IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sunner v. Lee,*
2023 BCSC 988

Date: 20230612
Docket: M196891
Registry: New Westminster

Between:

Parminder Kaur Sunner

Plaintiff

And

Myung Ju Lee

Defendant

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for the Plaintiff:	T.F. Dennis
Counsel for the Defendant:	C.N. Wong N. Knezevic
Place and Dates of Trial:	New Westminster, B.C. December 5-9; 12-16, 2022
Place and Date of Judgment:	New Westminster, B.C. June 12, 2023

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I. INTRODUCTION

[1] The plaintiff, Parminder Kaur Sunner, was a pedestrian walking through the parking lot at the Costco located at 9151 Bridgeport Road in Richmond, British Columbia, when she was struck by the vehicle of the defendant Myung Ju Lee on August 10, 2017 (the "Accident").

[2] Liability for the Accident has been admitted on behalf of Mr. Lee.

II. ISSUES

[3] The issues at trial were as follows:

1. Whether Ms. Sunner's alleged injuries were caused by the Accident.

2. Whether Ms. Sunner is entitled to damages under the following categories:

    a) non-pecuniary damages;

    b) damages for loss of past earning capacity;

    c) damages for loss of future earning capacity;

    d) damages for the cost of future care;

    e) damages for loss of housekeeping capacity; and

    f) special damages.

3. Whether Ms. Sunner failed to mitigate her losses.

III. BACKGROUND

[4] Ms. Sunner was born in the United States in 1973, and has been living in Canada since 1996. She has four daughters ranging in ages between 17 and 24 years old. Ms. Sunner, who is divorced, lives in Surrey with her common law spouse, Bob Gill. She has been living with Mr. Gill since 2012.

[5] Prior to the Accident in 2017, Ms. Sunner had been working full-time hours as a medical imaging booking clerk at Royal Columbian Hospital, with a salary of $21.26 per hour. When the Accident occurred, she had been in that position for approximately two and a half months and was in her probationary period.

[6] In the years immediately preceding her employment at Royal Columbian Hospital, Ms. Sunner had worked as a makeup consultant for Clinique at Sears and as a medical office assistant at the Viva Care Medical Clinic (“Viva Care”) in Queensborough, New Westminster. In the role of medical office assistant, she was responsible for billing, scheduling, inputting payroll, ordering stock, checking patients, filing doctors’ reports and other related tasks.

[7] Ms. Sunner ceased working at Viva Care in August 2016, in or around the time when that clinic closed. Ms. Sunner testified that she had developed the entrepreneurial idea at that time that she could open a medical clinic of her own, and was taking active steps prior to and at the time of the Accident to transform that business vision into a reality.

[8] Ms. Sunner also testified that, prior to the Accident, she was doing some freelance esthetician work for family and friends. She stated that she would do facials for $65–$70 a session and a full body treatment for $375–$425 a session.

[9] Ms. Sunner testified that, prior to the Accident, she was experiencing no pain, headaches, sleep issues or mental health issues. She stated that she was a casual social drinker but had no issues with substance abuse. She testified that she worked hard at her jobs, had a happy home life, a busy social life, and a normal sex life.

[10] On the day of the Accident, Ms. Sunner testified that she recalled landing on the hood of the defendant’s car during the Accident and hitting her head near her ear. She testified that following the Accident, there was a bruise under her jaw line.

[11] Later that day she recalled experiencing a headache and pain in her side. She testified that the pain was sufficient that she had to rest and made a doctor’s appointment for the next day. She testified that the next day, and for the following

month, her whole body hurt and she suffered excruciating headaches. She testified that the symptoms persisted and indeed worsened after the Accident. Ms. Sunner testified that, during the time she was giving her testimony, she was experiencing pain throughout her body, with the back being the worst and also the hips, neck and head.

[12] Ms. Sunner testified that she has been unable to work since the Accident. She testified that she has undergone a variety of treatments including chiropractic therapy, massage therapy, physiotherapy, needling, and shock wave treatments and has received a large amount of injections in her back (cortisone, water, plasma, epidural). Ms. Sunner testified that she underwent back surgery to target non-stop pain in her leg which she testified was intolerable. She testified that the surgery helped with some of the pain but did not eliminate it.

[13] Ms. Sunner also testified that, since the Accident, she has suffered from anxiety and depression, has been self-medicating with up to 20 drinks per week in addition to her prescribed medication, and has made two suicide attempts. She testified that her previously busy work life, social life and sex life have ceased completely, and that her interpersonal relationships with her friends and family have been impaired.

IV. ANALYSIS

1. Preliminary issue: credibility and reliability of the plaintiff

[14] The defence argues as a preliminary matter that there are significant issues with the reliability and credibility of Ms. Sunner's evidence.

[15] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dillon summarized in a well-known passage the recommended analysis for a trier of fact when assessing credibility:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and

> opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Farnya*] *v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
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> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[16] In *Sandhu v. Braich* (1991), 61 B.C.L.R. (2d) 273 at para. 49, 8 B.C.A.C. 164 (C.A.), adopted more recently in *Samuel v. Chrysler Credit Canada Ltd.,* 2007 BCCA 431, the Court cautioned that triers of fact must assess the credibility of a plaintiff when considering the weight to be given to conclusions of medical experts who rely principally on the subjective complaints of a plaintiff:

> …It is trite law — although I note that what is trite law is frequently brushed aside — that in order for an expert to give an opinion the facts upon which he gives that opinion must be proven by the person who has personal knowledge of them: see *Enge v. Trerise* (1960), 33 W.W.R. 577, 2 D.L.R. (2d) 529 (B.C.C.A.), and *Lenoard v. British Columbia Hydro & Power Authority* (1964), 50 W.W.R. 546, 49 D.L.R. (2d) 422 (Wilson, C.J.S.C.), in which that most distinguished judge said (at p. 548 [W.W.R.]):
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> > I now enter into an area in which I must consider subjective as well as objective evidence because both were placed before me without objection by counsel. All physicians must I think, rely to some extent on what their patients tell them. If, for instance, a patient had a pain in his neck and went to a doctor, mum, challenging him to find what, if anything, was the matter with him, then I think that doctor would be in almost as difficult a position as a lawyer would be if all his client told him was that he wanted to sue Tom Jones, and condescended to no

> further detail. When the doctor relates in court what his patient told him, he may be stating hearsay, but common sense in the courts has long ago rejected the idea that this evidence may not be heard and has accepted the idea that it should be listened to, not because it proves by itself the truth of the thing stated by the patient to the doctor, but because it defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence. It is closely allied to the hypothetical question often put to other expert witnesses where the witness is asked: "Well, granting the existence of such and such facts, what is your opinion?" The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to ejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established, having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[17] In this case, the defence argues that Ms. Sunner was not a credible witness for the following reasons:

a) Ms. Sunner was inconsistent with respect to whether she hit her head in the Accident. While she denied that she hit her head in the Accident at her examination for discovery in 2019, she claimed during her direct examination at trial that she remembered hitting her head and bruising her face near her jaw line. The defence notes that she has likewise been inconsistent in reporting to her doctors whether she hit her head.

b) The plaintiff testified in direct examination that she had worked at Viva Care for several years before she left voluntarily in August 2016. However, in cross-examination, when presented with the Service Canada Employment Insurance records, she acknowledged that she worked at Viva Care for only approximately 10 months from October 2015 to August 2016 and was terminated for cause.

c) Ms. Sunner testified in direct examination that she was a manager at Viva Care. However, Dr. Edward Ko, the chiropractor who worked with Ms. Sunner at Viva Care, testified that she was not a medical office manager as she had claimed but instead a medical office assistant.

d) Ms. Sunner testified in direct examination that when she learned that Viva Care was closing its Queensborough location, she was offered a position by Viva Care at another one of its locations but "had other ideas" to open her own medical clinic. Later in her direct examination, she acknowledged that she was actually dismissed by Viva Care. The defence notes that at her examination for discovery, Ms. Sunner also did not disclose that she was terminated. She answered defence counsel's questions as follows, at page 96 of the discovery transcript, which was at best a significant omission with respect to her dismissal:

522 Q:	Okay. And why did you leave Viva Care?
A:	Well, Viva Care closed down.
523 Q:	Okay.
A:	That location closed down, so I was moved to [a] different location, but I didn't like the drive.

e) When confronted by the Service Canada agent investigating her termination by Viva Care in September 2016, the plaintiff denied, in a manner inconsistent with her testimony at trial, that she was attempting to open a new medical clinic, denied that she had secured a lease for the Queensborough office space formerly held by Viva Care, and claimed that she was simply

helping the pharmacist, Rob Dhesi, who had taken over the lease. I will address this more fully below.

f) The plaintiff acknowledged that she did not report any income to CRA from her freelance esthetician work.

g) The plaintiff testified in direct examination that, following her suicide attempt in July 2021, she was hospitalized at Royal Columbian Hospital for "four to five days". It was also her evidence that she felt trapped, as if she was in jail, while she remained hospitalized. She says that she therefore lied to the Royal Columbian medical staff "and told them what they wanted to hear" so that she could leave the hospital as soon as possible.

h) The records of Royal Columbian Hospital show that the plaintiff was admitted on July 20, 2021 and discharged as a patient on July 21, 2021, after less than 48 hours, not four to five days. The plaintiff's common-law spouse, Bob Gill, corroborated that the plaintiff was never hospitalized at Royal Columbian Hospital for more than two days. He picked her up from the hospital after each of the suicide attempts in 2021 and 2022. His evidence is the most reliable in that regard.

[18] The issues raised by the defence are a cause for concern as they illustrate that Ms. Sunner has an ability to exaggerate and stretch the truth when it suits her interests. This tendency was identified by Dr. Johann Brink in his report, where he observed that Ms. Sunner self-rated her anxiety levels at 21/21, which Dr. Brink observed is the maximum rating and opined is "unusual and did not accord with her presentation during the interview." Moreover, with respect to the alleged suicide attempts, Dr. Brink identified:

> …her reported suicide attempts on the Queensborough Bridge and then a short time later, also at the Royal Columbian Hospital, suggest vulnerability for impulsive, self-destructive behaviour, especially when disinhibited by alcohol. Her at times, exuberant and expansive presentation during the interview with me, suggests a theatrical aspect to her personality, a trait that often indicates underlying insecurity.

[19] Taking the above concerns into account, I have approached Ms. Sunner's evidence with appropriate caution throughout my reasons, particularly in the damages analysis and where her testimony has been uncorroborated by other witnesses or documents.

[20] That said, the above concerns do not in my view rise to a level where Ms. Sunner's testimony should be wholly rejected as lacking credibility. I say this for three reasons. First, with the exception of the circumstances concerning her departure from Viva Care and the failure to report her esthetician income, the remainder of the issues identified by the defence could arguably be equally characterized as going to reliability not credibility. Given the range of her physical and psychological injuries, it is perhaps not surprising that Ms. Sunner would have some issues with respect to memory and recollection, particularly as it pertains to events on the date of the Accident and her hospitalization for a suicide attempt.

[21] Second, Ms. Sunner's account of her injuries and their impact on her life was in my view generally consistent and coherent and, perhaps most importantly, corroborated in many respects by the evidence of the other lay witnesses, including Mr. Gill, a family friend and Ms. Sunner's daughter.

[22] Third, there was an abundance of expert evidence adduced at trial pertaining in particular to the serious nature of Ms. Sunner's injuries and symptoms. While I have exercised appropriate caution to take into account the possibility that some of the narrative conveyed by Ms. Sunner to these medical professionals may be subject to certain exaggeration, I also cannot ignore the fact that the conclusions in these reports are remarkably consistent in terms of Ms. Sunner's injuries and symptoms, with the exception of Dr. Stephen Maloon's, whose evidence I will address separately.

2. Causation

[23] Ms. Sunner alleges that the Accident caused her a wide range of injuries, namely soft tissue injuries to her neck and back, myofascial tissue injuries to her spine, radiating limb pain, chronic pain, cervicogenic headaches, major depressive

disorder with anxious distress and passive suicidality, insomnia, and post-traumatic stress disorder (the "Alleged Injuries"). She testified that she had never experienced any of these conditions prior to the Accident.

[24] The onus is on Ms. Sunner to prove on a balance of probabilities that (1) she did in fact suffer the Alleged Injuries; and (2) that the Accident caused the Alleged Injuries. To establish causation, Ms. Sunner must demonstrate that "but for" the Accident she would not have suffered the Alleged Injuries: *Clements v. Clements*, 2012 SCC 32 at para. 8. Inherent in the "but for" test is a requirement that the Accident was necessary to bring about the Alleged Injuries, although not necessarily the sole cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 17, 1996 CanLII 183; *Clements* at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[25] Ms. Sunner need only establish a "substantial connection between the injury and the defendant's conduct", beyond the *de minimus* range, in order to establish causation: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327, 1990 CanLII 70; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11. The "but for" test must be applied in a "robust common sense fashion" with no requirement for scientific evidence of the precise contribution the defendant's negligence made to the injury: *Welder v. Lee,* 2019 BCSC 1328 at para. 76; *Clements* at para. 9.

[26] On the question of causation, I note at the outset that the defence does not dispute that most of the Alleged Injuries were in fact caused by the Accident (with the exception of her lower back condition which the defence argues was a pre-existing condition and which I will address below). In the defence's closing argument, for example, the defence states:

> The defence does not dispute that Ms. Sunner sustained physical injuries as a result of the Accident, including injuries primarily to her low back, on the left side, with physical symptoms emanating from that area generally, and also that she developed headaches and emotional sequalae as a result of her injuries.

[27] There was also ample expert evidence adduced at trial to support the conclusion that the Accident did in fact cause the Alleged Injuries. Given the defence's concession that most of the Alleged Injuries were in fact caused by the

Accident, I do not find it necessary to summarize the content of all the expert reports. Instead, I will touch on some of the key conclusions found in certain reports to the extent that they are relevant to the issue of causation and also to the damages analysis.

Dr. Heran

[28] Dr. Navraj Heran, a neurosurgeon at Royal Columbian Hospital and Eagle Ridge Hospital, opined that the following areas of diagnosis are attributable to the Accident:

1) Myofascial injuries involving neck and upper torso eccentric towards the left side.

2) Myofascial injuries involving the low back eccentric toward the left side.

3) Probable left-sided SI joint mediated pain.

4) Probable discogenic low back pain at L4-5.

5) Probable left-sided L5 radiculopathy from dynamic nerve root impingement.

6) Cervicogenic headaches.

[29] With respect to prognosis, Dr. Heran emphasized in particular the lack of improvement for Ms. Sunner over the past two to three years since the Accident, which he noted would be expected in the majority of patients:

> From a treatment standpoint, anything utilized to date has been focused upon myofascial pain management. It is unlikely that she would have remediation of these sources of symptoms any longer at this point, particularly now that she is over two years from the subject accident. The majority of patients are plateaued if not resolved by two to three years following an insult. She is not declaring any improvement in the past year or so and therefore further improvement here is not likely.

[30] Dr. Heran also observed that there are future risks of deterioration associated with her condition:

> … more defined comments with respect to her risk for accelerated arthritis and deterioration can be made. At this point in time, I do think she is at increased risk for further deterioration in her SI joint as well as the disc and facet joints in her low back which are contributing to some of her symptoms. She is also at increased risk for exacerbation or aggravations at these sites following any superimposed traumatic events, but sometimes even day-to-day activities, particularly those that are repetitive in nature or involving sustained positions or heavy. These too can result in exacerbations of her myofascial source of symptoms and potentially an aggravation too with more vigorous insults.

Dr. Le Nobel

[31] Dr. John Le Nobel, a specialist in physical medicine and rehabilitation and medical director of the Lions Gate Hospital Rehabilitation Ward since 1985, diagnosed Ms. Sunner with the following injuries which he attributed to the Accident:

- spinal, paraspinal and radiating limb pain which is chronic pain; and
- chronic post-traumatic headache and cervical, thoracic and lumbar spinal and paraspinal pain due to myofascial tissue injuries.

[32] Dr. Le Nobel opined that Ms. Sunner is disabled and that her disability extends to work, household and recreation tasks.

[33] Dr. Le Nobel opined that Ms. Sunner's prognosis is guarded for the foreseeable future and further opined that there were no treatments or operations which could restore her to her pre-Accident state. He stated:

> Ms. Sunner's prognosis is guarded. Absent some as yet unachieved improvement I anticipate her remaining symptomatic and remaining limited for the foreseeable future, most likely for the next several years and possibly longer. It is understood that functional improvement may occur before, or in the absence of, symptom reduction. With increased activity Parminder Sunner's symptoms may worsen to the point that in spite of pain modulators she is unable to tolerate active rehabilitation. Most likely there will be some benefit. There are no other treatments which will, with certainty, return Parminder Sunner to her pre-collision state. I do not anticipate that an operation will resolve her symptoms or restore her function.

Dr. Robinson

[34] Dr. Gordon Robinson, a neurologist at Vancouver General Hospital and clinical professor of neurology at the University of British Columbia, opined that

Ms. Sunner's experience of severe headaches within a couple of months of the Accident "is consistent with a diagnosis of post-traumatic headache probably related to soft tissue injury to the neck sustained in the accident", with "prominent aggravating factors" being sleep disruption and psychological distress, including post-traumatic stress disorder ("PTSD"). Dr. Robinson opined that "I do not believe that she would have developed frequent or severe headaches had the injury not occurred".

[35] With respect to prognosis, Dr. Robinson opined that Ms. Sunner will likely continue to experience post-traumatic headaches, albeit suggesting some treatments that could result in improvement:

> It is now two years since the October 10, 2017 injury. She continues to have frequent headaches that are usually mild to moderate in intensity. I believe that she probably will continue to have posttraumatic headache indefinitely unless there is improvement with the treatments suggested in this report. I do not believe that her posttraumatic headaches will worsen.

Dr. Paramonoff

[36] Dr. Catherine Paramonoff, a specialist in physical medicine and rehabilitation at the GF Strong Rehabilitation Centre and a clinical instructor at the University of British Columbia, opined:

> It is my opinion that Ms. Sunner is presenting with a chronic pain presentation, likely with significant contribution from cofounding factors. Such factors include mood symptoms, psychological/behavioural issues (including maladaptive coping mechanisms, kinesiophobia) and decreased sleep. Such factors can negatively affect a person's experience of pain, thereby contributing to an ongoing [chronic] pain presentation. It is my opinion that the clinical presentation is most consistent with likely having sustained myofascial injuries at the back and lumbopelvic regions from the MVA. The superimposed soft tissue injuries likely also aggravated the pre-existing baseline of and susceptibility to lower back symptoms…

[37] I will address the issue of the lower back symptoms further below.

Dr. Brink

[38] Dr. Johann Brink, former head of forensic psychiatry and a professor at the University of British Columbia, opined that Ms. Sunner has a major depressive

disorder with anxious stress and passive suicidality, although he also opined that Ms. Sunner would improve with an increase in her dose of antidepressant medication and cognitive behavioural therapy ("CBT"). Dr. Brink concluded (in contrast to Dr. Robinson) that Ms. Sunner did not meet the criteria for a diagnosis of PTSD.

Dr. Maloon

[39] Dr. Stephen Maloon, an orthopedic surgeon now in private practice as a consultant and teacher, opined that Ms. Sunner may have incurred soft-tissue injuries but stated that his expectation was that these would have been resolved within six to eight weeks.

[40] Under cross-examination, Dr. Maloon further clarified his apparently long-held opinion that a diagnosis of "chronic pain" or "chronic myofascial pain" is not a valid diagnosis. I do not accept this particular aspect of his opinion as persuasive for three reasons. First, I note that Dr. Maloon's opinion in this regard was at odds with the opinion of the other experts, Dr. Paramonoff, Dr. Heran and Dr. Le Noble, who opined that Ms. Sunner does indeed suffer from chronic pain arising from myofascial injuries. Dr. Maloon's conclusions were simply not reconcilable with the bulk of the other expert evidence adduced at trial. Second, the Supreme Court of Canada has for many years recognized chronic pain as a valid diagnosis that may create a real disability. In *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54 at para. 1, the Court stated:

> [1] Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may

> be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. …

[41] Third, I note the growing line of authority in this Court wherein judges have found Dr. Maloon's testimony (generally on behalf of ICBC and generally very similar in content to the testimony given in this trial) to be unhelpful or unpersuasive: see e.g., *Chevez-Babcock v. Peerens*, 2020 BCSC 863 at para. 66. In *Hanger v. Shin,* 2019 BCSC 99 at para. 72, Mr. Justice Branch (in rejecting the opinion of Dr. Maloon) noted that Dr. Maloon's opinion that soft tissue strains are expected to heal within six to eight weeks "would seem to fly in the face of the conclusions reached in hundreds of reported decisions in this province." I have reached the same conclusion.

[42] Taking into account the testimony and the expert opinion evidence, I conclude that the Accident did in fact cause the Alleged Injuries, with one exception: Ms. Sunner's low back condition. Before proceeding to the damages analysis, I must first address the defence's argument that Ms. Sunner had a pre-existing back condition which was not caused by the Accident.

Pre-existing back injury

[43] The defence argues that Ms. Sunner had pre-existing low degenerative back symptoms, relying in particular upon the expert reports of Dr. Paramonoff and Dr. Maloon.

[44] In her medical legal report, Dr. Paramonoff diagnosed Ms. Sunner with longstanding degenerative changes at the lumbosacral spine which pre-dated the Accident:

> Post-MVA imaging initially (2017) reported degenerative changes at the lumbosacral spine [lower back]. It is my opinion that these findings are likely long-standing, i.e. pre-existed the subject MVA, as it takes time for degenerative changes to develop. However, superimposed soft tissue injuries/ muscle imbalance/ deconditioning have likely resulted in some unmasking of these pre-existing changes, further contributing to the ongoing clinical presentation (mechanical sources). Other underlying pathology at the lower back (epidural lipomatosis) may also be contributory.

> Taken together with the past history of lower back pain (when bending over to pick something up), it is my opinion that the need for surgery (flare of back pain with nerve compression symptoms after bending over to pick something up) is likely largely unrelated to the subject MVA, instead reflecting the trajectory of underlying degenerative changes at the lower back.
>
> My examination findings were most suggestive of, and it is my opinion that the residual clinical presentation is most consistent with- mechanical and myofascial sources at the lumbopelvic regions, myofascial sources at the neck and upper/ mid back regions, and including with contribution from muscle imbalance/ deconditioning. Confounding factors likely remain significantly contributory.

[45] In reaching her conclusion, Dr. Paramonoff observed that Ms. Sunner had incurred a pre-Accident June 2016 bending injury and opined that, as a result of this earlier injury, Ms. Sunner was likely predisposed or more susceptible to lower back pain. As such, Dr. Paramonoff concluded that Ms. Sunner's clinical presentation is most consistent with likely having sustained myofascial injuries at the back and lumbopelvic regions from the Accident which likely also aggravated the pre-existing baseline of and susceptibility to lower back symptoms.

[46] In his report, Dr. Maloon similarly opined that the MRI of the plaintiff's low back "revealed longstanding degenerative change" and "[i]n the absence of structural injury, I do not believe that any mild soft tissue injury strain that she may have sustained in the pedestrian motor vehicle accident of August 10, 2017 would have been significant enough to alter the natural history of her low back or neck". Although I have approached Dr. Maloon's report with caution with respect to his conclusions on chronic pain, I note that the above conclusion was unrelated to the chronic pain issue and therefore is entitled to some weight, to the extent that it is consistent with Dr. Paramonoff's conclusion. I also note that there was no expert evidence adduced at trial which contradicted the conclusions of Dr. Paramonoff and Dr. Maloon on this issue.

[47] On the basis of the above medical evidence, the defence argues that Ms. Sunner was in effect a "crumbling skull" plaintiff at least with respect to her back condition, asserting that the Accident did not affect the trajectory of her underlying degenerative condition. The plaintiff argues that Ms. Sunner was in fact a "thin skull"

plaintiff, taking the position the Accident triggered a back condition which might otherwise have remained dormant absent the Accident.

[48] In *Athey* at paras. 34–35, Mr. Justice Major described the difference between the “thin skull” and “crumbling skull” doctrines in the following terms:

> The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> 35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[49] In my view, the expert evidence supports the defence’s argument that Ms. Sunner was a crumbling skull plaintiff with respect only to the lower back issue (but not the other Alleged Injuries). While Dr. Paramonoff did posit that the Accident may have had an “unmasking” effect with respect to the prior back injury, she then went on to clearly conclude that “the need for surgery…is likely largely unrelated to the subject MVA, instead reflecting the trajectory of underlying degenerative changes at the lower back.” Aside from Dr. Paramonoff’s and Dr. Maloon’s, the other expert reports were simply silent on pre-existing conditions. In my view, to the extent Dr. Paramonoff’s statement was uncontradicted by other expert evidence, her opinion, as supported by the opinion of Dr. Maloon, supports the conclusion that

there was indeed a measurable risk, or a real and substantial possibility, that Ms. Sunner's pre-existing lower back condition would have detrimentally affected her in the future, regardless of the defendant's negligence. This should be taken into account in reducing the overall award: *Mofazeli v. Johnson*, 2021 BCSC 1061 at paras. 58–60.

[50] I assess the risk at 25%. That said, I also note that the back condition is only one of a constellation of other physical and psychological symptoms experienced by Ms. Sunner after the Accident, and therefore any reduction should be comparatively minor. Thus, although I assess the risk of the prior back condition manifesting at 25%, I find that the reduction in damages should be only 10% to account for the fact that the back condition is only one relatively small component of a variety of causes (including in particular the headaches and psychological impacts, which have nothing to do with the low back) contributing to Ms. Sunner's post-Accident condition.

3. Damages

a) Non-pecuniary damages

[51] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities: *Welder* at para. 82. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal set out an inexhaustive list of factors to consider when assessing non-pecuniary damages:

> . . .
> (a) age of the plaintiff;
> (b) nature of the injury;
> (c) severity and duration of pain;
> (d) disability;
> (e) emotional suffering; and
> (f) loss or impairment of life;
> . . .
> (g) impairment of family, marital and social relationships;

> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff. . .
>
> [Citation omitted.]

[52] Each plaintiff must be assessed individually, though reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053 at para. 56.

[53] The amount of the non-pecuniary award should compensate for more than direct injuries. As explained by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260:

> [95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 129 D.L.R. (3d) 263; *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, 263 D.L.R. (4th) 19, leave to appeal ref'd [2006] S.C.C.A. No. 100; *Lee v. Dawson*, 2006 BCCA 159 at paras. 76-79, 267 D.L.R. (4th) 138, leave to appeal ref'd [2006] S.C.C.A. No. 192. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".
> >
> > [Internal citations omitted]

[54] There is little question that the injuries that Ms. Sunner incurred as a result of the Accident have had a profound and longstanding effect on her quality of life. Ms. Sunner in her testimony, as corroborated by Mr. Gill and the plaintiff's daughter, described her life prior to the Accident as being very active and social. Apart from being an active mother, Ms. Sunner was working full-time (describing herself as a

"workaholic") and had entrepreneurial plans relating to a start-up medical clinic and growing the part-time esthetician work she was performing for family and friends.

[55] Ms. Sunner testified that she played golf every week and softball. She would walk or sometimes run every day. She was described as "the life of the party" and loved to host dinner parties for big groups of friends (30–40 people) where she would cook many appetizers and the dinner. This would require two to three days of preparation and then she would do the cleanup after the party. She and her friends loved to dance and would attend clubs and bars regularly.

[56] Ms. Sunner described herself as having a healthy sex life, being pain free, and there was no evidence that she had mental health issues. She drank socially and smoked cigarettes from time to time, but had no substance issues, and was taking no medication prior to the Accident.

[57] After the Accident, Ms. Sunner's life changed completely. Ms. Sunner testified that, since the Accident, due to pain and associated depression, she has not worked. She has also ceased engaging in recreation of any kind. She no longer dances, golfs or plays softball. She has become socially withdrawn and rarely leaves her home at all. She does not host parties anymore. Prior to the Accident, her weight was in the range of 160–165 lbs but, afterwards, her weight exceeded 200 lbs for a period and she is currently around 190 lbs. She has not had sexual relations with Mr. Gill since prior to the Accident.

[58] Ms. Sunner testified that the impact on her mental health has been substantial, and that she experiences suicidal ideation. She drinks alcohol three to four nights per week and on those nights, usually consumes three to four drinks per night (in her testimony she estimated approximately 20 drinks per week, which suggests five drinks per night), often combined with painkillers. She testified that, in 2020, after consuming painkillers and alcohol at home, she tried to jump off a nearby bridge and was saved by two passersby who ran and grabbed her. She testified that in 2021 she made a second suicide attempt.

[59] Ms. Sunner submits that $340,000 is an appropriate award for non-pecuniary damages, and relies upon the following authorities in support of her claim:

- *Grabovac v. Fazio*, 2021 BCSC 2362;
- *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155, aff'd on appeal 2018 BCCA 410; and
- *Plett v. Davis*, 2022 BCSC 789.

[60] The defence submits that an appropriate range for non-pecuniary damages is $170,000 to $200,000, and relies on the following cases:

- *Marois v. Pelech*, 2007 BCSC 1969, aff'd on appeal 2009 BCCA 286;
- *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81;
- *O'Mara v. Insurance Corporation of British Columbia*, 2019 BCSC 2222; and
- *Dunn v. Heise*, 2021 BCSC 754, rev'd in part 2022 BCCA 242.

[61] In *Grabovac*, which involved two accidents, Chief Justice Hinkson awarded $350,000 in non-pecuniary damages. The facts in that case were described by Justice Kirchner at para. 284 of *Plett* as follows:

> In that case, a 26-year-old female dental hygienist was injured in two motor vehicle accidents. In the first she suffered soft tissue injuries to neck, shoulders, and back, headaches, fatigue, problems with memory and concentration, depression and anxiety. Her injuries had largely resolved by the time of the second accident when she suffered soft tissue injuries to neck, shoulders, upper and lower back, right arm (with hand tremors), left hip and leg. She had headaches three times a week or sometimes daily. She also suffered from fatigue, insomnia, problems with memory and concentration. Her pain was chronic which led to Major Depressive Disorder, Somatic Symptom Disorder, Post-Traumatic Stress Disorder and General Anxiety Disorder. She was awarded non-pecuniary damages of $40,000 for the first accident and $310,000 for the second.

[62] As conceded by counsel for the plaintiff, a distinguishing factor in *Grabovac* was the fact that the plaintiff was unable to have children because of the accidents, which the Chief Justice found to be significant in his reasoning. That is not a factor in this case, as there was no evidence Ms. Sunner wanted more children. In addition,

the award of non-pecuniary damages in *Grabovac* included an award for loss of housekeeping capacity, which is addressed separately in this case. For these reasons, the amount of the award in *Grabovac* would be too high in the circumstances of this case.

[63] In *Hans*, the Court awarded $265,000 in non-pecuniary damages and an in-trust award to Mr. Hans' spouse in the amount of $165,000. In that case, Mr. Hans' pre-Accident state was described as "gregarious, fun-loving, competitive, hard-working, ambitious and financially driven …with boundless energy" (at para. 480). Mr. Hans was described as actively involved in the lives of his children and a contributor to household responsibilities. Following the accident, Mr. Hans developed PTSD and Major Depressive Disorder. He became isolated and withdrawn, "emotionally and socially a shell of his former self" (at para. 486). He was depressed and agitated with bursts of anger. Mr. Hans attempted suicide three times resulting in hospitalizations for extended periods. He faced a future of continued pharmaceutical and psychiatric intervention and close supervision from medical professionals, family, and friends. His prognosis was guarded at best and bleak at worst. The Court stated as follows:

> [515] In this case, Mr. Hans was only 33 years old when he began to suffer the debilitating all-consuming psychological injuries caused by the collision that have now endured for almost seven years and which at their worst have manifested in three failed suicide attempts. There is little chance that Mr. Hans will ever recover socially, emotionally or mentally from the effects of the collision.
>
> [516] I agree with Mr. Mackoff's characterization of Mr. Hans' injuries as being near catastrophic when viewed from the perspective of what his life was before the collision, has been since then, and will be in the future.

[64] While there are parallels between *Hans* and this case, an important distinguishing factor is that Mr. Hans was considerably younger than Ms. Sunner (affecting his relationships as a father to a young family), the symptoms were more severe and the prognosis was worse. Therefore, the amount of the award in *Hans* would be too high in the circumstances of this case.

[65] In *Plett*, where the Court awarded $210,000 in non-pecuniary damages, Ms. Plett suffered soft-tissue injuries to her neck, shoulder, arm, and back, and chronic pain was unlikely to improve significantly. She also suffered a mild traumatic brain injury, which caused significant and permanent cognitive impairments that had affected her personal life and left her unable to work as a bookkeeper. Ms. Plett suffered from frequent headaches, fatigue, anxiety and mood disorders, and depression (which had become intermittent by the date of trial). Ms. Plett had been actively involved in fitness and had a busy life before the accidents, although she did have some medical conditions that pre-dated the accidents. The Court found that she had been "significantly affected by the accidents both physically and cognitively" (at para. 280) but also noted that she continued to take lengthy road trips on her motorcycle, though with some difficulty, and that she was "not completely disabled and unable to enjoy any activity" (at para. 281).

[66] With respect to the cases proposed by the plaintiff as comparables, I find that the facts of this case are more closely analogous to *Plett* than the other two.

[67] Turning to the defence's authorities, in *Marois*, where the Court awarded non-pecuniary damages in the amount of $130,000, the 49-year-old plaintiff suffered from musculoligamentous strain to the neck, mid back, and low back. The plaintiff went on to develop a chronic myofascial pain condition involving the upper neck musculature, mid back and low back. In turn, the plaintiff's pain contributed to depression and, at times, the plaintiff was unable to work following the accident and became suicidal.

[68] In my view, this case is distinguishable in several important respects. The Court in that case found that the accident did not have "any significant effect on her injuries, physical or psychological" (at para. 90). Further, there was compelling evidence that the plaintiff's health was improving leading up to trial and there were significant concerns with respect to her credibility. In my view, the amount of the award in *Marois* would be too low in the circumstances of this case.

[69] In *Pololos*, where the Court awarded non-pecuniary damages in the amount of $180,000, the 48-year-old plaintiff suffered from chronic pain and soft tissue injuries to his neck, back, shoulder, and elbow, and also a range of psychological issues including depression, anxiety, PTSD, and suicidal ideation. He was competitively unemployable and participated in virtually no activities that were positive or that gave him pleasure. He did not attend to his physical hygiene and was physically unkempt. His self-esteem and self-image had significantly deteriorated. He was both depressed and anxious.

[70] In my view, there are parallels between *Pololos* and this case, as both involved a combination of significant physical and psychological injuries. However, a factor that distinguishes *Pololos* is that there was evidence at trial that Mr. Pololos had been misdiagnosed psychologically with the effect that he had only been treated for depression for a short time prior to trial, leaving the evidentiary record unclear with respect to his true psychological condition. I must also take into account the fact that the award in *Pololos* was in 2016 dollars and some inflation must be accounted for.

[71] In *O'Mara*, the Court awarded $200,000 reduced to $185,000 due to pre-existing conditions. In that case, the 38-year-old plaintiff sustained several injuries in the accident including broken bones in her right knee and left wrist, a concussion, a torn lip and a torn ligament in her right knee. After a week in hospital and over three months recovering at home, she was able to return to work temporarily but her pain only worsened over the next several years to the point that she was forced to leave work entirely and remained off work at the time of trial. Although she had pursued a variety of treatments on the advice of her doctors, none had succeeded in relieving her pain. The persistence of her pain had left her frustrated and deeply depressed. She would sometimes speak of ending her life and, on one occasion in 2018, attempted suicide unsuccessfully.

[72] While there are parallels between this case and *O'Mara*, I note that a distinguishing feature in *O'Mara* is that the plaintiff had three conditions including depression that pre-dated the accident (in contrast to Ms. Sunner who had only the

one lower back condition) and that would have impacted her in future even without the accident. The Court also found in *O'Mara* that the impact of the accident on her life was not as serious as in *Hans*.

[73] In *Dunn*, where the Court ordered non-pecuniary damages in the amount of $200,000, the 24-year-old plaintiff sustained several injuries in the accident, including chronic pain in his right arm that developed into somatic symptom disorder, soft tissue injuries to his shoulder and back that had largely resolved at the time of trial, PTSD, depression, and anxiety. The plaintiff further claimed that the psychological impact of the accident was so severe that he attempted suicide and had ongoing issues with low self-worth and self-esteem at the time of trial. The plaintiff further claimed that the accident ended his career installing residential audio-visual systems, and he opted to transition into retail sales.

[74] There are again parallels between this case and *Dunn*. One distinguishing factor is that the Court in *Dunn* found that Mr. Dunn's condition had improved to an extent by the time of trial due to cessation of drinking, effective medication use and therapy, and he was described as having "moderate major depressive disorder" (at para. 86), in contrast to Ms. Sunner's more serious symptoms. The Court also found it significant that he was able to look after his personal hygiene, undertake all activities of daily living and work full-time. In my view, the impacts on Mr. Dunn's life were less severe than the impacts on Ms. Sunner's life.

[75] After considering all the *Stapley* factors, the relevant authorities and the impact of inflation with respect to the quantum of prior comparable awards, I conclude that an appropriate award of non-pecuniary damages in this case is $225,000.

b) Loss of past earning capacity

[76] The plaintiff argues that an award of $350,000 is appropriate for loss of past earning capacity.

[77] In *Singh v. Paquette*, 2022 BCSC 1579, Justice Walker helpfully summarized the legal analysis to be applied with respect to a past income loss claim:

> [162] Past income loss is a component of loss of earning capacity. The award is meant to compensate an injured plaintiff for the loss of the value of the work that the plaintiff would have performed but was unable to because of the injury caused by the tortfeasor's negligence: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141 at paras. 28–30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45; *X. v. Y.*, 2011 BCSC 944 at para. 185; *M.B. v. British Columbia*, 2003 SCC 53 at paras. 47, 49; *Wainwright* at para. 171. Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 130.
>
> [163] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2020 BCCA 398; *Wainwright* at para. 172.
>
> [164] While the standard of proof for proving a past event is on a balance of probabilities, any hypothetical events, past or future, will be taken into consideration as long as it is a real and substantial possibility and not mere speculation, and will be given weight according to its relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 27-28; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 27–29; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 14, 27-28.
>
> [165] In *Falati*, Justice Saunders summarized the principles governing the assessment of pre-trial lost earning capacity caused by the tortfeasor:
>
> > [39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. "past loss of income" or "past wage loss", it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity – *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative "real possibility" and "capital asset" approaches to assessment are reviewed and discussed.
> >
> > [40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies – what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of

future earning capacity: “The only difference is that knowledge of events occurring before trial takes the place of prediction” – Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable – Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

> “What would have happened in the past but for the injury is no more ‘knowable’ than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.”

[41] Those general principles involved in the process of assessment include the following:

- The task of a court is to assess damages, rather than to calculate them mathematically – *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;

- The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood – *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;

- Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong – *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff’d (1987), 49 B.C.L.R. (2d) 99 (C.A.);

- Any assessment is to be evaluated in view of its overall fairness and reasonableness – *Rosvold*, at para. 11.

[42] A trial decision of Finch J., as he then was, *Brown v. Golaiy*, 1985 CanLII 149, 26 B.C.L.R. (3d) 353, which has been frequently cited, sets out a list of further specific considerations which may be taken into account in making an assessment:

> “The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the

> considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."
>
> [43] Having said that, one cannot lose sight of the rule that the determination of what has in fact happened in the past is on the basis of the balance of probabilities – *Steenblok v. Funk*, [1990] 5 W.W.R. 365, 46 B.C.L.R. (2d) 133 (B.C.C.A.); see also *Smith v. Knudsen*, at para. 36. In the present case the plaintiff must prove that each of the various claimed losses of opportunity by which he says the loss or earning capacity is to be evaluated was, more likely than not, actually caused by the accident. If the plaintiff succeeds on that issue, then the potential value of each of these opportunities, adjusted for various contingencies, may be weighed in determining the value of the plaintiff's lost earnings capacity, both past and future.

[78] As stated above, I am satisfied on a balance of probabilities that the Accident caused the Alleged Injuries, with the exception of the pre-existing back condition (as the evidence demonstrates there was a measurable risk that it may have manifested in any event).

[79] I am also satisfied based on all the evidence that all four of the *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) considerations were operative with respect to Ms. Sunner during the period between the Accident and the trial. In this respect, I note that Ms. Sunner was unable to return to work after the date of the Accident and had not returned as of the date of the trial (even though she

remains on the payroll at Royal Columbian Hospital). She testified that she has been unable to return to employment as a result of her injuries, or to pursue other work and business opportunities, and this testimony was corroborated by the testimony of her family. Ms. Sunner's testimony is also supported by the expert evidence. As noted above, Dr. Le Nobel opined that Ms. Sunner is disabled and that her disability extends to work, household and recreation tasks. I also note the expert opinion of Mr. Russell McNeil, an occupational therapist, that Ms. Sunner is not capable of sedentary work and the opinion of Dr. Quee Newell, a vocational expert, that Ms. Sunner is competitively unemployable.

[80] Moving next to the issue of assessment, I note that Ms. Sunner's claim for loss of past earning capacity in the amount of $350,000 is based upon the following assumptions:

- a 70% probability that Ms. Sunner would have continued working 40 hours per week within Vancouver Coastal Health and supplementing her income five hours per week doing esthetician work, resulting in a hypothetical income of $76,428 per year; and

- a 30% probability that she would have been successful in opening up the Queensborough Medical Clinic as a proxied medical director, resulting in a hypothetical income of $125,000.

[81] Ms. Sunner argues that combining the above weighted averages results in an income of $90,999.60 per year. Multiplied by the 5.32 years from the date of the Accident, Ms. Sunner asserts a gross past loss of earning capacity of $484,117.87, netted for 19.92% tax to $387,681.59 (rounded down to $350,000 for assessment purposes).

[82] Ms. Sunner's claim is based upon three hypotheticals: (1) that she would have successfully established her own medical clinic; (2) that she would have successfully developed and grown her esthetician business; and/or (3) that she would have continued to work at Royal Columbian Hospital or found suitable alternative employment. With respect to these hypotheticals, Ms. Sunner has the

onus of establishing a “real and substantial possibility” of loss and is not required to prove such a loss on the higher balance of probabilities standard: *Singh* at para. 164. I will address each of the hypotheticals in turn.

The Medical Clinic

[83] With respect to the start-up Queensborough Medical Clinic, Ms. Sunner argued that there was a 30% probability of her succeeding. She posited that she would have taken on the role of a proxied medical director (as the medical director must by law be a medical doctor, who she intended to hire). She also posited that she would have earned $9,000 to $10,000 per month in that role.

[84] In *Bricker v. Danyk,* 2015 BCSC 2404, which involved a new business venture, Justice Skolrood (as he then was) outlined a number of non-exhaustive factors at para. 150 for the Court to consider when assessing the likelihood of a plaintiff’s claim that a start-up venture would be successful:

> …
>
> a) the plaintiff's education and training as it relates to the business in issue;
> b) the plaintiff's employment history;
> c) the plaintiff's earning history, both before the creation of the business and through the business;
> d) the existence (or absence) of a business plan setting out how the plaintiff intended to develop the business;
> e) actual steps taken to implement the business plan;
> f) the performance of similar businesses;
> g) market conditions that might impact the business, both positively and negatively, and
> h) existing and anticipated clients.

[85] In my view, taking into account the factors outlined in *Bricker* and all the available evidence, Ms. Sunner has failed to establish that there was a real and substantial possibility rising to a level beyond mere speculation that the proposed start-up medical clinic would have been successful. In reaching this conclusion, I have considered the following evidence:

- Ms. Sunner had no experience in operating a medical clinic or acting as a medical director, nor did she have any demonstrated training in that regard. There was no evidence other than testimony from Ms. Sunner that she was able to fulfill the role of a medical director. While she had worked in a medical office at Viva Care as an assistant for a relatively brief period, this role was obviously very different from founding and operating a medical clinic as a director;

- there was no evidence that Ms. Sunner had started any similar business ventures in the past;

- Ms. Sunner admitted that the proposed new medical clinic never did in fact open for business prior to the Accident and that no date had been set with respect to the proposed opening of the medical clinic at the time of the Accident. Setting aside the other evidentiary issues I will outline below, I note that the lack of a proposed opening date in itself makes the assessment of any without-Accident past income loss more speculative and problematic;

- Ms. Sunner adduced no documentary evidence that she had a clear or firm plan with respect to the new medical clinic. For example, she did not introduce into evidence any prior business plans (indeed there was no evidence that she ever prepared a business plan at all), spreadsheets or other detailed analyses which might have corroborated her testimony concerning this start-up venture, including her allegation that she could have earned $9,000 to $10,000 per month, or that the business would even have been profitable. It was open to Ms. Sunner to call expert evidence on this point but she declined to do so. She also adduced no evidence that she had given any thought as to how the business would be financed. For example, she adduced no evidence of loan applications, correspondence with banks for financing purposes, or even that she had taken steps to open a business account;

- no evidence was provided regarding market conditions at the alleged time this clinic would have been opened aside from general allegations that medical services are in short supply in British Columbia;

- Ms. Sunner testified that she and Mr. Gill had spent $20,000 to $30,000 on furniture, appliances and computers for the medical office, and also a Facebook page, letterhead, banner and business cards, but produced no receipts documenting her purchase of these items despite claiming that she had kept those receipts. In my view, an adverse inference is appropriate in this context*: Naramalta Development Corporation v. Therapy General Partner Ltd.,* 2012 BCSC 191 at paras. 89–93. In similar circumstances, the Court in *Dass v. Salmond*, 2002 BCSC 1758 drew an adverse inference at para. 23:

  > …there were no receipts in evidence. While Ms. Dass had indicated at her discovery that she kept copies of the receipts and while she was asked to produce them, no receipts were in evidence. If receipts evidencing income in the neighbourhood of $2,800.00 to $2,900.00 per month are available, they were not produced. Accordingly, I draw an adverse inference arising from the fact that the receipts which were said to have been available were not produced.

- Ms. Sunner admitted that she was aware that she could not legally open the medical clinic until she had entered into a contract with a medical doctor who would take on the director's role (with Ms. Sunner's plan apparently being to assume the role of "proxy director"). Ms. Sunner admitted that she had not located a doctor who would agree to take on that role, nor did she name any specific doctor in her testimony who had expressed a willingness to do so. No doctor testified at trial to confirm an interest in taking on the role, or any discussion with Ms. Sunner to that effect. This supports the reasonable inference that none of her alleged discussions with prospective directors had reached a level of approaching a real and substantial possibility of a hire;

- Ms. Sunner did not establish on the evidence that her proposed organizational structure, with Ms. Sunner taking on the position of "proxy director" in coordination with a medical doctor, was actually in conformity with

provincial health law and regulations (which is not a hypothetical question and could have been established with expert or other evidence at trial). She adduced no documentary evidence to establish that she took any steps, such as corresponding with regulatory authorities or obtaining a legal opinion, to confirm that her proposed clinic was legally permitted;

- Ms. Sunner testified that she had verbally agreed to a lease with the landlord of the office space formerly occupied by Viva Care. However, she also agreed on cross-examination that she had not exchanged any draft lease agreements, nor had she even exchanged any emails or text messages with the landlord about a lease. The lack of a draft lease supports the conclusion that her plans at the date of the Accident were still speculative and fluid; and

- Ms. Sunner's testimony at trial appeared to be inconsistent with statements she made to a Service Canada representative (concerning employment insurance) relating to her termination by Viva Care in September 2016, in which Ms. Sunner denied that she was attempting to open a new medical clinic, denied that she had secured a lease for the Queensborough space formerly held by Viva Care, and claimed that she was simply helping a pharmacist, who had taken over the lease. Page 39 of the EI record, dated September 6, 2016, reads as follows:

> I asked the client if she was in contact with the new clinic. The client states there is no new clinic yet. The client states the pharmacist will be opening a clinic at this location and she offered to help him out because she is currently not employed.
>
> I advised the client her employer had stated she was dismissed as a result of trying to poach other employees and doctors to come and work for the new clinic. I asked the client if this is correct. The client states she is shocked at the allegation and this is in no way true. The client further adds if this was the case she would have a job right now.
>
> I advised the client the employer had stated she had obtained the lease for the medical clinic facility where the employer had operated out of. I asked the client if she agrees with this statement. The client states this is not at all true, and she has only been back at the clinic once to help out and is not working there.

> I asked the client who has obtained the lease for the facility. The client states the pharmacist next door has the lease.
>
> I advised the client the employer had provided me with a screen shot of a post she made on Facebook regarding physicians required for a new clinic. I asked the client if this was correct. The client confirms this is correct. The client states she is friends with the pharmacist and had posted this to Facebook to help the pharmacist out. The client further states this was posted following her dismissal. I asked the client if she could forward a copy of the post which includes the date. The client has agreed to forward a copy of the post including the date.
>
> I advised the client the employer had stated she had also shredded important patient information related to appointments with specialists. I asked the client if she would like to comment on this. The client states this was actually something another employee had done and was therefore dismissed. The client further adds she cannot believe what the employer is stating.

[86] I conclude that Ms. Sunner's plan to open a medical clinic was speculative at best and never rose to the level of a real and substantial possibility.

Esthetician Business

[87] Moving next to the question of Ms. Sunner's esthetician work, I accept her evidence that she had been doing some freelance work for friends and family based on word-of-mouth referrals prior to the Accident and that, as a result of the Accident, she ceased being able to do that work. Thus, she has proved that she suffered a loss.

[88] However, the challenge in this case is how to value the loss. In particular, the problem in is that, although Ms. Sunner provided some estimates in her testimony as to hourly pricing for individual services there was no evidence before the Court (even from her) as to how frequently she performed the esthetician work, what her revenue streams were from this work prior to the Accident, and the prospects for growth.

[89] Again, there was a critical lack of documentary evidence on this point. Ms. Sunner agreed in cross-examination that she had not kept a calendar of her prior bookings as an esthetician, and therefore, she had no record of her work or

earnings. She also agreed that she did not report her income to CRA and therefore had no supporting tax documentation. As above, an adverse inference is appropriate with respect to the lack of documentation.

[90] In *Henry v. Fontaine*, 2022 BCSC 930 at para. 116, Justice G.C. Weatherill cited the well-known principle that where quantification is difficult, the Court must do the best it can:

> [116] Quantifying a plaintiff's loss of future income earning capacity is always a challenging task. However, the mere fact that quantifying the loss is difficult is no reason for not making an award. Rather, the court must simply do the best it can with the evidence it has: *Rab* at para. 76.

The same principle applies to quantifying loss of past earning capacity.

[91] In quantifying the loss, I note that Ms. Sunner was working a full-time job and living a busy life prior to the Accident and thus would not have had much free time to deliver esthetician services. I also note that there was no evidence she had made efforts to develop the business as a full-fledged enterprise rather than a part-time sideline (for example, by hiring employees, advertising or locating a permanent space). In light of this, I find that there is a real and substantial possibility that she would have continued to deliver approximately one facial session bi-weekly at the rate she charged of $65–70 (or more expensive treatments less frequently), which is equivalent to about $1,600 annually. Due to the lack of documentary evidence, a higher amount is not in my view justifiable.

Employment at Royal Columbian Hospital

[92] In addition to the lost business opportunity and esthetician work, Ms. Sunner also argues that she suffered a loss of past income from her position at Vancouver Coastal Health.

[93] Ms. Sunner was working full-time in her probationary period as a scheduler for the Medical Imaging Department at Royal Columbian Hospital at the time of the Accident. She began this employment as a casual employee on June 8, 2017, at $21.26 per hour, less than three months before the Accident.

[94] In my view, there is a real and substantial possibility that, absent the Accident, Ms. Sunner would have graduated from probationary employee to full-time employee and remained in that role up to the date of the Accident. Based upon her past experience at Viva Care, Ms. Sunner clearly had skills and experience which could have enabled her to succeed in the role of scheduler. However, such a hypothetical possibility is also subject to a contingency analysis.

[95] The positive contingencies which might have impacted this possibility include the following:

- having survived the probationary period, Ms. Sunner would reasonably have benefitted from salary increases in accordance with the collectively bargained agreement. In this respect I note that the rate of pay for her position as of April 1, 2023 has increased to $26.27 as per the collective agreement;

- there was a possibility of promotion beyond the scheduling position. That said, I note that there was no evidence adduced by Ms. Sunner to validate the proposition that a promotion was more than a purely speculative possibility;

- Ms. Sunner may have left her position to pursue an entrepreneurial opportunity, and this opportunity may have been profitable; and

- Ms. Sunner may have left Royal Columbian Hospital but found employment elsewhere, with a potentially comparable salary. The evidence was that she was a hard worker, entrepreneurial in spirit and a “go getter” and therefore this does not appear unlikely.

[96] The negative contingencies which might have impacted this possibility include the following:

- Ms. Sunner may not have successfully completed the probation period or may have been terminated thereafter. In this respect, I note that Ms. Sunner failed to adduce any evidence (such as, for example, testimony from a manager)

concerning the prospects of her continued employment at Royal Columbian Hospital after the probation period;

- Ms. Sunner may have voluntarily left the position at Royal Columbian Hospital. As previously noted, Ms. Sunner did not have a track record of long-term employment with any single employer (she had not maintained any employment position for longer than one year in the three years preceding the Accident) and also had a variety of entrepreneurial interests. Ms. Sunner also made it clear in her testimony that, while working at Royal Columbian Hospital, she was actively considering other options and that she would have left her position with Royal Columbian Hospital if an entrepreneurial opportunity arose. For this reason, there was in my view a very realistic possibility that she would have been motivated to leave stable employment before the trial date;

- Ms. Sunner may as a result have had periods of unemployment while she looked for other work or pursued entrepreneurial opportunities. In addition, the entrepreneurial opportunities may not have been successful, or may have been less remunerative than the position at Royal Columbian Hospital; and

- Ms. Sunner may have found employment elsewhere, but at a lower salary than Royal Columbian Hospital.

[97] In my view, in light of all the evidence, the negative contingencies outweigh the positive contingencies. It is therefore not reasonable or fair to assume that Ms. Sunner would have earned an income equivalent to her salary at Royal Columbian Hospital up to the date of trial, keeping in mind the principle that she is entitled to be compensated for what she would have earned and not what she could have earned: *Singh* at para. 162. In reaching this conclusion, I have taken into account in particular Ms. Sunner's self-professed lack of commitment to the Royal Columbian Hospital position in her testimony, the fact that her salary during the three-month probationary period at Royal Columbian Hospital substantially

exceeded her historical earnings, and her lack of a prior track record in sticking with any one employment position.

[98] In light of all the above, a more realistic, balanced and fair approach in my view is to apply a three-year average taking into account the 2017 projected Royal Columbian Hospital salary and Ms. Sunner's income in the two years prior to the year of the Accident, namely $38,461 in 2015 and $28,808 in 2016. This accounts for the uncertainties about the stability of Ms. Sunner's employment situation and her historical tendency to move around between jobs and opportunities.

[99] With respect to Ms. Sunner's 2017 projected income this can be calculated based upon her $21.26/h salary at the date of the Accident as follows (assuming two-week holidays):

> 40 hours/week x $21.26/h x 50 weeks + 11.8% holiday pay = $46,772

[100] Applying a three-year average from 2015–2017 results in a salary of $114,041/3= $38,013 (the "Three-Year Average"). From the Accident to the date of trial is 5.32 years. The past loss of earning capacity is therefore 5.32 x $38,013 = $202,229 gross for full-time employment income. To this I add the esthetician income of 5.32 x $1,600 = $8,512 for a total of $210,741.

[101] The lowest combined marginal tax rate in British Columbia is approximately 20%, which amounts to $42,148, resulting in a net amount of $168,593 as past income loss.

c) Loss of future earning capacity

[102] The plaintiff argues that an award of $1,400,000 is appropriate as an award for loss of future earning capacity.

[103] In *Rattan v. Li*, 2022 BCSC 648 the Court helpfully set out the applicable analysis:

> [145] An award for future loss of earning capacity represents compensation for a pecuniary loss. While the award is an assessment of damages, not a calculation, the award nevertheless involves a comparison between the likely

future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident has happened. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157 [*Dornan*].

[146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.

[147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[148] At para. 47 of *Rab*, Grauer J.A., writing for the Court, sets out a three-step process for considering claims for loss of future earning capacity:

> (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?;
>
> (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?; and,
>
> (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[149] As a final step in the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117 [*Lo*].

[150] The relevant jurisprudence identifies two approaches to the assessment of damages for loss of earning capacity: an earnings approach and a capital asset approach. In cases using the earnings approach, valuation of the future loss—the third step of the process—typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Lo* at para. 109; *Dornan* at paras. 155–156. In cases using the capital asset approach, such as cases where the plaintiff continues to

> earn income at or near pre-accident levels, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: *Rab* at para. 72; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 43; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

[104] Applying the above, I conclude that the first two steps in the *Rab* analysis are met in this case, namely, that there is a real and substantial possibility that Ms. Sunner's symptoms from the injuries she incurred during the Accident will continue to give rise to loss of capacity for her and, as a result, cause a pecuniary loss to her in the future.

[105] As noted in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 with respect to the first and second steps of the *Rab* test:

> [11] …there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies.

[106] In my view, given the severity of the injuries and the fact that Ms. Sunner has not worked since the Accident, this case is one of the "straightforward cases" referenced in *Ploskon-Ciesla* where the plaintiff has "clearly lost capacity and income" and the first and second steps of the *Rab* analysis are therefore essentially a "foregone conclusion" (at para. 11). The more difficult question in this case relates to the third step: quantification.

[107] Turning to the third step of the *Rab* analysis, the valuation of the possible future loss, I must next decide between an earnings-based and capital asset approach. In *Ploskon-Ciesla*, the Court explained the difference as follows:

> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often

> appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[108] In the context of this case I find that the earnings approach is more appropriate. There has been an identifiable loss at the time of trial and this is not a situation, as in many of the capital asset cases, where the plaintiff has continued to work and earn income but where a loss of value to the capital must nonetheless be calculated despite continued but diminished earnings. Further, although it is difficult to say that Ms. Sunner had a "settled" career path, she was already well into middle-age at the time of the Accident (i.e. she had not recently entered the workforce) and has enough of a past employment history to make reasonable projections about her future earnings potential. Conversely, there was little or no evidence adduced at trial with respect to the value of Ms. Sunner's earnings potential as a capital asset.

[109] Ms. Sunner is currently 49 years old. This leaves 16 years until she reaches 65, which in my view is a reasonable assumption for a retirement age. As a baseline, I am able to use Ms. Sunner's Three-Year Average income of $38,013 from her full-time work plus $1,600 a year in esthetician income, for a total of $39,613 a year.

[110] Pursuant to s. 56(2)(a) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and s. 1(a) of the *Law and Equity Regulation*, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate used to calculate the present value of a future income loss is 1.5%.

[111] Where no economic opinion evidence is provided, it is appropriate for this Court to apply the multipliers found at Appendix E of the *Civil Jury Instructions,* 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2019 update) [*CIVJI*], in order to quantify the present value of a future

loss: *MacGregor v. Bergen*, 2019 BCSC 315 at para. 116, n 1; *Dunn v. Heise*, 2021 BCSC 754 at paras. 202–03, rev'd in part 2022 BCCA 242. The multiplier for the period of 16 years at 1.5% is 14.1313, multiplied by $39,613. This leads to a base future lost earnings amount of $559,783 using the earnings approach.

[112] I must next consider applicable contingencies. I have reviewed the principal positive and negative contingencies in my analysis on past income loss and will not repeat those here, except to emphasize that in my view they remain applicable into the future. With respect to contingencies that were not applicable to the past income analysis but are applicable into the future, the principal contingencies relate to Ms. Sunner's health prognosis, the prospects of her returning to the workforce in the future and the operation of wage inflation over time.

[113] With respect to Ms. Sunner's health prognosis and the possibility of her returning to the workforce, it is my view based on the expert evidence that her prospects of returning to work on a full-time basis are less than 10% and her prospects of returning to work on a part-time basis with potential employer accommodations to be no more than 25%. In reaching this conclusion, I note the guarded prognosis of Dr. Heran and Dr. Le Nobel. Dr. Heran, for example, opined that, in terms of myofascial pain, Ms. Sunner "is not declaring any improvement in the past year or so and therefore further improvement here is not likely" and his view that "she is at increased risk for further deterioration in her SI joint as well as the disc and facet joints in her low back which are contributing to some of her symptoms." Dr. Le Nobel's opinion is that Ms. Sunner is disabled and that her prognosis is guarded for the foreseeable future, with no treatments or operations available which could restore her to her pre-Accident state.

[114] That said, Ms. Sunner's prognosis is not entirely negative, and there is reason to believe that some improvement (albeit considerably less than full improvement) is possible. In particular:

- Although Dr. Robinson opined that Ms. Sunner will likely continue to experience post-traumatic headaches, he suggested some treatments that could result in improvement;

- Dr. Brink, the only psychiatrist who provided expert evidence, opined that Ms. Sunner could improve with regular use of her prescribed dose of antidepressant medication, and also possibly with an increase in the dose, as well as CBT. Dr. Brink also testified that, from a psychiatric perspective, there should be no contraindication to her returning to full-time employment provided she optimizes her medication (although I note that this psychiatric opinion did not address the limiting effect of her physical injuries as discussed by Drs. Heran and Le Nobel).

- Dr. Paramonoff also opined that Ms. Sunner could experience an improvement in her physical experience of pain with an increase or optimization of her medications, improved sleep hygiene and more engagement in independent exercise focused on strengthening. While certainly not predicting a full recovery, Dr. Paramonoff opined that Ms. Sunner could still have moderate symptom improvement by building strength and engaging in conditioning exercises.

[115] To be clear, the foregoing opinions do not suggest that Ms. Sunner will be able to return to her pre-Accident state but merely that she may be able to improve her experience of pain and her depression-related symptoms, which might permit an eventual return to part-time work with accommodations, and perhaps an ability to resume some aspects of her esthetician services, possibly with assistance. In reaching this conclusion, I reference my earlier credibility finding with respect to the possibility that some of Ms. Sunner's symptoms have perhaps been exaggerated to a degree (although by no means completely) and, therefore, there may be more room for improvement than was apparent from her testimony taken alone.

[116] On the other side of the contingency analysis, it is reasonable to expect, in my view, that Ms. Sunner would have enjoyed some level of wage inflation over and

above the baseline income level I have used for the purposes of my calculation (indeed, the hourly wage at Royal Columbian Hospital has increased from $21.26 as of the date of the Accident to $26.27 as of April 1, 2024 per the collective agreement, which represents a 23.5% increase). She may also have been able to grow her esthetician business to a certain extent.

[117] Recognizing that this is an assessment and not a calculation, the value of the negative contingency relating to the possibility of Ms. Sunner's partial return to work is about equal in my view to the value of the positive contingency relating to inflationary effects and potential growth relevant to lost future income, and these adjustments in my view should offset.

[118] I conclude that the appropriate award for lost future earnings is $559,783.

d) Cost of future care

[119] Ms. Sunner seeks the following amounts with respect to the cost of future care:

1. lifetime physical therapy, medication, rehabilitation and pain management costs in the amount of $351,541.24; and

2. the cost of retaining a full-time licensed practical nurse or care aide in the amount of $2,500,000.

[120] I will address each of these claimed amounts in turn.

Rehabilitation and pain management costs

[121] Ms. Sunner estimates the annual cost of her future care as follows:

a. Registered massage therapy 104 x year [rate $85]	$8,840
b. Gym pass	$495.40
c. Pain control medications	$978.20
d. Botox	$2,550
e. Emotional Support Animal Registration	$270
f. Pain Management (pillows/heat pad)	$30
g. Mattress/bed	$1,000
h. Counselling/Psychology ($220 x 12)	$2,640
i. Mileage	$400

TOTAL ANNUAL CARE COSTS	**$17,203.60**
One-time costs (Kinesiologist 12 sessions)	+$936
One-time costs (pain management program)	+12,500

Annual future care costs extrapolated to age 75:

$17,203.60 x 20.1210 = $346,153.64 + $936 + $12,500 = $359,589.64

[122] Ms. Sunner is currently 49 years old. The plaintiff submits that age 75 would be when Ms. Sunner would otherwise be able to avail herself of assisted living in a group home, leaving 26 years of required coverage. This is reasonable in my view.

[123] The courts have made it clear that an award for the cost of future care should be based upon medical justification and should be reasonable. In *Chavez-Salinas v. Tower*, 2022 BCCA 43, Mr. Justice Abrioux reiterated the legal framework for future care awards:

> [83] The judge set out the applicable legal principles: Reasons at paras. 490–502. These were recently summarized by Justice Voith in *Pang v. Nowakowski,* 2021 BCCA 478:
>
> > [56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:
> >
> > > [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.
> > >
> > > [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable.
> >
> > [57] Several additional principles are relevant:
> >
> > i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item;
> >
> > ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred;

> iii) The court must be satisfied that there is no significant overlap in the various care items being sought.
>
> [58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss.
>
> [Citations omitted.]

[124] While medical evidence for each item of care is not strictly required, the award must be based upon the medical evidence as a whole. In *Langille v. Nguyen*, 2013 BCSC 1460 at paras. 231–235, aff'd on appeal 2014 BCCA 430, Justice Fitzpatrick summarized the applicable approach:

> [231] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.
>
> [232] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.
>
> [233] Future care costs must be justified both because they are medically necessary and are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
>
> [234] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be

> required: *Tsalamandris* at paras. 64-72. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.
>
> [235] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
>
> [Emphasis added.]

[125] The defence acknowledged in closing argument that Ms. Sunner will require future care to treat her pain symptoms and improve her overall functionality and concedes that the reasonable costs of future care that are medically recommended by the experts are appropriate. In particular, the defence also acknowledges that this may include passive therapy, such as a combination of physiotherapy and massage therapy, to manage her pain symptoms, exercise-based kinesiology, occupational therapy sessions and CBT sessions with a registered psychologist. That said, the defence also takes the position that certain of the expenses proposed by Ms. Sunner are not medically recommended or are unreasonable.

[126] In my view, having reviewed the medical evidence and considered what is reasonable, an appropriate award is $137,813.87. In reaching this conclusion, I have found Ms. Sunner's itemized claims to be reasonable, subject to the following adjustments and comments:

- Ms. Sunner has claimed massage therapy in the amount of 104 times per year. This is not consistent with the expert evidence. Both occupational therapists who testified, Mr. McNeil and Ms. Beriah Chandoo, recommended 12 sessions per year, which is what I find is indicated by the evidence.

- The one-time pain management and kinesiology expenses are consistent with the recommendations of Dr. Le Nobel, Mr. McNeil, and Ms. Chandoo, who also recommended a pain program. In my view they are reasonable and justified.

- The gym membership is consistent with the recommendation of Dr. Le Nobel, Dr. Paramonoff and Mr. McNeil and is also reasonable and justified.

- Ms. Sunner's list of special damages already includes an amount for a mattress purchased in 2022. In light of this, a further annual bed cost of $1000 is not reasonable in my view, nor is it medically indicated.

- The ongoing counselling and medication expenses are fully supported by the expert evidence, including in particular the report of Dr. Brink.

- Dr. Robinson opined that Ms. Sunner could reasonably benefit from Botox injections if there is a substantive response. However, such a recommendation does not in my view support a lifetime of annual treatments. In my view a more reasonable award is a one-time award of $5000.

- Ms. Sunner testified that the emotional support animal is based upon her family doctor's advice and that this provides her with comfort. It is not a large amount and appears reasonable in light of her psychological issues.

[127] On the basis of the foregoing, I have calculated the costs of future care award for rehabilitation and pain management costs as follows:

a. Registered massage therapy 12 x year [rate $85]	$1,020
b. Gym pass	$495.40
c. Pain control medications	$978.20
d. Emotional Support Animal Registration	$270
e. Pain Management (pillows/heat pad)	$30
f. Counselling/Psychology ($220 x 12)	$2,640
g. Mileage	$400
TOTAL ANNUAL CARE COSTS	**$5,833.60 x 20.1210 (CIVJI multiplier – see below) = $117,377.87**
One time costs (Kinesiologist 12 sessions)	+$936
One time costs (pain management program)	+12,500
Botox	$5,000
TOTAL	**$135,814**

[128] With respect to the above calculation, pursuant to s. 56(2)(b) of the *Law and Equity Act* and s. 1(b) of the *Law and Equity Regulation*, the discount rate used to calculate the present value of future losses (other than income) is 2.0%. The multiplier for the period of 26 years at 2.0% is 20.1210, pursuant to *CIVJI*.

Supervisory/companion care costs

[129] The plaintiff claims $2,500,000 as a lifetime cost of retaining a full-time licensed practical nurse or care aide. Ms. Sunner claims such care at 24 hours per day to age 75 at the cost of $40.19/h. The annual cost is calculated at $40.19/h x 24h/day x 365 days/year = $352,064.40/year.

[130] Ms. Sunner argues that such an expense is justified due to her depression, her overuse of a combination of alcohol and pain medications and the resulting risk of further suicide attempts. In particular, Ms. Sunner argues that, due to her need for constant monitoring, her family, including Mr. Gill and her daughters, have had to fill the gap by providing gratuitous assistance. It is not fair, she argues, for the burden of constant supervision to be imposed upon her family for a lifetime.

[131] While I am sympathetic to Ms. Sunner's mental health struggles, I emphasize at the outset that Ms. Sunner did not adduce any expert evidence in support of her position that companion care is required. The only psychiatric medical evidence adduced at trial was from Dr. Brink, who was clear in his opinion that in-home companion care or supervision care is not required by Ms. Sunner, nor would it in his view benefit her.

[132] Counsel for Ms. Sunner made valiant attempts in cross-examination to elicit admissions from the defence experts with respect to the necessity of companion care but did not in my view obtain a persuasive admission to that effect. While both Dr. Brink and Dr. Paramonoff made admissions with respect to the possible connection in some theoretical cases between chronic pain and the risk of suicide, and the possible utility of care aides under some limited circumstances and for certain tasks (such as helping with the organization of medications), neither of these medical experts went so far as to admit or agree that a full-time care aide was

medically indicated in the case of Ms. Sunner in particular. To the contrary, Dr. Brink, under cross-examination, emphasized that a full-time care aide is not recommended since a risk of suicide should be addressed by a doctor or family member and not a care aide. Dr. Brink's very clear view was that, if Ms. Sunner is sufficiently depressed to be at risk of suicide, she should be hospitalized and not remain at home. He further explained that, should Ms. Sunner's condition worsen, there are other more appropriate and effective care options available to the Plaintiff than in-home companion care:

> Q Would it be helpful for somebody in the community to watch over her so her friends and family don't get caregiver burnout? So they're not sitting there on supervisory role?
>
> A No, I don't think so. She has a family. She has the doctors. She – they can go to the family physician. She can have family meetings. And that is the way to address that. There is no need for external support if the person does not talk about that she is suicidal. And if she is suicidal, then she needs to be taken to the emergency room.

[133] Furthermore, the evidence at trial did not, in my view, support the proposition that Mr. Gill and the daughters are in fact currently providing 24/7 care, nor that any of them have given up full-time employment for the sole purpose of caring for Ms. Sunner. Rather, the evidence is more fairly described as that each of them have found it necessary to be more vigilant with respect to Ms. Sunner's use of alcohol and pain killers and to be more present and available to her. This is not evidence that they are providing 24/7 care, nor that such care is necessary under the circumstances.

[134] The plaintiff relies upon the *Hans* decision as authority supporting an award of this nature. However, in my view the facts of that case were materially different for two reasons. First, there were expert reports in that case identifying Mr. Hans' psychological condition, and attendant risk of suicide, as a lifelong condition. There was no such evidence in this case. To the contrary, the prognosis of Dr. Brink was that there is a reasonable possibility of improvement of Ms. Sunner's condition with therapy and proper use of medication. Second, and most importantly, there were two expert reports adduced at trial in *Hans* that specifically recommended full-time care

as a “medical need” (at para. 615). As noted above, there was no such expert evidence in this case.

[135] Accordingly, the claim for supervisory/companion care is dismissed.

e) Loss of housekeeping capacity

[136] Ms. Sunner claims six hours of housekeeping per week at a rate of $28.50/h to age 75 at which point, it is argued, it would be anticipated Ms. Sunner would have likely required help in any event, or would be placed into a home, or would be deceased. In addition, Ms. Sunner claims $456/year for seasonal cleaning.

[137] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal considered the proper approach to valuing a loss of housekeeping capacity:

> [28] In *McTavish v. McGillivray,* 2000 BCCA 164, this Court observed that loss of housekeeping capacity could be compensated by a pecuniary or non-pecuniary award: at para. 73. The types of circumstances which may determine whether a loss is more properly considered pecuniary or non-pecuniary were recently discussed by this Court in *Liu* [*v. Bains,* 2016 BCCA 374]:
>
> > [26] It lies in the trial judge’s discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, <u>while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services</u>, thereby avoiding necessary replacement costs.
> >
> > [Emphasis added.]

[138] Ms. Sunner and Mr. Gill testified that Ms. Sunner was doing the majority of the cooking and cleaning prior to the Accident, but has been unable to continue with this after the Accident. As a result, Mr. Gill and the plaintiff’s daughters have had to gratuitously perform these tasks to compensate for Ms. Sunner’s lost capacity. This loss of capacity was corroborated by other witnesses.

[139] In light of this evidence, I conclude that a pecuniary award for loss of housekeeping capacity is appropriate separate and apart from the non-pecuniary

damages award in this case. I would adjust the amount sought by Ms. Sunner to make it consistent with the recommendation of Mr. McNeil that four hours per week is sufficient. This can be calculated as 52 weeks per year x four hours x $28.50/h = $5928/year.

[140] Using the *CIVJI* multiplier results in the following amount: $5928 x 20.1210 = $119,277.29.

f) Special damages

[141] The plaintiff claims $67,750.94 in special damages.

[142] The list of special damages submitted by Ms. Sunner at trial included expenses in the amount of $52,480.94, supported by receipts, and also the alleged expenses relating to equipment purchased for the medical clinic in the apparent amount of $15,000, though no receipts were produced to support this claim.

[143] Due to the lack of receipts for the medical clinic equipment, that claim is denied. The other expenses are comprised principally of costs relating to medication, massage, chiropractic therapy, psychology and homemaking support. The defence does not oppose these proposed expenses with the exception of Ms. Sunner's purchase of a Cadillac Escalade in the amount of $32,603.20.

[144] In my view the defence's objection is well-founded. There was absolutely no medical evidence which supported the purchase of a luxury vehicle as a form of reasonable accommodation or treatment, nor was Ms. Sunner's testimony that the car is more comfortable to get in and out of, persuasive on this issue. Further, as noted by the defence, this vehicle is an asset for both Ms. Sunner and her family, and the benefits of the vehicle go far beyond the scope of special damages.

[145] An analogous case is *Flores v. Burrows*, 2018 BCSC 334, where Justice Greyell held at para. 141 the following:

> There was no medical evidence to support the purchase of a vehicle to assist the plaintiff in his commute to work (in place of riding his bike), nor do I consider the expense to be a reasonable one. As the defendant argues, the

> purchase of the vehicle was the purchase of an asset, one which the plaintiff's wife uses to transport their children. I disallow this claim.

[146] I disallow the claim for the car and also the claim relating to the medical clinic equipment expenses, which were unsupported by receipts or other documentation (and with respect to which I have made an adverse inference).

[147] Accordingly, I conclude that special damages in the amount of $19,877 are appropriate.

4. Failure to Mitigate

[148] The defence argues that Ms. Sunner has failed to mitigate her losses by not following treatment recommendations from her doctors and seeks a 15% reduction to any award for non-pecuniary damages, income loss, and cost of future care.

[149] A plaintiff has an obligation to take all reasonable measures to reduce her damages including undergoing treatment for injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. Whether the plaintiff acted reasonably is a factual question and determining whether the defendant has established a failure to act reasonably involves a consideration of all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202. The standard is reasonableness, not perfection: *Gilbert* at para. 203. Mere delay in seeking the recommended treatment is not necessarily unreasonable: *Lourenco v. Pham*, 2013 BCSC 2090 at paras. 52–56.

[150] If the defendant establishes that the plaintiff acted unreasonably, it remains for the defendant to establish the extent to which a plaintiff's damages would have been reduced had the plaintiff acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. The Court of Appeal in *Haug v. Funk,* 2023 BCCA 110 at para. 61 recently confirmed that the onus “to prove on a balance of probabilities that the plaintiff’s injuries *would have* been reduced to some degree” had she acted reasonably remains on the party asserting a failure to mitigate.

[151] The defence argues that Ms. Sunner has avoided active therapy, which was recommended by Drs. Le Noble and Paramonoff, has not followed CBT, which was recommended by Dr. Brink, and that she has admitted taking her anti-depressants inconsistently and consuming a large number of medications concurrently (in addition to consuming these medications in combination with large amounts of alcohol) which prevents her from determining the efficacy and necessity of each medication. Ms. Sunner's use of multiple medications in particular runs directly contrary to the advice of the physiatry expert Dr. Le Nobel, who recommended in his 2019 report that she engage in "diarization of her medication use and concentration on single analgesics to try and determine effectiveness of individual agents".

[152] In my view, the defence has demonstrated that following medical advice on the use of medications and CBT could reasonably have reduced Ms. Sunner's damages. While it is true that Ms. Sunner has pursued a range of physical therapies such as massage and chiropractic, her use of medication has been erratic and has significantly deviated from her doctors' recommendations. Ms. Sunner's claim for damages is based in significant part on the extent to which her depression and anxiety have impacted her quality of life, particularly as it relates to her suicide attempts. Dr. Brink in his report opined that proper use of medication and CBT could have a significantly ameliorative effect. On the basis of this medical evidence, it is reasonable to conclude in my view that these treatments would likely have reduced Ms. Sunner's injuries had she pursued them earlier as recommended.

[153] In *Nguyen v. Bhatti*, 2017 BCSC 1537**,** the plaintiff's non-pecuniary damages were reduced by 10% for a failure to mitigate by not following medical advice to be more active, instead pursuing passive therapies rather than those which, while initially more painful, would likely have resulted in a more efficient and effective recovery.

[154] In *Mahdi v. Bains*, 2022 BCSC 1158, the Court held:

> 242 While I accept that Ms. Mahdi is significantly disabled, predominantly as a result of her adjustment disorder, related heightened perception of pain, and corresponding functional impairment, I am not satisfied she has acted reasonably in an attempt to mitigate her loss. Dr. Levin admitted in cross-

> examination that he anticipates Ms. Mahdi will show signs of improvement with CBT and that he would expect improvement in her behaviour with this therapy. Dr. Tarazi emphasized the importance of active rehabilitation to prevent further deconditioning.
>
> 243 Despite knowing that she might benefit from treatment, Ms. Mahdi has, to date, not pursued it. In the circumstances, I find that she has failed to act reasonably in an effort to mitigate her damages. Accordingly, I discount the award for general damages by 15%.

[155] In *Barron v. Wine*, 2021 BCSC 711, Madam Justice Douglas reduced the plaintiff's award for damages due to a failure to pursue counselling in a timely manner, after first recommended. The plaintiff had testified that she did not pursue counselling because she had not been to a counsellor before and was not sure if the treatment would be helpful and also due to concerns about the cost. Madam Justice Douglas rejected this argument:

> [102] On all the evidence, I conclude that Ms. Barron would reasonably have known by March 2016 that she might derive some benefit from psychological counselling. In cross-examination, Dr. Anderson admitted that the benefits of timely psychological counselling in the first six to twelve months after the Accident would have been significant. Accordingly, I conclude that Ms. Barron has failed to mitigate her damages. Ms. Barron catastrophises her pain and has developed an entrenched fear of moving which has resulted in weight gain, physical deconditioning, more limited social engagement, and low mood. I conclude that her enhanced perception of pain negatively affects her overall function.
>
> [103] I conclude that Ms. Barron's emotional response to pain, her pain catastrophisation, and her ongoing anxiety, are her most disabling problems. Drs. Wasti and Yeung recommended that Ms. Barron pursue counselling after the Accident. On the evidence of her own psychiatrist expert, Dr. Anderson, she would likely have derived significant benefit from pursuing timely counselling following the Accident. I conclude that Ms. Barron's damages are appropriately discounted by 20% to reflect her failure to mitigate.

[156] In *Repin v. Aam Ventures Ltd*., 2020 BCSC 227 at para. 233, the Court reduced the plaintiff's award for damages by 25% for failing to seek psychological treatment following the recommendation of her doctor. The plaintiff attended one appointment with a psychologist but offered no explanation as to why she had not sought additional treatment.

[157] In my view, there are important parallels between Ms. Sunner's situation and the above decisions. While I am sympathetic to the depression symptoms suffered by Ms. Sunner, I also conclude that she could and should have taken more proactive steps to treat and medicate her symptoms (including the depression), exercise and rehabilitate herself. Her depression alone is not a justification, nor can she lay all of these decisions at the feet of the defendant. In my view, taking into account the foregoing, a 15% reduction to Ms. Sunner's claim should be applied for a failure to mitigate.

V. ORDER

[158] I conclude that Ms. Sunner is entitled to the following award of damages against the defendant:

Head of Damage	**Award**
a. Non-pecuniary damages	$225,000
b. Damages for Loss of Past Income	$168,593
c. Damages for Loss of Future Income	$559,783
d. Costs of Future Care	$135,814
e. Housekeeping Costs	$119,277
SUBTOTAL	$1,208,467
- 25%	$906,350
f. Special Damages	$19,877
TOTAL	**$926,227**

[159] I have reduced the awards for non-pecuniary damages, income loss, costs of future care and housekeeping costs by 25% to account for the pre-existing back condition (10%) and the failure to mitigate (15%).

[160] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

"M. Taylor J."