CITATION: Meade v. Hussein, 2023 ONSC 1000
COURT FILE NO. CV-14-1391
DATE: 20230209

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Richard Michaelis and Melanie Meade, by her litigation guardian, Lisabet Benoit

Plaintiffs

– and –

Ibrahim Hussein, Gore Mutual Insurance Company and Echelon General Insurance Company

Defendants

Mark Elkin and Sherilyn Pickering, for the plaintiff Melanie Meade

Ari Krajden, for the defendant Ibrahim Hussein

Heard: November 29, 30, December 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15 and 16, 2021, with written argument delivered January 31, March 2, and March 22, 2022.

S.T. BALE J.: -

Introduction

[1] Melanie Meade claims damages from Ibrahim Hussein for personal injuries suffered as a result of a motor vehicle accident. Although the title of proceeding names other defendants, Mr. Hussein was the sole defendant remaining at the time of trial. Accordingly, for convenience, I refer to him as "the defendant".

[2] The accident occurred on May 24, 2014. Melanie and her boyfriend, Richard Michaelis, while on route from Barrie to Stoney Creek, were rear-ended on Highway 401, by a vehicle driven by the defendant.

Plaintiff's position

[3] Melanie alleges that as a result of the collision, she has suffered from:

> Traumatic Brain Injury, Post-Concussion Syndrome, Post Trauma Vision Syndrome, Convergence Insufficiency, Binocular Dysfunction, Central Peripheral Integration Dysfunction, post- traumatic headaches (cervicogenic headaches, tension type headaches, and migrainous features), soft tissue injuries to her neck and back, C8 pinched nerve, shoulder girdle strain, Adjustment Disorder with mixed anxiety and depressed mood, Persistent Depressive Disorder with Anxious Distress with Intermittent Major Depressive Disorder, Somatic

> Symptom Disorder with predominant pain, Post-Traumatic Stress Disorder with panic attacks, and Alcohol Use Disorder (resulting in peripheral neuropathy).

[4] She alleges that despite treatment, she continues to suffer from headaches, dizziness, balance difficulties, cognitive impairments, vision impairments, hearing impairments, speech impairments, jaw pain, neck pain, shoulder pain, back pain, rib pain, pelvic pain, anxiety, depression, low mood and poor mood control.

[5] Melanie concedes that prior to the collision, she had poor coping skills and would have a much deeper response to life's events than others, but says those events were transitory and she would bounce back and move on. She argues that because her collision-caused pain and impairments, as well as her collision-caused losses, are ongoing and constantly present, she has lost her ability to bounce back and instead deteriorates with each loss. She has cut herself, scratched herself, and ended up in hospital on a psychiatric hold – events which she blames on accident-induced grief.

[6] As of the date of the accident, Melanie owned and operated a strategic planning business named "Next Step" which she opened in 2013. She says that she had to wind the business down because of her collision-related impairments. She tried other business ventures and jobs but says that she has been unable to remain employed because of those impairments. She argues that she suffers a substantial loss of enjoyment of life, a total loss of earning capacity, and a substantial loss of housekeeping capacity. She says that she requires significant future care.

Defendant's position

[7] The defendant argues that Melanie sustained no more than a WAD 1 neck strain and associated tension headaches as a result of the accident.

[8] He argues that her reported emotional decline was not contemporaneous with the accident and that the contemporaneous medical records show that her pre-existing mood issues remained stable for an extended period following the accident.

[9] The defendant argues that Melanie's purported post-concussive symptoms did not arise immediately following the accident and have not followed the pattern of a concussion.

[10] He argues that Melanie's assessors and treatment providers were not in possession of a full or complete medical brief at the time of their assessments and therefore cannot be relied upon to corroborate or validate the plaintiff's narrative.

[11] The defendant argues that there is a lack of objective findings to explain Melanie's alleged impairments and that she was not a credible witness.

Liability

[12] Once a plaintiff proves that a rear-end collision occurred, the evidentiary burden shifts to the defendant to show that he or she was not negligent: *Iannarella v. Corbett,* 2105 ONCA 110, at para. 19.

[13] In this case, the plaintiffs' evidence was that the defendant's vehicle struck them from behind. While the defendant has not admitted liability, he did not testify and led no evidence to show that he was not negligent.

[14] In these circumstances, I find the accident to have been caused by the defendant's negligence.

Medical history

[15] Melanie acknowledged that she had a pre-accident history that included two concussions, ADHD, and depression, but said she had no ongoing symptoms from the previous concussions and that her ADHD and depression were under control and improving prior to the collision.

[16] Melanie lived in Manitoba from 2001 to 2012. Before returning to Ontario in 2012, her physician was Dr. Dandekar. His records cover the period from June 25, 2011 to July 24, 2012.

[17] In June 2011 and August 2011, Melanie saw Dr. Dandekar for her attention deficit disorder. In June, she felt that her 72 mg dose of Concerta was too strong – she was experiencing insomnia. Her dose was reduced to 54 mg. She was also on a 40 mg dose of Celexa for mood issues. In August, she again saw Dr. Dandekar. At that time, she felt that her 54 mg dose of Concerta was inadequate. Her mood was down. She was experiencing agitation. Her Concerta dose was put back up to 72 mg.

[18] In September 2011, Melanie saw Dr. Dandekar with a diagnosis of depression with anxiety. She was suffering from poor concentration. She was experiencing "social isolation, not wanting to leave house." Her irritability had been worse. She was not having restful sleep and was exhausted in the morning. She was experiencing stress at and dreading work. The following day, she was attending court for custody issues with her children. Her mood was down. It was noted that her depression was under suboptimal control and that she had comorbid ADHD. Dr. Dandekar recommended cognitive behavioral counselling and supportive psychotherapy. A sick leave was discussed, and a sick note was written. Dr. Dandekar switched her medication for mood issues from Celexa to Zoloft.

[19] In December 2011, Melanie saw Dr. Dandekar with a diagnosis of depression. She was experiencing stress with work and had been fired. Her father had been diagnosed with Alzheimer's. Dr. Dandekar noted "mood/affect stress" and "depression/stress". He prescribed Concerta and Zoloft. He also sent Melanie for an x-ray of her lumbar sacral spine and her thoracic spine. When asked at trial, she said that she could not remember the reason for the x-rays.

[20] In March 2012, Melanie saw Dr. Dandekar with a diagnosis of neck pain. She was feeling better and had a new job. She was still suffering from depression and her medication was renewed. When asked about that neck pain on cross-examination, she said she could not remember.

[21] When shown a record to indicate that she received chiropractic treatment in 2011 and 2012, Melanie initially said that she was receiving nutritional advice. She later conceded that she was receiving chiropractic treatment but said she could not remember the nature of the treatment or which parts of her body were treated.

[22] In May 2012, Melanie saw Dr. Dandekar with a diagnosis of depression. Her emotions were up and down. Her partner was an alcoholic and she was experiencing stress. She had stopped taking Zoloft and Concerta. Her "mood/affect" was reported as "sad/crying." With respect to her

depression, the doctor wrote "things not going well." He recommended psychological counselling and cognitive behavioral therapy.

[23] After returning to Ontario, Dr. Morin became Melanie's physician. In May 2013 (one year before the accident), Melanie complained to him of low mood, irritability, anhedonia, lability, crying spells, and decreased concentration. He noted separation from her fiancé in July 2012, the death of her mother and her move from life in Alberta as stressors. Melanie reported that her sister had given her both Celexa and Concerta which she had restarted in the past week.

[24] In August 2013, Melanie saw Dr. Morin to discuss her ADHD. She was starting a business and felt that "she [was] having great difficulty with focusing, with memory and attention, with interpersonal skills, and with impulse control." He prescribed a 54 mg dose of Concerta.

[25] In September 2013, Dr. Morin did a depression screen which was negative. Melanie denied low mood and anhedonia. She admitted excellent concentration and memory. She said that her business was doing well. Dr. Morin suggested increasing her Concerta dose, which the plaintiff declined, but would consider when following up in 3 months.

[26] In October 2013, Melanie saw Dr. Morin to follow up regarding depression and worsening mood. She had restarted Celexa on a 20 mg dose in May 2013 but had reduced her dose to 10 mg over the past 3 weeks with "significant worsening of mood". She admitted to "low mood, delayed sleep onset, mind running like an engine, irritability, early morning awakening, anhedonia, emotional lability." She said that her mood changes were noted by her partner and family. She was not tearful but was near tears.

[27] In November 2013, Melanie saw Dr. Morin and told him her mood was "now manageable" and 80 per cent better. She reported no anhedonia, no emotional lability, no crying spells, no decreased concentration, no mind running, no irritability, no difficulty coping with change, and no fatigue. She said her memory had improved.

[28] In December 2013, Melanie returned to see Dr. Morin. She felt that her use of Celexa had provided significant improvement in her mood. She reported significant improvement of her symptoms, with significantly reduced irritability, no early morning waking, and no crying spells. She felt that she was back to 90 per cent of normal. However, she felt that her hyperactivity was not adequately controlled on her current 54 mg dose of Celexa. She noted early cessation of effect in the afternoon with difficulty focusing and withdrawal irritability. She admitted that her previous trial of 72 mg dose lasted longer into the evening.

[29] In January 2014, less than 4 months before the collision, Melanie saw Dr. Morin and again reported being at 90 per cent of normal. She had good concentration, good memory, no irritability, no emotional lability, no early morning waking, and no crying spells. However, her dose of Celexa was still an issue. She told Dr. Morin that she had reduced her dose to 54 mg as she felt the 72 mg dose was too high causing her to experience "irritability, feeling keyed up, and tremors." He obtained her agreement to continue the medication for 12-18 months "due to rapid decline after last stop of medication."

Post-accident symptoms

[30] On the day of the accident, Melanie attended at the Huronia Urgent Care Clinic. The physician's notes from that visit indicated that she reported intense pain going up her back to the

back of her skull. The diagnosis was neck and upper back strain or sprain. She was advised to modify activity and prescribed Vimovo. She was referred for physiotherapy or massage therapy and advised to follow up with her family doctor.

[31] Melanie saw Dr. Morin on June 5, 2014, approximately two weeks after the accident. She said that she had improved since the accident with chiropractic treatment three times a week and that she had an appointment for massage therapy. She said that she had no symptoms of hand weakness, radiating pain down arm, dizziness, tinnitus or decreased levels of consciousness. Dr. Morin noted that she seemed comfortable and was ambulating "well/independently." His physical examination of her was normal and she had a full range of motion of her neck. She complained of pain on palpation of her right and left trapezius, supraspinatus and neck muscles. His diagnosis was neck strain.

[32] At an appointment with Dr. Morin on June 17, 2014, Melanie admitted improvement with massage therapy but had stopped physiotherapy due to lack of benefits. She again denied hand weakness, radiating pain down arm, dizziness, tinnitus or decreased levels of consciousness. Her physical examination continued to be normal with a full range of motion of her neck. Dr. Morin's diagnosis was again neck strain.

[33] In June 2014, Melanie's physiotherapist, Suzanne Foreman, sent Dr. Morin a note in which she expressed the opinion that: "It is likely that Melanie has sustained a concussion along with her WAD II injury …" Ms. Foreman was not called as a witness and there was no evidence of her qualifications to diagnose concussion.

[34] Melanie saw Dr. Morin in August 2014. His notes indicate that she reported good mood, good concentration, good focus and good memory. With respect to her accident-related symptoms, Dr. Morin notes "marked improvement in dizziness, decreased concentration, and decreased memory with physiotherapy in addition to massage and chiropractic, with continued but improving shoulder and neck pain.

[35] The first mention of concussion in Dr. Morin's notes appears in notes of a visit from Melanie in December 2014 in which he writes: "Motor vehicle accident May 24, 2014 with neck strain and concussion, initially improving over weeks with physiotherapy and massage but markedly worse over the last 8-10 weeks with stop physio and massage due to loss of benefits …" In cross-examination, Dr. Morin agreed that Melanie had told him that she had a concussion.

[36] At appointments with Dr. Morin in January and February 2015, Melanie reported improvement in her concussion symptoms with physio and massage therapy. She had continued neck pain. She denied improvement in memory but admitted that her concentration continued to improve.

[37] In April 2015, Melanie reported to Dr. Morin that she had increased her dose of Concerta to 40 mg, that her mood was manageable (90 per cent better) and that she was having fewer headaches with a decrease in intensity.

[38] In June 2015, Melanie reported to Dr. Morin, "good exercise working in yard and garden with increased back pain but no increase in concussion symptoms." She again reported having fewer headaches with a decrease in intensity.

[39] In July 2015, Dr. Morin noted that Melanie admitted "significant stress over the past year regarding chronic concussion symptoms with significant impact on employment, finances and ability to earn a living." She reported "marked worsening of concussion symptoms (headache, decreased concentration and memory, and neck pain) since cessation of massage therapy at end of May 2015 due to end of course of funding." She reported a marked worsening of mood, mind running like an engine, moderate irritability, anhedonia, significant emotional lability, significant difficulty coping with change, prolonged crying spells, significantly decreased concentration, and significantly decreased memory - forgetting appointments and getting appointment times wrong.

[40] When Dr. Morin saw Melanie on August 18, 2015, she reported improving pain on amitriptyline with mildly better sleep and 50 per cent better management of pain, symptoms and life. Her headaches were much better with physiotherapy, with some increased neck pain which was manageable. However, her blood pressure was of concern. Her occupational therapist had refused to do some activities due to elevated blood pressure, with diastolic pressure in the high nineties. Dr. Morin prescribed Norvasc for hypertension and counselled her to monitor for symptoms of high and low blood pressure, "especially as concerns headaches, fatigue and dizziness."

[41] Dr. Morin's file contains a note from Dr. Vachhrajani, a neurosurgeon, at the St. Michael's Hospital Head Injury Clinic. Dr. Morin reviewed the note and understood that Melanie's headaches were "much better" and "essentially gone", other than a short-lived headache once a week. Dr. Vachrajani's note indicates that Melanie was relieved that the headaches were gone, that she was starting to get back to work slowly and was more physically active, having participated in dragon boat racing. He was concerned about her high blood pressure and referred her for a hypertension assessment.

[42] When Dr. Morin saw Melanie on September 15, 2015, he noted that she had stopped taking Norvasc for hypertension and that she was medication adverse. He advised her to re-start the medication, but she declined. She was also no longer taking amitriptyline. She reported worsening headaches. On cross-examination, Dr. Morin agreed that his note suggests that he had a concern that Melanie's headaches might be related to her hypertension.

[43] Dr. Morin's notes contain a mental health discharge summary dated October 7, 2015 from Anthony Fasciano indicating that Melanie had "dropped out of therapy/did not complete." In addition, a psychiatrist, Dr. Seevaratnam, wrote to Dr. Morin on October 29, 2015 reporting that she had failed to keep her appointment with him that day, which had been for a psychiatric assessment.

[44] In January 2016, Dr. Morin completed a medical reference addressed to Eastern Residential Services. The form was completed as part of Melanie's application to be a foster parent. In the reference, Dr. Morin confirmed that she was physically able to look after children in her home, was free from any mental illness that would prevent her from fostering and was emotionally and psychologically able to provide foster care and support for children. This reference was given approximately 20 months after the accident. Melanie thereafter began caring for a foster child but by October 2016, she was no longer fostering. Dr. Morin's notes indicate that the child had been stealing and lying.

[45] In March 2017, Dr. Morin noted that the plaintiff had ended her engagement in February 2017 after discovering that her partner was unfaithful. He agreed on cross-examination that she was very upset and that this was a traumatic experience for her.

[46] On June 14, 2017, Melanie reported to Dr. Morin that she had a long history of significant snoring at night, with witnessed apneas and chronic term mood issues with morning headaches. She agreed to a sleep study. She also reported that she was no longer taking amitriptyline and that her chronic headaches had resolved, with only 12 headaches in the past two months, associated with too much stress and activity.

[47] On June 19, 2017, Dr. Morin noted that the sleep study showed very severe apnea. On cross-examination, he agreed that Melanie's apnea was unrelated to the accident. He also agreed that an individual with severe sleep apnea would have headaches, would be at risk for high blood pressure and could have issues with memory and concentration.

[48] Following an appointment in July 2017, Dr. Morin noted:

> Patient admits significant stress over past several years regarding chronic concussion symptoms, break up with fiancé, and recent frustration with concussion symptoms, and loss of lawyer despite compliance with Celexa 40 mg. Admits low mood, significant delayed sleep onset more than one hour nightly, mind running Ike an engine, MODERATE irritability, NO early morning waking, anhedonia, SIGNIFICANT emotional lability, SIGNIFICANT difficulty coping with change, SIGNIFICANT social Isolation, MODERATE dark intrusive thoughts, significant crying spels, MODERATELY decreased concentration, and moderately decreased memory. Admits poor exercise, and 12 oz ETOH weekly. Admits recreational drug use, marijuana 2-3 joints weekly.

[49] As a result of a report from Dr. Morin in December 2017, Melanie lost her driver's licence. On cross-examination, he agreed that her sleep apnea was the only reason for making the report.

[50] In January 2018, Dr. Morin completed a report for the Ministry of Community and Social Services related to Melanie's participation in Ontario Works. In the report he wrote: "Uncontrolled/untreated sleep apnea. Patient unable to drive. Licence suspended. Moderate to significantly decreased memory and concentration fluctuating with mood dysregulation." On cross examination, he confirmed that by this time, his concern was sleep apnea and mood dysregulation and that these issues predated the accident. He also agreed that concussion was no longer a significant concern.

[51] On January 17, 2018, Dr. Morin notes that Melanie reported "significant stress over past years regarding chronic concussion symptoms with debilitating effects to employment, with loss of last job December 7, 2017 … and alienation from son who can no longer live with her." Her mood had begun to worsen in September 2017, began improvement in December 2017 after being prescribed Wellbutrin, and then continued to improve after being fired from her job. She reported significant delayed sleep onset, mind running like an engine, mild irritability, significant early morning waking, moderate emotional lability, significant difficulty coping with change, moderate social isolation, significant dark intrusive thoughts, moderate crying spells every 2-3 days, and significantly decreased concentration and memory.

[52] On March 1, 2018, Dr. Morin notes that Melanie reported marked deterioration in mood over the previous 6 weeks with worsening concussion symptoms which continue to fluctuate in severity and have never resolved enough to allow sustained effective employment. She reported moderate photophobia, worsening concussion and mood symptoms with stress and difficulty with word finding. She had not used her CPAP machine since being diagnosed with apnea in June 2017.

[53] Dr. Morin's clinical note from October 31, 2018 indicates that Melanie had moderate improvement in daily depression and anxiety over the previous month since breaking up with "abusive and controlling boyfriend." She had been off Concerta since a camping trip in July 2018 with no medication for 3 weeks and did not restart the medication when she returned.

[54] During the October 31, 2018 visit, Dr. Morin also notes that Melanie had not been using her CPAP machine. He discussed possible consequences of severe sleep apnea to "cardiac function, mood, and driving regarding risks of depression, anxiety, cognitive disturbance …" She agreed to restart her use of the machine.

Pre-accident income and employment

[55] While in Manitoba, Melanie was employed by Spectrum Education from about 2006 to November 2011 when her employment was terminated. As previously noted, she had reported to Dr. Dandekar in September 2011 that she was experiencing stress at and was dreading work.

[56] Her only job in Ontario prior to the accident was at minimum wage working for John Ironside. The job lasted for about two months – November 2012 to January 2013.

[57] In 2012, Melanie earned $1,932 in employment income. The only other income she reported that year was employment insurance of $16,020 and RRSP income of $6,119.

[58] In 2013, she started a business which she named "Next Step". That year, she reported $1,800 in employment income and Employment Insurance income of $14,805. With respect to Next Step, she reported gross business income of $12,418, with a net loss of $12,392.

[59] In 2014, Melanie reported employment income of $117 and employment insurance income of $2,961. She reported gross business income of $26,308, with a net loss of $899.

[60] However, it must be noted that the business income reported by Melanie in 2013 and 2014 was inflated by amounts that Mr. Michaelis had earned teaching first aid and diverted through her business for tax purposes. Her gross revenue in the 5 months before the accident was only $2,075.

Post-accident income and employment

[61] Following the accident, running Next Step became a struggle for Melanie due to her pain. She was unable to think straight to do her job. She described it as going overnight from being able to do her work to not being able to make sense of it. She retained a consultant whom she had met before the accident. The consultant provided her with business coaching services including staying focused and on track, self-management and task lists. However, Melanie was unable to continue with Next Step. The consultant testified that the difference in Melanie from when they met before the accident to how she was after the accident was like "night and day" – she was unable to process information the way she could before the accident.

[62] In 2015, Melanie tried two other business ventures – Sexy Wealthy in Heels (a franchise of some sort) and Scooby Doo. She obtained intermittent employment as a security guard and in the fall of 2015, tried an online job working for Site Docs. She struggled with learning the job and was let go after five weeks.

[63] In March 2016, Melanie tried to run a café in a Jeep dealership. However, she was unable to make a profit at the café and in December of 2016, the dealership closed the café down.

[64] In 2015, Melanie reported employment income of $5,038 and gross business income of $38,435, with net business income of $3,316. In 2016, she reported gross business income of $43,258, with net business income of $4,802.

[65] As previously noted, in 2016, Melanie tried to supplement her income by taking in a foster child who had behavioural problems. She became overwhelmed and ultimately had to contact the foster agency and say that she could not continue to care for him. Before the accident, Melanie had successfully cared for three foster children with high needs.

[66] In 2017, Melanie tried a succession of jobs but was unable to maintain employment. The last one was with CCI Bio. She had to work with the lights off. She was unable to sit for long periods. She struggled with learning their systems and databases. The work triggered debilitating pain within just a few hours. She was let go after four months. This was her last job. That year her employment income was $29,492 and she received EI benefits of $1,513.

[67] The defendant submits that I should infer that the most significant reason for Melanie's withdrawal from the work force was the loss of her driver's licence because of her untreated sleep apnea. While I agree that the loss of her licence would not have helped, I am satisfied that her accident-related injuries are one cause of her inability to work.

[68] In March 2018, Dr. Morin assisted Melanie with an application for CPP disability benefits. In his report to Service Canada, he noted: "post concussion symptoms with moderate to severe depression as a result" and "worsening concussion symptoms, which continue to fluctuate in severity, and have never resolved enough to allow sustained effective employment and which offer significant barriers to maintaining complex and long-term social relationships."

Plaintiff's credibility

[69] Counsel for the defendant argues that Melanie was not a credible witness. He submits that on cross-examination, she was frequently unable to recall pertinent details and became highly defensive when confronted with evidence which challenged her narrative. He says that this was particularly pronounced when faced with questions relating to her business finances and alleged pre-accident income levels. He argues that she sought to downplay the significance of her reported childhood traumas, pre-accident mental health issues and suicide attempts. Her presentation on cross-examination contrasted with how she conducted herself during her examination-in-chief. When questioned by her own lawyer she was seen to be helpful and despite being emotional, had a commendable recollection for dates, figures and events.

[70] The defendant argues that this contrast in Melanie's presentation should lead me to an adverse conclusion regarding her credibility, and that accordingly, I should to assign little weight to her evidence. I disagree and find her to be a generally credible witness.

[71] There were details that Melanie was unable to recall during both examination-in-chief and cross-examination. While I don't dispute that there was some contrast between the two examinations, I am not persuaded that there was any intention to deceive. It is not surprising that she would have more difficulty answering questions in response to a forceful (but fair) cross-examination, particularly given her difficulties with word-finding, self-expression and staying on topic. Added to that, she was being asked to recall events that had occurred many years earlier.

[72] The defendant argues that Melanie developed her "victim narrative" to suit her claim and that before the accident, she presented herself to friends and family as a financially successful entrepreneur, while her tax returns reveal this to be untrue. However, while I agree that she, at times, inflated her level of success, her so-called "victim narrative" is supported by the medical evidence. I also note that none of the experts believed her to be malingering, including, defence experts Dr. Bruun-Meyer and Dr. Mitchell.

Lay witnesses

[73] The defendant argues that Melanie's lay witnesses did not know her well enough to be reliable witnesses and that they relied on her subjective self-reports. He argues that even her sister and litigation guardian, Lisa Benoit, was unaware of her prior psychological issues and ADHD, did not know that she had been taking medication for those conditions for some time, did not know that she had been fired from her previous jobs, and did not know that she had been dependent on "government benefits" (employment insurance) before the accident. However, while the lay witnesses may not have known these details, the fact remains that they knew her both before and after the accident and witnessed her post-accident decline.

Neurology opinion evidence

Dr. Vincenzo Basile

[74] Dr. Basile was the plaintiff's expert neurologist. He assessed Melanie on March 26, 2018. He diagnosed her to have soft tissue injuries of her neck and low back, left-sided C8 pinched nerve, post-traumatic headaches, and post-concussion syndrome secondary to a traumatic brain injury as a result of the collision.

[75] Dr. Basile's opinion was that Melanie has suffered a permanent disability and that her prognosis is extremely guarded. He said that she is not employable in any occupation for which she is reasonably suited and that it is not possible for her to maintain self-employment. He said that prior concussions increase the chance of a patient having multiple ongoing impairments from a subsequent concussion and that Melanie's prior concussions in grade 9 and in the military increased her risk of having a negative outcome from the concussion suffered in the accident. He recommended treatment, including chiropractic therapy, physiotherapy, imaging, migraine medication, supplements, meditation, and mindfulness.

[76] Defence counsel argues that Dr. Basile's evidence should be given little or no weight. He notes that Dr. Basile had not been provided with Dr. Dandekar's clinical notes before forming his opinion and writing his report. He was not aware that Melanie had not lost consciousness following the accident. He was not aware that before the accident, she had been prescribed Concerta for ADD and had problems with concentration, memory and mood. He was not aware that she had continued to work after the accident.

[77] However, Dr. Basile diagnosed Melanie as having accident-related musculoskeletal soft-tissue injuries as a source of her neck and back pain, a possible cervical radiculopathy and features of posttraumatic headaches. He concluded that she met the criteria for post-concussive syndrome. I do not see those diagnoses as being compromised by his lack of awareness of her pre-accident history. The pain which Melanie has experienced since the accident has been identified as one of the causes of her loss of ability to cope with her post-accident conditions.

[78] At trial, Dr. Basile testified that a subsequent review of Dr. Dandekar's records did not change his diagnosis. He said that Melanie's ADHD, her mother's depression, her father's alcoholism, her sister's bipolar disorder and the fact that she did not lose consciousness at the accident scene would not change his opinion because, "in conglomerate", her symptoms were consistent with his diagnosis. While he conceded during a skilled cross-examination that many of the facts of which he was unaware in arriving at his diagnosis would have been relevant, he maintained his original opinion.

Dr. Sarah Mitchell

[79] Dr. Mitchell was the defence expert neurologist. Her opinion was that "on a balance of medical probabilities, given the mechanism of injury described by Ms. Meade, the information reviewed in the file brief and my thorough physical examination, it is not possible to definitively conclude that she sustained even a mild traumatic brain injury during the subject accident." While that statement is somewhat difficult to comprehend, the point is that in order for me to find that Melanie did suffer a traumatic brain injury, it is not necessary for me to "definitively conclude" that she did.

[80] Dr. Mitchell notes that there is no mention of symptoms concerning concussion or traumatic brain injury in the Huronia Clinic notes made on the day of the incident or during Melanie's appointment with her family doctor nearly two weeks later. The only diagnosis at that time was neck and upper back strain. She says that "on a balance of medical probabilities", it is unlikely that multiple physicians would miss altered mental status or a diagnosis of a traumatic brain injury. She says that the first mention of symptoms that could be considered related to concussion are in Dr. Morin's notes of August 5, 2014, nearly six weeks following the accident. She says that even if the plaintiff did sustain a very mild TBI , she would not have ongoing impairments or post-concussion syndrome nearly five years later.

[81] However, I note that physiotherapist Suzanne Foreman documented concussion symptoms on June 24, 2014. I also note that in a program on CBC television about the dangers of concussion, Dr. Mitchell said that people with concussions do not always exhibit symptoms right away and that one cannot always tell if someone does, in fact, have a concussion. Dr. Basile testified that concussion symptoms are often missed in early diagnoses.

[82] Dr. Mitchell does conclude that Melanie suffers from chronic tension headaches which are a result of the accident but says that those headaches are treatable with preventative headache medications such as amitriptyline.

[83] With respect to the constellation of symptoms Melanie has reported over the years since the accident, Dr. Mitchell commented in her report:

> These symptoms are well known to occur in a population of patients following MVA even in the absence of mTBI and in the presence of only a diagnosis of

> whiplash. Therefore, the presence of these symptoms alone is insufficient to demonstrate that a traumatic brain injury, even a mild one, occurred in the index accident as they can be seen in patients without TBI who are involved in an MVA.

This statement amounts to a concession that whether she suffered a TBI or not, the injuries Melanie suffered in the accident may well be a cause of the constellation of symptoms from which she continues to suffer.

[84] Referring to Melanie's pre-accident history of depression, Dr. Mitchell also said that it is likely that the accident exacerbated her pre-existing psychological symptoms.

Neuropsychology opinion evidence

Dr. Joanna Hamilton

[85] Dr. Hamilton was the plaintiff's expert neuropsychologist. She assessed Melanie in 2015 and 2018 – each time for a full day.

[86] In her neuropsychology report dated July 7, 2015, Dr. Hamilton concluded that Melanie probably sustained a concussion as a result of the accident. She said that it is typically expected that individuals who have sustained a concussion will recover well; however, Melanie's pre-existing history of ADD and depression were likely to place her at increased risk for prolonged recovery. She said that Melanie is experiencing challenges at present with sleep and pain, which will be contributing to her functioning, particularly in daily life. She said that it is clear is that Ms. Meade is reporting significant changes in her functioning, which are echoed by her partner, and evident in the testing situation. She concluded that Melanie requires treatment and intervention to address the difficulties she is experiencing.

[87] Dr. Hamilton also concluded that Melanie's cognitive challenges are multi-factorial in nature and include the effects of a concussion, exacerbation of her pre-existing attentional issues, disturbed sleep, pain, and psychological distress. She also concluded that Melanie was experiencing difficulties reflecting dysfunction of frontal lobe systems, including challenges with synthesis and decision making, which are unexpected given her pre-accident status and consistent with her self-report of the changes in her functioning. In Dr. Hamilton's opinion, but for the accident, Ms. Meade would not be exhibiting those challenges. She concluded that the accident materially contributed to Melanie's level of functioning.

[88] In her report dated July 20, 2018, Dr. Hamilton diagnosed Melanie with an adjustment disorder with Depressed Mood. She said that her pre-existing ADHD had likely been exacerbated and that her pre-accident history of depression would make her vulnerable to the development of further levels of psychological distress following subsequent trauma. She noted that while there had been improvements with respect to some aspects of her functioning, there had been declines with respect to her recall of visual information. She was slower on a measure of selective attention and aspects of her motor function had declined over time. Dr. Hamilton noted that declines would not be expected in the course of recovery following a brain injury. She thought that the declines reflected increased levels of psychological distress to which Melanie was vulnerable as a result of her pre-accident history of depression. She remained of the opinion that Melanie's challenges are multifactorial in nature and include the effects of a concussion, exacerbation of her pre-existing attentional issues, disturbed sleep, pain and psychological distress. She again concluded that but

for the accident, Melanie would not be experiencing those challenges and that the accident had materially contributed to her current level of functioning.

Psychology and psychiatry opinion evidence

Psychotherapist Allan Walton and Psychologist Dr. Miller

[89] Allan Walton and Dr. Miller were the plaintiff's expert psychotherapist and expert psychologist, respectively. They co-authored a psycho-vocational report. Mr. Walton testified as to their testing, findings and opinions.

[90] In their report dated December 11, 2018, they found Melanie to have above average to superior intellectual ability, average to above average basic academic skills and mostly high average to above average vocational aptitudes. They said that in principle, she was capable of working in many fields. However, her work history since the collision and her psychological testing indicated that she was unlikely to be successful in the future. Her presentation and limited endurance during their assessment were incompatible with employment. They agreed with Drs. Switzman, Basile and Hamilton that Melanie is unable to manage any suitable employment, and that her physical, cognitive as well as psychological challenges and dysfunctions have substantially compromised her competitive position in the labour market generally. They found her to be competitively unemployable with negligible future earning capacity. They noted that she had a strong work ethic as evidenced by her frequent post-accident attempts to return to employment.

[91] On the issue of causation, Mr. Walton and Dr. Miller concluded that there is little doubt that the accident was psychologically traumatic for Melanie and that she met the criteria for an adjustment disorder with mixed anxiety and depressed mood. It was their opinion that although some of the factors underlying her situation pre-existed the collision, much of it resulted from the problems and losses arising from the accident and its sequelae *(e.g.,* chronic pain, headaches, cognitive difficulties, inability return to work and financial stresses).

[92] Defence counsel argues that Mr. Walton was an advocate for the plaintiff, that he had not reviewed all the relevant documents and had based his opinion entirely on Melanie's subjective narrative. He says that the best example of this is the fact that when he wrote his report, he quoted Melanie as having earned more than $500,000 per year, before the accident, even though he was in possession of her tax returns and business records showing her to have been operating at a loss. Counsel notes that when presented with the inconsistency on cross-examination, he would not concede that the difference would have impacted his opinion. However, while the difference would be relevant to a consideration of the extent of Melanie's financial loss, it would not necessarily be relevant to a consideration of her current functional loss, the cause of that loss or whether she is employable.

Dr. Joseph

[93] Dr. Joseph was a participant expert psychiatrist. He was retained by Melanie's insurer to determine whether she was catastrophically impaired within the meaning of the Statutory Accident Benefits Schedule. He examined Melanie and reviewed the documentation available to him. He diagnosed her persistent depressive disorder with anxious distress, intermittent major depressive disorder, chronic pain syndrome, alcohol use disorder and cannabis use disorder. His opinion was that as a result of the accident, Melanie sustained a catastrophic impairment.

[94] Defence counsel argues Dr. Joseph's evidence was unreliable because he was not fully informed as to the extent of Melanie's mood fluctuations over the years prior to the accident or the extent to which her psychological issues impacted her before the accident. When he was presented with this information at trial, he agreed that the information was relevant and that he would have wanted to make further inquiries if he had the information when formulating his opinion on causation, but that in general, his opinion on causation remained the same.

Dr. Bruun-Meyer

[95] Dr. Bruun-Meyer was the defence expert psychiatrist. His opinion was that there is no psychiatric diagnosis related to the accident.

[96] He did not suggest that Melanie had no psychological diagnosis. He was aware of her pre-accident and post-accident complaints. He did opine that she had a diagnosis of adjustment disorder, in response to real life events, both before and after the accident. Some examples of post-accident stressors were business uncertainties, financial stress, relationship changes and tensions with her children.

Physiatry evidence

Dr. Benjamin Clark

[97] Dr. Clark was the defendant's physiatry expert. He reviewed the complete medical brief and concluded that Melanie had sustained no more than a WAD I neck strain as a result of the accident.

Loss of capacity

[98] Before the accident, Melanie was able to own and operate a business and care for her children. There was no concern about her capacity.

[99] Registered Nurse Alanna Kaye is a qualified and experienced capacity assessor who has done just under 3000 capacity assessments. In her opinion, there were a number of threats to Melanie's capacity, including impairments of memory, attention, concentration, executive functioning, motivation and follow-through, agitation, anxiety, and impulsiveness. These impairments combined to negatively affect Melanie's ability to reason in a logical fashion.

[100] In Ms. Kaye's opinion, while Melanie had the capacity to understand where her finances come from and that she needed to pay bills, she did not have the ability to appreciate the consequences of the decisions she was making. As a result, her sister Susan (a nurse) was appointed her guardian of property.

[101] In addition, Ms. Kay's opinion was that Melanie does not have the capacity to instruct legal counsel. As a result, her sister Lisabet (a police officer) was appointed her litigation guardian.

Causation

[102] It was the opinion of Drs. Basile, Hamilton and Joseph that the accident was a cause of the constellation of symptoms from which Melanie now suffers.

[103] The defendant argues that Melanie has failed to prove, on a balance of probabilities, that the subject accident caused the injuries and impairments she alleges. He argues that the court should find that her pre-accident health conditions, her post-accident diagnosis of sleep apnea and stressors occurring since the accident are the cause of her ongoing impairments. I disagree.

[104] Dr. Mitchell's evidence was focused on her opinion that Melanie had not suffered a traumatic brain injury. However, she did conclude that Melanie suffers from chronic tension headaches as a result of the accident. Those headaches are part of the constellation of symptoms that have resulted in Melanie's inability to cope and move on from periodic stressors as she was able to do before the accident. In addition, Dr. Mitchell allowed that the symptoms that Melanie is experiencing "are well known to occur in a population of patients following MVA even in the absence of mTBI and in the presence of only a diagnosis of whiplash."

[105] The defendant argues that the plaintiff's pre-accident history is replete with significant medical issues which compromised her ability to work and function before the accident. These included depression, ADD, financial stressors and family stressors. She suffered multiple traumatic events in her youth. In the 2-3 years before the accident, while residing in Manitoba, her physician, Dr. Dandekar, was providing treatment for her attention deficit disorder, and mood issues. In the nine months before the accident, Melanie continued to complain to Dr. Morin of ADD issues including great difficulty with focusing, memory, and attention; interpersonal skills, and impulse control. She also continued to complain of depression and low mood.

[106] However, if the pre-existing medical issues were exacerbated by the accident, or if new injuries suffered as a result of the accident contributed to her present condition (both of which are the case), then the accident may be found to be a cause of her present condition.

[107] In June 2017, Melanie received a new diagnosis of sleep apnea which is sometimes associated with a decrease in mood, cognitive impairment and headaches. The apnea negatively impacted her ability to sleep or benefit from restful sleep. The apnea was of sufficient severity that the plaintiff's family doctor invoked a medical suspension of her driver's licence. The defendant relies on the sleep apnea as an alternate explanation for Melanie's current issues. However, while the sleep apnea may be a contributing factor, the evidence does not support it as a factor which would exclude her accident-related injuries as a cause of her current condition.

[108] The defendant argues that following the accident, Melanie continued to grow her business, started new businesses, and had her most financially successful year in 2017, three years post accident. However, in 2014, 2015 and 2016, she was self-employed. In 2014, she had a net business loss of $899. In 2015 and 2016, she had net business income of $8,354 and $4,802, respectively. The only reason that she was more successful financially in 2017 was that she had been unable to continue operating her businesses and had obtained employment resulting in employment income of $29,492. That income was earned from a succession of at least three jobs. She tried very hard to continue to work and earn income. Her accident-related injuries contributed to her business failures and her inability to keep a job. Her business failures and inability to keep a job acted as further stressors, compounding her impairments.

[109] Based upon a consideration of all the evidence, I am satisfied that Melanie's accident-related injuries were a cause of the constellation of symptoms from which she now suffers.

Past and future income loss

[110] Melanie's employment income for the years 2009, 2010 and 2011 averaged approximately $42,000. In 2012, she earned only $1,932 – it appears she lived on employment insurance benefits and cash withdrawn from an RRSP. In 2013, she was running a business and had a net loss of $12,392. In 2014 (the year of the accident), she had a net business loss of $899.

[111] In 2015, Melanie earned employment income of $5,038 and had net business income of $3,316. In 2016, she had net business income of $4,802. In 2017, she had employment income of $29,492.

[112] Counsel for the defendant argues that Melanie has no past or future income loss because her net business income increased between 2014 and 2016, because in 2017, her employment earnings were the highest they had been since 2011 and because her inability to work after 2017 was not caused by the injuries she suffered in the accident. For reasons given earlier under the heading "causation", I do not agree that Melanie has suffered no accident-related loss of income.

[113] However, I do agree that Melanie has not proved an accident-related loss of income from the date of the accident to the end of 2017. There is little evidence to suggest that but for the accident, she would have achieved financial success 2015-2017. By abandoning her businesses and seeking employment, she was able to earn substantially more in 2017 than she had since 2012. However, beginning in 2018, the pain she was suffering from her accident-related injuries, in combination with her pre-existing health issues, rendered her unable to continue working. Accordingly, I find that she is entitled to recover past loss of income for the period from January 2018 to November 2021, and future loss of income from December 2021.

[114] Economist Saqib Durrani gave evidence of Melanie's income loss. He provided two scenarios. The first is based on Melanie earning the 2016 Statistics Canada census average employment income for an Ontario female, across all workers (full-time or part-time, full-year or not) with a bachelor's degree. The second scenario is based on Melanie earning the 2016 Statistics Canada census weighted average income of an Ontario female, across all workers (full-time or part-time, full-year or not), in occupations database analysts and data administrators, other financial officers, and retail salespersons, who have a bachelor's degree.

[115] Based upon the tables provided by Mr. Durrani, Melanie's total income loss (at 70%) for the years 2018, 2019, 2020 and 2021 was $219,760 under Scenario 1 and $154,405 in Scenario 2. As I have no evidence to suggest that one scenario is more appropriate than the other, I have used the average of the two in my calculations - $187,083.

[116] Mr. Durrani calculated Melanie's future income loss using the same scenarios and came up with $1,138,987 under Scenario 1 and $755,692 under Scenario 2. Again, in my calculations, I have used the average of the two - $947,340.

[117] However, defence counsel argues that given her sporadic work history and her existing psychological conditions and vulnerabilities, there is a significant risk that she would not have continued to work until age 65 and would likely have had numerous ongoing periods of unemployment and career changes for the remainder of her working years, regardless of whether the accident had occurred. He submits that if this court does choose to award a sum for income loss, it is appropriate to reduce any past/future loss of income/earning capacity award by 50 per

cent to account for these contingencies. I agree that the awards should be reduced for these contingencies. I also agree that a 50 per cent reduction is reasonable. Although Melanie's income for the years 2009-2011 was consistent, Dr. Dandekar's notes indicate serious psychological disorders beginning mid-2011 and in 2012, she had to rely on employment insurance income and cash from an RRSP. In the result, I find Melanie's past loss of income to be $93,541 and her future loss of income to be $473,670.

Threshold

[118] Pursuant to section 267.5 of the *Insurance Act*, the owner and occupants of an automobile and any person present at the "incident" are not liable in an action in Ontario for damages for health care expenses or non-pecuniary loss arising from the use or operation of the automobile, unless as a result of the use or operation of the automobile, the injured person has sustained a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function.

[119] In applying the threshold, the Court has accepted the three-pronged test initially set out in the trilogy of cases commonly referred to as *Meyer v Bright.* The correct approach is to sequentially answer the following questions:

1. Has the injured person sustained permanent impairment of a physical, mental or psychological function?
2. If yes, is the function which is permanently injured an important one?
3. If yes, is the impairment of the important function serious?

Defendant's position on threshold

[120] The defendant's position is that the crux of the threshold issue is whether the accident was the cause of Melanie's alleged injuries and impairments. He argues that Melanie was not a credible witness and that her experts were not sufficiently informed to come to the conclusions they reached. He argues that the injuries as reported in the weeks and even months following the accident were minor. He argues that her current issues and impairments were caused by pre-existing issues (depression, anxiety, ADHD/ADD), as well as subsequent unrelated issues (multiple failed businesses as stressors, severe uncontrolled sleep apnea and multiple falls). However, as I have earlier decided these issues in Melanie's favour, I am satisfied that the injuries suffered in the accident were a cause of her current condition for the purposes of the threshold.

Has the plaintiff sustained permanent impairment of a physical mental or psychological function

[121] While Melanie's condition has deteriorated over time, her impairments have been continuous since the date of the accident, more than seven years earlier. She continues to undergo treatment, but the medical evidence supports her position that she can expect to have chronic psychological and psychiatric impairments, post-concussion symptoms, cognitive impairments, and pain for the rest of her life. The opinions of the plaintiff's experts on the issue of permanence are as follows:

> Dr. Hamilton: "[Melanie's] impairment has been consistent since the incident and substantial improvement is not expected given the length of time she has exhibited her challenges. As a result, it is my opinion that she has sustained a permanent serious impairment of an important psychological function."

> Dr. Basile: "The treatments and investigations above are listed in order to give maximum opportunity for this patient to improve; however, given the amount of time that has passed and the extent of her symptomatology, prognosis is extremely guarded for any further recovery."
>
> Dr. Joseph: "It has been five years after the index motor vehicle accident. She has had some various treatments for her condition but now it has reached a state of maximum medical recovery. However, with treatment she may be able to develop skills to prevent any further deterioration in her level of functioning."
>
> Mr. Walton and Dr. Miller: "The permanency of the impairments is consistent with her ongoing symptoms despite that passage of time and treatment to date."

If yes, is the function which is permanently impaired important?

If yes, is the impairment of the important function serious?

[122] I will deal with these questions together.

[123] Melanie's impairments have rendered her unable to engage in the essential tasks of her previous self-employment or any employment in any occupation for which she is reasonably suited. She is also impaired with respect to her activities of daily living, housekeeping, and home maintenance. A summary of the opinions of her experts on these issues follows:

> Dr. Hamilton: "Ms. Meade's psychological status (emotional functioning) is impacting on her cognitive functioning and her ability to function in daily life. Her impairment interferes with her ability to continue her regular employment. Her psychological functioning (both cognitive and emotional) is necessary for her to perform the essential tasks of her employment. Her levels of distress impact on her relationships with others and her difficulties with attention and executive functioning would impact on her ability to make decisions and engage in the activities she did within her employment *(e.g.,* coaching others)."
>
> Mr. Walton and Dr. Miller: "Ms. Meade's presentation during this assessment, as well as the psychological test results, lead us to believe that her physical impairments and chronic pain combined with her psychological and cognitive dysfunctions are serious in that they impact virtually every area of Ms. Meade's life."
>
> Dr. Basile: "Certainly her cognitive and physical deficits have both negatively impacted on her ability to continue working or excel in any of her post-collision attempts to return to the labor market and certainly the injuries put her at a competitive disadvantage in this regard."
>
> "Her impairments have negatively impacted on her obtaining or excelling in any employment at this point in time as she has deficits both cognitively and physically."

[124] Melanie testified that her accident-related impairments substantially interfere with her ability to complete housekeeping tasks. Her evidence was corroborated by her sister Susan Luffman. Melanie's position with respect to her housekeeping abilities is supported by Dr. Basile, occupational therapist Erline Wong-Sing and case manager Ashley Oliver.

[125] Melanie's collision-caused impairments substantially interfere with her ability to engage in meaningful relationships. It caused a breakdown in her relationship with Richard Michaelis, alienation from her children, a change in the relationship with her sisters such that they have guardianship over her, and a change in her friends such that she rarely sees friends other than on social media.

[126] For these reasons, I find that Melanie has sustained permanent serious impairment of important physical, mental or psychological functions.

Cost of future care

[127] Melanie claims future care expenses totalling $1,694,111.

[128] The test for determining future care expenses is set out in *Higashi v. Chiarot,* 2021 ONSC 8201, at para. 246:

> The standard of real and substantial risk applies to future care expenses. The test for determining the appropriate award for future care costs is an objective one, based on medical evidence. To prove a claim for future care costs, the following conditions apply: (a) there must be medical justification for the claims; (b) the award must be fair and moderate; and (c) the claims must be reasonably necessary, having in mind personal circumstances. [Citation omitted.]

[129] Counsel for the defendant submits that Melanie has failed to prove that she has any ongoing impairments arising from the accident that will reasonably require future treatment. I disagree.

[130] Melanie's claim for future care costs is based upon a report prepared by Marla Tennen. She is a registered nurse and rehabilitation consultant. She has certificates in nursing, including in depression, insomnia, increased independence, assistive devices, pain management, mindfulness, psychosocial assessment, traumatic brain injuries, consulting, and rehabilitation nursing. The present value of the treatments included in Ms. Tennen's report has been calculated by Saqib Durrani.

[131] There are some difficulties with Ms. Tennen's report. First, she appears to have reviewed all the medical reports, pulled from them all recommendations for treatment she could find, and then recommended all such treatments, without any consideration of whether all were reasonably necessary as of the date of trial. If one medical expert recommends one treatment and another recommends a different treatment, it doesn't necessarily follow that both treatments are reasonably necessary. Second, Ms. Tennen's recommendations as to frequency and duration of treatments and other services is not backed up by the experts recommending the treatments, and some of the services she recommends were not included in any of the medical reports.

Occupational therapy

[132] The need for occupational therapy is supported by Dr. Hamilton, Dr. Schell, Dr. Joseph, case manager Ashley Oliver, occupational therapist Erline Wong-Sing, occupational therapist Carmen Quesnel, and Dr. Zacharias, Dr. Tippin, and Kathleen Gallagar of the DeGroote Pain Program.

[133] Ms. Tennen recommended occupational therapy beginning with two hours a week for two years and 20 sessions per year thereafter. The present value of the recommended treatment is $96,611. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Physiotherapy

[134] The need for physiotherapy is supported by Dr. Vachhrajani, Dr. Basile, and Dr. John, as well as Ashley Oliver, Erline Wong-Sing, Dr. Zacharias, Dr. Tippin, and Kathleen Gallagar. Melanie testified that that when she received regular physiotherapy treatment, it helped reduce her symptoms and increase her functionality.

[135] Ms. Tennen recommended physiotherapy beginning with three times per week for the first year, and 2 sessions per year thereafter. The present value of the recommended treatment is $95,953. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Massage therapy

[136] The need for massage therapy is supported by Dr. Basile, Dr. John, Dr. Vachhrajani, as well as Dr. Miller, Allan Walton, Dr. Morin, Erline Wong-Sing and Ashley Oliver. Melanie testified that that when she received regular massage therapy, it helped reduce her symptoms and increase her functionality.

[137] Ms. Tennen recommended massage therapy beginning with twice a week for 6 weeks, an additional 20 sessions for the balance of the first year, and 15 sessions per year thereafter. The present value of the therapy is $47,801. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Chiropractic treatment

[138] The need for chiropractic treatment is supported by Dr. Vachhrajani, Dr. Basile, and Dr. John. In addition, it is supported by Dr. Miller and Allan Walton, Dr. Morin and Ashley Oliver. There was evidence that chiropractic treatment had been of assistance to Melanie in the past.

[139] Ms. Tennen recommended chiropractic treatment twice a week for 24 weeks, once a week for the next 24 weeks, 24 sessions year for four years, and six additional reserves of 15 sessions over her lifetime. The present value of the treatment is $31,310. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Acupuncture

[140] While Dr. Basile and Dr. Vachhrajani recommended massage therapy, chiropractic treatment and physiotherapy, Dr. John recommended massage therapy, chiropractic treatment and acupuncture. In recommending acupuncture, he was alone. There is no evidence to support the need for massage, chiropractic, physiotherapy and acupuncture. I also note that Dr. John's recommendation was in 2014. The expense for acupuncture will be disallowed.

Psychological assessment and counselling

[141] Melanie has been diagnosed with serious psychological disorders and the need for psychological counselling is supported by Dr. Hamilton, Dr. Schell, Dr. Miller and Allan Walton, psychological associate Jiha Humayun, Ashley Oliver, Erline Wong-Sing, Psychologist Dr. Sprokay, Psychiatrist Dr. Ade-Conde, and Dr. Zacharias, Dr. Tippin, and Kathleen Gallagar. It is also supported by the evidence of Melanie, her sisters, and Richard Michaelis. Her psychological struggles were clear during her presentation at trial.

[142] Ms. Tennen recommended a psychological reassessment and weekly psychological counselling for the first two years, twice monthly sessions for the following three years, and six additional reserves of 24 sessions each over her lifetime. The present value of the recommended treatment is $55,878. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Concussion management treatment/Neurofeedback training

[143] Ms. Tennen recommended neurofeedback training based upon a recommendation of Dr. Hamilton in her report of July 7, 2015. Mr. Durrani calculated the cost of the treatment to be $4,995. However, at trial, Dr. Hamilton agreed that when she assessed Melanie in 2018, concussion was no longer a concern. When Ms. Tennen was asked on cross-examination whether given that evidence from Dr. Hamilton, she would agree that neurofeedback training is no longer necessary, she said that the answer would be “yes” based upon Dr. Hamilton’s evidence, but “no” based on Dr. Basile’s evidence. However, while Dr. Basile recommended an integrated concussion management program with multidisciplinary treatments, he did not recommend any specific treatments. Given Dr. Hamilton’s opinion and the absence of any specific recommendations from Dr. Basile, this expense will be disallowed.

Social work intervention

[144] When Ms. Tennen prepared her report, Melanie was sleeping on a friend’s couch and had no place of her own to live. Ms. Tennen recommended that Melanie obtain the assistance of a social worker in finding an appropriate living space. Melanie now lives in housing for disabled veterans. While this housing may not be a permanent solution, I am not satisfied that the expense for social work intervention is reasonably necessary on the medical evidence.

Family counselling

[145] Ms. Tennen recommended 64 one-hour sessions of family counselling at $220 per hour. Mr. Duranni calculated the cost of the counselling to be $26,090. While this was not recommended by any other expert, there was evidence that Melanie’s relationship with her children significantly deteriorated following the accident. Ms. Tennen’s explanation of the hourly rate of $220 was that the counselling would be done by a psychologist. However, I am not satisfied that it is necessary that the counselling be done by a psychologist, that Melanie would engage a psychologist for that purpose or that 64 hours of counselling is reasonably necessary. The costs of family counselling will be allowed but the amount will be reduced to $3,500.

Rehabilitation support worker

[146] Ms. Tennen recommended that Melanie have a rehabilitation support worker for life. Mr. Durrani calculated the cost of the worker to be $383,585. Ms. Tennen based the recommendation on Melanie telling her that when she had been living in Oshawa after the accident, the Oshawa Brain Injury Association provided her with a support worker who took her out one or two times a week to various appointments, and that when she moved to Barrie, she was unable to obtain a similar service. However, I am not satisfied, based on this evidence, that a rehabilitation support worker is reasonably necessary.

Case management services

[147] Ms. Tennen recommended that Melanie have a case manager so that an effective rehabilitation team can be put in place. She said that the case manager can also liaise with treatment providers to ensure that there are no rehabilitation gaps going forward. For this purpose, she recommended 7 hours per month for the first year, four hours month for the second year and 20 hours per year thereafter. The present value of these services is $88,320.With the breadth of services which Melanie will have access to, I accept case management to be reasonably necessary for the first two years. However, I am not satisfied that a dedicated case manager will be necessary after that. Case managers are typically social workers or occupational therapists. I see no reason why Melanie's occupational therapists cannot fulfil this role after the first two years. I therefore allow $16,472 for case management during the first two years.

Pain management program

[148] Ms. Tennen recommended that Melanie take the DeGroote Pain Program. Melanie had been referred to Degroote by Ashley Oliver. Following an assessment, DeGroote found that she could benefit from their interdisciplinary program. However, without evidence as to the make-up of the interdisciplinary team or the services to be provided, I cannot determine whether there is overlap between this program and the services to be provided by the other therapists for whom I have approved funding. This expense will therefore be disallowed. It may be that Melanie will be able to pay for this program from the funding provided for other therapists.

[149] Ms. Tennen recommended that Melanie be evaluated by a pain specialist to determine whether certain treatments would be beneficial to her, including, Botox injections, cortisone injections and plasma injections. Mr. Durrani calculated the costs of those treatments to be a total of $41,710. However, in the absence of such an evaluation, this amount will be disallowed.

Fitness membership and personal trainer

[150] Based upon the evidence of Dr. Basile and Dr. Vachhrajani, I am satisfied that personal training and exercise will be of benefit to Melanie. Ms. Tennen recommended membership at a fitness facility until age 70 and the services of a personal trainer for the first three years. The present value of the recommended services is $22,623. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Nutritional counselling

[151] Since the accident, Melanie has been diagnosed with diabetes for which Ms. Tennen recommended nutritional counselling. Mr. Durrani calculated the costs of the counselling to be $6,885. However, in the absence of evidence of any connection between the accident and the diabetes, this amount will be disallowed.

Medication allowance

[152] Ms. Tennen recommended a medication allowance to cover medications that have been prescribed for Melanie. The present value of the recommended medications is $37,395. While it may be true that she required these medications before the accident, she is entitled to funding for them, because she requires them to treat her current symptoms, of which the injuries suffered in the accident are a cause, and if she is unable to pay for them, she would be left without medication for those symptoms.

Medical marijuana

[153] Noting that Melanie told her that she smokes cannabis for pain management, Ms. Tennen recommended a medical marijuana allowance, the cost of which Mr. Duranni calculated to be $184,416. However, Ms. Tennen was not aware that Melanie had been diagnosed by Dr. Joseph with cannabis use disorder. He recommended that Melanie learn to manage pain without using alcohol or cannabis. In these circumstances, this amount will be disallowed.

Supplements allowance

[154] The use of high-dose fish oil was recommended by Dr. Basile. Dr. Anton recommended melatonin, magnesium and zinc. Ms. Tennen recommended a supplements allowance, the present value of which is $22,130. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Assistive devices allowance

[155] Ms Tennen recommended an assistive devices allowance, the present value of which is $20,340. I am satisfied that this recommendation is fair, moderate, reasonably necessary and within her area of expertise. This amount will therefore be allowed.

Vision therapy and prescription eyeglasses

[156] Ms. Tennen recommended an allowance for vision therapy and the replacement of prescription glasses every two years. The need for vision therapy is supported by optometrist Dr. Schell and neuro-ophthalmologist Dr. Corriveau. However, while Dr. Corriveau said that it is possible that as her visual skills improve, Melanie’s prescription may change, this does not support the need for replacement of her glasses every two years. The present value of the vision therapy alone is $1,858. I accept this treatment to be fair, moderate and reasonably necessary, based upon the medical evidence. The expense will therefore be allowed.

Attendant care assistance

[157] Ms. Tennen recommended attendant care assistance: 3 hours per day for the first 2 years; 1.5 hours per day for the next 3 years; and then 6 hours per week for the balance of her life expectancy. Mr. Durrani calculates the cost of this care to be $56,855 for the first 2 years, $42,420 for the next 3 years and $208,957 thereafter. However, this level of care is not supported by Melanie's other experts or by her evidence of living in her current bachelor apartment without such support. I accept the recommendation of 6 hours per week but not the higher number of hours recommended for the first 5 years. The claim for attendant care assistance will be allowed at a total of $250,000.

Housekeeping

[158] Ms. Tennen recommended housekeeping assistance based upon Dr. Basile saying that Melanie will require assistance with heavy housekeeping. She recommended 6 hours per week of housekeeping assistance until age 75, the present value of which is $158,387. However, I am not satisfied that she will require 6 hours per week of heavy housekeeping. The amount allowed for housekeeping with be $105,591 (based on 2 hours twice a week).

[159] Counsel agreed at trial that the question of deduction from the future care award for amounts received from the settlement of Melanie's accident benefits claim would be dealt with following my release of this decision. Subject to that deduction, the award for future care expenses will be $805,462, made up as follows:

Occupational therapy	$96,611
Physiotherapy	93,953
Massage therapy	47,801
Chiropractic treatment	31,310
Psychological assessment and counselling	55,878
Family counselling	3,500
Case management services	16,472
Fitness membership and person trainer	22,623
Medication allowance	37,395
Supplements allowance	22,130
Assistive devices	20,340
Vision therapy and prescription eyeglasses	1,858
Attendant care	250,000
Housekeeping	105,591
Total future care costs	$805,462

General damages

[160] Non-pecuniary damages ("General Damages") compensate for past and future non-pecuniary loss such as physical and mental pain and suffering, loss of the amenities and enjoyment of life, and loss of expectation of life: *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229.

[161] There are three principles that anchor the assessment of general damages. The first is that these awards are by their very nature arbitrary and turn on the experience of each individual, both in terms of physical and psychological suffering. The second is that the award must be fair, reasonable, and consistent with other decisions involving similar injuries. The third is that general damages award compensation to provide an injured person with reasonable solace for her misfortune: *Higashi v Chiarot*, 2021 ONSC 8201, at para. 132.

[162] Counsel for the plaintiff submits that general damages should be assessed at $275,000. In support of this submission, she cites: *Kwok v Abecassis*, 2017 ONSC 164, *James v Harper* 2010 ONSC 4785, *Gray v Macklin*, 2000 CarswellOnt 4708, and *Higashi v Chiarot*, 2021 ONSC 8201, 2021,

[163] Counsel for the defendant submits that if the plaintiff is found to meet the threshold, general damages should be assessed at $30,000 to $40,000. In support of this submission, he cites: *Clark v. Zigrossi*, 2010 ONSC 5403, at paras. 19, 21-22, *Mundinger v. Ashton*, 2019 ONSC 7161, at para. 240, *Al-Radwan v. Wanless*, 2018, ONSC 5464, at para. 254, *Nyamadi v. Mississauga*, 2005 CanLII 36467 (ON SC), *Sherman v. Guckelsberger*, 2008 CanLII 68165 (ON SC), at para. 225, and *Shipley v. Virk*, 2017 ONSC 4941, at paras. 36-37.

[164] Having regard to her pain and suffering, loss of enjoyment of life and the authorities provided by counsel, I assess Melanie's non-pecuniary damages at $200,000. In doing so, I have taken into consideration the fact that the plaintiff's enjoyment of life was already compromised by her pre-existing medical condition. The defendant should not be held liable for the difference between a healthy person and Melanie's condition immediately before the accident. A proper application of the compensation principle holds a defendant liable only for the difference between the plaintiff's pain and suffering and enjoyment of life at the time of trial and the pain and suffering and enjoyment of life that she would have had but for the accident.

Disposition

[165] For the reasons given, Melanie will have judgment against the defendant in the following amounts:

General damages	$200,000
Past income loss	$93,541
Future income loss	$473,670
Future care costs (subject to deduction for accident benefits received)	$805,462

[166] If the parties are unable to agree on costs, I will consider brief written argument provided that it is delivered to monica.mayer@ontario.ca, no later than March 6, 2023.

Released: February 9, 2023

CITATION: Meade v. Hussein, 2023 ONSC 1000
COURT FILE NO. CV-14-1391
DATE: 20230209

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Richard Michaelis and Melanie Meade,
by her litigation guardian, Lisabet Benoit

Plaintiffs

– and –

Ibrahim Hussein, Gore Mutual Insurance Company
and Echelon General Insurance Company

Defendants

REASONS FOR JUDGMENT

S.T. BALE J.

Released: February 9, 2023