IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Buttar v. Hergott,*
2023 BCSC 2043

Date: 20231122
Docket: M221502
Registry: New Westminster

Between:

Parmjeet Kaur Buttar

Plaintiff

And

Ronald Hergott

Defendant

- and -

Docket: M239114
Registry: New Westminster

Between:

Parmjeet Kaur Buttar

Plaintiff

And

Brandon Lee Reid and Stephen Alexander Reid

Defendant

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff: B. Yu

Counsel for the Defendants: K. Powar
J. Dassan, Articled Student

Place and Dates of Trial:	New Westminster, B.C. October 3-6; 10, 11, 2023
Place and Date of Judgment:	New Westminster, B.C. November 22, 2023

Table of Contents

I. INTRODUCTION AND ISSUES

[1] This is an assessment of damages for injuries to the plaintiff arising from two motor vehicle accidents. The plaintiff's two actions were tried together. The defendants admit liability.

[2] The plaintiff was involved in four accidents that are material to this case:

1. March 17, 2018, at the intersection of Glover Road and Logan Avenue in Langley ("MVA #1");
2. November 20, 2018, at the intersection of 88th Avenue and Fraser Highway, Surrey ("MVA #2");
3. October 17, 2019, also at the intersection of Fraser Highway and 88th Avenue, Surrey ("MVA #3"); and
4. January 4, 2020, at the intersection of Fraser Highway and 192nd Street in Langley ("MVA #4").

[3] As indicated above, in these reasons I will generally refer to these accidents as MVAs #1 to #4. These two legal actions concern injuries she alleges she suffered arising from MVAs #1 and #3. These are the Hergott action and the Reid actions, respectively. The plaintiff was at fault for causing MVA #2, and so she makes no claim in respect of that accident. She says that the injuries she suffered in MVAs #3 and #4 were minor, and are indivisible from her injuries sustained in MVAs #1 and #3. She says her injuries are very largely attributable to MVA#1.

[4] The defendants were jointly represented at trial. Defence counsel advised me that there is no practical need to allocate assessed damages as between the two actions.

[5] The plaintiff submits that damages should be assessed at $1,114,000–$1,139,000, approximately.

[6] The defendants challenge causation of most of the injuries that the plaintiff claims, and allege that she failed to mitigate her loss. They argue that the plaintiff suffered only soft tissue injuries in the two accidents, which had only minimal effects upon her health, ability to function, and enjoyment of life. The defendants argue that damages should be assessed at $40,000–$60,000, for non-pecuniary loss only, with a reduction of 25% for failure to mitigate loss. They acknowledge special damages of $2,664.60.

II. BACKGROUND

A. The Plaintiff

[7] The plaintiff is 46 years of age. She was 40 years of age at the time of MVA #1. She was born and raised in India. She immigrated to Canada in March 2006.

[8] The plaintiff testified through a Punjabi interpreter. Her responses were sometimes partly in English. She acknowledged that she is more comfortable speaking in her first language, Punjabi, rather than English.

[9] In India, she obtained a Bachelor of Arts degree in computers, and a Bachelor of Computer Applications degree (BCA) as well as a Masters degree in history.

[10] In 2008, in Canada, she studied to become a Medical Office Assistant (MOA), in a nine-month part-time program at a local community college in Surrey. She began working as an MOA in 2009, in the medical office of Dr. Balbir Bhatti.

[11] She was married March 28, 2009. She resides in Surrey together with her husband, and her mother-in-law. She and her husband have two sons, born August 2012 (11 years of age currently) and May 2014 (nine years of age, currently).

[12] She worked in several doctor's offices from 2009 to August 2012, when her first child was born. She then went on maternity leave with the birth of her first child. The interruption in her work was extended due to the birth of her second child in May 2014. She returned to work as an MOA in 2015. During her leave, she briefly worked as a receptionist, probably sometime in 2014. She also worked at a pizza restaurant

at some point in 2015, prior to resuming her work as an MOA. She worked as an MOA with Dr. Moosa in 2015 and 2016.

[13] In 2016, her husband acquired a pizza business, called Hot Spot Pizza. The business was incorporated, and her husband was the sole shareholder. The plaintiff left her work as an MOA with Dr. Moosa, and began working in the pizza business sometime in 2016.

[14] As of March 17, 2018, the plaintiff was working full time (eight hours per day, five days per week) in the pizza business.

B. The Accidents

1. MVA #1 – March 17, 2018

[15] MVA #1 occurred at the intersection of Logan Avenue and Glover Road in Langley. The plaintiff was driving a compact SUV, painted or covered in Hot Spot Pizza signage, and was proceeding on her way to a Safeway store to pick up restaurant supplies, which she was planning to deliver to the Hot Spot pizza premises. She was proceeding straight through the intersection on a green light when her vehicle was struck by the defendant's vehicle, which was attempting a left hand turn. She testified that her head hit the vehicle headrest. The air bags deployed, causing a lot of “smoke”, which frightened her. She exited the vehicle. She noticed her body was shaking a great deal. She sat down on the ground. Police, ambulance, and fire attended. She declined the suggestion of the ambulance attendants that she go with them to the hospital. She went instead to the pizza store. The accident occurred about 1:40 p.m. Later in the day she felt pain in her neck and back, and was shaking again. She attended Langley Hospital.

[16] At trial she denied losing consciousness at the time of the collision; however, she told Dr. Misri that she “blanked out for a few seconds", and that “the next thing she remembered when she came to is being in a complete state of shock". In cross-examination, she confirmed that she said this to Dr. Misri. Dr. Misri also confirmed

that she was told this by the plaintiff. In cross-examination the plaintiff distinguished between a “blackout” and a loss of consciousness.

[17] In her evidence, the plaintiff testified to a long list of injuries resulting from MVA #1, which she described as a life-changing accident for her. She testified that she was totally fine, prior to the accident. She testified to:

1. Neck pain — particularly on the left side. The pain is sometimes unbearable, sometimes less so. The pain goes into her arm at times, and down into her fingers of her left hand. The pain is worse after work as an MOA, and lessened if she exercises and does stretches. She has a lot of pain at night. The pain interferes with her sleep. The pain is in the “unbearable" state three or four times per week. Any activities at home or activities utilizing her left hand increase her neck pain;

2. Low back pain — left side, lower back. Sometimes with pain radiating into her left leg. It is worse in the morning, when she arises from bed. It is aggravated by pulling or lifting activities. She avoids bending.

3. Left shoulder pain — she had shoulder pain prior to MVA #1, when her second son was born in 2014. However she states that her pain in her left shoulder was minor prior to the accident. She saw an orthopedic surgeon in White Rock, Dr. Smit, who suggested injections into the shoulder. She declined. The MVA made her shoulder pain worse, and caused her neck pain, she states. Previously, her shoulder pain did not go into her arm. Previously, her shoulder pain was not seriously affecting her ability to function. Now, she has to ask her children to help lift grocery bags or other items. If she has to lift anything heavy, her arm starts to shake. The pain is daily, and gets worse at night.

4. Headaches — the plaintiff describes left side head pain “like a thumping” and like “migraine". The pain can come on suddenly. An MRI did not reveal anything of note. The headaches are “once or twice

a week" and last a half an hour to an hour. She mostly takes Tylenol or Advil, or another prescribed medication (Diclofenac, or Voltaren), which she uses occasionally.

5. Dizziness, balance, vertigo, nausea, and left side hearing loss — My impression of her evidence is that these symptoms seem to be interrelated or connected. She saw ENT specialists on referral from her family doctor, Dr. Ivan Choo. She saw Dr. Mark Miller and Dr. Tyler Mori. Dr. Miller recommended a “music pillow” for her tinnitus. A clinical record from Dr. Mori indicates a finding of some hearing loss, but no such opinion is in evidence. The tinnitus is constant, in her left ear.

   Vertigo started after MVA #1. She has suffered vertigo episodes on several occasions. No special triggers are involved. Vertigo can come on when she is just lying in bed, and the room starts to spin, and she gets nauseous. Exercise can bring on vertigo and nausea. She saw a vestibular therapist on the advice of Dr. Choo.

   Her balance problems are constant. Dizziness can bring on nausea, and headache. Nausea sometimes results in vomiting. She felt dizziness and imbalance when she was testifying, she said. She feels dizziness at work, sitting at her desk at times, or if she has to pick something up.

6. Balance issues — she does not feel “balanced" when she stands up. She feels like she is falling to one side. The ENT specialist, Dr. Miller, sent her to see a vestibular expert, a neurophysiologist, Art Mallinson, who she saw December 7, 2020. Her balance problems persist.

7. Interference with sleep — she has difficulty falling asleep, and difficulty remaining asleep, due to pain, particularly with her left arm. However she manages to get seven to eight hours of sleep per night. She does not feel refreshed upon arising, however.

8. Anxiety and depression — she feels anxious, like something is going to happen to her. She sometimes feels like she cannot breathe. She has not had panic attacks lately. She takes medication as prescribed by Dr. Choo, Paroxetine, once a day, 20 mg. Her anxiety started after MVA #1. She does not know its cause. It has improved somewhat, but she has continued driving anxiety. She feels unable to avoid driving. She feels depressed. Her memory is not as good; she forgets things. She makes mistakes at work. She is worried about her future. She is trying her best to work as an MOA, and continues to work full time, but is always worried about her life, her children, her husband, and what would happen if she is unable to work in future. She feels depressed all the time, and feels guilty, and feels a loss of confidence.

9. Memory — she forgets things easily, like at work. She forgets names, and Dr. Sharma has to repeat instructions to her. Her mother-in-law needs to remind her about things around the house, and explain things repeatedly. Her husband also has to remind her to do things. She makes reminder notes on her phone. Her memory problems are very frustrating, she says. She has difficulty concentrating.

[18] She testified that her marital relations have been affected by her injuries, both mental and physical.

[19] She testified that the Paroxetine provides some relief for her depression. She has not obtained counselling for her mood symptoms, due to the cost. The cost is not covered by MSP, and she cannot afford to pay for it.

[20] Her doctor told her that weight gain is a side effect of her medication. She has gained 8-10 kilograms. However she cannot stop taking the medication.

[21] The plaintiff saw her GP, Dr. Choo, on March 22, 2018, five days after MVA #1. Dr. Choo has continued to be her primary medical care provider to the present.

He did not provide medical legal opinion, however his records have been reviewed by the experts in this case.

2. MVA #2 – November 20, 2018

[22] This MVA occurred at the intersection of 88th Avenue and Fraser Highway in Surrey. The plaintiff acknowledges that MVA #2 was her fault. The plaintiff was driving a vehicle. She was stopped. She started moving, and struck the vehicle in front of her. There is no independent evidence as to the damage to the vehicles. The plaintiff says that there was a little bit of damage to the front of her vehicle, and maybe a little bit to the other vehicle. No emergency personnel attended. After the accident she returned home. She testified that MVA #2 may have aggravated her emotional and mental symptoms for a few days, then she returned to her former state. There is no evidence that she obtained medical treatment specifically in relation to MVA #2.

3. MVA #3 – October 17, 2019

[23] MVA #3 occurred at the same location as MVA #2, the intersection of 88th Avenue at Fraser Highway, Surrey. She was driving a vehicle, which was rear-ended by the Reid vehicle. The plaintiff described the Reid vehicle as a “construction vehicle", and a “pickup truck with a big box on it". She was stopped. Her vehicle was struck from the rear. Her vehicle was pushed forward to a small degree, even though she had her foot on the brake. Her vehicle's airbags did not deploy. No emergency personnel attended. Photographs in evidence show that she was driving a Hyundai Santa Fe, a compact SUV. Her vehicle sustained very minor rear bumper damage.

[24] The plaintiff testified that her symptoms were aggravated by MVA #3. She felt a jolt to her neck. After a few days, her condition was the same as before the MVA.

4. MVA #4 – January 4, 2020

[25] The plaintiff was driving an ICBC courtesy car which was stopped at the intersection of Fraser Highway and 192nd Street in Langley. Her vehicle was struck from behind by another vehicle. The other driver left the scene. The plaintiff followed

the other vehicle. It struck another vehicle in a shopping plaza. The other vehicle's license plate was dislodged. The police attended. ICBC told the plaintiff that the other driver was a "drunk driver".

[26] The plaintiff testified that she did not bring legal action in relation to MVA #4, because it was just a minor accident. There was no noticeable damage to her courtesy car. Her symptoms were aggravated for two or three days, only.

C. Work History – Post Accident

[27] Following MVA #1, the plaintiff returned to work at Hot Spot Pizza, the family pizza business operated by her husband. She could not recall precisely when she returned to work. She thought she was off work for "a few months" after MVA #1. She returned on a part-time basis, working approximately five hours at a time. She found the work difficult. It caused back pain, neck pain, and dizziness. The work involved bending, standing, and lifting. She worked in the evenings. She thought she stopped working at Hot Spot Pizza possibly in August 2018.

[28] The plaintiff began looking for work as an MOA after discontinuing work at the pizza restaurant in August 2018. After making many applications, she obtained work in Bear Creek Medical Clinic commencing July 22, 2019. She worked there for about two months, until September 16, 2019. The work was full-time, eight hours per day, five days per week, and she was paid around $15 per hour. Her employment was terminated by the employer. According to the plaintiff, her work was terminated because she was unable to do the work effectively. She would forget things, and make mistakes. She tried to improve her performance, by making reminder notes to herself, in a notebook. However she continued to make mistakes, and one day, after she made another mistake, the office manager told her to leave, immediately. The plaintiff states that her physical symptoms also affected her performance at Bear Creek Medical Clinic.

[29] The plaintiff's evidence concerning her problems at Bear Creek Medical Clinic was corroborated by another witness, Gurpreet Clair. Ms. Clair worked at Bear Creek Medical Clinic during the same time as the plaintiff, working the same shifts.

Ms. Clair testified that the plaintiff would repeatedly forget to do things she was required to do. She made mistakes, such as placing patients into an examining room with the wrong doctor, and forgetting to equip the examining room with the appropriate supplies required for the appointment. She testified that the other workers attempted to help her, and teach her, but the plaintiff would repeat the same mistakes. The manager, Simran, also tried to help. Ms. Clair testified that the plaintiff looked “lost” when she was there, as if she was “not paying attention”.

[30] The plaintiff looked for work again as an MOA, and was hired by Aisha Medical Clinic, where she worked from November 1, 2019 to March 30, 2020. The plaintiff continued to struggle in doing the work. She received complaints. Dr. Hassan complained about her work. Another doctor, Dr. Raza, was more forgiving, and complained less. She explains that her memory problems were the issue causing difficulties at Aisha Medical. Dr. Hassan would get upset with her. For example, in failing to adequately describe and record a patient's complaints and needs. She made mistakes. She was afraid to face Dr. Hassan. She also suffered from back pain.

[31] Aisha Medical Clinic “laid off” the plaintiff due to the Covid 19 pandemic, effective March 30, 2020. The clinic told her that she was no longer required. When she inquired about being rehired at Aisha, she was told that the clinic would be hiring new staff. Although this of course is hearsay, the fact is the plaintiff was not asked to return to the clinic.

[32] Her husband had decided to sell Hot Spot pizza in 2019, as it was not making money, or not making enough money.

[33] The business was sold in early 2020. The plaintiff’s husband obtained work as a BC Transit bus driver instead.

[34] After not being asked to return to Aisha Medical Clinic, the plaintiff again sought work as an MOA. She found work at the office of Dr. Sandeep Sharma,

where she started work in July 2020. At first, her work was part-time. Later she increased her work to full time. She continues to work with Dr. Sharma's clinic.

[35] She testifies that she has the same memory and mental problems there as she did at the previous clinics. She also has back pain and neck pain. She gets help from coworkers, but continues to makes mistakes. For example, she forgets to deal appropriately with supplies. She writes reminders to herself. She uses lots of sticky notes. She says the doctor and the other staff at that clinic are very cooperative. They do not push her, or frighten her. She gets help from coworkers with heavier physical tasks like lifting supplies. Dr. Sharma is very nice to her, she says.

[36] On one occasion she was unable to work due to dizziness and vertigo for four to five days. The clinic was understanding.

[37] Initially her rate of pay was $16 an hour, and has gradually increased, and is now $21 per hour.

[38] Sharan Nijjar is an MOA co-worker at Dr. Sharma's clinic. She worked alongside the plaintiff prior to Ms. Nijjar’s recent maternity leave. She corroborated that the plaintiff has difficulty with her memory. She says instructions need to be repeated over and over. The plaintiff gets stressed, as it is a busy office. For example, in booking a referral for a patient, the plaintiff will ask the same questions repeatedly. She makes mistakes, such as in failing to send the appropriate paperwork to a pharmacy or another doctor's office. Ms. Nijjar encourages her to make notes in her notebook. The plaintiff makes notes and uses her notebook, but sometimes loses the notes, and cannot find the right note in her notebook. When she appears stressed, she tells her to go to the kitchen and relax briefly. Her mistakes can have significant consequences. For example, if the wrong forms for a test are used, a patient might have to redo the test.

[39] Ms. Nijjar notices that the plaintiff appears to suffer from back pain, and has a limited tolerance for standing. She needs breaks, and takes pain medication at work.

[40] Ms. Nijjar was the plaintiff's supervisor when she first started working for Dr. Sharma's clinic, and was responsible for training her. She is happy to help her in her work, but sometimes it is difficult to do so, when the clinic is busy.

D. Treatment of Injuries Post-Accident

[41] As noted, the plaintiff has continued under the treatment of her family doctor, Dr. Choo, since the accident, to the present.

[42] Dr. Choo referred the plaintiff to the following specialists or specialist treatment providers:

1. Dr. Kamani, a pain management specialist;
2. Dr. Tyler Mori — an ENT (seen in July 2019 and again in November 2020);
3. Dr. Myles Horton, neurologist;
4. Dr. Huang, a rheumatologist, seen in November 2020;
5. Dr. Mark Miller, ENT;
6. Art Mallinson, neurophysiologist, vestibular expert;
7. Vestibular therapist — Mr. Hirji; and
8. Dr. Mangat, a specialist in general internal medicine, hypertension, and obesity medicine.

[43] The plaintiff has attended many physiotherapy, massage therapy, and active rehabilitation sessions. Recently, since two or three months prior to the trial, she has been receiving chiropractic and massage treatments.

E. The Medical Opinion Evidence

[44] The following three witnesses provided expert opinion evidence at the trial. In addition to the evidence in their reports, these experts testified at the trial. There is no other expert evidence in this case.

1. Dr. Russell O’Connor – Physiatrist – report date June 30, 2020

[45] Dr. O’Connor assessed the plaintiff for an independent medical examination on June 30, 2020, approximately 27 months after MVA #1, and seven months after MVA #4. He has not seen the plaintiff since then.

[46] His report references MVA #1 and MVA #3 as being the focus of the report. His report also refers to the other two MVAs (#2, and #4), noting that the other two MVAs may have contributed to her fear of driving and her mechanical back and neck symptoms.

[47] When Dr. O'Connor saw her on June 30, 2020, she had worked post MVA #1 as an MOA at Bear Creek Medical Clinic in 2019, and at Aisha Medical Clinic until March 30, 2020. She resumed working as an MOA with Dr. Sharma in July 2020, just after seeing Dr. O'Connor.

[48] As listed by Dr. O'Connor, the plaintiff's symptoms, as reported to him, were:

1. Insomnia;
2. Anxiety, in relation to a range of issues;
3. Imbalance, including dizziness, ringing in the ears, two or three bouts of severe vertigo. Her problems with dizziness, imbalance, ringing in the ears, and vertigo intersected with anxiety and panic;
4. Left low back pain — daily pain; pain level 8/10, most days. Also pinching pain in her left leg, but no radicular symptoms in her arm or leg;
5. Left mid back pain — daily. Worse than her low back pain.
6. Neck pain — left greater than right;
7. Left-sided shoulder pain — present prior to the accident, and has persisted since.

[49] Dr. O'Connor diagnosed the following injuries or consequences caused by MVA #1:

1. Significant mood and anxiety difficulties, with panic type symptoms. (Dr. O'Connor also says the MVA triggered "substantial" fear and anxiety symptoms.) There may have been other psychosocial factors that also contributed to these problems, including her father's illness and death. Dr. O'Connor would defer to her psychiatrist or psychologist in respect of this condition;

2. Imbalance — her imbalance sensations were noted relatively soon after the accident. In relation to dizziness and vertigo, Dr. O'Connor would defer to an ENT specialist to determine causation;

3. Neck pain — musculoligamentous strain to the neck and chronic soft tissue pain around the neck and shoulder girdle and substantial deconditioning. No evidence of any nerve root impingement or damage;

4. Aggravation of pre-existing left sided shoulder pain and shoulder impingement – likely pre-existing left sided shoulder impingement or rotator cuff tear, aggravated by the accident but not caused by the accident;

5. Left mid-back pain — soft tissue in nature, over the paraspinal muscles of the mid back;

6. Low back pain and left leg symptoms — irritation of the left L5 – S1 facet that is causing some referral symptoms down the leg. No neurological impairment in the leg or nerve root pinching or damage;

7. Strain to the chest wall and pain in the chest — resolved; and

8. Headaches, bothersome for some weeks or months, but then settled.

[50] The plaintiff's fainting episodes and fall that occurred May 23, 2019 may not have been due to the accident but may have been related to other medical factors.

[51] Whether her loss of consciousness was related to a loss of balance and striking her head or whether she just fainted and then struck her head is not clear.

[52] Dr. O'Connor states that the fall may have aggravated her neck, mid and low back pain, but did not cause these problems.

[53] As a result of MVA #3, Dr. O'Connor diagnosed:

1. Aggravation of pre-existing neck pain;
2. Aggravation of pre-existing left low back pain; and
3. Aggravation of pre-existing anxiety and fear or worry.

[54] In relation to prognosis, I summarize Dr. O'Connor's opinion as follows:

1. The plaintiff had not reached maximum medical improvement yet, despite both passive and active treatment, and attempts at reconditioning. With the passage of time, there would be further improvement. Should she work on a more active based exercise program and keep this up on a more regimented basis, there remains at least a 15 to 20% chance that she will be left with chronic symptoms involving her neck and mid and low back.
2. Dr. O'Connor provides no prognosis with respect to mood or anxiety. He leaves that to a psychiatrist or psychologist to opine;
3. Similarly, with respect to her imbalance-related problems (including dizziness and vertigo), he leaves the prognosis to an ENT specialist;
4. The majority of patients that have ongoing chronic soft tissue pain symptoms are still able to work but do so with discomfort, reducing their enjoyment of life and causing them to modify how they do things, in order to cope;
5. She will still be able to work as an MOA, or other light or sedentary tasks, but may struggle with how long she can do a task, how intensely, or what kind of tasks she can do that do not heavily strain the neck, mid or low back; and

6. In order to maximize her chances of full recovery, she must continue on with a more active based exercise program, and she also needs to treat her mood and anxiety as aggressively as possible. Vestibular therapy could be in order.

[55] In cross-examination, Dr. O'Connor confirmed his report opinion that the plaintiff is profoundly deconditioned. The treatment of choice for almost every person, whatever the injury, is an exercise program. Losing weight would help reduce load on her body and hopefully diminish her joint and musculoskeletal pain, and increase her tolerance for activities. However, in general, the record for patients achieving weight loss as recommended is “dismal". Weight loss clinics can help, but their track record is also “not great". Nonetheless, weight loss is always recommended where appropriate, even though patients may not succeed in achieving it.

[56] Dr. O’Connor testified that based upon the plaintiff's information as to what happened on May 23, 2019, it is possible that she suffered a concussion on that occasion. However, she had symptoms of dizziness and balance problems prior to this incident. These concerns were noted quite soon after the accident by the physiotherapist and the plaintiff’s family doctor.

[57] Dr. O’Connor also testified that it is possible that her pain and disability could have been lessened if she had lost weight, and had succeeded in improving her fitness level, but patients usually do not successfully follow these recommendations.

[58] Dr. O'Connor made a number of recommendations for treatment:

1. To be seen by an ENT specialist;

2. Inner ear and vestibular testing, and treatment by a vestibular physiotherapist;

3. Treatment by a psychologist or psychiatrist to help manage her driving anxiety and more generalized anxiety;

4. An aggressive weight loss program would be ideal;

5. Working with a kinesiologist to work on specific strength and conditioning exercises for her neck, mid and low back;

6. A trial of ongoing passive treatments such as trigger point injections;

7. In relation to her shoulder impingement symptoms — a possible trial of subacromial injection, or if this fails, consideration of referral to a shoulder surgeon.

[59] Dr. O'Connor states that the plaintiff's mood and anxiety issues as well as her dizziness and vertigo resulted from MVA #1, but as noted he states that he would defer to a more specialized doctor or professional in relation to these injuries. However, there is no contrary medical opinion evidence from such specialists.

2. Dr. Shaila Misri – Psychiatrist – report date February 3, 2022

[60] Dr. Misri saw the plaintiff February 3, 2022 for an independent psychiatric examination, at the request of plaintiff's counsel.

[61] When seen by Dr. Misri, the plaintiff was 44 years of age, living in a house with her husband and two children and her mother-in-law, and working as a medical office assistant with Dr. Sandeep Sharma, in Delta.

[62] Dr. Misri's reports focused on MVA #1 and #3, the MVAs involved in the two actions the plaintiff has brought. Dr. Misri also took note of two other minor MVAs that the plaintiff reported to her.

[63] The plaintiff's post-accident treatment was reviewed carefully by Dr. Misri in her report, based upon Dr. Misri's thorough review of the plaintiff's medical and clinical records. She also had available to her, and reviewed, the report of Dr. Russell O'Connor of August 1, 2020.

[64] Dr. Misri diagnosed three sets of psychiatric symptoms resulting from MVA #1:

1. Neurocognitive Disorder (“NCD”) – onset after the MVA, presently following a fluctuating course, mild to moderate in intensity;

2. Unspecified anxiety disorder, onset after the subject MVA, presently moderate in intensity, following an up-and-down course; and

3. Persistent Depressive Disorder (“PDD”), onset after the MVA, presently moderate in intensity.

[65] Dr. Misri also stated:

1. MVA #3, the October 17, 2019 MVA, caused exacerbation or aggravation of all of her psychiatric symptoms;

2. NCD is a DSM-5 disorder, which requires a finding of modest cognitive decline;

3. Under the DSM-5, unspecified anxiety disorder refers to an anxiety disorder that causes clinically significant distress or impairment in social, occupational or other important areas of functioning, but does not meet the full criteria for any of these disorders in the anxiety disorder diagnostic class;

4. Dr. Misri also noted driving related anxiety;

5. The plaintiff’s score on the GAD-7 was 19, which denotes severe anxiety;

6. Her disorder is accompanied by ongoing panic attacks;

7. Her anxiety and panic attack symptoms amplify each other; and

8. On the PHQ-9, her score was 16, which denotes moderate to severe depression.

[66] Dr. Misri states:

> There is a very close [association] between these two sets of symptoms; one set of symptoms amplifies the other. As a result, the anxiety symptoms at present are causing a great deal of impairment in her life in general, and in work in particular. The anxiety symptoms have also contributed in a major way to the neurocognitive disorder, and also are contributing to her cognitive deficits.

[67] Dr. Misri explains that Persistent Depressive Disorder or Dysthymia, involves a number of elements, including depressed mood in excess of two years, coupled with other symptoms including:

- Poor appetite or over-eating.
- Insomnia or hypersomnia.
- Low energy or fatigue.
- Low self-esteem.
- Poor concentration or difficulty making decisions.
- Feelings of hopelessness.

[68] In addition, the symptoms cause clinically significant distress or impairment in social, occupational or other important areas of functioning.

[69] Dr. Misri discusses the basis of each of her diagnoses at length in her report.

[70] Among other things, Dr. Misri notes that:

1. The plaintiff has no previous history of depression.
2. Sleep difficulties perpetuate her depressive symptoms, as does her weight gain. She has gained a fair bit of weight since the accidents and is now close to or over 200 pounds, at a height of 5’3”.
3. Her relationship with her husband has been affected.

4. Her self-esteem is very low. She feels very sorry for how her life has evolved, both physically and mentally. She often has episodes of crying and feels a sense of remorse and guilt. She feels imprisoned in her pain and does not really like to go away anywhere. The pain impacts her functionality, which in turn influences her mood.

5. She used to pride herself as being a good mother, and an efficient homemaker. Now the pain symptoms interfere with all of these tasks. The miscarriage that occurred in May 2019 contributed to some extent to her sadness.

6. The cognitive deficits make her feel embarrassed and ashamed. She is very concerned about her lack of ability to do simple activities of daily living.

7. Dr. Choo prescribed Paroxetine (a medication used for treatment of depression and anxiety), but her response has been partial only. She has had no psychotherapy.

8. Her depression and the pain make her quite dysfunctional in most domains of her life, including work, housekeeping, and social and recreational activities.

[71] Dr. Misri's prognosis is generally negative. Specifically:

1. Complete symptomatic remission of her NCD is not likely to occur. Because of the multifactorial etiology, unless all of the causative factors improve significantly, the symptoms of NCD will continue to persist. Even though some of her physical symptoms have improved somewhat with treatment, the level of improvement has not been substantial.

2. Full recovery of her unspecified anxiety disorder is unlikely. The Paroxetine has helped somewhat with anxiety. Cognitive behavioural therapy and

supportive psychotherapy might bring some improvement, as would changing antidepressants.

3. Even with treatment, full recovery from her persistent depressive disorder may not be likely. Her depressive symptoms are complex, and very closely linked to her chronic pain symptoms. She states: “these individuals do not recover completely, even with treatment however, intervention is important from the point of view of improving the quality of her life".

[72] Dr. Misri makes a number of recommendations for treatment, including:

1. Changing of her antidepressant medication, gradually. The paroxetine has probably contributed to her weight gain;

2. Recommendations for other antidepressant medication, and also medication for sedation and neck pain;

3. Cognitive behavioural therapy (CBT) treatment with a PhD psychologist;

4. Possible marital counselling;

5. Pain management — referral to a private pain clinic, as public pain clinics have a long wait list;

6. Continuation of physiotherapy as needed along with other pain relief treatments as they directly impact her mental health issues;

7. Continued treatment with neurologist and other specialists involved in treatment of her balance and dizziness issues; and

8. Various others: sleep hygiene; consultation with a dietitian, utilization of a kinesiologist or personal trainer; yoga and meditation.

[73] At trial, in cross examination, Dr. Misri reiterated that the plaintiff’s physical and psychiatric symptoms are closely linked.

[74] Defence counsel suggested to Dr. Misri that other serious stressors in the plaintiff's life could be responsible for her anxiety disorder, and depression, such as the death of her father in May 2018, and her miscarriage in May 2019. Dr. Misri rejected this theory. Dr. Misri agreed that these other life circumstances could contribute to her anxiety, but testified that it was highly unlikely that her psychiatric condition was caused by these other stressors. She noted that she has diagnosed three sets of psychiatric disorders, in a person with no previous psychiatric history.

[75] She agreed that exercise could definitely benefit her mood.

[76] Dr. Misri agreed that she had not reached maximal medical recovery from her psychiatric conditions. She has not had psychotherapy, and her psycho-pharmaceuticals were limited to the Paroxetine.

3. Dr. Catherine Paramonoff – Physiatrist – report date July 6, 2023

[77] Dr. Paramonoff assessed the plaintiff for an independent medical examination at the request of the defence on June 19, 2023.

[78] Dr. Paramonoff was not provided with the reports of Dr. O'Connor and Dr. Misri, and therefore did not comment upon these other medical legal opinions.

[79] Dr. Paramonoff noted the following complaints from the plaintiff:

1. Left side neck and upper back pain — pain, stiffness, constant neck pain 7/10, maximum severity 7 or 8/10;

2. Left upper extremity pain — pain, weakness, numbness and tingling steadily worsening since the first MVA, soreness in the left collarbone, left arm, forearm, and into the ring and little fingers of the left hand, constant medium severity, maximum severity 7/10. Cannot lift left arm overhead without changing arm positioning, left-sided lower back pain, including around the sacroiliac area — almost daily. Worse upon arising, back stiffness, maximum severity 6/10;

3. Headaches — migraine headaches, maximum severity “very very severe", alleviated with Tylenol, Advil, and sometimes taking a sample medication at work;

4. Very forgetful — sometimes feels lost at work when she enters one of the five or six exam rooms (disorientation);

5. Sleep — difficulty due to stiffness and pain; average total night sleep approximately eight hours;

6. Mood — anxiety and depression — "unbearable", compared to the physical pain which is bearable. Afraid of doing things she has done regularly in the past.

[80] Dr. Paramonoff also described symptoms similar to those referred to by Dr. O'Connor, who categorized them under “imbalance". These symptoms were: pressure in the plaintiff’s head if she stands up suddenly, described as hearing pulsing sounds, or feeling like someone is breathing inside her head; pressure at the eyes; with walking, difficulty sensing the ground, and feeling like something is moving.

[81] Dr. Paramonoff diagnosed the following conditions which were related to MVA #1 and MVA #3:

1. Chronic pain presentation;

    a) Musculoligamentous injuries at the neck, and myofascial injuries at the lower back; and

    b) Headache, multifactorial, with contribution from cervicogenic and myofascial sources.

2. Mood symptoms/psychological issues — Dr. Paramonoff ultimately defers to psychiatry and psychology opinions, but notes the effects of such issues acting as contributing factors to the plaintiff's symptoms.

[82] Dr. Paramonoff states:

1. As to causation, the plaintiff had a history of left shoulder pain, ongoing since 2014, and left-sided neck pain for two months as of November 2014. Her history of left shoulder pain left her vulnerable to left-sided neck injury;

2. The soft tissue injuries at the neck and upper back regions sustained in the subject MVAs, and the other MVAs, contributed to symptoms generally around her left shoulder girdle;

3. Post-MVA imaging revealed a small partial thickness tear of the supraspinatus and mild arthritis of the acromioclavicular joint. These were underlying degenerative types of changes pre-existing the subject MVAs. Superimposed soft tissue injuries from the MVAs “unmasked" underlying degenerative changes;

4. The cause of the plaintiff's headache symptoms is likely multifactorial, with contribution from musculoligamentous injuries at the neck, and myofascial sources, consisting of muscle tension in the neck and upper back;

5. As to her cognitive difficulties, Dr. Paramonoff noted there is “no indication of an alteration of consciousness from the MVAs to suggest a concussion". She stated that her cognitive difficulties are likely secondary to the distracting effects of pain, disrupted sleep, and her mood and psychological problems;

6. Her prognosis is negative, in general. Dr. Paramonoff noted that when she saw the plaintiff, it had been approximately five years and three months since MVA #1, and approximately three years and eight months since MVA #3;

7. She states that the plaintiff will have a prolonged course of recovery, given the cumulative effect of superimposed soft tissue injuries, unmasking of pre-existing degenerative changes, significant post-MVA muscle

imbalance and deconditioning, potentially some underlying hypermobility, and significant “confounding factors". That is, mood and psychological/psychiatric issues including maladaptive coping mechanisms, kinesiophobia (fear of movement, generally associated with pain and fear of reinjury), decreased sleep, all contributing to an ongoing chronic pain presentation;

8. Despite her overall negative prognosis, in her opinion the plaintiff could still have moderate symptom and symptom management improvement, which will not eliminate the symptoms, but will leave the plaintiff with a residual baseline of symptoms due to her MVA injuries.

9. She suggests symptom management improvement by way of an independent strengthening exercise program. She recommends that the plaintiff have access to 30 sessions with a kinesiologist or physiotherapist, for guidance in establishing an independent exercise program.

10. She suggests pain management or symptom relief therapies such as physiotherapy or massage therapy for up to six treatments per year for the next two years.

11. She recommends a therapeutic course of medication such as nortriptyline, as well as the continued use of over-the-counter pain or anti-inflammatory medications from time to time, but not over the long term, and referral to an occupational therapist for one or two sessions to review her work and home activities to help optimize her functioning.

[83] Dr. Paramonoff states that activities are not contraindicated, with adaptations, including building up muscle strength and conditioning, and management of her psychological factors, taking micro-breaks when required, pacing and prioritizing, and optimizing ergonomics. Specifically, she can carry out homemaking activities, and work and recreational activities.

[84] Dr. Paramonoff testified at trial, and was cross-examined by plaintiff's counsel.

[85] She acknowledged that if the plaintiff “blacked out" or, as the plaintiff described it to Dr. Misri, “blanked out" for a few seconds after MVA #1, then this could qualify as an “alteration of consciousness" which is part of the diagnosis for a concussion.

[86] Dr. Paramonoff noted that symptoms arising from a concussion can be caused by many conditions. The symptoms of nausea, dizziness and headaches that the plaintiff described when she saw a physiotherapist March 26, 2018 (within 10 days of MVA #1) could be post concussion symptoms.

[87] She was asked whether she agreed with the diagnosis of “post-concussion syndrome" as referred to in a consult report to the plaintiff's GP, Dr. Choo, from a neurologist, Dr. Myles Horton, dated June 23, 2021. She did not agree or disagree, but noted that Dr. Horton based his opinion upon the information available to him, including the plaintiff's symptom history as related to him at the time.

[88] She would defer to an ENT specialist with respect to vertigo and tinnitus.

[89] She was asked about the plaintiff's four attendances at Surrey Memorial Hospital in April and May 2019. She stated that as far as she was aware, these incidents had no effect upon her musculoskeletal system, and therefore they were not mentioned in her report, as they did not affect her opinion.

III. THE PLAINTIFF’S INJURIES

A. Credibility and Reliability of the Plaintiff’s Evidence

[90] In most personal injury cases, particularly to those such as this one in which the plaintiff is claiming soft tissue injuries and psychological or psychiatric injuries or consequences, the credibility and reliability of the plaintiff's testimony is key.

1. Credibility and Reliability of Witness Testimony – General Commentary

[91] In relation to the plaintiff's credibility, both counsel referred me to the frequently cited and helpful comments of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

> [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. 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. 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.
>
> [Citations omitted.]

[92] Another authority frequently cited in the cases is the 1951 decision of the Court of Appeal, *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357, 1951 CanLII 252 (B.C.C.A.), in which Justice O'Halloran stated:

> … the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time…
>
> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called

> credibility …A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.
>
> [Citations omitted]

[93] These comments refer to both credibility, in the narrower sense (whether the witness is honestly telling the truth, or at least attempting to do so to the best of his or her ability) and reliability (whether the testimony of the witness is factually accurate). Credibility and reliability are not the same thing: *R. v. Plehanov*, 2019 BCCA 462 at para. 51.

[94] The assessment of credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events: *R. v. Gagnon*, 2006 SCC 17.

2. The Plaintiff’s Credibility and Reliability

[95] The plaintiff testified in Punjabi. All of her testimony was received through an interpreter, therefore. As a result I had very limited means to assess her demeanour as a witness. However, demeanour is generally not a reliable indicator of credibility in any event.

[96] In this case, I have no reason to doubt the credibility of the plaintiff's evidence, in general.

[97] The plaintiff’s evidence was not always reliable. As she freely and frequently acknowledged, she often had difficulty recalling specific details. That is common in cases of this type, where a witness is asked to testify about events and specific details extending over a number of years, and matters relating to treatment and her condition and the effects of her injuries, which tend to be variable over time and are not easily recalled with precision.

[98] In addition, in this case, I accept the medical evidence that the plaintiff's memory and cognitive abilities have been impaired due to her accident injuries. It is therefore particularly understandable that she would have difficulty specifying details, or there might be inconsistencies in her evidence.

[99] Inconsistencies in the plaintiff’s evidence were few, and minor. The defendants pointed to some alleged inconsistencies in the plaintiff’s testimony. In my view these are without merit or are minor and inconsequential.

[100] The defendants noted that on October 24, 2019, Dr. Choo noted that the plaintiff had re-started working at Bear Creek Medical Clinic on October 21, 2019, for two weeks, for vacation relief. However I accept the plaintiff's evidence that this entry

was in error. She did not return to Bear Creek Medical Clinic (where, she states, her employment was terminated). She worked at another medical clinic for the two weeks that Dr. Choo refers to.

[101] On the plaintiff's examination for discovery (conducted over video, and through an interpreter) the plaintiff testified that her job at Bear Creek Medical was the first job that she applied for after she decided to leave Hot Spot Pizza. At trial, she testified that she made many job applications before obtaining the job at Bear Creek Medical Clinic. I have no difficulty accepting the plaintiff's explanation that she may have misunderstood the question posed on her examination for discovery. I accept that her testimony at trial is truthful in this respect.

[102] At the trial, the plaintiff testified that her pre-accident shoulder condition caused only minor limitations on her activities. She said the same thing on her examination for discovery conducted August 29, 2022, but suggested there that she could lift only 2 or 3 kg with her left arm. At trial, she said she could lift more than that, because previously, she did not have arm or neck pain. This is a minor discrepancy in my view. I accept the plaintiff's evidence that prior to MVA #1, she had minimal pain and disability in the left shoulder, but that her condition now is much worse, and involves her neck, shoulder, arm, and hand.

[103] The plaintiff's evidence as to her injuries, which I summarized previously, is generally supported by the medical opinion evidence, which is largely consistent as between the opinions, and consistent with the plaintiff's testimony at trial.

[104] The plaintiff's testimony regarding her difficulties at work at Bear Creek Medical Clinic and, more recently, at Dr. Sharma's medical clinic, is strongly supported by the independent corroborative evidence of her coworkers, Ms. Gurpreet Clair, and Sharan Nijjar.

B. Adverse Inference

[105] The defendants argue that I should draw inferences adverse to the plaintiff's credibility and to the credibility of the plaintiff's claims generally, in that the plaintiff

did not call as a witness her husband, or any witness who could speak to her ability to function prior to MVA #1. The defendants also argue that the plaintiff failed to produce complete records to support her claim for past wage loss from income at Hot Spot Pizza.

[106] In *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21 (a summary trial case), I stated:

> [51] The court may draw an unfavourable inference where, in the absence of an explanation, a party fails to provide affidavit evidence from a material witness, when it can be inferred that the witness would be willing to assist the party or is someone over whom the party has exclusive control. Where the witness could be expected to have better evidence than the evidence of the witnesses adduced, the court may infer that the evidence of the absent witness would be contrary to the party's case or at least would not support it.
>
> [52] The Court of Appeal discussed the relevant principles in *Singh v. Reddy,* 2019 BCCA 79:
>
> > [8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:
> >
> > > §6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]
> >
> > In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:
> >
> > > An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to

> provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v*. *Norisawa*, 2001 BCSC 1126 at para. 127*; Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis added.]
>
> (See also Rohl v. British Columbia (Superintendent of Motor Vehicles) 2018 BCCA 316 at paras. 1-5.)

[9] As noted in *Rohl*, it is now generally accepted that the court is not r*equired* as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:

> A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:
>
> - There is a legitimate explanation for the failure to call the witness;
> - The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
> - The witness has material evidence to provide; and
> - The witness is the only person or the best person who can provide the evidence.
>
> Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added.]

[107] I decline to draw any adverse inference in this case. I agree that it is probable that the plaintiff's husband would have had material evidence to give concerning the plaintiff's pre-accident and post-accident condition, and that his absence is unexplained. However, as I have no serious doubts concerning the plaintiff's own credibility, I consider it unlikely that the plaintiff's husband's testimony would make a difference to my credibility assessment. I apply the same reasoning to the lack of pre-accident corroborative testimony from coworkers or employers. I accept that the lack of employment records from Hot Spot Pizza is explained by the fact that it was a small family-owned and operated business where record-keeping and retention was limited and imperfect.

C. Causation of the Plaintiff's Injuries

1. Legal Principles

[108] I adopt my discussion of causation set out in *McNabb v. Rogerson,* 2022 BCSC 1514, as follows:

> [125] The defendant argues that there have been independent intervening events that have contributed to the plaintiff's current mood issues. The defendant argues that the plaintiff's move from Kelowna to the small and relatively isolated community of Beaverdell in November 2018, and the death of a close friend approximately three years ago, have contributed to her mood issues.
>
> [126] This is an argument of causation. As I perceive the defendant's argument, the defendant argues that some of the plaintiff's loss is attributable to independent events that would have occurred regardless of the Accident, and that the plaintiff's loss should be apportioned between tortious and non-tortious causes.
>
> [127] However, the plaintiff's injuries are indivisible. It is not possible to separate them as to those caused by the Accident and otherwise. Where the plaintiff's injuries are not divisible, it is wrong in principle to attempt to divide them between tortious and non-tortious causes. This was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (SCC) as follows:
>
> > 12. The respondents' position is that where a loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation. This is contrary to well-established principles. It has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious

> contributing causes does not reduce the extent of the defendant's liability.
>
> ...
>
> 17. It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> …
>
> 25. In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.
>
> …
>
> 32. … The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.
>
> …
>
> 35. …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. …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…
>
> [Emphasis in original.]

[128] The relevant principles were further discussed in *Moore v. Kyba*, 2012 BCCA 361. The court stated:

[32] Much judicial ink has been spilled concerning the characterization of multiple injuries as divisible or indivisible, and the impact of that characterization on the determination of causation and assessment of damages in a negligence case.

[33] The legal principles underlying these concepts are clear, but explaining them to a jury "is no easy task" (see *Laidlaw v. Couturier*, 2010 BCCA 59 at para. 40). Nor is their application in varying particular factual contexts always straightforward.

[34] The relevant principles were clearly set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Their elaboration in *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, and by this Court in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 22-37, *B.P.B. v. M.M.B*., 2009 BCCA 365, *Bradley v. Groves*, 2010 BCCA 361 and *Laidlaw* are also helpful.

[35] The basic principles at play in this analysis are that a "defendant is not liable for injuries which were not caused by his or her negligence" (*Athey* at para. 24), and "the defendant need not put the plaintiff in a position better than his or her original position" (*Athey* at para. 35). These two principles, which deal with the concepts of causation and assessment of damages, were distinguished in *Blackwater* (at para. 78):

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[36] Thus, whether a defendant is liable to a plaintiff for an injury is a matter of causation; the amount of compensation the defendant must pay is a matter of assessment of damages.

[37] The concepts of divisible and indivisible injury are relevant at both stages of the analysis. At the stage of determining causation, the characterization of the plaintiff's

> injury or injuries as divisible or indivisible is relevant in determining what the defendant is liable for.
>
> …
>
> [42] If the injury is divisible, then the plaintiff is entitled to be compensated for the injury caused by the defendant…
>
> [43] If the injury is indivisible, then the plaintiff is entitled to be compensated for the loss flowing from the indivisible injury. However, if the plaintiff had a pre-existing condition and there was a measurable risk that that condition would have resulted in a loss anyway, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the defendant's negligence. This principle is called the "crumbling skull" rule. As explained in *Athey* (at para. 35): "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."

2. Analysis — Causation of Injuries

[109] The medical evidence as well as the plaintiff's own evidence is consistent, in relation to the effects of the multiple motor vehicle accidents. The plaintiff's injuries were substantially caused by injuries sustained in MVA #1. MVAs #2, 3 and 4 resulted in aggravation or exacerbation of the plaintiff's injuries.

[110] As noted, I accept the plaintiff's evidence that prior to MVA #1, her health was good, although she had pain in her left shoulder which was persistent but caused only a minor degree of disability.

[111] The defendants argue that the plaintiff has not established that she was functioning without difficulty prior to MVA #1. So, as noted, they argue that the plaintiff did not call witnesses to testify as to her performance as an MOA, pre-accident. However, I accept the plaintiff's evidence that she did not have the difficulties she describes working as an MOA prior to MVA #1. There is other evidence supporting the plaintiff's testimony in this respect. She was able to earn university degrees in India. She successfully completed the MOA program in Canada in 2008. She obtained a grade 12 English language equivalency in Canada. She worked for several doctors as an MOA from 2009 to 2012. These doctors included Dr. Moosa and Dr. Choo, who became her family doctor. She returned to

work at Dr. Moosa's clinic in 2015 and 2016. I infer that if her work performance as an MOA was unsatisfactory previously, Dr. Moosa would not likely have re-hired her.

[112] The plaintiff's injuries are indivisible as between the four accidents. All of the plaintiff's injuries are attributable to the four accidents, particularly the first one, with the exception of her pre-existing left shoulder problem.

[113] The defendants note that the plaintiff was first prescribed Paroxetine and Ativan in May 2019, following her miscarriage. They also point to the emotional distress suffered by the plaintiff resulting from the illness and death of her father, in May 2018. They submit that these events are more likely an explanation for the plaintiff's anxiety and depression. This theory was rejected by Dr. Misri.

[114] In my view, these are non-tortious contributing circumstances to the plaintiff's ongoing mental health conditions. In themselves, they would not have caused any significant injury to the plaintiff. But for MVA #1, the plaintiff would not have suffered her psychological/psychiatric injuries.

[115] The Defendants concede that the plaintiff's neck and back injuries are indivisible, as between the injuries sustained in the four MVAs.

[116] However, the defendants submit that the plaintiff has not established causation in respect of the plaintiff's neurocognitive disorder, anxiety disorder, and persistent depressive disorder. They argue that the plaintiff suffered a concussion or minor traumatic brain injury (MTBI) in a fall that occurred May 23, 2019, at her home. They assert that the plaintiff's symptoms of vertigo, dizziness, imbalance, tinnitus, hearing loss, light and sound sensitivity, memory loss, and difficulty concentrating are causally related to the May 2019 fall, and not the accidents. Therefore, they argue, any losses flowing from these conditions are not compensable by the defendants.

[117] The parties have agreed that the plaintiff attended Surrey Memorial Hospital on four occasions in April and May 2019. The terms of the agreed statement of facts are as follows:

1.The Plaintiff, Parmjeet Buttar was involved in two motor vehicle accidents that is the subject of this litigation. The first occurred on March 17, 2018 and the second occurred on October 17, 2019.

Employment

2. At the time of the first accident, Ms. Buttar worked at her husband's company Hot Spot Pizza.

3. Ms. Buttar worked at Bear Creek Medical Clinic from July 22, 2019 to September 16, 2019.

4. Ms. Buttar worked at Aisha Medical Clinic between November 1. 2019 and March 30. 2020.

5. Ms. Buttar worked at Dr. Sandeep Sharma Inc. From July 2020 to present.

Medicals

6. Ms. Buttar attended with Dr. Tyler Mori, ENT specialist, on July 10. 2019 and November 21, 2020 for complaints of tinnitus and hearing loss.

7. Ms. Buttar attended with Dr. Miller, ENT specialist, on May 11, 2020 for complaints of vertigo.

8. Ms. Buttar attended with Dr. Kamani, anesthesiologist, on Feb 3, 2020 for trigger point injections.

9. Ms. Buttar attended with Art [Mallinson], neurophysiologist, on December 7, 2020, for complaints of balance issues.

10. Ms. Buttar attended with Dr. Huang, rheumatologist, on July 10, 2020 for complaints of body pain.

11. Ms. Buttar attended with Dr. Horton. neurologist, on June 23, 2021, for complaints of headaches.

12. Ms. Buttar attended the Metacare Obesity Clinic on December 20, 2021.

Hospitalizations.

13. Ms. Buttar attended the hospital on April 4, 2019 with complaints of dizziness. Ms. Buttar was 5 weeks pregnant.

14. Ms. Buttar attended the hospital on April 16, 2019 with complaints of being dizzy upon exertion and that her body stopped working. Ms. Buttar was 7 weeks pregnant.

15. Ms. Buttar attended the hospital on May 1, 2019 with complaints of bleeding with clots and vertigo. Ms. Buttar was 7-8 weeks pregnant and subsequently suffered a miscarriage.

16. Ms. Buttar attended the hospital on May 23, 2019 with complaints of loss of consciousness, 2 episodes of syncope, hitting her head on the wall during the second episode, and vomiting.

[118] The plaintiff testified about the May 23, 2019 episode. At night, as she was lying in bed, with the whole family sleeping, she felt that the room was spinning. She

became nauseous. She went to the kitchen to get some water, felt dizzy, and fell. She came to in the kitchen. It was around 3 a.m. She returned to the bedroom, where she fell again, hitting her head against the wall. Her husband called 911. She began to vomit. She was taken by ambulance to the hospital. The hospital record shows she arrived at 3:39 a.m.

[119] In my view, the May 23, 2019 fall incident was probably caused by her MVA injuries. Dr. O'Connor noted that her “imbalance" was noted early on, shortly after the accident. As Dr. O'Connor noted, she had an acute episode of vertigo and vomiting relatively soon after MVA #1, on May 31, 2018, when exercising at home. Dr. O'Connor's report states that with respect to this episode “… It is likely the motor vehicle accident may have contributed to this but I would defer to an ENT specialist to determine causation with regards to this". There is, however, no ENT specialist to defer to in this respect.

[120] Dr. O'Connor also states that:

> The imbalance sensations were noted in the first month after the accident and then approximately two months after the accident. She developed this acute bout of vertigo that occurred when she started to try and workout and try and get back in shape. Given that this happened within a few months of the accident, it is likely the motor vehicle accident may have contributed to his but I would defer to an ENT specialist to determine causation with regards to this. This came on in a separate and distant time from the accident, although there were some slight dizziness sensations prior to it and occurred with a bout of exercise. From that point on she had more difficulties with vertigo and dizziness.
>
> […]
>
> The imbalance that was triggered by the motor vehicle accident was documented by her therapist within days and weeks after the accident and by her GP within a month after the accident. This imbalance problem has persisted. This has been associated with worsening of her anxiety symptoms when she exercises. It is my opinion and more likely than not, the motor vehicle accident was the trigger for the deterioration in her balance with several bouts of true vertigo likely relating to benign positional vertigo. More likely than not, it was post-traumatic. Her first bout of this triggering of this true severe vertigo was when she started exercising after the motor vehicle accident and this brought these symptoms on. She has had several attacks of this since and these are typically brought on with head and neck motion.

> She did have several fainting episodes. One fainting episode where she passed out when she went to go to the kitchen in May of 2019. This was around the time of her miscarriage and may have not been due to the accident but may have been related to other medical factors. Whether the actual loss of consciousness was related to a loss of balance in striking her head or whether she just fainted and then struck her head is not clear. When she did get up after this initial faint where she woke up on the ground, she then fell again and struck her head and this led to worsening of her balance-related problems. All of these factors combined have led to the sensation of movement or imbalance plus these intermittent attacks of benign positional vertigo. I would defer to her ENT specialist with regard to disability prognosis and further treatment.
>
> [Emphasis added.]

[121] The defence singles out and relies upon the underlined sentence about the May 2019 fainting episode, and that the fainting episode may not have been due to the accident and may have been due to other medical factors. He mentions her miscarriage.

[122] There is in fact some ambiguity in the wording used by Dr. O'Connor.

[123] The plaintiff's miscarriage occurred on or about May 1, 2019. Dr. O'Connor does not say how that event could be related to her fainting and fall on May 23. He does not clearly say that it was, nor was he asked about this at trial.

[124] Dr. O'Connor does not say that the plaintiff's symptoms of imbalance, vertigo, dizziness, nausea, tinnitus, and vestibular problems were caused by the May 2019 fainting episode. He says the opposite. These symptoms were brought on by the MVA. His report only allows for the possibility that this particular fainting episode "may" have been due to other medical factors such as her miscarriage. At most, his opinion suggests that the May 2019 fall itself may or may not have been due to her accident injuries.

[125] However, on the evidence overall, including Dr. O'Connor's report taken as a whole, I conclude that the plaintiff's symptoms of vertigo, dizziness, and related symptoms were caused by MVA #1. She did not have the symptoms prior to that accident, and they came on soon after the accident, as Dr. O'Connor notes. It is more likely than not that the May 23, 2019 episode was caused by the accident injuries. That is, but for the accident injuries, the fainting episode in May 2019 would

not have occurred. However, even if the May 2019 episode was an independent non-tortious cause (which I do not accept), the plaintiff's injuries in this respect are indivisible. Indivisible injuries cannot be apportioned as between tortious and non-tortious causes.

[126] While the plaintiff has the burden of establishing that her injuries were caused by the accidents for which the defendants were responsible, I note, nevertheless, that there is no medical opinion evidence supporting the alternative theory of causation that the defendants argue for.

[127] The defendants also argue that both Dr. O'Connor and Dr. Misri would defer to an ENT with respect to the plaintiff's vertigo, imbalance, dizziness and vestibular symptoms. They argue that without an opinion from an ENT, the plaintiff has failed to establish causation with respect to her most functionally limiting systems. However, the fact that these doctors would defer to an ENT is not relevant, since as noted there is no ENT opinion evidence to defer to. The plaintiff has established causation on the basis of the actual evidence at trial.

D. The Defendants' Failure to Mitigate Loss Argument

[128] The defendants submit that the plaintiff has failed to mitigate her loss, by failing to seek psychological counselling, failing to take appropriate medication as recommended by Dr. Misri, failing to attend a weight loss program, and failing to abide by a conditioning/exercise routine as recommended by doctors O'Connor and Paramonoff.

1. Legal Principles

[129] The test for a plaintiff's failure to mitigate loss is set out in *Chiu v. Chiu,* 2002 BCCA 618. The defendant must prove:

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 they acted reasonably: *Chiu* at para. 57; *Haug v. Funk,* 2023 BCCA 110 [*Haug*] at paras. 22, 56.

[130] In *Haug*, the Court of Appeal held that the onus on the second part of the *Chiu* test is a balance of probabilities, notwithstanding that the consequences of failure to mitigate are past hypothetical events: at para. 55. The Court disagreed with my analysis in *Forghani-Esfahani v. Lester,* 2019 BCSC 332 at para. 69, in this respect.

[131] The reasonableness of the plaintiff's mitigation efforts is assessed on a subjective/objective test. The plaintiff's personal circumstances may properly play a role in assessing the reasonableness of his or her mitigation efforts: *Gill v. Lai,* 2019 BCCA 103. There, Willcock J.A. stated:

> [26] In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person *in that plaintiff's circumstances* would do. As stated above, where a trier of fact applies the correct test, this Court must defer to their determination on this question of fact.
>
> [27] The trial judge in this case found the respondent had made a reasonable attempt to follow the recommended course of treatment but was constrained by her circumstances from fully engaging in the exercise program recommended to her. In my view, he did not err by taking into account her personal circumstances or by distinguishing *Friesen* as a case where the plaintiff refused to consider reasonable employment options. *Friesen* was a case where this Court found the plaintiff's course of action was arbitrary and unreasonable.
>
> (*Ueland v. Lynch,* 2019 BCCA 431 at paras. 30–32.)

2. Analysis – Failure to Mitigate Loss

[132] I am not persuaded that the defendants have established that the plaintiff failed to mitigate her loss in any manner. As she explained, she was unable to obtain

psychological counselling, as she has no ability to pay for it. The plaintiff's personal circumstances are relevant in this respect. There is no evidence that the plaintiff received or reviewed the medical legal reports of any of the doctors who provided evidence in this case. More importantly, there is no evidence that their reports made their way to her GP, Dr. Choo, upon whom she was entitled to rely for medical advice. There is no evidence that she failed to follow recommendations of Dr. Choo, her primary medical advisor. The medical legal reports could have been useful resources for Dr. Choo, of course.

[133] The plaintiff's condition would be improved if she lost weight, and engaged in an effective exercise, strength and conditioning program on a sustained basis. Dr. Choo referred the plaintiff to Dr. Mangat, an expert in obesity medicine. It is possible but not established that he did so in connection with her MVA related complaints. The plaintiff has not succeeded in losing weight. She was overweight before the accident, and has gained substantial weight since the accident. The medical evidence shows that the medication prescribed for her anxiety and depression, Paroxetine, contributes to weight gain. Dr. O'Connor noted the dismal record of compliance in patients who are urged to exercise and lose weight, even if they attend specialized clinics for such purposes. There is no medical opinion evidence supporting the defendant's failure to mitigate arguments.

[134] It is likely that the accident injuries have themselves made it more difficult for the plaintiff to exercise, and lose weight. She has suffered vertigo while exercising. Her physical pain would have made exercise more difficult. Dr. Paramonoff noted that the plaintiff developed kinesiophobia, a fear of movement. There is no suggestion she had this condition prior to MVA #1. Her depression and anxiety would be barriers to treatment. Notwithstanding this, the plaintiff has continued to do her best in relation to exercise. She works out at home on the treadmill and elliptical.

IV. ASSESSMENT OF DAMAGES

[135] The plaintiff claims damages for loss of past earnings, or past loss of earning capacity, as well as loss of future earning capacity. The defendants submit that no award should be made in these areas.

A. Loss of Income or Income Earning Capacity

1. Legal Principles

[136] I adopt the statement of legal principles I set out in *Cochran v. Bliskis,* 2023 BCSC 710 [*Cochran*] as follows:

> [100] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal summarized the principles related to loss of future earning capacity, having regard to the court's recent decisions. The court stated:
>
> > [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.
> >
> > [8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, Grauer J.A. clarified this approach. …
> >
> > …
> >
> > [10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
> >
> > > [47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss,

> which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

First Step

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, 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. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

> [36] … are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
>
> [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision 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.

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

Second Step

[15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

Third Step

[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.

[101] By contrast, assessing the plaintiff's past (that is, pre-trial) loss of earning capacity involves looking backwards. A claim for past loss of earning

capacity is “a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury”: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[102] I discussed the principles relating to a claim for past (that is, pre-trial) loss of earnings in *Sendher v. Wong*, 2014 BCSC 140:

> [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 153; *X. v. Y.*, 2011 BCSC 944, at para. 185.
>
> [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.
>
> [160] In *Smith v. Knudsen*, 2004 BCCA 613, at para. 29, Rowles J.A. stated:
>
> > 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.
>
> [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140, at para. 32; *Falati v. Smith*, 2010 BCSC 465, at para. 41, aff’d 2011 BCCA 45.
>
> [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

2. Past Loss of Earnings or Earning Capacity

[137] The plaintiff claims for past loss of earnings or earning capacity in the sum of $60,000, or, after applying a 15% tax rate, $51,000, net of tax. This claim is based on two grounds:

1. Loss of wages from Hot Spot Pizza after MVA #1, two-and-a-half months, or 10 weeks, times 40 hours a week, at $20 an hour, equals $8,000; and

2. Absent the accident injuries, the plaintiff would have worked as an MOA at a specialist medical clinic, or at a hospital, and would have earned a higher income then she has earned as an MOA at Dr. Sharma's clinic.

[138] The plaintiff makes no claim in respect of her termination from Bear Creek Medical Clinic. She obtained re-employment fairly quickly, first for a two week vacation relief job, and then with Aisha Medical Clinic, and then she received Canada Emergency Response Benefits (“CERB”) during the pandemic, before finding work with Dr. Sharma's clinic.

a) Hot Spot Pizza Wage Loss Claim

[139] When MVA #1 occurred, the plaintiff was working full-time for Hot Spot Pizza, in February 2018, the month before MVA #1. Her pay record indicates that she was paid $20 per hour, and worked 150 hours, and earned $3000, gross. As noted, when the accident occurred, she was in the process of purchasing supplies for the business. The vehicle she drove advertised Hot Spot Pizza.

[140] The plaintiff testified that she was off work after MVA #1 for “a few months". She was unable to remember exact dates, and has no business records from Hot Spot Pizza to confirm the loss. She testified that she was off work due to back pain, neck pain, dizziness, and difficulties with doing the physical work at Hot Spot Pizza including bending, standing, lifting. She thought that the business did not hire someone to replace her. She said the work was mostly in the evenings, and her husband worked there. From this, I infer that her husband had to work extra in order to compensate for the loss of the plaintiff's work. The pizza business was not very successful, which led to a decision to sell it in 2019. The sale concluded in early 2020.

[141] The plaintiff testified that she returned to work at Hot Spot Pizza on a part-time basis, which later became full-time. However, she estimated that as of August

2018, she stopped working at Hot Spot Pizza. She began looking for work as an MOA.

[142] As noted, I accept that the lack of business records confirming the plaintiff's earnings, and loss of earnings, following MVA #1, from Hot Spot Pizza, are attributable to either poor record-keeping or loss of business records in a small family business that has since been sold.

[143] I accept the credibility of the plaintiff's contention that she was off work for two or three months as a result of MVA #1. There is a solid medical basis for her inability to work, during this time, particularly in a job having some physical demands. In particular, I note that the defendants' expert, Dr. Paramonoff, states that in her opinion, missing time from work on the order of up to several months, followed by a graduated return to work, would be medically appropriate after the MVAs, given the plaintiff's injuries sustained. Therefore I find that the plaintiff has proven a loss of $8,000, based upon inability to work at Hot Spot Pizza for two and-a-half months, as claimed.

b) Specialist Clinic or Hospital MOA positions

[144] The plaintiff argues that there was a real and substantial possibility that, but for the accident injuries, she would have obtained work as an MOA at a hospital or specialist medical clinic rather than at Dr. Sharma's clinic, effective July 2020, around the time that she obtained work with Dr. Sharma's clinic.

[145] The plaintiff testified that she started working at Dr. Sharma's clinic initially on a part-time basis, then full-time, 40 hours a week. Initially she was paid $16 an hour. After a number of increases in pay, she now earns $21 per hour. She testified that but for the MVA injuries, she would have sought work as an MOA at a hospital or at a specialist medical clinic. She is now uncertain as to whether she could do that work. Therefore, she plans to stay with Dr. Sharma's clinic.

[146] The plaintiff testified that a specialist clinic would pay more than $28 per hour, and that hospital pay would be $28 or $29 per hour, and would have other employment benefits. No details were provided.

[147] There is no basis in evidence supporting the plaintiff's hearsay evidence as to the pay or benefits available at these other positions. There is no documentary or statistical evidence of any kind. There is no vocational or economic evidence of any kind. No other witness testified about pay and benefits available at other positions, whether such positions could be available, or the qualifications required for such positions.

[148] On cross-examination, the plaintiff testified that she had once applied for an MOA job with a specialist, and had interviewed for the position, but was not called back. No further details were provided.

[149] On cross-examination, the plaintiff acknowledged that at Dr. Sharma's clinic, many of the patients are Punjabi speakers, and the plaintiff can speak to these patients in Punjabi. She could not say whether English language skills would be required in a hospital or specialist clinic.

[150] It is reasonable to infer that better English language skills would be required for work in these other settings. The plaintiff is not comfortable speaking in English, and not fully fluent in English.

[151] The plaintiff has not established that she had the skills necessary for higher pay MOA jobs, that such jobs are or would have been available, or that she would or even could have earned more at these other jobs.

[152] I am not satisfied that the plaintiff has established a real and substantial possibility of an event or set of circumstances that could lead to an actual loss. The suggested loss does not rise above speculation. Moreover, there is no evidentiary basis upon which to assess the damages, even if a real and substantial possibility of loss had been established. In summary, this claim is rejected.

3. Loss of Future Earning Capacity

[153] The plaintiff submits that an award of $490,000 for loss of future earning capacity is appropriate.

[154] The plaintiff contends that this award is justified as follows:

a) The plaintiff is 46 years of age. The conventional retirement age is 65. Therefore she has 19 years of work life to consider. She currently earns $21 an hour. She works full-time. Plaintiff's counsel suggests that $21 per hour, multiplied by 40 hours a week, at 52 weeks per year (2,080 hours, per annum) her current income at Dr. Sharma's clinic is $43,680.

   Plaintiff’s counsel suggests that the plaintiff would be earning approximately $29 at a specialist clinic or the hospital, therefore there is a wage differential of $8 per hour. $8 per hour, multiplied by 2,080 hours, at a multiplier of 16.4262 equates to the sum of $273,332.

b) The plaintiff has a risk of dismissal or unemployment, due to her accident injuries, including her memory problems, concentration problems, mistakes, loss of productivity, and chronic pain. On a capital asset approach, plaintiff's counsel suggests that five years of annual salary is justified to offset this risk. Five years times $43,680 equals $218,400. Plaintiff counsel's submissions do not discount this claim for present value.

   These two numbers added together [$273,332, and $218,400], equals $491,732.

[155] Plaintiff's counsel recognizes that this is a “hybrid" approach, in that the first claim is, essentially, an earnings approach, whereas the second claim is a capital asset approach.

[156] As previously discussed, I do not accept that the plaintiff has established a real and substantial possibility that, but for her accident injuries, she would or could

have obtained work at higher pay at a specialist clinic or hospital. Therefore I do not accept that the plaintiff has established a basis for a claim in the first category noted.

[157] However, I accept that the plaintiff has established a real and substantial possibility that she will suffer a loss of income due to her injuries in future. Her injuries are chronic. The prognosis is negative. She is likely to continue with memory, concentration, vertigo, dizziness, and vestibular problems, as well as physical chronic pain problems in her neck, back and left shoulder and arm. These conditions all seriously impact her ability to work.

[158] As previously noted, I accept that the plaintiff was fired from her work at Bear Creek Medical Clinic because she was unable to do the work satisfactorily. I also accept that she was not invited back to Aisha Medical Clinic due to deficient work performance. Previous to the accidents, she was able to sustain work as an MOA or to do other work, such as the work in the pizza restaurant, without difficulty.

[159] I accept the plaintiff's own testimony about her significant problems doing the work at Dr. Sharma's clinic, and the corroborative evidence of Sharan Nijjar in that respect. That evidence is supported by the testimony of Gurpreet Clair, with respect to the plaintiff’s work at Bear Creek Medical Clinic.

[160] I conclude that the plaintiff’s work as an MOA is precarious. Her current employer is tolerant, supportive and accommodating. Her coworkers are also supportive. These circumstances may not continue. The plaintiff makes mistakes, and these mistakes may have serious consequences. Patients may complain. In short, there is a real and substantial possibility that her present employment with Dr. Sharma's clinic may end, for any number of reasons. There could be a change to Dr. Sharma’s clinic, such as retirement or re-organization. Other employees may be less supportive. The plaintiff is doing the best she can in difficult circumstances. She needs to work. Everything changes over the course of time, and 19 years is a long time.

[161] If the plaintiff is unable to sustain work as an MOA due to her injuries, she will also be handicapped in other possible areas of employment. Her English language skills are limited, and she has physical and cognitive limitations that would affect her ability to work in almost any occupation.

[162] There is a substantial risk that if the plaintiff is unable to continue with her work with Dr. Sharma's clinic, she will have difficulty obtaining and, more significantly, sustaining MOA work at another clinic. There is a real and substantial likelihood that she will suffer a pecuniary loss if she is unable to continue working with Dr. Sharma's clinic, in future. I consider the risk of this loss occurring as substantial.

[163] On the other hand, the plaintiff has succeeded in working at Dr. Sharma's clinic for more than three years, to date. She intends to stay there, and there is no evidence that Dr. Sharma does not plan to continue her employment. If there was some doubt about this, it was open to the plaintiff to adduce evidence, such as testimony from Dr. Sharma.

[164] Any award must take into account the time value of money (present value) as well as general contingencies which may increase or decrease the award.

[165] In 2022, the plaintiff earned $38,844. Detailed pay information is not in evidence. If she earned $20 per hour in 2022, then this would equate to 1942 hours, rather than 2080 hours, as suggested by the plaintiff. At $21 an hour, this suggests her 2023 pay would be approximately $40,782. Extrapolating this amount for a further 19 years results in the sum of $774,858, as the amount the plaintiff could earn, at that rate of pay, over the course of 19 years. Applying the multiplier of 16.4262, the present value of that amount is $669,893. Against that, I would apply a 10% contingency factor for general contingencies such as unrelated illness, unemployment, part-time work, or voluntary cessation of work. This leaves a future potential earning amount as an MOA of $602,900.

[166] It is possible that there will be no loss at all. It is possible that the loss of income would be temporary, or might occur several years into the future, only. A loss in future would increase the discount amount for present value. A loss of 50% of her future earnings is $300,000, approximately. A 50% chance of that loss occurring is $150,000. This is, very roughly, three and two-thirds her present salary. In other words, it is equivalent to income for three years and eight months.

[167] In cases where no better estimate is available, the courts sometimes use a proportion or a multiple of the plaintiff's annual salary as a tool for assessing loss of earnings on a capital asset approach. This approach may be appropriate "where the plaintiff continues to earn income at or close to his or her 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": *Gill v. Davis*, 2023 BCCA 381 at para. 17, citing *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (B.C.C.A.), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43, and *Rab v. Prescott*, 2021 BCCA 345 at para. 72. This method makes some sense, since the plaintiff's pre-accident or current earnings offer, at least, an indication of the value of the plaintiff's work capacity, and hence, the amount of the potential loss: *Hadley v. Pabla*, 2021 BCSC 238 at para. 109.

[168] As previously noted, the plaintiff had a pre-existing left shoulder condition. There is no indication in the evidence that her pre-existing left shoulder condition, which was only mildly disabling, would have impacted her ability to earn income in future. In other words, I do not conclude that there was a measurable risk that her pre-accident condition would have resulted in a loss of earnings. Therefore no offsetting factor or deduction should be made.

[169] Doing the best I can in the circumstances, I assess the plaintiff's loss of future earning capacity at the sum of $150,000.

B. Non-Pecuniary Loss

1. Legal Principles

[170] I adopt the summary of the applicable legal principles I set out in *Gillam v. Wiebe*, 2013 BCSC 565 at paras. 68–71.

2. Assessment – Non-Pecuniary Loss

[171] As noted, I accept that the plaintiff has suffered the injuries she described in her evidence, which I summarized previously.

[172] The plaintiff described her injuries as “life changing”. I accept that description. Prior to the accidents, the plaintiff had no serious limitations. Her shoulder injury was a comparatively minor problem. There is no reason to think that but for her accident injuries she would not have continued in relative good health.

[173] Since the accident injuries, she struggles at work, and fears for her future employability and ability to earn an income to support her family. There is, as I have said, a substantial risk that she will become unemployed in future. This would have especially severe consequences for her ability to enjoy life.

[174] Currently, she suffers chronic pain, as well as the significant psychological injuries Dr. Misri described. These injuries are all chronic and the prognosis is very negative, in overall terms. There is, however, some room for hope, if the plaintiff is able to take advantage of the various recommendations for treatment that the experts have recommended. The award she receives could enable her to take better advantage of the treatment recommendations made.

[175] Her marital life has suffered, to the point that Dr. Misri suggests marital counselling.

[176] Domestically, her ability to do housework and homemaking is diminished. She now relies on her mother-in-law and the other members of her family to do much of the homemaking and housekeeping work. She was previously unrestricted. I accept her evidence that prior to the accident injuries, she was capable of doing all kinds of

housework, including cleaning, dishes, lawn mowing, laundry, gardening, grocery shopping, looking after the children, and so on. Now, while she is able to do these things, she is not able to do them as much as she did previously. She still does housekeeping, because she must, but with difficulty. She asks for help from her family members with deep cleaning. Moving of laundry in baskets is done by others. She estimated that her housework now takes double the time than it did before. She has to take breaks. She breaks up her laundry work so that she does not do it all at once. Her mother-in-law helps quite a bit with various tasks including cooking and cleaning up (dishes). Her mother-in-law is 65 years of age.

[177] As I will explain, in my view this is not a case for a separate, pecuniary award for loss of housekeeping capacity. However the plaintiff's problems and loss of enjoyment of life in relation to housekeeping is a significant factor in the assessment of her non-pecuniary damages.

[178] Previously she enjoyed gardening as a hobby. Now, she still does "a little bit" of gardening, about twice a week. However it is difficult to do much gardening. Her husband does most of the yard work. She has been unable to mow the lawn.

[179] The plaintiff's evidence as to the effect on leisure activities was quite limited. She used to enjoy going to movie theatres and watching television. However, the motions on the screen are now disturbing, and she is unable to enjoy these activities. She used to enjoy activities with the children, such as helping them with their homework, or feeding them. She cannot enjoy these activities as much as she used to do.

[180] Although it appears the plaintiff was not terribly active in terms of recreational activities pre-accident, this does not substantially diminish her loss of enjoyment of life in relation to leisure or recreational activities. What matters is that the plaintiff is unable to engage in the general leisure and recreational activities that she used to enjoy, or that she might otherwise have enjoyed, but for her accident injuries. It is not the length of the list of activities that matters in this respect.

[181] The plaintiff suggests an award for non-pecuniary loss in the range of $150,000–$175,000.

[182] The plaintiff also seeks an award for loss of housekeeping capacity of $125,000.

[183] The plaintiff suggests the following case authorities as guidance:

1. *Wong v. Stone,* 2022 BCSC 978 [*Wong*] — $140,000;
2. *Najman v. Chinner*, 2021 BCSC 1377 [*Najman*] — $135,000;
3. *Chaudhry v. John Doe,* 2017 BCSC 1895 [*Chaudhry*] — $185,000.

[184] The defendants submit that non-pecuniary damages should be assessed in the range of $40,000-$60,000, relying on the following authorities:

1. *Tisalona v. Easton*, 2015 BCSC 565 — (present value $39,000);
2. *Eng v. Titov*, 2012 BCSC 300 — (present value $52,000); and
3. *Spence v. Yellow Cab Company Ltd.*, 2019 BCSC 1540 — (present value $58,000).

[185] The defendants' cases rely on their submissions that the plaintiff's symptoms attributable to the accidents do not materially impact her on a daily basis, and that she had pre-existing pain and suffered injuries related to other causes that are not subject to the litigation. They rely on their argument that the plaintiff has not established causation with respect to her psychological psychiatric conditions. These are, in fact, her main complaints.

[186] As I have rejected the defence submissions relating to causation, the defendants' authorities are not of assistance.

[187] I agree that the cases cited by the plaintiff offer useful guidance.

[188] In *Najman*, the plaintiff sustained injuries and consequences that were somewhat similar to those sustained by the plaintiff in this case. He was only about 18 or 19 years of age when the MVA occurred. The age of the plaintiff is one of the common factors mentioned in *Stapley v. Hejslet*, 2006 BCCA 34. His youth would substantially increase the award in comparison with this case. There was no specific reference to loss of housekeeping capacity in the assessment of non-pecuniary loss, but the plaintiff was a young man at trial, so this is perhaps not surprising and I would not put much weight on this consideration.

[189] *Wong* is probably the most factually similar case cited by the plaintiff here. I note that in *Wong*, the court made a separate award of $35,000 for loss of housekeeping capacity. Ms. Buttar's cognitive problems appear more severe than those of the plaintiff in *Wong*.

[190] The consequences of the accident injuries to the plaintiff in *Chaudhry* were substantially more severe than those of Ms. Buttar.

[191] Other decisions offering some guidance are:

1. *Dube v. Dube*, 2019 BCSC 687 ($160,000):

2. *Kijowski v. Scott*, 2015 BCSC 2335 ($140,000).

[192] In view of my findings and with reference to these authorities as guidance, in my view the sum of $160,000 is a fair and reasonable award for the plaintiff's non-pecuniary loss in this case.

C. Loss of Housekeeping Capacity

[193] As noted, the plaintiff submits that a separate pecuniary award for loss of housekeeping capacity is appropriate, and submits that an award of $125,000 is appropriate.

1. Legal Principles — Loss of Housekeeping Capacity

[194] I adopt my reference to the applicable legal principles as set out in *Cochran*, as follows:

> [151] In *McKee v. Hicks*, 2023 BCCA 109, the Court of Appeal endorsed the test for whether a discrete pecuniary award for loss of housekeeping capacity should be made, or whether the plaintiff's loss should be assessed as part of the plaintiff's loss in the award of non-pecuniary damages, set out in *Kim v. Lin,* 2018 BCCA 77. In *McKee*, the Court stated:
>
> > [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.
>
> [152] In *Haug*, the Court of Appeal also endorsed the *Kim* test (at para. 98), and also made reference to the considerations set out in *Riley v. Ritsco*, 2018 BCCA 366:
>
> > [98] There was no evidence that any incapacity on the part of Mr. Riley would result in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for. If it existed, such evidence could have supported a segregated award of pecuniary damages on the basis of *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; (1995) 4 B.C.L.R. (3d) 178 (C.A.).

2. Assessment — Loss of Housekeeping Capacity

[195] In this case, there is no functional capacity evaluation or occupational therapist evidence that would provide better evidence as to the plaintiff's inability or disability in relation to housekeeping. There is no evidence as to cost of replacement services. The plaintiff has not paid for outside services of any kind. I accept that this is possibly due to the fact that she and her husband cannot afford such services.

[196] The general tenor of the plaintiff's evidence is that she is able to do housework, but with difficulty, and pain, it takes her longer to do the work, and other family members help out. I accept that each of her other family members (husband,

two sons, and 65-year-old mother-in-law) have been required to do more than they might otherwise have.

[197] I am not satisfied that the evidence supports a separate pecuniary award for loss of housekeeping capacity. Rather, the plaintiff's difficulties with doing housework form a substantial component of her non-pecuniary loss, as previously assessed.

[198] In short, I have taken the plaintiff's loss of housekeeping capacity into account in determining the plaintiff's overall award for non-pecuniary loss.

D. Costs of Future Care

1. Legal Principles

[199] I adopt the statement of applicable legal principles set out 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: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
> >
> > [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: *Aberdeen* at para. 42; *Gao* at para. 69.
>
> [57] Several additional principles are relevant:
>
> > i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86–87.

> 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: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54–55;
>
> iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.
>
> [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: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. 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: *Shapiro* at para. 51; *Krangle* at paras. 21–22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245–248, 1978 CanLII 1.

[200] Another useful summary of the principles is set out in the decision of Justice Schultes in *Warick v. Diwell,* 2017 BCSC 68 at paras. 201–209, aff'd 2018 BCCA 53, and endorsed again recently in *Peters v. Taylor,* 2023 BCCA 391 at para. 7.

2. Assessment — Costs of Future Care

[201] The plaintiff claims for an award of $259,860 for the cost of future care. The defendants submit that no award should be made.

[202] The plaintiff submits that the following awards are justified on the evidence.

[203] As recommended by Dr. Misri, psychiatrist:

1. Cognitive behavioural therapy (CBT) — 284 sessions over the course of five years, at $275 per session — $78,100;

2. Trial of various medications — $15,000;

3. Dietitian $1,000;

4. Private pain clinic — $14,000;

5. Yoga $1000; and

6. Physiotherapy, three times per week, for five years, at $80 per session, total of 780 sessions equals $62,400.

[204] In addition, Dr. Misri also recommended kinesiology services or the use of a personal trainer. I will discuss this below.

[205] As recommended by Dr. O'Connor:

7. Kinesiologist — three times a week, for two years, $80 per session (total of 312 sessions) = $24,960; and

8. Vestibular physiotherapy — three times per week, for five years, $80 per session (780 sessions) = $62,400.

[206] As recommended by Dr. Paramonoff:

9. Occupational Therapy — $1,000.

Total: $259,860

[207] As noted, there is no cost of care report in this case. For many of the items claimed, there is little or no basis in the evidence as to the cost.

[208] My assessment of these items follows.

i. Cognitive Behavioural Therapy — $78,100

[209] Dr. Misri recommends CBT with a PhD psychologist.

[210] The frequency recommended is as set out in this claim, that is, once a week for the first year, twice per week for the next two years, and then “maintenance treatments" once a month for the next two years.

[211] Dr. Misri offered no costing for this in her report. In answer to a different question on cross-examination, she mentioned, as an example, the cost of this

treatment and the fact that the plaintiff may not be able to afford such costs. She referred to the CBT as costing between $250 and $300 per hour. Whether a session is an hour is not clear. She was not asked why she would recommend one session per week for the first year, yet two sessions per week for the next two years. I suspect this could be an error.

[212] Because there is no cost of care report and Dr. Misri did not provide a cost in her report, the defendants have had no opportunity to question the cost of this care.

[213] It seems more likely that Dr. Misri meant one session in two weeks after the first year, and then once a month for the next two years after that. This would be a total of 128 sessions, rather than 284 sessions.

[214] It is difficult to evaluate whether the plaintiff would utilize CBT services, and the extent to which she would do so. She did not specifically state in her evidence that she was interested in any kind of psychotherapy, or that it had been recommended to her. On cross-examination she conceded that she had not obtained any counselling treatment, and that she understood it was quite expensive. She could not recall if Dr. Misri had told her to try counselling.

[215] Generally the plaintiff has followed Dr. Choo's advice and recommendations. However she has not always followed through. Dr. Choo sent her to see Dr. B.K. Mangat, a specialist in obesity medicine, at a clinic called “MetaCare". Dr. Mangat asked the plaintiff to check whether she had extended health care coverage for the cost of a weight reduction medication, Ozempic. The plaintiff says it was not covered. However, the plaintiff did not follow through with other treatment recommendations made by MetaCare. She mentioned that she attended a webinar, but that the advice did not seem helpful to her.

[216] There are also questions as to whether the therapy would continue for the entire time and number of sessions suggested by Dr. Misri. I infer that, as with most treatment programs of this type, it would soon become evident as to whether the

treatment program was worth continuing, or not. It is quite possible that CBT would be commenced, but not continued, for one reason or another.

[217] Taking all the circumstances into account, it is reasonable to allow for the cost of 78 CBT sessions once a week, for 18 months, at a cost of $275. This works out to $21,450. This award also takes into account Dr. O'Connor's recommendation that the plaintiff have access to a psychologist to help manage her driving anxiety and more generalized anxiety.

ii. Trial of various medications — $15,000

[218] There is no indication that these medications are not covered by MSP, nor is there any costing of them, at all. There should be no allowance for this item.

iii. Dietitian — $1,000

[219] Dr. Misri suggests “consultation with a dietitian would be beneficial". There is no costing for this item. The plaintiff testified that she does her best. She eats healthy foods, and exercises, to the extent she is able to do so. I am not satisfied that this claim has been proven.

iv. Private pain clinic — $14,000

[220] Dr. Misri states that the plaintiff’s pain management is key. She suggests that she be referred to a private pain clinic, as the public pain clinics have a long wait list. Again, there is no costing for this item.

[221] Plaintiff's counsel suggests that $14,000 should be allowed on the basis of evidence adduced in another case, *Park v. Targonski,* 2015 BCSC 555. There, Justice Fitch said:

> [213] The plaintiff testified she would attend a pain clinic, if provision was made for it in a damages award. A cost estimate prepared by Back in Motion in May 2014 reflects that the plaintiff's participation in a pain program designed by them would cost approximately $14,000. Dr. Caillier reviewed a summary of the components of the proposed program and confirmed that it meets the requirements of the sort of multidisciplinary chronic pain program she had in mind.

[222] In this case, the plaintiff was not asked whether she would attend a pain clinic. There is no evidence as to what a pain clinic program would involve, tailored to the plaintiff's needs, or what the cost would be. There is no medical evidence other than the suggestion by Dr. Misri about a pain clinic. No recommendation for a pain clinic is made by Drs. O'Connor or Paramonoff, whose expertise more closely aligns with pain management issues. I am not satisfied that the plaintiff has established a basis for this claim.

v. Yoga — $1,000

[223] This claim is also not costed. The plaintiff was not asked whether she was interested in participating in yoga. Dr. O'Connor does not mention yoga, as distinct from exercises generally. I am not satisfied this claim has been established in the evidence.

vi. Physiotherapy — $62,400

[224] Dr. Misri states that the plaintiff should continue to receive physiotherapy as needed along with other pain relief treatments.

[225] In relation to physiotherapy, exercise and fitness, I place much more weight on the opinion of Dr. O'Connor, as a physiatrist. Dr. O'Connor does not recommend long-term passive treatments such as chiropractic and massage treatments that the plaintiff is still currently utilizing. He recommends an aggressive weight loss program and active treatments including working with a kinesiologist for strength and conditioning. He states that she could “intermittently use" passive treatments on a short-term basis to help settle some of her symptoms temporarily.

[226] Similarly, Dr. Paramonoff does not recommend reliance on passive treatments. She suggests an independent self managed exercise program. She also suggests that the plaintiff have access to 30 sessions with a kinesiologist or physiotherapist in order to establish an independent exercise program. However, she suggests that it would be reasonable for the plaintiff to have “adjunctive treatment for symptom relief" on a time-limited basis, to help manage flare-ups of

pain. This treatment would include physiotherapy, massage therapy, as examples. She suggests up to six treatments per year for the next two years. That is, 12 treatments.

[227] I will address physiotherapy and kinesiology below.

vii. Kinesiologist — $24,960

[228] As noted, the plaintiff claims $24,960 for the costs of kinesiology treatment, at $80 per session, three times a week, for two years.

[229] Dr. O'Connor recommends that the plaintiff work with a kinesiologist on strength and conditioning for her neck, mid and low back, for “2 to 4 days a week". He recommends specific exercises that the plaintiff should engage in. He does not specify how long the plaintiff’s work with a kinesiologist should continue. Dr. Paramonoff suggests 30 sessions. I accept this as a reasonable estimate of the number of sessions that would be of benefit to the plaintiff.

[230] For costing, the plaintiff relies upon Schedule 3.1 to the *Insurance (Vehicle) Act Regulation*. There, the maximum amount payable for ongoing kinesiology, massage therapy, and physiotherapy treatments is approximately $80.

[231] On the evidence as a whole, I allow 42 sessions with a kinesiologist or physiotherapist, in line with the recommendations of Dr. Paramonoff, and also Dr. O'Connor. This is the sum of $3,360.

viii. Vestibular Physiotherapy — $62,400

[232] Dr. Choo already referred the plaintiff to an ENT specialist, Dr. Miller for treatment of vertigo. Dr. Miller sent her to see Mr. Mallinson, a neurophysiologist, for treatment of vestibular problems. The plaintiff has already undergone vestibular physiotherapy at Proactive Physiotherapy and Sports Clinic, where she attended from January 29, 2020 to March 31, 2022. She saw vestibular therapist Abeed Hirji for a vestibular assessment (dizziness and balance) in December 2020. It appears,

overall, that the plaintiff has already received the vestibular treatment that Dr. O'Connor was suggesting. Therefore, no award should be made for this item.

ix. Occupational Therapy — $1,000

[233] Dr. Paramonoff suggests that the plaintiff see an occupational therapist for one or two sessions to review work and home activities, including an ergonomic assessment. She provides no costing for that service. Based roughly on the schedule to the *Insurance (Vehicle) Act* upon which the plaintiff relies, it seems to me that $500 is a reasonable allowance for an initial session and a follow-up session with an occupational therapist.

[234] In summary, the cost of care award is as follows:

CBT	$21,450
Kinesiology and physiotherapy	$3,360
Occupational Therapy	$500
Total	**$25,310**

E. Special Damages

[235] The plaintiff claims special damages in the amount of $3,676.77. These claims are for massage treatments, physiotherapy treatments, vestibular treatments, active rehabilitation, mileage to various treatments and doctors, and prescription receipts in the amount of $691.66.

[236] The defendants agree to special damages in the amount of $2,664.60. They oppose payment of special damages related to treatment and mileage for vestibular therapy, based upon their argument that these claims are unrelated to the accident injuries. They also argue that some of the plaintiff's treatment (proactive physiotherapy) was caused by MVA #4, which does not form part of the plaintiff's legal actions.

[237] I have rejected the defendant's arguments against causation. MVA #4 resulted in an aggravation of previous injuries and which are indivisible, therefore the costs of therapy are compensable. The plaintiff's special damages claim is allowed in full.

V. CONCLUSION AND SUMMARY

[238] The plaintiff's claims are allowed in the following categories and amounts:

Head of Damage	**Award**
Past loss of earnings	$8,000
Loss of Future Earning Capacity	$150,000
Non-Pecuniary Damages	$160,000
Costs of Future Care	$25,310
Special Damages	$3,676.77
TOTAL	**$346,986.77**

[239] Subject to any issues about offers to settle, the plaintiff is entitled to costs.

“Verhoeven J.”