

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thind v. Bains*,
2023 BCSC 462

Date: 20230324
Docket: M161096
Registry: New Westminster

Between:

Baljit Kaur Thind

Plaintiff

And

**Mukhdeep Singh Bains and
Tropicana Wholesale Ltd.**

Defendants

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

New Westminster, B.C.
May 30-31, June 1-3, 6, 7 and
27, 2022

Written Submissions received from
Defendants:

March 17, 2023

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INTRODUCTION

[1] On May 14, 2012, the plaintiff, Baljit Thind, was injured in a motor vehicle accident (the “Accident”) while driving her Acura MDX on 88th Avenue near 168th Street in Surrey, British Columbia. The defendants, Mukhdeep Singh Bains and Tropicana Wholesale Ltd., have admitted liability.

[2] As a result of the Accident, Mrs. Thind says she suffered both physical, emotional, and psychological injuries. Mrs. Thind says the impact of the Accident has been life-altering both in terms of immediate and ongoing physical injuries and sustained emotional and psychological injuries. She seeks awards for pain, suffering and loss of enjoyment of life, loss of past and future earning capacity, loss of housekeeping capacity, cost of future care and special damages.

[3] The Defendants acknowledge that Mrs. Thind suffered injuries arising from the Accident. However, they take the position that Mrs. Thind’s damages should be limited to reasonable awards for non-pecuniary damages, cost of future care and special damages.

[4] The issues to be decided by the Court are:

- a) What is the nature and extent of the Mrs. Thind’s injuries arising from the Accident given her pre-existing injuries; and
- b) What are the appropriate damages to be awarded to Mrs. Thind.

BACKGROUND

[5] The parties have provided a great deal of material and detailed submissions, both oral and written, on the facts and the law they consider to be relevant. While I have considered all of their material, in these reasons I will not address every argument made by the parties but rather only focus on the facts and law that I consider to be most directly relevant to the decision.

Circumstances Before the Accident

[6] Mrs. Thind grew up in Vancouver. Since childhood, she has been very active playing various sports and enjoying outdoor activities. In her teens, she developed a passion for strength training which has continued to date. Over the years, she received professional guidance on the proper techniques for strength training; maintained a home gym in addition to gym memberships; and worked with a personal fitness trainer. Photographs of her home gyms were tendered into evidence to help illustrate her extensive knowledge of and experience in strength training.

[7] Mrs. Thind continued her active lifestyle after marriage and starting a family. She stressed the importance of physical activity for her children and was active with them in various activities including swimming, hiking and other physical activities.

Work History Prior to Accident

[8] Mrs. Thind testified about her resilience and determination to achieve financial stability following the loss of her father at a young age and watching her mother struggle to raise her and her brothers.

[9] Mrs. Thind began working at a young age and following high school, worked multiple jobs while attending to her post-secondary education at BCIT in the nursing program.

[10] She decided that nursing was not her calling and left the program to enroll in the optician program. She also worked at Lenscrafters while completing the optician program. In 1998, she graduated and immediately began working full time in the field. After working in an eye doctor’s office, she found that optical sales was more aligned with her skills. She enrolled in a sales and marketing program at BCIT to improve her skills.

[11] Mrs. Thind began working for Westgroupe in 2004 in a temporary position in Victoria filling in for a sales representative on maternity leave. Mrs. Thind testified that this was an opportunity to realize her “dream job”. She was eventually offered

the position at Wescan (a division of Westgroupe) as a sales representative for British Columbia and Yukon.

Work at Westgroupe

[12] Mrs. Thind's work as an optical sales representative included making cold calls and setting up appointments with optometrist offices and optical stores. Her work involved attending appointments to sell eye glass frames to the prospective buyers. Mrs. Thind explained that she carried hundreds of frames to these appointments, which were in trays inside large carrying cases weighing between 35 to 40 pounds each. Photographs of these cases were tendered as exhibits.

[13] Mrs. Thind explained that she carried five to six bags to each appointment, which required her to lift and load the bags into her car each morning and the process was repeated for each of the 3-4 appointments she scheduled each day. Mrs. Thind says she tried to use a cart to help carry the bags but they would often fall off.

[14] She described how she did not work out of a formal office but rather worked from home when setting up appointments and referred to her vehicle as her office.

[15] Mrs. Thind was assigned a territory within BC and the Yukon. Locally she travelled within the Lower Mainland and Fraser Valley. She was also required to do overnight trips on average twice a month. She travelled by car to the Okanagan and Vancouver Island once a month and three times a year, to Northern British Columbia including Prince Rupert and Prince George. The longest drive was 17 hours to Prince Rupert. She also flew to the Yukon once a year and then drove to her appointments while there.

[16] Mrs. Thind explained that her road trips were tightly scheduled, with six to seven appointments in the same day so that she could see as many of her clients as possible. She often travelled with colleagues on the road trips for safety reasons and to reduce costs.

[17] Prior to the Accident, she and her colleagues took turns driving. One of those colleagues was her cousin, Sukhjit Heer, who testified at the trial.

[18] Mrs. Thind testified about her professional success at Westgroupe. She increased her sales in her territory from \$127,000 to \$750,000 over seven years. Her success at the company continued when she changed divisions with her territory remaining the same.

[19] Throughout the years, Mrs. Thind has received a number of awards including salesperson of the year and a Rolex watch for having achieved one million dollars in gross sales in her territory.

[20] Mrs. Thind's remuneration was 15% commission on her net sales. She also received a \$1,000 per month car allowance. As well, she received incentive bonus of one percent if her quarterly targets were met. These targets would increase 4–5% each year. Mrs. Thind testified that she fairly consistently met her targets. This was confirmed by her employer. Vacation pay and medical and dental was also provided by her employer.

[21] In the years before the Accident, Mrs. Thind's salary, including her car allowance and bonuses was as follows:

2010 – \$115,941

2011 – \$101,955.11

Pre-Existing Medical Conditions

[22] Prior to the Accident, Mrs. Thind was diagnosed with Hashimoto's Disease which causes her thyroid hormones to fluctuate. In October 2010, she was diagnosed with post- partum depression and was taking Celexa for anxiety and depression (either related to her post-partum or thyroid condition). I find that both of these diagnoses these did not impact her ability to function prior to the Accident.

The Accident

[23] Mrs. Thind's vehicle was rear-ended, while she was stopped eastbound on 88th Ave in Surrey, British Columbia, by the Defendant Mukhdeep Singh Bains. She was able to exit her vehicle unassisted. Emergency vehicles did not attend the scene of the accident.

[24] Immediately following the Accident, Mrs. Thind testified that she felt "shock" and when approached by the Defendant driver she recalled being "frazzled". She did not seek medical attention that day, however as her pain progressed she sought medical attention from her family doctor, Dr. Tommy Yuen.

Circumstances After the Accident

[25] There is no dispute that as a result of the Accident, Mrs. Thind suffered soft tissue injuries to her neck, shoulders, mid back and lower back. She says that the Accident aggravated her pre-existing anxiety and depression.

[26] Specifically, Mrs. Thind says she has pain in the base of her head, neck, left shoulder, upper, mid, and lower back, as well as pain that radiated down her left glute to her left leg. She explained that the majority of her pain complaints relate to the left side of her body.

[27] She testified that her pain and suffering requires greater time to recover as time goes on and that treatments provide temporary and short lived relief.

[28] Mrs. Thind says she does not sleep well at night as she cannot sleep on her left side and pushes herself to get out of bed. She often lays awake at night fearful of what the next day will bring in terms of pain.

[29] When she returns from work, she will often sit in her car before going inside and prepare herself mentally to take care of her responsibilities at home and not display her pain to her children. She has feelings of guilt for feeding her children instant, frozen or take out meals, something she did not do before the Accident.

[30] Because of her injuries, Mrs. Thind says she misses out on playing sports with her children because she is too tired or sore and does not participate in activities with her family including watching movies. Instead, she will often go to bed early. She feels she has let them down.

[31] She submits that the Accident has also limited her ability to work and pursue financial opportunities in her employment and has suffered both loss of past and future earning capacity. Mrs. Thind says she has taken numerous steps to mitigate her loss and continues to do so.

[32] Mrs. Thind says the injuries continue to adversely impact her social and domestic life, and overall quality of life, including the ability to maintain and pursue recreational activities. It has affected how she interacts with her children and husband. The Accident has left her unable to do household chores that she once was able to do without any difficulties.

Proposed Reduction of Work

[33] In 2018, Mrs. Thind was becoming concerned with her ability to continue with her work in the future and how that would affect her financially. She says that she was desperate given that her pain was constant and had not resolved six years after the Accident. She says she consulted with her medical providers, including Dr. Ajaero and Dr. Jaworski.

[34] She raised this with her employer and suggested splitting her territory to reduce her driving, which was causing her pain. Ultimately, she did not go ahead with this because of the financial impact the split would cause was too severe. Mrs. Thind testified that as her pain gets worse, she has resigned to the fact that ultimately, she will need to split her territory sometime in the future.

[35] Mrs. Thind says since the Accident her work capacity is closer to 60 to 70% versus 100% prior to the Accident. Mrs. Thind submits that she “lost a lot of money not being able to work at 100 percent after the Accident”.

[36] She has also expressed fears that she will not be able to catch her mentor and competitor, Ivy Weir's sales performance and but for the accident should have been able to close the gap between the two at some point in the future.

[37] She is fearful about the future as her pain was getting worse, she says she has pushed herself because she needed "to bank my hours". Mrs. Thind stated "I have a very short deadline because my injuries are getting worse".

Post Accident Medical and Other Accidents

[38] Shortly after the Accident, Mrs. Thind underwent perineum repair surgery (related to the birth of her second child). She was off from work for one week.

[39] In August 2019, Mrs. Thind fell at a Dollarama store, resulting in pain her right shoulder and hip. She did not receive any treatment for this.

[40] In October 2021, Mrs. Thind was involved in another motor vehicle accident which resulted in the aggravation of her injuries from the accident, including her back, legs and neck (the "Subsequent Accident").

Mitigation

[41] Mrs. Thind says she attempted to mitigate her loss by following the advice of her family doctors, including her current family doctor, Dr. Henry Ajaero and has complied with all of the medical advice.

[42] She has been referred to a number of medical specialists since her Accident. These include a rheumatologist, who referred Mrs. Thind to a pain specialist Dr. George Jaworski, who she saw eight times over four and a half years.

[43] Dr. Jaworski's treatment of Mrs. Thind was described as a "toolbox" approach, which is a combination of different treatment modalities including massage therapy, physiotherapy, acupuncture, and chiropractic treatments, transcutaneous electrical nerve stimulation, intramuscular stimulation, and trigger point/facet injection.

[44] Mrs. Thind testified that although she followed the toolbox approach, it only alleviated her pains temporarily and allows her to maintain some level of function to work and to complete some of her non-vocational responsibilities.

[45] She has followed through with self-directed exercises and stretching with fitness apps, personal trainer and gym membership at Orange Theory. However, all of these treatments only temporarily mitigate her pain.

[46] Mrs. Thind acknowledged that after the Accident, she has not received any counselling from a psychologist or psychiatrist for her anxiety and depression, which she says were aggravated by the Accident.

Lay Witnesses

Sukhjit Heer

[47] Sukhjit Heer is Mrs. Thind's cousin and work colleague. I found Ms. Heer to be a very credible witness. She was honest and did her best to provide an accurate and fair portrayal of Mrs. Thind's life, before and after the Accident. I find that her evidence generally aligns with Mrs. Thind's. Ms. Heer has a close relationship with Mrs. Thind and says they are best friends. She testified that she has known Mrs. Thind her entire life, perhaps even "better than her husband".

[48] Ms. Heer confirmed Mrs. Thind's long standing commitment to fitness training. She testified that the two of them have been involved in fitness training since they were teenagers and continued throughout into adulthood when they would train 4-5 days a week. Ms. Heer confirmed Mrs. Thind's strong understanding of strength training and the requisite equipment after working out for so many years together and with their personal trainer Karen Pang.

[49] I find Ms. Heer's evidence particularly important because her long-term relationship with Mrs. Thind is not only personal but also professional. Ms. Heer did not advocate for Mrs. Thind but rather provided a fair and accurate portrait of Mrs. Thind's work, before and after the Accident, as she observed it. I found her to be trustworthy and reliable on material points.

[50] Ms. Heer testified that they began working together for Westgroupe in 2011 when Mrs. Thind was able to get Ms. Heer to cover for her while she was on maternity leave. Ms. Heer eventually joined on a permanent basis as a sales representative.

[51] Ms. Heer explained that their work is very similar, other than the different types of products they sell and Mrs. Thind has a larger territory. Given that some of their territories overlap, they will travel together for out of appointments. This helps with reducing their travel costs and for safety reasons. They also shared the driving prior to the Accident.

[52] Ms. Heer confirmed the physical demands of the job, carrying the heavy sample bags that weigh between 25 to 40 pounds each. She confirmed that she does not have any difficulty in placing her bags in and out of the car and that Mrs. Thind did not either prior to the Accident. Mrs. Thind's bags are approximately 5 pounds heavier than Ms. Heer's because Mrs. Thind's products are heavier.

[53] Ms. Heer described Mrs. Thind as someone who works very hard and very long hours given their targets. She said it is difficult to meet targets but Mrs. Thind was able to do so year in year out.

[54] That all changed after the Accident. Ms. Heer explained that after the Accident, she did most of the driving when they travelled to Northern British Columbia. She would observe Mrs. Thind in a lot of pain and discomfort with low energy. Before the Accident, they would go for dinners but after the Accident, they do not do that anymore because Mrs. Thind doesn't have the energy and will often take a long nap to deal with the pain and discomfort. Often, Ms. Heer will assist in taking the bags in and out of the car for Mrs. Thind.

[55] Ms. Heer was also able to confirm the fact that Mrs. Thind viewed another Westgroupe employee, Ivy Weir, as both a mentor and as her competition. She testified that Mrs. Thind hoped to someday catch up to Mrs. Weir's sales performance.

Mike Debono

[56] Mike Debono is the Chief Operating Officer of Westgroupe.

[57] He described Mrs. Thind as a “hard worker” and a “trail blazer” and confirmed that she has received numerous awards and accolades over the years and is second in sales in Canada. Mr. Debono estimated that her 2021 T4 income as between \$240,000 and \$250,000 and that the average income for sales representatives was in the range of \$180,000 to \$200,000.

[58] Mr. Debono confirmed that Westgroupe has employees who are in their 70’s and 60’s including the company’s top salesperson, Ms. Weir, who is 66 years old and has been with the company for 30 years. Ms. Weir’s sales are \$900,000 more than Mrs. Thind despite having a territory with a smaller population.

[59] Having been a sales representative for 15 years before his current position, Mr. Debono confirmed the physical aspect of Mrs. Thind’s job which requires lifting and carrying 40 pound sample bags to appointments and long hours of driving to service her territory.

[60] Mr. Debono testified that he was aware of her injuries from the Accident and that Mrs. Thind had proposed splitting her territory in late 2018 which would allow her to travel less. He told her that an equal split of territory would be required, which would cause a “significant hit” to Mrs. Thind’s income. Mr. Debono said the split never occurred because Mrs. Thind did not want to incur the substantial loss of income with an immediate decrease in income of approximately 40%.

Shelley Logan

[61] Shelley Logan was Mrs. Thind’s regional manager at Westgroupe from 2015 to 2019. Mrs. Logan testified that Mrs. Thind is a valuable employee and had no concerns as to her performance or competence as a sales representative. Mrs. Logan advised that she did not believe that the Mrs. Thind’s job security was ever at risk.

Medical Experts

[62] Mrs. Thind relies on three experts: Dr. Ajaero, general practitioner; Dr. Jaworski, physiatrist; and Dr. Leong, chiropractor. The defendants called one medical expert, Dr. Stephen Helper.

[63] As this juncture, I will note that there was no expert evidence presented on the plaintiff's current or past work capacity.

Dr. Henry Ajaero

[64] Dr. Henry Ajaero has been Mrs. Thind's family physician since 2014, when he took over from her previous physician, Dr. Yuen. He was qualified as an expert witness in family medical practice. He provided a report dated March 6, 2022.

[65] Dr. Ajaero's first appointment with Mrs. Thind more than two years after the Accident and confirmed that her primary complaints from then to present have remained the same: back pain, neck and shoulders pain, and stiffness.

[66] At pg. 2 of this report, Dr. Ajaero notes:

These injuries were caused by the motor vehicle accident she had on May 14, 2012. She did not have similar symptoms prior to the accident. Her clinical symptoms are consistent with injuries sustained in motor vehicle collisions and whiplash injuries. Prior to the motor vehicle accident, she was very healthy, physically active and gainfully employed.

[67] Dr. Ajaero also wrote that Mrs. Thind "suffered a lot of stress, anxiety and depression" and that "because of her neck, shoulder and back pain and stiffness and the 'anxiety and depression' that has resulted from these, her quality of life and effectiveness at work deteriorated."

[68] I note that Dr. Ajaero wrote that Mrs. Thind was not able to work for some weeks. I do not accept this fact, because Mrs. Thind testified that she was off work for only a few days. Dr. Ajaero also stated that Mrs. Thind was prescribed anti-depressants as a result of the Accident. Mrs. Thind testified that she was prescribed anti-depressants for post partum depression, not for anxiety and depression related to the Accident. I prefer Mrs. Thind's evidence on these points.

[69] Dr. Ajaero opined that her prognosis is guarded given that she continues to complain of the same symptoms almost ten years after the Accident. As such, she will continue to need physiotherapy, massage therapy and chiropractic treatments.

[70] Additionally, Dr. Ajaero recommended treatment for Mrs. Thind's depression and anxiety:

With improvement and healing of her physical symptoms, it is my opinion that her anxiety and depression will gradually improve over time, though she will continue to need counselling and antidepressants for many years to come.

[71] Overall, I place minimal weight on Dr. Ajaero's report. It was general in nature and relied on incorrect facts and assumptions, including that Mrs. Thind was not able to work for weeks and that she received antidepressants.

Dr. J.S. Jaworski

[72] Dr. J.S. Jaworski is Mrs. Thind's treating psychiatrist, who has a speciality in sports medicine and rehabilitation. He was qualified as an expert in physical medicine and rehabilitation. He provided a report dated February 18, 2022.

[73] Dr. Jaworski first saw Mrs. Thind in August 2017. In total, he saw Mrs. Thind eight times prior to writing his report. His report was based on his physical examinations of Mrs. Thind on each visit, review of various medical records, and her self-reporting of symptoms and problems.

[74] Dr. Jaworski's initial diagnosis was that Mrs. Thind was suffering from chronic myofascial pain syndrome with likely a component of affective disorder. He opined that there is no quick cure with this type of pain and recommended a toolbox approach for pain management.

[75] He wrote that a toolbox approach involves a combination of interventions including those referred to by Mrs. Thind, such as injections, TENS, exercises involving frequent stretching routines and fitness programs along with passive treatments such as physiotherapy, chiropractic treatments and massage therapy.

[76] Dr. Jaworski opined that Mrs. Thind’s long term prognosis is poor. Given that the pain is still there after 10 years, it is likely not going to go away in the next few months.

[77] At pg. 13 of his report, he notes:

Review of the submitted documentation as well as her own account lead me to the conclusion that she has been suffering from now-chronic Somatic Symptom Disorder with predominant pain, mild to moderate, with features of so-called myofascial pain syndrome. There is no indication that she was suffering from long-standing musculoskeletal pains prior to the MVA in question... the motor vehicle accident led to soft tissue injuries which later triggered the development of Somatic Symptom Disorder/myofascial pains.

[78] The defendants point to Dr. Jaworski’s comments at pg. 13 of his report:

Note is made that in spite of her pain problem she remains reasonably functional and is able to keep up with the demands of her job and her household activities.

[79] In response to the defendants’ expert, Dr. Helper, Dr. Jaworski cautioned against Mrs. Thind being weaned off of passive treatment modalities because they are not meant to cure the problem but rather modify them and have modulating value. He also opined that a more active rehabilitation program would be problematic for Mrs. Thind given that she tried to be more physically active and it caused her more pain.

[80] Dr. Jaworski did not agree that the proposition that the aggravation of Mrs. Thind’s back while driving could be fixed by posture, explaining that while maintaining good posture was a “common sense approach”, people with myofascial pain have difficulty maintaining any one position at any one time.

[81] Dr. Jaworski recommended that Mrs. Thind continue with the treatments under the toolbox approach at a frequency and duration as needed by Mrs. Thind to help manage her pain. He also recommended ongoing surveillance of her emotional well-being and general health, supportive psychotherapy, as well as general fitness through regular exercises.

[82] I found Dr. Jaworski's report and evidence to be of considerable assistance and prefer his opinion over the defendant's expert, Dr. Helper. I will address his report below. However, I find Dr. Jaworski's report to be extremely thorough in part due to his knowledge of Mrs. Thind's day to day activities at work (including the physical strain of carrying boxes and lengthy driving) as well as her familial responsibilities. More importantly, in my view, his observations and assessment of Mrs. Thind over a long period of time provides a fuller picture of her prognosis as opposed to the assessment of Dr. Helper that was completed after one appointment.

Dr. Christopher Leong

[83] Dr. Christopher Leong has been Mrs. Thind's treating chiropractor since October 2016. He was qualified as an expert witness on chiropractic care. He provided a report dated February 28, 2022.

[84] Mrs. Thind sees Dr. Leong on a weekly to bi-weekly basis. He notes in his report that without this treatment, her daily activities become extremely difficult.

[85] He recommended that Mrs. Thind continue with weekly visits for her lifetime (25 years), noting that her condition was quite chronic and that consistent treatment was needed to maintain certain performance and capacity at work, and for daily living. However, in cross-examination, Dr. Leong agreed that he is not an expert on medical disability.

[86] The defendants submit the Court should not give any weight to Dr. Leong's report because it is self serving as it financially benefits him. While I do not entirely agree with the defendants, I find that Dr. Leong's report to be of little assistance.

Dr. Steven Helper

[87] Dr. Steven Helper is a physiatrist with a speciality in sports medicine and rehabilitation. He was qualified as an expert in physical medicine and rehabilitation. Dr. Helper examined Mrs. Thind on January 10, 2022 and prepared a report dated January 25, 2022.

[88] Like Dr. Jaworski, Dr. Helper diagnosed the plaintiff with myofascial pain to explain her left-side dominant neck and shoulder blade, midback, low back and left buttock pain, all of which are attributable to the Accident.

[89] At pg. 12 of his report, Dr. Helper opines that Mrs. Thind is “unlikely to resolve her musculoskeletal issues in the neck and upper back region or in the midback/low back, even with optimal care”. He also opined that Mrs. Thind obtains transient results from each of her therapies but is not experiencing a trend towards resolution. Dr. Helper opines that it is more likely than not that she will achieve improvement in strength and function under the guidance of kinesiologist.

[90] Dr. Helper recommended that Mrs. Thind be referred to a kinesiology to develop a slowly titrated, strength-based fitness routine for both home and gym settings, starting once a week for 12 weeks. He recommends that this can be reduced to once every two weeks for 12 weeks followed by once a month for a year.

[91] I find Dr. Helper’s opinion regarding her vocation of little assistance to the Court because it suggests that Mrs. Thind lacks stoicism or the resolve to improve:

Mrs. Thind has continued in the same job with the same responsibilities. She has regular symptom provocation in the workplace that she needs to tough out. With driving activities, she experiences symptoms in her neck, upper back, midback and low back. The low back is the most sensitive to symptom provocation.

[92] Further, Dr. Helper relied on an incomplete set of factual assumptions, as well as facts different than I have found on the evidence, in formulating his opinion. In cross examination, Dr. Helper acknowledged that he did not inquire with Mrs. Thind about the weight of the sample bags that she has to carry in and out of her car multiple times a days. In my view, this information was significant for him to know given that task is one that causes her a great deal of pain and one she cannot adjust or modify. Further, when the weight of the sample bags was put to him, Dr. Helper stated that his opinion would not change but rather recommended that she use a cart to carry her bags. Dr. Helper’s unwillingness to adapt his opinion when provided with new factual assumptions affects the reliability of his opinion.

[93] Where the opinions of Dr. Jaworski and Dr. Helper diverge, I prefer Dr. Jaworski's opinion on prognosis and treatment options.

[94] Consequently, I am unable to give much weight to Dr. Helper's opinion.

ANALYSIS

Credibility and Reliability

[95] In making my findings, I must assess the credibility and reliability of the plaintiff and the other witnesses.

[96] Credibility and reliability are two different, but related, considerations. Credibility focuses on a witness's veracity, while reliability is concerned with the accuracy of the witness's testimony, with consideration of the witness's ability to accurately observe, recall, and recount events in issue: *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[97] In assessing credibility, factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), provide guidance:

[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.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *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 (*Faryna* at para. 356).

[98] Where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the Court must be exceedingly careful in

assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.); see also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 24–25.

[99] Mrs. Thind testified over a two days. While she became emotional at times, I find that this does not affect her credibility. She was cross-examined extensively and was not argumentative or defensive and did not exaggerate her injuries. Her answers were straightforward. She had a good recollection of events. Overall, I found Mrs. Thind to be a credible and reliable witness.

[100] As well, I find that the other lay witnesses were credible and provided reliable evidence. In particular, I found Ms. Heer to be a very credible witness whose evidence I accept without hesitation.

[101] I find the expert witnesses to be generally credible and reliable and where I have issues with the aspects of their opinions, I have addressed it above and below.

Findings regarding the Plaintiff's Accident-related Injuries and Health

[102] There is no dispute that Mrs. Thind suffered injuries from the Accident. Ten years have passed and she continues to suffer.

[103] Based on all of the evidence of the witnesses including experts, I find that Mrs. Thind did not have any significant or relevant pre-existing medical issues prior to the Accident other than anxiety and depression resulting from post-partum for which she had under control through physical exercise and medications. I also accept that she did not suffer from long-standing musculoskeletal pains prior to the Accident.

[104] I accept that Mrs. Thind suffered soft tissue injuries which later triggered the development of chronic Somatic Symptom Disorder with predominant pain, mild to moderate, and features of myofascial pain syndrome. Her prognosis is poor and will likely persist for the foreseeable future.

[105] The chronic pain she has been living with has had a negative impact on her physical and mental health which has resulted in pain and suffering, loss of

enjoyment of life; loss of past and future income capacity, housekeeping capacity and costs associated to her future care. I find, with the exception of Mrs. Thind's complaints relating to the aggravation of her anxiety and depression, that she has followed through with all medical advice, including utilizing a toolbox approach and has acted reasonably and thereby mitigated her losses.

[106] In spite of her pain she has been able to function reasonably and able to keep up with the demands of her job and household activities. However, I accept that she is not able to work to her full capacity and is at 60-70% of what she was able to do prior to the Accident and will continue to do so.

ASSESSMENT OF DAMAGES

Mitigation

[107] A plaintiff is required to take reasonable steps to reduce her damages, including by taking recommended treatment. Whether a plaintiff acted reasonably is a question of fact: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201–202.

[108] A reduction is appropriate where the defendant is able to satisfy the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618:

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

[109] It is a subjective/objective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56. Recently, in *Huag v. Funk*, 2023 BCCA 110 at paras. 72–76, the Court of Appeal confirmed that the onus of proof upon the defendant for the second part of the *Chiu* test is a balance of probabilities.

Non-pecuniary Damages

[110] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The award should be fair to all parties and fairness requires reviewing comparable cases. However, each case must be assessed on its own unique set of circumstances: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[111] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined a non-exhaustive list of factors to consider in 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...

[112] Stoicism is a factor that should not penalize the plaintiff: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54–55.

[113] Mrs. Thind is now 46 years old. At the time of the Accident, she was 36 years old, physically active, married with two young children, employed and achieved enormous success in what she describes as “her dream job” with plans to succeed even further in her chosen profession. There is no question in my mind that she has worked extremely hard to achieve professional success and continues to do so at the expense of chronic pain arising from the Accident.

[114] Mrs. Thind says the Accident stopped this “trajectory”. Her professional and personal life has changed.

[115] I am satisfied that the Accident has caused significant changes to Mrs. Thind’s life both on a personal and professional level. The evidence from her and others demonstrates that her quality of life has deteriorated mainly due to the ongoing and chronic pain she suffers as a result of the Accident.

[116] From the time she was a teenager to the time of the Accident, she enjoyed physical activities, including in strength training. She had a busy active life with her family and even though Mrs. Thind had enjoyed tremendous success both before and after the Accident, she had not reached her full capacity. The Accident changed her into someone who comes home exhausted, short on patience, in pain and struggles to do the activities she once did ten years ago.

[117] Mrs. Thind argues that she is stoic and continues to work full time and advance in her profession, despite experiencing ongoing and persistent pain. She externally portrays herself as a strong person but below the surface, she admits “I know I can’t sustain it and feel stuck.”

[118] Mrs. Thind also submits that the Accident aggravated her pre-existing anxiety and depression.

[119] I accept that Mrs. Thind is only able to function at 60-70% capacity to what she was able to do prior the Accident.

[120] Mrs. Thind seeks an award of \$150,000 under the head of non-pecuniary damages relying on the following cases, which she says are comparable cases:

- *McMullin v. Trelenberg*, 2020 BCSC 49 – (awarded \$150,000)
- *Hollyer v. Gaston*, 2016 BCSC 1401 – (awarded \$125,000)
- *Clayton v. Barefoot*, 2018 BCSC 239 – (awarded \$130,000)
- *Ferguson v. Watt*, 2018 BCSC 1587 – (awarded \$140,000)
- *Redmond v. Krider*, 2015 BCSC 178 – (awarded \$150,000)
- *Cumpf v. Barbuta*, 2014 BCSC 1898 – (awarded \$150,000)
- *Wheeler v. Wilson*, 2021 BCSC 441 – (awarded \$100,000)

[121] The defendants agree that Mrs. Thind suffered left-side dominant myofascial pain in her neck, shoulder, midback, low back and left buttock and that her pain is unlikely to resolve. However, they say the experts disagree on whether Mrs. Thind can achieve further partial improvements through an improvement in her rehabilitation approach.

[122] The defendants say that the appropriate range for non-pecuniary damages are \$70,000 to \$100,000. The defendants submit that the claim for housekeeping capacity should be included in this heads of damage.

[123] In terms of Mrs. Thind's claim for anxiety and depression caused by the Accident, the defendants submit that Mrs. Thind did not seek any counselling and a reduction should be made for her failure to mitigate her damages. The defendants did not propose any specific percentage.

[124] The defendants rely on the following cases:

- *Mills v. Graham*, 2019 BCSC 641 – (awarded \$70,000)
- *Abraha v. Suri*, 2019 BCSC 1855 – (awarded \$70,000 and \$15,000 for loss of housekeeping capacity)
- *Chen v. Ma*, 2021 BCSC 645 – (awarded \$75,000)
- *France v. Natt*, 2009 BCSC 1147 – (awarded \$80,000, reduced by 25% for anxiety attacks unrelated to her injuries)
- *Matthews v. Noble*, 2020 BCSC 1499 – (awarded \$80,000)
- *Khakh v. Josol*, 2020 BCSC 286 – (awarded \$90,000 and \$30,000 for loss of housekeeping capacity)
- *Tourand v. Charette*, 2015 BCSC 2165 – (awarded \$100,000)

[125] The cases cited by Mrs. Thind are generally more comparable than those relied on by the defendants because in Mrs. Thind's situation, the injuries and the impact of the Accident on her enjoyment of life are more significant and her symptoms have not fully resolved.

[126] Although each case is unique, I find that Mrs. Thind's personal experiences in dealing with her injuries and their consequences is comparable to the facts in *Ferguson*. In that case, Justice Marzari awarded \$140,000 having found that the plaintiff's injuries resulted in chronic, persistent and disabling pain that continued to

impact her and the life that she had ahead of her is not likely to be as enjoyable as a result of the Accident.

[127] Just as Justice Marzari concluded, I am also of the view that despite the plaintiff's stoicism and perseverance in working through her pain has undoubtedly reduced her financial losses, it does not suggest that Mrs. Thind is in any less pain or emotionally affected by the loss. Ms. Ferguson was also successful in her career, receiving promotions, but she was not able to continue in her preferred role due to her injuries. Although Mrs. Thind has continued in the same role, she has not been able to achieve the success she once did and this has had an effect on her identity as a successful and capable career-person.

[128] In terms of whether Mrs. Thind has mitigated her damages by not attending counselling for the anxiety and depression she says was aggravated by the Accident, I agree that Mrs. Thind did not mitigate her losses as it related to the aggravation of anxiety and depression.

[129] Having regard to all the circumstances, I am satisfied that Mrs. Thind acted unreasonably in eschewing the recommendations of Drs. Ajaero and Jaworski to attend counselling or psychotherapy to address her symptoms of anxiety and depression. Mrs. Thind was aware of her symptoms of anxiety and depression and reported them to her physicians. She was diligent in attending other treatments under the toolbox approach, but unreasonably did not attend therapies for her mental health. In her testimony, Mrs. Thind was candid that she had not attended this recommended treatment. A reasonable plaintiff, in the shoes of Mrs. Thind, would have attended treatment recommended by two of her long-term physicians.

[130] I find that, had Mrs. Thind participated in counselling or psychotherapy, her mental health injuries would have been reduced by that treatment. The reports of Drs. Ajaero and Jaworski both included recommendations for counselling or psychotherapy to alleviate Mrs. Thind's symptoms of anxiety and depression and her condition overall to help her better manage her pain.

[131] Accordingly, the award must take that into account and a reduction is necessary.

[132] Mrs. Thind is entitled to reasonable damages for her pain and suffering and loss of enjoyment of life. Given the totality of the circumstances and taking into account all of the authorities referred to and the factors in *Stapley*, I am satisfied that an award of \$140,00 is fair and reasonable to both parties but a reduction of 10% must be applied to account for her failure to mitigate her damages as it relates to the aggravation of her anxiety and depression. Accordingly, the award will be \$126,000.

Loss of Housekeeping Capacity

[133] Mrs. Thind submits that an award of \$49,400 is appropriate for future loss of housekeeping capacity.

[134] Depending upon the circumstances, a claim for loss of housekeeping capacity may be assessed as a separate pecuniary head of damages or may be considered as part of a claim for non-pecuniary damages: *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34.

[135] Mrs. Thind testified that the Accident has taken away her independence and feels like the housework never ends.

[136] However, Mrs. Thind agreed that her teenage sons help out with some of the chores, such as laundry and garbage and she would expect them to help around the house regardless of the Accident.

[137] The defendants argue that loss of housekeeping capacity should be included in the award for non-pecuniary damages. They argue that no expert evidence was led to support that Mrs. Thind is unable to carry out her household chores after the Accident. As well, the defendants point to Dr. Helper's comments that he does not expect her to require regular housework support.

[138] The defendants also point to Dr. Jaworski's report wherein he writes that Mrs. Thind has been able to keep up with the demands of her household activities. However, in my view, that does not mean that she does the work without any pain.

[139] While I appreciate that no expert report was provided to support her claim for loss of housekeeping capacity, I accept Mrs. Thind's evidence that she is partially restricted or fully restricted from doing housework that was able to do with ease prior to the Accident and now must rely on members of her household for assistance. This is consistent with someone who was active as she was before the Accident. I also accept that her ongoing pain is aggravated when she does housework and as a result no longer cares about the condition of her house.

[140] I find two similar cases relied on by Mrs. Thind for the proposition a separate pecuniary damages award under this category is appropriate to be helpful: *McMullin v. Trelenberg*, 2020 BCSC 49 at para. 153 and *Carmody v. Druex*, 2022 BCSC 891 at para. 100.

[141] Accordingly, I award \$30,000 for loss of housekeeping capacity.

Loss of Earning Capacity

[142] Mrs. Thind seeks an award for loss of earning capacity, both past and future. She submits that an award of \$50,000 is appropriate for past loss of earning capacity. As well, she submits based on a capital asset approach that an award of \$500,000 is appropriate for future loss of earning capacity.

[143] The defendants submit that no award should be made for either heads of damages. In the alternative, for future loss of earning capacity, they agree that a capital asset approach is appropriate and that the range of such an award should be 10% of her annual earnings to one year's salary (based on an average of her last three years' earnings). They do not propose an alternative argument for past loss of earning capacity.

Past Income Loss

[144] A plaintiff is entitled to loss of the value of work that a plaintiff would have – not could have – performed but for the injuries sustained as a result of the defendants conduct: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[145] A plaintiff may only recover damages for her past net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98.

[146] Projecting what a plaintiff would have earned in the past had they not been injured is a hypothetical exercise. Establishing a real and substantial possibility means that any hypothetical loss must be shown to be realistic considering the plaintiff's likely circumstances without the injury. The plaintiff's claim must have an evidentiary foundation: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34, 36.

[147] If the plaintiff establishes a real and substantial possibility, the Court must then assess the relative likelihood of the hypothetical event and adjust the damages accordingly: *Gao* at para. 37.

[148] A fair and reasonable award is an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.

[149] Mrs. Thind submits that the award she seeks is appropriate because she continues to work in the same position with the chronic pain in her back, neck and shoulders. She argues that she has been stoic and works through her pain. Mrs. Thind explained she is paid on commission based on her sales and bonuses are contingent on making targets that are increased each year.

[150] However, despite meeting her sales targets, since the Accident she does not work as many hours as she could. Mrs. Thind submits that she does not have the same energy in making cold calls which are essential to growing her accounts and meeting her sales targets.

[151] Mrs. Thind's income has consistently increased year after year since the Accident with significant increases beginning in 2017. Her income in the years after the Accident to trial is as follows:

2012	\$124,202.75
2013	\$143,940.52
2014	\$145,636.73
2015	\$158,930.65
2016	\$124,656.05
2017	\$186,376.93
2018	\$205,765
2019	\$197,540
2020	\$193,282
2021	\$246,669

[152] Mrs. Thind says her employer and colleagues praised her for her strong work ethic and is described as a hard worker and a trailblazer. She submits the Court should follow the reasoning of Justice Armstrong in *Tang v. Duong*, 2020 BCSC 85 at para. 24:

Despite carrying the burden of chronic pain and its effects, including sleep disturbance and some anxiety, his work was described by Mr. Trainer as being of high quality. Nevertheless, had he not been injured I have no doubt that Mr. Tang's work performance would have been better still. I find that his bonus income would likely have been slightly higher had he not been injured.

[153] Mrs. Thind submits that similar to *Tang*, but for her injuries, she would have earned higher income based on earning higher commissions after the Accident to the trial.

[154] The defendants argue that Mrs. Thind did not take any time off work but for a period of 1-2 weeks where she did not make any calls to increase her clientele. They also point out that her commission earnings have steadily increased each year from 2011, and has been able to meet her sales target which increases annually. However, Mrs. Thind argues that her commission would have been higher than what she was actually able to earn because of the effects of the injuries from the Accident.

[155] I accept that Mrs. Thind's productivity was affected because of the chronic pain she has suffered as a result of the Accident. I am satisfied that there is a real and substantial possibility that Mrs. Thind would have earned more pre-trial income but for the Accident.

[156] While there is no evidence to clearly establish how much additional commission Mrs. Thind would have earned, I accept that this is not a mathematical calculation. Taking into account all of the evidence, I am of the view that an award of \$30,000 for past loss of earning capacity is fair and reasonable.

[157] Section 98 of the *Insurance (Vehicle) Act* requires that tax must be deducted to the past loss of earning capacity award. The parties are at liberty to return within 30 days of the date of this judgment if they are not able to come to agreement on the appropriate deduction.

Future Income Loss

[158] Assessing a parties' loss of future earning capacity involves comparing a plaintiff's likely future, had the accident not happened, to their future post-accident. This assessment will depend on the type and severity of the plaintiff's injuries, and the nature of the anticipated employment in issue but should not be a mathematical exercise: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7 [*Ploskon*].

[159] As stated in *Rab* at para. 47, a tripartite test should be used to assess damages for loss of future earning capacity. I have found Justice Burke's summary in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182, of the three steps most helpful and will reproduce it below:

- a) First, does the evidence disclose a potential future event that could result in a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues which may affect their ability to maintain gainful employment or remuneration.
- b) Second, does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss? Having established that the plaintiff may suffer from long-term health issues which could affect their earning potential at the first stage, the trial judge must assess the likelihood that the plaintiff's loss of capacity will affect their ability to earn income.

- c) Third, having established that there is a real and substantial likelihood that the plaintiff will suffer from ongoing loss of capacity, and that this loss of capacity will result in a loss of income, the trial judge must assess this possible future loss. It is at this stage that the trial judge should consider the basis for compensation (*i.e.*, capital versus earnings approach), contingencies, and the relative likelihood of the loss occurring. The damages award should be reduced based on the relative likelihood that the potential future would not occur.

[160] In *Ploskon*, the Court discussed in detail the capital assets versus earnings approach:

[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.

[161] Finally, the Court must also ensure that the award is fair and reasonable. The assessment is a matter of judgment, not a mathematical calculation.

[162] Mrs. Thind submits that the evidence discloses a potential future event that could lead to a loss of capacity. She submits that she suffers from ongoing symptoms that could have an effect on her ability to earn income.

[163] Mrs. Thind submits the evidence supports a real and substantial possibility that this potential loss of capacity will cause a pecuniary loss. She says the chronic pain has rendered her less capable overall from earning income from all types of employment, that she is less marketable or attractive as an employee to potential employers and less valuable to herself as a person capable of earning income in a competitive market.

[164] The defendants submit that no award of damages should be made under this head as the plaintiff has consistently increased her annual earnings since the Accident; has been able to continue to meet her increased sales targets year after year; did not contemplate the change in territory until 2018, six years post-Accident; and no medical evidence was presented to indicate she has a permanent disability or will be unable to work in her chosen vocation.

[165] They also submit that her employer (through testimony of Mr. DeBono and Ms. Logan) values her as an employee and her job security was never at issue, nor did they have concerns regarding her work performance or competence.

[166] In the alternative, if the Court finds there is a real and substantial possibility that Mrs. Thind will suffer a pecuniary loss, the defendants submit that the award should be based on a capital asset approach and that the range of such an award would be 10 percent of her annual earnings to one year's salary (based on an average of her last three years' earnings).

Step 1: Does the evidence disclose a potential future event that could lead to a loss of capacity?

[167] I have found that Mrs. Thind suffered soft tissue injuries which later triggered the development of chronic Somatic Symptom Disorder. As such, I find that Mrs. Thind has established a potential future event that could lead to a loss of capacity.

[168] The evidence demonstrates that the injuries she sustained in the Accident has caused her to suffer long term physical health issues affecting her functional capacity in her employment. I find they will continue to do so in the future given the physically demanding aspects of her job. The chronic nature of her condition limits her ability to earn to her full capacity that she would have been able to do but for the Accident.

Step 2: Does the evidence demonstrate that there is a real and substantial possibility that the future event in question will cause a pecuniary loss?

[169] Mrs. Thind submits that she has established a real and substantial possibility that this loss of capacity due to the Accident will cause a pecuniary loss.

[170] Mrs. Thind testified that her pain is becoming worse over time. She says it is supported by Dr. Jaworski's objective findings that Mrs. Thind will continue to suffer from ongoing symptoms as she has the past ten years. Dr. Jaworski noted that the chronic nature of her pain would make her "susceptible to more suffering" and that "more pain may translate to vocational repercussions".

[171] The physical nature of her work was confirmed by her employer Mr. DeBono and her cousin and colleague, Ms. Heer. Mrs. Thind, Ms. Heer, and Mr. Debono testified about the physical nature of Mrs. Thind's job at Westgroupe, which includes long days of driving to various locations and physically carrying heavy cases of samples.

[172] I have accepted that prior to the Accident Mrs. Thind was a healthy, active, career driven individual. She has worked hard to land her "dream job" where she was able to apply her sales skills with enormous success. Even after the birth of her children, she was focused on working hard and demonstrating her value to her employer by increasing sales in her territory in short order. She was ambitious and her employer recognized her as a trailblazer who quickly rose to second in sales in Canada receiving numerous awards and accolades.

[173] Prior to the Accident, she had no difficulties with the physical demands of her job, including the long drives to service her territory, the daily lifting of multiple heavy bags in and out of her car and working long hours to increase her client base.

[174] Mrs. Thind's injuries are aggravated by the physical demands in her current job. There does not appear to be any kind of accommodation for her injuries by her employer. While Mrs. Thind receives assistance from Ms. Heer in lifting her bags in and out of the car when they are on road trips together, Mrs. Thind does not have

such assistance the majority of the time when she is servicing clients on her own in the Lower Mainland and Fraser Valley.

[175] While Mrs. Thind's income has consistently increased each year since the Accident to trial, I also accept that she had the desire, motivation and intention to earn more but for the Accident. This is supported by the fact that her competitor, Ms. Weir, earned substantially more in a territory with a smaller population. Mrs. Thind's career intentions and aspirations are no longer realistic for her. According to Dr. Jaworski, her long-term prognosis is poor and her conditions will likely get worse with age.

[176] Mrs. Thind is now 46 years old and faces a number of challenges until retirement. She attempted to reduce her driving by proposing a split in her territory. However, that would have resulted in an immediate 40% reduction in her income. Mrs. Thind testified that she will eventually have to resign to splitting her territory as she does not believe she can sustain the daily pain for much longer. There is a real and substantial possibility that she will be incapable of continuing at her current pace or be able to surpass Ms. Weir's sales.

[177] I find there is a real and substantial possibility that the injuries she suffered have rendered her less capable from earning a higher income in her current employment causing a pecuniary loss.

[178] Mrs. Thind has worked fulltime, consistently and without any significant time off in her current employment. However, I do not find that this is an indication that she will be able to continue to do this in the future. She has struggled significantly and it is only through the various treatments that she has been able to function at not 100% but rather at 60-70% pre-Accident capacity.

[179] I find that there is a real and substantial possibility she will be incapable of working consistently fulltime as a sales representative until retirement age. She will very likely have to divide her territory to reduce the long out of town road trips and

daily heavy lifting of bags multiple times a day. She may even have to switch to a less demanding career such as an optician.

[180] Even if Mrs. Thind were to leave Westgroupe, I am satisfied on the evidence that Mrs. Thind is less marketable or attractive as an employee to potential employers as a result of her injuries and will not be able compete for similar positions given her limited ability to take on the demands of travelling long distances or lifting heavy bags.

[181] Mrs. Thind is also less valuable to herself as a person capable of earning income in a competitive labour environment, especially in the small optical industry where there are likely few accommodations for someone with Mrs. Thind's injuries. As such, I find there is a real and substantial possibility this loss of capacity will cause a pecuniary loss in the future.

Step 3: Assessing the value of the future loss

[182] I must now determine the true future pecuniary loss Mrs. Thind has suffered as a result of the accident.

[183] Both parties agree Mrs. Thind's loss should be valued using the capital asset approach. I agree. Where losses are difficult to determine, the capital asset approach is best: *Rab* at para 30.

[184] In my view, the capital asset approach is preferable because Mrs. Thind's loss is not measurable by comparing pre- and post-Accident income but her capacity to work has diminished. While she continues to suffer from her injuries, her income at trial is similar or higher than what it was at the time of the Accident.

[185] In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871, the Court considered the capital asset approach and the resulting calculation of loss:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years

of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.

[186] Subsequent cases have relied on this passage to establish the 'Pallos approach', applicable where the plaintiff continues to earn income at or close to their pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future, resulting in a loss that is difficult to calculate with any mathematical certainty: *Rab* at para. 72. Under this approach, the typical award is one to two years' income: see *Daleh v. Schroeder*, 2019 BCSC 1179 at para. 146; *Kania v. Evans*, 2021 BCSC 797 at para. 91.

[187] I have also considered that Mrs. Thind suffered from anxiety and depression that was further aggravated by the Accident but I have found that she did not mitigate her losses in respect of these. These specific health issues will have an impact on her future and I have factored that into my assessment.

[188] Taking into account Mrs. Thind's age and her health after the Accident, her employment background and injuries, I conclude that one year of Mrs. Thind's salary (based on an average of her last three years' earnings) is fair and reasonable compensation for her diminished income earning capacity.

[189] Accordingly, I award \$212,000 in future loss of earning capacity.

Cost of Future Care

[190] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair summarized the principles that apply to the assessment of future cost of care claims:

[107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability

and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[191] The purpose of an award for cost of future care is to restore the injured party to the position they would have been in, but for the accident. Assessing future care costs is not a precise accounting exercise, rather, it is a matter of prediction: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. A common sense approach must be taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

[192] Mrs. Thind submits that without the current toolbox approach she has undertaken to manage her pain, she would not be able to function in life. She testified that she attends for treatments before road trips and afterwards to deal with the pain. She explained that the various treatments in her toolbox helps brings the pain down to a level her body can handle. Mrs. Thind does not make a claim for any medications.

[193] The defendants do not disagree that Mrs. Thind requires the future care she has asked the Court to award. Rather, they say the Court should prefer Dr. Helper's recommendations of kinesiology treatments and contingency of six to eight treatments per year of two passive modalities (massage, physiotherapy, chiropractic, or acupuncture) "as a safety net for flare-ups as she tries to increase her participation in strength-based training". The defendants also do not take issue that the contingency be supported till age 65.

[194] I accept Dr. Jaworski's warning against weaning Mrs. Thind off of passive treatment modalities and that a toolbox method is more suitable for Mrs. Thind's situation. I also accept Dr. Jaworski's comments about the benefits of a kinesiology program ten years after an accident and that when a patient tries to be physically active to that extent it can lead to more pain, which is counterproductive.

[195] Dr. Jaworski testified that he was up to date on current literature in this area and was not aware of any good academic literature advancing the proposition that chronic somatic symptoms could be improved with the type of program recommended by Dr. Helper.

[196] I also find that given Mrs. Thind’s extensive knowledge of fitness training, a kinesiologist may not be necessary. In my view, what is more important is her having access to treatment that helps relieve her ongoing pain to allow her to live a life as close as possible to the one prior to the Accident.

[197] Mrs. Thind will continue to experience pain for the foreseeable future and the toolbox approach as recommended by Dr. Jaworski is the best way to manage her chronic pain.

[198] Accordingly, I calculate \$112,176 for cost of future care, based on the following:

<i>Type of treatment</i>	<i>Frequency per month</i>	<i>Cost per treatment</i>	<i>Cost per year</i>
Chiropractic care	2	\$ 66.00	\$ 1,584.00
Physiotherapy	1	\$ 120.00	\$ 1,440.00
Acupuncture	1	\$ 120.00	\$ 1,440.00
Massage	1	\$ 120.00	\$ 1,440.00
			\$ 5,904.00
			Total per year
			\$ 112,176.00
			...to age 65

[199] I must calculate the present value of the award for cost of future care, which will cover a duration of 19 years. In doing so, I will apply the set rate of interest of 2% pursuant to s. 56(2)(b) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and the *Law and Equity Regulation*, B.C. Reg. 352/81. As such, the present value of the award is \$92,565.86.

Special Damages

[200] In *Redl v. Sellin*, 2013 BCSC 581, the Court discussed a plaintiff’s claim for special damages:

[55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness.

[201] The Defendants accept Mrs. Thind's special damages that are documented and relate to her injuries and treatments for the Accident.

[202] However, they dispute those claims that relate to the Subsequent Accident from October 2021. They point to Dr. Ajaero's clinical records that indicate he referred Mrs. Thind to physiotherapy and massage therapy on October 15, 2021.

[203] The defendants say starting November 8, 2021, Mrs. Thind attended 19 treatments including acupuncture, physiotherapy and massage therapy using the billing number associated to the Subsequent Accident.

[204] The defendants submit the total amount is \$133.54. Accordingly, that amount will be deducted from the special damages award sought by Mrs. Thind.

[205] The defendants also dispute Mrs. Thind's claim for expenses incurred for gym membership and personal training. They submit that Mrs. Thind testified that she would have incurred these expenses regardless of the Accident. I note that Mrs. Thind had a gym membership and received personal training prior to the Accident. I agree with the defendants on this point. Mrs. Thind's claim for gym membership and personal training in the amount of \$945.53 is denied.

[206] Special damages are assessed at \$13,806.55.

CONCLUSION/ORDERS

[207] In summary, I award the following damages:

Non-pecuniary loss	\$126,000
Loss of past earning capacity	\$30,000

Loss of future earning capacity	\$212,000
Loss of Housekeeping	\$30,000
Cost of Future Care	\$92,565.86
Special Damages	\$13,806.55
Total	\$504,372.41

COSTS

[208] As the successful party, Mrs. Thind is presumptively entitled to her costs from the defendants, at scale B. If either party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

“Girn J.”