at a cost of $112,405. The defendant would allow 25% of this claim, or $28,101.

[140] All of these claims are grounded in recommendations contained in Ms. Chow's report.

[141] The defendant objects to the claims on three bases:

a) Ms. Chow's care recommendations are exaggerated and she has approached her task as an advocate rather than as an independent expert;

b) Ms. Chow's care recommendations as to rehabilitation therapies are deficient because the evidence does not connect them to a physician's assessment of pain, disability, and recommended treatment; and

c) On the evidence, there is a substantial likelihood that Ms. Gustafson will not use the services recommended by Ms. Chow and reductions are therefore necessary to reflect that contingency.

[142] I reject the defendant's objection that Ms. Chow approached her task as an advocate rather than as an independent expert. To the contrary, I find that, in the preparation of her report and in testifying, Ms. Chow manifested an awareness of her duty to assist the court and not to be an advocate for any party. She was articulate, precise, and careful. Sometimes she was opinionated, but not inappropriately so. I found her an impressive witness.

[143] Concerning the defendant's second objection, I am satisfied that Ms. Chow's recommendations for rehabilitation therapies are consistent with and grounded in Dr. Simonett's opinions concerning Ms. Gustafson's diagnosis and prognosis. In her report, Dr. Simonett specifically recommends spasticity management through a treatment physiatrist or a spasticity clinic, life-long monitoring and equipment for Ms. Gustafson's SCI complications as detailed by an occupational therapist, and occupational therapy on an as-needed basis. In cross-examination, Dr. Simonett states that therapists and clinics participate fully in the care of SCI patients because there are many complications that can occur, and only a dozen or so physicians in British Columbia who are spine specialists.

[144] For her part, in cross-examination, Ms. Chow explains that Dr. Simonett's recommendation of spasticity management engages physiotherapy, because physiotherapy is a means by which spasticity is managed. She adds that it is the job of an occupational therapist charged with case management to determine the modalities of treatment within a treating physiatrist's diagnosis and recommendations.

[145] Based on this evidence, I find that the care of SCI patients is typically managed by a team in which an occupational therapist, such as Ms. Chow, may make recommendations such as the recommendations for rehabilitation therapies contained in Ms. Chow's report. Accordingly, I find that the recommendations are medically justified.

[146] I turn to the defendant's third objection proposing contingency reductions to reflect a likelihood that Ms. Gustafson would not make use of all the rehabilitation services recommended by Ms. Chow. The defendant submits that rehabilitation services have been made available to Ms. Gustafson and she has not made use of them. The defendant further submits that the proposed services are unrealistic because they would involve numerous attendances for different therapies in any given week.

[147] Ms. Chow's recommendations for rehabilitation services may be summarized as follows:

a) Physiotherapy: there should be an initial assessment by a physiotherapist and weekly treatments for four years, and an average of 12 visits a year thereafter;

b) Occupational therapy: four hours a month for one year, two hours a month for three years, and an average of 18 hours a year thereafter, including therapeutic services to be provided at Ms. Gustafson's home as well as case management services;

c) Rehabilitation assistant: commencing in the second year, two sessions or four hours a week to assist with physical maintenance activities such as exercise routines, time in a standing frame, and overall range of motion; and

d) Aquatic rehabilitation: 40 sessions a year in a therapeutic pool following a program run by a physiotherapist in which the rehabilitation assistant and a support worker might participate.

[148] In her evidence in chief, Ms. Gustafson was referred to Ms. Chow's recommendations. She testified that she has read them and there are none that she will not take into consideration and follow. She expresses enthusiasm at the prospect of aquatic rehabilitation with a physiotherapist in a therapeutic pool, having enjoyed swimming before the accident.

[149] The rehabilitation services offered to Ms. Gustafson since her discharge from G.F. Strong have been very limited. She had one outpatient visit from a physiotherapist employed by Fraser Health Authority on July 21, 2021. He told her that he would put her on a waiting list for outpatient physiotherapy at Abbotsford General Hospital, and she has heard nothing further. She does not appear to have been offered occupational therapy, apart from an outpatient visit to GF Strong on July 23, 2021 that is referenced in Ms. Chow's report but was not addressed in Ms. Gustafson's evidence.

[150] Ms. Gustafson was employed by London Drugs at the time of the accident and is still covered by its benefits plan. In cross-examination, she was asked whether physiotherapy was covered under the benefits plan, and she said that she did not know. That is the extent of the evidence on this point. She was not asked why she did not attempt to find out and obtain any rehabilitation services that might be available to her. It is not clear that the possibility is something that she or Mr. Blanes ever considered.

[151] It is not established that Ms. Gustafson has failed to take advantage of rehabilitation services available to her. Even if that were the case, it would not lead me to infer that she would not now take advantage of the rehabilitation services recommended by Ms. Chow, if she were a person of ample means. Since her discharge from G.F. Strong, she and Mr. Blanes have been dealing with extraordinary personal challenges without a great deal of help from public health authorities. For most of that time, there has been the distraction of a pandemic that frightened Ms. Gustafson and limited the services available to everyone.

[152] I accept Ms. Gustafson's evidence that, if she has the means, she will pursue Ms. Chow's recommendations. I think that she will consider, as I have concluded, that pursuit of the recommendations is likely to contribute to her physical and mental health. I do not think that the recommendations are unrealistic as to the frequency of recommended therapy appointments. It is not as though Ms. Gustafson's days are filled with other commitments.

[153] I am not persuaded by the defendant's submissions that there is a real and substantial possibility that Ms. Gustafson will not follow Ms. Chow's recommendations for rehabilitation therapies.

[154] The defendant does not dispute Ms. Gustafson's quantification of the claim for rehabilitation services with the result that his valuation overstates this element of the cost by $12,000.

[155] To summarize, I allow the following costs of future care in respect of rehabilitation services: $37,644 for physiotherapy treatments; $41,255 for occupational therapy treatments and case managements, $112,405 for the services of a rehabilitation assistant, and $99,128 for aquatic rehabilitation. The total comes to $290,000 (rounded).

Counselling

[156] Ms. Gustafson seeks $5,752 for one year of counselling sessions with a psychologist. The defendant submits that there are significant likelihoods that Ms. Gustafson would have required counselling in any event, or that she will not utilize counselling services. To account for these contingencies, the defendant submits that the proposed award should be discounted by 75%.

[157] As already noted, Ms. Gustafson had a history of anxiety and depression for which she was being treated prior to the accident. Her family physician prescribed Venlafaxine, which is an antidepressant. She smoked marijuana daily, usually one or two cigarettes. Since the accident, she has continued with the Venlafaxine and reduced the amount of marijuana she smokes.

[158] Prior to the accident, Ms. Gustafson did not seek psychological counselling for her anxiety and depression.

[159] Dr. Simonett recommends that Ms. Gustafson should have access to mental health services as needed. Ms. Gustafson's claim is based on Ms. Chow's recommendation that there be an allowance for the provision of 24 to 36 sessions with a Registered Psychologist who has experience working with SCI patients. I accept Ms. Chow's evidence that the SCI has changed the clinical picture for Ms. Gustafson and made her anxiety and depression more challenging to manage. In this light, an allowance for clinical counselling is medically justified.

[160] I do not think that there is a real and substantial likelihood that Ms. Gustafson would have required counselling in any event. Her mood issues were long-standing and stable. In late 2017, she underwent a period of intense stress associated with her daughter's pregnancy. She took time off from work, but did not seek psychological counselling.

[161] Because Ms. Gustafson has been under a physician's care for her mood issues and her condition is stable, I think there is a real and substantial possibility that she will not pursue this aspect of Ms. Chow's recommendations. Ms. Gustafson may perceive her need for counselling as different from, and less pressing than, her need for rehabilitation services.

[162] I discount the claim for an allowance for counselling services by 50% to reflect the real and substantial possibility that Ms. Gustafson will not pursue private counselling, or will pursue counselling for fewer sessions than Ms. Chow has recommended. Accordingly, I allow $2,900 (rounded) for this claim.

Conclusion as to the cost of future care

[163] To recapitulate, I find that the following allowances for the cost of future care are appropriate: $258,774 for uncontested elements; $3,770,000 for paid personal care; $118,000 for a Van; nothing for home maintenance; $290,000 for rehabilitation services; and $2,900 for counselling. With rounding, the total comes to $4,440,000.

[164] An allowance for accommodative housing is justified and not included in this award. The parties have leave to reopen their cases to present further evidence and argument limited to this head of damage.

In-trust award

[165] Ms. Gustafson seeks an in-trust award of $380,000 in recognition of the care and services provided to her by Mr. Blanes since the accident. The defence submits that an award of $150,000 is appropriate.

[166] Mr. Blanes has been Ms. Gustafson's full-time caregiver since her discharge from G.F. Strong on November 28, 2019, a period in excess of 1,050 days. He has not had a day off.

[167] It is settled law that a damage award may include an "in-trust" component in recognition of the care and services provided to the plaintiff by a family member such as Mr. Blanes; *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28; *Farand v. Seidel*, 2013 BCSC 323 at paras. 99-100. Though described as in-trust awards, the plaintiff recovers them and British Columbia courts do not generally impose trust terms in their orders; *Dykeman* at para. 28. The care and services provided must be necessary because of the plaintiff's injuries and they must be over and above what is to be expected from the family relationship.

[168] Both parties cite *Bystedt v. Hay,* 2001 BCSC 1735, at para. 180, where D. Smith J. addressed the valuation of the care and services provided by a family member and identified the following principles:

a) The maximum value of such services is the cost of obtaining the services outside the family;

b) Where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount; and

c) Quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services, reflecting the wage of a substitute caregiver.

[169] The opportunity cost to Mr. Blanes is the limiting factor in this case, because the reasonable cost of obtaining the services provided by Mr. Blanes from substitute caregivers far exceeds the opportunity cost to Mr. Blanes. The reasonable cost of the services exceeds $30,000 per month or $360,000 per year. Mr. Blanes is retired from the workforce and, while he might have returned to it, he would not have looked forward to an income in that range. Giving full weight to intangibles and the non-pecuniary burdens shouldered by Mr. Blanes, $30,000 per month is not a fair measure of what he has given up.

[170] Ms. Gustafson proposes that the opportunity cost to Mr. Blanes, and therefore the award, be valued at 40% of the cost of outside care, or $12,000 per month. She submits that this is equivalent to the valuation methodology adopted by Betton J. in similar circumstances in *James* at paras. 154-157, but the argument is based on a mis-reading of the judgment. Betton J. valued the full-time care required by Ms. James at $500 per day – equivalent to approximately $15,000 per month – and then reduced that amount by 40%. In other words, he made an in-trust award of 60% of the cost of full-time care, not 40%, applied to a much lower cost. The result was an award of $345,000 in respect of 1,150 days of full-time care provided by Mr. James following Ms. James' discharge from the hospital.

[171] The valuation methodology in *James* does not provide a guide to the opportunity cost to Mr. Blanes. Ms. Gustafson's care costs are more than double those of caring for Ms. James, and there is no reason to think that Mr. Blanes' opportunity cost of providing roughly equivalent care is double that experienced by Mr. James who was, in fact, working and not retired. Nevertheless, it is helpful to observe that an opportunity cost to Mr. James of $300 per day or $9,000 per month is implied by *James*.

[172] The defence values the proposed award by comparison to the valuation of an in-trust award for the parents of a brain-injured adult child in *McCormick v. Plambeck,* 2020 BCSC 881 at paras. 354-368, aff'd 2022 BCCA 219. Chief Justice Hinkson dismissed the plaintiff's claim and assessed damages in the alternative. His valuation of an in-trust award of $100,000 to the plaintiff's father and $50,000 to his mother is not helpful in this regard in the case at bar because the issue in *McCormick* turned on the extent of the care provided by the parents, not the opportunity cost to the parents in providing it.

[173] Consistently with the result in *James* (though not the methodology), I value the in-trust award at $315,000, equivalent to $300 per day times 1,050 days.

Loss of past earning capacity

[174] Evidently, Ms. Gustafson has been unable to work since the accident. The parties agree that she has suffered a loss of past earning capacity in respect of the period from July 14, 2019 to the date of judgment.

[175] The question of what Ms. Gustafson would have earned, but for the accident, is hypothetical. The assessment of hypothetical events—whether past or future—does not take place on a balance of probabilities. The approach is the same as I have already described for the valuation of the costs of future care. Hypothetical events are taken into account as long as they are a real and substantial possibility, and not a mere speculation. The court determines the measure of damages by assessing the likelihood of the event; *Grewal* at para. 48.

[176] The assessment of income loss—again whether past or future—is a matter of judgment, not mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[177] Ms. Gustafson values her loss at $47,000 based on an assumption that, but for the accident, she would have continued working in the post office booth at London Drugs earning an average of $15,000 per year. There is no issue as to the calculations, taking into account labour market contingencies, to convert this figure

into a capital amount. The defendant proposes a 25% reduction to reflect the contingencies that she would have taken time off work for stress-related or health-related reasons, or chosen to retire from the workforce completely.

[178] Ms. Gustafson's tax returns establish that she earned $83,417 over the period from 2014 through July 14, 2019. Her monthly earnings averaged $1,235, or $14,829 annually. This figure does not include the value of her benefits. This period includes 2017, when Ms. Gustafson was off work on a stress leave and her income was lower. If 2017 were omitted, the annual average from 2014 through 2018 would have been $16,007, exclusive of benefits, so the $15,000 figure featured in Ms. Gustafson's calculation of her loss may be thought already to incorporate, to some degree, the contingency of a further stress leave.

[179] Ms. Gustafson testifies that, when she began work at London Drugs in 2014, she was working 30 to 35 hours a week. Between 2014 and 2019, she gradually reduced her hours to the point where she was working 20 to 25 hours a week, in order to have more time to spend with her grandchildren and great grandchildren being born. She adds that she enjoyed her work, even though it could be stressful, especially during the Christmas rush, and her plan was to continue working at the same pace until age 65.

[180] The defence argues that Ms. Gustafson's evidence "shows a loose attachment to the workforce". This is not unfair. In the four years prior to 2014, Ms. Gustafson lost her late husband and suffered a workplace injury that kept her off work for an extended period. Ms. Gustafson and Mr. Blanes began their relationship in 2014, at roughly the same time as Ms. Gustafson began to work at London Drugs, and they build a life together that was centred as much or more on family as on work. Mr. Blanes was already retired at a relatively young age because, after 21 years in the workforce, he had decided that he would rather do what he wanted to do. Their needs were modest, and their means were sufficient to their needs. Ms. Gustafson was not at all someone who lived to work.

[181] On the other hand, Ms. Gustafson's attachment to the workforce, though loose, was also stable. In the context of the family's circumstances, her income of roughly $15,000 a year was significant. She made friendships in her workplace and she still visits with some of her former colleagues there. So far as the evidence discloses, there was nothing in particular to motivate her to retire prior to age 60.

[182] On balance, it seems to me that Ms. Gustafson's calculation of her loss of past earning capacity is realistic and reasonable. I am not satisfied that there is a real and substantial possibility that she would have had to take time off work or quit work to an extent beyond that which is implicit in the assumption of an annual income of $15,000.

[183] Accordingly, I award Ms. Gustafson $47,000 for her loss of past earning capacity, subject to a point having to do with the interaction of the awards for past earning capacity and future earning capacity that I address below.

Loss of future earning capacity

[184] An award for future economic loss requires the plaintiff to prove that there is a real and substantial possibility of a future event leading to an income loss. The question is whether, in the oft-quoted words of Justice Finch (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), Ms. Gustafson's injuries make her "less valuable to [her]self as a person capable of earning income in a competitive labour market".

[185] As with past economic loss, the assessment is a matter of judgment, not mathematical calculation; *Rosvold* at para. 18.

[186] Also, as with past economic loss, future economic loss must be assessed based on a consideration of hypothesized events. The difference from an assessment of past economic loss is that there are hypotheses on both sides of the comparison. The court must evaluate the likely future for the plaintiff but for the accident, and compare it to the likely future taking the injuries suffered in the accident into account, allowing for real and substantial positive and negative

contingencies in both cases. However, in a case such as this one, involving catastrophic injuries, the difference is essentially theoretical, because it is a practical certainty more than a hypothesis that Ms. Gustafson's fate in the years to come is to continue not to earn income.

[187] In *Rab v. Prescott,* 2021 BCCA 345 at para. 29, Grauer J.A. described the task in this kind of case:

> [29] Some claims for loss of future earning capacity are less challenging than others. In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. *Dornan* was such a case.

[188] In *Dornan*, the Court dealt with negative contingencies arising from a pre-existing injury.

[189] Ms. Gustafson claims an award of $57,000 on the basis that, but for the accident, she would have continued to average $15,000 in earnings working at London Drugs until she turns 65 in 2026. The defence submits that there should be a contingency reduction of 33% to reflect the possibilities that she would have chosen to leave the workforce before age 65, or been forced to leave by ill-health, reducing the claim to $38,000 (rounded).

[190] The defence and Ms. Gustafson point to the same considerations in this regard as they advanced in their submissions concerning past economic loss. The important difference is that, all other things being equal, early retirement between ages 60 and 65 is considerably more likely than early retirement between ages 57 and 60. With increasing age, the risk of a medically induced withdrawal from the workforce also increases, especially for someone with Ms. Gustafson's pre-existing health challenges. Taking these increases into account, I find that there is a real and substantial possibility that Ms. Gustafson would not have worked until age 65.

[191] Based on Mr. Benning's evidence, if the hypothesis were that Ms. Gustafson would have retired at age 63 rather than age 65, her future loss would be approximately $31,500 rather than $57,000. That would correspond to a 45% contingency discount against the claim. If the hypotheses were a retirement at age 64, her future loss would be approximately $43,200, a discount of approximately 24%.

[192] Given Ms. Gustafson's evidence that she intended to work to age 65 and her relatively loose attachment to her working life, as I have described it, I do not think there is a significant likelihood that she would have worked longer to balance the negative contingency arising from the possibility that she might have left the workforce before age 65.

[193] Doing my best to weigh all the considerations I have described, including Ms. Gustafson's work history, intentions, lifestyle, friends in the workplace, age, and the state of her health prior to the accident, I find that an award of $43,000 or approximately 75% of the amount claimed for future economic loss is fair and reasonable.

Timing issue in relation to the awards in respect of lost past and future earning capacity

[194] The economist's calculations underlying my awards for loss of past and future earning capacity assume a judgment made on the first day of trial on September 12, 2022. If the calculations are adjusted to the actual date of judgment, there would be a modest increase in the award in respect of past earning capacity, and a corresponding reduction in the award in respect of future earning capacity. The adjustments would largely but not exactly offset each other. The possible adjustments may not be material. I leave it to counsel to consider whether adjustments are necessary and give them leave to speak to the matter if they cannot agree.

Disposition

[195] For these reasons, I find that Ms. MacFarlane is liable to pay damages to Ms. Gustafson for negligence as follows:

a) $435,000 in general damages;

b) $89,670.36 in special damages;

c) $4,440,000 for the cost of future care, other than accommodative housing;

d) $315,000 as an in-trust award in respect of the care and services provided to Ms. Gustafson by Donald Blanes;

e) $47,000 for loss of past earning capacity; and

f) $43,000 for loss of future earning capacity.

[196] Counsel may agree to adjust the awards for loss of past and future earning capacity as contemplated in para. [194] above, and may speak to this matter if they cannot agree as to the need for or amount of any adjustments.

[197] Subject to the possibility of an adjustment in the awards for loss of past and future earning capacity, Ms. Gustafson may enter judgment immediately for the amounts awarded in these reasons for judgment which total $5,369,670.36.

[198] I grant the parties leave to continue the trial and adduce further evidence and argument which will be limited to the following four issues:

a) The magnitude of an appropriate allowance for accommodative housing, as a cost of future care;

b) A tax gross-up;

c) A management fee; and

d) Ms. Gustafson's claim in respect of health care services received by her from the Province, in respect of which the Province is subrogated pursuant to the *Health Care Costs Recovery Act*.

[199] The question of costs should be deferred until all other issues are determined.

"Gomery, J."